

March 26, 2019

The Honorable Jim Risch, Chairman  
The Honorable Bob Menendez, Ranking Member  
US Senate Committee on Foreign Relations  
423 Dirksen Senate Office Building  
Washington, DC 20510

**Re: Nomination of Mr. Keith Krach**

Dear Chairman Risch and Ranking Member Menendez:

We write to you regarding your upcoming nomination hearing of Mr. Keith Krach to be Under Secretary of State for Economic Growth, Energy, and the Environment.<sup>1</sup> In that position, Mr. Krach would serve as the US Privacy Shield Ombudsperson. EPIC takes no position for or against the nominee. We write to underscore the urgency of Congressional action to safeguard the privacy interests of Americans.

American consumers face unprecedented privacy and security challenges. The unregulated collection of personal data has led to staggering increases in identity theft, security breaches, and financial fraud in the United States. Far too many organizations collect, use, and disclose detailed personal information with too little regard for the consequences. The US should take three steps to update domestic privacy law: (1) enact comprehensive baseline privacy legislation, (2) establish an independent data protection agency, and (3) ratify the International Privacy Convention.

EPIC is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues.<sup>2</sup> EPIC has testified about transatlantic data flows and has made recommendations on how the US and Europe could move forward to address shared concerns about the protection of privacy.<sup>3</sup>

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<sup>1</sup> *Nominations*, 116th Cong. (2019), S. Comm. on Foreign Relations, <https://www.foreign.senate.gov/hearings/nominations-032719> (Mar. 26, 2019).

<sup>2</sup> See EPIC, *About EPIC*, <https://epic.org/epic/about.html>.

<sup>3</sup> Marc Rotenberg, EPIC Executive Director, Testimony before the H. Comm. on Energy & Commerce, Subcomm. on Communications and Technology, *Examining the EU Safe Harbor Decision and Impacts for Transatlantic Data Flows* (November 13, 2015), <https://epic.org/privacy/intl/schrems/EPIC-EU-SH-Testimony-HCEC-11-3-final.pdf>; Marc Rotenberg, “They’re Right to Distrust US Data Security”, *Wall Street Journal* (March 22, 2016); Marc Rotenberg, “Digital Privacy, in US and Europe,” *N.Y. Times*, Oct. 13, 2015; Marc Rotenberg, “On International Privacy: A Path Forward for the US and Europe,” *Harvard International Review* (Spring 2014); Marc Rotenberg & David Jacobs, “Updating the Law of Information Privacy: The New Framework of the European Union,” *Harvard Journal of Law and Public Policy* (Spring 2013); Marc Rotenberg, “Better Privacy Laws: Priority for America and Germany,” *N.Y. Times* (Sept. 3, 2013).

## To Support Cross Border Data Flows, Congress Must Modernize US Privacy Law

There are several steps that Congress should take to address concerns about data protection in the United States. These recommendations would also help safeguard cross border data flows that are important for US consumers and US businesses.

First, Congress should enact comprehensive baseline privacy legislation. Baseline federal legislation should be built on a familiar privacy framework, such as the original US Code of Fair Information Practices and the widely followed OECD Privacy Guidelines. The rights and responsibilities set out in these frameworks are necessarily asymmetric: the individuals that give up their personal data to others get the rights; the companies that collect the information take on the responsibilities. This is the approach that the US, the EU, and others have always taken to establish and update privacy laws about the collection and use of personal data.<sup>4</sup>

Second, Congress should create an independent privacy agency, as Congress contemplated in 1974 when it enacted the Privacy Act.<sup>5</sup> EPIC has recommended the establishment of a privacy agency to ensure independent enforcement of the Privacy Act, develop additional recommendations for privacy protection, and provide permanent leadership within the federal government on this important issue.<sup>6</sup> This independent privacy agency would be charged with enforcing privacy laws.

Enforcement should not be assigned to the FTC, as the FTC has missed many opportunities to strengthen US privacy law. Even when the FTC reaches a consent agreement with a privacy-violating company, the Commission rarely enforces the Consent Order terms.<sup>7</sup> American consumers whose privacy has been violated by unfair or deceptive trade practices do not have a private right of action to obtain redress. Only enforceable privacy protections create meaningful safeguards, and the lack of FTC enforcement has left consumers with little recourse.

Third, the US should ratify the International Privacy Convention 108, the most-well established legal framework for international privacy protection.<sup>8</sup> Because of the global reach of new technologies, international agreements provide the best opportunity to establish data protection standards.<sup>9</sup> The Privacy Convention would establish a global bias to safeguard personal information and enable the continued growth of the Internet economy. Many US companies have already

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<sup>4</sup> See Privacy and Digital Rights for All, *The Time is Now: A Framework for Comprehensive Privacy Protection and Digital Rights in the United States* (2019), <https://www.citizen.org/sites/default/files/privacy-and-digital-rights-for-all-framework.pdf>.

<sup>5</sup> Staff of S. Comm. on Gov't Operations, 93d Cong., Materials Pertaining to S. 3418 and Protecting Individual Privacy in Federal Gathering, Use and Disclosure of Information (Comm. Print 1974) (collecting materials on S. 3418, a bill to establish a Federal Privacy Board).

<sup>6</sup> See, e.g., Marc Rotenberg, *In Support of a Data Protection Board in the United States*, 8 *Gov't Info. Q.* 79 (1991); *Communications Privacy: Hearing Before the Subcomm. on Courts and Intellectual Prop. of H. Comm. on the Judiciary*, 105th Cong. (1998) (testimony of Marc Rotenberg), available at <https://www.epic.org/privacy/internet/rotenberg-testimony-398.html>.

<sup>7</sup> See *EPIC v. FTC*, No. 12-206 (D.C. Cir. Feb. 8, 2012).

<sup>8</sup> See generally, EPIC, Council of Europe Privacy Convention (2015), <https://epic.org/privacy/intl/coeconvention/>.

<sup>9</sup> Brief for EPIC and Thirty-Seven Technical Experts and Legal Scholars as Amici Curiae in Support of Respondent 12-20, *United States v. Microsoft*, No. 17-2 (Jan. 18, 2018), <https://epic.org/amicus/ecpa/microsoft/US-v-Microsoft-amicus-EPIC.pdf>.

indicated their support for the General Data Protection (GDPR) of the European Union.<sup>10</sup> But there is no mechanism for the United States to accede to the EU Regulation. However, the United States is an Observer to the Council of Europe and has formally ratified COE conventions in the past, most notably the Cybercrime Convention.<sup>11</sup> The Privacy Convention provides the opportunity for the United States to back a well known and well regarded international framework that would both protect privacy and preserve cross border data flows.

The United States should update its privacy law because it is long overdue, because it is widely supported, and because the ongoing failure to modernize our privacy is imposing an enormous cost on American consumers. This is not simply a matter of trade policy. It is a matter of fundamental rights. There is today a growing consensus on both sides of the Atlantic, supported by consumer groups and business leaders, to recognize that privacy is a fundamental human right.

### *Privacy Shield Is Not an Effective Basis for EU-US Data Flows*

EPIC and many others are concerned about the adequacy of the Privacy Shield and the protection of consumer data.<sup>12</sup> Without more substantial reforms to ensure protection for fundamental rights of individuals on both sides of the Atlantic, Privacy Shield will put users at risk and undermine trust in the digital economy. Specifically, the United States must commit to protecting the data privacy of both US-persons and non-US-persons in order to protect users and instill trust in the digital economy.<sup>13</sup>

Neither consumers nor businesses want to see the disruption of cross border data flows. But the problems of inadequate data protection in the United States can no longer be ignored. U.S. consumers are suffering from skyrocketing problems of identity theft, data breach, and financial fraud. European governments are very concerned about what happens to the personal information of their citizens when it is transferred to the United States. Privacy Shield does not solve this problem. The US will need to do more to reform privacy law to enable cross border data flows. It is a well-known paradox that promoting the free flow of personal data across national boundaries requires comprehensive privacy protection.<sup>14</sup>

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<sup>10</sup> Rachel England, *Tim Cook calls for GDPR-style privacy laws in the US*, Engadget (Oct. 24, 2018), <https://www.engadget.com/2018/10/24/tim-cook-calls-for-gdpr-style-privacy-laws-in-the-us/>; Isobel Asher Hamilton, *Microsoft CEO Satya Nadella made a global call for countries to come together to create new GDPR-style data privacy laws*, Business Insider (Jan. 24, 2019), <https://www.businessinsider.com/satya-nadella-on-gdpr-2019-1>.

<sup>11</sup> EPIC, *The Council of Europe's Convention on Cybercrime*, <https://www.epic.org/privacy/intl/ccc.html>.

<sup>12</sup> See, e.g., Testimony of Marc Rotenberg, EPIC Executive Director, Testimony before the US House of Representatives Energy & Commerce Subcommittees on Commerce, Manufacturing, and Trade and Communications and Technology, *Examining the EU Safe Harbor Decision and Impacts for Transatlantic Data Flows* (Nov. 3, 2015), <https://epic.org/privacy/intl/schrems/EPIC-EU-SH-Testimony-HCEC-11-3-final.pdf>.

<sup>13</sup> See, e.g., Letter from EPIC, et al., to Article 29 Working Party Chairman Isabelle Falque-Pierrotin, et al., on Privacy Shield (Mar. 16, 2016), <https://epic.org/privacy/intl/schrems/Priv-Shield-Coalition-LtrMar2016.pdf>.

<sup>14</sup> Marc Rotenberg, *On International Privacy: A Path Forward for the US and Europe*, Harvard International Review (June 15, 2014), <http://hir.harvard.edu/on-international-privacy-a-path-forward-for-the-us-and-europe/>.

We ask that this Statement from EPIC be entered in the hearing record. We look forward to working with you on these issues of vital importance to the American public.

Sincerely,

/s/ Marc Rotenberg

Marc Rotenberg  
EPIC President

/s/ Caitriona Fitzgerald

Caitriona Fitzgerald  
EPIC Policy Director

/s/ Eleni Kyriakides

Eleni Kyriakides  
EPIC International Counsel