

Hearing of the Subcommittee on Innovation, Data and Commerce of the
House Committee on Energy and Commerce:
“Safeguarding Data and Innovation: Building the Foundation for the Use
of Artificial Intelligence”
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Testimony of
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“Why Enacting a Bipartisan Federal Privacy Law Would Lay the
Foundation For Safeguarding Data and Innovation the Age of AI, and
Why it Should be Done this Congress.”

Chair Rodgers, Ranking Member Pallone, Subcommittee Chair Bilirakis, Ranking Member Schakowsky, and Members of this Subcommittee: thank you for inviting me to speak before you today on two important and interrelated topics: the need for a statutory framework governing Artificial Intelligence (“AI”) and why federal privacy legislation is a critical first step toward stopping AI misuse.

My name is Jon Leibowitz and I am a former Commissioner (2004-2009) and Chairman (2009-2013) of the Federal Trade Commission (“FTC”), our nation’s leading consumer protection enforcement agency. I am also the Vice-Chair of one of America’s foremost consumer organizations, the National Consumers League, and an investor in a privacy technology and an AI compliance company,¹ But I am not testifying on behalf of any of these entities today. Instead, I am speaking in my personal capacity as a former government official.

The rapid growth of AI technologies, including generative AI, is bringing extraordinary benefits to every American. From transportation to education to commerce to healthcare, AI is enhancing efficiencies, and creating new products and services. But that same use of AI poses very real challenges relating to discrimination, deception, disclosure, data security, accountability and, of course, privacy. Your Committee deserves credit for tackling this issue with a series of hearings so that you can determine the most appropriate way to create legislative guardrails around AI—ones that will maximize its value and limit its liabilities.

But as we debate the best governmental approach to AI, let’s not forget the critical need for federal privacy legislation, which addresses many of these very issues, including the use of personal data in AI. We live in an era in which data is incessantly collected, shared, monetized and used in ways never contemplated by consumers themselves. AI has amplified and accelerated these disturbing trends; indeed, it is because consumers have little control of their personal data and it is shared at will by companies that AI can be deployed so perniciously. For all these reasons, Americans deserve a muscular federal law that will give us greater control over our own information wherever we live, work or travel, and require more transparency and accountability by corporations.

Last year, this Committee reported out a such a comprehensive federal framework—one that would create a foundation upon which AI rules and law could develop—the American Data Privacy and Protection Act (the “ADPPA”)—by an overwhelming and bipartisan 53-2 margin. It was not a perfect piece of legislation and collectively you may decide to make some modest changes to it when you reintroduce this year’s version. But ADPPA was supported by many civil society groups and businesses. Its provisions are stronger than any single state law and smarter in many ways than the General Data Protection Regulation (“GDPR”) that governs Europe. It

¹ See <https://nclnet.org/>; <https://anonymco.com/>; and <https://www.trustible.ai/>. During my time in government, I also worked in Congress for more than a dozen years, including for the Senate Judiciary Committee, the late Paul Simon of Illinois and Herb Kohl of Wisconsin. While in private practice I served as a co-chair of the 21st Century Privacy Coalition, a group of companies and associations supporting federal privacy legislation, but I am no longer affiliated with that organization.

showed that Members on both sides of the aisle could work together on a quintessentially interstate issue to create a robust privacy regime benefitting all Americans, and you came close to enacting a law last year. That bill even included a provision prohibiting discrimination in algorithms which, as you know, would be effective at prohibiting discrimination by AI.

Artificial Intelligence

There is no doubt that AI has the potential to benefit society in a variety of ways. In healthcare, AI can help provide more personalized treatment as well as disease identification and prevention. In education, AI can create more individualized learning and expand access to rural and underserved communities. In business, it can make industries far more efficient and more responsive to consumers. In fighting fraud, AI detection systems can help identify suspicious activity across digital platforms.

But it is also true that we have seen AI used to create real harms. Amazon, for example, reportedly scrapped an AI driven recruitment tool that demonstrated bias against women. AI driven facial recognition used by law enforcement has been criticized for racial bias and misidentifications. AI, through social media data collection, has been used to threaten people and track their activities. AI-generated deepfakes have enabled the creation of inaccurate but realistic looking videos, leading to the spread of disinformation. AI has been used to engage in financial fraud, data breaches and identity theft more effectively. Generative AI models, which collect huge amounts of personal information without consumer consent, have become infamous for confidently spouting blatantly false information, posing potential risks to both consumer safety and democracy. And AI has threatened privacy rights by making it extremely difficult—if not impossible—for users to find and delete information the AI has on them.

Existing laws and regulatory authority can stop some of these abuses, but they are not an adequate match for the problems created by misuse of AI. For example, the FTC has authority to prohibit "unfair or deceptive acts or practices in or affecting commerce," and some commercial behavior—like using AI for identity theft, fraud, or to steal or misuse data—clearly violates the FTC Act and companion state laws. The FTC could likely enjoin the company that recently created an AI-generated version of Tom Hanks without his permission and used that image to peddle an apparently bogus dental plan.² But it is not clear that an AI driven deepfake, even if deceptive, always comes within the definition of "commerce."

Copyright and product liability law may help resolve some aspects of these problems, but they are uncertain, take time to percolate through the courts, and can only be partial solutions. The National Institute of Standards and Technology has done excellent work creating an AI framework, but it is not an enforcement agency—that is, it can only issue guidance. The White House Office of Science and Technology Policy has weighed in on five principles that should guide AI regulation, and three of them—data privacy, safe and effective systems, and

²<https://www.theguardian.com/film/2023/oct/02/tom-hanks-dental-ad-ai-version-fake>.

algorithmic discrimination protections—are core components of the privacy measure this Committee reported out last year.³ Regulating AI and providing privacy protections would benefit businesses as well as consumers.

Some large companies have developed ethical approaches to the use of AI, but most other businesses are looking for direction. Organizations can try to protect themselves from AI predation—for example, by conducting risk management activities to reduce the risk to themselves. But they would all benefit—as would all Americans—from clear rules of the road. In other words, legislation is probably the best way to clarify in advance what responsibilities deployers of AI must consider and what risks they must disclose to others.

What is the best approach? I doubt we know that yet. The European Union, through its AI Act, would classify systems according to the risk they pose to users. Different risk levels would result in more or less regulation, with special emphasis on transparency and prohibiting discrimination. Some states are starting to look at regulating AI in specific areas—for example, insurance, health care and employment as well as use by government entities—and some are proposing greater disclosures and generalized prohibitions. States can be laboratories of democracy but, no matter how well-intentioned and thoughtful state law may be, federal legislation around AI is far preferable to a patchwork of state laws.⁴

Having said that, Congress will need to do a lot of collective thinking before it decides where it wants to end up. In the last month, at least three different Senate committees and one other House committee have held hearings on AI. The unprecedented interest by lawmakers in AI-related issues is a welcome development, and it is always possible that you can bring the relevant groups together expeditiously.⁵ Indeed, Congress can and should work on crafting a framework for AI at the same time it tries to protect consumer privacy. But a comprehensive AI law may be several years away.

³See <https://www.whitehouse.gov/ostp/ai-bill-of-rights>.

⁴The FTC rulemaking proceeding focused on consumer privacy issues also raises significant questions about the use of AI. See <https://www.ftc.gov/legal-library/browse/federal-register-notices/commercial-surveillance-data-security-rulemaking> and <https://iapp.org/news/a/ftc-takes-steps-toward-privacy-ai-rulemaking/>. All three sitting Commissioners said that they would prefer federal privacy legislation to an FTC rule. See Commissioner statements at <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-explores-rules-cracking-down-commercial-surveillance-lax-data-security-practices>. I agree. Going back to 2012, during my time on the Commission, we wrote a blueprint for lawmakers to legislate on privacy. See <https://www.ftc.gov/reports/protecting-consumer-privacy-era-rapid-change-recommendations-businesses-policymakers>.

⁵The administration supports both privacy legislation and AI regulation. See <https://iapp.org/news/a/biden-calls-on-us-congress-to-unite-on-privacy-pass-federal-legislation/> and <https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/21/fact-sheet-biden-harris-administration-secures-voluntary-commitments-from-leading-artificial-intelligence-companies-to-manage-the-risks-posed-by-ai/#:~:text=The%20Biden%2DHarris%20Administration%20published,in%20home%20valuation%20and%20leveraging>.

Conclusion

A comprehensive *privacy* law, though, should not take that long—and it is entirely within this Committee’s jurisdiction and Congress’s reach. Indeed, privacy and AI legislation are complementary, and the ADPPA includes many of the same components upon which responsible AI development will be built: individual privacy protections for consumers that prevent data from being collected, requirements for data security, mandatory risk assessments, consistency across jurisdictions, obligations for companies to minimize data, prohibitions against the use of discriminatory algorithms, fining authority for the FTC and state attorneys general, and extended protections against targeted advertising for minors 17 and under (effectively raising the age for the Children’s Online Privacy Protection Act or “COPPA”). Many of these provisions place the burden on companies, not consumers, to ensure that data is treated responsibly, which is exactly where the burden should be placed.

So as you begin to consider the regulatory metes and bounds for AI, let me urge you to keep in mind your groundbreaking work on a federal privacy statute last Congress. Even if enacting a such a law requires some complicated negotiations and a few difficult votes, the country will be grateful to you for that effort. You will have done something meaningful for American consumers if you succeed. And you will have laid the groundwork for legislation regulating AI.