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A Government of Secrecy and Fear

By Andrew P. Napolitano

October 23, 2013

Every American who values the rights to life, liberty and the pursuit of happiness, every American who enjoys the right to be different and the right to be left alone, and every American who believes that the government works for us and we don't work for the government should thank Edward Snowden for his courageous and heroic revelations of the National Security Agency's gargantuan spying operations. Without Snowden's revelations, we would be ignorant children to a paternalistic government and completely in the dark about what the government sees of us and knows about us. And we would not know that it has stolen our freedoms.

When I saw Snowden's initial revelation – a two-page order signed by a federal judge on the FISA court – I knew immediately that Snowden had a copy of a genuine top-secret document that even the judge who signed it did not have. The NSA reluctantly acknowledged that the document was genuine and claimed that all its snooping on the 113,000,000 Verizon customers covered by that order was lawful because it had been authorized by that federal judge. The NSA also claims that as a result of its spying, it has kept us safe.

I reject the argument that the government is empowered to take our liberties – here, the right to privacy – by majority vote or by secret fiat as part of an involuntary collective bargain that it needs to monitor us in private in order to protect us in public. The government's job is to keep us free and safe. If it keeps us safe but not free, it is not doing its job.

Since the revelations about Verizon, we have learned that the NSA has captured and stored in its Utah computers the emails, texts, telephone conversations, utility bills, bank statements, credit card statements and digital phone books of everyone in America for the past two and a half years. It also has captured hundreds of millions of phone records in Brazil, France, Germany and Mexico – all U.S. allies – and it has shared much of the seized raw American data with intelligence agencies in Great Britain and Israel. Its agents have spied on their girlfriends and boyfriends literally thousands of times, and they have combed the collected raw data and selectively revealed some of it to law enforcement. All of this directly contradicts the Constitution.

And, if all of this is not enough to induce one to realize that the Orwellian future is here thanks to the secret governments of George W. Bush and Barack Obama, Snowden also revealed that the NSA can hack into anyone's mobile phone, *even when it is turned off*, and use each phone as a listening device and as a GPS to track whoever possesses it.

When Gen. Keith Alexander, the head of the NSA, was confronted with this litany of unlawful and unconstitutional behavior, he replied by claiming that his spies have saved the U.S. from 54 terrorist plots. He pleaded with lawmakers not to strip him of the power to spy or of the billions they have given him to spend on spying, lest another 9/11 plot befall us.

Many Americans were willing to make this trade: spy on 330,000,000 Americans in order to stop 54 plots. But the government lacks the moral and constitutional power to compel this trade, because the right to privacy is a personal, individual and inalienable right, and so it cannot lawfully be taken away by majority vote (which never happened) or by secret fiat (which did happen). The government also lacks the authority to spy without legal constraint on anyone it wishes, because that violates the Constitution and fundamentally changes our open and free society. All-hearing ears and all-seeing eyes and unconstrained power exercised in secret are a toxic mix destined to destroy personal freedom.

Now we know that Alexander has lied yet again to a congressional committee. He recently acknowledged that the number of plots foiled is not the stated-under-oath 54, but is either two or three. He won't say which two or three or how spying on every American was the only lawful or constitutional way to uncover these plots. He also won't say why he originally said 54, instead of two or three; but he did say last week that he will retire next spring.

This is maddening. The government breaks the law it has been hired to enforce and violates the Constitution its agents have sworn to uphold; it gets caught and lies about it; and no one in government is punished or changes his behavior.

Then we realize that the so-called court that authorized all of this is not a court at all. Federal judges may only exercise the judicial function when they are addressing cases or controversies; and their opinions only have the force of law when they emanate from that context. But when federal judges serve an essentially clerical function, they are not serving as judges, their opinions are self-serving and legally useless, and their apparent imprimatur upon spying gives it no moral or legal legitimacy.

All of this – which is essentially undisputed – leads me to the question: Where is the outrage? I think the government has succeeded in so terrifying us at the prospect of another 9/11 that we are afraid to be outraged at the government when it claims to be protecting us, no matter what it does. C.S. Lewis once remarked that the greatest trick the devil has pulled off is convincing us that he does not exist. The government's greatest trick has been persuading us to surrender our freedoms.

Will we ever get them back? The answer to that depends upon the fidelity to freedom of those in whose hands we have reposed the Constitution for safekeeping. At present, those hands are soiled with the filth of totalitarianism and preoccupied with the grasp of power. And they seem to be getting dirtier and their grip tighter every day.