

Santa Clara University

Obama Administration's "Consumer Data Privacy in a Networked World"

Prof. Eric Goldman

Director, High Tech Law Institute

<http://www.ericgoldman.org> • <http://hightechlaw.scu.edu>

egoldman@gmail.com

Does the Privacy “Framework” Matter?

- **Turf war over privacy regulation**
 - FTC, CFPB, Congress, Obama Administration and others are fighting each other to “own” the privacy issue
 - Does the Obama administration’s position matter?
 - DC is shut down until after the election
 - GOP Platform references “privacy” 3x, none relevant to this topic
- **Abstract principles; rehash of long-standing privacy doctrines**
- **Report’s main contributions**
 - Government-guided negotiations between industry and consumer advocates
 - Favors federal solutions and FTC enforcement over options

Report Elements

- Privacy Bill of Rights
- Multi-stakeholder process to implement
- Enforcement
- International coordination

Fair Information Practices Principles

- FTC's Interpretation of FIPPs

- (1) Notice/Awareness
- (2) Choice/Consent
- (3) Access/Participation
- (4) Integrity/Security
- (5) Enforcement/Redress

Privacy Bill of Rights [and FIPPs analog]

- Individual control [choice]
- Transparency [notice]
- Respect for context [purpose specification + use limitation]
- Security [security]
- Access and accuracy [access]
- Focused collection
- Accountability [enforcement/redress]
- Note: Incumbents usually think they do all of this (ex: Facebook's definition of "opt-in")

Who Develops the Implementation?

- International entities
- National entities [BOR-preferred]
- States [BOR would preempt]
- Common law [BOR would preempt]
- Industry standards/“codes of conduct” [BOR-preferred]
 - But opportunity for competitor collusion
 - Biased towards incumbents
 - Small entities don’t participate
 - Next great startup can’t participate
 - See Campbell et al, [Privacy Regulation and Market Structure](#)
- Technology

Who Enforces Violations of the Rules?

- See generally Eric Goldman, [The Irony of Privacy Class Action Litigation](#)
- Federal Trade Commission [BOR-preferred]
- Other federal agencies, e.g., CFPB
- State AGs [OK with BOR?]
- Private litigation (especially class action lawsuits)
- Industry enforcement/certification
- Technology
- Publicity/word of mouth (market mechanisms)

What's Happened Since the Report Issued?

- Legislation unlikely in near future
- First multi-stakeholder effort: mobile apps notice (see <http://www.ntia.doc.gov/category/privacy>). Tech Daily Dose report:
 - Meetings are “messy, sprawling, and not conducive to quick action”
 - “Quite a bit of lobbying muscle is being brought to bear”
- Other stakeholder efforts could move in parallel (ex: HR data in cloud) + parallel efforts in cybersecurity