

## Emerging Constitutional Issues for the Trump Presidency

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Kim Taylor-Thompson Transcript

So, when Adam asked me to join the panel to discuss the effect of a Trump presidency on criminal justice policy, I have to admit that I hesitated. Largely because his request actually forced me to face the reality that this was not just a bad nightmare on 11/9, but actually was a reality. So, even if I refuse to watch the inauguration on Friday, it's going to happen. And even if I refuse to acknowledge Trump's toxic tweets, they will continue. And even if I refuse to believe that someone so divisive will actually be our president, he will on Friday. So, that means that I and the rest of us have to acknowledge the disturbing reality that President Trump will be making decisions that will affect the lives of people whom he has no interest in understanding.

And so, what I'm gonna do is spend a little bit of time—since I spent a little time preparing—talking about some of the things that I've learned as I've tried to pull together a coherent set of policies, perhaps, from his tweets, campaign rhetoric, and cabinet choices. The themes that emerge when you look at all of that are troubling, to say the least, and suggest that we are likely to see a radically altered view of justice in this country. Or, to be more precise, we're likely to experience a set of regressive policies that hearken back to the law-and-order regime of a Nixon administration. And those were the sorts of policies that led to the retributive path of crime control and radicalized policing strategies from which we have yet to recover.

So, as you likely know, the vast majority of criminal prosecutions take place at the state level, not the federal level, right? So about 211,000 people are locked up in federal prisons, compared with 1.3 million in state prisons. But federal prosecutions could increase. So, that could be one thing that we see as a change. But more troubling still, the federal government has the power of the purse and the pulpit and it can encourage and advance retributive policies that will affect the states. So, I'm gonna talk a little bit about that as well. And so, what I'm gonna try to do in my ten minutes is talk about the tone, the picks, and the effects of a Trump presidency on the experience of justice. And my comments will be less about constitutional issues and more about policy implications. And I think I should state up front that I'm not gonna say much about immigration. I'm gonna leave that to Adam [Cox], who's going to spend his time talking about that.

So, first let me talk about the tone. Trump ran on a law-and-order platform because he likes to proclaim he believes that crime is out of control. So, his priorities, or at least as he articulated them and his nominee for attorney general has articulated them, are to crack down on drugs and violent crime. And given those priorities, Trump has advocated a return to more aggressive anti-crime tactics. So, let's start with some of those. Some of the policing tactics that he is advocating. He's recommended the widespread use of stop-and-frisk by law enforcement, and

we will likely see incentives from the federal government to states in the form of federal aid to states to encourage the implementation of the kinds of policies that he would like to see spread. For example, the Office of Justice Programs has about \$2 billion that it uses to fund programs in the states. And that money tends to flow towards policies that the administration is interested in spreading.

But back to stop-and-frisk for a moment. As many of you know, the stop-and-frisk policies that were used by the New York Police Department and applauded by Trump were ultimately found to be unconstitutional in their application by Judge Scheinlin in *Floyd v. [City of] New York*. She concluded that the stops that were taking place were not based on reasonable suspicion and were not being conducted in a race-neutral way. What was happening was that blacks and Latinos were being stopped more than anyone else and we were getting what was—could only be described as—a ridiculously low success rate. Four-point-four million people were stopped. Fifty-two percent of those were followed by a frisk. One-point-five percent of those produced a weapon. So, that meant that 98.5% of the 2.5 million frisks discovered no weapon whatsoever. So, despite Trump's full-throated claims to the contrary, this was not a program that worked well. And he threatened that, or at least he suggested, that reducing the use of stop-and-frisk would lead to an increase in crime. And at least in New York's experience, the crime rate has actually declined since it stopped using stop-and-frisk.

Which brings us to police oversight. Trump is calling for less regulation of police. And as you may know, the Obama Justice Department made great use of its power to investigate law enforcement agencies engaged in a pattern or practice of violating civil rights. DOJ actually initiated 23 investigations and entered into 11 consent decrees, mandating reform in Chicago, Baltimore, Cleveland, and other cities. Attorney General—or at least his nominee—Attorney General—[Jeff] Sessions has condemned such interventions as an abuse of federal authority. What we're seeing is that Sessions and Trump are actually looking at some of the violence that police are engaging in against citizens as the behavior of "rogue officers" rather than the byproduct of a culture that too often sees itself as an occupying force in communities of color.

So, in addition to sort of being tone deaf to the incidents of police violence, we may see some reversal of some of the progress that's been made in the Obama administration really maintaining strict oversight of police activities. What we've also seen in terms of the tone is that Trump's rhetoric has played to racial divisions by playing to a tried and true device that certainly propelled much of the criminal justice policymaking in the 80s and 90s. And that is you look to stoke the fear of crime by suggesting that US cities, particularly inner city neighborhoods, are drowning in crime. Trump uses inflammatory language, calling communities of color "crime infested" as a way of setting the stage for Draconian policies to eradicate the infestation. And that kind of language will actually lead to, I suspect, some really dangerous events. Because it's a dangerous and divisive message that enables us to use fear to drive policy choices.

But we've also seen him use that kind of language to push an agenda that is really free of facts. Because facts are not his weapon of choice. Explosive language is. And, so, his fact-free rants often invite drastic responses and make Draconian tactics seem normal. So, it perhaps should not come as a surprise that the National Fraternal Order of Police recently issued a wish list. Easy for me to say—a wish list—for the first 100 days of the Trump presidency, that calls for Trump to reverse the Bush-era ban on racial profiling and to reinstate it to enable federal law enforcement to use it. He set a tone and people are beginning to pick up on that tone.

If we look at his picks quickly... I think I have very little time. If you look at his picks quickly, he has chosen Jeff Sessions as the attorney general, and it's perhaps his clearest message about his views on criminal justice. Sessions positions himself to the right of even his fellow Republicans on issues of crime. Or as *Time* magazine suggests, he's firmly planted on the fringe. And what we see is that Sessions has opposed efforts to reduce unnecessarily long federal prison sentences for non-violent crimes despite a bipartisan effort to actually push that legislation. He actually made it a personal crusade to block that sentencing reform bill. He is very focused on drugs—really believes that we need to have essentially a war on drugs—and is concerned about the fact that we have moved away from those kinds of punitive policies. He adheres to them. When he was in Alabama, Alabama became the first state to bring back the use of chain gangs in 1995, which was obviously a horrific remnant of Jim Crow. He as attorney general defended it as perfectly proper. And the worry is that there's nothing in his public life since then that actually has convinced most of us that he is a different man than he was back then. And in 1986, he was, at the time, being considered to become a federal district court judge, and he was deemed too racially insensitive to be a federal district court judge. And yet, he is the nominee for attorney general.

I think if we look at the effects, finally—and I'll rush this and be willing to open this up to questions—but I think that we're going to see a number of things happen. We thought that there might be an end to the death penalty. The Supreme Court seemed to be hinting at that. But Trump supports a death penalty. Sessions supports it. And Trump will likely nominate people to the Court who will support his retributive policies. So, the death penalty will likely continue. We may see a change in the composition of the federal judiciary. Sessions has expressed concern about appointing public defenders as federal judges because he worries about their agenda. And Trump seems to be in accord with that. We're likely to see an increase in people of color in prisons. Currently, no other country in the world imprisons so many of its racial or ethnic minorities. We imprison a larger percentage of our black population than South Africa did at the height of apartheid. That's likely to increase.

So, not wanting to end on a low note, let me say that the agenda for activists I think is pretty clear. The fight has to be in the courtrooms. It has to be in the state legislatures and in the media

because I actually think the center of gravity for reform will take place locally rather than federally.