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Civil Liberties in Wartime

by Andrew Napolitano

The following is a transcript of a speech given at The Future of Freedom Foundation's June 2007 conference, "Restoring the Republic: Foreign Policy & Civil Liberties" held in Reston, Virginia.

Jacob Hornberger: Andrew Napolitano is Senior Judicial Analyst at FOX News. He appears daily on *The Big Story* with John Gibson. He co-hosts *FOX & Friends* once a week and he's a regular on *The O'Reilly Factor*. He is the youngest life-tenured Superior Court Judge in the history of the state of New Jersey. He served as adjunct professor at Seton Hall Law School, where he taught constitutional law and jurisprudence. A graduate of Princeton University and a law school graduate of the University of Notre Dame, he is the author of *Constitutional Chaos* and *The Constitution in Exile*.

Now I've got to tell you something about these two books. When I picked up these books to read I figured they're probably just going to be sort of a conservative analysis of the law and since I'm a lawyer I had some background in terms of integrating libertarian economic principles and legal principles and so forth; especially there was a great book called *Economic Liberties in the Constitution* by Bernard Siegan that played a big role in my intellectual development. So I figured when I picked up these books they certainly weren't going to rank. There was going to be your standard conservative-type screed. I've got to tell you I was overwhelmed. Absolutely overwhelmed. I consider myself a fairly hardcore purist libertarian. These books were opening up my eyes to libertarian principles that I had never even thought of. Andrew, I hope that the adjective that I'm going to use in this compliment does not get you fired at FOX News, and I certainly hope it doesn't get me sued for defamation, but these are the two finest libertarian books I have ever read. They are fantastic. I highly recommend them. It is with great honor and pleasure that I introduce to you Andrew Napolitano. The title of his talk is *Civil Liberties in Wartime*.

Andrew Napolitano: There are 535 people on Capitol Hill whose job it is to write the laws that govern all of us, and he is one of them. There are 535 people on Capitol Hill whose job it is to

preserve the Constitution and he is one of them. There are 535 people whose job it is to preserve our liberties and he is one of them, but in his heart and in his head, in his character and in his intellect, in what he has done and what he will become, the Thomas Jefferson of our day, Ron Paul, is one of us.

I think I had been on the bench for about two weeks and they assign you small claims. You walk out on the bench and there's about this many people in your courtroom and they each want to have their case heard before lunchtime, and a typical case is, "The dry cleaner ruined my dress but he also tried to pick up my cousin." So a lawyer comes up to me and says, "Judge, we're going to need a translator for this case. My client doesn't speak any English." I said, "What language does your client speak?" He said, "Italian." I call the courthouse administrator looking for the Italian translator. She was busy in another courtroom, so I said to the 300 people in my courtroom, "Is there anybody here that speaks Italian?" A little guy in the back raised his hand, he comes up, we swear in the translator, we swear in the witness, and here is exactly literally what happens. Lawyer to translator: "Tell the Court your name." Translator to witness: "What is-a your name-a?" I said, "All right, let me see where this is going to go." Lawyer to translator: "Give the Court your address." Translator to witness: "Where is-a your house-a?" I looked at this guy and said, "I thought you told me you could speak Italian." He said, "I can-a, Your Honor, but my English-a is-a not-a so good."

In New Jersey when you're trying a criminal case, in a civil case, a jury case, the judge picks the jury so you walk out again in your courtroom, there's 200 people there, you have to pick 12 that have no bias, prejudice, interest in the outcome, and so you interrogate them. So I said, "Is there anybody in this room," this was a drug distribution case, we had to try those, "Is there anybody in this room that doesn't want to be on this jury?" Little lady raises her hand and said, "I can't be on the jury because of my occupation." Well all right, what does she do? I fall for this. I said, "Madam, what do you do?" She said, "I'm a soothsayer." C'mon, who calls themselves a soothsayer today? So again I fall for it and I said, "Lady, how does that keep you from being on this case?" She said, "Judge, I already know how it ends up." I should've said, "Lady, tell us and save us the next three weeks in the courtroom."

Now I have to take a little blame for an unhappy event. It was the recount in November and December of 2000 and at FOX we were working 17-, 18-hour days. I had to become an expert as you may recall in Florida election law and I was on the air towards the end of the recount. It was early December. I was on the air with Brit Hume It was 10 minutes of 7:00. I was in New York, Brit was in Washington. Through the magic of television it looked like we were in the same room together and all of a sudden one of those swoosh alerts that FOX does about 25 times every 30 minutes comes on. He says, "Judge, we just got word that the Florida Supreme Court has ordered that the recount resume not only in the four counties where Gore and Bush are in dispute, but in all the counties in the state of Florida, and we further learned that the lawyers for

Governor Bush are going to appeal this decision of the Florida Supreme Court to the United States Court of Appeals for the 11th Circuit in Atlanta. What do you think about that?”

And I said, “Well, Brit, it’s pretty basic civil procedure. The United States Court of Appeals does not have jurisdiction to hear an appeal from the highest court of a state.” He said, “Well, what should the Bush lawyers do?” I said, “Well they should go to Georgetown where Justice Anthony Kennedy lives and go to his house and knock on the door because he is the Circuit Justice for the 11th Circuit wherein Florida resides. He can stay the decision of the Florida Supreme Court for 24 hours pending a vote of the other justices of the Supreme Court.” At that point I went up to my office to take a nap because we had been going for so long. About five minutes after 7:00, this is 15 minutes later, my very garrulous, very excitable FOX News colleague, Shepherd Smith, was hosting and another one of those whooshes comes through, FOX News alert, and he says, “We’ve just learned that the lawyers for Governor Bush have been sighted in their cars in Georgetown looking for the house of Justice Anthony Kennedy,” and then as only Shep can do, he looks in the camera, he says, “Do you know what that means? That means that George Bush is watching FOX and he’s getting his legal advice from Judge Napolitano.” I’m sorry. The rest, as they say, is history.

It’s funny how you get a reputation. As Yogi Berra said, “Half the lies they say about us are untrue and the other three-quarters are gross exaggerations.” When we were colonies of Great Britain and the Parliament and the King wanted to raise money, they had some ingenious ways of doing it, and one of the laws that the Parliament enacted that it imposed on the colonies was the Stamp Act. The Stamp Act required that every piece of paper in your possession, every official piece of paper — a book, a pamphlet, a mortgage, a deed, even a poster you were going to nail to a tree — had to bear the King’s stamp. You had to go to a post office-like facility operated by British soldiers and buy stamps from them in order for your papers to be official. Question: How did the King and the Parliament know 3,000 miles away if colonists had the King’s stamps on their papers? Answer: Something called the Writs of Assistance Act. This permitted British soldiers, under the authority of the King and the Parliament, to write their own search warrants to show up at your home and knock on the door and hand you a piece of paper that they had written authorizing themselves to enter your property ostensibly to look for the stamps. Of course, if they also found rum from the islands without a tax stamp they’d seize the rum and arrest you. If they found furniture from another colony and you couldn’t prove that you paid taxes on that, they’d seize the furniture and arrest you.

We all know what happened. We fought a revolution. We wrote a Constitution. In the debate over the Constitution in the summer of 1787 there were basically two camps. There were the big government guys, Adams and Hamilton, and there was Jefferson and Madison. Adams and Hamilton argued that our liberties came from consent of the governed that we allowed each other to have liberty and because we allowed each other to have liberty, the Constitution should reflect

that. Jefferson, who wasn't present that summer but his ideas were, and Madison argued that that was absurd. Our liberties come from our humanity. We are born free. Freedom is the natural state of all human beings. The yearnings for freedom don't come from the government or from the consent of the governed. They come from the God who created us in His own image and likeness.

At least on paper Jefferson and Madison carried the day because in the Fourth Amendment to the Constitution we wrote the right to privacy. Described by Justice Louis Brandeis as the greatest right there is, the right to be left alone. When the government wants a target, government target, no matter how widespread is the belief in the guilt of the target, no matter how accurate is the belief in the guilt of the target, no matter how actually guilty the target is, for the government to get to the target it has to go through a neutral magistrate. That's called probable cause. That's the right to privacy. The government in this country can't write its own search warrants and bang down doors in the middle of the night. It must go through a neutral judge first. That is the unique character of the American Constitution which, at the moment of its adoption, was the greatest political achievement in the history of the Western world.

Unfortunately, that achievement would be attacked before the ink was dry. In the Adams' administration the government enacted the Alien and Sedition Acts which made it a crime to criticize the President. A crime to criticize? Wait a minute. Didn't we just fight a revolution ten years ago? A crime to criticize the President, members of the Cabinet and members of Congress. Note who was left out. He was the Vice President. He was not one of them. He was one of us, like Ron Paul. They didn't care if he was criticized and neither did he. But of course when he became President he allowed the Alien and Sedition Acts to expire.

During the Civil War, which was the greatest violation of human freedom in the history of this country, Abraham Lincoln arrested newspaper publishers, arrested a Republican congressman — I could talk all night about the Clement Vallandigham case — suspended the Writ of Habeas Corpus, sent his soldiers and agents to destroy property and rape women and kill innocent humans. Sherman is lauded because he burnt Atlanta and half of Georgia and South Carolina to the ground under the authority of Abraham Lincoln, but it was wartime and people in the North accepted it. During World War I the Espionage Acts were enacted and 1,600 Eastern European Jews from Boston to Baltimore were locked up without trial. You know what they called them? Anarchists. Today they call them enemy combatants but at the time they called them anarchists. Some of them served lengthy jail terms because it was a crime to dissuade someone from going to work if they worked in a munitions plant. It was a crime to encourage anyone. Notice the words: Dissuade. Encourage. Remember the First Amendment? It was a crime to encourage anyone to go on strike who worked in a munitions plant.

In a famous case called *Gitlo v. New York*, Gitlo dropped pamphlets out of a tenement in the Lower East Side that were written in Yiddish and they sent him to jail for violating the Espionage Act of 1917. The government prosecutors didn't even know what he had said because

of disputes among certain Talmudic scholars at the trial as to what the Yiddish words meant when translated into English. It's funny now but Mr. Gitlo died in jail because of what he wrote in Yiddish on a couple of pamphlets he threw out of a tenement building in Lower Manhattan.

In 1977, under the presidency of Jimmy Carter, the government enacted the Foreign Intelligence Surveillance Act known very well today as FISA, and this Act permitted the government to go to a super-secret court that meets in the basement of the Justice Department. There are three basements to the Justice Department. FISA meets in the lowest of the three. It's about 65 feet below the street level, and remember probable cause in order to get a search warrant? Well if you go to FISA you don't have to show probable cause of criminal activity, which you do when the government wants to get to its target. You only need show probable cause that the person whose phone calls you want to listen to or papers through which you want to rummage is a foreign agent. It could be an agent of a friendly country like Great Britain or Italy or it could be an agent of an unfriendly country like China or Cuba or North Korea. As long as the target is a foreign agent and you have probable cause that the human being is a foreign agent, the FISA Court will give you a search warrant.

Now why do I say the FISA Court will give you a search warrant? Because the last time we checked the numbers of over 19,000 requests since 1977, five were denied. All the other requests for these search warrants were granted, but even Carter, to his credit, insisted that because evidence obtained under FISA was not consistent with the Fourth Amendment, because there was only a showing of probable cause of foreign agency, not probable cause of a crime, that the evidence obtained by executing one of these FISA warrants could not be used to prosecute the target. So, as an example, if the janitor in the Russian Embassy is really a KGB agent who beats his wife, he could not be prosecuted for wife-beating and he could not be prosecuted for spying because that information was obtained extra-Constitutionally, he could only be deported and sent back to the Soviet Union. That was the FISA statute. Wrong because it weakened the protections of the Fourth Amendment, wrong because Congress presumed that it has the power to tamper with the Constitution. The last time I looked only the states can amend it, not the Congress, but nevertheless the information obtained under a FISA warrant could not be used in a criminal prosecution.

Not satisfied with this power, a year later a Democratic Congress and President Carter would cause to come to pass the right to Financial Privacy Act. ... statutes. If something is called the Right to Financial Privacy, bet the farm there's no privacy involved in this because in 1978 the government authorized FBI agents to serve national security letters, self-written search warrants. Two hundred and one years to the day, after the Constitution was agreed to in Philadelphia, the government enacts a statute that for the first time under law, this had obviously been done not under color of law, that authorizes FBI agents and other federal agents to write their own search warrants. But they're limited. They're limited to financial institutions. So if the government

wanted your bank records pre-1978 it had to go to a federal judge and show probable cause to a grand jury and get a warrant, a subpoena, and in either case you'd be told of this and you'd have an opportunity to challenge it. But after 1978 the government could go to your bank and say, "Here's a self-written search warrant. I'm an FBI agent, I just wrote myself the power to look at Robert Higgs' banking records at your bank." The banker would say, "What? Are you crazy? I'm going to call up Higgs and tell him that you were here."

And that is frequently what would happen, and the Robert Higgs of the world, and this is just a hypothetical and I say it only because I love him, not because I have any knowledge that the government may have been looking at his banking records, and I love his brain and his heart as well as him as a person, the government would inform the customer of the bank that somebody was here writing a search warrant and the government would say, "Well, we're not going to comply with this until some judge tells us it's okay." So if the FBI agent was persuasive, the self-written search warrant worked. If the banker knew you, the customer, or knew the Constitution, the banker would say, "I don't believe this self-written search warrant stuff. I'm going to make you go to a judge." Yet again to Carter's credit. The evidence obtained from one of these self-written search warrants could not be used in a criminal prosecution because it was obtained extra-Constitutionally because the FBI agent or the Federal Treasury agent or whoever it was wrote their own search warrant. They didn't go to that neutral magistrate that the Fourth Amendment puts between the government and its target.

In 2001, on the 11th of September, of course, you know, the tragedy occurred. If you lived in New York at the time as I did you probably knew people that died. I lived downtown. I lived very close to where it was. The authoritarian who was the Mayor of New York at the time wouldn't even let me get back in my house. Of course I wasn't friends with Ron Paul in those days. Had I been maybe I could've gotten back into my apartment. Nevertheless, those were very, very difficult times to live in New York City. We all knew people that died and it took a long time. I'll probably never forget the neighborhood and the pictures on trees and on mailboxes and telephone poles, "Do You Know This Person? Have You Seen Them?"

And of course the government reacted and the government's initial reaction was the Patriot Act, the most abominable, unconstitutional, hateful from the point of freedom piece of legislation since the Alien and Sedition Act since 1798. John Ashcroft told the House Judiciary Committee and the Senate Judiciary Committee the Patriot Act was so important that they didn't have time to read the statute before they could vote on it. Imagine that. Two members of the Senate claimed they read it and one of them is now dead. Paul Wellstone. He voted against it. Russ Feingold says he read it. He voted against it. Ron Paul and his colleagues in the House were given 15 minutes on the House Intranet, the internal internet for members of Congress and their staffs to read the Patriot Act. It's 315 pages long and it doesn't read like a novel. I have read it. I have read it twice. In order to read it you have to have in front of you the entire United States criminal code, because

most of the Patriot Act says in 14 U.S.C. 1523, move the comma, change “or” to “and,” change “six months” to “eight months.” It will take days to read this. Members of the House, without having had the opportunity to read it at all in any way, never mind meaningful in any way, nevertheless with no debate on the floor, fearing what John Ashcroft told them, voted for the Patriot Act and it passed and the Senate voted for it and with two dissents it passed and the President signed it.

Now the Patriot Act took FISA and said you know those warrants that you obtained that you can't use, information in criminal prosecutions? Now you not only may use that in criminal prosecutions, you *must* use it in criminal prosecutions. And you know that information that you got from the self-written search warrants, the financial institutions? You now not only may use that in criminal prosecutions, you *must* use it in criminal prosecutions. And you know the banker that would call up the client and say there's a guy here with a self-written search warrant that wants your banking records? If the banker reveals that he has received a self-written search warrant, it's a felony for the banker punishable by five years in jail.

Now you may say, “Well, what about the First Amendment?” The First Amendment says Congress shall make no law abridging the freedom of speech, but the Patriot Act says if you tell anyone — your spouse, your lawyer, your priest, your best friend, a judge in a federal courtroom, that's right, every challenge of the Patriot Act has been an anonymous challenge because if you reveal to a judge in a courtroom that you received one of these self-written search warrants — you'll be arrested when you walk outside the courtroom. Congress just forgot about the First Amendment. Congress believes Ron Paul and those freedom-lovers to the contrary that it can just override the principles of the supreme law of the land.

What about the Fourth Amendment? What about the requirement of a judge before the government can get information from a financial institution? Congress said forget about it. The times are too tough. It's too difficult. We don't want another 9/11. Here's the bargain. Give me your freedom and I'll keep you safe. It has never worked. It makes us less free and unsafe. You come home from a lovely gathering like this on a Sunday night or a basketball game on a Friday night, the front door is broken open, the bed is turned upside down, everything is pulled out of your filing cabinet and the kitchen's been ransacked. What do you do? You call the police. The police will say to you, “Well, we think it was the FBI.” “What?” “Yes, because the Patriot Act authorizes something called Sneak and Peak. The FBI can break into your house. Break into your house and make it look like it was a burglary and plant a bug under the kitchen table or on the bedpost or behind the toilet and not have to tell you about this for 18 months. They can do this.”

Where is this in the Constitution that the Congress has this kind of power to authorize federal agents to override the fundamental law of the land? And all this information that they get about us, or about you or whoever the target is, they can use in a criminal prosecution. On December 13, 2003, a day in which everyone in this room remembers where she or he was,

December 13, 2003. The President signed the Intelligence Authorization Act for fiscal '04, a dreary, drab, long, boring statute which no one had read before they voted for it. Congressman Paul and the freedom-lovers voted against it. I didn't get to see it until it was published in *The Federal Register* a month-and-a-half later on the 29th of January. The President and his people had obviously just re-read, well I don't know if he read it but somebody perhaps read it to him, sorry, 1984, because they engaged in newspeak, remember the target of the national security letters was limited to financial institutions.

So in this 100-page statute, which divvies up money among the 18 intelligence agencies in the federal government, the 18 that we know of, God knows how many there truly are, they re-defined "financial institution." From and after the 13th of December, 2003, a "financial institution" means the following: a bank, a trust company, a credit union, a stockbroker, an investment banker, an insurance company, a pawnbroker, a delicatessen, a bodega, a travel agency, a hospital, an HMO, a real estate office, a jeweler's office, a restaurant, a hotel, your lawyer's office, and that great financial institution to which we would all repose our fortunes, the post office.

It sounds ridiculous, but think about it. Patriot Act, you can attack financial institutions. Privacy Act of '77, you can attack financial institutions. All we have to do is change the definition of "financial institutions" and now big government can attack whatever it wants. So now an agent on his own or her own can go to your lawyer with a self-written search warrant and look at documents that are of the most privileged nature in our society and your lawyer can't tell anybody. Your doctor and look at those documents. Your real estate agent and look at those documents. Your accountant and look at those documents. December 13, 2003, George Bush knew that something happened 10,000 miles away such that if he put his signature on that document that day nobody would notice it. It was the day we captured Saddam Hussein. Who the heck is going to talk about a dreary appropriations bill that the President signed when everybody was talking about swabbing the inside of Hussein's mouth on NBC News?

The Intelligence Reform Act of 2004, I mean, these things just keep going on and on, allows the government to deport foreigners without trial. Never mind that the Constitution protects persons. Not citizens. Persons. That statute allows the President and the Attorney General without trial to deport whomever they want. You're arrested for a crime. The government has to show that you are a flight risk in order for the judge to deny bail. No longer in federal court, now you have to show that you are not a flight risk. The Congress has taken 600 years of Anglo-American jurisprudence and turned it upside down. For the first time in a criminal case the defendant, before he's even charged with a crime, has to prove to a judge that he's worthy of bail rather than the government having to prove to a judge that the defendant is not worthy of bail. Grand Jury secrecy. You can go to jail if you reveal what happens before our Grand Jury unless you're a federal prosecutor. Then you can leak to your heart's content enshrined in the statute.

In the last great debate, Ron Paul and company ... had the end of the Republican dominance of the Congress [text omitted?] was the Military Commissions Act of 2006, and without going through great detail, I'll tell you the most horrific aspect of it. The Congress gave George Bush and all of his successors a tyrannical power that none of history's tyrants have ever claimed for themselves. One would expect after trial if acquitted one would be set free. Pretty basic Anglo-American jurisprudence. Even in one or two of Stalin's show trials the guys got off and they walked free. But in the Military Commissions Act of '06 the President may, by declaring you an enemy combatant, read *anarchist* going back to Woodrow Wilson, incarcerate you for as long as the war on terror is being fought, even if you've been acquitted by one of his tribunals.

Now I'm going to scare you a little bit. This is my Blackberry. It's off. There are two ways for it to go on. I can press the top of it and it goes on, or I can wait for the NSA to turn it on when it's in my pocket if they want to hear what I'm saying in a private conversation. I don't think I'm telling you anything you don't know. This has been published. The government doesn't want it published. But the same people that took an oath to uphold our Constitution have figured out the way to turn these on without you knowing about it and listen to whatever conversation is occurring within the range of the microphone in here.

Now where does all of this lead us? Well it leads us to the fact that we need a Ron Paul in the White House more desperately now than we ever have at any time in our history. It leads us to the fact that the Patriot Act has been challenged six times in court before six different judges, two of whom were appointed by George Bush, two of whom were appointed by George Bush, Sr., and all six of whom found it unconstitutional but the government still keeps using it. When Alberto Gonzales and John Ashcroft said to George Bush, "Go to Cuba. Go to Guantanamo Bay. The criminal laws don't apply. The Constitution doesn't apply. The treaties don't apply. The federal courts can't reach you." The Supreme Court said no by a vote of 8 to 1. What Bush unilaterally took away the right to Habeas Corpus by a signature, the Supreme Court by a vote of 6 to 3 said no, you can't do that. When the President said we can torture and maim and do whatever we want because this is not a country that we're fighting and they didn't sign the Geneva Convention, the Supreme Court by a vote of 5 to 4 said no, the Geneva Convention applies. Note the numbers. 8-1, 6-3, 5-4. All before Sandra Day O'Connor left the court.

I really never thought that my former colleagues in their black robes would be our last line of defense for basic human freedom, but unless we can change the attitude of the Congress and the occupants, the occupant of the White House, that's what we're left with. The country was founded by people who said things like "Those who would give up essential liberty to obtain temporary safety deserve neither." The country was founded by people who said things like "Give me liberty or give me death." And today we have a government that preaches fear and turns our phones on and plants bugs under our toilets and claims that it has the right to do it. [Jefferson] had a lot of flaws. None of us is perfect but shortly before he died reminded us all. When the

people fear the government, that is tyranny. But when the government fears the people, that's liberty. God bless you. Turn your cell phones off.

M1: Take your battery out.

Andrew Napolitano: Actually that is right. If you take the battery out even the NSA can't turn it on.

Man 1: <inaudible>

Man 1: All right, Judge. Can you hear me?

Andrew Napolitano: Yes.

Man 1: Okay.

Andrew Napolitano: Loud and clear.

Man 1: Okay, fine. I'm not quite sure exactly how you phrased it but I think you said something to the effect that our freedom comes from God.

Andrew Napolitano: I argued that our freedom comes from our humanity because we were created by God who is perfectly free.

M2: Okay. I have a slight problem.

Andrew Napolitano: You'd better take it up with Him.

Man 1: I picture a Black man in 1800 Alabama saying to his supervisor or overseer or whatever, "I believe in God. I believe in your God and I believe that God wants me to be free," and after the guy finishes laughing like hell he probably beat him to death.

Andrew Napolitano: Unfortunately that's true. Probably happened a million times.

Man 1: Yeah. I picture a Jew in servitude in Egypt doing the same thing and having the same result. So I have problems with God granting us freedom.

Andrew Napolitano: Well sometimes we allow the freedom to go away but the Jews in the Warsaw Ghetto fought the Nazis for three months. If they had more guns they might have prevailed.

Man 1: Let me tell you where I think it comes from.

Jacob Hornberger: Let's have a question for ...

Man 1: Yeah. Yeah, well I'm trying to clarify an issue here. John Stuart Mill spoke to the issue on liberty and he said something to the effect that to the extent that the government is constrained we are free, and so when I think of freedom being created I think of something like the circumstance that prevailed in England in 1215 when some Englishmen had a whole pile of rules and they shoved them in front of the king and they put a sword to his throat and they said we intend to follow these rules. If you intend to follow them too we won't stick this sword through your throat, and he agreed to abide by the rules. To the extent that the ruler is constrained to that extent people are free and people will be free and get their freedom from the point of a sword. It's unfortunate but that's the way it happens. People unwilling to put up with bullshit from the ruler. That's where liberty comes from, I think.

Andrew Napolitano: The European example is the opposite of the American example. The European example, it was the kings. It was power giving liberty. In the American example, it's liberty giving power. It's the exact opposite. Ours has lasted, they're a bunch of Socialists. Now go say your prayers.

Man 2: Did George Bush violate FISA by the domestic wiretapping?

Andrew Napolitano: Ask me again, I can't hear you.

Man 2: Did George Bush violate FISA with the domestic wiretapping he's alleged to have done?

Andrew Napolitano: Absolutely. FISA only governs foreigners physically present in the United States, whether they're agents of friendly governments or governments that wish us ill, and FISA does require going to a judge. Now the advantage of going to the judge, even the super-secret court where you only have to show the existence of the person as being a foreigner, there still is a record of who the person is and why you want to tap their phone or their computer or gather their papers. But what NSA does, there is no record, there is no court, it clearly violates FISA and to the extent that it does this to any non-foreigner, read *American*, it violates the very statute Congress enacted to redress the evils of the Nixon era, which made it a crime punishable by five years in jail for anyone, including the President, to authorize or install a wiretap without authorization from a judge, are you ready for this, five years per wiretap. No one's charged them. Maybe his successor's Justice Department will charge him.

Woman 1: Judge, in an earlier conversation with you, you said --

Andrew Napolitano: Well that was a private conversation.

Woman 1: It was a private conversation. Oh no, I had my phone on.

Andrew Napolitano: Very good.

Woman 1: You said that approximately 23 people decided the subjects that you talked about on FOX. I hope I'm getting that somewhat right in that area, and that two-thirds of the conversation on FOX, therefore, was what they decided and one-third was what you were able to give. How can we in any way influence what they decide? Is there a way that we can e-mail in? What would you suggest to us that would have more of what we want you talking about that they would feel was a top issue?

Andrew Napolitano: I guess you should buy the products that are advertised on FOX. No, in television today, I mean, this goes for Bill O'Reilly and Sean Hannity and Chris Matthews and Wolf Blitzer. The producers who are frequently younger and perceived as more hip than those of us that are on the air, like young Gregory over here, the producers are the ones that decide the subject matters that we discuss and sometimes we can jawbone with them a little bit to get it more towards things that are everlasting in influence rather than what are Lindsay Lohan's chances of actually ending up in jail.

Man 3: Could you talk more about this Blackberry NSA business? So they can turn it on? How do they do that?

Andrew Napolitano: No, I was not kidding. I do not know the technology of how it's been done. I have been told this by two former CIA agents, whom I know well and whom I know truly were in the CIA and I won't tell you their names but they're on the air with me. It's not even a technology that is doubted or disputed. The <gap in audio> is whose phone do they turn on and when do they turn it on?

Man 4: <inaudible>

Andrew Napolitano: Well if they turned everyone's phone on they wouldn't be able to listen to all the conversations because as huge and bloated as the bureaucracy is, it's not that big.

Man 4: Judge, to follow on an earlier question, as far as FOX News, well I don't watch much of FOX News so I don't know but have you raised some of these issues ... opportunity to raise some of these issues on that morning show, and also just a second question ... and I think you started to answer that, why aren't some of even the other networks, why are these critical issues not being discussed by any of the newscasters?

Andrew Napolitano: Because there are not enough people in the media like those in this room who truly love liberty, and most of the media's filled with big government types, whether they're Republicans, Democrats, Liberals, or Conservatives who don't perceive the danger that is coming to them. I mean, I've reminded O'Reilly off air and on that if Hillary Clinton ever became President, she could declare him an enemy combatant and ban him to Guantanamo Bay. Now that made a lot of people at FOX very happy, the prospect of that happening, and he said to me, and I've been to Guantanamo Bay, he said, "Would you come and visit me?" and I said, "No." God love you.

Jacob Hornberger: Thank you very much, Judge Napolitano. What a great night, huh? I've got to tell you one last story about Judge Napolitano. When we contacted him about speaking here, we had sent him the list of the speakers we had lined up and we were doing it through his Speakers Bureau. We got a message back from the Speakers Bureau that said, "Judge Napolitano would like you to know that he wants very, very much to speak at this conference." So it was great. It was great. So thank you very much. We shall adjourn until tomorrow morning. We'll see you bright-eyed and bushy-tailed in the morning. Thank you very much.