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Trump to Inherit Vast Surveillance Powers

Many Democrats trusted President Obama with the vast surveillance powers inherited from President George W. Bush, but now the failure to curtail those powers means they pass on to Donald Trump, notes Nat Parry.

By Nat Parry

12/16/2016

As the Electoral College gathers across the country on Monday to cast ballots for the 45th president of the United States – and the reality of a Trump administration draws closer – an overriding concern (beyond the questionable appointments of oil executives, billionaires and bankers to top cabinet posts) is what the Trump presidency might mean in terms of civil liberties, individual privacy and human rights.

For those who once dismissed the idea that there was anything particularly worrying about the mass surveillance conducted by the National Security Agency under the Bush and Obama administrations, as whistleblower Edward Snowden’s revelations confirmed more than three years ago, the fact that Donald J. Trump will now be inheriting these sweeping powers might put things into perspective. The same could be said about arbitrary detention, “enhanced interrogation” and assassinations.

With an incoming president who is reportedly compiling an “enemies list” in order to keep track of those who have shown a perceived lack of loyalty or disrespect – not to mention someone who compulsively takes to social media to denounce those seen as slighting or insulting him – perhaps now it is a bit more clear why allowing limitless government powers over individual privacy and other fundamental rights might not be such a good idea after all.

There is some irony, to say the least, that while Washington is now up in arms about the Russian government allegedly hacking emails from the Democratic National Committee, these same capabilities are now being freely handed over to Trump, who has stated that he wants surveillance of mosques and has spoken about how much he would like to have the power to hack the emails of his political opponents. “Honestly, I wish I had that power,” he said. “I’d love to have that power.”

One who has long been raising concerns over “that power” is William Binney, a former high-level NSA executive who helped create the agency’s mass surveillance program more than 15 years ago. In an interview with journalist James Bamford in 2012, Binney said that the United States is creeping dangerously close to totalitarianism. With his thumb and forefinger centimeters apart, Binney told Bamford, “We are, like, that far from a turnkey totalitarian state.”

Binney left the NSA in late 2001 after the agency launched its warrantless-wiretapping program. “They violated the Constitution setting it up,” he told Bamford, “but they didn’t care.”

When Barack Obama took office in 2009, Binney hoped that the new administration might take steps to reform the program he had helped design in order to bring it in line with constitutional safeguards. Instead, what happened was the program’s expansion.

Incredible Continuity

According to Michael Hayden, who was NSA Director from 1999 to 2005, Obama placed the program under more congressional oversight than Bush, but “in terms of what NSA is doing, there is incredible continuity between the two presidents.” In fact, the surveillance programs have expanded under Obama, Hayden says, and the spy agency now has more powers now than when he was in command.

This is saying a lot, considering that under Hayden’s watch, the NSA’s surveillance powers grew exponentially, particularly after several important programs were moved from the Pentagon’s Defense Advanced Research Projects Agency (DARPA) to the NSA’s Advanced Research and Development Activity in Fort Meade, Maryland.

While the public was led to believe that congressional action in 2003 killed DARPA’s controversial Total Information Awareness (TIA) program, the National Journal revealed in February 2006 that it was actually kept alive within NSA’s secret budget. The most important components were simply moved from DARPA and given new names at NSA.

TIA’s Information Awareness Prototype System, for example, was renamed “Basketball” at NSA, but still provided the basic architecture tying together information extraction, analysis and dissemination tools developed under TIA. Another piece of TIA, called Genoa II, was shifted to NSA and renamed “Topsail.”

Snowden later revealed several other secret NSA activities, such as PRISM, which targets the personal data of web users by accessing the servers of major internet companies, the Dishfire database that stores years of text messages from around the world, the Tracfin collection, which

accumulates gigabytes of credit card purchases, and the NSA's Polarbreeze hacking program. The NSA's Tailored Access Operations division, Snowden revealed, breaks into computers around the world to steal data.

And thanks to the State Department's diplomatic cables leaked by Army Private Chelsea Manning, currently serving a 35-year prison sentence for divulging government secrets, we know that Washington was using at least some of these tools in running a secret intelligence campaign that targeted the leadership of the United Nations and Security Council representatives from China, Russia, France and the United Kingdom.

Last February, WikiLeaks released more classified documents revealing how the NSA intercepted the communications of various heads of state, including Angela Merkel, Benjamin Netanyahu, Silvio Berlusconi and Nicolas Sarkozy, as well as U.N. Secretary General Ban Ki-Moon.

Recommended Reforms

Although the Snowden revelations led to the appointment by President Obama of a Review Group on Intelligence and Communications Technologies, which later issued a 300-page report with 46 recommendations to dramatically curtail the NSA's surveillance powers, Snowden himself was vilified as a traitor by prominent Democrats such as Sens. Dianne Feinstein and Bill Nelson, and several congressional leaders called for his arrest and prosecution.

The ranking Democrat on the House Intelligence Committee, Rep. Adam B. Schiff, said that Snowden's claims of acting in the public interest are "self-serving and false, and the damage done to our national security [is] profound." While welcoming recommended reforms stemming from Snowden's revelations, Jim Himes, the top Democrat on the House's NSA and Cybersecurity Subcommittee, said that Snowden's actions were "inconsistent with the estimable tradition of civil disobedience."

On the campaign trail, Hillary Clinton flatly stated that "he broke the laws of the United States" and "stole very important information that has unfortunately fallen into a lot of the wrong hands." Asked whether Snowden should be allowed to return to the United States, she said, "I don't think he should be brought home without facing the music."

Trump and other Republicans have not been any kinder to Snowden, with the President-elect calling him "a bad guy" who might be deserving of the death penalty.

After years of these bipartisan attacks against his character and motivations, public approval ratings for Snowden's actions have plummeted. While polls conducted in June and July 2013 found that 55 percent viewed him as a "whistleblower" and just 34 percent saw him as a "traitor," those numbers have largely flipped in the years since. According to a KRC Research poll released last year, 64 percent of Americans held a negative opinion of Snowden, while 36 percent viewed him positively. A Rasmussen survey released in September 2016 found that just 25 percent supported a presidential pardon.

Snowden remains to this day in Russia where he was stranded in June 2013 after U.S. authorities rescinded his passport and where he was subsequently granted asylum. As Snowden settled in to his life as an exile, the President's commission appointed in response to his revelations stressed that future U.S. leaders should not be trusted with the current level of capabilities enjoyed by the NSA.

"We cannot discount the risk, in light of the lessons of our own history, that at some point in the future, high-level government officials will decide that this massive database of extraordinarily sensitive private information is there for the plucking. Americans must never make the mistake of wholly 'trusting' our public officials," read the panel's NSA report, published on Dec. 13, 2013.

The report's recommended reforms included proposals such as requiring that NSA analysts obtain a court order before accessing data, banning the government from using "back door" methods to hack into hardware or software, and requiring that the government obtain a court order before issuing "national security letters," which force businesses to hand over private customer information.

Although the report's proposals were varied and in some cases highly detailed, they all echoed the general theme that the government could not be trusted with the sorts of powers and access to personal information that Snowden had revealed. There was a clear need for new laws and institutional reforms to prevent the current or a future government from abusing its authority, the panel determined.

The effectiveness of adopting new laws, however, was called into question the next month when a report was issued by the White House's Privacy and Civil Liberties Oversight Board, which said that the NSA program was probably both illegal and unconstitutional. Critics wondered what new laws would accomplish when it was clear that the government had already been violating existing laws.

The NSA's program "lacks a viable legal foundation under Section 215 [of the Patriot Act], implicates constitutional concerns under the First and Fourth Amendments, raises serious threats to privacy and civil liberties as a policy matter, and has shown only limited value," the Privacy and Civil Liberties Oversight Board's report said. "As a result, the board recommends that the government end the program."

A federal court backed up the board's findings in May 2015, when it ruled that the NSA's mass collection of Americans' phone records violates the Patriot Act. A scathing 97-page unanimous opinion by the U.S. Court of Appeals determined that the government had stretched the meaning of the law to enable "sweeping surveillance" of Americans' data that could be used to "reveal civil, political, or religious affiliations," or an individual's "social status," providing such improper information as whether "he or she is involved in intimate relationships."

Incremental Improvements

When the Patriot Act's Section 215 expired later that month, Congress passed the USA Freedom Act, signed into law by President Obama on June 20, 2015. The legislation attempted to end the bulk collection of calling records by limiting collection to instances where there is "reasonable, articulable suspicion" that a "specific selection term" used to request call detail records is associated with international terrorism. It also increased penalties for providing "material support" to U.S.-designated "foreign terrorist organizations."

Civil libertarians, however, argued that the final version of the law did not go nearly far enough to rein in NSA abuses and contained several unwarranted concessions to the intelligence community and pro-surveillance legislators.

"This bill would make only incremental improvements, and at least one provision – the material-support provision – would represent a significant step backwards," said ACLU deputy legal director Jameel Jaffer. "The disclosures of the last two years make clear that we need wholesale reform."

Human Rights Watch noted that although the law curtailed some provisions of the Patriot Act, the new law did nothing to address bulk collection practices that may be occurring under other laws or regulations, such as Section 702 of the FISA Amendments Act or Executive Order 12333. "These practices affect many more people and include the collection of the actual content of internet communications and phone calls, not just metadata," said HRW.

"This is a fake privacy bill," said Tiffiniy Cheng of the advocacy group Fight for the Future. "Corrupt members of Congress and their funders in the defense industry are attempting to package up their surveillance-powers wish list and misleadingly brand it as 'USA Freedom.'"

Binney, the former NSA executive who left the agency in protest in 2001, said that the Freedom Act "won't do anything" to protect privacy. "Why do you think NSA supports it?" he said.

Thomas Drake, another former NSA senior executive who had attempted to blow the whistle on NSA abuses before the government prosecuted him under the Espionage Act, said the Freedom Act was a ploy by government officials "to keep the status quo in place." Focusing on the metadata program was unfortunate, he said, because internet surveillance was far broader than telephone surveillance.

"It's a shiny, shiny bright spot, [but] there's a whole lot more being collected," he said, including a "staggering" amount of online communications.

Making a List

Now, access to this staggering amount of information is being handed over to President-elect Donald Trump, who allegedly is "keeping a list" of those he considers political "enemies."

On election night, following a tweet that Republican Sen. Lindsey Graham, R-South Carolina, sent out indicating that his vote had been cast for independent candidate Evan McMullin rather than the Republican nominee, Trump surrogate Omarosa Manigault said, "it's so great our

enemies are making themselves clear so that when we get in to the White House, we know where we stand.”

Conceding that Graham ultimately has the right to vote for whomever he wants, Manigault warned nevertheless: “Let me just tell you, Mr. Trump has a long memory and we’re keeping a list.”

These sorts of oblique threats might not be such a cause for concern if it weren’t for the fact that Trump has seemed to make it his mission to go after anyone who criticizes or insults him, anyone who he considers an enemy – and apparently he has lots of them. In fact, the New York Times compiled a list earlier this year of nearly 300 people who Trump has attacked on Twitter.

Being singled out by Trump on Twitter can have dramatic real-life consequences, as Chuck Jones, the president of the United Steelworkers Local 1999 whom Trump recently targeted over his favorite medium, can readily attest. The Washington Post reported that about half an hour after Trump tweeted on Dec. 8 that Jones “has done a terrible job representing workers,” the union leader started receiving menacing messages over the phone.

“What kind of car do you drive?” said one caller. “We’re coming for you,” said another.

“A tweet from Trump is enough to ensure that his target’s phone will start to ring with vague threats from strangers,” writes Libby Nelson at Vox.com. “His or her inbox will fill up with explicit messages and invective. If the harassment gins up media coverage, that ensures more of it. For one target, the messages from Trump fans have lasted at least a year.”

Nelson calls these online cyberbullies Trump’s “shock troops” who are mobilized to shut down critics.

The ongoing, blatant and increasingly petty social media bullying tactics recently drew the attention of former labor secretary Robert Reich, who called on Trump to stop the online harassment and raised concerns over what sort of abuses might lay in store once the President-elect inherits the most powerful intelligence apparatus in the world.

“What you would like is for no one – not a CEO, nobody on television, no journalist – nobody to criticize you,” Reich said, addressing his comments to Trump. “You take offense at that. Well, you are going to be president very shortly, and you are going to have at your command not just Twitter, but also the CIA, the IRS, the FBI. If you have this kind of thin-skinned vindictiveness attitude toward anybody that criticizes you, we are in very big trouble.”

Troubling Picks

Now, as Trump announces his cabinet picks, it is coming more into focus just how much trouble we may be in for. His choice, for example, of Mike Pompeo to lead the CIA indicates a willingness to expand mass surveillance activities and usher in other intelligence abuses.

“Congress should pass a law re-establishing collection of all metadata, and combining it with publicly available financial and lifestyle information into a comprehensive, searchable database,” Pompeo wrote in an op-ed in The Wall Street Journal last January.

The hawkish Kansas lawmaker has also spoken in favor of returning to the CIA’s discredited torture program that Obama ostensibly prohibited in 2009, and has called for expanding the Guantanamo detention center, saying that it “has been a goldmine of intelligence about radical Islamic terrorism.”

Calling out mainstream Muslims for allegedly failing to condemn Islamic terror with sufficient gusto, Pompeo has said that their “silence has made these Islamic leaders across America potentially complicit in these acts and more importantly still, in those that may well follow.”

Trump’s pick for National Security Adviser, Michael Flynn, is no less troubling. He is a political figure with “a history of restricting religious liberty, immigrants’ rights, and privacy,” according to the ACLU. He has advocated forcing American Muslims to register with the government and has publicly claimed that “fear of Muslims is rational.”

The appointments seem to follow Trump’s earlier campaign pledges to implement draconian security measures that “some people are going to be upset about,” such as a blanket ban on Muslims entering the United States, increased surveillance, and bringing back waterboarding and “a hell of a lot worse than waterboarding.”

“We’re going to have to do things that we never did before,” he said in 2015. “And certain things will be done that we never thought would happen in this country in terms of information and learning about the enemy. And so we’re going to have to do certain things that were frankly unthinkable a year ago.”

Last-Ditch Efforts

With these concerns in mind, 21 of the nation’s largest human rights and faith organizations released a joint statement of principles on Dec. 13 regarding the eligibility of Trump’s nominees. The statement outlines key requirements of top administration officials that should be evaluated by the Senate during confirmation hearings, including respect for international human rights obligations and adherence to the rule of law.

“Those nominated to serve in a Trump Administration will hold critical positions affecting millions of people’s human rights. It’s crucial that they commit to upholding this country’s obligations under international and U.S. law. The U.S. cannot hold moral high ground and will never be seen as leader on human rights if it flouts these obligations at home,” said Margaret Huang, executive director of Amnesty International USA.

Nearly 200 organizations also sent a letter to President Obama, asking him to abolish the National Security Exit-Entry Registration System (NSEERS), which they worry will be used by a Trump administration to register and track Arabs and Muslims. In a letter delivered to Obama administration late last month, the American Arab Anti-Discrimination Committee called

NSEERS “ineffective as a counterterrorism tool,” which has caused “tremendous harm” to immigrant communities.

Others, such as the National Religious Campaign Against Torture, are calling on Obama to release in full the Senate’s torture report and force “appropriate officials” to read it in order to ensure that they “learn from the past.” Although White House Counsel Neil Eggleston recently announced that Obama will archive one copy of the torture report, it will apparently remain classified for at least 12 years. “At this time, we are not pursuing declassification of the full Study,” he wrote in a letter to Sen. Feinstein.

When it comes to the government’s mass surveillance activities, civil liberties and privacy advocates are calling for President Obama to enact emergency NSA reforms before leaving office. Various proposals have been offered as some degree of protection against possible overreaching by a Trump administration, including the introduction of intelligence principles such as pledges not to unlawfully spy on fellow Americans.

Yet, it’s not clear how any such guidelines would prevent abuses from taking place, especially since earlier abuses have been left unpunished. For example, when Snowden’s leaks revealed in 2013 that the NSA had overstepped its legal authority thousands of times, there were no prosecutions launched over this law-breaking, with the only people prosecuted being the ones who exposed the programs, not those who carried them out.

The same could be said, of course, for the lack of law enforcement by Obama’s Justice Department when details came to light over the CIA’s illegal torture program. This is despite the fact that even high-ranking U.N. officials called for prosecutions following the release of the Senate torture report’s executive summary two years ago in order to uphold principles of international law.

U.N. Special Rapporteur on Human Rights and Counterterrorism Ben Emmerson stated that senior officials from the Bush administration who sanctioned crimes, as well as the CIA and U.S. government officials who carried them out, must be investigated and prosecuted to deter future crimes and punish past crimes.

“As a matter of international law, the U.S. is legally obliged to bring those responsible to justice,” Emmerson said on Dec. 9, 2014. “The UN Convention Against Torture and the UN Convention on Enforced Disappearances require States to prosecute acts of torture and enforced disappearance where there is sufficient evidence to provide a reasonable prospect of conviction. States are not free to maintain or permit impunity for these grave crimes.”

U.N. Secretary-General Ban Ki-moon also expressed hope that the release of the torture report was the “start of a process” toward prosecutions, because the “prohibition against torture is absolute.” Needless to say, no prosecutions followed.

Prohibited Policy Options

This has led to torture, much like mass surveillance, becoming a “policy option” for presidents to utilize or not depending on the political whims of the day.

So, ultimately, what Trump is inheriting is a national security apparatus that engages in prohibited activities as matters of policy. The government he is taking over has in recent years committed torture, indefinite detention, and has even used drones to kill American citizens without trial. He will also be inheriting legal doctrines advocated by his predecessors that provide ready rationales for all of these practices.

With the Obama administration having acknowledged that CIA drone strikes have killed at least four U.S. citizens, former Attorney General Eric Holder has articulated a legal foundation for these attacks that President-elect Trump can now build upon.

In a speech at Northwestern University School of Law on March 5, 2012, Holder offered a legal defense of drone assassinations, including of U.S. citizens, arguing that although the decisions for who is targeted are made entirely in secret, they nevertheless follow the Constitution’s due process requirements.

“Some have argued that the President is required to get permission from a federal court before taking action against a United States citizen,” Holder said. “This is simply not accurate. ‘Due process’ and ‘judicial process’ are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.”

While acknowledging that “it is preferable to capture suspected terrorists where feasible,” Holder claimed “that there are instances where our government has the clear authority – and, I would argue, the responsibility – to defend the United States through the appropriate and lawful use of lethal force.”

Democrats may have accepted this argument based on the faith that they had in Obama to use these extraordinary powers responsibly. But as civil libertarians and national security experts have long pointed out, even if citizens generally trust a sitting president with these abilities, there is no reason to think that a future president – one with notoriously thin skin or authoritarian tendencies, for example – should be entrusted with these sweeping powers.

The oft-repeated notion that you shouldn’t mind a little government snooping as long as you have nothing to hide, or that there is no reason to concern yourself with the constitutional rights of suspected terrorists, or the comfort that comes with believing that only the “worst of the worst” could be sent to legal black holes like Guantanamo or targeted by U.S. drone strikes, begins to wear thin when people come to believe that the government itself cannot be trusted to use these powers properly.

And when it comes to the looming Trump administration, there is little reason to believe that it can.

