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Lies the Government Is Telling You

By Andrew P. Napolitano

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Last week, Republicans and Democrats in Congress joined President Barack Obama in congratulating themselves for taming the National Security Agency's voracious appetite for spying. By permitting one section of the Patriot Act to expire and by replacing it with the USA Freedom Act, the federal government is taking credit for taming beasts of its own creation.

In reality, nothing substantial has changed.

Under the Patriot Act, the NSA had access to and possessed digital versions of the content of all telephone conversations, emails and text messages sent between and among all people in America since 2009. Under the USA Freedom Act, it has the same. The USA Freedom Act changes slightly the mechanisms for acquiring this bulk data, but it does not change the amount or nature of the data the NSA acquires.

Under the Patriot Act, the NSA installed its computers in every main switching station of every telecom carrier and Internet service provider in the U.S. It did this by getting Congress to immunize the carriers and providers from liability for permitting the feds to snoop on their customers and by getting the Department of Justice to prosecute the only CEO of a carrier who had the courage to send the feds packing.

In order to operate its computers at these facilities, the NSA placed its own computer analysts physically at those computers 24/7. It then went to the U.S. Foreign Intelligence Surveillance Court and asked for search warrants directing the telecoms and Internet service providers to make available to it all the identifying metadata – the times, locations, durations, email addresses used and telephone numbers used – for all callers and email users in a given ZIP code or area code or on a customer list.

The first document revealed by Edward Snowden two years ago was a FISA court search warrant directed to Verizon ordering it to make available to NSA agents the metadata of all its customers – more than 113 million at the time. Once the court granted that search warrant and others like it, the NSA computers simply downloaded all that metadata and the digital recordings of content. Because the FISA court renewed every order it issued, this arrangement became permanent.

Under the USA Freedom Act, the NSA computers remain at the carriers' and service providers' switching offices, but the NSA computer analysts return to theirs; and from there they operate remotely the same computers they were operating directly in the Patriot Act days. The NSA will continue to ask the FISA court for search warrants permitting the download of metadata, and that court will still grant those search warrants permitting the downloading. And the NSA will continue to take both metadata and content.

The Supreme Court has ruled consistently that the government must obtain a search warrant in order to intercept any nonpublic communication. The Constitution requires probable cause as a precondition for a judge to issue a search warrant for any purpose, and the warrant must "particularly (describe) the place to be searched, and the persons or things to be seized." Because this is expressly set forth in the Constitution itself, Congress and the president are bound by it. They cannot change it. They cannot avoid or evade it.

Probable cause is evidence about a person or place sufficient to permit a judge to conclude that evidence of a crime will probably be found. Both the Patriot Act and the USA Freedom Act disregard the "probable cause" standard and substitute instead a "government need" standard. This is, of course, no standard at all, as the NSA has claimed under the Patriot Act – and the FISA court bought the argument – that it needs all telephone calls, all emails and all text messages of all people in America. Today it may legally obtain them by making the same claim under the USA Freedom Act.

When politicians tell you that the NSA needs a court order in order to listen to your phone calls or read your emails, they are talking about a FISA court order that is based on government need – not a constitutional court order, which can only be based on probable cause. This is an insidious and unconstitutional bait and switch.

All this may start with the NSA, but it does not end there. Last week, we learned that the FBI is operating low-flying planes over 100 American cities to monitor folks on the streets and intercept their cellphone use – without any search warrants. Earlier this week, we learned that the Drug Enforcement Administration has intercepted the telephone calls of more than 11,000 people in three years – without any search warrants. We already know that local police have

been using government surplus cell towers to intercept the cellphone signals of innocent automobile drivers for about a year – without search warrants.

How dangerous this is. The Constitution is the supreme law of the land. It applies in good times and in bad, in war and in peace. It regulates the governed and the governors. Yet if the government that it regulates can change it by ordinary legislation, then it is not a constitution but a charade.

Suppose the Congress wants to redefine the freedom of speech or the free exercise of religion or the right to keep and bear arms, just as it did the standards for issuing search warrants. What is the value of a constitutional guarantee if the people into whose hands we repose the Constitution for safe keeping can change it as they see fit and negate the guarantee?

What do you call a negated constitutional guarantee? Government need.