



**International Working Group on Data Protection in Telecommunications  
65<sup>th</sup> Meeting  
Bled, Slovenia – 9-10 April 2019**

**Country Report  
United States of America  
(provided by EPIC)**

## I. Major U.S. Privacy Developments

### Reports: NSA Call Record Program Shut Down

The National Security Agency has reportedly ended the controversial collection of Americans' phone records.<sup>1</sup> Historically, the U.S. intelligence community relied on the Foreign Intelligence Surveillance Act (FISA) Section 215 program to justify unlawful bulk collection of the phone record metadata of nearly all Americans.<sup>2</sup> In 2015, the USA Freedom Act limited the NSA's bulk collection program, but the NSA has acknowledged problems complying with the new law.<sup>3</sup> A senior Hill aide disclosed in an interview that the NSA "hasn't actually been using it for the past six months" and it is not clear "that the administration will want to start that back up."<sup>4</sup>

EPIC and a coalition of civil liberties organizations sent a statement to the House Judiciary Committee calling for a permanent end to the NSA's phone record collection program.<sup>5</sup> The groups asked that Congress to "hold hearings and make public information critical to permit an informed debate over the reauthorization of Section 215 and other provisions of the Patriot Act, which are set to expire December 15, 2019." Congress introduced a bipartisan bill to permanently end the call detail record program.<sup>6</sup> However, there has been no change to Section 702 of FISA, which permits broad, "programmatically" surveillance of non-U.S. persons located outside the U.S. Last year, the U.S. Congress voted to extend Section 702 for another six years without new privacy protections for non-U.S. persons.<sup>7</sup>

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<sup>1</sup> Charlie Savage, *Disputed N.S.A. Phone Program Is Shut Down, Aide Says*, N.Y. Times (Mar. 4, 2019), <https://www.nytimes.com/2019/03/04/us/politics/nsa-phone-records-program-shut-down.html>.

<sup>2</sup> EPIC, *American Civil Liberties Union v. Clapper*, Epic.org, <https://epic.org/amicus/fisa/215/aclu/>.

<sup>3</sup> Press Release, NSA Reports Data Deletion (June 28, 2018), <https://www.nsa.gov/news-features/press-room/Article/1618691/nsa-reports-data-deletion/>.

<sup>4</sup> Jen Patja Howell, *The Lawfare Podcast: Luke Murry and Daniel Silverberg on National Security in Congress*, Lawfare (Mar. 2, 2019), <https://www.lawfareblog.com/lawfare-podcast-luke-murry-and-daniel-silverberg-national-security-congress>.

<sup>5</sup> Letter from EPIC, et. al, to , House Comm. on the Judiciary Chairman Jerrold Nadler & Ranking Member Doug Collins (Mar. 18, 2019), <https://epic.org/privacy/nsa/EPIC-Letter-to-House-Judiciary-re-NSA-bulk-surveillance-03182019.pdf>.

<sup>6</sup> Ending Mass Collection of Americans' Phone Records Act of 2019, 116th Cong. (2019), <https://www.wyden.senate.gov/imo/media/doc/Ending%20Mass%20Collections%20of%20Americans%20Phone%20Records%20Act%20of%202019%20Bill%20Text.pdf>.

<sup>7</sup> The FISA Amendment Reauthorization Act of 2018, Public Law No: 115-118, 132 Stat. 3 (2018).

## **Congress Holds Hearings on Federal Privacy Legislation**

The new Congress convened in 2019 has begun to hold hearings on U.S. federal privacy legislation. Significant hearings included House Commerce Committee hearing on “Protecting Consumers in the Era of Big Data,” a Senate Commerce on “Policy Principles for a Federal Data Privacy Framework in the United States,” a Senate Judiciary Hearing on “GDPR & CCPA: Opt-ins, Consumer Control, and the Impact on Competition and Innovation” a Senate Commerce Hearing on “Small Business Perspectives on a Federal Data Privacy Framework.”

Two major questions have been presented in the US debate over a federal privacy law at these hearings: (1) whether a federal law should preempt state laws, such as the recently enacted California Consumer Protection Act and (2) whether the United States should establish a data protection agency.<sup>8</sup> A new Government Accountability office released by the House Commerce Committee stated “additional federal authority [on privacy] could enhance consumer protection” and noted that the FTC has failed to use its existing authorities to regulate privacy.<sup>9</sup> Congress has yet to vote on any proposed legislation.

Consumer groups, including EPIC, have endorsed a policy framework for federal privacy legislation based on eight goals: (1) enact baseline federal legislation; (2) enforce fair information practices; (3) establish a data protection agency; (4) ensure robust enforcement; (5) establish algorithmic governance; (6) prohibit “take it or leave it” terms; (7) promote privacy innovation; and (8) limit government access to personal data.<sup>10</sup> The consumer framework states that the Federal Trade Commission has failed to enforce the orders it has established and states, “The US needs a federal agency focused on privacy protection, compliance with data protection obligations, and emerging privacy challenges.”

## **Facebook-Cambridge Analytica: Still No FTC Enforcement, EPIC Campaigns to “Enforce the Order”**

Facebook continues to fail to bring an enforcement action against Facebook for the disclosure of the personal data of 50 million users to Cambridge Analytica, the controversial British data mining firm that sought to influence the 2016 presidential election and the Brexit Vote.

The unlawful disclosure of user records to the data mining firm likely violated a 2011 FTC Consent Order against Facebook that resulted from a sustained campaign by US privacy

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<sup>8</sup> See, e.g., Letter from EPIC to Senate Commerce Comm. Chairman Jerry Moran & ranking Member Richard Blumenthal (Mar. 26, 2019), <https://epic.org/testimony/congress/EPIC-SCOM-SmallBusiness-Mar2019.pdf>; Letter from EPIC to Senate Judiciary Comm. Chairman Lindsey Graham & Ranking Member Dianne Feinstein (Mar. 11, 2019), <https://epic.org/testimony/congress/EPIC-SJC-GDPRandCCPA-Mar2019.pdf>.

<sup>9</sup> Gov’t Accountability Office, Internet Privacy: Additional Federal Authority Could Enhance Consumer Protection & Provide Flexibility (2019), <https://www.gao.gov/assets/700/696437.pdf>.

organizations.<sup>11</sup> As a result, EPIC and consumer organizations called on the FTC to “immediately undertake an investigation and issue a public report as to whether Facebook complied with the 2011 Order.”<sup>12</sup> In March 2018, after the Cambridge Analytica scandal became public, the FTC announced it would reopen the investigation of Facebook.<sup>13</sup> A year since the FTC announcement, the FTC has not issued a judgment or report in the investigation.

EPIC launched the #EnforceTheOrderCampaign to urge action on the consent order, and hosted a rally marking a year passage since the investigation was announced.<sup>14</sup> EPIC has also joined with Color of Change, the Open Markets Institute and others to urge the FTC to impose a significant fine and to break up the company, reform hiring and management practices, and install a director to represent users.<sup>15</sup>

### **Privacy and Civil Liberties Oversight Board Holds First Meeting, Final Members Await Confirmation**

At the end of 2018, the U.S. Senate confirmed three new Privacy and Civil Liberties Oversight Board Members, establishing a quorum for the long dormant agency. The Privacy and Civil Liberties Oversight Board provides oversight and advice over executive branch intelligence activities.<sup>16</sup> As a result, the Board was able to hold its first public meeting in February 2019 titled “Countering Terrorism while Protecting Privacy and Civil Liberties: Where do We Stand in 2019.”<sup>17</sup>

Two final nominations to the Board are still pending approval by the full U.S. Senate. Travis LeBlanc, a partner at Boies Schiller and former Federal Communications Commission Enforcement Bureau Chief, and Aditya Bamza, a law professor at the University of Virginia and

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<sup>11</sup> Marc Rotenberg, *How the FTC Could Have Prevented the Facebook Mess*, Techonomy (Mar. 22, 2018), <https://techonomy.com/2018/03/how-the-ftc-could-have-avoided-the-facebook-mess/>; <https://www.bloomberg.com/news/articles/2018-06-19/former-ftc-technologist-says-facebook-violated-consent-decree>.

<sup>12</sup> Letter from EPIC, et. al, to Acting FTC Chair Maureen Ohlhausen & Commissioner Terrell McSweeney (Mar. 20, 2018), <https://epic.org/privacy/facebook/EPIC-et-al-ltr-FTC-Cambridge-FB-03-20-18.pdf>.

<sup>13</sup> Press Release, Statement by the Acting Director FTC Bureau of Consumer Protection Regarding Reported Concerns About Facebook Privacy Practices (Mar. 26, 2018), <https://www.ftc.gov/news-events/press-releases/2018/03/statement-acting-director-ftcs-bureau-consumer-protection>.

<sup>14</sup> EPIC, #EnforceTheOrder, Epic.org, <https://epic.org/enforce-the-order/>.

<sup>15</sup> Letter from EPIC, et. al, to FTC Chairman Simons (Jan. 24, 2019), <https://epic.org/privacy/facebook/2011-consent-order/US-NGOs-to-FTC-re-FB-Jan-2019.pdf>.

<sup>16</sup> PCLOB, *History and Mission*, Pclob.gov, <https://www.pclob.gov/about/>.

<sup>17</sup> Press Release, Privacy and Civil Liberties Oversight Board Announces Panelists for Upcoming Public Forum (Jan. 30, 2019), <https://www.pclob.gov/newsroom/20190130.html>.

former Department of Justice attorney, were both announced as nominees by President Trump in August.<sup>18</sup>

In advance of the PCLOB forum, EPIC sent a statement to the Board outlining priorities. EPIC said the Civil Liberties Board should (1) release the report on Executive Order 12333; (2) limit government use of facial recognition; (3) establish safeguard for government AI use; (4) monitor proposals for "smart" borders and assess privacy impacts on US residents; and (5) reform Section 702 surveillance authority.<sup>19</sup> EPIC previously testified before PCLOB to set out a broad agenda for the work of the independent agency, and spoke at the first meeting of the Oversight Board in 2013.<sup>20</sup> In 2016, EPIC awarded former PCLOB Board Member Judge Patricia Wald with the EPIC Champion of Freedom Award.<sup>21</sup>

### **Privacy Shield Ombudsperson Nominated but Unconfirmed**

The U.S. has nominated Keith Krach to serve as Under Secretary of State for Economic Growth, Energy, and the Environment<sup>22</sup> – the official designated to serve as the EU-U.S. Privacy Shield Ombudsperson.<sup>23</sup> Mr. Krach’s nomination must still be confirmed by the Senate. Mr. Krach is Chariman and former CEO of an e-signature company DocuSign. Acting Under Secretary of State for Economic Growth, Energy, and the Environment, Manisha Singh, currently serves as the Privacy Shield Ombudsperson.<sup>24</sup>

EPIC has long urged a Privacy Shield Ombudsperson be appointed,<sup>25</sup> and raised concerns about privacy protections afforded by the Privacy Shield in comments on the annual review of

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<sup>18</sup> EPIC, *Two More Nominees for Intelligence Oversight Board*, Epic.org (Aug. 13, 2018), <https://epic.org/2018/08/two-more-nominees-for-intellig.html>.

<sup>19</sup> Letter from EPIC to Privacy & Civil Liberties Oversight Bd. (Feb. 7, 2019), <https://epic.org/testimony/congress/EPIC-PCLOB-Feb2019.pdf>.

<sup>20</sup> Marc Rotenberg, *Prepared Statement for the Record, Workshop on “Domestic Surveillance Programs Operated Under the USA PATRIOT Act and the Foreign Intelligence Surveillance Act” Before the Privacy and Civil Liberties Oversight Board*, Epic.org (July 9, 2013), <https://epic.org/privacy/oversight/EPIC-PCLOB-Statement.pdf>; Statement of EPIC to the Privacy and Civil Liberties Oversight Board on “Sunshine Act; Notice of Meeting” (Oct. 23, 2012), <https://epic.org/privacy/1974act/EPIC-PCLOB-Statement-10-12.pdf>.

<sup>21</sup> EPIC, *EPIC Gives Freedom Awards to Goldberg, Kasparov, Rivest, and Wald*, Epic.org (June 5, 2017), <https://epic.org/2017/06/epic-gives-freedom-awards-to-g.html>.

<sup>22</sup> Press Release, President Donald J. Trump Announces Intent to Nominate Individual to Key Administration Posts (Jan. 18, 2019), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-individual-key-administration-posts/>.

<sup>23</sup> See, e.g., Article 29 Working Party, EU – U.S. Privacy Shield – First annual Joint Review (2017), [http://ec.europa.eu/newsroom/just/document.cfm?doc\\_id=48782](http://ec.europa.eu/newsroom/just/document.cfm?doc_id=48782).

<sup>24</sup> *Privacy Shield Ombudsperson*, State.gov, <https://www.state.gov/e/privacyshield/ombud/>.

<sup>25</sup> Letter from EPIC to John Culberson, Chairman House Comm. on Appropriations, Jose Serrano, Ranking Member (Mar. 20, 2018), <https://epic.org/testimony/congress/EPIC-HAC-Commerce-Mar2018.pdf>.

the pact.<sup>26</sup> EPIC sent a letter to the Senate regarding the nomination of Mr. Krach to underscore the urgency of updating federal privacy law, establishing a data protection agency in the United States, and ratifying Council of Europe Convention 108.<sup>27</sup>

### **Senators Tell DHS to Suspend Facial Recognition**

After a BuzzFeed story featured documents obtained by EPIC about plans to expand facial recognition at airports, Senators Ed Markey (D-MA) and Mike Lee (R-UT) called for the suspension of the program.<sup>28</sup> The documents released as the result of an EPIC FOIA request describe the Administration's plan to extend a faulty CBP pilot program to TSA, ICE, and the Coast Guard. The Senators stated: "DHS should pause their efforts until American travelers fully understand exactly who has access to their facial recognition data, how long their data will be held, how their information will be safeguarded, and how they can opt out of the program altogether." EPIC has now filed a new Freedom of Information lawsuit, *EPIC v. CBP*, to determine whether the agency is allowing travelers to opt-out of facial recognition.<sup>29</sup>

### **White House Issues Executive Order on Artificial Intelligence**

President Trump has signed an executive order on artificial intelligence.<sup>30</sup> However, the Order leaves significant questions unanswered. The Order focuses on investing resources on research and development resources and coordinating federal activity on AI. The White House also launched a website on "Artificial Intelligence for the American People," which emphasizes "AI for American Innovation, AI for American Industry, AI for the American Worker, and AI with American Values."<sup>31</sup>

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<sup>26</sup> Comments of EPIC to the European Commission (Aug. 14, 2018), [https://epic.org/privacy/intl/Comments\\_Privacy\\_Shield\\_Review\\_2.pdf](https://epic.org/privacy/intl/Comments_Privacy_Shield_Review_2.pdf).

<sup>27</sup> Letter from EPIC to Chairman Senate Comm. on Foreign Relations Jim Risch & Ranking Member Bob Menendez (Mar. 26, 2019), <https://epic.org/testimony/congress/EPIC-SFR-KeithKrach-Mar2019.pdf>.

<sup>28</sup> Davey Alba, *These Senators Want Homeland Security To "Pause" Its Airport Facial Recognition Program*, BuzzFeed (Mar. 12, 2019), <https://www.buzzfeednews.com/article/daveyalba/these-senators-want-homeland-security-to-pause-its-facial>; Davey Alba, *The US Government Will Be Scanning Your Face At 20 Top Airports, Documents Show*, BuzzFeed (Mar. 11, 2019), <https://www.buzzfeednews.com/article/daveyalba/these-documents-reveal-the-governments-detailed-plan-for>.

<sup>29</sup> EPIC, *EPIC v. CBP (Biometric Entry-Exit Alternative Screening Procedures)*, Epic.org, <https://epic.org/foia/dhs/cbp/alt-screening-procedures/default.html>.

<sup>30</sup> Exec. Order No. 13859, 84 Fed. Reg. 3967 (Feb. 11, 2019), <https://www.whitehouse.gov/presidential-actions/executive-order-maintaining-american-leadership-artificial-intelligence/>.

<sup>31</sup> *Artificial Intelligence for the American People*, Whitehouse.gov, <https://www.whitehouse.gov/ai/>.

EPIC has urged both the White House and Congress to enhance the opportunity for public input on AI policy.<sup>32</sup> EPIC has also proposed the Universal Guidelines for Artificial Intelligence as the basis for AI legislation to reduce bias in decision-making algorithms, ensure digital globalization is inclusive, create human-centered evidence-based policy, promote safety in AI deployment in national security uses, and rebuild trust in institutions.<sup>33</sup> The Universal Guidelines have been endorsed by more than 250 experts and 60 organizations in 40 countries.

### **OECD AI Guidelines**

After more than two years of work, the OECD Council Recommendation on Artificial intelligence is now final. The Recommendation will be formally adopted at the OECD Council Meeting on May 22-23.<sup>34</sup>

The final includes strong principles on fairness, accountability, and transparency, also robustness, security, safety, and inclusive growth. The protection of human rights, the rule of law, and democratic values feature prominently.

### **III. U.S. Supreme Court**

#### **Settlement Fairness – *Frank v. Gaos***

The Supreme Court has remanded a case about class action settlement fairness back to the lower courts because the Court could not decide if the proposed settlement in a privacy case was "fair, reasonable, and adequate," or if the case was properly before the Court.<sup>35</sup> *Frank v. Gaos* involves Google's disclosure of search histories to third parties without consent, a business practice that could violate several privacy laws. Under the terms of the settlement, there was no benefit to Internet users and Google was not prohibited from continuing the allegedly unlawful practice.

In a dissenting opinion, Justice Thomas set out two key guidelines for future consumer privacy litigation.<sup>36</sup> First, Justice Thomas said that consumer privacy cases could go forward when a "private right" is violated, such as when a violation of a federal privacy law is alleged. Second, Justice Thomas made clear that class action settlements must provide a "meaningful" benefit to class members, which could include monetary relief or a change in business practices. Justice Thomas opposed the settlement in *Gaos*, explaining "because the class members here

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<sup>32</sup> Petition to OSTP for Request for Information on Artificial Intelligence Policy (July 4, 2018), <https://epic.org/privacy/ai/OSTP-AI-Petition.pdf> [hereinafter OSTP Petition].

<sup>33</sup> Universal Guidelines for Artificial Intelligence (2018), <https://thepublicvoice.org/ai-universal-guidelines/>.

<sup>34</sup> *OECD moves forward on developing guidelines for artificial intelligence (AI)*, OECD (Feb. 20, 2019), <http://www.oecd.org/going-digital/ai/oecd-moves-forward-on-developing-guidelines-for-artificial-intelligence.htm>.

<sup>35</sup> EPIC, *Frank v. Gaos*, Epic.org, <https://epic.org/amicus/class-action/gaos/>.

<sup>36</sup> *Frank v. Gaos*, No. 17-961, 2019 WL 1264582, at \*3-4 (U.S. Mar. 20, 2019) (Thomas, C., dissenting).

received no settlement fund, no meaningful injunctive relief, and no other benefit whatsoever in exchange for the settlement of their claims...." Justice Thomas did not rule out cy pres remainder settlements for "disposing of unclaimed or undistributable class funds" or cy pres-only settlements that provide some actual benefit to class members.

In an amicus brief, EPIC stated, "the proposed settlement is bad for consumers and does nothing to change Google's business practices."<sup>37</sup> EPIC and several organizations objected to the original settlement on multiple occasions.<sup>38</sup> EPIC routinely opposes settlements that fail to provide an actual benefit to Internet users.<sup>39</sup>

### **Access to Commercial Records - *Food Marketing Institute v. Argus Leader Media***

The Supreme Court has agreed to hear a case involving public access to commercial information held by federal agencies.<sup>40</sup> *Food Marketing Institute v. Argus Leader Media* challenges a federal court decision to require an agency to release data on low income food program. The question is whether an exemption to Freedom of Information Act applies to require the government to withhold all confidential commercial information requested regardless of whether there would be substantial harm to the company from release.

EPIC has filed an amicus brief urging the Supreme Court to protect the public's right to access commercial information held by federal agencies.<sup>41</sup> EPIC described several of its own FOIA cases where access to commercial records made possible meaningful oversight and reform.<sup>42</sup> EPIC also warned that private parties, "acting on behalf of public agencies and with public funding," often hide their activities. EPIC wrote, "The public must have access to commercial information in agency records to conduct effective oversight of government programs that implicate privacy."

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<sup>37</sup> Brief of Amici Curiae Electronic Privacy Information Center (EPIC) in Support of Petitioner, Frank v. Gaos, No. 17-961 (July 16, 2018), <https://epic.org/amicus/class-action/gaos/Frank-v-Gaos-EPIC-Amicus.pdf>.

<sup>38</sup> Letter from Consumer Privacy Organizations to Hon. J. Davila (Aug. 27, 2014) (docketed in In re Google Referrer Header Privacy Litig., No. 10-4809), <https://epic.org/privacy/internet/ftc/google/CPO-ltr-Judge-Davila-re-Gaos.pdf>; Letter from Consumer Privacy Organizations to Hon. J. Davila (Aug. 22, 2013) (docketed in, In re Google Referrer Header Privacy Litig., No. 10-4809), <https://epic.org/privacy/google/EPIC-et-al-Ltr-Google-Referrer-Header.pdf>.

<sup>39</sup> EPIC, *Fraley v. Facebook*, Epic.org, <https://epic.org/amicus/facebook/fraley/>.

<sup>40</sup> EPIC, *Food Marketing Institute v. Argus Leader Media*, Epic.org, <https://epic.org/amicus/foia/food-marketing/>.

<sup>41</sup> Brief of Amici Curiae Electronic Privacy Information Center (EPIC) and Twenty Legal Scholars and Technical Experts in Support of Respondent, Food Mktg. Inst. V. Argus Leader Media D/B/A Argus Leader, No. 18-481 (Mar. 25, 2019), <https://epic.org/amicus/foia/food-marketing/Food-Marketing-v-Argus-SCOTUS-EPIC-Amicus.pdf>

<sup>42</sup> EPIC, *EPIC v. FTC (Facebook Assessments)*, Epic.org, <https://epic.org/foia/ftc/facebook/>.



## Telephone Privacy – *PDR Network v. Carlton & Harris Chiropractic*

The Supreme Court heard arguments in a case involving FCC rules that protect the public from robocalls and junk faxes.<sup>43</sup> *PDR Network v. Carlton & Harris Chiropractic* concerns federal courts' jurisdiction to disregard federal agency interpretations of statutes, like the FCC interpretations of the Telephone Consumer Protection Act. EPIC has filed an amicus brief urging the Supreme Court to safeguard the FCC rules.<sup>44</sup> EPIC explained that permitting companies to avoid FCC rules "will exclude the voices of consumers" in agency decision making. EPIC also explained that the company's efforts to sidestep agency rules will benefit those "who have resources to attack FCC rules."

### III. Other U.S. Privacy Developments

#### Senators Introduce Facial Recognition Privacy Act

U.S. Senators Roy Blunt [R-MO] and Brian Schatz [D-HI] introduced a bill to protect consumers from companies collecting facial images.<sup>45</sup> Senator Schatz said: "Our faces are our identities. They're personal. So the responsibility is on companies to ask people for their permission before they track and analyze their faces."<sup>46</sup> EPIC previously urged the FTC to stop Facebook's use of facial recognition to capture personal identity.<sup>47</sup>

#### U.S. AI Commission Holds Secret Meeting on National AI Policy

The National Security Commission on Artificial Intelligence held its first meeting this on March 11th with no notice of the meeting and no opportunity for public participation.<sup>48</sup> The Commission is tasked with advising the federal government on artificial intelligence. The Commission was established by the National Defense Authorization Act. Last year, EPIC—joined by nearly 100 experts and leading scientific organizations including AAAS, ACM, FAS, and IEEE—successfully petitioned the White House Select Committee on Artificial

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<sup>43</sup> EPIC, *PDR Networks v. Carlton & Harris Chiropractic*, Epic.org, <https://epic.org/amicus/tpca/pdr/>.

<sup>44</sup> Brief of Amici Curiae Electronic Privacy Information Center (EPIC) in Support of Respondent, *PDR Networks v. Carlton & Harris Chiropractic, Inc.*, No. 17-1705 (Feb. 14, 2019), <https://epic.org/amicus/tpca/pdr/PDR-Network-EPIC-Amicus.pdf>.

<sup>45</sup> Press Release, Blunt, Schatz Introduce Bipartisan Commercial Facial Recognition Privacy Act (Mar. 14, 2019), <https://www.blunt.senate.gov/news/press-releases/blunt-schatz-introduce-bipartisan-commercial-facial-recognition-privacy-act>.

<sup>46</sup> *Id.*

<sup>47</sup> Comments of the Electronic Privacy Information Center to FTC on "Face Facts: A Forum on Facial Recognition" (Jan. 31, 2012), <https://epic.org/privacy/facerecognition/EPIC-Face-Facts-Comments.pdf>.

<sup>48</sup> Justin Doubleday, *National Security Commission on AI hosts first meeting*, Inside Defense (Mar. 13, 2019), <https://insidedefense.com/insider/national-security-commission-ai-hosts-first-meeting>.

Intelligence to incorporate public input in the committee's work.<sup>49</sup> EPIC is now seeking the public release of the documents distributed at the AI Commission meeting.<sup>50</sup>

## **U.S. Releases Annual Human Rights Report**

The U.S. Department of State released the annual report on human rights practices across the globe.<sup>51</sup> The State Department report reviews adherence to "internationally recognized individual, civil, political, and worker rights, as set forth in the Universal Declaration of Human Rights and other international agreements," including the arbitrary or unlawful interference with privacy.<sup>52</sup> The 2018 report highlights China's social credit system which "quantifies a person's loyalty to the government by monitoring citizens' online activity and relationships." The report also cites the Indian Supreme Court ruling that privacy is a fundamental right and Turkish authorities' investigation of more than 45,000 social media accounts between 2016 and April 2018. Two EPIC publications - *The Privacy Law Sourcebook 2018* and *Privacy and Human Rights: An International Survey of Privacy Laws and Developments* - provide a comprehensive overview of privacy frameworks around the world and track emerging privacy challenges.<sup>53</sup>

## **Internet of Things Legislation Introduced in Senate, House**

Bipartisan legislation governing the Internet of Things was introduced in the Senate and House of Representatives. Sens. Mark R. Warner (D-VA) and Cory Gardner (R-CO) along with Sens. Maggie Hassan (D-NH) and Steve Daines (R-MT) introduced the Internet of Things (IoT) Cybersecurity Improvement Act of 2019 in the Senate, and Reps. Robin Kelly (D-IL) and Will Hurd (R-TX) filed the bill in the House.<sup>54</sup> The legislation would require the National Institute of Standards and Technology to set baseline security standards for Internet-connected devices. EPIC called attention to the privacy and security risks of connected cars in comments to NHTSA,<sup>55</sup> complaints to the CFPB,<sup>56</sup> and an amicus brief filed in federal court.<sup>57</sup>

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<sup>49</sup> OSTP Petition, *supra* note 33.

<sup>50</sup> Letter from EPIC to Dep't of Defense (Feb. 22, 2019), <https://epic.org/foia/dod/EPIC-19-02-22-DOD-FOIA-20190222-Request.pdf>.

<sup>51</sup> Bureau of Democracy, Human Rights, and Labor, Dep't of State, *Country Reports on Human Rights Practices for 2018*, State.gov (2018), <https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>.

<sup>52</sup> Bureau of Democracy, Human Rights, and Labor, Dep't of State, *Human Rights Reports*, State.gov, <https://www.state.gov/j/drl/rls/hrrpt/>.

<sup>53</sup> EPIC, *EPIC Bookstore*, Epic.org, <https://epic.org/bookstore/>.

<sup>54</sup> S.1691, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/senate-bill/1691>.

<sup>55</sup> Comments of EPIC to the NHTSA on Federal Automated Vehicles Policy (Nov. 22, 2016), <https://epic.org/privacy/internet/iot/EPIC-NHTSA-AV-Policy-Comments-11-22-16.pdf>.

<sup>56</sup> Complaint, Request for Investigation, Injunction, and Other Relief Submitted by The Electronic Privacy Information Center ("EPIC") to the Consumer Financial Protection Bureau (CFPB), In the Matter of CAG Acceptance, LLC, and Gordon Howard Associates, Inc., d/b/a/ PassTime USA (Mar. 15, 2017), <https://epic.org/privacy/cfpb/EPIC-CFPB-SID-Complaint.pdf>.

<sup>57</sup> EPIC, *Cahen v. Toyota Motor Corporation*, Epic.org, <https://epic.org/amicus/cahen/>.

## Senate Report Finds Equifax failed to Address Known Cybersecurity Risks

In a new report, the Senate Homeland Security Investigations Subcommittee found that Equifax was aware of cybersecurity weaknesses for years before the massive breach in 2017, which affected 148 million U.S. consumers.<sup>58</sup> The Senate report found that Equifax chose "efficient business operations rather than security protocols" that allowed a foreign government to access the authenticating details, including dates of birth and SSNs, of American consumers. In December, the House Committee on Oversight released a report which found that the Equifax breach was "entirely preventable."<sup>59</sup> Following the Equifax data breach, EPIC President Marc Rotenberg testified before the Senate Banking Committee and recommended free credit freezes and other consumer safeguards to mitigate the risk of identity theft.<sup>60</sup>

## Two Federal Courts Block Census Citizenship Question

A federal court in California has blocked the Census Bureau from adding a citizenship question to the 2020 Census, becoming the second court to do so.<sup>61</sup> The court found that the Bureau made an arbitrary decision to include the citizenship question, then engaged in a "cynical search to find some reason, any reason" to "justify that preordained result." Another federal court in New York recently blocked the citizenship question in a different case, but the Supreme Court is set to review that decision.<sup>62</sup> EPIC filed an amicus brief in that case, arguing that "history has shown that personal data, collected by the government through the census, can threaten individual rights."<sup>63</sup>

EPIC has also filed suit against the agency. In *EPIC v. Commerce*, EPIC alleges that the Bureau failed to conduct and publish required privacy impact assessments before making an

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<sup>58</sup> Staff, Senate Permanent Subcomm. on Investigations, *How Equifax Neglected Cybersecurity and Suffered a Devastating Data Breach* (2019), [https://www.carper.senate.gov/public/\\_cache/files/5/0/508a6447-853f-4f41-85e8-1927641557f3/D5CFA4A0FC19997FF41FB3A5CE9EB6F7.equifax-report-3.6.19.pdf](https://www.carper.senate.gov/public/_cache/files/5/0/508a6447-853f-4f41-85e8-1927641557f3/D5CFA4A0FC19997FF41FB3A5CE9EB6F7.equifax-report-3.6.19.pdf).

<sup>59</sup> Democratic Staffs, House Comm. on Oversight & Gov't Reform & House Comm. on Science, Space, and Technology, *What the Next Congress Should Do to Prevent a Recurrence of the Equifax Data Breach* (2018), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Equifax%20Minority%20Report%20-%20FINAL%2012-10-2018.pdf>.

<sup>60</sup> *Consumer Data Security and the Credit Bureaus: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 115th Cong. (2017), (statement of Marc Rotenberg, Exec. Dir., Electronic Privacy Information Center), <https://epic.org/privacy/testimony/EPIC-Testimony-SBC-10-17.pdf>

<sup>61</sup> *State v. Ross*, No. 18-cv-01865-RS, 2019 WL 1052434 (N.D. Cal. Mar. 6, 2019).

<sup>62</sup> *New York v. Dep't of Commerce*, 351 F.Supp.3d 502 (S.D.N.Y. 2019), *cert. granted sub nom Dep't of Commerce v. New York*, 139 S.Ct. 953 (2019).

<sup>63</sup> Brief of the Electronic Privacy Information Center as *Amicus Curiae* in Support of Plaintiffs' Position at Trial, *New York v. Dep't of Commerce*, No. 18-cv-2921 (S.D.N.Y. Oct. 29, 2018), <https://epic.org/amicus/census/2020/NY-v-Commerce-EPIC-Amicus.pdf>.

uninformed decision to collect citizenship data.<sup>64</sup> EPIC is seeking an injunction from the D.C. Circuit, which will hear arguments in the case in May.

### **Representatives Introduce Resolution on AI Policy**

Reps. Brenda Lawrence (D-MI) and Ro Khanna (D-CA) have introduced a Congressional resolution calling for guidelines for the ethical development of artificial intelligence.<sup>65</sup> The Ethical AI resolution sets out core principles, including transparency, accountability, fairness, privacy protection, public engagement, education, and safety. EPIC has proposed similar principles, the Universal Guidelines for Artificial Intelligence as the basis for AI legislation.<sup>66</sup> EPIC previously urged lawmakers to appoint AI Commission members who support the Universal Guidelines.<sup>67</sup>

### **FTC Obtains Fines TikTok for Violation of Children's Privacy**

TikTok settled with the FTC for \$5.7 million over allegations that the Chinese video app company violated the Children's Online Privacy Protection Act.<sup>68</sup> The FTC complaint alleges that TikTok violated COPPA by collecting personal information from kids without parental consent. The \$5.7 million fine is the Commission's largest COPPA penalty.<sup>69</sup> The Commission's vote was unanimous. EPIC regularly submits comments to the FTC on children's privacy issues.<sup>70</sup>

### **Congress Passes Foundations for Evidence-Based Policymaking Act of 2018**

Congress has passed the Foundations for Evidence-Based Policymaking Act of 2018.<sup>71</sup> The legislation, championed by House Speaker Paul Ryan (R-WI) and Senator Patty Murray (D-WA), includes new requirements for federal agencies to establish senior leaders for program evaluation and data coordination to help agencies produce and use evidence, strengthens privacy

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<sup>64</sup> EPIC, *EPIC v. Commerce (Census Privacy)*, Epic.org, <https://epic.org/privacy/litigation/pia/epic-v-commerce/>.

<sup>65</sup> H.R. Res. 153, 116th Cong. (2019).

<sup>66</sup> Universal Guidelines for Artificial Intelligence, *supra* note 34.

<sup>67</sup> Letter from EPIC to Chairman Senate Select Committee on Intelligence Richard Burr (Dec. 19, 2018), <https://epic.org/privacy/ai/EPIC-AICommittee-Dec2018.pdf>.

<sup>68</sup> Press Release, Video Social Networking App Musical.ly Agrees to Settle FTC Allegations That it Violated Children's Privacy Law (Feb. 28, 2019), <https://www.ftc.gov/news-events/press-releases/2019/02/video-social-networking-app-musically-agrees-settle-ftc>.

<sup>69</sup> Lesley Fair, Largest FTC COPPA settlement requires Musical.ly to change its tune, FTC.gov (Feb. 27, 2019), <https://www.ftc.gov/news-events/blogs/business-blog/2019/02/largest-ftc-coppa-settlement-requires-musically-change-its>.

<sup>70</sup> Comments of EPIC to the FTC on "Children's Online Privacy Protection Rule: Entertainment Software Rating Board's Safe Harbor Program Application to Modify Program Requirements (May 9, 2018), <https://epic.org/privacy/kids/EPIC-COPPA-ESRB-Safe-Harbor-Comment-05-09-18.pdf>.

<sup>71</sup> Foundations for Evidence-Based Policymaking Act of 2017, Pub. L. No. 115-435 (2018).

protections for confidential data, and directs government to make secure access to data more available to generate evidence.

In a statement to Congress last year, EPIC expressed support for the findings of the Commission on Evidence-Based Policymaking — Congress established the Commission to study how data across the federal government could be combined to improve public policy while protecting privacy.<sup>72</sup> EPIC filed comments with the Commission urging adoption of Privacy Enhancing Techniques, such as anonymization, that minimize or eliminate the collection of personal data.<sup>73</sup> The National Academies of Sciences previously released a report that examined how disparate federal data sources can be used for policy research while protecting privacy.<sup>74</sup>

#### **IV. EPIC's Work**

##### **EPIC Files First Lawsuit for Special Counsel Report on Russian Election Interference**

EPIC filed a Freedom of Information Act lawsuit to obtain the final report by Special Counsel Robert Mueller concerning Russian interference in the 2016 U.S. presidential election.<sup>75</sup> Attorney General William Barr notified Congress on March 22nd that the Special Counsel had delivered the final report to the Department of Justice.<sup>76</sup> In November 2018, EPIC submitted a detailed Freedom of Information Act request to the Department of Justice seeking records about the investigation. The Special Counsel was authorized to conduct an investigation into Russian interference, including "any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump."<sup>77</sup> Special Counsel Mueller has since brought criminal charges against 34 individuals and three organizations.<sup>78</sup> EPIC, through its Democracy and Cybersecurity Project, has pursued multiple FOIA cases concerning Russian interference, including *EPIC v. FBI*(response to Russian cyberattacks), *EPIC*

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<sup>72</sup> Letter from EPIC to Chairman House Comm. on Oversight & Gov't Reform Trey Gowdy & Ranking Member (Sept. 25, 2017), <https://epic.org/testimony/congress/EPIC-HOGR-CEBP-Sep2017.pdf>.

<sup>73</sup> Comments of EPIC to the Commission on Evidence-Based Policymaking (Nov. 14, 2016), <https://epic.org/apa/comments/EPIC-CEP-RFC.pdf>.

<sup>74</sup> National Academies of Sciences, Engineering, & Medicine, *Innovations in Federal Statistics: Combining Data Sources While Protecting Privacy* (2017).

<sup>75</sup> EPIC, *EPIC v. DOJ (The Mueller Report)*, Epic.org, <https://epic.org/foia/doj/mueller-report/>.

<sup>76</sup> Devlin Barrett, Matt Zapotosky, & Josh Dawsey, *Mueller report sent to attorney general, signaling his Russia investigation has ended*, Wash. Post (Mar. 22, 2019), [https://www.washingtonpost.com/world/national-security/mueller-report-sent-to-attorney-general-signaling-his-russia-investigation-has-ended/2019/03/22/b061d8fa-323e-11e9-813a-0ab2f17e305b\\_story.html](https://www.washingtonpost.com/world/national-security/mueller-report-sent-to-attorney-general-signaling-his-russia-investigation-has-ended/2019/03/22/b061d8fa-323e-11e9-813a-0ab2f17e305b_story.html).

<sup>77</sup> U.S. Dep't of Justice, Office of the Deputy Att'y Gen., Order No. 3915-2017, Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters (May 17, 2017), <https://www.justice.gov/opa/pressrelease/file/967231/download>.

<sup>78</sup> *Special Counsel's Office*, Justice.gov, <https://www.justice.gov/sco>.

v. ODNI (Russian hacking), EPIC v. IRS I (release of Trump's tax returns), EPIC v. IRS II (release of Trump's offers-in-compromise), and EPIC v. DHS (election cybersecurity).<sup>79</sup>

### **EPIC Gives International Privacy Award to Giovanni Buttarelli, Joe McNamee**

EPIC presented the 2019 International Privacy Champion Awards to Giovanni Buttarelli, European Data Protection Supervisor, and Joe McNamee, long time Executive Director of European Digital Rights. The ceremony took place at the annual conference on Computers, Privacy, and Data Protection in Brussels, Belgium. EPIC Advisory Board members Max Schrems and Shoshana Zuboff presented the awards. The 2019 EPIC Champion of Freedom Awards will be held at the National Press Club in Washington, DC on June 5, 2019.

### **EPIC Publishes Simon Davies Memoir, "Privacy: A Personal Chronicle"**

EPIC published Simon Davies's memoir, "Privacy: A Personal Chronicle." Founder of Privacy International and one of the most effective privacy advocates in the world, Davies tells the inside story of privacy campaigns that captured media attention and transformed the world. Davies's memoir is part law and technology primer, part tale of how one person can make a difference. Hear Davies describe the memoir in his own words in video for the EPIC Blog.<sup>80</sup> "Privacy: A Personal Chronicle" is available in the EPIC Bookstore in e-book and paperback.<sup>81</sup>

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<sup>79</sup> EPIC, *Democracy and Cybersecurity: Preserving Democratic Institutions*, Epic.org, <https://epic.org/democracy/>.

<sup>80</sup> Candace Paul, *Simon Davies: A Privacy Pioneer Tells His Story*, EPIC Frontlines (Jan. 24, 2019), <https://blog.epic.org/2019/01/24/simon-davies-a-privacy-pioneer-tells-his-story/>

<sup>81</sup> EPIC, *EPIC Bookstore*, Epic.org, <https://epic.org/bookstore/>.

## Appendix: EPIC Resources

### *Commentaries*

Eleni Kyriakides, *The CLOUD Act, E-Evidence, and Individual Rights*, European Data Protection Law Review, vol. 5, no. 1 (2019), <https://edpl.lexxion.eu/article/EDPL/2019/1/16>

Marc Rotenberg, *Updates to U.S. privacy laws are long overdue*, Washington Post (January 10, 2019), [https://www.washingtonpost.com/opinions/updates-to-us-privacy-laws-are-long-overdue/2019/01/09/5c58a058-12be-11e9-ab79-30cd4f7926f2\\_story.html](https://www.washingtonpost.com/opinions/updates-to-us-privacy-laws-are-long-overdue/2019/01/09/5c58a058-12be-11e9-ab79-30cd4f7926f2_story.html)

Marc Rotenberg, *America Needs a Privacy Law*, New York Times (December 25, 2018), <https://www.nytimes.com/2018/12/25/opinion/letters/data-privacy-united-states.html>

Marc Rotenberg, *After Latest Facebook Fiasco, Focus Falls on Federal Commission*, Techonomy (December 21, 2018), <https://techonomy.com/2018/12/after-latest-facebook-fiasco-focus-falls-on-federal-commission/>

Marc Rotenberg, *Carpenter Fails to Cabin Katz as Miller Grinds to a Halt: Digital Privacy and the Roberts Court*, American Constitution Society Supreme Court Review (December 4, 2018), <https://www.acslaw.org/analysis/acs-supreme-court-review/carpenter-fails-to-cabin-katz-as-miller-grinds-to-a-halt-digital-privacy-and-the-roberts-court/>

Marc Rotenberg, *The Digital Economy & Privacy Protection: the Challenges Ahead*, Japan Economic Forum (Nov. / Dec. 2018), [https://www.jef.or.jp/journal/pdf/222nd\\_Cover\\_Story\\_01.pdf](https://www.jef.or.jp/journal/pdf/222nd_Cover_Story_01.pdf)

Eleni Kyriakides, *On Big Brother Watch v. U.K.: The Future of Surveillance at Two Europe-Wide Courts*, Just Security (October 15, 2018), <https://www.justsecurity.org/61042/big-brother-watch-v-u-k-future-surveillance-europe-wide-courts/>

Marc Rotenberg, *Democracy and the Internet*, New York Times (October 3, 2018), <https://www.nytimes.com/2018/10/03/opinion/letters/democracy-internet.html>

Marc Rotenberg and Natasha Babazadeh, *US Supreme Court Affirms Fourth Amendment in Rental Car Search, Steers Clear of Commercial Contract Limitation (Byrd v United States)*, European Data Protection Law Review (September 26, 2018), <https://edpl.lexxion.eu/article/EDPL/2018/3/23>

Ralph Nader and Marc Rotenberg, *Consumer Voices Needed in US Privacy Debate*, Nader.org (September 24, 2018), <https://nader.org/2018/09/24/consumer-voices-needed-in-us-privacy-debate/>

## **Books**

*EPIC Bookstore – with many books by members of the EPIC Advisory Board and other featured authors – [www.epic.org/bookstore](http://www.epic.org/bookstore)*

*Privacy: A Personal Chronicle*, by Simon Davies (EPIC 2019)

*Privacy Law Sourcebook 2018: United States Law, International Law, and Recent Developments (Kindle Edition)*, edited by Marc Rotenberg (EPIC 2018)

*The Right to Be Forgotten on the Internet: Google v. Spain*, Artemi Rallo (EPIC 2018)

*Privacy Law Sourcebook 2016: United States Law, International Law, and Recent Developments (Kindle Edition)*, edited by Marc Rotenberg (EPIC 2016)

*Privacy and Human Rights (Kindle Edition): An International Survey of Privacy Laws and Developments*, edited by Marc Rotenberg (EPIC 2016)

*Communications Law and Policy: Cases and Materials, 5th Edition*, by Jerry Kang and Alan Butler (Direct Injection Press 2016)

*Privacy Law and Society, 3rd Edition*, by Anita L. Allen and Marc Rotenberg (West 2015)

*Privacy in the Modern Age: The Search for Solutions*, by Marc Rotenberg, Julia Horwitz, and Jeramie Scott (The New Press 2015).

*Privacy in the Modern Age: The Search for Solutions, Chinese Edition*, by Marc Rotenberg, Julia Horwitz, and Jeramie Scott (The New Press 2015).