

# Cato's Letter

A QUARTERLY  
MESSAGE  
ON LIBERTY

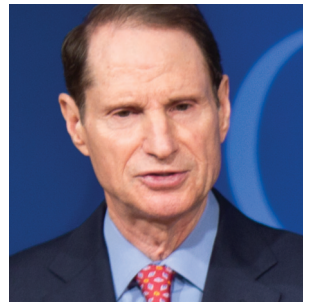
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## Unveiling the Surveillance State

SEN. RON WYDEN

I want to begin by saying that, in my view, a good way to measure the credibility of scholars and thinkers in Washington is by watching to see whether they can stay true to their views, regardless of the impact those views have on partisan politics. That's why Cato scholars like Jim Harper and Julian Sanchez are the go-to leaders—the people we look to—on these issues of security and liberty. That said, this conference could not be more timely.

Back in September, a bipartisan group of senators, myself included, kicked off the debate surrounding recent National Security Agency (NSA) activities by introducing the first comprehensive bipartisan surveillance reform bill following the June disclosures.



SEN. RON WYDEN (D-OR) HAS SERVED AS THE SENIOR U.S. SENATOR FOR OREGON SINCE 1997. HE SPOKE AT A CATO INSTITUTE CONFERENCE ON NSA SURVEILLANCE IN OCTOBER.

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Our legislation sought to accomplish a number of things: to end the bulk collection of Americans' records, to close the backdoor search loophole that allows Americans' communications to be reviewed without a warrant, to make the Foreign Intelligence Surveillance Court operate more like a court that's worthy of our wonderful country, and to expand the ability of our citizens to have their grievances heard in federal courts.

The goal of our bipartisan group is to set the bar for measuring what constitutes real intelligence reform. We know that in the months ahead we're going to be up against what I

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call the business-as-usual brigade. The influential members of the government's intelligence leadership—including sympathetic legislators, retired government officials, and their allies in think tanks and academia—want to fog up the surveillance debate. Their objective is to convince Congress and the public that the real problem is not overly-intrusive, constitutionally flawed domestic surveillance, but rather the sensationalistic media reporting surrounding it.

Their end game is to ensure that any surveillance reforms are only skin deep.

We've heard from the business-as-usual brigade, for instance, that surveillance of Americans' phone records—also known as metadata—is not actually surveillance, but simply the collection of bits of information. We've been told that falsehoods aren't really falsehoods, they're just imprecise statements. We've been told that rules that have repeatedly been broken are actually a valuable check on government overreach. And we've been told that codifying secret surveillance laws and making them public laws is the same as reforming overreaching programs.

These arguments leave the public with a distorted picture of what the government is actually up to. When put together, those tiny bits of information paint an illuminating picture of what the private lives of law-abiding Americans entail. Erroneous statements that are made on the public record—but never corrected—mislead the public and other members of Congress. Privacy protections that don't actually protect privacy are not worth the paper they're printed on. And just because intelligence officials say that a particular program helps catch terrorists does not make it true.

I'm encouraged that the president has said that he supports the creation of an independent advocate to argue cases before the FISA court. But I believe that the intelligence leadership is going to continue to argue for

limiting the advocate's mandate and resources. They will most likely propose that the advocate should only be allowed to argue cases at the request of FISA court judges, without the ability to appeal cases or assist companies and individuals that wish to challenge these overly broad surveillance orders.

The executive branch has also begun declassifying information about domestic surveillance activities in response to disclosures by the media and the lawsuits filed under the Freedom of Information Act. With any luck, that will continue. But when it comes to greater transparency and openness, the executive branch has shown little interest in lasting reforms. Requiring the government to be more open about its official interpretation of the law is critical. It's the only way that fellow citizens can decide whether or not our laws need to be changed.

I also expect the defenders of business-as-usual to attempt to codify the surveillance authorities that reformers want to appeal. This is truly a dangerous proposition. Not only would it spark a new era of digital surveillance in our country, it would also serve as a big rubber stamp of approval for invading the rights of law-abiding Americans. Their argument will be that nobody ought to worry about such data collection because there are rules about who can be scrutinized when. But there are several problems with this "trust us" argument.

First, when the Founding Fathers wrote the Fourth Amendment, they

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didn't say that it's fine to issue general warrants as long as there are rules determining when you're allowed to look at the papers you seize. They said that the government should only be allowed to obtain somebody's private effects if they have evidence that that person is involved in nefarious activities. The reason is that collecting private information about people has an impact on their privacy whether you actually look at it or not.

Second, none of these rules involves individual review by a judge. If the NSA decides that it wants to look through the bulk phone records database or conduct a backdoor search for a particular American's emails, it can do so without the approval of anyone outside the NSA. Clearly, there aren't enough independent checks on the government's authority.

Third, when examining the actual track record of our intelligence agencies, it's clear that the rules have been broken *a lot*. In 2009 the FISA court itself ruled that “the minimization procedures proposed by the government in each successive application and approved as binding by the orders of [the FISA court] have been so frequently and systematically violated that it can fairly be said that this criti-

cal element of the overall [business records] regime has never functioned effectively.”

Even if these rules were somehow written in a way that completely erased the privacy impact of bulk records collection—which I don’t think is possible—the routine violation of these rules over the years clearly demonstrates that trying to rely on them is a seriously flawed approach.

In short, the business-as-usual



brigade is going to argue that the best way to protect Americans’ rights is to codify these rules into law. This would be a huge mistake. Codifying the rules for bulk phone records collection—in effect, putting a congressional imprimatur on invading the rights of law-abiding Americans—will just make this constitutionally flawed program more permanent. In particular, it will make it easier for the executive branch to use the Patriot Act to collect other types of records in bulk in the fu-

ture—including medical, financial, and firearm records. This will normalize overly broad authorities that were once considered unthinkable in our country.

The defenders of this approach were hoping that public outrage about these programs would fade once there were details out there. But the exact opposite has occurred. The more people learn about these programs, the less they actually like them. Polls show that public opinion has moved significantly in a pro-reform direction since those initial disclosures were made back in June. The fact is that most Americans think their government can protect our security and our liberty.

As a result of this groundswell of public concern, members of Congress have been outlining ideas for reform. But make no mistake about it, the business-as-usual brigade is going to be working very hard behind the scenes to preserve existing authorities and avoid real change.

When it comes down to it, the effects of these constitutionally flawed, overly intrusive surveillance programs go beyond the invasion of individual privacy. American companies that are believed to have been the subject of government surveillance orders are taking a major hit both internationally and here at home. This is coming at a time when we all know our economy is fragile. If a foreign enemy was doing this much damage to our economy, people would be in the streets with pitchforks.

So what is the bar for reform? First and foremost, meaningful reform has to end the bulk collection of Ameri-

cans' records. The NSA can't even demonstrate that this bulk collection provides value beyond what their existing authorities give them. Back in June intelligence officials kept suggesting that bulk phone records collection had helped in 54 terrorism investigations. That number has not held up under real scrutiny.

I believe that meaningful legislation also has to reform Section 702 of the Foreign Intelligence Surveillance Act. Congress intended for this program to target foreigners, but as the court pointed out in a recently declassified document, tens of thousands of wholly domestic communications were swept up in the collection. The FISA court called this a violation of the "spirit of the law."

Finally, Congress needs to create an independent advocate to make the other side of the case on significant matters before the court. Right now, when the FISA court considers a major question of law, like whether the Patriot Act permits the dragnet surveillance of innocent Americans, the court's only going to hear one side of the argument. I don't know of any other court in America that is so skewed. The court's major opinions should then be redacted and released, so that the American public has an opportunity to understand how their laws and Constitution are actually being interpreted.

Executive branch officials spent the last several years making misleading statements about domestic sur-

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veillance to both Congress and the American people. That should never be allowed to happen again.

Winning the reform battle is not going to be a glamorous exercise. It certainly hasn't been over the last few years for the handful of reformers who have tried every day to advance the cause. We worked very hard, for instance, to get a few short lines of a secret court opinion declassified because we knew that once we started pulling out the threads, eventually the whole secret law edifice would start to unravel. In time, the Electronic Frontier Foundation, an important privacy group, filed a lawsuit and managed to get that entire opinion—which detailed serious constitutional violations—declassified and released to the public.

It's going to take a groundswell of support from Americans across the political spectrum who are willing to let their members of Congress know what they want, communicate that business-as-usual is no longer okay, and insist that liberty and security are not mutually exclusive. For the millions of law-abiding Americans who care about protecting those values, the time for action is now. ■



## CATO SCHOLAR PROFILE

# Daniel R. Pearson

DAN PEARSON JOINS THE CATO INSTITUTE AFTER SERVING FOR 10 YEARS ON THE U.S. INTERNATIONAL TRADE COMMISSION (USITC). PEARSON WAS NOMINATED TO THE USITC BY PRESIDENT GEORGE W. BUSH IN 2003. HE SERVED AS CHAIRMAN IN 2006–8 AND AS VICE CHAIRMAN IN 2008–10. PRIOR TO JOINING THE USITC, PEARSON WORKED ON AGRICULTURAL AND TRADE ISSUES FOR SEN. RUDY BOSCHWITZ (R-MN) AND FOR CARGILL.

### WHAT DREW YOU TO THE CATO INSTITUTE?

For years I've chafed over excessive government intervention in the marketplace. Readers who have been around since the 1973 oil embargo will recall that U.S. price controls on crude oil led to shortages of gasoline and long lines at filling stations. A policy of trying to prevent the price from reaching a market-clearing level created huge costs and inefficiencies. My conclusion was very libertarian: it is far better to let the invisible hand of the marketplace work than for the government to stand in its way.

In the early 1980s my career shifted from farming in Minnesota to dealing with agricultural and trade-policy issues for Sen. Rudy Boschwitz (R-MN). My efforts from that time on have been largely devoted to reforming policies so that domestic and international markets are able to do their important work of balancing supply and demand. Having long been a fan of Cato, I found the opportunity to continue that work here to be particularly appealing.

### WHAT WILL YOUR WORK FOCUS ON?

At Cato I hope to build on my past work by applying economic reasoning to public policies that influence international trade. This will go beyond just dealing with "border measures" (tariffs, quotas, etc.) and will include arguing for reform of domestic policies that distort market signals, thus leading to protectionist border measures. Open and competitive markets do a fine job of allocating resources, promoting growth, and expanding international trade.

It's unfortunate that so many policymakers in this country and overseas seem uncomfortable with the marketplace. The market is always trying to tell us something. My objective will be to encourage policymakers to listen to what the market is saying, and then to develop policies that work in harmony with those forces instead of against them. My initial efforts will focus primarily on reform of trade remedy measures (antidumping and countervailing duties), on agriculture/food policies, and on rebuilding support for multilateral trade liberalization.

### WHY HAS TRADE LIBERALIZATION BECOME SO CONTROVERSIAL IN THE UNITED STATES?

In one sense, opposition to trade liberalization is surprising. Almost all economists agree that freer trade makes societies better off by providing a wider variety of goods and services for consumers, while encouraging firms to produce efficiently in order to meet world-class competition. However, it's also well understood that liberalization results in some companies and workers finding it hard to succeed. Much of my time at the USITC was spent on antidumping cases brought by industries that were having difficulty dealing with competition from imports. Those industries usually aren't hesitant to argue that freer trade is bad—and to make imports a scapegoat for any and all problems they're facing. The ongoing challenge for supporters of liberalization is to educate thought leaders and policymakers that the benefits of open markets far outweigh the costs. ■

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# Taking Stock

**J**anuary! February! The holidays are over and it's time to think about paying the bills and gathering your tax information. It can also be a good time to take stock of your financial situation.

For example do you have an updated will? Federal estate tax laws have changed a good deal over the last few years. Right now—and likely for the next few years—we have a fairly generous exclusion from Federal estate and gift taxes: inflation adjusted \$5,340,000 for an individual and \$10,680,000 for a married couple. Wills written a few years ago when the exclusion was drastically lower may simply not “work” anymore. That's because those older wills frequently “pegged” gifts and bequests to the exclusion amount, thus leading to unintended, supersized gifts under the new exclusion rules.

And what about your IRAs, 401Ks, and other tax advantaged retirement savings accounts? We tend to forget that these assets pass by operation of law, that is, by the beneficiary designation form you filled out on the first day of your job or when you opened the account. Do you remember who you designated? It's always a good idea to make sure that you and perhaps your lawyer have copies of these designation forms—and to take a moment to think about whether you chose the right beneficiary.

There is a growing debate about the best way to maintain—and appropriately share—a list of user IDs and passwords. Most of us have some system for storing them for our ever-proliferating investment accounts, medical accounts, online vendors, professional associations, travel sites, and so on. The list is practically infinite! Some of us use encrypted spreadsheets while others prefer the simplicity, and risk, of an old fashioned notebook. And, let's be honest, many passwords are scribbled on Post-Its scattered around our homes and offices. So give some



thought to what is, for you, a practical and safe storage system. And also think about the fact that we all—especially as we get older—need to share that system with a spouse, friend, or lawyer. Otherwise we can easily leave a horrendous riddle for our heirs: deconstructing a life in the absence of passwords often proves daunting and expensive.

Our password list may well serve another important purpose: that of having a master list of investment assets, bank accounts, retirement accounts, insurance policies, real estate holdings, mortgages, and other indebtedness. If you prefer to maintain two separate lists, that's fine. The important thing is to have a clear, readable record of your IDs and passwords as well as of your assets and liabilities. And, finally, remember to share information about your assets and liabilities with a spouse, friend, or lawyer—and to tell them where your safety deposit box and keys are located.

So far we have been talking about the nitty gritty details. But it's also important to take stock of the big picture and to think through your estate plan. Will your assets flow to the right people, the people you really care about? Will these people be able to handle the inheritance or do some of them have “special needs” such that it might be a good idea to include a trustee or custodian? Have you consulted with a lawyer or other adviser to make sure your plan is tax efficient? And have you included gifts to those charities—such as Cato—that you really care about?

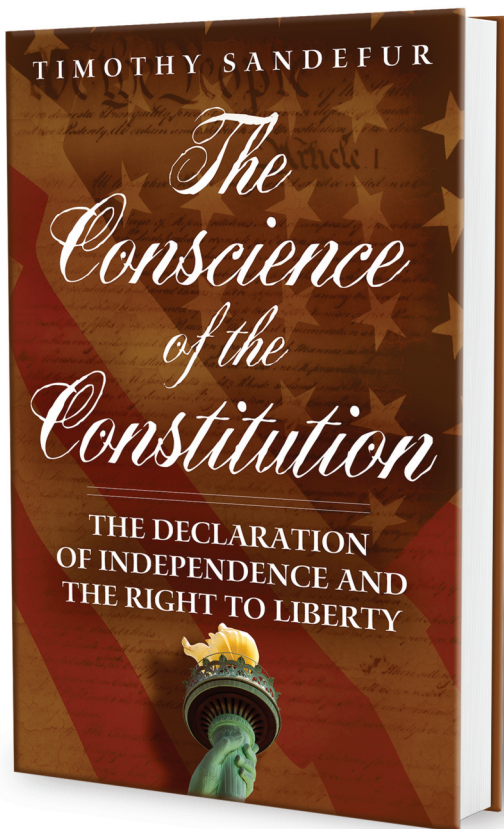
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“Makes a compelling case that the principles of the Declaration of Independence pervade our Constitution and should inform its interpretation.”

— CLINT BOLICK  
*Vice President for Litigation, Goldwater Institute*

Timothy Sandefur's insightful new book documents a vital, forgotten truth: our Constitution was written not to empower democracy, but to secure liberty. Yet the overemphasis on democracy by today's legal community—rather than the primacy of liberty, as expressed in the Declaration of Independence—has helped expand the scope of government power at the expense of individual rights. Now, more than ever, the Declaration of Independence should be the framework for interpreting our fundamental law. It is the conscience of the Constitution.

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