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Intrusive Pandemic-Era Monitoring Is the Same Old Surveillance State, Not a New One

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To effectively save lives amid pandemics like the coronavirus contagion, states at times must impose restrictions on the movement, economic activities, and other individual liberties of ordinary citizens. One aspect of the global response to the pandemic has been the ways that some countries are using [intrusive surveillance methods](#) to slow the virus's spread. These methods include identifying hot spots with higher concentrations of infected individuals, keeping tabs on who infected people have come in contact with, [tracking the movements](#) of individuals to [enforce quarantines](#) and self-quarantines, and restricting symptomatic individuals' access to public places. Some of these methods have been highly intrusive.

States like China, South Korea, and Taiwan have seemingly used these tools successfully, though there are increasingly reports that a second wave of the

pandemic is forming. In some quarters, this reliance on digital monitoring has created fears that the successful deployment of pandemic-era surveillance technologies will further empower not just these countries but many other states to employ more surveillance powers in the future.

Some observers, like Israeli public intellectual Yuval Noah Harari, [have argued](#) that the surveillance measures states have enacted during this global emergency are likely to become permanent and that the techniques and tools countries have used to identify and monitor individuals during the pandemic could later be employed more broadly to regulate other aspects of daily life.¹ Others like columnist Evgeny Morozov have gone further, claiming that technological “solutionism” not only threatens privacy but also risks becoming the “default option” for addressing public crises. He [writes](#),



The real risk is that this crisis will entrench the solutionist toolkit as the default option for addressing all other existential problems—from inequality to climate change. After all, it is much easier to deploy solutionist tech to influence individual behaviour than it is to ask difficult political questions about the root causes of these crises.

Does the use of technologically enabled disease surveillance constitute a long-lasting (or even permanent) threat to individual privacy and democracy? If the answer is yes, there are legitimate grounds for resisting such practices absent greater transparency and safeguards. Doing so, however, would detract from the all-hands-on-deck approaches that most governments have adopted. On the other hand, if these surveillance techniques are temporary or limited, then citizens should be less worried about long-lasting damage to individual privacy and democratic politics. In that case, their energies should be focused on ensuring that intrusive surveillance mechanisms continue to be temporary and limited in scope as well as on devising better methods to save people's lives and livelihoods.

The surveillance techniques being used to combat the pandemic have given rise to two specific fears. First, some observers are concerned that the surveillance practices deployed by some countries (some of which, like China, happen to be authoritarian states) will now be adopted more widely by other countries around the world until these practices become routine. Second, some commentators worry that the dire conditions of the pandemic could popularize and legitimize the idea of using state power to surveil citizens extensively (in the manner taking place now), leading to a significant loss of individual privacy vis-à-vis the state. Based on current evidence, it is far from clear if these doomsday scenarios will actually play out.

Discerning whether a new kind of surveillance state is on the horizon requires more than merely looking narrowly at the tools and practices that governments are using. It is worthwhile to learn from the metrics used by scholars who have studied previous periods of state expansion to identify how sharp increases of state power occurred and became permanent.² These metrics include increases in government spending, increases in state legal powers, and the nature of powers that governments acquire (and whether they are temporary or permanent). During this pandemic, for instance, some countries are using smartphone apps for contact tracing in new and disturbing ways. However, this alone may not be sufficient evidence to predict the birth of a radically new surveillance state. How these countries do (or do not) change their legal frameworks, how they employ these tools, and how they seek to legitimize their use are key factors in determining whether there are significant changes in state power or not.

SAME OLD STATE SURVEILLANCE

One important fact that has gotten lost in much of the public discourse about pandemic-era surveillance is the difference between normal, inexorable increases in state power and the abrupt shifts that sometimes happen during public emergencies. Many public emergencies in the twentieth and twenty-first centuries have prompted increases in state power. For example, the Patriot Act in the United States after the September 11, 2001, terrorist attacks greatly expanded the government's surveillance powers. To accurately measure the actual scale and scope of an expansion of state power, a critical metric is whether or not the state's legal power to regulate human activity increases. Such increases in legal authority are categorically different from a more aggressive use of powers that already were vested with the state. As scholar Tyler M. Curley [notes](#), “. . . state building [in

the United States] has been episodic in that distinct crises have led to stark changes in the state institutional structure; but each period has nevertheless *transformed the legal resources* available to upcoming presidents.”

The Great Depression saw the enactment of laws that gave government officials expanded powers to regulate labor-capital relations, and these powers remained in place until well after the Great Depression ended. Similarly, during World War II, the U.S. federal government sought new sources of state power such as price controls and industrial policy.³ Wartime laws enacted to control the markets of food and other essential items furnished powers that governments of countries like India, the UK, and the United States among others had not wielded before. Historian Robert Higgs argues that state power tends to “ratchet” up during emergencies—as states create new legal powers to coerce private citizens—and that these new powers tend not to be ratcheted down after the crises pass and the problems are solved.⁴ In such instances, state power tends to increase much more significantly than it would otherwise. At other times, rather than adding to preexisting powers, state power can be increased by [removing checks and balances](#) on the use of existing powers. In either case, the expansion of state power happens through a legal imprimatur that explicitly reorders state-citizen relationships.

But public emergencies do not always broaden state power. The transformation of state power is not just about increasing a government’s legal power but also about legitimizing its exercise of this new power among voters. In many cases, dominant trends or ideological beliefs concerning the role of the state tend to be accentuated in times of crisis. If prevailing ideological trends favor an increase in state power, emergencies often crystallize and reinforce these ideas. On the other hand, if the ideological leanings of a given political

moment favor a limited role for the state, an emergency may not automatically change these beliefs and lead to an expansionist state.

Prevailing ideas make a big difference. As per Higgs, during the economic crash in the United States in the 1890s, the government adopted a laissez-faire attitude because the prevailing political consensus among those in power was that it was better to be noninterventionist. However, by the time of the Great Depression in 1929, the United States was in the middle of the progressive movement, which gave a large degree of ideological legitimacy to the interventionist policies proposed and implemented by president Franklin D. Roosevelt and his administration.⁵

Applying these principles to the present, the surveillance measures that governments are adopting amid the coronavirus pandemic can therefore be examined empirically based on two factors. First, will these policies lead to new, permanent shifts in legal state power and an enduring dilution of individual privacy? Second, how do political leaders and citizens at large feel ideologically about government attempts to harness technology, sometimes intrusively, to help control the pandemic?

HOW ARE COUNTRIES DEPLOYING SURVEILLANCE TO FIGHT THE PANDEMIC?

As the coronavirus outbreak has unrolled, advanced technology has enabled governments to combat the pandemic more precisely, but it has supplemented rather than upended existing mechanisms for combating infectious diseases. Almost all states recognize that the current situation is anything but normal. That is why most governments are [treating the pandemic like a war](#),



justifying wholesale restrictions on normal freedoms in light of high fatality rates caused both by the coronavirus and by the absence of a vaccine to date. While some governments have taken fairly extreme measures, many strategies for fighting the pandemic have adhered closely to the standard operating procedures used to combat past epidemics like Ebola.⁶ This highlights that these measures are rooted in existing state powers and capabilities.

One key variable is states' preexisting public health capabilities to combat the virus and governments' access to the public health data and information needed to effectively tailor these tactics. Notably, new surveillance technologies have largely been implemented to complement existing state capabilities, rather than to create new state powers and capabilities.

For example, Taiwan drew lessons from the outbreak of the 2003 severe acute respiratory syndrome (SARS) epidemic, and when the coronavirus spread in China, Taiwanese authorities successfully [managed to merge](#) its public health insurance database with its immigration database to track where its citizens had traveled in the past two weeks. This cross-referenced information was then used to identify individuals who had to be tested or quarantined. Meanwhile, Singapore was one of the first countries to use a contact tracing app to fight the coronavirus, and it did a relatively good job of combating the pandemic's initial wave, though the island nation has since struggled to contain the virus's spread among migrant laborers. According to September 2019 [news reports](#) from before the pandemic struck, Singapore had been experimenting with a real-time location system to better track patients and staff through its new National Center for Infectious Diseases.

India, on the other hand, uses its [Integrated Disease Surveillance Program](#) to keep tabs on the emergence and spread of diseases. This system relies on integrating ground-up reporting on disease outbreaks from the state-level public healthcare system throughout the country. In addition, since healthcare is a state subject

in India, state governments also have varied healthcare systems. While the Indian central government took other steps like screening international passengers, it was not able to merge the kinds of databases Taiwan did. Indian government officials therefore leaned on the capabilities they did have, though the country recently introduced a new contact-tracing app called Aarogya Setu as well. Provincial and local governments have used varying surveillance techniques too. In some parts of India, for example, state governments have used phone records, video surveillance footage, and GPS data for [contact tracing](#) and sometimes have published the personal information of patients infected by the coronavirus.

In all these cases, governments have tried to use new technology to complement and sharpen their existing capabilities and powers. Governments are seeking to harness technological advances, sometimes fairly intrusively, but so far most of them have not felt the need to propose new legislative measures to do so. Additionally, governments have not yet used the pandemic as an excuse to argue for a general increase in their legal surveillance powers beyond the scope of addressing the pandemic; rather, the use of surveillance techniques so far has been largely focused on responding to the coronavirus outbreak.

Another key factor is how willing citizens are to accept governments' use of surveillance techniques and to comply with them amid the pandemic. For example, in India, while the national government is actively promoting the use of the Aarogya Setu app, there are [regular reports](#) of people routinely violating lockdown orders even in containment zones (with heightened restrictions and monitoring compared to the general lockdown) in the national capital of New Delhi. Such behavior can undermine any intrusive surveillance techniques that governments employ.

Public acquiescence to intrusive surveillance might be easier to ensure in countries with more authoritarian systems of government (like China) or those that [have](#)

weathered similar diseases in the past (like China, Singapore, and South Korea). Adherence to such orders is proving harder to count on in jurisdictions with strong, rights-based approaches to privacy or those with no recent experience of a pandemic of this nature—like in various parts of the EU, for instance.

But the sustained perceived legitimacy of these techniques in the eyes of the public will depend on how successfully these governments use them to fight the pandemic and how readily the public accepts such practices once the pandemic is over. Consider a few examples. Poland has recently introduced an app for tracking those who are quarantined, and other EU countries may also move in the same direction. Meanwhile, the Indian central government's Aarogya Setu app has been downloaded voluntarily—though it has now been made practically mandatory—more than 75 million times as of the last week of April 2020 (within approximately three weeks of its launch). But it is too early to assume that Indians will accept having contact tracing apps on their smartphones even after the pandemic is over.

Given the variety of countries' responses, there is currently no global or regional consensus on the need for new or increased surveillance powers as a result of the current pandemic. So far, it stands to reason that countries that have both robust existing surveillance capabilities and the capacity to make their citizens comply with lockdown orders have found it relatively easier to use surveillance techniques, while other countries have had less success.

IS BIG BROTHER-STYLE SURVEILLANCE AROUND THE CORNER?

It is debatable whether the pandemic-era heightening of state surveillance constitutes a more sweeping ratcheting up of government power or the dawn of a new surveillance state. While the technologies being

deployed are worryingly intrusive in some cases, so far the scope of state surveillance itself has remained narrowly limited to the purposes of combating the coronavirus outbreak. For example, India's Aarogya Setu app is only being used for public health purposes such as contact tracing, rather than for generalized surveillance.

While many countries are taking an all-of-government approach to tackling the pandemic, in the narrow sphere of privacy and data protection itself, most governments have not significantly increased the scope of their exercise of sovereign power. Rather, they merely have found new ways to wield existing power. Notably, very few if any privacy laws or regulations have been changed or promulgated since the pandemic began. The UK's Coronavirus Act is a notable exception and has been criticized for giving the government excessive surveillance powers.

In most countries, existing regulations and laws on data privacy permit governments to suspend or dilute data protection requirements during public health emergencies. The EU's General Data Protection Regulation (GDPR), for example, allows some of the surveillance measures deployed so far and permits cell phone tracking if EU member states pass legislation to such effect. Meanwhile, section 12(d) of India's proposed data protection law also would allow government officials to process individual data without consent during emergencies like pandemics.

In addition, no government to date has articulated the need for a major overhaul or rewriting of privacy laws to dilute privacy protections. While governments may make such claims in the future, it seems that existing laws so far have given governments sufficient powers for intrusive surveillance during emergencies. The coronavirus pandemic is only clarifying what governments' exercise of power and the technologies at their disposal in a public emergency looks like under current data protection laws.



This is not to say or predict that an upward ratchet in state surveillance power is unlikely to occur. It is possible that governments eventually might seek qualitatively greater powers of surveillance if the pandemic is prolonged or causes more damage than expected. However, it is also worthwhile to note that citizens around the world are more cognizant about data protection issues than possibly at any time in the recent past, as evidenced by the many countries that have proposed or passed data privacy laws in the past few years.

MUCH ADO ABOUT PRIVACY

The pandemic has not yet ushered in an abrupt, wholesale increase in state legal power to surveil citizens nearly anywhere. It is hard to understand why privacy should be prioritized as a fundamental value over other bedrock freedoms during this pandemic. Citizens in many jurisdictions have quickly and willingly given up other freedoms—such as the right to move freely or to run businesses—that are just as important for their sustenance as privacy is. It is not objectively clear why privacy deserves to be placed on a higher pedestal than other fundamental human rights. As many instances across various countries have shown, it has generally proven easier to regulate physical movement compared to online activity.

Additionally, few are seriously articulating the fear that their governments will use this pandemic as an excuse to keep them restricted to their houses indefinitely (since most people would rebel at some point). It is hard to understand why efforts to create a permanent surveillance state would be much easier to achieve. In most democratic states, the consent of the governed is critical for legitimizing state power. Focused democratic debate likely can prevent such efforts from becoming *fait accompli*, contrary to what some commentators are suggesting.

Not all public emergencies are created equal, and not all of them provoke the same public responses. State surveillance power expanded in the United States (and many other jurisdictions as well) after September 11, 2001, because of the ongoing need to identify any possibility of violent terrorist strikes in the foreseeable future. Preemptively disrupting terrorist activity was key to preventing further attacks. This necessity created a powerful and continuing justification for a permanent expansion of surveillance power.

By contrast, countering a viral pandemic depends as much on developing vaccines as it does on early detection and prevention. And once the worst of the pandemic subsides, peacetime conditions almost certainly will not require escalated levels of surveillance, so an indefinite expansion of state authority would be harder to justify. While surveillance techniques might improve after this pandemic, this improvement is likely to involve perfecting the use of existing powers rather than a massive, permanent expansion of governments' legal authority.

The point here is not to say that states are not going to make excuses for more surveillance powers if this pandemic continues. Nevertheless, it is important to keep in mind that most governments have not done so yet and that, if they do, any reasons for doing so would stand on a weaker footing than after the September 11 terrorist attacks in the United States and the November 2008 terrorist strikes in the Indian city of Mumbai. While citizens should remain alert to calls to grant governments more surveillance powers in the future, the expansive use of existing state surveillance power is not the same as the dawn of a categorically new surveillance state.

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NOTES

- 1 For similar pieces in India, see Nikhil Pratap and Kashish Aneja, “1.3 Billion People. One Virus. How Much Privacy?,” the *Wire*, March 30, 2020, <https://thewire.in/government/covid-19-pandemic-privacy-india>; and Rohan Venkataramakrishnan, “Will the Coronavirus Crisis Inevitably Result in an Expansion of the Surveillance State in India?,” Scroll.in, April 5, 2020, <https://scroll.in/article/958138/will-the-coronavirus-crisis-inevitably-result-in-an-expansion-of-the-surveillance-state-in-india>.
- 2 For example, see Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (New York: Oxford University Press, 1989). Higgs looks

at the increase in the scope of coercive power wielded by the U.S. federal government in major emergencies. He also reviews quantitative measures such as the permanence of spending increases by the federal government compared to the period before the emergencies that precipitated these increases. Higgs provides a framework for understanding the causes and consequences of such ratcheting up of state power. Please also see James T. Sparrow, *Warfare State: World War II Americans and the Age of Big Government* (New York: Oxford University Press, 2011); and Tyler M. Curley, “Models of Emergency Statebuilding in the United States,” *Perspectives on Politics* 13, no. 3 (September 2015): 697–713.

- 3 For an account of the increased scope of the U.S. federal government’s power, see Sparrow, *Warfare State*.
- 4 See chapter four of Higgs, *Crisis and Leviathan*.
- 5 See chapters five and eight of Higgs, *Crisis and Leviathan*.
- 6 As a point of reference, see Table 1 of the following document: “Critical Preparedness, Readiness and Response Actions for COVID-19,” World Health Organization (WHO), March 19, 2020, <https://www.who.int/publications-detail/critical-preparedness-readiness-and-response-actions-for-covid-19>. Please also see “WHO | Contact Tracing,” WHO, May 9, 2017, <http://www.who.int/features/qa/contact-tracing/en/>.

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