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## The Chickens Have Come Home to Roost

By Andrew P. Napolitano  
February 22, 2017

Last week, *The Wall Street Journal* revealed that members of the intelligence community – part of the deep state, the unseen government within the government that does not change with elections – now have acquired so much data on everyone in America that they can selectively reveal it to reward their friends and harm their foes. Their principal foe today is the president of the United States.

Liberty is rarely lost overnight. The wall of tyranny often begins with benign building blocks of safety – each one lying on top of a predecessor – eventually collectively constituting an impediment to the exercise of free choices by free people, often not even recognized until it is too late.

Here is the back story.

In the pre-Revolutionary era, British courts in London secretly issued general warrants to British government agents in America. The warrants were not based on any probable cause of crime or individual articulable suspicion; they did not name the person or thing to be seized or identify the place to be searched. They authorized agents to search where they wished and seize what they found.

The use of general warrants was so offensive to our Colonial ancestors that it whipped up more serious opposition to British rule and support for the revolutionaries than the "no taxation without representation" argument did. And when it came time for Americans to write the Constitution, they prohibited general warrants in the Fourth Amendment, the whole purpose of which was to guarantee the right to be left alone by forcing the government to focus on bad guys and prohibit it from engaging in fishing expeditions. But the fishing expeditions would come.

In 1978, Congress passed the Foreign Intelligence Surveillance Act, which was intended to rein in the government spying on Americans that had been unleashed by the Nixon administration. FISA established a secret court and permitted it to issue warrants authorizing spying on agents of foreign governments when physically present in the United States.

People born in foreign countries who are here for benevolent or benign or even evil purposes have the same constitutional protections as those of us born here. That's because the critical parts of the Constitution that insulate human freedom from the government's reach protect "persons," not just citizens. But FISA ignored that.

And FISA was easy for the government to justify. It was a pullback from Richard Nixon's lawlessness. It required the feds to seek a warrant from federal judges. The targets were not Americans. Never mind, the argument went, that FISA has no requirement of showing any probable cause of crime or even articulable suspicion on the part of the foreign target; this will keep us safe. Besides, the government insisted, it can't be used against Americans.

That argument was bought by presidents, members of Congress and nearly all federal courts that examined it. We don't know whether the authors of this scheme really wanted federal spies to be able to spy on anyone at will, but that is where we are today. Through secret courts whose judges cannot keep records of their own decisions and secret permissions by select committees of Congress whose members cannot tell their constituents or other members of Congress what they have learned in secret, FISA has morphed so as to authorize spying down a slippery slope of targets, from foreign agents to all foreigners to anyone who communicates with foreigners to anyone capable of communicating with them.

The surveillance state regime today permits America's 60,000 military and civilian domestic spies to access in real time all the landline and mobile telephone calls and all the desktop and mobile device keystrokes and all the digital data created and used by anyone in the United States. The targets today are not just ordinary Americans; they are justices on the Supreme Court, military brass in the Pentagon, agents in the FBI, local police in cities and towns, and the man in the Oval Office.

The British system that arguably impelled our secession in 1776 is now here on steroids.

Enter the outsider as president. Donald Trump has condemned the spying and leaking, as he is a victim of it. While he was president-elect, the spies told him they knew of his alleged misbehaviors – vehemently denied – in a Moscow hotel room. Last week, his White House staff was shaken by what the spies did with what they learned from a former Trump aide.

Trump's former national security adviser, retired Lt. Gen. Michael Flynn, himself a former military spy, spoke to the Russian ambassador to the United States in December via telephone in Trump Tower. It was a benign conversation. He knew it was being monitored, as he is a former monitor of such communications. But he mistakenly thought that those who were monitoring him were patriots as he is. They were not.

They violated federal law by revealing in part what Flynn had said, and they did so in a manner to embarrass and infuriate Trump.

Why would they do this? Perhaps because they feared Flynn's being in the White House, since he knows the power and depth of the deep state. Perhaps to send a message to Trump because he once compared American spies to Nazis. Perhaps because they believe that their judgment of the foreign dangers America faces is superior to the president's. Perhaps because they hate and fear the outsider in the White House.

The chickens have come home to roost. In our misguided efforts to keep the country safe, we have neglected to keep it free. We have enabled a deep state to become powerful enough to control a powerful president. We have placed so much data and so much power in the hands of unelected, unaccountable, opaque spies that they can use it as they see fit – even to the point of committing federal felonies. Now some have boasted that they can manipulate and thus control the president of the United States by selectively revealing and concealing what they know about anyone, including the president himself.

This is a perilous state of affairs, brought about by the maniacal passion for surveillance spawned under George W. Bush and perfected under Barack Obama – all with utter indifference to the widespread constitutional violations and permanent destruction of personal liberties. This is not the government the Framers gave us. But it is one far more dangerous to human freedom than the one from which they seceded in 1776.