Cato's Letter

A QUARTERLY
MESSAGE
ON LIBERTY

FALL 2017
VOLUME 15
NUMBER 4

Curbing the Surveillance State

RAND PAUL AND RON WYDEN

Section 702 of the FISA Amendments Act of 2008, which is set to expire at the end of this year, is one of the most powerful and intrusive tools in the intelligence community's arsenal. It grants the government the authority to intercept the communications of foreign targets as they cross U.S. soil—including conversations with American citizens that are "incidentally" caught up in these collections. What is the scope of these "incidental" collections? Should American communications be accessed without a warrant? Does Section 702 need reforms to protect Americans' privacy? As Congress prepares for another battle over reauthorizing Section 702, Cato's Patrick Eddington interviewed two of the law's most vocal critics, Sens. Ron Wyden (D-OR) and Rand Paul (R-KY), at the Cato Institute in July.

SEN. RON WYDEN (D-OR), Cato's PATRICK EDDINGTON, and SEN. RAND PAUL (R-KY) speak at the Cato Institute in July.

CATO INSTITUTE

RAND PAUL: A good place to start, I think, is to ask: Do we need more or less oversight of the intelligence community? Without a question, I think the answer is "more."

RON WYDEN: The two of us decided a long time ago that good policies ensure that security and liberty are not mutually exclusive: you can have *both*. You can have policies that make us safer *and* protect our liberties, and foolish policies often give you less of both. We would agree that there are threats overseas, but we're troubled by these backdoor searches. We try to focus on areas where, in the pursuit of a legitimate national security priority, nobody is saying, "Excuse us, where are the rights of law-abiding Americans, and particularly, the right to not have their emails and data reviewed without a warrant?"

PATRICK EDDINGTON: Would it be fair to say that there is an enormous amount of American information that winds up getting swept up through Section 702?

> "Good policies ensure that security and liberty are not mutually exclusive: you can have *both*."

WYDEN: I can't comment on anything that touches on classified information, but what I can tell you is that this is a big problem today, and it's going to get bigger and bigger in the years ahead. Because as global communications systems become more integrated, more American communications are going to get swept up. For six years, Democrats and Republicans in the Senate and the House have been asking the National Security Agency how many Americans are getting swept up in this.

PAUL: Sen. Wyden said he couldn't tell you the number, because it's classified. This is part of the problem: we can't make rational decisions on policy because we don't know the numbers. You can't find out those numbers. Some public reports say "tens of millions," because if there are 100,000 targets, each target has tentacles that might point out in 100 directions—it's 100,000 times however many

contacts you have in your email list. That's an enormous amount of contacts that might get swept up, many inadvertently, and many American-to-American communications. We really have to do something about this, and part of it is trying to get these numbers so that Americans can be as alarmed as we are. So usually if they ask *me* how many Americans are swept up, I say "a gazillion," because a gazillion's a fake number and I know I can't be punished for saying "a gazillion."

EDDINGTON: The issue that they're referring to here has to do with the fact that these gentlemen had to sign secrecy agreements to gain access to this information.

WYDEN: Recently, in a public hearing, I asked the Director of National Intelligence Dan Coats if Section 702 could be used to collect domestic communications. He said no. But later, the Office of National Intelligence told journalists that he was answering a different question than the one that I had asked. So I wrote *again*, insisting on an answer to the question I asked. I still haven't gotten that answer. But to say, "Oh, he responded to something different"—I'll let you draw your own conclusions.

PAUL: They say, "Oh no, we don't *wittingly,*" or "we don't *intentionally*," but they jolly well know that hundreds of thousands of purely domestic conversations are being absorbed.

EDDINGTON: What is it that congressional leadership doesn't understand about how they themselves, their family members, their staffs, and above all, their constituents, can be victimized by this?

PAUL: I think they accept the dictum, "If you have nothing to hide, you have nothing to fear." They seem to think the government always does "good"—but Ron and I would say, do you remember the interning of the Japanese? Do you remember what they did to civil rights advocates?

WYDEN: I think the leadership, in particular, because they don't specialize in these issues, is always caught up in this false dichotomy that you can have one or the other, liberty or security. And look, I'm one of the longest-serving members of the Intelligence Committee in the Senate's history. I do not dispute the fact that it is a dangerous world. You go in there a couple of times a week, they lock the doors, and you hear that there are a lot of bad guys out there who do not wish the country well. What is different, between our view and congressional

leadership, is that we ask, "Can we just think about what this means in practical terms?" For example, all these proposals to require companies to build backdoors in their products to get access to your browsing history without warrants—these policies make us less safe and sacrifice our liberties. Any proposal—and I expect we'll see it from the Trump administration—to weaken strong encryption, I will close down the United States Senate to block it.

Let's really unpack this: encryption is not about security versus liberty; it's about security versus *less* security. Encrypted devices are how we protect ourselves against hackers and threats. And it's a really dumb idea from an economic standpoint, because we have so many high-skill, high-wage jobs in this country that revolve around encrypted technologies. We're for protecting America just as much as they are, but we've got policies that will make us *more* secure, without giving up our liberty, rather than policies like weakening encryption that will make us less secure, with less liberty, and harm a big part of our country's economy.

PAUL: If you look at the odds of what you're more likely to have happen—have a terrorist attack you, or have someone steal your credit card information—it's like a million to one; you're more at risk of having your credit card information stolen than you are of being attacked. That doesn't mean we shouldn't protect against terrorism, but we certainly can't give up the protections that encryption provides for the privacy and security of our financial transactions.

EDDINGTON: What needs to be done, at a minimum, to reform Section 702?

WYDEN: First, 702 needs an expiration date. It should not be permanent. Second, we need to write into the law a legal prohibition on "abouts" collection, when American communications are collected without a warrant merely for *mentioning* a foreign target or the target's contact information. Third, we ought to add new voices to the FISA court and make sure that there are people who are knowledgeable about surveillance issues. Right now, the judges hear only the government's side of the debate. And we definitely have to improve transparency over how 702 works. That would mean having the government tell us what the targets are, and having Director Coats respond, among other things, to whether 702 would be used to collect domestic communications.

PAUL: I would add a couple of things. We have lowered the standard for the collection of foreign data below the Fourth Amendment—and I'm not com-

pletely opposed to this, for data collected overseas, but I'm absolutely opposed to using a lower standard for domestic crime. Do we want a government that's going to look at every transaction, everything we do, all through this lower standard?

We should also have rules for the database. They either should have to delete the domestic-domestic incidental data, or at the very least, they should have to get a warrant to search an American. I'm very concerned about Americans' names being put in the database for political purposes, even members of Congress. You'd be surprised how many people have had incidental contact. Millions of Americans are changing their behavior because they're worried about their own government. And that's wrong. We have to do more.

> "Millions of Americans are changing their behavior because they're worried about their own government."

WYDEN: Sen. Paul and I have also joined forces on another matter that I think is going to be increasingly important to people's privacy. We've proposed the Protecting Data at the Border Act, which sets rules for searching people's devices at the border. We have been trying to excavate information about how often people are having their devices taken at the border.

PAUL: I asked General Kelly, when he was still Secretary of Homeland Security, "If I leave the country, you're going to deny me entry, as an American citizen, to *my* country, unless I give you the password to my phone? My computer? To all of my data?" and he said, "Yes, if you're dangerous." But it turns out you're "more dangerous" if your skin's not completely white, or if your name's not completely Anglo-Saxon. I would maybe acknowledge there might be a slightly lower standard if you're visiting the country. But if you're a green card holder or a U.S. citizen, if you're coming back to your country, demanding your password is obscene, and this is something we should fight. And I think the public would be with us. ■

SCHOLAR PROFILE

Andrei Illarionov

ANDREI ILLARIONOV is a Cato senior fellow. From 2000 through December 2005, he was the chief economic adviser to Russian president Vladimir Putin before resigning in protest. He has since been an important critic of Putin's government, which became an aggressive authoritarian regime destroying the rule of law, violating human rights, and attacking neighboring countries. Illarionov received his PhD from St. Petersburg University in 1987.

How did growing up in the Soviet Union shape your political views?

Everyday life under a totalitarian communist regime was an important factor in the formation of my economic, legal, and political views. But even more important was the impact of my parents, who helped me analyze what I saw and heard but was yet too young to fully understand. The everlasting economic hardships, including shortages of basic goods and services, stimulated my interest in economics and inspired me to study economics at St. Petersburg University. There, as in my high school before that, I was quick to find huge areas of forbidden topics that no one was allowed to study, write, talk, or even read about. The largest public library in St. Petersburg had the Department of Special Storage, where they stored books not permitted for reading without authorities' special permission. To read the 1962 edition of Paul Samuelson's *Economics* in a closed room, without the right to move it out or even to put notes in my own notebook, I had to collect four signatures—from the head of my department, the dean of the faculty, the rector of the university, and the director of the library. When I grew up, I learned that both my grandfathers were arrested by Stalin's secret police and sent to the gulag, where both of them were executed.

The Putin you once worked for, who praised economic freedom, had very different ideas from the ones he's pursuing now. What caused this change?

A person who could correctly answer this question could easily contend for a Nobel Prize in psychology. Although historic (d)evolution in attitudes is a normal feature for any person, politicians included, the dramatic changes in the views and policies of the leader of the world's second-most-powerful nuclear power is a serious problem. Over the past few years, there have been several hypotheses trying to explain these dramatic changes. My own version is that this (d)evolution is the result of the peculiar combination of the beliefs he had inherited from his personal experience during his very unlucky childhood, his semi-criminal teenage years, his education in a judo training club, in the Department of (Soviet) Law in St. Petersburg University, and in the KGB high school, as well as the persistent and ever-increasing impact of conservative, xenophobic, imperialistic views of the Russian orthodox clergymen who surrounded him in the past years and who became extremely influential in shaping and changing his personal worldview.

What are you working on these days?

My efforts are concentrated mostly on writing a book on the transformation of former communist countries in the last three decades. The central question in the book is why some transition countries turned out to be more successful, and others did not; why Russia's transition that was so promising just a quarter century ago turned out to be the greatest failure; and what lessons should be learned by prospective transition nations and by the world as a whole from the uneven political, economic, legal, ideological, and social transformations of the former communist countries, from Eastern Germany to Vietnam. ■

Adventures in Liberty

Fifty years ago, Dave and Jacky Hood met at the University of Nebraska as engineering students with a mutual interest in Objectivism. Today, they're still two independent-thinking engineers, happy, productive, and doing what they can to encourage voluntary relationships in every aspect of life.

The 50 years have been full of adventures.

Dave graduated first and was hired by Bell Labs, which sponsored his master's degree at Stanford. The pay was $400 per month, $450 for married students. (As Dave puts it, what better reason could there be to get married?) The couple spent 10 years in Canada, with both Dave and Jacky working at Bell-Northern Research (later Nortel) in Ottawa.

But Ottawa winters eventually reminded the Hoods how great the weather was in the

Mikel Peterson

San Francisco Bay area, not to mention the high-tech environment. The pair moved to Palo Alto, where they enjoyed the unparalleled opportunities for outdoor activities. Remembering a daydream from university days, Dave and Jacky decided to bicycle 4,200 miles across North America. They spent a year living in Munich and traveled widely, from enjoying beer in the Bavarian Alps, Switzerland, Vienna, and Salzburg to exploring Kuala Lumpur and Bucharest.

As dedicated libertarians back in California, they soon connected with Cato around our Bay Area events, like a 1994 seminar with Milton Friedman and our 2003 Liberty, Technology, and Prosperity Seminar co-sponsored with *The Economist*.

Dave and Jacky are part of Cato's community because they strongly believe in the power and morality of voluntary associations. Because Dave and Jacky are longtime Cato Sponsors, the Institute has benefited from their financial as well as personal contributions for many years. Our work is stronger thanks to their loyal, sophisticated engagement in Cato's efforts.

"Appeals to emotion are satisfying but unproductive," say Dave and Jacky, citing rallies, slogans, political parties, and the like. "In the long term, what matters are ideas. If force and fraud are off the table, ideas are the only weapons we have. We can only improve things by convincing those who do not share our outlook."

"We view Cato as the organization best focused on serious advocacy that goes beyond preaching to the choir," they added, citing Cato's success in amicus briefs to the Supreme Court, the use of Cato studies as reference material by government staffers, and Cato testimony to congressional committees, among other things.

A few years ago, Dave and Jacky decided that, in addition to their annual contributions to Cato, leaving an outright gift in their estate was an opportunity to make a lasting contribution to our shared values. Creating their legacy gift to Cato was as simple as making the designation in their estate plans and informing the Institute. ■

IF YOU'RE CONSIDERING YOUR LEGACY FOR LIBERTY, PLEASE KNOW WE'RE AVAILABLE TO DISCUSS YOUR LONG-TERM ASPIRATIONS WITH A GIFT IN YOUR ESTATE. PLEASE CONTACT BRIAN MULLIS DIRECTLY AT BMULLIS@CATO.ORG OR 202-789-5263.

Liberty Matters

In this new series from Libertarianism.org, George Smith takes readers on excursions into the history of libertarian ideas. The first three books of this series address the relationship between religious and intellectual liberty, the complicated nature of our revolutionary legacy, and the misconception that libertarianism supports a selfish individualism that weakens society. Along the way, readers will cross paths with freethinkers, atheists, political philosophers, the Sons of Liberty, and the Founding Fathers.

Libertarianism.org

A PROJECT OF THE CATO INSTITUTE

AVAILABLE AT LIBERTARIANISM.ORG AND ONLINE RETAILERS WORLDWIDE.

Nonprofit
Organization
U.S. Postage
PAID
Cato Institute

CATO INSTITUTE
1000 Massachusetts Ave., N.W.
Washington, D.C. 20001
www.cato.org