

KNIGHT
FIRST AMENDMENT
INSTITUTE at
COLUMBIA UNIVERSITY

A First Amendment Agenda for the New Administration

December 2020

When Joe Biden is inaugurated in January as the 46th president of the United States, his administration will confront a host of monumental challenges relating to the freedoms of speech and the press. The massive influence that technology platforms exert over the flow of information and ideas, the aggregation of vast amounts of personal data in government and private hands, the proliferation of spyware and its exploitation by authoritarian and other rights-abusing regimes, algorithmic discrimination, the scourge of disinformation—each of these presents urgent questions relating to our system of free expression. Addressing these questions will require sustained attention by the new administration, Congress, and the courts.

But there are steps the incoming Biden administration can take on its own, in its earliest days, to reverse, roll back, revise, or improve a range of executive branch practices and policies that are now undermining First Amendment protections and, in many cases, weakening our democracy. Here are 12 actions that the new administration should put at, or near, the top of its list.

1. Narrow or withdraw policies that unconstitutionally restrict public servants from participating in policy debates.

Over the past four years, several federal agencies, including the Centers for Disease Control and Prevention and the Executive Office of Immigration Review, imposed or expanded speech restrictions on their employees. Some polices explicitly prohibit employees from speaking on matters of public concern even in their personal capacities. These policies violate the free speech rights of the employees and deprive the public of access to critical information and insights. The Biden administration should narrow or withdraw these policies.

2. Routinely publish White House visitor logs.

Reversing a policy adopted by the Obama administration, the Trump administration refused to publish logs disclosing the identity of visitors to the White House and fought in court against their release under the Freedom of Information Act. The public is entitled to know who has access to the administration and its decision makers. President-elect Biden has already announced that he will resurrect the Obama administration's policy. His administration should also enter into a memorandum of understanding with the Secret Service, which controls the White House visitor logs, making clear that the logs are subject to the Freedom of Information Act.

3. Impose new limits on the surveillance of journalists

Although the Department of Justice has adopted news media guidelines meant to limit journalists' exposure to certain investigatory tools like subpoenas, warrants, or court orders, the Biden administration will inherit a legal framework that does not go far enough to protect press freedom. The guidelines fail to define who qualifies as a "member of the news media" and do not restrict the surveillance of journalists under national security authorities. The Biden administration should disclose the criteria the Justice Department uses to determine who is protected under its guidelines as well as under secret FBI guidelines governing the use of national security tools against the news media. It should annually disclose the number of times the government has used national security author-

ities to target news organizations and journalists. And it should impose new limits on the use of secret surveillance tools in leak investigations.

4. Rescind President Trump's executive order directed at social media platforms.

On May 28, 2020, President Trump issued an executive order directing the Department of Justice, the Federal Communications Commission, and the Federal Trade Commission to explore options to narrow legal protections for social media companies. The order, released two days after Twitter appended fact-checking labels warning of inaccuracies in a tweet the president posted alleging widespread fraud in mail-in voting, targeted Section 230 of the Communications Decency Act in particular—a provision that protects technology platforms from liability for content posted by their users. There is a legitimate debate to be had about whether Section 230 should be amended, and, if so, how. But President Trump's executive order was not a good faith effort to engage this debate; it was an effort to retaliate against companies that had exercised their First Amendment rights. President Biden should rescind the order.

5. Publish the Office of Legal Counsel's final legal opinions as a matter of course.

The Justice Department's Office of Legal Counsel issues legal opinions that bind executive agencies. The OLC's determinations are far-reaching, effectively determining federal policy and practice in areas ranging from government surveillance and covert operations to health care and social scurity. Although the Freedom of Information Act requires the OLC to proactively publish final opinions and statements of law and policy, the OLC in fact releases its opinions very selectively and most never see the light of day—which means that the OLC is slowly creating an immense body of secret law. The Biden administration should immediately order the OLC to publish its final, written opinions on an ongoing basis, redacting the opinions only as necessary to protect classified information or other material exempt from disclosure under FOIA. It should also instruct the OLC to conduct a systematic review of all unpublished prior written opinions, with the presumption that all such opinions should be released.

6. Require a warrant for searches of electronic devices at U.S. borders.

More than a decade ago, Customs and Border Patrol and Immigration and Customs Enforcement adopted policies allowing officers and agents to search travelers' electronic devices—including laptops, phones, and tablets—without having to show any suspicion of wrongdoing. Since then, the frequency of electronic device searches at the border has skyrocketed, with CBP conducting almost 41,000 searches of electronic devices in fiscal year 2019. These warrantless and suspicionless searches violate both the First and Fourth Amendments. The Biden administration should immediately withdraw current ICE and CBP directives authorizing federal agents to conduct these searches and issue new rules that prohibit agents from searching electronic devices without individualized suspicion and judicial authorization.

7. Rescind social media registration requirements for travel and immigration applicants.

Since May 2019, virtually all applicants for U.S. visas have been required to register with the State Department the social media handles they've used over the previous five years. The information the government collects through the registration requirement can be retained indefinitely in federal government files and disseminated to state, local, and foreign governments. Recently, the Department of Homeland Security proposed extending the same registration requirement to nearly 30 million applicants for other travel and immigration benefits each year. The registration requirement imposes unjustifiable burdens on the expressive and associational rights of visa applicants, as well as on the rights of U.S. citizens and residents who communicate and associate with them. The Biden administration should rescind the State Department's social media registration requirement and reject proposals to extend the requirement.

8. Rescind President Trump's executive order on diversity training.

On September 22, 2020, President Trump issued an executive order purporting to "combat … race and sex stereotyping." The executive order prohibits federal employees from teaching or promoting certain concepts during diversity and inclusion trainings and requires federal contractors to certify that they won't use workplace trainings that teach those concepts. The order is widely understood to target discussions referencing or drawing on critical race theory, which President Trump has attacked as a "Marxist" and "horrible" doctrine. This kind of viewpoint-based discrimination in the awarding of federal contracts is a blatant violation of the First Amendment. President Biden should rescind President Trump's order.

9. Disclaim the use of the Espionage Act for the prosecution of journalists, sources, and publishers.

Both the Bush and Obama administrations relied on the Espionage Act to prosecute government insiders accused of providing sensitive information to the press. The Trump administration continued this trend, charging six individuals for disclosing information on matters such as possible war crimes committed in Afghanistan, racially discriminatory investigative practices within the FBI, and Russian interference in the 2016 election. It also charged Wikileaks founder Julian Assange under the Act, in the first use of the Act against a publisher. The use of the Espionage Act in these cases raises profound First Amendment concerns and threatens journalism that is crucial to our democracy. The Biden administration should reserve the Espionage Act for cases of classic espionage, and it should affirmatively disavow the use of the Act for the prosecution of journalists, sources, and publishers.

10. Reform the prepublication review system.

The prepublication review system, which requires millions of current and former employees of federal agencies to submit writings for official review and potential censorship before publication, is broken. Submission and review standards are vague and overbroad; long delays are the norm; and censors' decisions are too often arbitrary, unexplained, or politically driven. The dysfunction of the prepublication review system has far-reaching effects, as the ongoing dispute over former National Security Advisor John Bolton's book has highlighted. Reform is long overdue. The Biden administration should issue an executive order that narrows submission and review criteria, and establishes new procedural mechanisms to prevent abuse and guarantee timely review.

11. Rescind President Trump's executive order on the International Criminal Court.

In June 2020, President Trump issued an executive order imposing sanctions on officials associated with the International Criminal Court. A vindictive response to the ICC's ongoing investigation of war crimes committed during the nearly two-decade-long conflict in Afghanistan, the order gives the Secretaries of State and Treasury author-

ity to deny visas to, and freeze the assets of, foreign citizens who have supported or participated in the ICC's investigations. It also bars others—including Americans—from transacting with the foreign citizens whose assets the government has frozen. The order exceeds the president's statutory authority and violates the First Amendment by impeding U.S. citizens and residents from engaging in protected advocacy and association. President Biden should rescind the order.

12. Release the Director of National Intelligence's report on the murder of journalist Jamal Khashoggi.

The October 2, 2018 murder of journalist Jamal Khashoggi in the Saudi Arabian consulate in Istanbul was one of the most brazen, brutal human rights violations in recent memory. But instead of supporting international and domestic efforts to hold Khashoggi's murderers to account, the Trump administration ran interference for the Saudi regime, refused to release information on whether U.S. intelligence agencies complied with a legal duty to warn the journalist that his life was in danger, and suppressed a report from the Office of the Director of National Intelligence assessing who ordered and carried out the murder. President Biden should order the ODNI to create an unclassified version of the report and release it.