

Questions for the Record

Senator Kyrsten Sinema

Written Questions Submitted by Sen. Kyrsten Sinema to Peter Swire:

Data Privacy Legislation. In August 2020, you wrote, “After Schrems II: A Proposal to Meet the Individual Redress Challenge,” which focused on long-term solutions after the European Court of Justice’s invalidation of the EU-U.S. Privacy Shield Framework. In addition to long-term solutions, you wrote about the potential benefits of a federal privacy bill.

Question 1. Moving forward, what recommendations do you have for Congress on how to develop a federal privacy bill that can receive bipartisan support?

Swire: Thank you, Senator, for this question. I appreciate the interest and expertise in these topics that you showed in 2017 when you came to Georgia Tech for a cybersecurity conference.

My particular focus for U.S. privacy legislation is to suggest a process for resolving the difficult issue of federal preemption of state laws. In January, 2020 with a co-author I published “A Proposal To Help Resolve Federal Privacy Preemption,” at <https://iapp.org/news/a/a-proposal-to-help-resolve-federal-privacy-preemption>. Our proposal seeks to define areas of consensus concerning state data privacy and security laws. In short, the late [Robert Ellis Smith](#) published a “[Compilation of State and Federal Privacy Laws](#),” most recently updated in 2018. Our hypothesis is there will be consensus for many categories of current laws that should be retained. For instance, we doubt the drafters are seeking to repeal attorney-client privilege or state cybercrime laws that prohibit hacking. Where there is consensus, have congressional experts in legislative drafting create language to implement the consensus.

To help promote the possibility of eventual legislation, knowledgeable staff, likely from both parties, could begin work immediately to seek such areas of consensus. It may be helpful to have one or more trusted mediators assist, such as the experts from the non-partisan Future of Privacy Forum. In that way, if and when there is political support to take up a privacy bill, the necessary preliminary work will have been done.

Other experts, including Cam Kerry of Brookings, have proposed ways to reach potential bipartisan agreement on preemption and the other most difficult issue, about enforcement and private rights of action. In short, I believe it would be fruitful to seek to narrow the gaps on these most difficult and complex issues, so that final negotiations can hopefully bridge a small gap rather than a chasm.