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Indefinite Surveillance: Say Hello to the National Defense Authorization Act of 2014

By Stephen Benavides
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Passed in 1978, the Foreign Intelligence Surveillance Act (FISA) set the groundwork for surveillance, collection, and analysis of intelligence gathered from foreign powers and agents of foreign powers, up to and including any individual residing within the U.S., who were suspected of involvement in potential terrorist activity. On October 26, 2001, a little over a month after 9/11, President George W. Bush signed the USA Patriot Act into law. Two provisions, Sec. 206, permitting government to obtain secret court orders allowing roving wiretaps without requiring identification of the person, organization, or facility to be surveyed, and Sec. 215 authorizing government to access and obtain "any tangible thing" relevant to a terrorist investigation, transformed foreign intelligence into domestic intelligence.

NDAA 2014 builds on the powers granted by both the Patriot Act and FISA by allowing unrestricted analysis and research of captured records pertaining to any organization or individual "now or once hostile to the United States". Under the Patriot Act, the ability to obtain "any tangible thing" eliminated any expectation of privacy. Under NDAA 2014 Sec. 1061(g)(1), an overly vague definition of captured records enhances government power and guarantees indefinite surveillance.

On May 22, 2013 the Subcommittee on Intelligence, Emerging Threats and Capabilities, one of several Armed Services Committees, met to discuss the National Defense Authorization Act(NDAA) for Fiscal Year 2014. The main subject of the hearing was Sec. 1061, otherwise known as *Enhancement of Capacity of the United States Government to Analyze Captured Records*. This enhancement provision of NDAA 2014 would effectively create a new intelligence agency, one with the authority to analyze information gained under the Patriot Act, FISA, and known spying programs such as PRISM.

Sec. 1061(a) authorizes the Secretary of Defense to "establish a center to be known as the 'Conflict Records Research Center'" (Center). The main purpose of the center, according to the bill text, is to create a "digital research database," one with the capability to "translate" and facilitate research on "records captured from countries, organizations and individuals, now or once hostile to the United States." The authorization also says the Center will conduct research and analysis to "increase the understanding of factors related to international relations, counterterrorism and conventional and unconventional warfare, and ultimately, enhance national security."

In order to make the Center run, and to accomplish such an incredibly broad scope of "research and analysis," the Secretary of Defense needs the Director of National Intelligence (DNI) to cooperate in coordinating "information exchanges important to the leadership of

the United States Government". That coordination would require participation of all 16 member agencies and departments of the U.S. Intelligence Community. This would leave James Clapper, the man accused of lying to Congress about the National Security Agency's domestic spying program known as PRISM, in de facto direction of another federal surveillance and data analysis agency. And while the Center would be officially directed and overseen by the Secretary of Defense, without unfettered access to secret and top secret information, the Center would be completely ineffective. These information exchanges would most likely include data and records generated by the mass surveillance of everyday people under PRISM, as well as surveillance of those identified as "potential terrorists" or "high value targets" by any one of those 16 intelligence agencies now in operation.

The proposed Center's information exchanges rely on captured government records. Under the NDAA 2014, Sec. 1061(g)(1), a captured record is defined as "a document, audio file, video file, *or other material* captured during combat operations from countries, organizations, or individuals, now or once hostile to the United States." But considering that the 2001 Authorization to Use Military Force (AUMF) allows the "War on Terror" to exist in a perpetual and permanent state of combat operations, and that the American public is already existing under an expansive surveillance state, any record may qualify as a "captured record." Thus, any captured document, audio file, video file, or other material could potentially be submitted to this new intelligence agency for research and analysis, all in the name of national security and counterterrorism, as deemed appropriate by a swelling government surveillance class.

The NDAA 2014 enhancement provision extends and consolidates the government's authority to further gather and analyze records and data captured during any national security or terrorist related investigation, not just combat operations. But it does so without creating any explicit restriction from violating an individual's right to privacy, from being subjected to unwarranted searches and seizures, or due process of individuals guaranteed by the Constitution. That's eerily similar to the NDAA 2013 Sec. 1021 that codified the indefinite military detention of American citizens without requiring they be charged with a specific crime, or given a trial.

Under NDAA 2013, Sec. 1021 allowed the military detention of civilians without a writ of habeas corpus, when a person "was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces." Under NDAA 2014, anyone is now subject to surveillance, not based on support of al-Qaeda or its associated forces, but based merely upon whether or not an individual is, or once was hostile to the U.S. The question of what constitutes "hostility", is left completely unanswered.

The new enhancement provision, as well as the previous NDAA's indefinite detention mandate, goes to show how far the legislation has strayed from its stated purpose. According to House Armed Services Committee Chairman Buck McKeon (R-CA), the NDAA "authorizes funding for military activities of the Department of Defense, for military construction, for defense activities of the Department of Energy, to prescribe military personnel strengths, and for other purposes."

Instead, the NDAA has become the vehicle for the Executive Branch and Department of Defense to bypass Congress, and legislate away any perceived right, liberty, or privilege

that conflicts with our current state of permanent war and indefinite surveillance.

In 2012, in an attempt to stop that "indefinite detention" provision, Sen. Dianne Feinstein (D-CA) introduced an amendment that would have prohibited the government from detaining citizens indefinitely using military force. That proposed law, otherwise known as the "Feinstein Amendment" easily passed the Senate floor, but was later removed by Senate Armed Services Committee Chairman Carl Levin (D-MI). After removal of the only specific language that would guarantee the US Government would be prohibited from interpreting the act illegally; President Obama, also a Democrat, signed NDAA 2013 into law.

If passed in its current state, NDAA 2014 would authorize approximately $552 billion in total defense spending, with $86 billion going directly to war spending. This amount exceeds what is allowed under the automatic austerity measures that went into effect as of March 1, 2013. According to a report released in April 2013 by the Center for Strategic and Budgetary Assessments, "[i]f personnel, operation and maintenance costs keep rising, they may consume the "entire defense budget" by 2024, leaving no funding for weapons procurement, military construction or family housing." Any program created by the Enhancement Provision of NDAA 2014 would necessarily burden an already overwhelmed working class, who are most affected by austerity.

While the National Security Agency swears that no citizen was spied on under PRISM, the very fact that cell phone metadata and online activity was gathered from millions of individuals guarantees that information was taken illegally from innocent people . We're told that the government is attempting to minimize the amount of information captured from Americans, and that all of that information is being kept in specialized and restricted servers in order to protect our constitutional rights. But that's difficult to believe when the Department of Justice is currently fighting the release of a secret FISA Court opinion that details unconstitutional government surveillance.

If indefinite detention became the primary reason for opposing NDAA 2013, then the enhance provision authorizing unlimited indefinite surveillance, may become the same issue for NDAA 2014. If passed in its current state, NDAA 2014 will further guarantee that people exist not only under indefinite detention and permanent war, but also under indefinite surveillance by its government.

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