

## Ways & Means S7E2 What Hasn't Worked

**Bob Sullivan:** From the Sanford School of Public Policy at Duke University. This is part two of a co-production between Ways & Means and the Debugger Podcast. I'm Bob Sullivan.

**Kyle Taylor:** Off to a very rough start. And, in all honesty, since there has not been very much direct communication, say for people who work on their comms team, uh, for lack of a better word, trolling members of our board, on social media, um, like Twitter.

**Bob Sullivan:** So you don't communicate, you just throw little bombs at each other on Twitter.

**Kyle Taylor:** I think that's been their strategy. It's sort of unreal, but, uh, Spokespeople from within Facebook would comment on things or say things like, you know, "don't quit your day job," or "couldn't you find something better to do." Things like, of that nature. And you're sort of going, like we just said something extremely serious about hate speech and, you know, conspiracy theories and your response is, like don't quit your day job?

**Bob Sullivan:** Hi I'm Bob Sullivan and my day job is host of a podcast called Debugger, but this is a special project with Ways & Means – on something called "platform accountability." This is episode 2 of 3 ... please go listen to episode 1 if you haven't done that yet.

But to catch you up.... very large technology companies fit into a special category we're calling platforms – raised up above everyone else – companies like Facebook, and Google and Twitter and Amazon – And since they have so much money, and they are so powerful, the question is: what if society doesn't like something they're doing? What if society becomes convinced one of these tools is hurting kids, or failing democracy, or polluting the environment, or stealing? Since they are so big that even fines don't seem to scare them, what now? Episode 2 is going to take a deep dive into what's been tried already. Not everything that's been tried...just a couple of examples. And no, trolling isn't one of them.

**David Hoffman:** This series is supported by the Cyber Policy Program at Duke University's Sanford School of Public Policy and by the Kenan Institute for Ethics. I'm Professor David Hoffman and I lead the Cyber Policy Program at the Sanford School of Public Policy. We are training the next generation of tech policy leaders and researching how tech platforms can show that they're behaving responsibly and ethically.

**Bob Sullivan:** As I said, trolling hasn't been very successful at reigning in Big Tech. But what about self-regulation?

Plenty of industries set up organizations with names like "The Associated Widget Makers of America" ... with the idea that they can keep themselves in check. Widget makers who cheat their consumers give the whole industry a black eye, so all the legitimate widget makers have an interest in rooting out bad actors.

That works, sometimes. Other times, this self-regulatory structure is really just a stalling tactic designed to delay lawmakers from writing new rules, or creating new agencies to police an industry. In tech, both things have happened.

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A few years ago, Facebook took self-regulation another step farther, however.

And that's our first stop on our "what's been tried" tour.

After years of complaints that Facebook was acting as judge and jury when it came to controversies like removing hate speech or censoring political posts, Facebook decided it would create its own judge and jury. An independent entity, the Facebook Oversight Board. Announced in 2018, Mark Zuckerberg was really excited about the prospect on this video in 2019.

The Facebook Oversight Board. Kind of like a Supreme Court for Facebook.

The announcement struck a lot of the right notes. Independent. Transparent. Binding. Giving people a voice. Sure, there are obvious reasons for skepticism. Who picks the board members? Could it really be independent?

It's been three years since the entity was announced and it has now published a series of decisions, so we decided to give it a fair shake. After all, it is a unique idea for a large tech company to set up its own Supreme Court, its own judicial system. Studying how the Oversight Board works has become a passion project for Alexys Ogorek, a second-year law school student at Duke University.

**Alexys Ogorek:** So the Facebook Oversight Board was created after Mark Zuckerberg was trying to think of a way to increase accountability and transparency within Facebook's content moderation process. So obviously when Mark Zuckerberg founded Facebook, he probably didn't predict it would get this big. And he certainly didn't think about all of the difficult decisions that would happen when you're dealing with people's free speech rights and having to moderate hate speech, and the differences of nuances between cultures and contexts.

So the Facebook oversight board was meant to bring about academics and experts in a bunch of different areas of study, but also a bunch of different geographies to try to help make some of those decisions and keep Facebook accountable to its own policies.

**Bob Sullivan:** So, Facebook takes down \*a lot\* of posts. Posts that are dangerous, hate speech. The firm says it takes down 20 to 30 million posts just for violating hate speech standards every quarter. It's not easy. Mistakes are made. You can see why.

**Alexys Ogorek:** Facebook wants to obviously remove hate speech, and a lot of that they flag specific words that are known to be degrading, demeaning, offensive, hateful, particularly when you're looking at minority groups.

Of course, there are always issues when groups try to reclaim words, right. And so like, I'm going to use bitch for an example, because I'm a woman and I feel comfortable saying that one. But if somebody were to call me a bitch in an offensive way, that would be problematic. But if I were to say like, "let's go bitches" in an uplifting, reclamation kind of a way of the word that would be okay. And some of the Facebook algorithms have problems detecting and noticing the

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context and the nuances between these two uses of the same word. And so when a minority group tries to reclaim a word, it often can get taken down.

And of course, that's seen as problematic by the minority group. So some of the Facebook oversight board decisions deal with, "well, what do we do in these contexts where the word is problematic, but the context is not?"

**Bob Sullivan:** And all that makes sense, but I think part of the reason we're doing this podcast is, "oh, wait a minute: Who appointed Facebook as the arbiter of taste and morality, and why do they get to make these decisions and, and, uh, you know, uh, why would we trust them to make such decisions," right?

**Alexys Ogorek:** Yeah. That is a great question. And in short Facebook kind of appointed itself.

**Bob Sullivan:** So, how's it going? Ogorek actually said she's impressed with the way Facebook went about creating the oversight board.

**Alexys Ogorek:** So I actually do think that this was probably one of the better choices that Facebook could have made. And I think there are a lot of points in the procedure where they do call for external comment and public information. So, once they establish the concept of the board, they released a draft charter of it, and then they solicited public proposals on different board structures and design. They released all the global feedback and the input it got, redrafted the charter. They were very conscious about selecting members that wouldn't just bow to the whim of Facebook, which I think was important.

So, they wanted to make sure they had representation from the geographical communities that were represented on Facebook, but also a ton of different expertise backgrounds. So you have people who work on elections, people who work in international human rights, LGBTQ rights, women's rights, children's rights, access to information, terrorism, like you name it. There's somebody on the oversight board who specializes in it.

**Bob Sullivan:** Ok, so now that the board is established and in action. How does it work? A person who posts something on Facebook gets a notice saying the content has been removed, perhaps by an algorithm. That person also might be assigned a "strike" by Facebook. The user appeals, there's an internal review and the decision stands. Then, that user can appeal to the oversight board. And that happens. A lot! About 300,000 times already. But not every case is selected for review...if this were the actual Supreme Court, we'd be talking about whether or not a case was "granted cert" – whether or not the Supreme Court has decided the case is important enough to be considered by all nine justices.

Now since Facebook is assigning strikes to users who post conduct it finds objectionable; I'll stay with that metaphor. A very tiny number of appeals are selected for review by Facebook's Oversight Board, so that's the first strike against it.

**Alexys Ogorek:** As you can imagine, there are hundreds and thousands of these reviews submitted. So there's a selection procedure. So administrative staff filters, reviews, and identifies

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a short list that's also a long list for the committee's consideration, taking into account really how the decision impacts others.

**Bob Sullivan:** And I saw these numbers, right, something in the order of 300,000 people make appeals, but ultimately the board decides on a couple of dozen cases. Is that about right?

**Alexys Ogorek:** Yeah, it's considerably less than 1% of cases get decided. Um, I think in the first few months it was less than one 100th of a percent of the cases. So that is one of the biggest critiques of the oversight board. It has good intentions, but they just can't get through enough material, in any given time, like, unless you would have to dramatically expand the size of the oversight board so that. That's one critique for sure.

**Bob Sullivan:** I mean, it doesn't sound like a critique to me, it sounds like something that barely works.

**Alexys Ogorek:** I was trying to give him the benefit of the doubt, but yeah.

**Bob Sullivan:** To be fair to Facebook, it says the Oversight Board picks cases that come up over and over again, so a single decision could act as precedent for maybe thousands of other cases.

But we're not sure how that works yet.

**Alexys Ogorek:** A lot of times context would tell you that these two cases are similar, but the decision may not necessarily be applied to the next case. Unfortunately, because there's not a lot of transparency about what those 300,000 case submissions are and what happened to those, I can't really tell you if the decisions are actually given precedential value or not. Just cause I don't really know what's happening to the other 300,000 cases that are not decided on.

**Bob Sullivan:** Meanwhile, despite that rather staggering number of cases.... you'll probably be surprised to learn that Facebook's 'Supreme Court' actually only gets to rule over a pretty limited part of the service.

I'm gonna call that strike two.

**Alexys Ogorek:** So only certain types of content are eligible for review. So individual pieces of content is the limitation, which includes specific posts, photos, videos, and comments. What it does not include are groups, pages, events, advertisements. There's also decision types. So only content that can be removed, that was removed for violations, can be appealed.

**Bob Sullivan:** Only content removals can be appealed. So called "keep-up" decisions -- someone complains about a piece of content, but Facebook decides it's ok -- those choices cannot be appealed. To Ogorek, this is a big swing and a miss. Strike three.

**Alexys Ogorek:** When a post gets left up and that post is harmful or problematic, like spreading misinformation or spreading hate or advocating for genocide or pushing sex trafficking, to me,

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those are harms that are actually being perpetrated against other members of the community on and off Facebook.

So, I think leaving up something that is harmful is more of a problem than taking down something that is not harmful.

**Bob Sullivan:** I think when people hear the term “Facebook Oversight Board,” they might be, excused for, for believing that decisions like that would be part of its charter.

**Alexys Ogorek:** Absolutely. I personally was shocked to find it wasn't. It's kind of funny, it took me a lot of research and a lot of digging to figure out what exactly eligible meant. It wasn't easily defined anywhere. And so like, I've read the charter and the bylaws, and I've combed their websites dozens of times and figuring out that it was only posts that were taken down, took hours.

**Bob Sullivan:** The appeals also take a lot of time. You might remember the oversight board's most famous ruling. It took about five months. That's typical, Ogorek says.

**Bob Sullivan:** How long does this process typically take?

**Alexys Ogorek:** Uh, great question. Let's go all the way back.

Let's say Facebook makes a final content decision on a piece internally. The user has 15 days to decide if they're going to appeal it to the Facebook oversight board. And then from there there's an additional 60 days until decisions will be made.

**Bob Sullivan:** Ogorek got back to us later to say the actual timeline might be closer to 180 days, but you get the point.

**Alexys Ogorek:** The panel can request extensions of this. I haven't really seen very many of those and when necessary, the process can be expedited to only 30 days between when it was submitted to the oversight board and when it was finalized.

**Bob Sullivan:** But I might say in October, here's a strong opinion I have about a candidate running for office in November. If that post gets taken down and restored in January, what good does that do?

**Alexys Ogorek:** Exactly.

**Bob Sullivan:** A timeline like that...definitely sounds like a strike to me. So is this:

**Bob Sullivan:** How long have you been working on this research?

**Alexys Ogorek:** Oh, my gosh. I want to say since October or November, so three-ish months now.

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**Bob Sullivan:** This makes you one of the world's leading experts in the Facebook oversight board it sounds like to me.

**Alexys Ogorek:** I've been over this website a dozen times. It is fascinating to me. It ties in with some of the other research that I'm doing, but it's kind of just become a passion project -- trying to figure out what exactly is going on.

**Bob Sullivan:** What does it suggest to you about the potential effectiveness of the Facebook oversight board or any company that might imagine a structure like this, that you, Duke law student, have spent several months trying to figure this out and still haven't quite figured it out. What does that suggest to you about how all this is working?

**Alexys Ogorek:** I mean, quite frankly, I don't think it's as transparent as it claims to be.

**Bob Sullivan:** Is that strike four or five?

Also, the Oversight Board is quite limited in what it can do. It's pretty much stayed in the realm of content moderation decisions. It has nothing to say about, for example, the research suggesting Instagram hurts children. In fact, when that story was released, the oversight board came out with a statement saying the research -- well it was news to them.

So, that's a lot of strikes. Still, Ogorek isn't as cynical about the oversight board as some others.

**Bob Sullivan:** I've heard from people I've interviewed for this podcast who tell me the idea of a Facebook Oversight Board itself is fatally flawed. Do you think that the Facebook Oversight Board has a role in the platform accountability?

**Alexys Ogorek:** I think if Facebook treated the Facebook Oversight Board as legitimately as it says it does, it could have a role. But the fact that it's keeping information from the oversight board in the first place is obviously deeply problematic. The fact that the Facebook oversight board actually has such limited ability to make decisions on content and the policy recommendations don't seem to be truly treated as recommendations rather as a, well, we have to consider this. But it's unclear, whatever happens, like how long it gets considered or how deeply. If they were truly seeding control of content moderation to an oversight board, I think that could be effective, but that is just blatantly not what's going on right now.

**Alexys Ogorek:** I think this is a very good prototype that could be built off of. I think that there probably, to my knowledge, there wasn't something like this before the Facebook Oversight Board.

**Bob Sullivan:** There wasn't something like the oversight board before this, it's a novel idea and one could imagine a structure like it could play a role in platform accountability. But there is something like it now. At least, in name. A group calling itself the "real" Facebook Oversight Board. It was created soon after Facebook announced its oversight board, by experts around the world who were critical of Facebook's idea...worried it just wouldn't work, that the firm needed a truly independent body of outsiders to review important decisions.

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You've already heard from one of its founders, Kyle Taylor, at the top of this podcast. Let's just say the real Facebook Oversight Board and Facebook don't see eye to eye. More like spitball for spitball. You shouldn't be surprised to hear Taylor thinks Facebook's attempt at self-regulation – quasi-independent regulation – is doomed.

**Bob Sullivan:** Why, first of all, do you think Facebook's oversight board didn't work or doesn't work?

**Kyle Taylor:** Um, I mean I think that the baseline assumption, the idea that an industry, or a company could fund and set up their own oversight board, is in and of itself a conflict. So I think of it as, you know, if an oil company set up their own oversight board to decide where they could drill. Or a tobacco company set up their own oversight board, to decide who they could sell cigarettes to.

Because the point at which Facebook created their own oversight board would be the point at which those companies would have taken those types of decisions. And the answer to those two as well but there are laws that decide. There are government enforceable laws that decides, where a company can drill and who a company can sell a cigarette to.

And that's why I think ultimately, we believe that the need for similar regulation over big tech must sit at the government enforceable level. So, you know, if you're writing the bylaws for your own oversight board, it's like being allowed to mark your own homework.

**Bob Sullivan:** The “real” oversight board was intended to be temporary, set up as a watchdog in the run-up to the contentious 2020 Presidential election. But it became clear soon after that Facebook issues would linger well beyond election night.

**Kyle Taylor:** What we saw on January 6th, in the first 202 interviews of people involved that were done by the Department of Justice, nearly half cited Facebook or Instagram as a way that they either heard about the insurrection or helps to organize the insurrection.

**Bob Sullivan:** So half of the people who stormed the Capitol building on January 6th got there in some way, because of Facebook.

**Kyle Taylor:** Yeah, of the half of the first roughly 200 people that the DOJ interviewed, that's all that's been publicly released to date. So I'm unsure of the total number of people, but it's a pretty large sample size 200 people. And to think that half of them cited a Facebook product as their tool either to find out about or to facilitate, I think is extremely important to remember.

**Bob Sullivan:** In episode 1, we talked a lot about the David vs Goliath nature of platform accountability – companies like Facebook are so large their legal teams dwarf the regulators who try to enforce rules against them. Well, the tiny real Facebook Oversight Board is quite a David indeed. Still, it seems to get under the company's skin. The first thing Facebook did to react to them was try to get their website knocked off the internet for – essentially -- copyright infringement, for using Facebook's name as part of its URL.

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**Kyle Taylor:** But, you know, it is daunting sometimes to think we are still taking on one of the most powerful companies in the world and arguably the most powerful person in the world, in an ecosystem where a large part of the public is dependent on their tools.

**Bob Sullivan:** Has there ever been a moment where it was scary?

**Kyle Taylor:** Has there ever been a moment it was scary? Um, honestly, I would say there's not been a moment when it's scary. But the word surreal does come to mind.

When you're seeing people within Facebook's company structure sort of trolling you, for lack of a better word, on Twitter, you're sort of going like "what is happening? This is a spokesperson for a major corporation, just trolling civil rights activists on Twitter." And if anything, it almost reinforces to you how much power they have, if they feel that they're able to do that successfully. But I wouldn't say it's scary. I'd say it's daunting.

**Bob Sullivan:** Uh, do you have an example of the trolling? You mentioned that a couple of times.

**Kyle Taylor:** Oh yes. It's sort of unreal, but spokespeople from within Facebook would comment on things or say things like, you know, don't quit your day job, or couldn't you find something better to do things like of that nature. Um, and you're sort of going, like we just said something extremely serious about hate speech and you know, conspiracy theories and your response is "don't quit your day job?"

**Bob Sullivan:** Facebook PR seems to know something. You've probably heard that extreme views – provocative views – get the most engagement on platforms like Facebook and Twitter. Well, it's not just extreme views. Rudeness. Sarcasm. Trash talking. "Dunking" on your opponents, as the kids say, these things play really well on social media, too.

**Kyle Taylor:** Really, to me, it speaks to hubris, right? It speaks to the belief that you are untouchable and therefore you can say or do anything. And I've always read these incidents as signals of the level of unchecked power. If you treat people that way with abandon and think that nothing will happen as a result I mean, that really must be a level of self-belief in terms of power that, is extreme.

**Bob Sullivan:** No, one's going to yell at you for saying something rude, right?

**Kyle Taylor:** No, you'll get a lot on social media. You'll get a lot of likes and reshares and comments if you say rude things. So it's almost incentivized as currency.

**Bob Sullivan:** What's not incentivized, Taylor says, is decisions that help humanity. So when Facebook is faced with a decision – what's good for society or what's good for the bottom line – it's a fantasy to think the company would choose the good for society. He thinks Facebook whistleblower Frances Haugen brought receipts to Congress showing that this is true.



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**Kyle Taylor:** Absolutely I believe that following Francis Hagan's testimony and the release of those documents we now know that what we have believed to be true for years is in fact, true, based on Facebook's own internal documents. Whether it's their ability to deal with hate speech or their prioritization of engagement over all else.

And I'll just give one example.

There was a piece of information in the Haugen documents that suggested from internal documents that engineers at Facebook had found a way to reduce COVID related disinformation by 38%, but that it was directly nixed by Zuckerberg himself, because it would reduce engagement too much.

**Bob Sullivan:** Even without financial pressures, content moderation choices are incredibly challenging, as Ogorek demonstrated earlier. They're made even more complex by a very new, digital-era problem sometimes described as free speech vs free reach. It's one thing to tell the guy sitting next to you in a coffee shop that the Covid vaccine includes a computer chip. That's free speech. It's another to tell millions of followers on social media. That's free reach. And that's...a platform problem.

Remember in episode one we described a county fair with raised platforms for musical acts, rising above everyone else at the fair? Tech platforms like Facebook and Google and YouTube and Twitter give people an amazing megaphone of reach. And in fact, the more outrageous things you say, the more likely you are to get free reach, the more algorithmic juice they give you. So vaccines with computer chips end up as viral as dancing baby videos.

Tech companies need to do a much better job controlling what goes viral, Taylor says.

**Kyle Taylor:** I like to use you can't shout fire in a crowded movie theater example, right? So you can't shout fire in a crowded movie theater, but you can whisper it, right? We're not going after people whispering things. We're going after people shouting things.

**Bob Sullivan:** It's not about limiting free speech...in fact, he thinks limiting virality would actually make room for MORE free speech.

**Bob Sullivan:** I suppose if you were to limit these incredibly viral posts, there would be more air for everyone to breathe, right?

**Kyle Taylor:** Uh, yeah, absolutely. I think not only would there be more air for everyone to breathe, but we would be saying actually that a company like Facebook or Twitter or any of these tech companies should not be profiting from harm, right? So, we know Facebook could have reduced COVID disinformation by 38%. It's impossible to say how many lives directly that may have saved, but what we know is they profited them from that disinformation.

And that is for me, becomes a moral question, you know, and there are campaigns specifically that came out of this idea that you should not be making money from racist abuse, misogynist abuse, public health disinformation, uh, or destabilization of democratic governments.

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**Bob Sullivan:** Moderation is, of course, an essential part of any tech company's work – really, any company's work. You get to decide, with only a few limits, who gets to buy your product or service. And if let's say you own a shopping mall, you get to decide what stores to rent to. That's not controversial. But what if you owned.... almost every shopping mall? That's the position that a company like Apple finds itself in right now with its app store.

If a small business wants to use the app store.... Apple has to approve. Apple is judge and jury for every app that appears on the app store, effectively gatekeeping every iPhone in the world. The app store is a "walled garden." That, once again, is platform power. As you might imagine, this app store gatekeeping has not been without controversy. But Jane Horvath, Apple's chief privacy officer, argues that there is tremendous benefit from this walled garden strategy. All app developers have to pay a fee, register with their real name, and submit software to review before it's posted to the app store. That keeps things safe.

**Jane Horvath:** Your health data health is an API. With the health app, you can literally upload all of your medical records. So it's really sensitive data. And any app that wants to either read or write to the health app has to agree to the developer guidelines. And one of the most important protections is those apps can only do that for the health purposes. So they can't use any data that they collect from the health app for targeted advertising, for red lining, for anything other than strictly health and fitness purposes. So, app agrees to that, app wants to get put on the app store and we have all kinds of technical tools that we run the app through before that app can actually be placed in the app store and put up for sale.

**Bob Sullivan:** Keeping malware or privacy invading apps out of the app store...that's certainly a worthy goal. But a bit like Facebook and content moderation, this puts Apple in a very powerful position, deciding what stays and what goes. Should Apple, or should any tech company, really have that much power?

**Bob Sullivan:** There are lots of situations now where tech companies are acting as judge and jury in these situations. And, you know, a lot of customers probably trust whatever apple does, but some don't, and you know, what can Apple do? What can tech companies do in a situation where they're making these really critical decisions?

**Jane Horvath:** I think, this is a really interesting question. And I think we need to look to literally the privacy community for the answer to that. We have been grappling with that very same question, particularly as GDPR was drafted and GDPR contains accountability provisions.

So not only are you supposed to abide by the underlying provisions of GDPR, the law itself, but you actually have to have systems in place to show that you're abiding by the laws. So to me, we should take a page from the privacy law and make companies accountable.

So you're absolutely right. Most people, we try to be a trustworthy company and do the right thing, but we should be accountable and held accountable if we do the wrong thing. So if we were to reject an app or pull an app from the app store for anti-competitive reasons, we need to be accountable for that. And I do think that there is a lot of opportunity to legislate around these

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accountable systems to allow for the fact that, you know, a particular technology company is not the judge and jury.

**Bob Sullivan:** So if Apple – or other large tech companies – were no longer judge and jury – who would be? Can you throw out a couple of ideas that you like? There's a lot of proposals out there.

**Jane Horvath:** You know, I think that we, one of them would be being transparent. So in the, I described app review and we have a very, you know, back and forth with companies as to why they're rejected. Well, we could move that up and, you know, if they are rejected, of course, we could be required to publish and create records at the very least. And probably not published because of intellectual property concerns, but you know, a requirement to document why individual decisions were made. And though that document could be auditable to ensure that there was no self-dealing and that the reasons put down were in fact, the reasons.

**Bob Sullivan:** Your mind kind of obviously wanders to some sort of external appeals process, you know, could there be a body that someone could say I disagree with Apple's decision about my app, I want someone that has nothing to do with apple to take a look at this. Is that a structure that would make sense, do you think?

**Jane Horvath:** I think the devil would be in the details there and we'd need to figure out what that looks like. If we ended up at a place where every single small app review decision ended up being litigated, it could, you know, impose an enormous cost on the system. Not only in terms of delay, but, I mean, it is an interesting idea. And I think we, I don't think we're at the point to foreclose an idea like that, but I think that there is an opportunity to just start to start discussing ideas such as those.

**Bob Sullivan:** Start discussing ideas. Hopefully, that's what we're doing here.

Okay, to review: so we have these enormous, very rich companies making these very important decisions about what we see, what companies can make money, what we believe... and no one has any oversight over anything they do, so they just act as judge and jury themselves?!!!

Okay, that's ... not quite true. In fact, in a way, it's entirely wrong...I'm sorry I've misled you a bit.

Of course, we have judges and juries in the U.S. And we have a "prosecutor," of sorts, who already gets to drag tech companies into court for misdeeds. The Federal Trade Commission is the agency in the U.S. that's generally tasked with keeping tech companies in line. The act creating the FTC gives the agency very broad powers to regulate.... well, deception of any kind by companies. And Congress has given it power to act as watchdog over other issues, too. Abuse of data. Keeping kids under 13 off most websites. The FTC can force any tech company to be accountable for the promises it makes.

So.... why isn't that working out? It's a bit of a complex tale.

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We've already told you what happened when the FTC sued Facebook back in 2011 for mistreating consumer data. The firm just did it again. To better understand this side of the problem, we talked to current and former FTC lawyers. There are lots of quirks, to use a nice term, about how the FTC gets to enforce the law.

Here's Bobbi Spector, long-time FTC lawyer who currently works for Commissioner Christine Wilson, describing what is sometimes called the 'one bite of the apple' problem.

**Bobbi Spector:** For example, Facebook, they in 2012, entered an order with the FTC, and what's important to understand is we are only able for a new first-time violation. We can't get civil penalties unless the company has violated one of the privacy statutes that we enforced, like the children's privacy act, CAPA, that CAPA violations, we can get civil penalties or the fair credit reporting app. But if it's a section five case unfairness or deception, we can only get an order.

**Bob Sullivan:** Imagine if you got a parking ticket that said simply "don't do this again." No fine! At least the first time. One free bite of the apple. You probably wouldn't be afraid of parking illegally. And the parking enforcement offers, well they would get pretty frustrated. That's just about the situation the FTC finds itself in. But that is how Congress set things up .... a long, long-time years ago.

**Bobbi Spector:** People get upset about and are frustrated about is that our orders, even injunctive wise, they don't go far enough. There was a criticism of the Facebook order that didn't change Facebook's core business. Well, as I explained to you before, we're bringing these cases under section five of the FTC Act. This is a hundred-year-old statute that was not designed to address these kinds of practices.

**Bob Sullivan:** Yes, the FTC Act is 100 years old. Not only did the writers of the law not envision the Internet. They didn't envision television when that law was written. But there's more.

Updating this 100-year-old statute, even making tweaks to account for small changes, well that takes forever. Say the FTC wants to redefine location data as personal information, subject to stricter controls. That...could take years.

**Bobbi Spector:** The FTC is unique among federal agencies in that, in our consumer protection, we have a specialized type of rulemaking called Magnuson Moss, and it's very onerous. It has many layers of procedural steps because it requires the FTC to, in addition to putting out a notice and getting comments, we have to hold hearings and we have to issue a findings report. It's just additional procedural steps. And each one of those, if you can imagine, could take months, right? Because you have a hearing and then you have to analyze the record of the hearing and then you have to issue these findings. And there's a particular way that has to be, let's use your location example.

Like, let's say the definition of personal information didn't include your location. And so the FTC would put out a notice saying we want to amend the copper rule to include location. And then we request comments, and you usually give companies at least 30 or 60 days. And then if we get hundreds of thousands of comments, that's a lot to review, which does happen in some rules. And

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then we have to prepare another notice that analyzes the comments. And what's interesting about this is if based on the comments the commission decides to do something very different than what initially proposed, then they would need to put out that new proposal for comment again.

**Bob Sullivan:** You get the idea. By the time the FTC decides location information is personal information that must be handled with a certain care, 1,000 startups have already come and gone. While tech companies are innovating at 500 miles an hour, flying around in private jets, the FTC is chasing after them on a bicycle with one flat tire. But even that doesn't really express the depth of the David vs Goliath challenge.

**Bobbi Spector:** Yeah. And the other challenge that we always bring up is that we have a severe resource limitations. We have a division of privacy that has 40 to 45 employees depending on the day. And then we have employees in other parts of the agency enforcement and our office of policy and planning that also work on privacy, but it's not like where the UK commissioner's offices that have 700 plus employees. Irish data protection has like 150. I mean, we don't have that.

So, we have to make very difficult decisions sometimes about where to, you know, commit resources and in case selection and in research and other things, we try very hard to cover, you know, cover all of the issues, but you know, it can be challenging.

**Bob Sullivan:** And there's more. FTC rule makers have to thread the impossible needle of making rules specific enough that a judge would get it ... but not so specific that they are useless in a few months.

**Bobbi Spector:** that proved challenging for us in an enforcement action. We tried to enforce an order with that kind of requirement. And the court said that it didn't have enough specificity to tell the company what they needed to do so they to be able to comply. But if you put in that specificity, is it going to be outdated within a year? So it's a challenge.

**Bob Sullivan:** Which is why former FTC head of consumer protection David Vladeck, who is instrumental in that first Facebook lawsuit, sometimes sounds so exasperated.

**David Vladeck:** It's just a matter of triage. We just don't have the resources that are needed to really keep companies the size of Google, Facebook, apple, Amazon Twitter, among the cases that we brought. Remember it wasn't just Facebook. We simultaneously sued Google. We shortly thereafter sued Twitter. We sued Apple a number of times, we sued Microsoft a couple of times.

So, these are big companies that have substantial enterprises that we need to oversee. And, you know, I think it is fair to criticize the FTC for not doing better job, but given the resources we had available to us, we did the best we could.

**Bob Sullivan:** Imagine suing Google, and Facebook, and Twitter, and Microsoft, all at once, with a few dozen lawyers. Trying to keep all of Big Tech accountable in an office that wouldn't even quality as a mid-size law firm. Is this situation hopeless? Well there's plenty of proposals working their way through Congress that would fund a dramatic increase in FTC enforcement.

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And Lina Khan, the new FTC Chair, has certainly made it clear she plans to more actively take on Big Tech – even if the odds are long.

**Lina Khan:** Uh no, look, I think it takes courage. These are enormously well-resourced companies; they are not shy about deploying those resources. And I think in these moments, it's important to kind of ensure where we're really showing these companies but also showing the country that enforcers are not going to back down because of, you know, these companies flexing some muscle or kind of trying to intimidate us. And so I think those are the types of lessons that we're trying to learn looking back over the last decade.

**Bob Sullivan:** Speaking on CNBC, Khan promised she would be willing to drag Goliath into court even if the outcome were far from clear.

**Lina Khan:** But I think it's certainly true that deciding when moving forward and taking action is still worth it. Even if it's not a slam dunk case, even if there is a risk you might lose, there can be enormous benefits from taking that risk. You might win, right, you lose all the shots you don't take. But I think what we can see is that inaction after inaction after inaction can have severe costs. And that's what we're really trying to reverse.

**Bob Sullivan:** Inaction CAN have severe costs. That's what we're living with right now. Along with – a bunch of things that really haven't worked, what we talked about today, like the Facebook Oversight Board, or companies acting as their own judge and jury, or FTC oversight. Don't get me wrong, I'm all for the FTC taking more shots but... we probably can't sue our way out of the techlash.

So next episode we'll ask – what alternatives are there? How do we move past the Twitter dunking we started this episode with? While sometimes this problem feels helpless...this is hardly the first-time humankind has faced down a powerful industry and brought it back into line. After all, the contaminated Cuyahoga River spontaneously caught fire near Cleveland – several times! -- in the 1940s, 50s and 60s. We've cleaned up pretty big messes before. What can we beg and borrow from other big cleanup efforts in history?

That's next in this special Ways & Means project -- Protecting Democracy – and Ourselves – from Big Tech.

Next week on Ways and Means:

**Francella:** One thing I want us to also think about is if we're to compare what we do, when we're thinking about policies and regulations to companies, companies aren't afraid to fail. They try new things. You think about the fact that it's like, we're on iPhone 12 or 13. They got several bites at this phone and we're okay with giving them a chance to prove it, prove that every single iPhone is better than the last iPhone, right? I think that we should apply that same level of expectation and grace to whatever we decide on is the framework, is the place to start. Because number one, it doesn't have to be perfect, and number two, it should be designed with the intent of revisiting it as tech changes.