

# U.S. Surveillance & Redress

## EU Court of Justice holds U.S. law “inadequate”:

- The scope of U.S. foreign intelligence surveillance is too broad.
- U.S. remedies for unlawful surveillance are insufficient.

## EU Court of Justice:

- Third-party country can interfere with right to privacy only insofar as strictly necessary
- Government must have an “objective criterion” to justify surveillance
- Government access and use must be limited to “specific, strictly restricted” purposes
- “Legislation permitting the public authorities to have access on a generalized basis” to the content of communications violates the essence of the right to privacy

## Section 702 of FISA

- Targeting standard is extraordinarily low
- Targets need not have any nexus to criminal activity or terrorism, and can include human rights workers and journalists abroad
- No judicial review of targets
- To locate targets' communications through Upstream surveillance, the government searches through non-targets' communications en masse

## Executive Order 12,333

According to media reports, this surveillance has included:

- Collection of billions of cell phone location records each day;
- Recording of every single cell phone call into, out of, and within two countries;
- Collection of hundreds of millions of contact lists and address books;
- NSA tapping into fiber-optic cables offshore, collecting Europeans' data during its transit to the U.S.

## **Biden Administration's new executive order**

- “Necessity and proportionality”
  - But “strictly” necessary?
  - What is being assessed as “proportionate”?
- Expressly permits “bulk” surveillance

## Article 47 of the EU Charter of Fundamental Rights

- Effective remedy
  - Independent tribunal
  - Impartial tribunal
- Fair trial principles

## Article III Courts—Obstacles to Redress

- Notice
- Standing
- State secrets privilege



## **New Redress Procedure—Article 47 Problems**

- Independence
- One-sided proceeding and “fair trial” principles
- Boilerplate responses to complainants
- Limited definition of “covered violation”
- Lack of notice

## Potential U.S. Legislative Reforms to Put Data Transfers on Sound Legal Footing

- Reform the state secrets privilege
- Delayed notice to targets (with exceptions)
- Standing fix