

TRANSITION 2020–2021

A Presidential Agenda for Liberty and National Security

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Foreword

American democracy urgently needs renewal. In the coming years, one of the great issues facing the country will be the presidency itself. A half century ago, in the wake of Watergate and Vietnam, laws and rules aimed to check the “Imperial Presidency.” Over the decades those limits eroded and then were finally cast off. The past three years have seen a refusal to honor oversight and a politicization of the executive branch. The president insists the Constitution gives him “the right to do whatever I want.” The abuse of power in Lafayette Park this summer was just the most visible, and most violent, example of shattered norms. And from the administration’s onset, abusive and often unconstitutional power has been wielded against religious minorities and immigrants in a way that has no precedent in the past half century.

In this time of reckoning, a great task must be to reset the system of checks and balances and once again restore the presidency to its rightful place. There must be, as well, an immediate reset of many policies that are driven by racial or religious animus rather than the national interest.

This volume includes recommendations for executive actions and legislation from the Brennan Center for Justice at NYU School of Law. They focus on ending religious and racial profiling and immigration bans driven by the same motives, a new law enforcement focus on the real threat of white supremacist violence, and renewed protection for civil liberties and transparency. It reflects, as well, urgently needed steps to curb abuse of executive powers. A previous Brennan Center volume proposed executive actions to enhance ethics and fight corruption. A forthcoming report will outline legislation and executive actions to end mass incarceration and advance racial justice.

In all of this, Congress must do its part to play its constitutional role. Courts, too, must step up.

But the president can lead, displaying what Alexander Hamilton called “energy in the executive,” this time not to grossly expand presidential power but to restore the office to its rightful role.

We the people have a duty as well: to insist that our leaders commit to the Constitution and make renewal of our democracy not just one issue among many but also a central task for our nation.

Michael Waldman
President
Brennan Center for Justice

Introduction

Our freedoms — freedom to speak, travel, and worship; freedom from intrusive government surveillance; and freedom from invidious discrimination — are the guardians of our democracy. These freedoms are under threat as rarely before in our history. Specious invocations of national security, the failure of Congress to fulfill its role as a coequal branch of government, and a resurgence of overt racism both inside and outside of government are enabling an alarming assault on civil liberties and constitutional limits on executive power. As always, it is minority communities — African Americans, Muslim Americans, immigrants, and others — who are bearing the brunt.

This assault has many fronts. Blanket immigration bans have targeted entire countries based on religion and race. A national emergency declaration, whose sole purpose is the construction of a wall along the southern border that Congress refused to fund, has been in effect for over a year. Military forces and heavily armed federal agents have assembled in the streets of our cities to intimidate those who peacefully protest racial injustice, all while the Department of Justice is systematically deprioritizing the investigation and prosecution of white supremacist violence. Each of these actions targets people of color, painting them as less American than the waning white majority.

These unprecedented measures add to — and build on — several longstanding government practices that undermine civil liberties and burden marginalized communities. Changes in the law and technology have given the government broad, warrantless access to Americans’ communications and other sensitive information. Gaps in racial profiling rules allow border agents, local law enforcement, and other government actors to target people based on their race, nationality, and religion. Excessive government secrecy prevents effective congressional oversight and stymies accountability. Weak legal protections for whistleblowers translate to pink slips and criminal referrals for government employees who expose abuses within the executive branch.

To fulfill this nation’s promise of equality and freedom for all, we must change course. Our country is more secure, not less, when our government welcomes people of all faiths and races; decides whom to investigate and prosecute based on evidence of criminal conduct rather than on a person’s race or beliefs; and operates with transparency, oversight, and accountability. To that end, the president should undertake the following policy changes:

End immigration bans.

The president should

- immediately repeal existing blanket immigration bans, including those against travelers from several majority-Muslim and African countries;

- support legislation that would establish criteria for future decisions to deny entry; and
- put an end to “extreme vetting,” which facilitates discrimination in the issuance of visas and serves as a backdoor ban.

End racial and religious profiling.

The president should

- direct agencies to close the loopholes in their racial profiling guidance that enable profiling based on race, religion, nationality, and other protected characteristics in far too many cases; and
- support the long overdue passage of the End Racial and Religious Profiling Act, which would codify a prohibition on racial and religious profiling.

Mount an effective and targeted response to white supremacist violence.

The president should

- commit his administration to collecting and disclosing the data necessary to determine whether the Department of Justice is adequately responding to white supremacist and far-right violence;
- direct the attorney general to issue a comprehensive strategy to address this growing threat; and
- reject approaches — such as new domestic counterterrorism laws and Targeted Violence and Terrorism Prevention programs — that hold little promise but carry significant risk for the marginalized communities they inevitably target.

Build guardrails for emergency powers.

The president should

- issue a presidential memorandum establishing criteria for declaring a national emergency and support legislation amending the National Emergencies Act to bolster Congress’s role as a check against abuse;

- disclose presidential emergency action documents to relevant congressional committees; and
- issue an executive order placing a heavy thumb on the scales against using military forces for domestic law enforcement, even in those situations where the Posse Comitatus Act does not apply.

End warrantless spying on Americans.

The president should

- direct agencies to overhaul their procedures under the Foreign Intelligence Surveillance Act (FISA) to better safeguard Americans' privacy, and support FISA reform legislation;
- direct agencies to develop policies requiring warrants to obtain certain highly sensitive information, in accordance with *Carpenter v. United States*; and
- ensure that the federal government only supports the development of digital contract-tracing tools if they are effective and accompanied by strong privacy safeguards.

Recommit to national security transparency.

The president should

- issue an executive order targeted at reducing overclassification and streamlining declassification;
- issue a presidential memorandum limiting secret law; and
- strengthen protections for intelligence community whistleblowers by revising Presidential Policy Directive 19, directing the attorney general to revise regulations, and supporting reform legislation.

These changes alone will not ensure the health of our democracy. But they will go a long way toward securing the freedoms for all Americans, regardless of race or creed, that make a robust democracy possible.

I. End Immigration Bans

Background

Blanket bans have become a defining feature of immigration policy. What first started as a ban on the citizens of seven predominantly Muslim countries now prevents more than half a billion people, including a quarter of Africa's population, from coming to the U.S. on equal terms with people from other nations.¹ Under cover of the coronavirus pandemic, sweeping restrictions have been placed on would-be immigrants and temporary workers, among others.²

These bans are driven by prejudice, not proof. The president has made clear that he doesn't like Muslims,³ described African nations as "shithole countries,"⁴ and disparaged those seeking a safe haven in the U.S. as terrorists and criminals.⁵ The bans are also unnecessary. The U.S. already has a robust vetting system for those seeking entry — whether tourists, family members of Americans, or people fleeing war-torn countries.⁶

In fact, the bans actually harm U.S. national security and foreign policy interests by straining our relationships with countries around the globe, as former national security officials from across the political spectrum have pointed out.⁷ And they do immeasurable damage, not only to those seeking entry but also to immigrants here in the United States who are blocked from reuniting with their families and are stigmatized as belonging to an unwanted group.⁸ Indeed, all Americans suffer from the negative impact such bans have on tourism, cross-cultural exchanges, the technology industry, universities, medical institutions, and, ultimately, tax revenues.⁹

The 2017 Muslim ban's pernicious companion is "extreme vetting," which seeks to deter travel to the United States by imposing ever-increasing burdens on people seeking visas. In some cases, these hurdles exceed the requirements to get a top-secret security clearance and delay visa applications for months or years.¹⁰ New rules require applicants to disclose their social media identifiers, allowing the U.S. government to easily track their religious and political views and undertake ideological vetting, an avowed goal of the Trump administration.¹¹ The collection of social media identifiers is now mandatory for nearly all visa applicants, totaling 14 million people annually.¹² Plans are underway to expand the program to sweep in an additional 33 million people, including permanent residents, every year.¹³ Additional social media vetting tools are being used in various ways by the Department of Homeland Security (DHS) and the State Department, with little transparency and minimal safeguards.¹⁴

Like the bans, extreme vetting seeks to close off the United States and inflicts much of the same damage. DHS's inspector general has questioned the efficacy of

pilot programs that employed social media to vet visa applicants, and the department's own assessments show that such vetting is largely ineffective in identifying national security threats.¹⁵ This is hardly surprising in light of consistent empirical findings that social media is highly vulnerable to misinterpretation.¹⁶ Rather than making us safer, collecting social media handles sends the message that the U.S. government will judge those who wish to travel to the country based on the views they express online, undermining our commitment to freedom of speech and association.¹⁷

Solutions

Repeal the immigration bans.

On his first day in office, the president should repeal the Muslim ban and associated restrictions on immigrants, refugees, and asylum seekers, including Presidential Proclamations 9645, 9822, and 9983 and Executive Orders 13769, 13780, and 13815, as well as any implementing memoranda and directives. The president should also repeal Presidential Proclamations 10014 and 10052 and associated guidance, which use the coronavirus pandemic as a pretext for sweeping bans on legal immigration.

Urge Congress to enact the No Ban Act and pledge to sign it into law.

The president should urge Congress to enact the No Ban Act, which passed the House of Representatives with bipartisan support in July 2020.¹⁸ The bill overturns the restrictions on people from majority-Muslim and African countries entering the United States. It also guards against future abuse of Section 212(f) of the Immigration and Nationality Act, the law invoked as authority for the bans and a host of other sweeping immigration restrictions, by expanding antidiscrimination protections and requiring that travel and immigration bans be supported by evidence, narrowly tailored to further specified compelling interests, and subject to review by Congress and the courts.¹⁹

End backdoor bans and ideological profiling.

The administration must eliminate extreme vetting and all other backdoor bans. It should review the changes to visa forms made over the past four years to eliminate requirements that create unwarranted barriers to entry. It should end the State Department's dragnet collection of social media identifiers from applicants for immigrant and nonimmigrant visas, which captures the data of up to 14 million people each year in government databases.

And it should halt plans to expand the program, including DHS's efforts to cover an additional 33 million people per year.

In addition to these measures, the new president should direct the State Department and DHS to conduct a review of all programs that collect and analyze social media for investigative and visa-vetting purposes, including permanent, temporary, and pilot programs. The review should map these programs and assess (1) whether they are necessary and effective; (2) their impact on freedom of speech, religion, and association; (3) the existence and extent of any disparate impact on different commu-

nities; (4) whether these programs have comprehensive and effective rules to protect civil rights and liberties concerns; and (5) the measures in place to ensure that these rules are followed and to ensure accountability for abuses. These audits should be made available to the relevant congressional committees and, to the extent possible, the public. Based on the audit results, the new administration should inform Congress and the public which collection programs will be continued and for what purposes, disclose the evidence of their effectiveness, and specify the civil liberties and nondiscrimination safeguards that ensure that they will not be misused.

II. End Racial and Religious Profiling

Background

It is a cardinal principle of our democracy that all Americans — regardless of race, religion, or ethnicity — should be treated equally by our government. As our law enforcement agencies carry out the enormous responsibility of keeping us safe, they must do so consistent with this principle.

Unfortunately, history is replete with examples of law enforcement failing to act in accordance with our values. Communities of color have long endured discriminatory policing,²⁰ a practice that impedes their ability to freely exercise their constitutional rights and fractures police-community relations. Religious communities too have experienced discriminatory policing, which increased sharply after 9/11.²¹ Law enforcement agencies deliberately target American Muslims for surveillance without any basis to suspect wrongdoing, instead treating these communities as inherently suspicious and monitoring everything from how they practice their religion to where Muslim students congregate.²²

Latinos are treated as illegal immigrants, gang members, or both, with their neighborhoods and workplaces targeted for Immigration and Customs Enforcement raids and surveillance by state and local police.²³ It is now widely recognized, for instance, that gang databases, which use vague and unproven criteria to make determinations about gang membership, contribute to the disproportionate targeting of Black and Latino youth for surveillance, policing, and prosecution.²⁴ The Trump administration has further demonized Latino communities by recasting loosely defined gangs as dangerous “transnational criminal organizations” and using exceptional national security measures to track and prosecute people believed to be associated with them.²⁵

Profiling is a concern in immigration as well. The nondiscrimination policies of DHS and one of its components, Customs and Border Protection (CBP), place no restrictions on the use of religion as a factor in their investigative, screening, enforcement, and other activities, and CBP does not limit its agents’ use of national origin to make decisions about screening and admissions.²⁶ Muslim travelers have long faced intrusive questioning at the border, which accelerated in the aftermath of the Muslim ban.²⁷ More recently, in the wake of the U.S. drone strike that killed Qassem Soleimani, a general in Iran’s Islamic Revolutionary Guard Corps, CBP agents in Washington State launched an operation against U.S. citizens of Iranian origin, stopping them at the border based on their country of birth and inquiring about their religious faith, political beliefs, and more.²⁸

These practices persist despite wide recognition that racial, ethnic, and religious profiling is both wrong and ineffective. Discriminatory assumptions in law enforcement have a terrible cost, both to the individuals who suffer invidious discrimination and to the nation, whose goal of “liberty and justice for all” recedes with every such act of discrimination.

Solutions

Direct federal agencies to update their guidance and close loopholes that enable profiling on the basis of race, religion, national origin, and other protected characteristics, and ensure that proxies are not used in their place.

First, the Department of Justice should amend its 2014 *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity*.²⁹ This guidance is substantially incomplete because it exempts border security, does not cover law enforcement surveillance activities, does not generally apply to state and local law enforcement agencies, and has no provisions for enforcement. In addition to closing these loopholes, the revised guidance should ensure that individuals cannot be targeted based on proxies for race, ethnicity, or religion. For example, there must be significant narrowing and greater scrutiny of how *gang affiliation* is defined in order to prevent specious claims from resulting in overbroad targeting of Black and Latino communities.

In addition, to prevent further discriminatory targeting, the president should direct CBP to issue updated guidance that expressly prohibits discrimination based on nationality where not required by law and direct both CBP and DHS overall to issue guidance that prohibits discrimination in screening on the basis of religion as well as gender, sexual orientation, and gender identity.³⁰

Prioritize passage of the End Racial and Religious Profiling Act (ERRPA).

The president should urge congressional leaders and members to expeditiously enact ERRPA, which has been introduced several times (most recently as part of the George Floyd Justice in Policing Act).³¹ The bill would prohibit profiling “to any degree” of “actual or perceived race, ethnicity, national origin, religion, gender, gender identity, or sexual orientation” for investigatory or enforcement activities.

III. Mount an Effective and Targeted Response to White Supremacist Violence

Background

White supremacist and far-right violence is a persistent problem that regularly produces more U.S. fatalities than attacks associated with foreign terrorist groups like ISIS and Al Qaeda.³² Nonetheless, international terrorism has been the No. 1 priority of the Federal Bureau of Investigation (FBI) for the last two decades,³³ while white supremacist and far-right violence is generally treated as a civil rights matter, which ranks a distant fifth on the bureau's list of priorities.³⁴

Recently, the bureau and the Justice Department claim to have stepped up enforcement of the laws available for prosecuting violent crimes by white supremacists.³⁵ But the FBI remains intent on obscuring the extent of this type of violence, preventing an assessment of whether it is properly applying its domestic terrorism resources to the most violent threats. Congress passed the Hate Crimes Statistics Act, which required the Justice Department to collect national data regarding bias crimes, in 1990,³⁶ but the Justice Department failed to follow this mandate. Instead, it deferred to voluntary reporting by state and local law enforcement through Uniform Crime Reporting, a methodology that has failed to produce reliable data.³⁷ The FBI also has sought to create a new category of threat — “racially motivated” violence — that conflates the demonstrated threat from white supremacists with an imaginary threat from so-called Black identity extremists.³⁸ As a result, the federal government does not even know how many people white supremacists and far-right militants kill across the country each year. And the government has failed to comply with a provision in the National Defense Authorization Act (NDAA) for Fiscal Year 2020 that required it to harmonize across agencies how domestic terrorism is defined and tracked; to disclose how it is classified, prioritized, and investigated; and to produce comprehensive and specific data about individual attempts and incidents of domestic terrorism.³⁹

There is also a risk that efforts to combat white supremacist violence will repeat the mistakes of the war on terror, which gave rise to ineffective programs that broadly targeted communities of color, especially Muslims, as well as protesters and activists. Some members of Congress, for instance, are pushing to create a new crime of domestic terrorism.⁴⁰ No such law is needed. The FBI already has dozens of federal statutes at its disposal to prosecute domestic terrorism cases, including terrorism, civil rights, violent crimes, and organized crime statutes.⁴¹ Domestic terrorism legislation would

simply give the FBI another tool to aggressively target disfavored communities, including racial and ethnic minorities and protest movements.

DHS's Targeted Violence and Terrorism Prevention (TVTP) programs similarly do more harm than good. They are explicitly built on failed countering violent extremism (CVE) initiatives that have almost exclusively targeted Muslim communities, reflecting and reinforcing false stereotypes about their proclivity for violence.⁴² There is no one-size-fits-all policy fix to “targeted violence,” which even DHS concedes is an insufficiently specific term, with working definitions sweeping in everything from workplace violence to a large-scale terrorist attacks.⁴³ Moreover, there is no way to reliably predict whether an individual will commit a violent act.⁴⁴ TVTP programs thus produce little value but have significant downsides: they disproportionately target marginalized communities and unjustifiably cast suspicion on the most vulnerable members of society.⁴⁵

Solutions

Require the Department of Justice and the FBI to expeditiously collect and publish information on white supremacist and far-right violence and develop a strategy for addressing this threat as a matter of priority.

The president should direct the Department of Justice and the FBI to expeditiously comply with all legal requirements to collect, track, and disclose information relating to white supremacist and far-right violence and how the government combats such violence, including the requirements set forth in the Hate Crimes Statistics Act and the NDAA for FY 2020. The president also should direct the development of a strategy to combat white supremacist and far-right violence, which should include concrete actions to ensure that the FBI investigates and prosecutes these crimes as a matter of priority.

Reject counterterrorism approaches that are not supported by empirical evidence and create risks for communities of color.

The president should make clear that he intends to veto any bill creating a new crime of domestic terrorism. In addition, he should end the Department of Homeland Security's CVE and TVTP programs.

IV. Build Guardrails for Emergency Powers

Background

The actions of the Trump administration have underscored the dangers of our current legal framework for emergency powers, which grants broad powers to the president without sufficient checks and balances. Under the National Emergencies Act of 1976 (NEA),⁴⁶ the president has nearly unlimited discretion to declare a national emergency, and such a declaration unlocks enhanced powers contained in more than 100 provisions of law.⁴⁷ The act's legislative veto provision, which was meant to guard against abuse by allowing Congress to terminate emergency declarations with a concurrent resolution, was held unconstitutional by the Supreme Court in 1983.⁴⁸ Accordingly, to terminate an emergency declaration, Congress has to pass a law by a veto-proof supermajority — a nearly impossible feat in today's hyperpartisan environment.

President Trump has taken advantage of this state of affairs. He declared a national emergency, though there was none, to secure funding for a wall along the southern border after Congress refused his budget request.⁴⁹ Congress twice voted to terminate the emergency but was stymied by the president's vetoes.⁵⁰ The president also declared a national emergency to impose economic sanctions on International Criminal Court prosecutors and staff, in retaliation for the court's investigations into alleged post-9/11 war crimes by U.S. personnel.⁵¹ He used emergency declarations to ban the Chinese-owned apps WeChat and TikTok⁵² — a move that has been blocked by a federal court because of the harm it would inflict on Americans' First Amendment rights.⁵³ And he has threatened to declare national emergencies to impose tariffs on Mexico⁵⁴ and to order U.S. companies out of China.⁵⁵

In addition, recent reports have drawn attention to the relatively unknown phenomenon of presidential emergency actions documents (PEADs).⁵⁶ These are unsigned executive orders, proclamations, or messages to Congress drafted in anticipation of a range of emergency scenarios. They were originally devised by the Eisenhower administration for use in the event of a nuclear attack on the United States and have been updated by both Republican and Democratic administrations since then. While advance planning for emergencies is laudable, these documents are problematic in at least two respects. First, various official sources indicate that PEADs, at least in the past, have purported to authorize unconstitutional measures such as the presidential suspension of habeas corpus, establishment of martial law, detention of persons inside the United States who are deemed dangerous, and general search warrants. Second (and relatedly), the docu-

ments are not shared with the relevant congressional oversight committees.⁵⁷

Finally, President Trump's actions have highlighted shortcomings in the law governing the use of military personnel to police protests. He threatened to invoke the Insurrection Act to deploy active-duty federal troops during the mostly peaceful protests that followed the police killing of George Floyd.⁵⁸ While such an invocation would clearly have been inappropriate, the act itself, with its antiquated and vague language,⁵⁹ places few constraints on the president. In addition, the governors of eleven states deployed their National Guard units to Washington, DC, under a provision of law (32 U.S.C. § 502) that authorizes federally funded training exercises. Although nominally under the command and control of the state governors, they in fact acted at the direction of the president and the secretary of defense,⁶⁰ who were exploiting poorly drafted language in the statute to evade the restrictions of the Posse Comitatus Act on the federal deployment of troops for law enforcement purposes.⁶¹

Solutions

Issue a presidential memorandum establishing criteria for declaring national emergencies, and support legislative reform.

The president should issue a memorandum establishing criteria for declaring a national emergency. Specifically, he should commit to (1) declaring emergencies only when unforeseen circumstances require immediate action to prevent grave harm to public safety or other crucial national interests; (2) *not* declaring a national emergency to take any action for which Congress has withheld support or funding; and (3) seeking congressional approval, in the form of a joint resolution, for any use of emergency powers (other than those authorized by the International Emergency Economic Powers Act, which presents unique considerations⁶²) that extends beyond 30 days.

In addition, the president should commit to working with Congress to enact bipartisan legislation, such as the ARTICLE ONE Act,⁶³ that would require presidential national emergency declarations to expire after 30 days unless Congress passes a joint resolution of approval.

Disclose presidential emergency actions documents to Congress, and support legislation requiring such disclosure.

The president should share extant PEADs with relevant

congressional committees and should do the same for any new or revised PEADs created during his administration. He should also support the enactment of legislation, such as Sen. Edward J. Markey's REIGN Act, to make such disclosure mandatory.⁶⁴

Issue an executive order and a presidential memorandum limiting the domestic deployment of the military, and support legislative reform.

The president should issue an executive order and a presidential memorandum limiting deployments of the military under the Insurrection Act and Title 32. The president should commit to invoking the Insurrection Act only in cases of sustained violence or to enforce civil rights laws, and only in circumstances where the states cannot or will not address the problem. When invoking the act, the pres-

ident should provide detailed explanations and plans for deployment (including an end date) to Congress. The president should also commit that National Guard units will not be used for law enforcement purposes when deployed for a federal mission (excluding major disaster relief operations) under 32 U.S.C. 502(f).

The president should support legislative reform of domestic deployment authorities, including Insurrection Act reform (consisting of tighter criteria for deployment, enhanced reporting to ensure that these criteria are met, and a requirement for congressional approval after a short time period)⁶⁵ and reform of 32 U.S.C. 502(f) to prohibit the National Guard from engaging in law enforcement activities when pursuing a federal mission other than major disaster relief (along the lines proposed by Sen. Tom Udall and Rep. George McGovern).⁶⁶

V. End Warrantless Spying on Americans

Background

Warrants are one of the most basic safeguards of American democracy, regarded by the founders as critical barriers to government overreach and guardians of individual liberty.⁶⁷ They keep the government out of our private affairs unless there is both a compelling need and court supervision, protecting dissent and free speech as well as the privacy of political, religious, and social activities.

But the law has not kept pace with changes in technology, and in some cases it has actually moved in the wrong direction. As a result, the protections of the Fourth Amendment, and the constitutional rights secured by those protections, are steadily eroding.

The Foreign Intelligence Surveillance Act (FISA),⁶⁸ which was intended to ensure the protection of Americans' constitutional rights when the government conducts foreign intelligence surveillance, has turned into a rich source of warrantless access to Americans' communications and other highly sensitive information. Under Section 702, an authority meant to target foreigners overseas, Americans' communications are swept up in massive amounts — and the FBI routinely searches for and reads these communications without probable cause or a warrant.⁶⁹ The FBI also obtains extremely revealing information from telecommunications companies, financial institutions, and other third parties⁷⁰ — sometimes without any court order⁷¹ — based on a low “relevance” standard.

Even in ordinary criminal investigations, the government has warrantless access to highly sensitive personal information. This is a result of the so-called third-party doctrine, the notion that information we share with third parties (such as libraries, doctors, or banks) is not truly private.⁷² This decades-old doctrine is ill-suited to the digital age, in which almost every action we take leaves a trail of digital bread crumbs stored with third parties. Recently, in *Carpenter v. United States*, the Supreme Court clarified that the third-party doctrine is not absolute and cannot be mechanically applied to novel forms of surveillance; in that case, the acquisition of historical cell-site location information.⁷³ The Court's reasoning in *Carpenter* would apply to many other modern surveillance practices (such as the collection of Internet search and web browsing records), but it could be years before the Court addresses those, by which time entirely new practices might have been developed. Americans' Fourth Amendment rights should not be put on indefinite hold; the president and Congress should step in now.

Finally, the spread of Covid-19 has opened the door to new forms of untested but intrusive surveillance and the accumulation of vast stores of health and location data,

with insufficient attention being paid to whether the proven benefits outweigh the privacy risks.⁷⁴ Through common cell phone apps, unregulated private companies collect location information, which they can then sell to government agencies or other buyers.⁷⁵ Some states have also rolled out cell phone apps to track people's movements or proximity to others to help with contact tracing.⁷⁶ While the data sets these apps generate may be useful in tracking population-level trends, they can also reveal sensitive individual-level information, such as whether someone was at a protest or the nature of one's associations.⁷⁷ Nonetheless, public health authorities are collecting data in unprecedented quantities, with little transparency about how this information is being used and the entities with which it might be shared.⁷⁸ The involvement of private companies such as Palantir adds another layer of opacity and risk.⁷⁹ The law provides minimal safeguards for the use and sharing of this information, as the United States lacks a robust and comprehensive regime to protect data privacy.⁸⁰

Solutions

Support FISA reform, and implement administrative changes in the interim.

The president should work with Congress to overhaul FISA. Section 702 surveillance, which takes place without a warrant, should be limited to foreign powers or their agents and should occur only when the primary purpose is acquiring foreign intelligence. The FBI and other agencies should be required to obtain a warrant to search Section 702 data for Americans' information. Any unreviewed information about Americans should be deleted after three years. Under the Section 215 and pen register/trap-trace authorities, the targets again should be limited to agents of foreign powers. And the law should specify categories of information, such as call detail records, that cannot be obtained with national security letters (which involve no judicial approval or oversight). Pending legislative changes, the president should direct agencies to revise their internal procedures to implement these same measures as a matter of policy.

Require a warrant for federal agencies to use certain surveillance technologies and techniques, and incentivize police departments to do the same.

The president should work with Congress to extend warrant protections to situations in which the government seeks location data or other sensitive information

from modern technologies including cell phones, smart cars, body-worn technologies, and smart-home devices. The legislation should also require a warrant to obtain Internet search and web browsing records. Pending legislation, the president should direct federal agencies to obtain a warrant when accessing this type of information.⁸¹ Moreover, the government should put in place mechanisms, including funding conditions and technical assistance, that incentivize state and local police departments to adopt similar policies and make those policies easily available to the public.⁸²

Ensure that the collection and use of public health information is effective, narrowly tailored, and protective of privacy.

If digital tools are established to be useful for contact tracing, the administration should only support those that are voluntary, do not track sensitive location information, and do not centralize data.⁸³ The president, working with Congress where necessary, must ensure that any individually identifiable or aggregated sensitive data obtained for public health purposes, whether through an app or other means, remains confidential and out of the hands of law enforcement, immigration, and security agencies.⁸⁴ The president should also build on the Obama administration's efforts to develop a comprehensive legal regime to protect data privacy in the United States.⁸⁵

VI. Recommit to National Security Transparency

Background

Intelligence agencies have long been mired in a culture of secrecy. A holdover from the Cold War, this reflexive default to secrecy is harmful to national security today.⁸⁶ Combating modern threats often requires broad and quick sharing of threat information across the government and with private partners.⁸⁷ Perfectly securing digital data against hacking or insider theft is next to impossible, making secrecy a weak defense.⁸⁸ And as the intelligence community itself recognizes, the trust and support of the American public are vital to its work.⁸⁹

The Obama administration learned this lesson when Edward Snowden leaked information about NSA surveillance programs in 2013. The administration responded with a concerted effort to bring more transparency to the operation of intelligence agencies. It issued a set of principles to guide the disclosure of intelligence-community information.⁹⁰ It declassified and released a significant volume of information about intelligence policies and practices, along with many Foreign Intelligence Surveillance Court opinions and the intelligence community directives that serve as regulations for intelligence agencies.⁹¹ It issued yearly statistical reports on the use of its national security authorities (primarily under FISA).⁹²

The Trump administration has taken a very different approach. Although it has continued to release statistical transparency reports and significant Foreign Intelligence Surveillance Court opinions (disclosures that are now required by law⁹³), it has shut down transparency on national security matters wherever it can. For instance, it reneged on a promise by the Obama administration to release an estimate of how many Americans' communications are swept up in FISA Section 702 surveillance.⁹⁴ It classified and redacted previously public information about Afghan security forces.⁹⁵ It revoked President Obama's executive order establishing reporting requirements for civilian casualties of U.S. lethal operations overseas.⁹⁶ And it recently ceased in-person briefings of congressional committees on election security.⁹⁷

The president should recommit to the principles of intelligence community transparency and build on the progress begun under the Obama administration. He should tackle some of the stubborn secrecy problems that still remain. Overclassification continues to be a major concern, with petabytes of classified information — a volume that overwhelms our overly bureaucratic declassification system — being generated each year.⁹⁸ There is still a significant epidemic of secret law, including classified agency rules and binding legal interpretations.⁹⁹ And the patchwork of legal protections for intelligence

community whistleblowers¹⁰⁰ continues to serve more as a trap than a safeguard, exposing those who perform this vital service to official retaliation and even criminal prosecution.

Solutions

Revise the executive order on classification.

The president should issue a revised order on classification that adds to the reforms included in President Obama's order,¹⁰¹ with an eye toward reducing overclassification and expediting declassification. It should include the following key provisions: (1) the establishment of a White House–led commission of senior agency officials tasked with narrowing the criteria for classification; (2) a definition of “intelligence sources and methods”; (3) a requirement to declassify or create unclassified summaries of rules or binding legal interpretations; (4) the implementation of an auditing system to facilitate accountability for repeated or intentional overclassification; (5) authorization for the National Declassification Center to declassify records at 25 years without referral to agencies with equities; (6) creation of a system for declassifying information classified for less than 25 years; (7) establishment of an expedited review track under Mandatory Declassification Review for records of significant current public interest; and (8) guidelines for the next Fundamental Classification Guidance Review.¹⁰²

Issue a presidential memorandum on secret law.

The president should issue a presidential memorandum establishing principles and practices to rein in secret law. The memorandum should include the following key provisions: (1) the establishment of a standard higher than generalized harm to national security for classifying rules or binding legal interpretations (to be incorporated into the new executive order on classification); (2) a requirement that agencies share all rules and binding legal interpretations with Congress, the courts (in relevant cases), and internal oversight bodies; (3) the imposition of a time limit on withholding rules or binding legal interpretations from the public, to prevent indefinite secret law; and (4) a requirement that each agency produce a public index listing all of its nonpublic rules and binding legal interpretations by date, general subject matter, and any other information that can be made available.¹⁰³

Strengthen administrative provisions and support legislative reform to ensure protection for intelligence community whistleblowers.

The president should amend Presidential Policy Directive 19, issued by President Obama, to clarify that whistleblowers may report protected disclosures directly to members of Congress and to require that agency heads comply with corrective actions recommended by the inspector general panels that review reprisal complaints. The revised directive should also include stronger protections against security clearance retaliation across the entire U.S. government and specifically prohibit retaliatory investigations of whistleblowers. And it should explicitly bar all executive branch officials from breaching the confi-

dentiality of any government whistleblower.¹⁰⁴

With respect to FBI whistleblowers, who are subject to a different legal regime, the president should direct the attorney general to revise Justice Department regulations to improve the internal process for adjudicating FBI whistleblower reprisal claims by authorizing administrative law judges to review these cases using Administrative Procedures Act standards and publishing their decisions.¹⁰⁵

The president should also support legislation that codifies these improvements and ensures that intelligence community and FBI whistleblowers have access to federal courts to vindicate their rights once internal administrative measures have been exhausted.¹⁰⁶

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ABOUT THE BRENNAN CENTER'S LIBERTY AND NATIONAL SECURITY PROGRAM

The Brennan Center's Liberty and National Security Program works to advance effective national security policies that respect constitutional values and the rule of law, using research, innovative policy recommendations, litigation, and public advocacy. The program focuses on reining in excessive government secrecy, ensuring that counterterrorism authorities are narrowly targeted to the terrorist threat, and securing adequate oversight and accountability mechanisms.

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