

Remarks of William E. Kennard, U.S. Ambassador to the EU

Before the Committee on Civil Liberties, Justice, and Home Affairs

“DATA PROTECTION IN A TRANSATLANTIC PERSPECTIVE”

October 25, 2010

Introduction

Thank you Mr. Chairman and Mr. Rapporteur for this opportunity to offer a U.S. perspective on the important topic today before this committee -- a committee that I am coming to know well. I begin as I have many times in addressing this legislative body -- the U.S. Government recognizes and respects the important role of the European Parliament and we want to deepen our relationship with this body. This is a message that has also been delivered by Vice-President Biden, Secretary of State Clinton, Secretary of Homeland Security Napolitano and the many other top U.S. government leaders who have visited the Parliament in the past year -- a demonstration of the respect that the Obama Administration holds for this body. I am grateful that you have warmly welcomed leaders from the United States to Parliament and I appreciate the opportunity that you have given me to make a brief intervention in today's session.

I will touch on a few key areas: our shared values and challenges, our robust experience in working together, some issues of U.S. concern, and a proposed task the U.S. and Parliament should undertake going forward.

Shared Values

The United States and Europe share common values that have kept us close for hundreds of years through peace and strife, prosperity and financial crisis, revolution and stability. We are 800 million democratically-governed people united by a shared history, culture and values. My first year in Brussels has only deepened a personal conviction that Americans and Europeans share the most fundamental of human values.

I have heard the often-repeated assertion that the U.S. cares more about security and less about privacy than Europeans. Like most stereotypes, it is simply not true. The United States is a nation committed by its very foundation to defending individual liberties. It was established by dissidents who sought freedom of speech, religion and association, and the right to be free from unreasonable searches and intrusions into their homes and property. For over two centuries, we have expanded and adapted these freedoms and rights to new situations, conditions, and technologies undreamt of in the 18th century. This is a testament both to our enduring shared values with Europeans and our abiding commitment to these principles in a rapidly changing world.

Shared Challenges

But we also believe – as I know you do – that there can be no exercise of personal freedoms if there is no security – security from terrorism and serious crime, from threats to commerce and trade – and governments on both sides of the Atlantic must safeguard their citizens' security even as they protect their liberties. This is a challenge we must confront together. We need not sacrifice privacy for security. We must have both. We can have both.

And we must do so in a rapidly changing environment. The internet has made it possible to steal money, commit multi-national frauds, prey on children, disrupt critical infrastructure, and much worse, all from a personal computer. The global nature of terrorism and serious crime today demands international solutions and multinational cooperation.

In the last decade, technology has revolutionized how we communicate in the last decade. Today, it is assumed that you can be reachable *anywhere, anytime*. Records that once filled file cabinets and archives can now be “crunched” in seconds, stored on tiny chips, and disseminated all over the world. And technology will not remain static. So to secure both the privacy and safety of our people, our laws, regulations, and international agreements must be state-of-the-art. Not only do we need to be dynamic and keep pace, but we should also build in necessary safeguards from the very outset when we plan and design new record-keeping systems, including those that we rely on for law enforcement objectives.

Shared Achievements

Over the years, the U.S. and Europe have successfully managed our law enforcement cooperation and judicial information sharing with two fundamental obligations in mind – privacy and security. Here is a perfect example of why our progress together is vital. This year, the U.S.-EU Extradition and Mutual Legal Assistance Agreements and 54 accompanying bilateral instruments that came into force powerfully demonstrated our commitment to work together to combat crime and terrorism. Using these modern treaties and working with Eurojust and Europol, U.S. and European police and prosecutors successfully investigated an international ring of child sexual predators and pornographers. What otherwise would have been a

single arrest of one of those predators in one country developed quickly into a comprehensive investigation and prosecutions of more than 20 defendants in five countries. Working together we rescued more than 50 children. This compelling example shows what we can achieve together.

Our decades of cooperation and information exchange have demonstrated a firm commitment to safeguarding information and protecting against its misuse – on both sides of the Atlantic. Fugitives have been brought to justice and prosecuted on the strength of evidence collected and shared at home and abroad. One of our greatest success stories has been the work over three years of the U.S.-EU High Level Contact Group, the “HLCG,” on data protection/privacy.

Together we identified and defined the “common principles” of an effective data protection regime. The U.S. and EU delegations integrated the expertise of senior prosecutors and law enforcement agents, international law experts, and privacy policy specialists so that the principles were not an abstraction but grounded in today’s “real world” circumstances. These experts learned a great deal about each others’ systems – different approaches founded on different legal systems and traditions, but sharing common attributes and unquestionably committed to the same core values.

One year ago, our Justice and Home Affairs leaders directed the group to move forward to solidify these principles as a binding agreement between the U.S. and the EU. This will greatly facilitate future agreements and mutually recognize the effectiveness of our different approaches to data protection and privacy. It would mean that in this important area of data privacy, we would not lurch from one agreement to the next. That we would

have an overarching umbrella agreement enabling us to move forward together.

The United States remains hopeful about this effort. However, a few recent suggestions for the negotiation have now given us cause for concern, which I would now like to take the opportunity to address.

U.S. Concerns

From what we understand of the proposed mandate, we are concerned that it diverges from our respective leaders' instruction to adopt the HLCG's well-informed "common principles." In particular, we are concerned and need to ensure that the agreement not jeopardize the several hundred treaties, agreements, conventions, and arrangements underpinning every facet of Europe's and the United States' robust cooperation in justice and law enforcement. Making the effect of this agreement, or of the EU's own proposed regulation, retroactive carries serious harmful implications. This is something the U.S. cannot in good conscience do, especially given our steadfast history together of protecting against the abuse or misuse of information exchanged under the existing agreements. Even if it were possible to rewrite the entire body of work governing our existing law enforcement relationships, an effort which would take decades to accomplish, such a transition period would cast unwarranted doubt on past and current transatlantic transfers of fugitives, evidence, and information.

Practically speaking, retrospective application would sow confusion among law enforcement and judicial authorities and threaten our most serious prosecutions. It would invite court challenges on both sides of the Atlantic regarding prior criminal convictions and other legal judgments, with

serious and irreparable consequences. Such legal uncertainty would at best impair and at worst imperil these critical exchanges. This is a circumstance in which the U.S. cannot and should not be a party. We are confident that, continuing the HLCG's good work and good will, talented U.S. and EU lawyers will find creative and appropriate means to avoid such a perilous course.

Another point. The U.S. will also seek a clear statement of mutual recognition -- to use the EU term, "adequacy" -- of the effectiveness of each other's data protection systems. Without such legal effect, the added value of such an umbrella agreement to our ongoing excellent relationship is hard to discern.

Through the HLCG, we have learned that we can have different privacy approaches and yet uphold the same principles and fundamental values. It is therefore exceedingly important to the U.S. that the negotiation be flexible in order to accommodate our different legal systems and promote enhanced cooperation. Both sides should be guided by the HLCG's carefully crafted principles.

We do not believe there are serious shortcomings in either the U.S. or the EU data privacy regimes. We do believe, however, that we should always remain open to strengthening our dialogue and to increasing legal certainty. The negotiation of an umbrella U.S.-EU data privacy agreement would provide us that opportunity.

A Way Forward

Again, I am grateful for your generous invitation to participate today and I would like to offer one final point. I submit that each of us should take on the commitment – and I especially include LIBE members and your staff in this – to learn the “on-the-ground” reality of EU-U.S. law enforcement and judicial information sharing in order to best inform our responsibilities. Many of you have already traveled to Washington to learn first-hand about our information exchange programs and the privacy protections and laws that safeguard them. We greatly appreciate the investment of your time. Many high-level U.S. officials have made the same effort by visiting Brussels and EU capitals in the past few months. I invite others to do the same.

Come to Washington, ask questions, meet with our Chief Privacy Officers. But don't just take our word on the importance and reliability of our relationship. I ask that you take time when you are in your home countries to seek out officials in your national justice and interior ministries, your national police and prosecution services, to learn the value to Europeans of transatlantic law enforcement and judicial information exchanges and how, together, we uphold our commitments to protect individual privacy rights in this critical work.

So now is the time for us to recommit to working together. To build on our history of success. To respect our differences, recognizing always that there is far more that unites us than divides us. And to reaffirm once again our shared commitment to safeguard our citizens' security and privacy.

Thank you.