

Publish, Punish, and Pardon: Nine Things Obama Could Do Before Leaving Office

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In less than seven weeks, President Barack Obama will hand over the government to Donald Trump, including access to the White House, Air Force One, and Camp David. Trump will also, of course, inherit the infamous nuclear codes, as well as the latest in warfare technology, including the Central Intelligence Agency's fleet of killer drones, the National Security Agency's vast surveillance and data collection apparatus, and the Federal Bureau of Investigation's enormous system of undercover informants.

Before the recent election, Obama repeatedly warned that a Trump victory could spell disaster. "If somebody starts tweeting at three in the morning because SNL [Saturday Night Live] made fun of you, you can't handle the nuclear codes," Obama typically [told](#) a pro-Clinton rally in November. "Everything that we've done over the last eight years," he added in an [interview](#) with MSNBC, "will be reversed with a Trump presidency."

Yet, just days after Obama made those comments and Trump triumphed, the *Guardian* reported that his administration was deeply involved in planning to [give](#) Trump access not just to those nuclear codes, but also to the massive new spying and killing system that Obama personally helped shape and [lead](#). "Obama's failure to rein in George Bush's national security policies hands Donald Trump a fully loaded weapon," Anthony Romero, the executive director of the American Civil Liberties Union, [observed](#) recently. "The president's failure to understand that these powers could not be entrusted in the hands of any president, not even his, have now put us in a position where they are in the hands of Donald Trump."

In many areas, it hardly matters what Barack Obama now does. In his last moments, for example, were he to make good on his first Oval Office [promise](#) and shut down the prison at Guantanamo Bay, Cuba, Trump could reverse that decision with the stroke of a pen on January 20, 2017.

So, at this late date, what might a president frightened by his successor actually do, if not to hamper Trump's ability to create global mayhem, then at least to set the record straight before he leaves the White House?

Unfortunately, the answer is: far less than we might like, but as it happens, there are still some powers a president has that are irreversible by their very nature. For example, [declassifying](#) secret documents. Once such documents have been released, no power on earth can take them back. The president also has a virtually unlimited power of [pardon](#). And finally, the president can [punish](#) high-level executive branch or military officials who abused the system, just as President Obama [recalled](#) General Stanley

McChrystal from his post in Afghanistan in 2010, and he can do so until January 19th. Of course, Trump could rehire such individuals, but fast action by Obama could at least put them on trial in the media, if nowhere else.

Here, then, are nine recommendations for action by the president in his last 40 days when it comes to those three categories: publish, punish, and pardon. Think of it as a political version of "[publish or perish](#)."

Drones

1. Name innocent drone victims: Last July, the Obama administration quietly [released](#) a statement in which it admitted that it had killed between 64 and 116 innocent people in 473 drone strikes in Libya, Pakistan, Somalia, and Yemen between January 2009 and the end of 2015. (Never mind that the reliable Bureau of Investigative Journalism, based in Britain, has [recorded](#) a total closer to 800 innocent deaths from the same set of strikes.)

President Obama should immediately name those innocent people his administration has admitted killing, while providing the dates and locations of the incidents, where known. There is a precedent for this: on April 23, 2015, Obama apologized for the deaths in a drone strike in Pakistan of Giovanni Lo Porto and Warren Weinstein, an Italian and an American held captive by Al Qaeda, whom he identified by [name](#). Why not release the names of the rest?

Faisal bin Ali Jaber, a Yemeni engineer, has been asking for just such a response. His brother-in-law Salem and nephew Waleed were [killed](#) by a U.S. drone strike in 2012. Yemeni officials gave Jaber \$100,000 in cash that they swore was compensation from the U.S. government, but if so, Washington has not acknowledged what it did. Reprieve, a British-based group that supports drone victims, has [sued](#) President Obama to get a public apology for Jaber.

2. Make Public Any Reviews of Military Errors: When Obama apologized for the killings of Lo Porto and Weinstein, he said that he had ordered a full review of any mistakes made in that drone strike. "We will identify the lessons that can be learned from this tragedy and any changes that should be made," he [announced](#). Until January 20th, he has the power to make such documents public and prove that lessons have actually been learned. (The only document available on the subject to date is the \$1.2 million [settlement](#) agreement between Lo Porto's parents and the U.S. embassy in Rome published by Stefania Maurizi in the Italian newspaper *L'Espresso*.)

There is precedent for such publication. The Pentagon released transcripts and data from an airstrike that resulted in the [killing](#) of 23 Afghan villagers on February 21, 2010, in Uruzgan Province after a drone crew mistook them for Taliban militants. Documents relating to U.S. air strikes against a Médecins Sans Frontières hospital in the Afghan city of Kunduz on October 3, 2015, have also been [released](#).

How many similar military investigations (known as [AR 15-6](#) reviews) have been conducted into accidental killings in the war on terror? According to Airwars, another British-based organization, we know, for instance, that the U.S. is looking into a strike that [killed](#) at least 56 civilians in Manbij, Syria, this past July. There are guaranteed to be many more such investigations that have never seen the light of day.

The Obama administration consistently claims that groups like Airwars and the Bureau of Investigative Journalism do not have the full story. This flies in the face of multiple reports from [Amnesty International](#), [Human Rights Watch](#), [Al-Karama](#), researchers at [Stanford](#) and [Columbia](#) universities, and even the [United Nations](#), all of whom have investigated and identified a growing number of drone-strike deaths among those without any links to terror or insurgent movements. If evidence to the contrary really exists, this would be the moment for Obama to prove them wrong, rather than simply letting more “collateral damage” be piled on his legacy.

3. Make Public the Administration’s Criteria for Its “Targeted Killings”: In July and August, under pressure from the American Civil Liberties Union (ACLU), the Obama administration released a series of [documents](#) revealing the procedures it uses to identify and target for assassination individuals responsible for terrorist activities in much of the world — and the way it has justified such killings internally. If anything, however, those documents (known as the presidential policy guidance, or PPG) have merely suggested how much of the process still remains beyond public view.

“Frustratingly, too much remains secret about the program, including where the PPG actually applies, what its general standards mean in practice, and how evidence that those standards have been met is evaluated — in addition to who the government is killing, and where,” [writes](#) Brett Max Kaufman, an ACLU staff attorney.

When Donald Trump first sends out a CIA drone to kill someone chosen by his White House, he will be able to claim that he is doing so under the secret system set up by Obama. Without access to the procedures that Obama pioneered, we will have no way of knowing whether Trump will be telling the truth.

None of these three suggestions would be difficult or even controversial (though don’t hold your breath waiting for them to happen). With each, Obama could increase transparency before he inevitably hands over control of the targeted-killing program to Trump. None of this would even faze a future Trump administration, however. So here are a few suggestions of things that might matter for all of us if Obama did them before Trump enters the Oval Office.

Surveillance

4. Disclose Mass Surveillance Programs: Even though Senator Obama [opposed](#) the collection of data from U.S. citizens, President Obama has vigorously [defended](#) the staggering expansion of the national security state during his two terms in office. “You can’t have 100% security and also then have 100% privacy and zero inconvenience,” he said in 2013, days after Edward Snowden [leaked](#) a trove of National Security Agency data that transformed our view of what our government has collected about all of us. “You know, we’re going to have to make some choices as a society.”

Thanks to Snowden, we also now know that the U.S. government secretly received [permission](#) from the Foreign Intelligence Surveillance Court to collect all U.S. telephone metadata via programs like [Stellarwind](#); created a program called [Prism](#) to tunnel directly into the servers of nine major Internet companies; [tapped](#) the global fiber optic cables that lie on the ocean beds; collected text messages via a program called [Dishfire](#); set up a vast database called [X-Keyscore](#) to track all the data from any given individual; and

even built a program, [Optic Nerve](#), to turn on users' webcams, allowing for the collection of substantial quantities of sexually explicit communications. And that's just the tip of the iceberg. (For a searchable index of all such revelations so far, click [here](#).)

Ironically, a report from the FBI that was finally published in April 2015 shows that this vast effort was largely useless in identifying terrorists. "In 2004, the FBI looked at a sampling of all the [Stellarwind] tips to see how many had made a 'significant contribution' to identifying a terrorist, deporting a terrorism suspect, or developing a confidential informant about terrorists," [wrote](#) *New York Times* reporter Charlie Savage who spent years fighting for access to the documents. "Just 1.2 percent of the tips from 2001 to 2004 had made such a contribution. Two years later, the FBI reviewed all the leads from the warrantless wiretapping part of Stellarwind between August 2004 and January 2006. None had proved useful."

These days smart criminals and terrorists use [encryption](#) or other [means](#) like burner phones to make sure that they can't be followed. The only senior operatives being hacked these days seem to be Democratic Party officials like [John Podesta](#) and millions of ordinary citizens whose data is stolen by criminals. So why not reveal just what programs the government used in these years, what was done with them, why it failed, and what lessons were (or weren't) learned? Evidence of the national security state's massive waste of time and resources might indeed be useful for us to have as we think about how to improve our less than 100% privacy and security. Such disclosures would not imperil the government's ability to seek warrants to [lawfully](#) intercept information from those suspected of criminal wrongdoing or terrorism.

5. Make Public All Surveillance Agreements With Private Companies: To this day, the U.S. government has secret agreements with a variety of data companies to trawl for information. Some companies are deeply uneasy about this invasion of their customers' privacy, if only because it probably violates the terms of service they have agreed to and could cause them to lose business (given that they face competition from non-U.S. companies and more secure alternatives).

Take Yahoo, for example. The Justice Department obtained a court order in 2015 to search all users' incoming emails for a unique computer code supposedly tied to the communications of a state-sponsored "terrorist" organization. The company has requested that the government [declassify](#) the order to clear its name. It has yet to do so.

Of course, not all companies are as eager to see their government deals revealed. Consider AT&T, the telecommunications giant. Police departments across the country pay it as much as \$100,000 a year for [special access](#) to the telephone records of its clients (without first obtaining a warrant). The program is called "Hemisphere" and the company requires buyers to keep its existence secret.

The Electronic Frontier Foundation, a San Francisco-based activist group, calls this "[evidence laundering](#)." As Adam Schwartz, senior staff attorney on the Electronic Frontier Foundation's civil liberties team, [puts it](#): "When police hide their sources of evidence, the accused cannot challenge the quality or veracity of the government's investigation, or seek out favorable information still in the government's possession. Moreover, hiding evidence from individuals who are prosecuted as a result of such surveillance is antithetical to our fundamental right to an open criminal justice system."

Surely such an argument ought to convince a former law professor? President Obama could easily strike a major blow for fair trials by revealing the extent and the details of these local police contracts, which are essentially an open secret, as well as any other agreements the national security state has with private companies to spy on ordinary citizens. Once again, this would not hamper the government's ability to seek warrants when it can convince a judge that it needs to intercept individual communications.

6. Make Public All Secret Law Created in Recent Years: The last thing we'd want would be for Donald Trump and his future White House adviser, [white nationalist](#) Steve Bannon, to enter the Oval Office and start making secret law by wielding executive powers to, say, round up Muslims or deny women their rights.

Stopping Trump from taking this route and creating his own body of secret law is going to be hard indeed, given that Obama has probably signed more secret orders than any previous president. As Elizabeth Goitein, the co-director of the Brennan Center's Liberty and National Security Program, [noted](#) in a recent report, the Obama administration has failed to release a minimum of 74 of the Justice Department's Office of Legal Counsel opinions and memos that have been the secret basis for government actions on national security issues — including detention, interrogation, intelligence activities, intelligence-sharing, and responses to terrorism. In addition, as many as 30 rulings of the Foreign Intelligence Surveillance Court between 2003 and 2013 have not been made public. And an astonishing 807 international agreements, including bilateral ones to control the transportation of narcotics, signed by the U.S. between 2004 and 2014 have [never](#) seen the light of day.

Trump, of course, has refused even to publish his tax returns (previously a presidential campaign ritual), so if Obama doesn't come clean, don't expect Trump to release any of the secret law his predecessor made in the next four years. This moment, then, represents a unique opportunity for the president to fulfill his [promise](#) of 2009 to create the most open presidency of all time. Sadly, no one expects him to do so. The Obama administration has apparently "abandoned even the appearance of transparency," according to Anne Weisman, executive director of Citizens for Responsibility and Ethics in Washington, a nonpartisan NGO that tracks government accountability.

Since it's very unlikely that Obama will reverse course on surveillance and secret law in the next 40 days, here at least are some suggestions on what he might still accomplish as the nation's chief law enforcer.

Punish

7. Punish Anyone Who Abused the Drone or Surveillance Programs: We don't really know who ordered the drone strikes that knocked off so many innocent people. But the names of the [architects](#) of the program are known and, more importantly, the president undoubtedly has all the names he needs.

And if Obama does want to clean house before Trump takes over, why not identify and dismiss the individuals who designed the NSA's surveillance programs that infringed in major ways on our privacy without uncovering any terrorists?

8. Punish Those Responsible for FBI Domain Management Abuses: Since the attacks of September 11, 2001, the FBI has developed a network of more than 15,000 informants as part of its Domain Management program. Many of them were recruited to infiltrate Muslim

communities to identify terrorists. For the last 15 years, this vast sting program has been used to round-up Muslims — those dumb enough to fall for FBI enticements at least — and put them in prison.

In the process, plenty of “terror operations” were created, but few real ones broken. We already know the details of many of the abuses involved. Back in 2011, for instance, a *Mother Jones* investigation found that 49 “successful” prosecutions of “terrorists” were the result of [sting](#) operations set up by FBI agents provocateurs. “You realize that many of these people would never have committed a crime if not for law enforcement encouraging, pressuring, and sometimes paying them to commit terrorist acts,” Andrea Prasow of Human Rights Watch [wrote](#) in a report on the program in 2014.

Whistleblowers have come forward to expose the abusive tactics employed by the FBI in such cases. Take Craig Monteilh, an ex-convict hired by the Bureau to [infiltrate](#) mosques in southern California. After he had a change of heart, Monteilh helped local Muslims sue the agency. The case was, in the end, reluctantly [dismissed](#) by District Judge Cormac Carney who wrote that “the state secrets privilege may unfortunately mean the sacrifice of individual liberties for the sake of national security.” Other informants, like Saeed Torres, have since come [forward](#) to expose other aspects of the program. The government has never acknowledged any of this.

It is very likely that this same group will be called upon to support Donald Trump’s orders if a Muslim registry is ever set up. So this would be the moment for Obama to crack down in some fashion on this hapless system of profiling and entrapment before the Trump administration can expand it.

Pardon

9. Pardon Edward Snowden, Chelsea Manning, and the other whistleblowers: Last but not least, why not [pardon](#) Edward Snowden, Chelsea Manning, and the other whistleblowers who served the public good by letting us know what the president wouldn’t? As of now, Barack Obama will go down in history as the president who prosecuted [more](#) truth-tellers, often under the draconian World War I-era Espionage Act, than all other presidents combined. Stephen Kim, Jeffrey Sterling, John Kiriakou, and Thomas Drake were government officials who talked with journalists. They were subsequently jailed or had their lives turned upside down. Others like Chelsea Manning and Barrett Brown have been jailed for hacking or for the release of documents relating to surveillance, U.S. wars abroad, and other national security matters.

Gabe Rottman of the ACLU sums the situation up [this way](#): “By my count, the Obama administration has secured 526 months of prison time for national security leakers, versus only 24 months total jail time for everyone else [who ever leaked] since the American Revolution.”

On this issue, Obama has already made his position clear enough. Of Snowden, in particular, he [told](#) *Der Spiegel* earlier this month, “I can’t pardon somebody who hasn’t gone before a court and presented themselves.”

For a constitutional law professor, that’s a terrible argument. “The power of pardon conferred by the Constitution upon the President is unlimited except in cases of impeachment,” the Supreme Court [ruled](#) in 1866. “It extends to every offence known to the

law, and may be exercised at any time after its commission, either before legal proceedings are taken or during their pendency, or after conviction and judgment. The power is not subject to legislative control.”

It also flies in the face of history and of the president’s own actions. “Richard Nixon hadn’t even been indicted when Gerald Ford issued a full, free, and absolute pardon unto Richard Nixon,” [comments](#) the Pardon Snowden campaign. “Nor had the thousands of men who had evaded the Vietnam War draft, who were pardoned unconditionally by Jimmy Carter on his first day in office. President Obama himself pardoned three Iranian American men earlier this year in the framework of the nuclear deal with Iran. Like Snowden, the three had been indicted but hadn’t stood trial when they were pardoned.”

Given how rarely Obama has issued presidential pardons, it seems unlikely that he will act. “He’s pardoned fewer people than any president since James Garfield, who was fatally shot in 1881 after less than three months in office,” [writes](#) Steven Nelson at *U.S. News & World Report*. Indeed, Bush pardoned twice as many people as Obama in his first seven years in office, a record that he might want to ameliorate. (In fairness, it should be noted that Obama has [set](#) a record for commuting jail sentences.)

Will Obama act on any of these nine recommendations? Or will he simply hand over the vast, increasingly secretive national security state that he helped build to a man whom he once declared to be “unfit” not just for the presidency but even for a job at a retail store. “The guy says stuff nobody would find tolerable if they were applying for a job at 7-Eleven,” Obama [told](#) an election rally in October.

Now, it’s his move. Forget about 7-Eleven; Obama will not have to apply for, or campaign for, his next well-paid job, whatever it may be. But there is the little matter of his legacy, of truth, and oh, yes, of the future security of the country.

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