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Cato Unbound Exchange on “The Snowden Files: One Year Later”

By Benjamin Wittes
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The Cato Institute is hosting an online exchange entitled “The Snowden Files: One Year Later.” The lead essay, by Cato’s Julian Sanchez, opens as follows:

America’s first real debate about the 21st century surveillance state began one year ago. There had, of course, been no previous shortage of hearings, op-eds, and panels mulling the appropriate “balance between privacy and security” in the post-9/11 era. But for the masses who lacked a security clearance, these had the character of a middle school playground conversation about sex—a largely speculative discussion among participants who’d learned a few of the key terms, but with only the vaguest sense of the reality they described. Secrecy meant abstraction, and in a conflict between abstract fears and the all-too-visible horror of a burning skyscraper, there could be little question which would prevail. The panoptic infrastructure of surveillance developed well out of public view.

A more meaningfully informed public debate finally became possible via a series of unprecedented disclosures about the global surveillance apparatus operated by the National Security Agency—disclosures for which the word “leak” seems almost preposterously inadequate. It was a torrent of information, and it gave even the most dedicated newshounds a glimmer of what intelligence officials mean when they complain about “drinking from the fire hose” of planet-spanning communications networks.

The fountainhead of this stream of revelations, a young former contractor named Edward Snowden, declared himself to be motivated by a “reasonable fear of omniscient State powers kept in check by nothing more than policy documents.” It is a telling formulation, because it concedes at the outset the point on which intelligence officials invariably insist: That there are rules and procedures, safeguards and oversight mechanisms, meant to guarantee that the vast quantities of information ingested by the NSA and its global partners are used only for good purposes. The question remains whether, once the astonishing scope of the spy machine is apprehended, those fetters begin to seem somewhat decorative—and if so, what we can do about it.

My contribution opens as follows:

As I type these words, I have to take on faith that the Washington D.C. police, the FBI, the DEA, and the Secret Service are not raiding my house. I also have to take on faith that federal and state law enforcement authorities are not tapping my various phones. I

have no way of knowing they are not doing these things. They certainly have the technical capability to do them. And there's historical reason to be concerned. Indeed, there is enough history of government abuse in the search and seizure realm that the Founders specifically regulated the area in the Bill of Rights. Yet I sit here remarkably confident that these things are not happening while my back is turned—and so do an enormous number of other Americans.

The reason is that the technical capability for a surveillance event to take place does not alone amount to the reality—or likelihood—of that event's taking place. And though the D.C. police certainly have the battering rams to take down my door, there are at least two other less-visible barriers to their entry. One is the substance of the law, which forbids their entry in the absence of probable cause of a crime. The other is the compliance and oversight mechanisms that ensure the police follow the law. If one has confidence in those two things, the technical capability of government to conduct an abuse actually does not pose an unmanageable threat.

For much the same reason as I am not rushing home to guard my house, I have a great deal of confidence that the National Security Agency is not spying on me. No doubt it has any number of capabilities to do so. No doubt those capabilities are awesome—in the wrong hands the tools of a police state. But there are laws and rules that protect me, and there are compliance mechanisms that ensure that the NSA follows those laws and rules. These systems are, to be sure, different from those that restrain the D.C. cops, but they are robust enough to reassure me.

Contributions still to come from Carrie Cordero and Marcy Wheeler.