



Episode 1,198: Judge Napolitano on Kavanaugh, and the Court's Worst Decisions

Guest: Judge Andrew Napolitano

WOODS: I have a bunch of questions for you from my Supporting Listeners group, so if you haven't joined that, it's at SupportingListeners.com. This morning, I gave them about 20 minutes' notice. I said, "I'm talking to the Judge in 20 minutes. What do you guys want me to ask?" So one thing on people's minds is Brett Kavanaugh. Now, I know you've been commenting on that subject on television, but for our audience, what are your primary concerns about him?

NAPOLITANO: That's easy: the Fourth Amendment. Judge Kavanaugh was present at the creation of the Patriot Act, was part of the legal team that created that created it, and I don't know how much of that he's going to acknowledge, if any. But he was part of the legal team in the White House that crafted the Patriot Act, which in my view is the most abominable piece of American congressional legislation since the Alien and Sedition Acts. It eviscerates the Fourth Amendment because it removes the requirement — it purports to remove, I should say, the requirement that only judges can issue search warrants, and by calling search warrants "national security letters," this is pure Orwellian. Change the name of something, you change the meaning of it. So instead of calling it a search warrant, they call it a national security letter, and it allows one FBI agent to authorize another FBI agent to search custodians of records.

Then another statute expands what custodians may be searched. So if you read the Patriot Act in tandem with the National Defense Authorization Act of 2003, you will learn that the FBI can serve national security letters, and FBI-authorized and -issued search warrant, without the need for probable cause and without the involvement of a federal judge on everything from jewelers to hoteliers to lawyers to the post office to banks to doctors to virtually any person or entity in the world that has documents about you. Brett Kavanaugh present at the creation, I don't know that he was the exact scrivener. He was the youngest person on the team. I want to know his involvement.

But worse than that is an opinion that he wrote as a federal judge basically saying that the Fourth Amendment only protects you from prosecution, meaning the government is not required to comply with the Fourth Amendment for intelligence purposes, meaning the government can listen to any phone conversation — I know we're not on film, but I'm holding up my iPhone — and capture every keystroke on every computer as long as it uses that information only for intelligence purposes and not for prosecution. Beyond me where he gets that from. That's not in the Constitution. So he is no friend to the right to privacy, and he is a friend of big government.

On the other hand, he's also a friend of the Second Amendment, which you and I are and most people listening to us, and he's extremely skeptical about the administrative state, which we are. But the Fourth Amendment objections, to me, are disqualifying. Not his intellect, but his values.

WOODS: Are they so disqualifying that you think somebody like a Rand Paul should expend what political capital he has in fighting against it, or should we more or less reconcile ourselves to the fact that, chances are, a Trump appointee may not be so good on some issues and there's nothing you can do about it?

NAPOLITANO: Well, that depends on Rand Paul's vision of himself. If we're talking about Ron Paul, he would fight to the end because he viewed himself as the standard against which other constitutionalists should be measured. But Rand may have other plans for himself. However, if asked by Rand Paul or Mike Lee if I thought they should vote no or if I would vote no if I were in their shoes, my answer would be an unequivocal yes, I would vote no. But they have other factors to balance in the equation. They have to live with Trump. They have to work with him. They may have judicial nominees of their own for the lower federal courts that they want him to consider, which would be disabling if they were to oppose him. There are so many factors that go into this. But from a pure defense-of-human-freedom perspective, Brett Kavanaugh is the heart and soul of the establishment. He's exactly what Donald Trump said he would not nominate. Neil Gorsuch is not. Neil Gorsuch is what he said he would nominate and not from the heart and soul of the establishment. Brett Kavanaugh is. He has, with the exception of his seven years at Yale, never lived or worked more than a two-mile radius from the White House. I mean, this is Washington personified.

WOODS: Yeah. I have a friend who said he was hoping for an affirmative action appointee, by which he meant maybe somebody from Stanford or Chicago, given the makeup of the court.

NAPOLITANO: There are two Notre Damers in the mix, of which I am a graduate. One Judge Amy Coney Barrett is a graduate of Notre Dame Law School and studied constitutional law under the same scholar that I did, who profoundly influenced both of us, the late Professor Charles Rice. Charlie Rice was on Ronald Reagan's shortlist of five that produced Justice Scalia. So Antonin Scalia and Charlie Rice were two of the five that were on that shortlist. Charlie was a great, great proponent of the natural law —

WOODS: I'm pretty sure I read a book by him.

NAPOLITANO: Oh, yeah. Before Robbie George at Princeton, Charlie was the foremost academic authority in the country on the natural law, and he taught both of us. The other Domer — meaning a graduate of Notre Dame, dome after the Golden Dome in which the famous statue of the Blessed Mother — is Tom Hardiman, who's in the Third Circuit. He's sort of a diamond-in-the-rough type of conservative. Now, neither of them is my candidate. My candidate was Mike Lee, because he —

WOODS: Really? Not Kethledge?

NAPOLITANO: Well, of the four, Kethledge. Of the 25, Mike.

WOODS: Got it.

NAPOLITANO: Now, part of that is personal. I mean, I know Mike very well. We've spent many, many hours splitting constitutional hairs, and I think your audience would agree with Mike Lee and vice versa on nearly everything. But of the four, Kethledge believes in the primacy of the individual and in natural rights, as does Neil Gorsuch. I don't believe that any of the other three does. So when I was asked — and this is not a secret anymore, because I said it on Fox — the weekend before the naming of Judge Kavanaugh my opinion on the four, I sent a paragraph to the White House on each, and I said if you're looking for another Gorsuch, Kethledge is your guy.

WOODS: Mm, yeah. Geez —

NAPOLITANO: But we did not get another Gorsuch. We did not get a freedom-oriented person. Now, he may be good on separation of powers. I don't know where he is on the First Amendment. But to me, the Fourth Amendment is disabling, because that's the future of where we are. Look, he says he's an originalist, so if he were here with us, I would say, "Are you a textualist?" And he would say yes, meaning the words of the text mean what they say. Okay, so the Fourth Amendment protects privacy in persons, houses, papers, and effects. And then I'd hold up my iPhone and say, "Here is a computer chip. Is the computer chip in my iPhone an effect?"

WOODS: Yeah.

NAPOLITANO: I don't know how he could answer that, because if he says yes, then his own opinion is invalidated, because his own opinion allows the NSA to get that computer chip. If he says no, then he's violating his textualism bona fides. When I asked that question of Justice Scalia in front of 2,000 people at the Brooklyn Academy of Music — I was teaching at Brooklyn Law School at the time — he looked at me and he said, "I better not answer that one," because he thought it would be making its way to the court.

WOODS: Right.

NAPOLITANO: It is still making its way to the court. He died before it got there. So it's going to hit the court while Justice, presumably, Kavanaugh is sitting there, and we know which way he's going to go.

WOODS: You know, the funny thing about this whole Kavanaugh decision — who knows what all the factors are that go through a president's mind in a case like this? But it can't even be that, well, this guy, I'm going to pick this one because he'll maybe appease my enemies a little bit more. His enemies just left a blank for whoever the name was going to be. They were going to protest anybody, so you might as well go for Kethledge.

NAPOLITANO: Yes. Well, you know who he wanted to appease? I believe —

WOODS: The establishment, he wanted to appease? Yeah.

NAPOLITANO: Yes, I believe that when he left Bedminster two Sunday nights ago — Bedminster's the place in New Jersey where he spends some weekends, where he has an estate — it was Hardiman. His sister, very persuasive — I sat with his sister. We were judges in New Jersey. I know her better than I know him. Judge Maryanne Trump Barry, a judge of the

Third Circuit Court of Appeals, she had persuaded him that it was Hardiman, and he touched all the bases, all the buttons that Donald Trump promised he would touch with Hardiman. When he got to D.C. Sunday night, the establishment with which he has surrounded himself surrounded him and verbally browbeat him into changing his mind. I would like to have heard the conversation when he called his sister back and said, "Maryanne, I've changed my mind." What?

But the establishment, just like Ronald Reagan eventually surrounded himself with Jim Baker and the establishment, President Trump has already begun to surround himself with the establishment and is beginning to show establishmentarian ways. And he wanted to satisfy the establishment and they were satisfied with one of their boys, the quintessential member of the Washington, D.C. legal-judicial establishment.

Look, there's this other crazy thing I warned him about, and that's the body of Vince Foster. I don't want to sound like Roger Stone, but he was the young prosecutor in charge of investigating what happened to Vince Foster. How did a guy who killed himself end up wrapped up in a rug in a public park? And he arguably suborned perjury by browbeating a witness out of giving testimony about seeing two thugs moving a rug in the park. This is documented. I'm not making this up. And I said to the president's people, "You really want this to come out in the confirmation hearing? It will. It'll come out in the conservative attack on him, not on the left's attack on him."

WOODS: All right, I want to talk to you about law schools for a minute. Now, we know of course the state of constitutional law, but I wonder — let's leave that aside. I bet if I went to your typical law school, I could predict what they're going to say about the Constitution. But do those problems spill into other areas of law? Could I go to a law school and take a contracts class and have that be basically okay? Is it just constitutional law where there's a problem?

NAPOLITANO: There's no question but that the center of gravity of every major American law school, with the exception of one or two, is left. I don't know if there's a leftish way of teaching contracts or torts. I have never taught those as subjects. I've had colleagues who've taught them. I have taught constitutional law, criminal procedures, jurisprudence, theories of interpreting the Constitution, select problems with Supreme Court jurisprudence, topics like that. But I do know that the center of gravity is hard left, except for George Mason, where there are serious, bona fide libertarians, Regent Law School, where there are serious conservatives and libertarians. But for the most part, the center of gravity is to the left. But I don't know if that spills over into other subjects.

WOODS: Okay, I was just wondering about that. How would you advise a young law student in terms of what school to go to and what to look out for and stuff like that?

NAPOLITANO: I would advise a student to go to the best school a person could get into, because you want to learn from the best minds, even if they are leftish. They can't change the law; they have to teach you. I've always said on day one of law school, I have three jobs. One is to teach you basic constitutional law, the second is to teach you enough constitutional law so you can pass the bar exam section on constitutional law, and the third is to think like a lawyer. I think most professors want to do that. They may have their own ideas about where the law should go. You can resist that, or you can regurgitate back to the professor what you think the professor wants to hear, but you want to learn the basics from the brightest minds

at the best institution you can get into, because that pedigree will stick with you for the rest of your career.

WOODS: That's exactly the advice I give when people want to know about studying history. Sometimes people will say: where can I study with a libertarian? And I say: that's the wrong way to think about it. Study with the best person in the best program you possibly can, and then when you graduate, you can write all the libertarian history you want.

NAPOLITANO: All right, I'll give you an example. I'm going to use the name of a friend of ours. You can go to Georgetown Law School, which is arguably the most leftish of the top 20. But at Georgetown, you can find Randy Barnett, who is the most serious libertarian law school academic in the country and who resists the tide, actually works with the tide, he's very popular with his faculty members. But he's a goldmine as an advisor and colleague and mentor, even though he's surrounded by people who couldn't disagree with him more than they do. He's also a wonderful human being, so if you go to Georgetown, get to know him.

WOODS: You were the guest moderator at a debate recently with him on the subject of originalism that was very interesting, and that was my first time ever seeing him in person. What would you say, if you had to look back on — maybe we could confine it just to the 20th century or all of American history or however you want to do it. But if you had to come up with a rogues' gallery of maybe a few Supreme Court decisions that were just atrocious, how would you pick? What would you pick?

NAPOLITANO: Well, there's a great book by Bob Levy, who's —

WOODS: Oh, *The Dirty Dozen*?

NAPOLITANO: *The Dirty Dozen*, it's terrific. You and I both know that book, and I think we would agree on all of the dirty dozen. But certainly *Roe v. Wade*, which takes away personhood from living beings, as if the lesson of slavery had never existed. Certainly *Wickard v. Filburn*, which allows the Congress to regulate economic activity that is immeasurable. I love *Lochner* and would want to reinstate *Lochner*, which manifests a fidelity to the natural right to engage in commercial activity free from government regulation. I could think of a few more, but those are the ones that come to mind immediately. There are a number of Supreme Court opinions in the New Deal era besides *Wickard* which are horrific. *Carolene Products*, for example. This is below their radar screen, but this basically distinguishes between personal liberty and economic liberty, and it makes it difficult for the government to regulate personal liberty like free speech but easy to regulate economic liberty. How and why it makes the decision is in a footnote.

WOODS: Footnote Four.

NAPOLITANO: Footnote Four, the most infamous footnote in all Supreme Court jurisprudence. Now we know was written by a clerk, was never even read by any of the justices, and hundreds of cases — literally hundreds of them, maybe thousands if you count the lower federal courts — have relied on Footnote Four to say the government only has to show a rational basis when it wants to regulate economic freedom, but it must show strict scrutiny, a very, very high bar if it wants to regulate personal freedom. How you can make the

distinction is beyond me. And who the clerk was that wrote Footnote Four, I don't know. I think the person's hiding their face.

WOODS: All right, let me ask you —

NAPOLITANO: If they're still living.

WOODS: This is a little controversial, but where do you stand on the idea of a convention of states to propose amendments to the Constitution?

NAPOLITANO: I know the fear that a lot of our colleagues have that a convention would be runaway, but what could be worse than what we have now?

WOODS: That's been my —

NAPOLITANO: And I am willing to take that chance.

WOODS: Yeah.

NAPOLITANO: I have offered myself to be chair of that convention [laughing].

WOODS: See, no one would have any problem if you were the chair. What could go wrong?

NAPOLITANO: I'm sorry to be so vain, but you know, there's just a half a dozen things you would want to put in the Constitution, like the word "expressly" in the Tenth Amendment, like defining "commerce" in the Interstate Commerce Clause. There's not too much we'd have to clarify.

WOODS: But also, we wouldn't just have to focus on changing the wording and clarifying definitions, because wording is so slippery. But you could change the structure of how things work. You could say if X number of states think a law is unconstitutional, it gets invalidated or something like that.

NAPOLITANO: I am 100% with you on that. You and I have been arguing for this since we were teenagers, in those days to deaf ears, in these days to many millions of people who have seen enough is enough.

WOODS: Yeah, exactly. It would just be another layer of protection. Let the states play a role.

NAPOLITANO: You know, Charlie Rice, the professor at Notre Dame who taught Judge Barrett and me, used to say: *I don't think that the — who agreed with us on all this — I don't think the constitutional convention would come about, but as you started to get more and more states onboard, the Chuck Schumers of the world — in those days, Chuck was a congressman. He wasn't the majority or the minority leader of the Democrats in the Senate — would start to get terrified and be looking over their shoulders, and it might actually dampen their enthusiasm for big government for fear that they would be out of jobs in the new system.*

WOODS: Right.

NAPOLITANO: I don't know, but it was just sort of an argument in favor of the march toward the convention, that we might actually see real results without the convention actually being called.

WOODS: I'm curious, given that we're about to face confirmation hearings for another justice, going back 30 years to Robert Bork, I was growing up in the '80s. I graduated high school in 1990. But I followed that pretty closely, and after he was rejected, I got his book *The Tempting of America* as a high school kid, and I read that thing and that was my introduction to constitutional law, really, was Judge Bork's book. What's your opinion of Judge Bork and of what happened to him?

NAPOLITANO: Well, Bork was a positivist. He was not a natural law person.

WOODS: But same with Scalia, right?

NAPOLITANO: And was a textualist. So Scalia in heaven would recoil at being called a positivist, but he was.

WOODS: But in practice, yeah.

NAPOLITANO: In practice, meaning the law is what the lawgiver says it is, and the words have meaning and they mean what they meant at the time the lawgiver promulgated the law. They both believed that. And I don't. I believe that the natural law, your natural human rights trumps positivism. But what happened to him was reprehensible, and it began this cascading effect, senators trying to destroy nominees. I mean, Sam Alito, now Justice Alito, my Princeton classmate, once told me he'll never be in the same room with Joe Biden. I said, "Why not?" He said, "Because when then Senator Biden interrogated me, he wore a Princeton baseball cap and he wore it cockeyed just to irritate me," Senator Biden having gone to a school other than Princeton, Sam having gone to Princeton. And that type of pettiness drove him and his wife — his wife wept and left the room during Biden's interrogation of Sam. Now, Sam has forgotten more constitutional law than Joe has ever known, and I'm a friend of Biden's too, but not the way I am with Sam. And even though I disagree with many if not most of Sam's decisions, I value his friendship and admire his intellect.

But that type of stuff in my view has no place. But you're going to see that since the Robert Bork demise. If the Bork thing had not been successful, if he had gotten on anyway, we might not be where we are now. They almost succeeded with Clarence Thomas. They tried, as I told you, with Robert Bork. I don't know what's going to happen with Kavanaugh, but this is no way to run a railroad.

WOODS: I think they were trying to say that if Bork had had his way, we wouldn't have had desegregation and stuff like that. We'd still have segregated lunch counters. And he blisteringly answers that in his book.

NAPOLITANO: Yes, he did. That was Teddy Kennedy. There's a famous one-liner from Teddy Kennedy: if Robert Bork becomes justice of the Supreme Court, we'll have a return to segregated lunch counters and back-alley abortions and that kind of nonsense. But Teddy was very effective, and left-wing groups took that one-liner with his Boston accent and played it over and over and over again, and it worked on wavering and fearful senators.

I will tell you a funny story. I've never told this publicly, Tom. When Bork's name came down and was nominated, there were 14 names on that list. The other 13 were circuit court and district court nominees. None of the other 13 was ever confirmed, because their names had been on that list. How do I know this? My name was on that list.

WOODS: Whoa. Wow.

NAPOLITANO: I'm not complaining about my career, but my name was on that list for the United States District Court for the District of New Jersey. Nobody on that list was confirmed because of what happened to Bork.

WOODS: Oh my gosh, wow. The consequences are far-reaching, indeed.

NAPOLITANO: Well, the consequences are far-reaching. As I said, I'm not complaining about my career —

WOODS: Oh, yeah, it's turned out pretty well [laughing].

NAPOLITANO: I couldn't tell you off the top of my head who the other 12 were. Bork was number one, I was number 14, and there were 12 between us.

WOODS: Wow, how about that? Well, listen, I'm going to let you get going, because the Judge teaches constitutional law here at the Mises Institute and, in particular, as it affects economic freedom, and everybody is waiting, as always, with baited breath to hear what the Judge has to say. So I'm going to let you get going, but thanks so much for answering all these great questions from my folks, and it's always fun chatting.

NAPOLITANO: You have great listeners, and it's a thrill of me to be exposed to them, Tom. Thank you — to say nothing of our deep and enduring friendship.

WOODS: Well, that is one of the great pleasures of my life. Thank you very much, Judge.