

**Populist Politics and the Prospects for Privacy
Roundtable at CPDP 2017
25 January 2017**

Notes for initial comments by Edward Hasbrouck

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1. Who am I? Background includes 15 years in international travel industry working with personal data in airline reservations (Passenger Name Records). More recent work as privacy and human rights activist in USA, engaging with US government in lobbying and litigation and with businesses as consumer advocate. Also involved with issues of government regulation and oversight of international personal data flows within and between both public and private sector. My examples will be drawn mainly from Trump and the USA, but also other countries.
2. Will privacy issues with populist regimes be more of the same, or fundamentally different? Mostly an intensification and unleashing of current threats to privacy from both government and business. Change for the worse in both government and commercial practices, but in general (see some exceptions below), I expect more change by businesses than by government.
3. Trend to government tracking and algorithmic control of individuals is long-term and has been supported by each party whenever it was in power, in the US and most other countries. The status of privacy in the US is much worse as Obama leaves office than when Obama took office 8 years ago, and the same is true for each US President since at least F.D. Roosevelt. Populist governments aren't necessarily more authoritarian than non-populist governments. The ratchet only tightens, never loosens, regardless of the party in power.
4. Similarly, each party and President in power (including Obama) has supported an increase in power of the executive relative to that of the legislature and the judiciary. Obama used executive orders to get around a Congress controlled by the opposition party. In so doing, Obama enhanced and reinforced the Presidential powers that Trump will now have.
5. In general, privacy activism in the US has focused on privacy invasion by government. Under Trump (with exceptions discussed below related to xenophobia, foreigners, and borders), there will be greater need for attention to commercial surveillance, profiling, etc.
 - (a) Trump initiative for "reducing regulation of business", with Carl Icahn as special advisor.
 - (b) Support for US businesses (which profit from privacy invasive dataveillance and profiling) against foreign competitors. If lack of US privacy law gives US businesses an advantage over foreign competitors, Trump & Co. will see that as a good thing.
 - (c) Nationalist resistance to international law or norms. "No surrender of sovereignty."
 - (d) No chance for enactment of national privacy or data protection law in Trump's USA.
 - (e) Likely very strong resistance (or retaliatory action) by Trump Administration to any international enforcement action against US-based businesses. Similar protection of local companies against international sanctions by similar regimes in other countries.
 - (f) Potential responses include increased need for non-US companies that have better privacy practices to market this as a consumer benefit and selling point vis-a-vis US companies.

6. Status and future of non-treaty international "executive agreements":
 - (a) Existing agreements not binding on new President, including:
 - i. US-EU PNR agreement
 - ii. "Privacy Shield"
 - (b) Populists prefer executive agreements to treaties, because revocable and not enforceable.
 - (c) How will foreign governments (in EU, Canada, etc.) respond if Trump Administration:
 - i. Explicitly repudiates executive agreements by previous President?
 - ii. Ignores these agreements without explicit renunciation?
 - (d) Major challenge for international privacy community. What is to be done?
7. Federalism and conflicts between states and central government in Federal systems: If there is a good side to populism on this issue, it's that populist governments often combine "nationalism" with support for regional autonomy (cf. Belgium...). US populists generally support "states' rights". Implications for privacy policy and significance of anti-Trump vote in California.
8. Nationalist requirements for personal data localization, e.g. Russia:
 - (a) Data localization is:
 - i. Protectionism for local data hosting industry
 - ii. Ensures availability of data to government of host country
 - (b) But data hosted "in the cloud" is often available to even more national governments
 - (c) Can't secure data against access by govt. of host country, so best that can be done is to build systems with immutable access logging so data subjects will know details of any access.
 - (d) Accounting for disclosures requires access logging. Data localization makes this critical. Access logging should also be enforced for cloud hosting platforms (e.g. CRSs).
 - (e) N.B. lack of clarity in Russian law for exceptions, e.g. airlines and travel agencies.
9. Enforcement issues. Rule of law, transparency, judicial review, vs. populist reliance on "trust the leader" (and "trust my friends" among foreign governments and business executives). This means foreign governments and individuals need to pay more attention to enforcement, or the problem of privacy policies that don't correspond with privacy practices will get even worse. What are the roles of private legal action (e.g. Schrems) and data protection authorities? If governments can't protect privacy rights against companies protect by populist regimes in their home countries, will individuals turn to technical self-defense? Consumer boycott?
10. Populist nationalism, xenophobia, mistrust of foreigners, isolationism. Control of borders and foreigners defined as existential issue of defense of national security, national integrity (e.g. push for PNR-based travel surveillance and control on all modes of cross-border travel within the EU, discussed at CPDP side event, coming from Flemish and Dutch populists/nationalists).
11. Nationalism in USA reinforces tendency to define rights, including privacy rights, as rights of citizens rather than human rights. Focus of government privacy invasion will be on foreigners, immigrants, and border-crossers. International travel is inherently suspect. If our country is the greatest country in the world, why do you travel abroad or deal with foreigners?
 - (a) "Extreme vetting" of foreign visitors and immigrants is one of few explicit Trump campaign promises. Vetting of people crossing US borders is already extreme. How will it intensify?
 - (b) "Build the wall" is another Trump campaign promise. He may not be able to build a physical wall, but he can build a "virtual wall" of data-driven algorithmic travel permissions. The US already has this. How will this virtual wall be raised and strengthened?