

“Does Government Believe in the Constitution?”

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By Andrew P. Napolitano

NEWTON, N.J.—Last week, FBI officials boasted that in 2022 their agents had spied on only 120,000 Americans without search warrants! Under the Constitution, that number should be *zero*.

This revelation is supposed to give members of Congress comfort that the folks we have hired to preserve, protect and defend the Constitution are in fact doing so. In reality, the FBI and its cousins at the National Security Agency continue to assault and violate a core freedom protected by the Constitution—the right to be left alone.

The reason for the FBI revelation last week is the pending expiration of Section 702 of the Foreign Intelligence Surveillance Act and the bipartisan animosity toward its extension.

Section 702 is unconstitutional on its face as it directly contradicts the core language of the Fourth Amendment. On its face, it permits the feds to conduct warrantless surveillance on foreign persons who are either physically or digitally present in the United States and all with whom they communicate—American or foreign—who are located here.

Thus, for example, if you call or text or E-mail an art dealer in Florence, Italy, from your home in New Jersey or your cousin in Geneva, Switzerland, calls or texts or E-mails you at your home in California, the FBI can monitor all those communications without a search warrant. And then the feds can monitor the future calls you make and texts and E-mails you send. And then they can monitor all the communications of the persons you reached and all the persons they reach. As this expands on and on to the sixth degree, the numbers grow exponentially to hundreds of millions.

Why are we fighting Putin for empire?

The reason for the search-warrant requirement is to prevent a repeat of what British agents did to the American colonists before the Revolutionary War. Then, secret British courts in London issued general warrants to British

agents in America that authorized the bearer to search wherever he wished and seize whatever he found.

When the British used their general warrants to search colonial homes ostensibly looking for tax stamps in compliance with the Stamp Act, they were really attempting to predict who among the colonists entertained revolutionary ideas that might lead to a revolt against the king.

FBI Houston Special Agent in Charge James Smith speaks during a news conference, Sunday, April 30, 2023, in Cleveland, Texas. The search for a Texas man who allegedly shot his neighbors after they asked him to stop firing off rounds in his yard stretched into a second day Sunday, with authorities saying the man could be anywhere by now. The suspect fled after the shooting Friday night that left five people dead, including a young boy.

The existence and the enforcement of the Stamp Act proved so unpopular that Parliament rescinded it after just one year. But the former bond between colonials and their king had been irreparably breached and a sea change in colonial thinking pervaded the land. The core of that sea change was not taxation without representation; it was "freedom."

To the colonial mind-set, freedom had one universal meaning. It meant freedom from the government—from king and Parliament.

The sea change in colonial thinking resulted in an ideological welcome mat for the Declaration of Independence. When Thomas Jefferson was holed up in a Philadelphia rooming house for five days in June 1776 writing and revising the Declaration, he thought he was crafting the ideological fountainhead of a minority of landowners who despised the king's autocracy. Yet, within a year, farmers and laborers joined the popular and bloody revolt that ended in 1783 with freedom from England.

What about freedom from the new government here?

When the Constitution was ratified six years later, it had no amendments and made no mention of personal liberty. Five of the ratifying states had insisted upon the promise of the addition of a bill of rights as a precondition to ratification.

And so, the first task of the new Congress was to comply with that promise and craft the Bill of Rights, lest these five states secede from the new union. What became the Fourth Amendment protected the quintessentially American right to be left alone.

It states that "the right of the people to be secure in their persons, houses, papers, and effects" shall be secure and may be violated by the government only pursuant to a search warrant issued by a neutral judge and based on probable cause of crime—and the warrant must specifically describe the place to be searched or the persons or things to be seized.

There is no exception in the amendment for foreign people, bad people, dangerous people, violent people, or people the government hates or fears. By the plain meaning of its English words, the amendment protects *all* people. There is no limitation in the amendment to government personnel engaged

in law enforcement. The amendment restrains *all* government. The very purpose of the amendment is to present an obstacle to all government because the amendment protects the natural human right to personal privacy.

James Madison and his colleagues who drafted the amendment made a value judgment consistent with their Judeo-Christian-informed morality—namely, that natural rights trump governmental needs.

The violation of privacy is a form of government aggression. Madison knew the tendencies of government toward aggression. The Fourth Amendment was to be the bulwark against it. The people could protect themselves against private aggressors, but they'd need a clause in the supreme law of the land and independent judges to restrain government aggressors.

After 50 years of studying, teaching, writing about, judging, interpreting and just plain explaining the Constitution, I am convinced that those in government don't believe its words or accept its values. They don't feel bound by it.

They have crafted mechanisms of all sorts—like Section 702—to evade and avoid it. They will claim that it impairs their duties. Yes, it does—intentionally so, and in the name of personal liberty. Today, liberty is impaired for foreign persons, an immutable characteristic. Tomorrow it could be impaired for any other immutable trait. Of what value is a Constitution with congressionally crafted, politically based exceptions? None.

Channeling Justice George Sutherland, if the provisions of the Constitution are not upheld when they pinch as well as when they comfort, they may as well be abandoned.