

## Cozen Currents: The Coming Biden Reset

### The Cozen Lens

- Personnel is policy in a presidential administration. For President Biden, his administration will encounter changing faces and priorities after a looming red wave in the midterms.
- A federal data privacy bill is under consideration in Congress, but the path forward for the legislation isn't clear. Meanwhile, the Federal Trade Commission is getting more involved in privacy, and on the state level, California is leading the way in strengthening privacy protections.
- Democrats and Republicans both have expressed frustration with Big Tech, but they have so far been unable to bridge their differences to pass legislation forcing change on the industry.

### Biden's Post-Midterms Reset

**The Biden Administration's Dynamics Today:** As someone who has been in Washington since 1973, President Biden has a routine and established group of confidants. This experience helps in the most difficult job in America but does not help when an administration needs to be nimble.

- The White House power center today is among a small coterie of advisors with decades of experience working with President Biden. This includes Chief of Staff Ron Klain, Counselor Steve Ricchetti, Senior Advisor Mike Donilon, Senior Advisor Anita Dunn, and Deputy Chief of Staff Bruce Reed.
- New members in the Biden orbit can enter the inner circle after proving their mettle. Domestic Policy Council Director Susan Rice has become a powerful voice inside the administration. So has Deputy Chief of Staff Jen O'Malley Dillon, who was Biden's campaign manager for the general election.
- The vice president and the broader Cabinet play second fiddle, with some exceptions. Vice President Harris and Treasury Secretary Janet Yellen were brought onto team Biden in no small part because of optics. But neither have breached Biden's inner circle. Meanwhile, Commerce Secretary Gina Raimondo and Transportation Secretary Pete Buttigieg have punched above their respective weights on communicating and operating on behalf of the Biden administration.
- Biden goes with his gut on long-held positions, but takes a deliberative approach elsewhere that can be stifling. No one needed to push Biden to withdraw from Afghanistan last year, a position he long held. But the morass of governing and trying to appease the different Democratic coalitions has led to a drawn out legislative and executive process on items like reconciliation, student loan debt forgiveness, and tariff relief.

**The Biden Administration's Shift Post-Midterms:** With an expected red wave in the midterms, the Biden administration will go through its own pivot to acclimate to the new political environment and seek opportunities ahead of the 2024 election.

- While the Trump administration tenure was measured in "Scaramuccis," the Biden White House and administration is waiting for a more natural culling point after the midterm elections. Klain is expected to depart and so is Yellen. Rice, Dunn, and Ricchetti are leading contenders to be the next chief of staff. Raimondo is seen as a top contender for Treasury.
- The post-midterms White House will be focused on the next election. Biden continues to publicly and privately indicate he's running for reelection in 2024, especially if Donald Trump runs again. An announcement would likely come in the spring of next year.
- The White House will be focused on Republican investigations, oversight, and possibly



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impeachment. The administration is already preparing for GOP oversight investigations, ranging from the Afghanistan withdrawal, the handling of the pandemic, and Hunter Biden. These probes can stretch an administration but can also lead to backlash on the Republican investigators if they're seen as overtly political.

- The White House will also pivot to the center. This is a function of being blocked by a potentially Senate Majority Leader Mitch McConnell-led Senate to confirm progressive nominees as well as because perceived moderates perform better in general elections. Donald Trump was perceived as *more moderate* than Hillary Clinton in 2016 and Biden was perceived as *more moderate* than Trump in 2020. That Biden moderation, but still Democratic, will likely show up in the new personnel.
- A populist regulatory agenda will remain on track though. Figures like Federal Trade Commission Chair Lina Khan, Securities and Exchange Commission Chair Gary Gensler, and Consumer Financial Protection Bureau Director Rohit Chopra aren't planning on leaving anytime soon. They will still be empowered to move forward on their respective aggressive agendas that they have laid out over the first two years of Biden's tenure.

#### Data Privacy Gains Momentum at the Federal and State Levels

**A Comprehensive Federal Data Privacy Bill.** Lawmakers have unveiled a new proposal to enact data privacy protections on the federal level, but passing this legislation won't be easy.

- Earlier this month, House Energy and Commerce Committee Chair Frank Pallone Jr. (D-NJ) and Ranking Member Cathy McMorris Rodgers (R-WA) and Senate Commerce Committee Ranking Member Senator Roger Wicker (R-MS) released bipartisan *draft privacy legislation*. The proposal includes a compromise on two issues that have historically been difficult to resolve: preemption of state privacy laws and a limited private right of action for individuals to sue over privacy violations. The draft legislation would preempt most state privacy laws (but not all), and it would establish a private right of action, which would come into effect four years after passage.
- Reactions to the proposal from industry and advocacy groups have been divided, as indicated by a House Energy and Commerce Committee Subcommittee on Consumer Protection and Commerce *hearing* on the draft legislation last week. In his prepared remarks, John Miller of the Information Technology Industry Council, a trade group, objected to the bill's inclusion of a private right of action. "It is too broad and will not appreciably limit a likely wave of litigation," he *wrote*.
- On the other hand, representatives from advocacy groups called for the legislation to have stronger privacy protections. In their testimony, Caitriona Fitzgerald of the Electronic Privacy Information Center and David Brody of the Lawyers' Committee for Civil Rights Under Law said that Americans should be able to pursue greater damages in litigation under the privacy law. Jolina Cuaresma of Common Sense Media testified that lawmakers should increase the age cutoff for enhanced children's privacy protections to cover 17-year-olds. As currently written, the draft bill covers only 16-year-olds and younger.
- It's notable that the first hearing on this proposal took place in the House and not the Senate. It looks like the legislation will face a steeper climb in the upper chamber because Senator Maria Cantwell (D-WA) is reportedly not on board. Cantwell is chair of the Senate Commerce Committee, so her support will be crucial for the legislation to move forward. In a statement quoted by Politico this month, she *said*, "For American consumers to have meaningful privacy protection, we need a strong federal law that is not riddled with enforcement loopholes. Consumers deserve the ability to protect their rights on day one, not four years later."
- The window of opportunity for passing a comprehensive federal privacy bill in the near future is seemingly narrowing. There's just under two months until the August congressional recess, which is the unofficial deadline for passing any legislation not considered "must pass" before the midterm elections. And in the next Congress, Senator Ted Cruz (R-TX) is in line to take over from Wicker as the top Republican on the Senate Commerce Committee based on seniority. Wicker is expected to leave his position on this committee in favor of taking the top GOP spot on the Senate Armed Services Committee left open by retiring Senator Jim Inhofe (R-OK). The deeply conservative Cruz, who is eyeing another run for president in 2024, will likely be less inclined to work with Democrats on privacy.

**The FTC and Privacy.** The Federal Trade Commission (FTC) is becoming more involved in digital privacy.

- In the FTC's first meeting since the confirmation of Commissioner Alvaro Bedoya, which re-established a Democratic majority, the agenda focused on children's privacy. Commissioners unanimously approved a new [policy statement](#) on the agency's enforcement of the Children's Online Privacy Protection Act focused on education technology. The statement delineates prohibitions on collecting children's personal information when using education tech services. "Parents should not have to choose between their children's privacy and their participation in the digital classroom. The FTC will be closely monitoring this market to ensure that parents are not being forced to surrender to surveillance for their kids' technology to turn on," Samuel Levine, director of the FTC's Bureau of Consumer Protection, said in a [press release](#).
- The arrival of Bedoya, a noted privacy advocate, to the FTC makes the agency well positioned for a push to safeguard privacy. Prior to joining the FTC, Bedoya worked as the founding director of the Georgetown University Law Center's Center on Privacy & Technology and the chief counsel of the US Senate Judiciary Committee Subcommittee on Privacy, Technology and the Law, per his [Georgetown bio](#).
- FTC Chair Lina Khan has signaled an interest in privacy. In April, she gave a [speech](#) at the IAPP Global Privacy Summit suggesting that a new approach is needed to protect user privacy online. With the agency's Democratic majority back in place, it will be possible for Khan and Bedoya to chart a new course on the issue.

**Privacy in California.** In the absence of a federal data privacy law, states have forged their own paths, most notably California.

- On Thursday, the California state Assembly passed the [Age-Appropriate Design Code Act](#), a bill that would boost online privacy protections for children. Components of the bill include a requirement for platforms to make strong privacy settings the default for children and new limits on their ability to collect and distribute data belonging to young users. The bill passed by a resounding bipartisan vote of 72-0, with six assembly members not voting. The Age-Appropriate Design Code Act is now in the state Senate, which will have until August 31st to pass it.
- The Golden State's top privacy regulator, the California Privacy Protection Agency (CPPA), is moving towards crafting new privacy rules for the state. Two weeks ago, the CPPA board voted to start a rulemaking process to bring the California Privacy Rights Act into effect. The agency released a [draft of proposed rules](#) in a notice circulated before the board meeting. The draft [covers](#) consumer rights for opt-out and requests to access or correct information, rules around dark patterns, and the definition of a service provider, among other provisions.

**Will Democrats and Republicans Come Together to Legislate Against Big Tech?**

**Me Before We.** One of the changes that members of Congress are aiming to tackle is tech platforms' ability to self-preference.

- The American Innovation and Choice Online Act (AICOA) is a bill from Senators Amy Klobuchar (D-MN), the chair of the Senate Judiciary Committee's antitrust subcommittee, and Chuck Grassley (R-IA), the ranking member of the Senate Judiciary Committee. The legislation takes aim at large tech platforms' ability to self-preference. This would prevent search engines from promoting links to their own websites first or online marketplaces from putting their own goods at the top of search results. It could also force some changes to search results in app stores.
- If there is to be a significant federal antitrust bill passed in this Congress, this is the bill. The difficulty for its sponsors is that, despite their optimism, there does not clearly appear to be enough votes to pass. Particularly in the Senate where the bill has yet to gain backing from key Republicans like Senator Mike Lee (R-UT), the ranking member of the Senate Judiciary Committee's antitrust subcommittee, even some Democrats have urged more revisions as recently as last week. Also complicating this is that some Democrats in battleground states have voiced concern about having to take what they view as a contentious vote ahead of the midterms.
- Taking these factors together, it would appear that the AICOA is unlikely to pass in the

current session of Congress. Its chances in future sessions though should not be dismissed as it does enjoy bipartisan backing. That being said, the current text would have to be pared back to pass in a split or Republican-controlled Congress. Another mark against the chances for the bill in such a scenario is that addressing self-preferencing will likely not be the top item for Republicans when it comes to their issues with Big Tech. The GOP has tended to be more frustrated with content moderation practices and what it views as biased censorship.

**Breaking Down the Gates.** The other major bill members of Congress are looking to push through would bring a set of changes to the app store ecosystem.

- In addition to the AICOA, the Open App Markets Act is a meaningful antitrust bill that seemed to have a chance to pass Congress. The legislation would have required app stores to allow mobile apps to communicate with users about fees and would protect sideloading. It would also prevent app stores from requiring developers from using specific payment systems. These are reforms with backing from many app companies which would see it as a welcome curb on the gatekeeper power of the app store companies.
- When the Senate Judiciary Committee marked up the Open App Markets Act, some observers were surprised that the bill garnered support from twenty of the twenty-two committee members. This was more backing than the AICOA received. It also included key Republican support like Lee, which seemed to indicate it may be the bill into which reformers would put their effort. Since that markup though, the bill has faded from the limelight and it has still yet to receive a hearing or markup in the House Judiciary Committee.
- Compared to the AICOA, this bill seems to have a better chance of being passed in a split or Republican-controlled Congress given the wider bipartisan backing it has found and support from key GOP members. What is unknown is just how well received it may be in the House. An identical bill has been introduced, but with its lack of progress thus far, gauging the level of support in the lower chamber is difficult.

**Testing Grounds.** Given the greater partisan divide of state legislatures, they are the fora where Democrats and Republicans are able to trial their desired reforms.

- In Texas and Florida, Republican politicians have pushed through laws aimed at what they view to be censorship of their views by social media platforms. These laws have both been largely stopped by legal decisions that have ruled the laws would violate the platforms' free speech rights under the First Amendment. This is unlikely to be the last time that this issue arises and it is more than probable that in a Republican-led House or Senate, there will be federal proposals that make some progress aimed at a similar goal.
  - As discussed above, at the other end of the spectrum, Democrats in California have been pushing to pass a law that would make social media platforms legally liable for social media addiction in minors. This bill, if passed, would likely face legal challenges from tech groups on freedom of speech grounds too. California Democrats have also been pushing for enhanced privacy protections for children, including new limits on a platform's ability to collect and distribute data belonging to young users.
  - What these examples both reflect are the partisan differences that are leading to a growing patchwork of tech regulation across the country. Federal legislation can preempt the regulatory gaps, but often those bills get bogged down by the same disagreements that prevent states from creating a uniform standard. States, in their role as laboratories of democracy, are uniquely positioned to advance the national conversations on tech regulation, but they are often doing so in contradictory directions.
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