

Privacy, Security, and the FTC's UnCommon Law

Gus Hurwitz

Assistant Professor of Law, University of Nebraska College of Law
Lincoln, NE

Hurwitz

Data security and privacy regulation are important to the continued development of the Internet and information economy. Over the past decade, the FTC has come to play a lead role in this important area of regulation. This paper considers jurisprudential issue raised by the FTC's so-called "common law approach" to privacy and data security, relating this approach to the long-standing debates in administrative law relating to agency choice of procedure (i.e., the use of rulemaking versus case-by-case adjudication to develop legal norms). The FTC has faced controversy for its use of case-by-case adjudication in recent years, having engaged in extensive case-by-case adjudication to develop what several commentators and Commissioners have taken to calling its "common law of privacy." Several Commissioners are now advancing the same "common-law" approach to data security jurisprudence, and Chairwoman Ramirez has recently advocated a "common-law" approach to developing its Section 5 unfair methods of competition authority. The Supreme Court has embraced a very permissive approach to agency choice of procedure over the past 65 years, first in *Chenery II* (1947) and again in *Bell Aerospace* (1974). Under these cases, administrative agencies are generally free to develop the legal norms under their statutory authority through either administrative rulemaking or case-by-case adjudication. This approach, however, has been the subject of constant scholarly criticism, with administrative law scholars consistently arguing that agencies should rely on administrative rulemaking wherever possible and use case-by-case adjudication only to fill interstices or where rulemaking is otherwise not possible. Indeed, critiques of the existing standard are so uniformly negative that many administrative law scholars don't even characterize discussion of agency choice of procedure as a "debate." While today the FTC is on sound precedential ground in its use of case-by-case adjudication, the Court's recent administrative law cases suggest that it is increasingly concerned about agency choice of procedure. The FTC's current approach to privacy, data security, and possible unfair methods of competition is one of to, if not the, most aggressive uses that any agency has ever made of case-by-case adjudication to develop legal norms. This paper considers issues relevant to understanding the FTC's approach to developing legal norms related to the Internet, considers possible challenges that it may face, and discusses approaches that the agency should consider to ensuring it develops jurisprudentially sound legal norms. This discussion is also relevant to other agencies, including the FCC's proposed case-by-case approach to developing its Section 706 authority and Open Internet regulation. It also contributes to the ongoing scholarly debate about agency choice of procedure.

Email: ghurwitz@unl.edu