

# PATHWAYS TO INFORMATION PRIVACY POLICY: PLURALIST VS EXPERT?

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## ABSTRACT

This Article examines the dynamics of information privacy policymaking using the pathways framework developed by Timothy J. Conlan, Paul L. Posner, and David R. Beam in 2014. They identify four different pathways for policy—the pluralist, the partisan, the expert, and the symbolic. The Article is particularly interested in exploring why the expert pathway has not been employed in information privacy policymaking, and what conditions might enhance the likelihood of its use in this area. The Article proceeds as follows—first, a brief review of Conlan et al.’s framework and arguments; second, an application of their pathways framework to the development of privacy policy; third, an analysis of expertise in policymaking both generally and then with respect to information privacy policy; and fourth, an explication of why information privacy policymaking has been and is unlikely to take the expert pathway. Although the barriers to more expert input for information privacy policymaking are high, the analysis below identifies three factors which hinder expert input and three complementary changes which could enhance expert influence over information privacy policymaking.

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### I. INTRODUCTION

Information privacy policymaking has been plagued by the dominance of interests opposed to effective policy. This was true in the earliest rounds of policy debates in the late 1960s and persisted into the 1970s, when business interests opposed omnibus legislation that would have imposed similar fair information principles on both the public and private sectors, and federal agencies opposed the establishment of a new federal agency to protect privacy.<sup>1</sup> This trend continued into the 1980s and 1990s as interests that would have been affected by sectoral privacy legislation successfully weakened original proposals. And this scenario is being replayed once again as advocates of stronger online privacy protections, especially with respect to online platforms, are outspent, outmaneuvered, and overwhelmed by the political strength of online business players.

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1. *See generally* PRISCILLA M. REGAN, LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY (1995).

In the public policy literature, Timothy J. Conlan, Paul L. Posner, and David R. Beam have identified four different pathways to policymaking—the pluralist, the partisan, the expert, and the symbolic.<sup>2</sup> To date, privacy policy has been firmly embedded in the pluralist pathway. They argue that proponents of a certain policy can strategize to frame their policy problem and their proposals in such a way that policymaking occurs on a pathway that will be most conducive to success. This Article explores the possibility that privacy advocates might achieve success by moving policymaking from the pluralist pathway, where they have been unsuccessful, to the expert pathway, where they might achieve more success. The Article concludes that it is unlikely that privacy advocates will succeed in switching information privacy policymaking to the expert pathway for several reasons, including the current assault on expertise and even on facts themselves, compounded in the privacy area by the question of who the experts are. Such questions have become more contested as privacy issues and technology have evolved. Moreover, congressional hearings tend to privilege a more pluralistic approach to policymaking. Interestingly, the Belfer Center recently issued a report concluding:

... in legislative and high-profile hearings, Congress has appeared unprepared to reckon with emerging technologies and their effects on society. In recent years, Congress has failed to produce substantive legislation on emerging science and technology issues of national import, *like personal data privacy and protections*.<sup>3</sup>

The Article proceeds as follows—first, a brief review of Conlan and Posner’s framework and arguments; second, an application of Conlan et al.’s framework to the development of privacy policy; third, an analysis of expertise in policymaking both generally and then with respect to information privacy policy; and fourth, an explication of why information privacy policymaking is unlikely to take the expert pathway. Although the barriers to more expert input for information privacy policymaking are high, the analysis below identifies three factors which hinder expert input and three complementary changes which could enhance expert influence over information privacy policymaking.

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2. *See generally* TIMOTHY J. CONLAN, PAUL L. POSNER & DAVID R. BEAM, *PATHWAYS OF POWER: THE DYNAMICS OF NATIONAL POLICYMAKING* (2014).

3. MIKE MIESEN, MAEVE CAMPBELL, CHRIS KUANG, LAURA MANLEY & EMILY ROSEMAN, BELFER CTR. FOR SCI. & INT’L AFFAIRS, *BUILDING A 21ST CENTURY CONGRESS: IMPROVING CONGRESS’S SCIENCE AND TECHNOLOGY EXPERTISE 9–12* (2019), <https://www.belfercenter.org/sites/default/files/2019-09/ST/Building21stCenturyCongress.pdf> (emphasis added).

## II. PATHWAYS TO POWER

Conlan et al. identify four distinct pathways that federal policymaking can take and further identify each pathway's primary actors, scale and scope of political mobilization, patterns of formulation and adoption, levels of salience and conflict, and enactment time. Table 1 below provides a summary and overview of these pathways.

**Table 1: Comparison of Four Pathways—Conlan, Posner and Beam<sup>4</sup>**

	<b>Pluralist</b>	<b>Partisan</b>	<b>Expert</b>	<b>Symbolic</b>
<b>Scope and Form of Mobilization</b>	Specialized/ Organizat'l	Mass/ Organizat'l	Specialized/ Ideational	Mass/ Ideational
<b>Chief Sponsor</b>	Comm. Chairs/ Ranking Members	Pres/Cong Party Leaders	Comm. Chairs/ Ranking Members	Variable – Ind'l Membs/ Leaders
<b>Public Salience</b>	Relatively Low	High	Highly Variable	Relatively High
<b>Incubation Period</b>	Several Years	10+ years	Slow but steady	Quick
<b>Enactment Time</b>	16 months	5 months	22 months	107 days
<b>Degree of Consensus</b>	High	Low	High	High
<b>Partisanship</b>	Low	High	Low	Low
<b>Actors Involved</b>	Interest groups	Party, esp. Pres	Area experts	Media, movements
<b>Issue Definitions</b>	Feedback	Indicators	Indicators	Crisis
<b>Level of Conflict</b>	Low	High	Medium	Low
<b>Magnitude of Policy Change</b>	Incremental	Non- incremental	Non- incremental	Mixed (58%/42%)
<b>Policy Sustainability</b>	77%	66%	44%	50%

4. This table is derived from Chapters 1 and 6 of CONLAN, *supra* note 2.

The *pluralist pathway* is arguably the most common in the U.S. policy system as it involves organized interests bargaining, negotiating, and compromising to reach some agreement, generally of an incremental nature and reflecting the more well-organized interests. The roots of the pluralist pathway, as well as the drawbacks, can be found in James Madison's identification in *Federalist No. 10* of the dangers of "factions," which "are united and actuated by some common impulse of passion, or of interest, adverse to . . . the permanent and aggregate interests of the community."<sup>5</sup> Political scientists originally regarded the policy process as a struggle among competing interest groups, enabling all groups concerned about a particular issue to have influence on the policy outcome, which was seen as the equilibrium point among the groups.<sup>6</sup> Later studies, however, pointed to the unequal influence among groups and the fact that some groups were not organized,<sup>7</sup> as well as the fact that, as E. E. Schattschneider noted, "[t]he flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent."<sup>8</sup>

Despite the recognized biases in the pluralist system, it remains the dominant mode of policymaking in the United States, in part because the American political systems provides many points of access and many veto points, with politicians acting as advocates for particular groups and brokers to cobble together compromises.<sup>9</sup> Much of the policy work of interest groups today takes place in what Hugh Hecla identified as "issue networks,"<sup>10</sup> similar to John Kingdon's "policy communities,"<sup>11</sup> wherein government actors, special interest groups, public interest groups, and policy specialists in a particular policy area all interact to define problems, vet solutions, and work towards agreement. But, as Frank Baumgartner et al. conclude, this process "works in favor of the status quo."<sup>12</sup> Similarly, Conlan et al. note that coalition-

5. THE FEDERALIST NO. 10 (James Madison).

6. *See generally* ARTHUR BENTLEY, *THE PROCESS OF GOVERNMENT* (Peter H. Odegard ed., 1967); DAVID TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* (1951).

7. *See generally* THEODORE J. LOWI, *THE END OF LIBERALISM* (1969).

8. E.E. SCHATTSCHNEIDER, *THE SEMI-SOVEREIGN PEOPLE: A REALIST VIEW OF AMERICAN DEMOCRACY* 35 (1960).

9. *See generally* ALLAN J. CIGLER & BURDETT LOOMIS, *INTEREST GROUP POLITICS* (1990); FRANK BAUMGARTNER & BETH LEECH, *BASIC INTERESTS: THE IMPORTANCE OF GROUPS IN POLITICS AND IN POLITICAL SCIENCE* (1998); KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, *ORGANIZED INTEREST AND AMERICAN DEMOCRACY* (1986).

10. Hugh Hecla, *Issue Networks and the Executive Establishment, in* *NEW AMERICAN POLITICAL SYSTEM* (Anthony King ed., 1978).

11. JOHN KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 122–28 (1984).

12. FRANK BAUMGARTNER, JEFFREY BERRY, MARIE HOJNACKI, DAVID KIMBALL & BETH LEECH, *LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY* 65 (2009).

building strategies in the pluralist pathway “tend to favor relatively modest, noncontroversial, and incremental initiatives.”<sup>13</sup>

The *partisan pathway* requires a strong party leader and party unification towards a policy goal and can achieve more dramatic policy change. Political parties, in theory, represent broader social interests and perspectives that can serve as a basis for policy action than do interest groups. This “responsible party model” assumes, however, that party members are unified in agreement and will be disciplined in working towards goals.<sup>14</sup> American political parties rarely achieve such agreement or discipline.<sup>15</sup> When they do, it almost always requires presidential leadership, as illustrated by the policy changes ushered in by President Franklin Roosevelt’s New Deal and President Lyndon Johnson’s Great Society programs, and partisan support by congressional leadership, as recently evidenced by President Barak Obama’s Affordable Care Act and President Donald Trump’s tax cuts. However, as Conlan et al. point out, presidential leadership and partisan congressional majorities are often brief and result in countermobilization by the other party.<sup>16</sup> Given the range of viewpoints embraced in the American two-party system, it is unusual for partisan political power to align behind a particular policy position and to sustain that position. Countermobilization is likely to occur from the other party as well as from factions within the party initiating change, both of which often render partisan change fragile.

The *expert pathway* provides visibility and legitimacy to policy experts in academia, bureaucracies, and think tanks whose ideas have been developed and refined in specialized policy communities where consensus has opportunities to develop. Conlan et al. note experts “have come to play growing roles in policymaking” with “professional knowledge and technical feasibility becom[ing] the source of legitimacy against which all proposals are based.”<sup>17</sup> They acknowledge that the expert pathway will need to compete with other pathways but as those pathways become more polarized, “analysis and evidence is likely to be prized as much for the ammunition it provides for entrenched interest group, partisan and ideological positions as for its contribution of new and important ideas.”<sup>18</sup> They also point out that experts have become more integrated into government bureaucracies, interest groups,

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13. CONLAN, *supra* note 2, at 29.

14. Evron M. Kirkpatrick, *Toward a More Responsible Two-Party System*, 65 AM. POL. SCI. REV. 965, 966–67 (1971).

15. SAMUEL P. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* (1983).

16. CONLAN, *supra* note 2, at 52–53.

17. *Id.* at 61.

18. *Id.*

and political parties, but they suggest that experts can be distinguished because of “their adherence to professional norms and values of a professional community”<sup>19</sup> rather than institutional loyalty. Experts are active in the policy communities, referred to above in reference to the pluralist pathway, but if they are acting as experts, they would be taking positions more in line with their professional values than with the interests of their organizations. Conlan et al. conclude that the expert pathway “is alive in our system, if not always well”<sup>20</sup> as it has to compete with other pathways for influence and political trends do not necessarily provide continuous support as actors in other pathways will strive to challenge the influence of experts.

The *symbolic pathway* highlights the role of the media and tends to be used for issues that can be simplified and involve values or notions of right and wrong. Goals of policies in the symbolic pathway tend to be abstract, focused on widely held legislative ends rather than complex questions and making coalition building much easier but likely to result in “poorly understood public policies.”<sup>21</sup> Although the symbolic pathway may seem to result in quick resolution of a policy, the pathway tends to have negative consequences, including “producing unexpected outcomes . . . and defer[ring] key policy choices and debate until after policy passage or adoption.”<sup>22</sup> It is also difficult to control.<sup>23</sup>

Policymaking for a particular issue—be it gun control, climate change, health care reform, or privacy—is not predetermined to take a certain pathway. And once started on a pathway, it is not relegated to continue on that pathway. Indeed one of the lessons of Conlan et al.’s research and analysis is that policy actors should look at the policy process strategically—“policies are often fought over by different actors in the political system who strive to gain control over the process by routing consideration of the policy onto a pathway that maximizes their resources and power in the system.”<sup>24</sup> Different types of policy actors are more likely to find success in achieving their goals and building coalitions on different pathways. As alluded to above, interest groups are more likely to succeed on the pluralist pathway, party leaders on the partisan, policy specialists and bureaucrats on the expert, and policy advocates and entrepreneurs on the symbolic. Political parties and interest groups tend to be

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19. *Id.* at 67.

20. *Id.* at 82.

21. *Id.* at 92.

22. *Id.* at 97.

23. *Id.*

24. *Id.* at 12.

attracted to aspects of the symbolic pathway in their attempts to frame issues in broad, emotive terms that help to mobilize their members.

An understanding of these pathways can help policy actors to try to direct discussion of a policy to a pathway that is likely to result in an outcome favorable to them. Policy actors who want to be strategic in terms of setting an issue on a particular pathway need to start by *defining the issue*. Definitions, or framing, of policy issues are not predetermined by the issues but instead are matters of interpretation and emphasis and are, in effect, political decisions.<sup>25</sup> Conlan et al. note that “political leaders and policy actors alike are quite opportunistic in reshaping the definition of issues and institutions to manipulate the pathways to favor their position.”<sup>26</sup> If an issue can be redefined so that it shifts to a different pathway, those who benefited from the previous definition lose their leverage unless they adapt their strategies to the shift. Conlan et al. caution: “When issues take an expert turn, groups skilled in the pluralistic pathway may further develop their research capabilities to challenge expert-based arguments against their claims.”<sup>27</sup>

Not surprisingly, each pathway carries certain political liabilities.<sup>28</sup> Because the pluralist pathway does not consider all interests equally and does not successfully secure broad policy goals, policy actors who are not advantaged by that pathway can strategize to mobilize actors on alternative pathways. This can be accomplished, for example, by encouraging political leaders, such as presidential candidates, to advocate for broader policy change and thus shift policy discussions from the pluralist pathway to the partisan. Similarly, policies decided in a partisan fashion often exclude affected interests that reassert themselves and move policymaking to the pluralist pathway, where their interests are more likely to be recognized and advantaged. Likewise, policy decisions reached through the expert pathway will engender opposition from interest groups if the policy imposes additional costs on the typical operations of these interest groups. The affected interest groups will then respond by trying to transfer policymaking to the pluralist pathway. Policies arrived at through the expert pathway may also disadvantage broader interests and parties may become involved and try to shift policymaking to the partisan pathway. Finally, policy decisions resulting from the symbolic pathway generally are made quickly and may be infeasible over time, allowing interests or experts to shift subsequent policymaking to the pluralist or expert pathway.

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25. KINGDON, *supra* note 11.

26. CONLAN, *supra* note 2, at 111–12.

27. *Id.* at 113.

28. *Id.* at 196.



The policy pathway framework envisions a dynamic and fluid environment. Conlan et al. conclude that: “The system is now positioned to encourage more pathway switching in more directions than have traditionally been recognized.”<sup>29</sup> Policy actors are more sophisticated and more adept at marshalling issue definitions and resources so that they can cross pathways. The next Part will explore privacy policymaking through the lens of the pathway framework.

### III. PATHWAYS OF PRIVACY POLICYMAKING

Using the pathways framework to analyze the history of information privacy policymaking helps to reveal the dynamics of policy decisions and the players who have been most influential in making those decisions. Most information privacy policymaking in the United States has taken the pluralist pathway with well-organized special interests seeking to limit any restrictions on their information practices. Initially, one might have expected that information privacy policy would take the symbolic pathway as the policy issue or problem was framed in rather symbolic terms as reflected in titles of books from the 1960s—*On Record: Files and Dossiers in American Life*, *The Naked Society*, *The Privacy Invaders*, *The Assault on Privacy*, *The Death of Privacy*, and *Privacy and Freedom*.<sup>30</sup> Although media coverage was far different then than now, the media did cover this issue from the perspective of people being defined by what was in their computerized files with a serious diminution of their privacy. In this scenario, technology was seen as the threat and, as Arthur Miller argued, “man must shape his tools lest they shape him.”<sup>31</sup>

The discussion in Congress also adopted symbolic language and images and framed the policy issue as privacy threatened by technology. At the earliest congressional hearings on the possible establishment of a Federal Data Center, the chair of the Special Subcommittee on the Invasion of Privacy defined the policy problem of “The Computerized Man” in these terms: “Through the standardization ushered in by technological advance, his status in society would be measured by the computer and he would lose his personal identity.”<sup>32</sup> Although symbols, rather than information practices or interests, dominated

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29. *Id.* at 198.

30. MYRON BRENTON, *THE PRIVACY INVADERS* (1964); ARTHUR MILLER, *THE ASSAULT ON PRIVACY* (1971); VANCE PACKARD, *THE NAKED SOCIETY* (1964); JERRY ROSENBERG, *THE DEATH OF PRIVACY* (1969); ALAN WESTIN, *PRIVACY AND FREEDOM* (1967); STANTON WHEELER, *ON RECORD: FILES AND DOSSIERS IN AMERICAN LIFE* (1969).

31. MILLER, *supra* note 30, at 8.

32. *The Computer and Invasion of Privacy: Hearings Before a Subcommittee of the Committee on Government Operations*, 89th Cong. 2 (1966).

these early hearings, Congress quickly recognized the need to understand how federal agencies actually handled personal information, and, at that point, the federal agencies' interest in efficiency came into play. The next round of congressional policy formulation involved a four-year study of government data banks,<sup>33</sup> as well as similar studies by the Department of Health, Education and Welfare (HEW)<sup>34</sup> and by the Russell Sage Foundation and the National Academy of Sciences.<sup>35</sup> One might characterize this policy moment as something of a battle over which pathway policymaking would take—the framing of privacy threatened by technology pushed it towards the symbolic, the interests of organizations in controlling their own information practices in a way that kept them efficient steered discussion into the pluralist pathway, and a need to understand the technical capacities of computerization led policy discussion to the expert pathway.

By the time these studies were completed and bills were introduced, interests dominated the policy process as public and private organizations realized that giving individuals control over their personal information would decrease organizational control over a critical resource and increase organizational costs. The details of this are told elsewhere,<sup>36</sup> but the result was the Privacy Act of 1974, which only affected federal agencies and reflected the minimum protection of information privacy that was advocated at that time. The next step in policymaking was the Privacy Protection Study Commission (PPSC), tasked with investigating private sector personal information practices and making recommendations to Congress. The PPSC conducted its investigations on a sector-by-sector basis, hearing from over three hundred private sector witnesses who advocated against government regulation and new laws and, instead, argued that they could best monitor their own information practices and protect privacy.<sup>37</sup> The privileging of the firms who would be affected by policy steered policymaking solidly onto the pluralist pathway, and the PPSC concluded, in line with the interests of the firms, that a voluntary (i.e., self-regulatory) approach rather than a regulatory approach should be the initial approach.

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33. *Federal Data Banks, Computers and the Bill of Rights: Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary United States Senate*, 92nd Cong. (1971).

34. *See* SEC'Y'S ADVISORY COMM. ON AUTOMATED PERS. DATA SYS., RECORDS, COMPUTS. & THE RIGHTS OF CITIZENS, U.S. DEP'T OF HEALTH, EDUC., & WELFARE, (Report of the Secretary's Advisory Committee of Automated Personal Data Systems) (1973).

35. *See* ALAN F. WESTIN & MICHAEL A. BAKER, NAT'L ACAD. OF SCIS., DATABANKS IN A FREE SOCIETY: COMPUTERS, RECORD-KEEPING, AND PRIVACY (1972).

36. REGAN, *supra* note 1, at 77–83.

37. *See* PRIVACY PROT. STUDY COMM'N, PERSONAL INFORMATION IN AN INFORMATION SOCIETY (1977).

In the 1980s, when the symbolism of information privacy highlighted surveillance<sup>38</sup> and the “Shadow of Orwell,”<sup>39</sup> there was a brief opportunity (coinciding with the year 1984) when the symbolic pathway may have become dominant. At the same time, circumstances were favorable for the expert pathway to play a role with a study by the congressional Office of Technology Assessment (OTA) examining how federal agencies were using computers to process and exchange personal information and hearing from experts in computerization, civil liberties and privacy, and government operations. The OTA report warned that “computer networking is leading rapidly to the creation of a *de facto* national database containing personal information on most Americans.”<sup>40</sup> However, once the congressional debates on legislation began, interests again prevailed and shifted policy discussion to efficiency and detection of fraud, waste, and abuse. The result was passage of watered-down legislation<sup>41</sup> despite what might have been termed “expert” findings from OTA that there was no firm evidence to support claims of efficiency and cost savings.

Space does not permit a full review of the policy history of information privacy, but the focus on sectoral policy development in the late 1980s and into the 1990s is illustrative of policymaking steered by interests on a pluralist pathway,<sup>42</sup> as is the stakeholder approach taken by the National Information Infrastructure (NII) task forces in the Clinton/Gore administration. Privacy was one of several topics discussed by the NII Task Force and, in April 1997, an options paper was released for public comment raising the question of how best to implement fair information practices “that balance the needs of government, commerce, and individuals, keeping in mind both our interest in the free flow of information and in the protection of information privacy.”<sup>43</sup> The Task Force noted the possibility that “demand could foster a robust,

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38. *Privacy and 1984: Public Opinions on Privacy Issues: Hearings Before a Subcommittee of the Committee on Government Operations House of Representatives*, 98th Cong. (1984).

39. Symposium, *Information Law and Ethics: In the Shadow of Orwell – the Citizen and Government*, AM. BAR ASS'N (1984), as noted in REGAN, *supra* note 1, at 93.

40. STAFF OF U.S. CONG. OFFICE OF TECH. ASSESSMENT, FEDERAL GOVERNMENT INFORMATION TECHNOLOGY: ELECTRONIC RECORD SYSTEMS AND INDIVIDUAL PRIVACY (1986).

41. See Computer Matching and Privacy Protection Act of 1986, Pub. L. No. 100-503.

42. See, e.g., Driver's Privacy Protection Act of 1994, 18 U.S.C. § 2721 (2018); Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191; Video Privacy Protection Act of 1988, Pub. L. No. 100-618, 102 Stat. 3195 (codified at 18 U.S.C. § 2710 (1988)); Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779.

43. Info. Policy Comm. & Nat'l Info. Infrastructure Task Force, *Options for Promoting Privacy on the National Information Infrastructure*, OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION (Apr. 1, 1997), <https://aspe.hhs.gov/report/options-promoting-privacy-national-information-infrastructure>.

competitive market for privacy protection. . . . [and] that privacy could emerge as a market commodity in the Information Age,” but also discussed the ways in which the government could facilitate the development of a privacy market and enforce self-regulation, and the possibility of the creation of a federal privacy entity.<sup>44</sup> Based in part on the report of the Task Force, the Clinton Administration’s *Framework for Global Electronic Commerce* concluded that: “We believe that private efforts of industry working in cooperation with consumer groups are preferable to government regulation, but if effective privacy protection cannot be provided in this way, we will reevaluate this policy.”<sup>45</sup>

#### IV. EXPERTS IN POLICYMAKING

##### A. SKEPTICISM/AMBIVALENCE

Expert involvement in public policymaking in the United States has generally been somewhat controversial. Although there is broad recognition that policies should be based on facts and evidence, there is a stronger recognition that policymaking is an inherently political process and that policy choices should reflect a political choice. Criticisms of “technocratic” decision-making that surfaced in the 1970s reflected early debates about distinctions between “facts” and “values” and the importance of the latter in policymaking, as well as distinctions between “politics” and “administration.”<sup>46</sup> In a 1970 review of four books on public policy, Ted Lowi voiced these concerns: “Being instrumental and technocratic means that the analyst becomes blinded to certain fundamental political patterns that his individualist and informal view defines away.”<sup>47</sup>

A parallel development in the 1970s was interest in “evidence-based policymaking,” which did not fully take off until the 1990s but brought new attention to the role of experts, not only in administrative decision-making but in congressional policymaking. Evidence-based policymaking has roots in rational decision-making and the recognition that evidence should be used to better understand the nature and extent of social problems, inform decisions about the effectiveness of policy options, and evaluate how well existing

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44. *Id.*

45. William J. Clinton & Albert Gore, Jr., *A Framework for Global Electronic Commerce*, WHITE HOUSE, <https://clintonwhitehouse4.archives.gov/textonly/WH/New/Commerce/read.html> (last visited Aug. 13, 2020) (emphasis added).

46. Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 197–222 (1887).

47. Theodore Lowi, *Decision Making vs Policy Making: Toward an Antidote for Technocracy*, 30 PUB. ADMIN. REV. 314, 319 (1970).

policies have worked to address problems.<sup>48</sup> In order for evidence-based policymaking to be incorporated into the policy process, a political culture allowing for transparency and rationality in the policy process and a research culture encouraging an analytical commitment to rigorous methodologies for generating policy-relevant evidence are both required.<sup>49</sup> In response to renewed congressional interest in evidence-based policymaking, the Bipartisan Policy Center issued a two-volume report on the use of evidence in Congress. Volume One identified sixteen barriers to congressional use of evidence including: perception barriers such as unclear relevance of evidence; institutional barriers such as lack of collaborative decision-making structures and congressional expertise; and systemic barriers such as challenges related to norms, incentives, and transparency.<sup>50</sup>

As more and more policies involve choices involving knowledge and understanding of science and technology, and as more and more policies become complex and inter-related, the role of experts in policymaking is again receiving new scholarly and public attention. At the same time, however, there is a backlash against facts themselves—resulting in what one commentator has termed the “death of expertise”<sup>51</sup> and another “the age of American unreason.”<sup>52</sup> Resistance to intellectual authority and anti-rationalism have been a constant characteristic of American culture as Richard Hofstadter has documented,<sup>53</sup> but what is more novel is the abundance of data allowing policymakers, and people, to cherry-pick facts that confirm their preferred explanations.

## B. FORUMS FOR EXPERT INPUT

In addition to some skepticism about the role of experts in policymaking generally, there are questions about when and how experts should be involved. Is expert input possibly most critical, as suggested above, at the early stages of policy formation (issue definition) and policy formulation (consideration of policy options/alternatives)? And if so, is that best conveyed through study reports and congressional testimony? Do experts then recede into the

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48. Ian Sanderson, *Evaluation, Policy Learning, and Evidence-Based Policymaking*, 80 PUB. ADMIN. 1, 4 (2002).

49. Brian W. Head, *Reconsidering Evidence-Based Policy: Key Issues and Challenges*, 29 POL’Y & SOC’Y 77, 78–79 (2010).

50. See NICK HART, EDWARD DAVIS & TIM SHAW, BIPARTISAN POL’Y CTR., EVIDENCE USE IN CONGRESS: CHALLENGES FOR EVIDENCE-BASED POLICYMAKING (2018), <https://bipartisanpolicy.org/wp-content/uploads/2019/03/BPC-Evidence-Use-in-Congress.pdf>.

51. TOM NICHOLS, THE DEATH OF EXPERTISE (2017).

52. SUSAN JACOBY, THE AGE OF AMERICAN UNREASON (2008).

53. See generally RICHARD HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE (1962).

background during policy adoption, at which point their positions are weighed against interests and values, translated by political actors, and become part of the final decision? Does expert input continue to be important as policies are implemented in executive agencies, and do those forums become another critical point where experts might reassert influence lost during policy adoption? And similarly, is expert opinion on how well policies are working as intended taken seriously during policy evaluation through either agency reports, congressional hearings, or outside studies? Arguably, expert input is important throughout the stages of the policy process although in different forums and with slightly different purposes.

Conlan et al. identify four circumstances where the roles of experts are likely to be most significant.<sup>54</sup> The first is *rationalizing changes to established policies* (not new) that have not been working as intended.<sup>55</sup> The second is for *low-conflict, low salience issues* on which other policy actors see minimal effect on their own interests.<sup>56</sup> The third area is *highly complex issues* where other actors recognize that they do not understand the risks involved.<sup>57</sup> The fourth are issues on which other policy actors are not engaged or only limitedly engaged, which is most likely to occur at the *initial stage of defining a policy problem*.<sup>58</sup> However, if experts are not able to reach and sustain a consensus based on their professional knowledge and research, they are likely to be viewed as political operatives and have limited influence.

### C. POLITICAL DYNAMICS

There are at least two different views of how seriously Congress is likely to consider expert analyses and policy preferences. Kevin Esterling's research suggests that the uncertainty that is attendant with policy proposals presents risks for members of Congress, and the level of risk that members perceive from interest groups affects to what extent members consider expert input.<sup>59</sup> Drawing on an examination of policymaking for emissions trading, school choice, and the adoption of health maintenance organizations, Esterling finds that interest groups, under conditions of ambiguity and uncertainty, do provide neutral expertise and not merely information that enhances their positions.<sup>60</sup> But others point out that on any number of issues "expertise and strong

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54. See CONLAN, *supra* note 2, at 75–78.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. See generally KEVIN ESTERLING, THE POLITICAL ECONOMY OF EXPERTISE (2004).

60. See generally *id.*

consensus on factual matters have been trumped by ideology.”<sup>61</sup> Other research suggests that Congress relies upon its own congressional staff agencies—the Congressional Budget Office, Government Accountability Office, Congressional Research Service, and formerly the Office of Technology Assessment—for policy advice, somewhat independent of the level of interest group consensus. David Whiteman, for example, finds that, although congressional members and staff have formed initial policy preferences, they use expert analysis in development of the conceptual framing of the policy debate and in the concrete details of policy proposals.<sup>62</sup> His research reveals that for many policy issues there is a core group of legislators who are heavily involved in policy deliberations and whose offices interact regularly with experts in congressional agencies.<sup>63</sup>

There also appear to be two dynamics at play as experts get involved in policymaking.<sup>64</sup> The first is that if an issue is solidly on the expert pathway, then professional knowledge and technical feasibility are privileged and become the lodestar against which proposals are evaluated. Experts dominate and are viewed as legitimate because their knowledge is critical to successful policy. The second is that experts can be co-opted to lend support for the policy positions of interest groups or parties or ideological groups. Conlan et al. recognize this possibility, noting that “the proliferating range of scientists, economists, and policy analysts employed by contending interests . . . challenges the credibility of expert communities.”<sup>65</sup> In this case, an issue is not on the expert pathway but one of the other three pathways, and the influence of experts is limited to how their expertise supports others. The question then becomes: for what issues are experts likely to be viewed as so critical to policy resolution that an issue can ride the expert pathway?

Conlan et al. examined forty-two legislative policies within eight different policy areas to identify the main policy pathway used for getting an issue on the agenda and securing its passage for each legislative decision.<sup>66</sup> The only one of the eight policy areas which never used the expert pathway was gun control, for which the pluralist, partisan, and symbolic pathways were instead used. In some cases, it is fairly obvious why experts would play a major role in policy development and passage. For example, tax policy requires a detailed understanding of existing tax laws, the implications of those laws on different

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61. Burdett Loomis, Book Review, 34 PERSP. ON POL. SCI. 125, 173 (2005).

62. See generally DAVID WHITEMAN, COMMUNICATION IN CONGRESS (1995).

63. See generally *id.*

64. CONLAN, *supra* note 2, at 61.

65. *Id.* at 9, 198.

66. See generally CONLAN, *supra* note 2 (the eight areas are health care, gun control, farm policy, tax legislation, welfare policy, financial regulation, federal mandates, and budget policy).

groups, and the effects of proposed changes. However, only two of seven laws passed from 1981 to 2001 rode the expert pathway.<sup>67</sup> One might similarly expect budget policy to take the expert pathway, but only one of five laws from 1985 to 2011 did so.<sup>68</sup>

Factors other than the substance of the issue must, therefore, play a role in the choice of pathways. Conlan et al. suggest that members of Congress inject considerations pertaining to their reelection prospects when evaluating whether to involve experts.<sup>69</sup> They identify four factors that members are likely to consider in the choice to involve experts in a meaningful way in the policy process: *shame* or the fact that experts have gained public status and credibility on an issue which allows politicians to align with them against narrow interests that had controlled an issue; *competition* when one set of political actors is making expert-based claims and those opposed initiate the involvement of other experts to counter those claims; *conflict management* for issues where agreement on empirical facts can establish a baseline and control the scope of conflict; and *blame avoidance* for issues on which political actors want to insulate themselves from political opposition on hard choices.<sup>70</sup>

The following sections will examine the likelihood that, and circumstances under which, experts will play a dominant role in information privacy policymaking.

## V. EXPERTS IN INFORMATION PRIVACY POLICYMAKING IN THE 2000S AND BEYOND

Before examining policymaking in the 2000s, it is important to describe the policy environment and arenas that previous policy initiatives had established as the working environment for information privacy development and implementation. With respect to federal agencies, the locus of policy responsibility was primarily the Office of Management and Budget (OMB). With respect to private sector organizations, the locus was the Federal Trade Commission (FTC) with its jurisdiction over unfair and deceptive trade practices. With respect to organizations operating at the state level, state Attorneys General (AG) had varying level of authority. Looking at these three arenas from an expert perspective, the primary actors at the OMB are government bureaucrats who are often lawyers, at the FTC are lawyers and

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67. *See id.* at 110–11

68. *See id.*

69. *See id.* at 81–82.

70. *Id.*



economists,<sup>71</sup> and at AG offices are lawyers.<sup>72</sup> Although it may well be the case that these lawyers have backgrounds in other areas, their shared expert orientation to an issue would be legal, and they are likely to adopt a fairly narrow policy perspective based on an interpretation of the current law and precedents.

During this time, however, three factors were changing the policy landscape in ways that did not fundamentally reflect a legal perspective and that necessitated different types of expertise. The first factor was *technological changes* in computer, information, and communications technologies, and the concomitant development of “big data” and the Internet of Things.<sup>73</sup> The experts needed to understand the changes, as well as the likely implications of the changes, were computer and data scientists—some of whom were in academia, a few in government agencies such as the National Telecommunications and Information Administration (NTIA), but most employed by the companies spearheading the innovations. The second factor was *industry changes* and the rise of large internet platforms and multiplication of both small, start-up, internet-based companies and consolidation of large internet companies.<sup>74</sup> The experts needed here were financial and industry analysts with backgrounds in economics or business administration—some of whom were in government agencies such as the FTC and Department of Commerce, but many of whom were again employed by the companies involved. The third was *international policy actions* by other countries and regional bodies, which affected the range of legitimate information practices by the U.S.-based companies. The necessary experts here are less well-defined but likely to include foreign policy actors and international lawyers—some of whom are in government agencies including the State Department, Commerce Department, and the Office of the U.S. Trade Representative.

During the early 2000s, public interest in online privacy increased initially because of concerns about identity theft and online tracking of activities, then

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71. See generally CHRIS JAY HOOFNAGLE, FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY (2016).

72. Danielle K. Citron, *The Privacy Policymaking of State Attorneys General*, 92 NOTRE DAME L. REV. 747 (2017), <https://scholarship.law.nd.edu/ndlr/vol92/iss2/5>.

73. See generally David Gewirtz, *Technology that Changed Us: The 2000's, from iPhone to Twitter*, ZDNET (May 29, 2018), <https://www.zdnet.com/article/technology-that-changed-us-the-2000s/>.

74. Makada Henry-Nickie, Kwadwo Frimpong & Hao Sun, *Trends in the Information Technology Sector*, BROOKINGS INST. (Mar. 29, 2019), <https://www.brookings.edu/research/trends-in-the-information-technology-sector/>; Bryan Martin, *Tech Boom 2.0: Lessons Learned from the Dot-Com Crash*, WIRED (Aug. 2013), <https://www.wired.com/insights/2013/08/tech-boom-2-0-lessons-learned-from-the-dot-com-crash/>.

because of concerns about data breaches, and more recently because of concerns about mobile tracking, flows of personal data through apps, and organizational uses of artificial intelligence.<sup>75</sup> During this time, there are three significant trends in congressional interest in privacy policymaking. The first is that more congressional committees or subcommittees exerted jurisdiction over information and data privacy issues reflecting the complexity and inter-relatedness of the issue. During earlier congressional deliberations, the locus of responsibility was generally with judiciary committees or subcommittees but, as can be discerned from Appendix A, commerce committees and subcommittees dominate, taking both a consumer protection and a technology perspective, with decreased interest from the judiciary.<sup>76</sup> Second is that, regardless of the subject of the congressional hearings, most of the witnesses were from industry. Of the 286 witnesses testifying at thirty-eight major congressional hearings on information privacy from 2010 to 2019, over half (174) were from technology companies or industry-related organizations while twenty-six witnesses were from public interest groups, twenty-eight were academics or lawyers, thirty-five were government officials, and five were from other entities (e.g., international).<sup>77</sup> Finally, despite the number of bills introduced, no legislation passed, which could signal a lack of consensus among experts or the dominance of interests.

This leaves us with a critical question about whether one can distinguish who the experts are and whether they can be differentiated from the interests. The 2012 Obama Administration's policymaking around its proposed Consumer Privacy Bill of Rights and around its Big Data report can both be analyzed to explore an answer. Instead of leaving deliberations on the proposed bill to congressional committees, the White House tasked the NTIA, part of the Commerce Department and last involved with information privacy during the Clinton Administration's stakeholder processes addressing the NII, with "convening interested stakeholders—including companies, privacy advocates, consumer groups, and technology experts—to develop and implement enforceable codes of conduct that specify how the principles in the

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75. Alex Hern, *Internet Privacy: The Apps that Protect You from Your Apps*, GUARDIAN (Feb. 16, 2020, 2:00 AM), <https://www.theguardian.com/technology/2020/feb/16/internet-privacy-settings-apps-to-protect-you-> [https://perma.cc/V7YF-8KZQ]; Timothy L. O'Brien, *Identity Theft Is Epidemic. Can It Be Stopped?*, N. Y. TIMES (Oct. 24, 2004), <https://www.nytimes.com/2004/10/24/business/yourmoney/identity-theft-is-epidemiccan-it-be-stopped.html> [https://perma.cc/R9HJ-N3JH].

76. *Infra* app. A.

77. *Id.*

Consumer Privacy Bill of Rights apply in specific business contexts.”<sup>78</sup> The NTIA also issued a request for public comment on the proposed bill. The NTIA specifically defined this initiative as a “multistakeholder process,” and the NTIA was designated as the forum for discussion with a role to mediate or facilitate consensus building among stakeholders.<sup>79</sup> To some extent, one can interpret the Obama Administration’s strategy as a testing of all four pathways—symbolic because of the use of “bill of rights”; pluralist because of the “stakeholder” perspective; partisan because of an exertion of executive control; and expert because of the specified inclusion of “technology experts,” the only stakeholders explicitly accorded the expert label.<sup>80</sup>

The Obama Administration’s approach yielded eighty-seven comments,<sup>81</sup> overwhelmingly from industry groups. Comments were submitted by major internet-related businesses, including Facebook, Visa, Mozilla, Microsoft, AT&T, eBay, Verizon and Intel. Additionally, comments were submitted by key industry associations including the Retail Industry Leaders Association, Software and Information Industry Association, Application Developers Alliance, Marketing Research Association, Interactive Advertising Bureau, National Cable and Telecommunications Association, Direct Marketing Association, Internet Commerce Coalition, and CTIA-The Wireless Association. Privacy and consumer groups also submitted comments, including from the Electronic Privacy Information Center (EPIC), ACLU, Privacy Rights Clearinghouse, Center for Digital Democracy and Consumer Watchdog, but they were far outnumbered by industry groups. NTIA also held a multistakeholder meeting, which also yielded no concrete results and was not surprisingly dominated by industry groups.<sup>82</sup> Although a mere accounting of the number of groups commenting is not sufficient to determine the policy pathway, it does shed light on the fact that industry related groups were in the majority. Although these groups may indeed have expertise on technological

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78. Lawrence E. Strickling, *Moving Forward with the Consumer Privacy Bill of Rights*, NTIA (Feb. 29, 2012), <https://www.ntia.doc.gov/blog/2012/moving-forward-consumer-privacy-bill-rights>. On February 23, 2012, the White House released *Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy*, <https://obamawhitehouse.archives.gov/sites/default/files/privacy-final.pdf>.

79. *Comments on Multistakeholder Process*, NTIA (Apr. 3, 2012), <https://www.ntia.doc.gov/federal-register-notice/2012/comments-multistakeholder-process?page=1> (comments received by Apr. 3, 2012).

80. *Id.*

81. *Id.*

82. Jeff Chester, CTR. FOR DIG. DEMOCRACY, *HEAD IN THE DIGITAL SAND: HOW THE OBAMA ADMINISTRATION’S NTIA-LED MULTISTAKEHOLDER EFFORT DOESN’T DELIVER ITS PROMISED PRIVACY BILL OF RIGHTS* (2013), <https://www.democraticmedia.org/sites/default/files/CDDPrivacyObamaAdmReportAugust2013.pdf>.

capacities and consumer behavior, that expertise is in the context of the industry and most likely framed in terms of the interests of the industry, and not professional norms and values. The proposed consumer privacy bill made little headway.

Likewise, the process during the Obama Administration around big data employed a multistakeholder process with industry groups again playing a major role but with more input from technology experts and public interest groups. This time the process was co-managed by several executive departments, including the Department of Commerce, Department of Energy, Office of Science and Technology Policy (OSTP), and National Economic Council, and involved outreach to academic experts, industry representatives, privacy advocates, civil rights groups, law enforcement agents, and other government agencies.<sup>83</sup> Three university conferences were organized around the topics of privacy; social, cultural, and ethical dimensions; and governance and values. Stakeholder meetings were convened with over a hundred groups, including major industries, industry associations, and public interest groups.<sup>84</sup> A request for public comment drew over seventy comments, with more balance among stakeholders, though industry-related associations were the largest group of commenters.<sup>85</sup>

As the Executive Office process was underway, the President's Council of Advisors on Science and Technology (PCAST) also undertook a parallel study to assess the technological dimensions of the intersection of big data and privacy. PCAST is explicitly an expert advisory group of scientists and engineers convened in order to better inform the President about policy choices in the area of science, technology, and innovation. Of the sixteen PCAST members, eleven are from universities and four from industry (Google, Microsoft, United Technologies Corporation, Zetta Venture Partners), and one from a non-profit (National Quality Forum).<sup>86</sup>

Both reports raised privacy concerns, particularly regarding fairness and discrimination, as well as acknowledging the societal benefits from appropriate uses of big data and provided policy options for such uses. The White House report identified a number of specific policy recommendations, including

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83. EXEC. OFFICE OF THE PRESIDENT, WHITE HOUSE, BIG DATA: SEIZING OPPORTUNITIES, PRESERVING VALUES 3–4 (2014), [https://obamawhitehouse.archives.gov/sites/default/files/docs/big\\_data\\_privacy\\_report\\_5.1.14\\_final\\_print.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/big_data_privacy_report_5.1.14_final_print.pdf).

84. *Id.* at 70–72.

85. *Id.* at 77–78.

86. PRESIDENT'S COUNCIL OF ADVISORS ON SCI. & TECH., EXEC. OFFICE OF THE PRESIDENT, BIG DATA AND PRIVACY: A TECHNOLOGICAL PERSPECTIVE (2014), [https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast\\_big\\_data\\_and\\_privacy\\_-\\_may\\_2014.pdf](https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_big_data_and_privacy_-_may_2014.pdf).

passing a Consumer Privacy Bill of Rights and National Data Breach Legislation, as well as amending the Electronic Communications Privacy Act.<sup>87</sup> However, again, no legislative change resulted. Although this multistakeholder process was unsuccessful in generating congressional action, the process itself was more inclusive partly as a result of the university conferences and the inclusion of PCAST, both of which allowed for contribution from experts.

With respect to information privacy policy, the Trump Administration has continued the multistakeholder approach of the Clinton and Obama Administrations. The Commerce Department created an Internet Policy Task Force “to conduct a comprehensive review of the nexus between privacy policy, copyright, global free flow of information, cybersecurity, and innovation in the Internet economy.”<sup>88</sup> The Task Force was intended to “leverage expertise” and emphasized the importance of trust in the digital environment. The National Institute of Standards and Technology (NIST) was charged with developing a voluntary privacy framework to help organizations manage risk while NTIA was charged with modernizing U.S. data privacy policy and proposed focusing on outcomes of organizational data practices rather than specifying requirements for those practices.<sup>89</sup> NTIA’s request for public comment on the proposed outcomes yielded 217 comments.<sup>90</sup> More individuals commented than in response to previous requests, but, again, comments from companies and industry-related groups dominated.

From this brief review of development of information privacy policy in the 2000s in congressional committees, the FTC, the NTIA, and task forces, two conclusions can be drawn. The first is that current policymaking continues to occur primarily in the pluralist pathway as interests tend to dominate policy narratives and decisions. The second is that, although there is recognition that “technology experts” are included in lists of “stakeholders,” their input and appearance often occurs as industry employees and voices, not as independent actors with credibility and legitimacy as a result of their technological knowledge and experience. Expertise, and the leverage accorded to expertise,

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87. See STRICKLING, *supra* note 78.

88. *Internet Policy Task Force*, NTIA, <https://www.ntia.doc.gov/category/internet-policy-task-force> (last visited Aug. 13, 2020).

89. Press Release, NTIA, NTIA Seeks Comment on New Approach to Consumer Data Privacy (Sep. 25, 2018), <https://www.ntia.doc.gov/press-release/2018/ntia-seeks-comment-new-approach-consumer-data-privacy>.

90. Press Release, NTIA, NTIA Releases Comments on a Proposed Approach to Protecting Consumer Privacy (Nov. 13, 2018), <https://www.ntia.doc.gov/press-release/2018/ntia-releases-comments-proposed-approach-protecting-consumer-privacy>.

thus may be undercut or compromised because of their affiliation with an industry or public interest group.

## VI. BARRIERS TO EXPERTISE INFLUENCING INFORMATION PRIVACY POLICYMAKING

As noted immediately above, the first barrier is the hegemonic control that affected interests have had on information privacy and their capacity at keeping this issue in the pluralist pathway—an ability that derives from the fact that this is, to a very large extent, the default pathway in U.S. policymaking and is reinforced by the political and economic power of the affected interests. The second barrier is that expertise, particularly technological expertise, is to a large extent embedded in, and integral to, the industries that would be affected by more effective policy. One might, however, expect that as technological factors become a more critical component of information privacy issues, technology experts in particular would be able to exert more independent influence. Three additional factors, which to this point have also been barriers to expertise input but which could be corrected, come into play: the lack of technology expertise in Congress and the FTC; the complexity of information privacy as a policy problem; and the current deferral of policymaking to private entities collecting and using information about people.

The first factor is a barrier which, in theory, could be overcome and which, in practice, has been addressed to some extent. This factor involves the lack of technology expertise in congressional committees and the FTC, which has had primary jurisdiction over information privacy policy. Both relevant congressional committees and the FTC have recognized that their lack of knowledge has weakened their ability to evaluate claims made by industry actors and have taken steps to increase their technological expertise. For example, the FTC has added a Chief Technologist, an Office of Technology Research and Investigation, staff technologists in the Division of Privacy and Identity Protection, and, most recently, a Technology Task Force<sup>91</sup> in the Bureau of Competition (with seventeen lawyers and a number of technology fellows). Latanya Sweeney, during her tenure as Chief Technologist, established positions for Summer Research Fellowships in Technology and Data Governance to bring students with technology backgrounds to the FTC with opportunities to spend a summer “exploring ways to design, create, assess, and analyze technology at its intersection with business, society and

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91. Press Release, FTC, FTC’s Bureau of Competition Launches Task Force to Monitor Technology Markets (Feb. 26, 2019), <https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology>.

policy.”<sup>92</sup> Additionally, the FTC saw this program as an opportunity “to broaden its ability to understand and respond to current topics in technology.”<sup>93</sup> Given the academic focus of these programs, it is likely that they will serve as an effective way to bring expertise to the FTC and to inform experts about the operating culture of the FTC.

The second factor appears to be a larger barrier moving forward and involves the complexity of the information privacy environment. As alluded to directly above, the technology in question intersects “with business, society and policy,” necessitating not just expertise in technology but also in the dynamics of those intersections. The effect of this is that claims of expertise can (and are) contested, as one cannot draw a clear line from one type of disciplinary expertise to a claim of expertise about the effects of an information practice on privacy. For example, a *lawyer*, based on prior legal precedents in similar areas, can speak to whether a claim about a mobile app’s privacy policies raises questions about unfair and deceptive trade practices; a *computer technologist* can explain the technological underpinnings of the app; a *data scientist* can outline how information flows to make the app work and what information flows beyond the app itself; a *behavioral economist* can make predictions about how individuals will respond to the app; a *financial analyst* can evaluate the market effects; a *sociologist* can opine on the larger social and political effects of the app; and an *ethicist* can suggest moral questions posed by uses of the app. In this case, *seven* different professional groups can claim some expertise in policy discussions about the effects of the mobile app on privacy.

The multiplicity of claims to expertise is not entirely unique to privacy. Many policy areas draw on multiple types of experts, but this problem appears relatively greater in privacy policy. Tax policy, for example, draws heavily on three different types of expertise—law, accounting, and economics—each of which makes relevant and unique contributions to policy discussions without being fundamentally at odds. Given the overlap in these areas of expertise and a somewhat common language, it is more likely that an expert consensus can develop.<sup>94</sup> For an issue like privacy, experts are more likely to disagree as they approach the issue with divergent, not complementary, perspectives. As an example, law enforcement often calls for access to encrypted devices and weakening encryption, while people who are experts in the technology understand that it is difficult to do this while maintaining strong encryption and lawyers see Fourth Amendment concerns. Experts with particularized

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92. Latanya Sweeney, *Save the World*, NTIA (Apr. 17, 2014, 4:05 PM), <https://www.ftc.gov/news-events/blogs/techftc/2014/04/save-world>.

93. *Id.*

94. CONLAN, *supra* note 2, at 121.

areas of expertise are less likely to consider factors outside their area of knowledge, while those with more breadth and depth in their backgrounds are more likely to be able to recognize and negotiate competing claims.

To overcome this barrier of diverse claims of expertise, two possibilities present themselves. The first is to provide academic programs for students in interdisciplinary, or transdisciplinary, studies so that they have both depth and breadth to understand the complexity of the information privacy environment. A number of universities have launched graduate programs along these lines—UC Berkeley, New York University, Carnegie Mellon, and Cornell come immediately to mind.<sup>95</sup> A second is to provide forums that prioritize expert discussion in a manner that will not devolve into interest-group-dominated deliberation. Difficult as it may be to separate the two, an effort to provide some space that queries the technological capacities and implications in an objective manner appears essential if technological experts are to play a meaningful role in public policymaking.

A third factor providing a barrier is the nature of the current policy regime, which gives organizations—both public and private—a great deal of latitude to, in effect, set their own privacy policies. The self-regulatory regime for the private sector in particular provides private companies with control over developing their own privacy notices, including language that can be so vague and obtuse as to be relatively meaningless to a consumer, in addition to control over both enforcement and administration of those policies as well as any grievances arising from them.

## VII. ENHANCING THE ROLE OF EXPERTS

The above analysis leads to the conclusion that three complementary changes would reduce the barriers discussed above and enable experts to play a larger role in information privacy policy.

First, the establishment of a source of expertise outside of or independent of industry is critical for experts to have the professional standing to offer advice that is not seen as being in some way affected by industry interests. As mentioned above, there is an academic pipeline that is producing students who are well-versed in the various intersecting expertise central to understanding the implications of various technologies and practices on privacy. But producing experts is not enough to place them in positions where they not

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95. *E.g.*, UC Berkeley's Law and Technology certificate program or its graduate programs in Information Management Systems, Carnegie Mellon's Master of Science in Information Technology – Privacy Engineering, and the certificate programs at Princeton's Center for Information Technology Policy.



only can influence policymaking but also exert influence as a recognized professional community. This does not mean that such experts cannot be affiliated with industry, but it does require first that their identity is rooted in their profession and their professional reputation rather than their current position in industry. It also requires that these experts exist in a variety of institutions—public, private, and nonprofit.

If these two requirements were met, it would enable such experts to be recognized as such and to exert professional influence within policy communities discussing options for information privacy. Ken Bamberger and Deirdre Mulligan's research on privacy act officers within companies suggest that this may be occurring, at least at some of the largest companies.<sup>96</sup> Although the results of their research is limited by the small number of their respondents, they did find the emergence of a professional identity informed in part by attendance at conferences and workshops such as the Privacy Law Scholars Conference, the annual meeting of data protection commissioners, and the Computers Freedom and Privacy conference.<sup>97</sup> Bamberger and Mulligan note the role of the International Association of Privacy Professionals (IAPP) in meeting the informational, training, and networking needs of privacy "professionals" through educational programs, conferences, and a credentialing program.<sup>98</sup> Conferences and networking opportunities help privacy experts build and maintain a professional identity, as well as recognized credentialing, that provides not only a shared language and understanding of the issues across organizations, but also a sense of confidence in one's professionalism within the organization with which they are affiliated.

The second change to enable experts to play a more central role in policy development would be a congressional forum that privileges more expert input into the policy process for information privacy than is available through the more political congressional hearing process. Both the Belfer Center on Science and Technology and the National Academy of Public Administration (NAPA) have recently recommended that Congress increase its capacity in science and technology areas, and that it provide more forums for mid-level and long-term identification of policy issues and options. The NAPA report recommended that Congress both enhance the technological expertise and capacity of existing entities, such as the Congressional Research Service (CRS)

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96. See generally KENNETH A. BAMBERGER & DEIRDRE K. MULLIGAN, *PRIVACY ON THE GROUND: DRIVING CORPORATE BEHAVIOR IN THE UNITED STATES AND EUROPE* (2015).

97. See Kenneth A. Bamberger & Deirdre K. Mulligan, *New Governance, Chief Privacy Officers, and the Corporate Management of Information Privacy in the US: An Initial Inquiry*, 33 L. & POLY 477 (2011), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1701087](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1701087).

98. See Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy on the Books and on the Ground*, 63 STAN. L. REV. 247, 262 (2011).

and the Government Accountability Office (GAO), as well as create a new advisory office to increase the capacity of Congress itself.<sup>99</sup> Creating this new office would entail recruiting and hiring science and technology advisors for House and Senate committees with relevant oversight responsibilities.<sup>100</sup> The Belfer Center on Science and Technology similarly concluded that Congress had not given itself the resources needed to efficiently and effectively absorb new information.<sup>101</sup> The study pointed out that, “in legislation and high-profile hearings, Congress has appeared unprepared to reckon with emerging technologies and their effects on society. In recent years, Congress has failed to produce substantive legislation on emerging [science and technology] issues of national import, *like personal data privacy and protections*.”<sup>102</sup>

Finally, a serious prospect of legislative action would entice industry to pay attention and provide an opportunity for experts to play a larger role. As Cameron Kerry pointed out, within Congress and within the information privacy community, there is agreement on the key principles; nonetheless, “it is a challenge to articulate these in ways that are concrete without being too prescriptive or too narrow.”<sup>103</sup> The shortcomings of the current information privacy approach, relying on Fair Information Principles of notice, choice, and consent, are broadly recognized and necessitate a shift in policy thinking to obligate organizations to responsibly handle personal information. In setting such obligations or duties, Margot Kaminski’s conclusion that “both the current penalties and the current levels and kinds of uncertainty in the U.S. privacy regime are not enough to drive industry to the table in efficiency-maximizing ways” is important to consider.<sup>104</sup> She argues that effective policy will require broad standards backed by enforcement, ensuring that there is uncertainty over what the standards require and, therefore, driving companies to negotiate with the enforcement agency.<sup>105</sup> Bamberger and

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99. See SCIENCE AND TECHNOLOGY POLICY ASSESSMENT: A CONGRESSIONALLY DIRECTED REVIEW, NAT’L ACAD. OF PUB. ADMIN 51–55 (2019), [https://web.archive.org/web/20200405173323/https://www.napawash.org/uploads/Academy\\_Studies/NAPA\\_FinalReport\\_forCRS\\_110119.pdf](https://web.archive.org/web/20200405173323/https://www.napawash.org/uploads/Academy_Studies/NAPA_FinalReport_forCRS_110119.pdf).

100. *Id.* at 54–55.

101. See MIESEN, *supra* note 1, at 9–12 (2019), [https://web.archive.org/web/20200405174107/https://www.belfercenter.org/sites/default/files/2019-09/ST/Building\\_21stCenturyCongress.pdf](https://web.archive.org/web/20200405174107/https://www.belfercenter.org/sites/default/files/2019-09/ST/Building_21stCenturyCongress.pdf).

102. *Id.* at 1 (emphasis added).

103. Cameron F. Kerry, *Will This New Congress Be the One to Pass Data Privacy Legislation?*, BROOKINGS INST. (Jan. 7, 2019), <https://www.brookings.edu/blog/techtank/2019/01/07/will-this-new-congress-be-the-one-to-pass-data-privacy-legislation/>.

104. Margot E. Kaminski, *When the Default Is No Penalty: Negotiating Privacy at the NTLA*, 94 DENVER L. REV. 925, 946 (2016).

105. *Id.*

Mulligan's research further supports the value of such uncertainty. They credit the success of the FTC's divergence from "command-and-control governance" and a "reticent regulator" approach," and instead its embrace of regulatory and legal ambiguity which has, in effect, kept companies uncertain and aware of the potential privacy risks of their practices, incentivizing them to take the advice of information privacy experts more seriously.<sup>106</sup>

## VIII. CONCLUSION

Although the current policymaking regime for information privacy is dominated by the organizations with interests in a more unrestrained flow of information about individuals and is not conducive to effective and objective input by experts, the above analysis identifies some changes that would help experts to gain footing in policy discourse for this issue. Specifically, this analysis identifies the importance of providing a source of expertise independent of industry, establishing a congressional forum that privileges expert advice over interest group influence, and initiating legislative action that would lead industry to attend more seriously to concerns about information privacy. These changes would provide experts with a reliable forum to operate from, enhanced abilities to cross examine competing claims of expertise, and appropriate recognition in the formulation of policy. As demonstrated by the last fifty years of information privacy policymaking, the current system encourages ineffective political outcomes, marginalized experts, and interest-based loyalty. By enabling a more robust expert pathway for information privacy policymaking, we can begin to chip away at the dominant pluralist pathway and, in the process, make more effective policy choices.

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106. BAMBERGER & MULLIGAN, *supra* note 98, at 308.

**APPENDIX A – SELECTED INFORMATION PRIVACY  
CONGRESSIONAL HEARINGS (2010–19)\***

Date	Committee	Purpose	Witnesses
December 4, 2019	Senate Committee on Commerce, Science, and Transportation	Examine legislative proposals to protect consumer data privacy, including giving FTC more resources and authority	<ul style="list-style-type: none"> <li>• Julie Brill, Former Commissioner of the FTC, now at Microsoft</li> <li>• Maureen Ohlhausen, Former Acting-Chair of the FTC, now at 21st Century Privacy Coalition</li> <li>• Laura Moy, Georgetown Law Center on Privacy &amp; Technology</li> <li>• Nuala O’Connor, Walmart</li> <li>• Michelle Richardson, Center for Democracy and Technology</li> </ul>
July 16, 2019	Senate Committee on Banking, Housing, and Urban Affairs	Examine Facebook, Inc. proposed development of a new cryptocurrency, called Libra, and a digital wallet to store this cryptocurrency, called Calibra, and to review implications for consumers and potential risks associated with Libra	<ul style="list-style-type: none"> <li>• David Marcus, Facebook</li> </ul>

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\* Compiled by author and Caroline Ball, GMU MPA student and Graduate Research Assistant. The table includes most of the major information privacy hearings held over the last twenty years. It does not include hearings on communication privacy, student privacy, privacy of health records, or specific issues in one government agency. The primary sources were GovInfo ([www.govinfo.gov](http://www.govinfo.gov)), Congress.Gov ([www.congress.gov](http://www.congress.gov)), and websites of relevant congressional committees.

Date	Committee	Purpose	Witnesses
May 8, 2019	House Energy and Commerce Committee	Oversight of the Federal Trade Commission: Strengthening Protections for Americans' Privacy and Data Security	<ul style="list-style-type: none"> <li>• Joseph Simmons, FTC</li> <li>• Noah Joshua Phillips, FTC</li> <li>• Rohit Chopra, FTC</li> <li>• Rebecca Kelly Slaughter, FTC</li> <li>• Christine Wilson, FTC</li> </ul>
May 7, 2019	Senate Committee on Banking, Housing, and Urban Development	Privacy Rights and Data Collection in a Digital Economy	<ul style="list-style-type: none"> <li>• Peter Chase, German Marshall Fund</li> <li>• Jay Cline, PWC</li> <li>• Maciej Ceglowski, Pinboard</li> </ul>
May 1, 2019	Senate Committee on Commerce, Science, and Transportation	Examine consumers' expectations for data privacy in the Digital Age and how those expectations may vary based on the type of information collected and processed by businesses.	<ul style="list-style-type: none"> <li>• Helen Dixon, Republic of Ireland</li> <li>• Neema Singh Guliani, ACLU</li> <li>• Jules Polonetsky, Future of Privacy Forum</li> <li>• Jim Steyer, Common Sense Media</li> </ul>
March 26, 2019	Subcommittee on Manufacturing, Trade, and Consumer Protection of Senate Commerce Committee	Data privacy issues that impact small businesses and the unique challenges they face with laws designed for larger companies	<ul style="list-style-type: none"> <li>• Mr. Justin Brookman, Consumer Reports</li> <li>• Ms. Nina Dosanjh, National Association of Realtors</li> <li>• Mr. Jefferson England, Silver Star Communications</li> <li>• Mr. Evan Engstrom, Engine Advocacy and Research Foundation</li> <li>• Mr. Ryan Weber, KC Tech Council</li> </ul>

Date	Committee	Purpose	Witnesses
February 27, 2019	Senate Committee on Commerce, Science, and Transportation	Examine what Congress should do to address risks to consumers and implement data privacy protections for all Americans	<ul style="list-style-type: none"> <li>• Jon Leibowitz, 21<sup>st</sup> Century Privacy Coalition</li> <li>• Michael Beckerman, Internet Association</li> <li>• Brian Dodge, Retail Industry Leaders Association</li> <li>• Victoria Espinel, The Software Alliance</li> <li>• Woodrow Hartzog, Professor, Northeastern University</li> <li>• Randall Rothenberg, Interactive Advertising Bureau</li> </ul>
February 26, 2019	House Energy and Commerce Committee	Protecting consumer privacy in an era of Big Data	<ul style="list-style-type: none"> <li>• Brandi Collins-Dexter, Media, Democracy 7 Economic Justice</li> <li>• Dave Grimaldi, IAB</li> <li>• Rosalyn Layton, AEI</li> <li>• Nuala O'Connor, CDT</li> <li>• Denise Zheng, Business Roundtable</li> </ul>
September 26, 2018	Senate Committee on Commerce, Science, and Transportation	Examine current privacy policies in top companies, review current privacy laws, discuss possible new safeguards	<ul style="list-style-type: none"> <li>• Len Cali, AT&amp;T</li> <li>• Andrew DeVore, Amazon</li> <li>• Keith Enright, Google</li> <li>• Damien Kieran, Twitter</li> <li>• Guy Tribble, Apple</li> <li>• Rachel Welch, Charter Communications</li> </ul>

Date	Committee	Purpose	Witnesses
August 16, 2018	Senate Committee on Commerce, Science, and Transportation	Examine policy issues before the Commission and review the FCC's ongoing duties and activities	<ul style="list-style-type: none"> <li>• Ajit Pai, FCC</li> <li>• Michael O'Rielly, FCC</li> <li>• Brendan Carr, FCC</li> <li>• Jessica Rosenworcel, FCC</li> </ul>
June 19, 2018	Senate Committee on Commerce, Science, and Transportation – Subcommittee on Consumer Protection, Product Safety, Insurance, and Data Security	Follow-up to Zuckerberg hearing, focused on privacy concerns in the wake of Cambridge Analytica	<ul style="list-style-type: none"> <li>• John Battelle, NewCo</li> <li>• Aleksandr Kogan, University of Cambridge Department of Psychology</li> <li>• Ashkan Soltani, Soltani LLC (formerly FTC)</li> </ul>
June 14, 2018	House Committee on Energy and Commerce	Understanding the digital advertising ecosystem	<ul style="list-style-type: none"> <li>• Robert Glasser, Wunderman</li> <li>• Mike Zaneis, Trustworthy Accountability Group</li> <li>• Justin Brookman, Consumers Union</li> <li>• J. Howard Beales, GW School of Business</li> </ul>
April 11, 2018	House Committee on Energy and Commerce	Facebook: Transparency and Use of Consumer Data (Cambridge Analytica)	<ul style="list-style-type: none"> <li>• Mark Zuckerberg, Facebook</li> </ul>
April 10, 2018	Senate Commerce, Science, and Transportation and Judiciary Committees (joint)	Facebook, social media, privacy and the use and abuse of data (Cambridge Analytica)	<ul style="list-style-type: none"> <li>• Mark Zuckerberg, Facebook</li> </ul>

Date	Committee	Purpose	Witnesses
February 6, 2018	Senate Committee on Commerce, Science, and Transportation – Subcommittee on Consumer Protection, Product Safety, Insurance, and Data Security	Examine the Uber breach including coverups, review the value of “bug bounty” programs	<ul style="list-style-type: none"> <li>• Justin Brookman, Consumers Union</li> <li>• John Flynn, Uber</li> <li>• Márten Mickos, HackerOne</li> <li>• Katie Moussouris, Luta Security</li> </ul>
November 29, 2017	House Committee on Energy and Commerce – Subcommittee on Communication and Technology – Subcommittee on Digital Commerce and Consumer Protection	Discuss companies’ use of algorithms to personalize content, review concerns about protecting consumer information, outlining platform privacy policy disclosures	<ul style="list-style-type: none"> <li>• Catherine Tucker, MIT School of Management</li> <li>• Omri Ben-Shahar, University of Chicago Law School</li> <li>• Kate Klonick, Yale Law School</li> <li>• Michael Kearns, University of Pennsylvania Department of Computer and Information Science</li> <li>• Laura Moy, Georgetown Law Center on Privacy and Technology</li> <li>• Frank Pasquale, University of Maryland Law</li> </ul>



Date	Committee	Purpose	Witnesses
November 8, 2017	Senate Committee on Science and Transportation	Protecting consumers in era of major data breaches	<ul style="list-style-type: none"> <li>• P. Barros, Jr., Equifax</li> <li>• Richard Smith, former Equifax</li> <li>• Marissa Mayer, Yahoo</li> <li>• Karen Zacharia, Verizon</li> <li>• Todd Wilkinson, Entrust Datacard</li> </ul>
March 22, 2017	Senate Committee on Commerce, Science, and Transportation	Examine benefits and risks of innovative technologies to combat cyber threats and secure critical infrastructure	<ul style="list-style-type: none"> <li>• Caleb Barlow, IBM Security</li> <li>• Venky Ganesan, National Venture Capital Association</li> <li>• Steve Grobman, Intel Security Group</li> <li>• Malcolm Harkins, Cylance Corp.</li> <li>• Eric Rosenbach, DOD</li> </ul>
March 21, 2017	House Committee on Energy and Commerce – Subcommittee on Communication and Technology	Examine challenges facing broadband infrastructure deployment efforts, review proposals to promote broadband infrastructure development and investment and efforts to improve permitting process	<ul style="list-style-type: none"> <li>• Steven K. Berry, Competitive Carriers Association</li> <li>• Michael Conners, Saint Regis Mohawk Tribe</li> <li>• Thomas Murray, Community Wireless Structures</li> <li>• Joanne S. Hovis, CTC Technology and Energy</li> <li>• LeRoy T. Carlson, U.S. Cellular</li> <li>• James W. Stegeman, CostQuest Associates</li> <li>• Bryan Darr, Mosaik Solutions</li> </ul>

Date	Committee	Purpose	Witnesses
September 8, 2016	Senate Committee on Homeland Security and Governmental Affairs – Subcommittee on Regulatory Affairs and Federal Management	Examine Federal independent agencies regulatory review activities and processes, review proposals for potential improvements to regulatory process	<ul style="list-style-type: none"> <li>• Adam J. White, Hoover Institution</li> <li>• Cary Coglianese, University of Pennsylvania Law School</li> </ul>
July 12, 2016	Senate Committee on Commerce, Science, and Transportation	How will FCC's proposed privacy regulations affect consumers and competition	<ul style="list-style-type: none"> <li>• Jon Leibowitz, 21<sup>st</sup> C Privacy Coalition</li> <li>• Dean Garfield, Info Tech Industry Coalition</li> <li>• Paul Ohm, Georgetown Law</li> <li>• Matthew Polka, Am Cable Assoc</li> <li>• Peter Swire, Georgia Inst of Tech</li> </ul>
June 14, 2016	House Committee on Energy and Commerce – Subcommittee on Communication and Technology	Reviewing FCC proposed rules to establish consumer privacy requirements for broadband internet access service providers	<ul style="list-style-type: none"> <li>• Doug Brake, Information Technology and Innovation Foundation</li> <li>• Jon Leibowitz, 21<sup>st</sup> Century Privacy Coalition</li> <li>• Paul Ohm, Georgetown University Law Center</li> </ul>

Date	Committee	Purpose	Witnesses
July 29, 2015	House Committee on the Judiciary – Subcommittee on Courts, Intellectual Property, and the Internet	Examine the Internet of Things, focusing on privacy issues and government regulation	<ul style="list-style-type: none"> <li>• Gary Shapiro, Consumer Electronics Association</li> <li>• Dean D. Garfield, Information Technology Industry Council</li> <li>• Mitch Bainwol, Alliance of Automobile Manufacturers</li> <li>• Morgan Reed, ACT\The App Association</li> </ul>
July 28, 2015	House Committee on Energy and Commerce – Subcommittee on Communication and Technology	Summarizing current FCC activities and policy issues	<ul style="list-style-type: none"> <li>• Tom Wheeler, FCC</li> <li>• Ajit Pai, FCC</li> </ul>
April 29, 2015	House Committee on Oversight and Government Reform – Subcommittee on Information Technology	Examine digital data encryption and options to maintain proper balance between public safety and privacy	<ul style="list-style-type: none"> <li>• Amy Hess, FBI Science and Technology Branch</li> <li>• Daniel F. Conley, Suffolk County District Attorney</li> <li>• Kevin D. Bankston, New America Open Technology Institute</li> <li>• Jon Potter, Application Developers Alliance</li> <li>• Matthew Blaze, University of Pennsylvania Department of Computer and Information Science</li> </ul>

Date	Committee	Purpose	Witnesses
February 11, 2015	Senate Committee on Commerce, Science, and Transportation	Examine Internet of Things (IoT) Internet-connected devices, focusing on concerns over privacy and network security	<ul style="list-style-type: none"> <li>• Mike Abbott, Kleiner Perkins Caufield and Byers</li> <li>• Douglas Davis, Intel Corp.</li> <li>• Lance Donny, OnFarm Systems</li> <li>• Adam Thierer, George Mason University</li> <li>• Justin Brookman, Center for Democracy and Technology</li> </ul>
May 15, 2014	Senate Committees on Homeland Security and Governmental Affairs	Online advertising and hidden hazards to consumer privacy and data privacy	<ul style="list-style-type: none"> <li>• Alex Stamos, Yahoo</li> <li>• George Salem, Google</li> <li>• Craig Spiezle, Online Trust Alliance</li> <li>• Maneesha Mithal, FTC</li> <li>• Lou Mastria, Digital Advertising Alliance</li> </ul>
June 28, 2012	Senate Committee on Commerce, Science, and Transportation	Examine need for Federal privacy regulations to protect consumers from collection of personal information through commercial tracking of individual Internet activities, focusing on status of industry self-regulation efforts and mechanisms	<ul style="list-style-type: none"> <li>• Bob Liodice, Association of National Advertisers</li> <li>• Alex Fowler, Mozilla Corp.</li> <li>• Peter Swire, Ohio State University</li> <li>• Berin Szoka, TechFreedom</li> </ul>

Date	Committee	Purpose	Witnesses
January 31, 2012	Senate Committee on Judiciary	The Video Privacy Protection Act: protecting viewer privacy in the 21 <sup>st</sup> Century	<ul style="list-style-type: none"> <li>• Melvin Watt, Rep from NC</li> <li>• David Hyman, Netflix</li> <li>• William McGeeveran, U of Minn Law</li> <li>• Marc Rotenberg, EPIC</li> <li>• Christopher Wolfe, Hogan Lovells LLP</li> </ul>
October 13, 2011	Subcommittee on Commerce, Manufacturing, and Trade of House Committee on Energy and Commerce	Privacy and the collection and use of online and offline consumer information	<ul style="list-style-type: none"> <li>• Barbara Lawler, Intuit</li> <li>• Mike Hintze, Microsoft</li> <li>• Scott Meyer, Evidon</li> <li>• Linda Woolley, DMA</li> <li>• Alessandro Acquisti, Carnegie Mellon Univ</li> <li>• Pam Dixon, World Privacy Forum</li> </ul>
October 5, 2011	House Committee on Energy and Commerce – Subcommittee on Commerce, Manufacturing, and Trade	Examine child privacy issues on the Internet, focusing on adequacy of existing protections under the Children’s Online Privacy Protection Act (COPPA) of 1998 and FTC-proposed changes to COPPA	<ul style="list-style-type: none"> <li>• Mary Engle, FTC</li> <li>• Hemanshu Nigam, SSP Blue</li> <li>• Morgan Reed, Association for Competitive Technology</li> <li>• Stephen Balkam, Family Online Safety Institute</li> <li>• Kathryn Montgomery, American University</li> <li>• Alan Simpson, Common Sense Media</li> </ul>

Date	Committee	Purpose	Witnesses
September 15, 2011	House Committee on Energy and Commerce – Subcommittee on Commerce, Manufacturing, and Trade	Examine European Union (EU) regulatory efforts to protect online consumer data, focusing on unintended consequences of EU Data Protection and e-Privacy Directives for commerce, consumers, and businesses	<ul style="list-style-type: none"> <li>• Catherine Tucker, MIT</li> <li>• Stuart Pratt, Consumer Data Industry Association</li> <li>• Paula Bruening, Hunton and Williams, LLP</li> <li>• Peter Swire, Ohio State University</li> </ul>
July 14, 2011	House Committee on Energy and Commerce – Subcommittee on Commerce, Manufacturing, and Trade	Examine consumer Internet privacy issues, and to review Federal efforts to protect consumer privacy	<ul style="list-style-type: none"> <li>• Edith Ramirez, FTC</li> <li>• Julius Genachowski, FCC</li> <li>• Lawrence Strickling, National Telecommunications and Information Administration</li> </ul>
June 29, 2011	Senate Committee on Commerce, Science, and Transportation	Privacy and data security: protecting consumers in the modern world	<ul style="list-style-type: none"> <li>• Julie Brill, FTC</li> <li>• Cameron Kerry, Dept of Commerce</li> <li>• Austin Schlick, FCC</li> <li>• Stuart Pratt, Consumer Data Industry Assoc</li> <li>• Iona Rusu, Consumers Union</li> <li>• Tim Schaaff, Sony</li> <li>• Thomas Lenard, Tech Policy Inst</li> <li>• Scott Taylor, Hewlett-Packard</li> </ul>

Date	Committee	Purpose	Witnesses
May 19, 2011	Senate Committee on Commerce, Science, and Transportation	Consumer privacy and protection in the mobile marketplace	<ul style="list-style-type: none"> <li>• David Vladeck, FTC</li> <li>• Bret Taylor, Facebook</li> <li>• Morgan Reed, Assoc for Competitive Tech</li> <li>• Catherine Novelli, Apple</li> <li>• Alan Davidson, Google</li> <li>• Amy Guggenheim, Common Sense Media</li> </ul>
March 16, 2011	Senate Committee on Commerce, Science, and Transportation	State of online consumer privacy	<ul style="list-style-type: none"> <li>• Jon Leibowitz, 21st Century Privacy Coalition</li> <li>• Lawrence Strickling, NTIA</li> <li>• Erich Anderson, Microsoft</li> <li>• Ashkan Soltani, Privacy Consultant</li> <li>• Barbara Lawler, Intuit</li> <li>• Chris Calabrese, ACLU</li> </ul>
July 27, 2010	Senate Committee on Commerce, Science, and Transportation	Examine online consumer privacy issues and developments, focusing on Government and private industry efforts to protect consumers and assist consumer understanding of and control over privacy protection rights, policies, and mechanisms	<ul style="list-style-type: none"> <li>• Guy Tribble, Apple</li> <li>• Bret Taylor, Facebook</li> <li>• Alma Whitten, Google</li> <li>• Jim Harper, Cato Institute</li> <li>• Dorothy Attwood, AT&amp;T</li> <li>• Joseph Turow, University of Pennsylvania</li> </ul>

<b>Date</b>	<b>Committee</b>	<b>Purpose</b>	<b>Witnesses</b>
April 29, 2010	Senate Committee on Commerce, Science, and Transportation – Subcommittee on Consumer Protection, Product Safety, and Insurance	Examine online safety and privacy issues impacting children, focusing on new technological developments and efficacy of the Children’s Online Privacy Protection Act (COPPA) of 1998	<ul style="list-style-type: none"><li>• Jessica Rich, FTC</li><li>• Timothy Sparapani, Facebook</li><li>• Michael Hintze, Microsoft</li><li>• Kathryn Montgomery, American University</li><li>• Marc Rotenberg, Electronic Privacy Information Center</li><li>• Berin Szoka, Progress and Freedom Foundation</li></ul>