

Civil Liberties in the Digital Environment: Initiatives

Open Society Information Program



1) Protecting the Public Sphere on Private-Sector Platforms

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Opportunity: Much of the new networked public sphere has arisen on privately owned platforms such as Facebook, Google and Twitter. Governance of these spaces, based on private-sector contracts in the absence of established due-process safeguards, is increasingly constraining online freedom of expression, privacy, and other basic rights. There is an urgent need to identify and promote fresh approaches to protecting the rights of users of these platforms. So far, civil society has relied mainly on “name and shame” tactics to hold intermediaries to account. We propose an approach that is novel in this space: to test the application of the European legal framework to challenge these encroachments on human rights.

Insight: While the US legal tradition is not well-suited to holding private intermediaries to account, the European human rights framework is much more promising. Such an approach makes sense even though most global internet companies are US-based. These companies are reluctant to split services between different jurisdictions or to exit the large European market, so new protections for human rights online demanded in Europe are likely to be incorporated into these global platforms. Also, any progress on the legal front will greatly increase the pressure on companies to more thoroughly respect due process of law.

Objective: To strengthen due process protections for users of private-sector internet platforms, by testing the application of European legal frameworks, including human rights and, potentially, competition law.

Strategy: We will work to apply European legal frameworks to determine the extent to which (a) states’ failures to meet their positive obligation to protect free speech can be legally challenged and (b) internet intermediaries, though private in form, can be viewed as public in function, and if so, what obligations derive for these private platforms, given their role in hosting large swathes of the public sphere. Based on the results of these inquiries, we will support efforts to develop and enforce higher standards of protection through litigation and, where feasible, legislative reform. Legislative reform would aim to put intermediaries under public law by requiring them to comply with basic due process requirements when infringing on human rights; it could also take the form of a revised EU Unfair Contract Terms Directive. The work will also include a critical assessment of industry-promoted “fair process” initiatives. Our main tools will be grant-making, advocacy, and possibly litigation. Progress markers will include influential court rulings or legislative instruments that recognize positive duties for the state or for private internet actors.

Risks: We may find that the European legal framework is not robust enough to hold companies to account. Also, better due process protections adopted by Western companies will affect users world-wide, but not users of non-Western companies.

Capacity: In order to implement this line of work, the Information Program can draw on extensive capacity within OSF. We will work with the Justice Initiative, the Media Program, and US Programs to commission research, convene key actors (especially using connections in the European Parliament, together with OSEPI), and engage in litigation. The Information Program will also mobilize grantees such as the Global Network Initiative (a global self-regulatory initiative for tech companies) and the Institute for Information Law at University of Amsterdam (a center of legal excellence on these issues in Europe).

2) Responding to the Snowden Revelations: Creating international standards for foreign intelligence collection

**Initiative by Mort Halperin/DC Advocacy Office, Information Program and US Programs
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I. BACKGROUND

The mass surveillance programs revealed over the recent months have created a unique opportunity to work towards the adoption of multilateral human rights compliant standards for government surveillance conducted by one government against citizens of other countries. Europe and the United States and possibly a handful of other democracies such as Brazil are the target countries for this effort. The objectives are as follows:

1. Achieve increased transparency about national surveillance practices (phase 1)
2. Negotiated agreement of a new standard for foreign intelligence collection (phase 1)
3. Specific reforms/oversight in each country to bring current practices up to the new standard (phase 2)

Why take a multilateral approach? Current legal restrictions and oversight mechanisms of government surveillance in most countries are only concerned with the protection of the rights of each country's own citizens or, as is the case in the US, of all persons within the United States. Also, as the leaked documents indicate, there is substantial cooperation between intelligence agencies, and this cooperation enables the circumvention of restrictions set by national governments. Public outrage over the spying scandal is now driving a global movement towards "technological sovereignty"-- driving a set of proposals to create protected, national information infrastructures. This trend threatens to pull apart the norms and technical standards that support an open, global internet. In order to rebuild trust in the internet as a global infrastructure and avoid its "balkanisation", there is an urgent need to develop and enforce strong multilateral standards that apply to all persons or perhaps all citizens of states accepting agreed upon limitations on government surveillance.

What is the political strategy? Germany, the most influential country in Europe, presents the best opportunity for initiating a reform effort and championing a common standard among EU countries. Germany, in part for historic reasons, has an unusually strong commitment to privacy. The German government has been among the most outspoken in its demands for restrictions on the NSA, particularly in the wake of revelations that the Chancellor was personally targeted for surveillance. Large German technology companies are jumping at the opportunity to declare their American competitors untrustworthy and to demand new regulations guarding data privacy. But Germany must also get its own house in order when it comes to intelligence practices. A jurist and member of the G10 Commission, Germany's equivalent to the US FISA Court, recently argued that Germany is also engaged in mass surveillance and likely violating its constitution by not protecting the privacy of foreigners. The groundswell of public disdain for the NSA is currently being channeled into demands for Germany to offer asylum to Edward Snowden. This outcome is highly unlikely and public pressure could be better channeled into more concrete demands for reforms to surveillance practices. The political power of such calls for reform would have a very strong base of support and could fuel a German-led coalition within the EU that is strong enough to change minds in Washington. Germany has a unique combination of political power in Europe, commercial interests in strengthening its digital economy, and international integrity on issues of data privacy and human rights.

Meanwhile, the coalition of civil liberties and human rights advocates in the US is running up against strong opposition. The political momentum in Washington to extend privacy protections to non-citizens is very limited at this point in time. Current debates focus on reform of surveillance standards only for US citizens (or people located/residing in the US). Yet, there is some understanding in the USG that the international problem must be addressed because of the pressure from US internet companies, the

hypocrisy of intelligence practices that contradict American values, and because of the instability in global Internet governance that threatens a key source of American soft power. This means that there is an opportunity for Europe led by Germany and a global civil society coalition to build an alliance with the US internet industry to pressure the US to commit to multilateral human rights standards for surveillance. A trans-Atlantic rapprochement on these issues could serve as a model for the rest of the democratic world – building on the strength of decades of US-EU cooperation on trade and security to establish concrete reforms. Germany is well positioned to reach out to leading nations in the Global South, including Brazil. The two countries have for example introduced a resolution on Right to Privacy in the Digital Age to the UN General Assembly in early November. The circumstances are ripe for German leadership to link up with parallel movements in Europe and beyond to present a strong and credible alternative to Washington's post-9/11 security mindset.

II. IMPLEMENTATION

ad 1) Achieve increased transparency about national surveillance practices

OSF, in collaboration with other foundations, will need to support national efforts in the US, UK, Germany, Brazil and potentially other countries that seek transparency of the current rules under which surveillance is carried out including the rules, if any, that apply to non-citizen. This will entail support (mostly in the form of grants) for national-level advocacy work. The Council of Europe's aggressive push on the question of transparency will helpfully complement national-level work.

Questions that governments need to clarify include: What are the rules for acquiring material? On what legislation is the collection based? What is the interpretation of the legislation? etc

- ❖ Information Program, US Programs and other interested OSF entities to explore grant support for the UK, Germany, US, Brazil, etc

ad 2) Negotiated agreement of a new standard for foreign intelligence collection

OSF and its partners propose to convene a series of meetings to launch a standard setting process. In order to plan this process and make a first convening as productive as possible, a group of experts that includes Mort Halperin (OSF), Ben Scott (New America Foundation, US and Stiftung Neue Verantwortung, Germany), Ian Brown (Oxford Internet Institute), Mathias Vermeulen (European University Institute) and Ben Hayes (Statewatch) will work to address the following questions ahead of the meeting:

What are the new standards for surveillance that we'd like to advocate for? This will entail a legal and technical analysis of the current state of play and will result in a first draft proposal that will identify standards that are "necessary and proportionate" and provide for effective oversight. The experts will need to propose what these principles mean in terms of expected behaviour, red lines around illegitimate conduct, and alignment of national policies to international standards. The experts will also need to clarify how the propose standards deviate or not from the recently developed "International Principles on the Application of Human Rights to Communications Surveillance".¹

- ❖ Draft TOR for standards paper
- ❖ Stiftung Neue Verantwortung in collaboration with the Oxford Cybersecurity Centre (TBC) and OSF to host a first meeting for civil society and business representatives in February/March

¹ <https://en.necessaryandproportionate.org/text>