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EU/US Adequacy Negotiations and the Redress Challenge: How to Create an Independent Authority with Effective Remedy Powers

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Can the U.S. Government create, by non-statutory means, an independent redress authority capable of providing an effective remedy for a European person who believes that her or his rights have been infringed by an intelligence service? In this article we put forward a novel non-statutory solution that could resolve the "redress" problem in the EU/US adequacy negotiations. This solution is based on three "building blocks" inspired by methods utilized in U.S. administrative law. First, the U.S. Department of Justice should issue a binding regulation creating within that executive agency an independent "Foreign Intelligence Redress Authority" (FIRA). Second, the President should issue a separate Executive Order providing the necessary investigative powers and giving FIRA's decisions binding effect across the intelligence agencies and other components of the U.S. government. Finally, European individuals could obtain judicial review of an independent redress decision by using the existing Administrative Procedure Act.

Our first article, published on January 31, concentrated on whether the U.S. Congress would necessarily have to enact a new statute in order to create an adequate redress mechanism. We examined political, practical, and U.S. constitutional difficulties in enacting such a statute. Based on careful attention to EU law, we concluded that relying on a non-statutory solution could be compatible with the "essential equivalence" requirements of Article 45 of the EU's General Data Protection Regulation (GDPR), if the requisite substantive protections for redress were put into place.

This article examines, from both a U.S. and a European law perspective, measures that could address the substantive requirements, notably the deficiencies highlighted by the Court of Justice of the European Union (CJEU) in its *Schrems II* judgment: independence of the redress body; its ability to substantively review the requests; and its authority to issue decisions that are binding on the intelligence agencies. We discuss only the redress issues highlighted by the CJEU. We do not address here the other deficiency cited by the Court – whether U.S. surveillance statutes and procedures sufficiently incorporate principles of "necessity and proportionality" also required under EU law.

Part I of this article explains how the U.S. executive branch could create an independent administrative institution to review redress requests and complaints. The institution, which we call "FIRA", would be similar in important ways to what in Europe is considered as an independent administrative authority, such as the several surveillance oversight/redress bodies operating in Europe and listed in the EU Agency for Fundamental Rights' (FRA) 2017 comparative study on surveillance (p. 115 - in France, for example, the National Commission for Control of Intelligence Techniques, CNCTR). We submit that, in the U.S., such an institution could be based on a binding regulation adopted by the Department of Justice (DOJ). Despite being created by the executive branch, the independence of FIRA will be guaranteed, since leading U.S. Supreme Court precedent considers such a regulation to have binding effect and to protect members of the redress authority from interference by the President or the Attorney General.

Next, **Part II** of this article assesses how the U.S. executive branch could provide the necessary investigatory powers for FIRA to review European requests and complaints and to adopt decisions binding upon intelligence agencies. This could be done through a Presidential Executive Order that the President may use to limit executive discretion.

Finally, **Part III** of this article discusses the important question of whether the ultimate availability of *judicial* redress is necessary under EU law and whether there is a path under U.S. law to achieve it, despite the 2021 Supreme Court decision in the *TransUnion* case limiting standing in some privacy cases. We examine reasons why judicial review of decisions by the independent FIRA may not be required under EU law. Nonetheless, we describe a potential path to U.S. judicial review based on the existing Administrative Procedure Act.

I. Creating an Independent Redress Authority

Based on our discussions with stakeholders, the most difficult intellectual challenge has been how a redress authority can be created within the executive branch yet have the necessary independence from it. We first present the EU criticisms of the Privacy Shield Ombudsperson approach, and then explain how a binding regulation issued by DOJ can address those criticisms satisfactorily.

1. Identifying the problems of independence with the previous Privacy Shield mechanism

Four criteria for independence of the redress body have been identified by EU authorities in their critiques of the Ombudsperson approach included in the 2016 Privacy Shield.

a) Protection against dismissal or revocation of the members of the redress body

A crucial measure of independence under EU law, is protection against removal of any member of the independent body. In *Schrems II*, the CJEU noted there was "nothing in [the Privacy Shield Decision] to indicate that the dismissal or revocation of the appointment of the Ombudsperson is accompanied by any particular guarantees" (§195), a point previously made in 2016 by the Article 29 Working Party (WP29) when it observed "the relative ease with which political appointees can be dismissed" (here, p. 51). Protection against removal is also recognized under U.S. law and a key indicator for independence.[1]

b) Independence as protection against external intervention or pressure

Protection against external intervention is a major requirement for a redress authority, as stated by the Advocate General in his 2019 *Schrems II* Opinion:

> "The concept of independence has a first aspect, which is external and presumes that the body concerned is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them" (note 213).

By contrast, the Ombudsperson in the original Privacy Shield was "presented as being independent of the 'intelligence community', [but] (…) not independent of the executive" (§ 337).

c) Impartiality

In the same opinion, Advocate General Saugmandsgaard Øe stressed (and the CJEU endorsed), the importance of impartiality: "The second aspect of [independence], which is internal, is linked to *impartiality* and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings" (note 213, emphasis added).

d) Relationship to the intelligence community

In its 2015 study on surveillance, FRA noted that there is a "Goldilocks" challenge concerning the ties between redress bodies and intelligence agencies: "While ties that are too close may lead to a conflict of interest, too much separation might result in oversight bodies that, while independent, are very poorly informed" (p. 71). In 2016, the WP29 found that the Privacy Shield solution did not appropriately respond to this challenge:

> "The Under Secretary is nominated by the U.S. President, directed by the Secretary of State as the Ombudsperson, and confirmed by the U.S. Senate in her role as Under Secretary. As the letter and the Memorandum representations stress, the Ombudsperson is 'independent from the U.S. Intelligence community'. The WP29 however questions if the Ombudsperson is created within the most suitable department. Some knowledge and understanding of the workings of the intelligence community seems to be required in order to effectively fulfil the Ombudsperson's role, while at the same time indeed sufficient distance from the intelligence community is required to be able to act independently." (p.49)

2. How the creation of FIRA by DOJ Regulation could fix these problems

To date, despite insightful discussions of the challenges, we have not seen any detailed public proposals for how the U.S. executive branch might create a redress institution to meet the strict EU requirements for independence. [2] One innovation, which we understand that the parties might now be considering, could be a binding U.S. *regulation*, issued by an agency pursuant to existing statutory authority, to create and govern FIRA. Crucially, leading U.S. Supreme Court cases have given binding effect to a comparable regulation, even in the face of objections by the President or Attorney General.

a) Binding DOJ regulation to ensure independence of the FIRA

The Department of Justice could issue a regulation to create FIRA and guarantee its independent functioning. It could guarantee independence for the members of FIRA, including protections against removal, in the same fashion.

Under the U.S. legal system, such an agency regulation has the force of law, making it suitable for defining the procedures for review of redress requests and complaints. DOJ regularly issues such regulations, under existing statutory authorities, and pursuant to established and public procedures. To protect against arbitrary or sudden change, modifying or repealing the regulation would require following the same public procedural steps as enacting the regulation in the first place did. In *Motor Vehicles Manufacturers Association vs. State Farm Mutual Automobile Insurance Co.*, the Supreme Court held that since a federal agency had the discretion to issue a regulation initially, it would have to utilize the same administrative procedures to repeal it.

In an EU/U.S. framework for a new Privacy Shield, the U.S. Government unilaterally could commit to maintain this DOJ regulation in force, and the European Commission could reference the U.S. commitment as a condition of its adequacy decision. This would provide both to the EU and to members of FIRA a guarantee against revocation of the regulation ensuring that the authority would act independently.

b) Supreme Court precedents protect against external intervention or pressure

During the Watergate scandal involving then-President Richard Nixon, the Department of Justice issued a regulation creating an independent "special prosecutor" (also called "independent counsel") within that department. The special prosecutor was designed to be independent from Presidential control, with the regulation stipulating that he could not be removed except with involvement by designated members of Congress.

Acting within the powers defined in the regulation, the special prosecutor issued a subpoena for audio tapes held by the White House. The President, acting through the Attorney General, objected to the subpoena. In a unanimous 1974 Supreme Court decision, *United States v. Nixon*, it was held that the special prosecutor's decision to issue the subpoena had the force of law, despite the Attorney General's objection. The Court noted that although the Attorney General has general authority to oversee criminal prosecutions, including by issuing a subpoena, the fact that the special prosecutor had acted pursuant to a binding DOJ regulation deprived the Attorney General of his otherwise plenary power over subpoenas.

The Supreme Court observed that "[t]he regulation gives the Special Prosecutor explicit power" to conduct the investigation and issue subpoenas, and that "*[s]o long as this regulation is extant, it has the force of law*" (emphasis added). The Court concluded:

> "It is theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor's authority. But he has not done so. So long as this regulation remains in force, the Executive Branch is bound by it, and indeed the United States, as the sovereign composed of the three branches, is bound to respect and to enforce it."

In sum, as supported by clear Supreme Court precedent, a DOJ regulation can create a mechanism within the executive branch, so that the members of the administration must comply with its terms, even in the face of

contrary instructions from the President or Attorney General. And, as stated earlier, the lasting character of the DOJ regulation creating FIRA could be guaranteed by the US Government in the EU/US agreement and be identified by the European Commission in its subsequent adequacy decision as a condition for maintaining this decision in force.

c) Impartiality

We are not aware of significant U.S. constitutional obstacles to ensuring impartiality in FIRA. DOJ appoints Administrative Law Judges (ALJ), such as for deciding immigration matters, and "[t]he ALJ position functions, and is classified, as a judge under the Administrative Procedure Act."

U.S. law concerning ALJ's, including those located in DOJ, states that they are "independent impartial triers of fact in formal proceedings".[3] In *Nixon* the Supreme Court reaffirmed the lawfulness of an independent adjudicatory function located within the DOJ.[4] A DOJ FIRA regulation could similarly offer guarantees in terms of the impartiality and expertise of members.

d) Relationship to the intelligence community

Furthermore, the DOJ appears to be the executive agency best-suited to resolve the "Goldilocks" problem, mentioned above, by combining knowledge and understanding of the intelligence agencies with sufficient distance to judge their conduct independently.

As noted, EU bodies questioned whether the Department of State, a diplomatic agency, was a "suitable department" for the redress role. The DOJ is more suitable in part because of its experience with the Watergate independent counsel and, for instance, with Immigration Judges as independent triers of fact.

At the same time, a FIRA located within the DOJ would be well-placed to have knowledge about the intelligence community. The DOJ provides extensive oversight of intelligence activities through its National Security Division, including by issuing regular reports concerning classified activities of the Foreign Intelligence Surveillance Court. Other DOJ components, such as the Office of Privacy and Civil Liberties, also have access to classified information including Top Secret information about intelligence agency activities. In addition, an Executive Order could empower the DOJ to enlist other agencies, such as the Office of the Director of National Intelligence, to gain information from the intelligence community.

II. Creating Effective Powers for the Independent Redress Authority

A DOJ regulation creating an independent redress authority within that executive department must be accompanied by additional government-wide steps for effectively investigating redress requests and for issuing decisions that are binding on the entire intelligence community. The DOJ-issued regulation would define the interaction of FIRA with other parts of that Department. For the overall mechanism to be effective in other parts of the U.S. government, however, the key legal instrument would be a separate Executive Order issued by

the President. In issuing an EO, the President would act within the scope of his overall executive power to define legal limits, such as by requiring intelligence agencies to be bound by FIRA decisions.

1. Identifying the problems of effectiveness concerning the previous Privacy Shield mechanism

To meet the EU requirement of effective remedial powers, the new redress system would need to have two types of effective powers that the Privacy Shield Ombudsperson lacked.

a) Investigative Powers

The WP29 wrote in 2016:

> "concerns remain regarding the powers of the Ombudsperson to exercise effective and continuous control. Based on the available information (…), the WP29 cannot come to the conclusion that the Ombudsperson will at all times have direct access to all information, files and IT systems required to make his own assessment" (p. 51).

In 2019, the European Data Protection Board (EDPB) likewise stated:

> "[T]he EDPB is not in a position to conclude that the Ombudsperson is vested with sufficient powers to access information and to remedy non-compliance, (…)" (§103).

b) Decisional Powers

In *Schrems II*, the CJEU stated:

> **"**Similarly, (…) although recital 120 of the Privacy Shield Decision refers to a commitment from the US Government that the relevant component of the intelligence services is required to correct any violation of the applicable rules detected by the Privacy Shield Ombudsperson, there is nothing in that decision to indicate that that ombudsperson has the power to adopt decisions that are binding on those intelligence services and does not mention any legal safeguards that would accompany that political commitment on which data subjects could rely" (§196).

The EDPB similarly concluded in 2019:

> "Based on the available information, the EDPB still doubts that the powers to remedy non-compliance vis-à-vis the intelligence authorities are sufficient, as the 'power' of the Ombudsperson seems to be limited to decide not to confirm compliance towards the petitioner. In the understanding of the EDPB, the (acting) Ombudsperson is not vested with powers, which courts or other similarly independent bodies would usually be granted to fulfil their role" (§102).

2. How a Presidential Executive Order Could Confer These Powers upon FIRA

These passages describe key EU legal requirements for a new redress system. President Biden could satisfy them by issuance of an Executive Order (EO). The American Bar Association has published a useful overview explaining that an EO is a "signed, written, and published directive from the President of the United States that manages operations of the federal government." EOs "have the force of law, much like regulations issued by federal agencies." Once in place, only "a sitting U.S. President may overturn an existing executive order by issuing another executive order to that effect."

As a general matter, the President has broad authority under Article II of the Constitution to direct the executive branch. In addition, the Constitution names the President as Commander-in-Chief of the armed forces, conferring additional responsibilities and powers with respect to national security. The President's powers in some instances may be limited by a properly enacted statute, but we are not aware of any such limits relevant to redress.

Not only does the President enjoy broad executive powers, but he or she also may decide to limit how he or she exercises such powers through an EO which, under the law, would govern until and unless withdrawn or revised. Thus, the President would appear to have considerable discretion to instruct the intelligence community, by means of an EO, to cooperate in investigations and to comply with binding rulings concerning redress.

As with the DOJ regulation, the U.S. Government could commit in the EU/US adequacy arrangement to maintain this EO in force. But how could the EU and the general public have confidence that the EO is actually being followed by intelligence agencies? First, FIRA will be able to assess whether this is the case, backed by an eventual provision in the Presidential EO fixing penalties for lack of compliance with its orders (similarly as legislation in European countries fixes penalties for failure to comply with the orders of equivalent redress bodies – for an example see art. L 833-3 of the French surveillance law). Furthermore, U.S. intelligence agencies are already subject to parliamentary oversight, including on classified matters, by the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence. Oversight might also be performed by other governmental actors that have access to classified materials, such as an agency official called the Inspector General or the Civil Liberties and Privacy Office, or by the independent Privacy and Civil Liberties Oversight Board (whose new Director, Sharon Bradford Franklin, recently confirmed by the Senate, is known for her commitment to strong surveillance safeguards and oversight). Oversight may be performed at the Top Secret or other classification level, with unclassified summaries released to the public.

III. Creating Judicial Review of the Decisions of the Independent Redress Authority

Finally, we turn to whether and how decisions of FIRA may be reviewed judicially. We first explain why judicial review in these circumstances may not be required under EU law. Nonetheless, to minimize the risk of invalidation by the CJEU, we set forth possible paths for creating U.S. judicial review.

1. Reasons that judicial redress is not necessarily required

There are at least four reasons to believe that EU law does not necessarily require judicial redress if FIRA is independent and capable of exercising the quasi-judicial functions described above by adopting decisions binding on intelligence agencies.

First, as explained in our earlier article, Article 13 of the European Convention on Human Rights (ECHR) may be the appropriate legal standard for the European Commission to use in deciding upon the "essential equivalence" of third countries for international data transfer purposes. Article 13 only requires an independent "national authority," thus a non-judicial body could suffice.

Second, the Advocate General in *Schrems II* seemed to give the impression that judicial review should only be required in a case where the redress body itself is *not* independent:

> "in accordance with the case-law, respect for the right guaranteed by Article 47 of the Charter thus assumes that a decision of an administrative authority *that does not itself satisfy the condition of independence* must be subject to subsequent control by a judicial body with jurisdiction to consider all the relevant issues. However, according to the indications provided in the 'privacy shield' decision, the decisions of the Ombudsperson are not the subject of independent judicial review." (§340, emphasis added)

Since FIRA, unlike the Ombudsperson, will not only enjoy independence but also will exercise quasi-judicial functions by adopting decisions *binding* on intelligence agencies, separate judicial redress may not be required.

Third, this is exactly what seems to be happening in practice in EU Member States themselves. FRA noted in its 2017 comparative study on surveillance that, in most European countries, redress bodies are non-judicial bodies. It also observed that such non-judicial remedies appear better than judicial ones, because their procedural rules are less strict, proceedings are faster and cheaper, and non-judicial avenues generally offer greater expertise than judicial mechanisms. Furthermore, FRA found that "across the EU only in a few cases can decisions of non-judicial bodies be reviewed by a judge" (*ibid*., p.114 – and table pp.115-116). Requiring the U.S. to provide judicial redress would thus be more than what exists in many Member States.[5]

Fourth, these observations are even more relevant when one focuses on *international* surveillance. In France, for instance, an individual may file complaints with the Supreme Administrative Court (*Conseil d'Etat*) on the basis of the domestic surveillance law of July 2015. There is no possibility to do so under the international surveillance law of November 2015, however, since that law gives only the CNCTR, an administrative authority, the power to initiate (under some conditions) proceedings in the *Conseil d'Etat* – but does not confer this right directly upon an individual.[6]

Of course, actual practice under Member States law does not necessarily mean that a third country's similar practices meet the "essential equivalence" standard of EU fundamental rights law, since the relevant comparator seems to be European Law standards – not Member States' practices which do not always necessarily meet these standards.[7] Nonetheless, demanding from the U.S. a much more elaborate process than what already exists for international surveillance in most EU Member States might be complicated, particularly if there is an effective independent administrative regime in the U.S. exercising quasi-judicial functions.

2. Ultimate judicial redress will however help ensure meeting CJEU requirements

Despite these indications that European law may not require judicial redress, we acknowledge that the position of the CJEU on this point remains ambiguous.

As indicated in our first article, the CJEU in *Schrems II* expressly used the term "body," giving the impression that an independent national administrative authority (in conformity with the requirements of Art. 13 ECHR) could be enough to fulfill the adjudicatory function. As we explained, this is how the EDPB seems to have read *Schrems II* in its 2020 European Essential Guarantees Recommendations. Long-time EU data protection official Christopher Docksey concurs as well.

However, it is also true that the *Schrems II* judgment contains multiple references to judicial redress. It refers to " the premiss [sic] that data subjects must have the possibility of bringing legal action before an independent and impartial court " (§194); "the right to judicial protection" (*ibid.*); "data subject rights actionable in the courts against the US authorities" (§192); "the judicial protection of persons whose personal data is transferred to that third country" (§190); and "the existence of such a lacuna in judicial protection in respect of interferences with intelligence programmes" (§191). It is not clear whether these statements should also apply (following the Advocate General's logic) to an independent redress body such as FIRA capable of exercising quasi-judicial functions, in contrast to the Ombudsperson examined by the CJEU. Nevertheless, the CJEU judgment might be read as requiring at least some form of ultimate judicial control of a redress authority's decisions. This also appears to be the interpretation of a senior Commission official.

In light of these statements, it would be prudent for the U.S. to provide for some form of ultimate judicial review of FIRA decisions, to increase the likelihood of passing the CJEU test in an eventual *Schrems III* case.

3. A path to ultimate judicial review of FIRA decisions

As we explained in our first article, the U.S. constitutional doctrine of standing poses a major hurdle in creating a pathway to judicial redress. In the 2021 *TransUnion* case, the Supreme Court held that plaintiffs incorrectly identified by a credit reporting agency as being on a government terrorism watch list had not shown the required "injury in fact". This lack of injury in fact, and thus lack of standing, existed even though the underlying statute appeared to confer the right to sue. While one might find this U.S. constitutional jurisprudence unduly restrictive, any new Privacy Shield agreement must take it into account.

There might be, however, another way to provide an individual with judicial redress. An unsatisfied individual could *appeal* to a federal court an administrative disposition of a redress petition on the grounds that FIRA has failed to follow the law. In such a case an individual would not be challenging the surveillance actions of intelligence agencies (for which injury in fact may be impossible to satisfy) as such; instead, the suit would allege the failure of an independent administrative body (FIRA) to take the actions required by law.

As Propp and Swire have written previously, one useful precedent is the U.S. Freedom of Information Act (FOIA), under which any individual can request an agency to produce documents, without first having to demonstrate that he or she has suffered particular "injury in fact". The agency is then required to conduct an effective investigation and to explain any decision not to supply the documents. After the agency responds, the individual may appeal the decision to federal court. The judge then examines the quality of the agency's investigation to ensure compliance with law, and the judge can order changes in the event of mistakes by the agency.

Analogously, a European individual, unsatisfied by FIRA's investigation and decision, could bring a challenge in court. Taking into consideration that FOIA concerns a distinct question, the appeal against FIRA's decisions would be based upon the umbrella U.S. Administrative Procedure Act (APA). The APA provides generally for judicial review of an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Since both a regulation and an Executive Order have the force of law, an APA-based appeal could examine whether the FIRA decision and its implementation was "in accordance with law." Since the APA applies generally, it could operate in these circumstances without need for an additional federal statute. In addition, U.S. federal courts deciding APA-based appeals already have methods for handling classified national security information. For instance, they access classified information under the Classified Information Procedures Act (CIPA).

Including judicial review under the APA would be a good faith effort by the U.S. government to respond to ultimate EU law concerns. However, since the FIRA approach has not been judicially tested, some legal uncertainty concerning standing to bring the APA suit in federal court would remain. FOIA practice provides a good legal basis for meeting the standing requirement through challenging agency action itself, but *TransUnion* highlighted the level of privacy injuries which must be shown to enable a decision in federal court.

Conclusion

In these two articles, we have sought to examine rigorously and fully the requirements of EU law with respect to redress. We also have examined U.S. constitutional law, explaining both the difficulties surrounding some solutions (for instance the problem of standing for judicial redress) and the opportunities created by some precedents (such as the protection offered to independent investigative bodies by decisions of the U.S. Supreme Court).

We are not aware of any other published proposal that wrestles in such detail with the complexity of EU and U.S. law requirements for foreign intelligence redress. We hope that our contribution helps fill this gap and presents a promising path permitting resolution of the "redress challenge" in the EU/US adequacy negotiations.

Much will depend on the details of construction and implementation for this protective mechanism. What our articles contribute is the identification of three fundamental building blocks on which a solid and long-lasting transatlantic adequacy agreement could stand. We have shown that there is a promising way to create, by non-statutory means, an *independent* redress authority and to provide the necessary investigative and decisional powers to respond to redress requests by European persons. We also suggest a way to successfully address the problem of standing and thereby to provide for an ultimate possibility of judicial control. Using these building blocks to create an effective redress mechanism could enable the U.S. and the EU not only to establish a solid transatlantic adequacy regime capable of resisting CJEU scrutiny but also to advance human rights more broadly.

Footnotes

1. In 2020, as discussed here, the Supreme Court addressed the President's removal power in the *Seila Law LLC* case, finding unconstitutional Congress' establishment of independence for an agency head. At the same time, the Court reaffirmed that protections against removal can exist for "inferior officers" (roughly, officials appointed through a civil service process rather than by the President) and for multi-member bodies. Either or both of these categories may apply to FIRA members. In 2021, the Supreme Court, in U.S. v. Arthrex, struck down a system of independent Administrative Patent Judges. The approach in our article would be different since the President here issues an executive order, and thus the President serves as the "politically accountable officer" required by the Supreme Court in *Arthrex*. ↩
2. More specifically, there have been proposals for providing redress for surveillance conducted pursuant to Section 702 FISA, such as here and here. However, an additional"thorny issue is whether *international* surveillance, conducted by US intelligence agencies *outside* the territory of the US on the basis of Executive Order 12333 (EO 12333) should be (or not) part of the adequacy assessment." Although arguments exist under EU law that redress for EO 12333 surveillance might be excluded from the assessment, this article proceeds on the understanding that the current negotiations will only succeed if EO 12333 surveillance is covered as well. We are not aware of any published proposal that would do so, and seek in this article to present such an approach. For example, the proposal here would apply to requests for redress concerning surveillance conducted under EO 12333, such as programs recently declassified by the U.S. government. ↩
3. It appears that terms such as "adjudication" and "court" may be understood somewhat differently in the U.S. compared with the EU, creating a risk of confusion in proposals concerning redress. Under U.S. law, many federal agencies, including the Federal Trade Commission and Department of Justice, routinely

conduct what is called "adjudication." Many federal agencies have Administrative Law Judges, defined by the U.S. government as "independent impartial triers of fact in formal proceedings." By contrast, in Europe, "courts" and "judges" generally exist outside of the Executive. Therefore, our discussion of FIRA avoids words such as "adjudication" that may be understood differently in different legal systems. ↩

4. In the 1954 case, *Accardi v. Shaughnessy*, the Attorney General by regulation had delegated certain of his discretionary powers to the Board of Immigration Appeals. The regulation required the Board to exercise its own discretion on appeals for deportation cases. As noted in *U.S. v. Nixon*, the Supreme Court in *Accardi* had held that, "so long as the Attorney General's regulations remained operative, he denied himself the authority to exercise the discretion delegated to the Board even though the original authority was his and he could reassert it by amending the regulations." ↩

5. For a recent description of the German system, see here by Daniel Felz. ↩

6. This finding was confirmed in a June 2018 decision by the *Conseil d'Etat* following a request introduced in this court by the Member of the European Parliament Sophie In 't Veld (analysis here). The Court also rejected the possibility for the claimant to challenge indirectly an alleged misuse of power resulting from the failure of the chairman of the CNCTR to refer the matter to the Council of State. However, as stated by the CNCTR (here, at 46) this is one of the points appearing in the (no less than) 14 challenges currently pending at the ECHR against the French surveillance laws. ↩

7. See for instance this study by I. Brown and D. Korff arguing that "the EU institutions should stand up for the rule of law and demand the member states and third countries bring their practices in line with those standards" (at 111). ↩