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## Congress Created a Monster

By Andrew P. Napolitano  
March 8, 2017

Those of us who believe that the Constitution means what it says have been arguing since the late 1970s that congressional efforts to strengthen national security by weakening personal liberty are unconstitutional, un-American and ineffective. The Foreign Intelligence Surveillance Act, which Congress passed in the aftermath of President Richard Nixon's use of the CIA and the FBI to spy on his political opponents, has unleashed demons that now seem beyond the government's control and are more pervasive than anything Nixon could have dreamed of.

This realization came to a boiling point last weekend when President Donald Trump accused former President Barack Obama of monitoring his telephone calls during the 2016 presidential election campaign. Can a U.S. president legally spy on a political opponent or any other person in America without any suspicion, probable cause or warrant from a judge? In a word, yes.

Here is the back story.

The president can order the National Security Agency to spy on anyone at any time for any reason, without a warrant. This is profoundly unconstitutional but absolutely lawful because it is expressly authorized by the FISA statute.

All electronic surveillance today, whether ordered by the president or authorized by a court, is done remotely by accessing the computers of every telephone and computer service provider in

the United States. The NSA has 24/7/365 access to all the mainframe computers of all the telephone and computer service providers in America.

The service providers are required by law to permit this access and are prohibited by law from complaining about it publicly, challenging it in court or revealing any of its details. In passing these prohibitions, Congress violated the First Amendment, which prohibits it from infringing upon the freedom of speech.

The fruits of electronic surveillance cannot be used in criminal prosecutions but can be shared with the president. If they are revealed publicly, the revelation constitutes computer hacking, a federal crime. Nevertheless, some of what was overheard from telephone conversations between the Russian ambassador to the U.S. and former Lt. Gen. Michael Flynn, Trump's former national security adviser, was revealed to the public – a revelation that profoundly disturbed the White House and many in the intelligence community and constituted a crime.

The original purpose of FISA was to place the judiciary as an intermediary between the nation's spies and the foreign agents we all know are among us. The theory was that the NSA would first need to demonstrate to a secret court probable cause that the target of the spying is an agent of a foreign power and this would restrain the NSA from spying on ordinary Americans. This probable cause of foreign agency was a dramatic congressional rejection of the constitutional standard – namely, probable cause of crime – for the issuance of warrants. Foreign agency is not a crime.

This congressional rejection of constitutional norms began the slippery slope in which the foreign agency standard has morphed by legislation and by secret interpretations of the Foreign Intelligence Surveillance Court to probable cause of foreign personhood to probable cause of talking to a foreign person to probable cause of being able to talk to a foreign person to – dropping the probable cause standard altogether – anyone who speaks to anyone else who could speak to a foreign person.

This Orwellian and absurd expansion was developed by spies and approved by judges on the FISA court. The NSA argued that it would be more efficient to spy on everyone in the United States than to isolate bad people, and the court bought that argument.

Hence, FISA warrants do not name particular people or places as their targets as the Constitution requires. Rather, they merely continue in place the previous warrants, which encompass everyone in the country. FISA warrants are general warrants, allowing intelligence agents to listen to whomever they wish and retain whatever they hear. General warrants are expressly prohibited by the Fourth Amendment, which requires that all warrants for all purposes be based on probable cause of crime and particularly describe the person or thing to be seized – e.g., a conversation – or the place to be searched.

Even though the NSA already has the legal, though unconstitutional, authority to capture any phone conversation or computer keystroke it wishes, its 60,000 agents lack the resources to listen to all conversations or read all electronic communications in real time. But it does capture the digital versions of all computer keystrokes made in or to the U.S. and all conversations had

within the U.S. or involving someone in the U.S.; it has been doing so since 2005. And it can download any conversation or text or email at will.

That's why the recent argument that Obama ordered the NSA to obtain a FISA warrant for Trump's telephone calls and a judge issued a warrant for them is nonsense. The NSA already has a digital version of every call Trump has made or received since 2005. Because the NSA – which now works for Trump – is a part of the Defense Department, it is subject to the orders of the president in his capacity as commander in chief. So if the commander in chief wants something that a military custodian already has or can create – such as a transcript of an opponent's conversations with political strategists during a presidential campaign – why would he bother getting a warrant? He wouldn't.

All of this leads to information overload – so much material that the communications of evil people are safely hidden in with the mountain of data from the rest of us. The NSA captures the digital equivalent – if printed – of 27 times the contents of the Library of Congress every year.

All of this also leads to the monstrous power of the NSA to manipulate, torment and control the president by selectively concealing and selectively revealing data to him. The Constitution does not entrust such power to anyone in government. But Congress has given it.

All of this also substantially impairs a fundamental personal liberty, the right to be left alone – a right for which we seceded from Great Britain, a right guaranteed by the Fourth Amendment and a right for which we fought wars against tyrants who we feared would take it from us.

Yet after we won those wars, we permitted our elected representatives to crush that right. Those faithless representatives have created a monster that has now turned on us.