

The Costs of 9/11's Suspicionless Surveillance: Suppressing Communities of Color and Political Dissent

Faiza Patel

Faiza Patel (@FaizaPatelBCJ) is the Co-Director of the Liberty and National Security Program at the Brennan Center for Justice at NYU School of Law. She formerly was the Senior Policy Officer at the Organization for the Prohibition of Chemical Weapons. She is a member of the editorial board of *Just Security*.

Domestic intelligence programs have grown inexorably since 9/11, born out of fear of terrorism and sustained by laws and policies that allow government agencies to amass more data about more Americans in an effort to ferret out the few who might do harm. Often these programs target Muslim communities in the United States, treating them as inherently suspect because of their faith. The same domestic intelligence programs and authorities have provided ready tools for suppressing political dissent and racial justice movements, which are viewed as threatening the existing sociopolitical order.

As we mark two decades since these changes became part of the legal landscape, it is time to rethink whether the nation is well served by a domestic intelligence system that can so easily be diverted from legitimate purposes. While the current structure may seem firmly entrenched after 20 years, it is not immune to reform. In fact, the existing system is itself a departure from the framework created in the 1970s to correct serious abuses. It can and must be reformed.

America's Dark Domestic Surveillance History

The evolution of two federal agencies – the Federal Bureau of Investigation (FBI) and the National Security Agency (NSA) – shows how expansive domestic surveillance has become the norm. In the 1970s, the Church Committee's investigation documented how these agencies (and others) had abused the trust of the American people to spy on ordinary Americans, such as those protesting against the Vietnam War and the leaders of the civil rights movement.

These findings reshaped the work of the FBI. While the committee's recommendation to establish a statutory framework for the Bureau was preempted by the issuance of internal guidelines by then-Attorney General Edward Levi, the rules he issued incorporated many of the Church Committee's recommendations. Most importantly, they required that "domestic security investigations be tied closely with the detection of crime" and incorporated "safeguards against investigations of activities that are merely troublesome or unpopular."

As for the NSA, in response to the Church Committee's investigation, Congress subjected the NSA's domestic surveillance programs to case-by-case judicial review by creating the Foreign Intelligence Surveillance Court (FISC). For the government to conduct surveillance on Americans, it had to convince the FISC that its primary purpose was to collect foreign intelligence and that it had probable cause to believe that the target of surveillance was an agent of a foreign power and had some link to criminal activity.

While by no means without flaws and blind spots, these reforms recognized the risks of domestic spying, placing firm constraints based on criminal suspicion which served to protect Americans' ability to speak and organize freely.

The Post-9/11 Domestic Surveillance System

Since 9/11, however, these strictures and the practices they generated have been rolled back and the abuses they were meant to prevent proliferated, teaching us once again why we need stricter limits on domestic intelligence.

I have previously written about how after 9/11, the Justice Department progressively loosened the FBI's guidelines for investigations to allow agents to open investigations absent suspicion of criminal activity and with minimal supervisory controls. This allowed for racial, ethnic, and religious profiling, including of Muslims, Chinese Americans, and racial justice protesters. To this day, the FBI continues to treat Muslims as suspicious and warranting surveillance even where there is no indication of criminal or terrorist activity – a trend spanning both Republican and Democratic administrations. It has tried to "map" Muslim communities and keep tabs on Muslims' lawful speech and religious observance by infiltrating mosques. The threat of immigration consequences is dangled to recruit Muslims to spy on their friends and neighbors. American Muslims traveling home from overseas trips are subjected to intrusive questioning about their faith, the mosques they attend,

and even their views on particular religious scholars. These practices are not an aberration. While the Justice Department has issued guidelines that purport to ban profiling on the basis of race, religion and ethnicity, it still allows for consideration of those characteristics in certain national security and border investigations.

In the aftermath of 9/11, the NSA has followed a similarly problematic path. It has spied on Americans without actual suspicion. Using an extraordinarily broad interpretation of Section 215 of the Patriot Act blessed by the FISC, the agency accumulated the phone records of millions of Americans. Once the extent of the program became public knowledge, Congress acted to limit its reach in 2015. But Congress has continued to allow the NSA to maintain President George W. Bush's warrantless wiretapping program. Section 702 of the FISA Amendments Act, which passed in 2008, allows the NSA to collect hundreds of millions of electronic communications each year. While the surveillance must be targeted at foreigners overseas, massive amounts of Americans' emails, phone calls, and text messages are scooped up in the process. The FISC has no role in reviewing whether this collection is justified; it is relegated to reviewing the NSA's rules for the program. Indeed, collecting foreign intelligence doesn't even need to be the "primary" purpose of collection; the government only needs to certify that acquisition of foreign intelligence is a significant purpose of the overall program. Despite the broad leeway afforded by the law, the government has consistently failed to follow rules meant to minimize its collection of purely domestic communications and remedy Fourth Amendment violations as directed by the FISC.

Information about Americans warrantlessly collected by the NSA under Section 702 can be accessed by the FBI for use in purely domestic criminal investigations. After years of advocacy by civil society, Congress imposed some modest requirements on these backdoor searches. The Bureau must follow "querying procedures" approved by the FISC; obtain an individualized order from the FISC for reviewing communications in cases that don't relate to national security; and keep track of each U.S. person query it conducts. The FBI, however, has not complied with even these minimal requirements, preferring to freely avail itself of the fruits of warrantless surveillance.

While little is publicly known about who is targeted by these programs, the NSA too has often trained its sights on Muslims. Documents revealed by NSA whistleblower Edward Snowden show that the FISC authorized surveillance of five Muslim men all of whom had led highly public, outwardly exemplary lives. They included Faisal Gill, a military lawyer who served as a high-level official in the White House and the

Department of Homeland Security under President Bush; Asim Ghaffoor, another attorney and former Congressional staffer who represented Muslim clients; Agha Saeed, a Muslim activist and organizer; Nihad Awad, the co-founder and leader of the Council of American Islamic Relations, the country's largest Muslim civil rights organization; and Hooshang Amirahmadi, a professor who advocated against sanctions on Iran. While it is possible that the government happened to have information suggesting these men were involved in criminal activities, a more likely explanation is the overall suspicion of Muslims that is the hallmark of the post-9/11 era.

The expansive post-9/11 notion of “homeland security” – manifested most concretely in the creation of the Department of Homeland Security (DHS) – underpins suspicionless surveillance. DHS itself, “as part of its regular operations, conducts invasive physical searches of millions of Americans and their belongings each week without any predicate.” These programs, according to the former general counsel of the agency, raise such serious privacy and due process concerns that those raised by homeland security information collection by the NSA “pale by comparison.”

The fusion center network supported by DHS is yet another fount of domestic intelligence. Police departments' reports of supposedly “suspicious activity” are shared with a range of federal, state, local, and tribal law enforcement officials through these centers. According to a two-year-long, bipartisan Senate investigation published in 2012, fusion centers have yielded few counterterrorism benefits, instead producing shoddy reports consisting of “predominantly useless information.” Often, the reports singled out Muslims engaged in normal activities for suspicion: a DHS officer flagged as suspicious a seminar on marriage held at a mosque, while a north Texas fusion center advised keeping an eye out for Muslim civil liberties groups and sympathetic individuals and organizations.

Political movements, too, especially those powered by people of color, are often viewed as threats, and the domestic intelligence infrastructure created in the last decades has been turned against them. The FBI, DHS, and local police have spied on the Black Lives Matter movement, immigration activists, and environmental campaigners. As I have previously explained:

In a move reminiscent of the J. Edgar Hoover era, the Bureau has racial justice protesters in its crosshairs. As early as 2015, the Department of Homeland Security monitored the social media posts of Black Lives Matter activists. Just nine days before the deadly 2017 white supremacist rally in Charlottesville, the FBI issued a report conjuring up a “Black Identity Extremist movement” out of a handful of unrelated acts of violence and warned law enforcement agencies across the country of the threat posed by Black activists protesting police violence.

As for immigration activists, DHS officers in New York kept track of protests against then-President Donald Trump’s anti-immigrant agenda through Facebook. They worked with other federal agencies and the Mexican government to create a surveillance target list of activists and lawyers suspected of supporting a migrant caravan heading north from Central America. A private security company provided local and federal law enforcement agencies with “daily intelligence updates” on the Standing Rock Sioux’s protests against the Dakota Access Pipeline. And most recently, last year, Trump and then-Attorney General Barr repeatedly tried to brand the countrywide racial justice protests triggered by the killing of George Floyd at the hands of Minneapolis police as the handiwork of “Antifa” domestic terrorists.

Anniversaries provide a time to reflect and reset. The rules were changed after 9/11. In light of the record of the last decades, we can no longer hide from how turning to a domestic intelligence collection system untethered from criminal suspicion has facilitated the targeting of communities of color and political dissent. The system must change again to curb the domestic surveillance infrastructure.