



**The Judge on Expanding Presidential Power**

**Guest: Judge Andrew Napolitano**

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***Judge Andrew Napolitano is senior judicial analyst at the FOX News Channel.***

**WOODS:** I'm so glad to have you here the day that this book is released: *Suicide Pact*. Fantastic! This book is astonishing. This is, by my lights, the most important thing you've done. It is so impressive. I thought it was just going to be on the War on Terror. This goes back to the beginning of the republic, and it takes you through the expansion of executive power. It's incredible how sweeping this thing is.

**NAPOLITANO:** Well, I thank you for your enthusiasm, Tom. Of course, the world knows that we are friends and colleagues and ideological compatriots in many schools of thought and many fields of human nature, but you are an independent thinker, and your praise is very much welcome. The reason the history is in there is to help people, help the reader understand the mindset of George W. Bush and Barack Obama. Structurally, the first half of the book is the history of presidential law-breaking. The second half of the book focuses exclusively on the law-breaking of President Bush and President Obama. So the history is in there to show the world from their point of view. I condemn that history of presidential law-breaking. Those two presidents welcome that history of law-breaking because they use it as a precedent for their own. Of course, Barack Obama uses George W. Bush's law-breaking as a precedent for his own. One of the lessons of this book is that when the government behaves against the natural law, when it interferes with constitutional liberties, when it breaks the law, when it violates the laws it is sworn to uphold, and there is no consequence, that's an incentive for the government to do it again, and a future government will use that unsanctioned lawlessness as precedent to justify its own lawlessness. You'll see many instances in which George W. Bush and Barack Obama point to things that Abraham Lincoln, Woodrow Wilson and FDR did to justify what they did.

**WOODS:** Now this history that you have in here: do you think there's any kind of qualitative difference between the abuses that we've seen in the past and those under the past two presidents, or is it just a quantitative difference—there's more of them, or they are more brazen about it. How do you compare what's going on today with the past?

**NAPOLITANO:** Well, I think it's actually both, but the more serious issue is the qualitative difference. George W. Bush told the world he could spy on people and torture them. Barack Obama has told the world he can spy on people and kill them. Barack Obama actually has a legal memorandum sent to him by Eric Holder signed by a then-functionary in the Justice Department—emphasis on “then,” because you won’t believe what he’s doing today—which in 30 pages attempted to justify the president killing people on his own: no judge, no jury, no indictment, no charge, no trial, no conviction, no sentencing. Just the president targeted this person, they are in a foreign country, and I am going to kill them. Two of the people that he targeted and killed were children, and Eric Holder justified it, and the president justified it.

So far as I know, so far as we are able to tell, George W. Bush, for all of his faults, never knowingly killed Americans and never claimed, either in a boastful way or in an academic way, that he could do so. So Barack Obama’s situation is far worse. But this gets back to the answer to your earlier question. Many of the precedents cited by this then-functionary were things that George W. Bush did and got away with. Where is the functionary today? It’s the judge of the United States Court of Appeals for the First Circuit, sitting in Boston, tenured for life. The memorandum justifying presidential murder was not released until after the Senate confirmed him to that position. I can’t imagine that he would have been confirmed had that memorandum been released ahead of time. Bush did the same thing. There is a judge of the Ninth Circuit Court of Appeals who as a Justice Department functionary told Bush how he could legally torture people, and that memorandum wasn’t revealed until after he was appointed to the Ninth Circuit. So we have two presidents appointing enablers to life-tenured appellate judgeships.

**WOODS:** Well, speaking of enablers, you do mention in here John Yoo. I think that’s an important name for people to know.

**NAPOLITANO:** Well, John Yoo is now a professor of law at Berkeley Law School. He is the architect of the Bush-Cheney torture regime. John Yoo has the very interesting theory, which is rejected by almost all of academia in which the non-academicians probably would just say this is crazy. The president derives powers from some source other than the Constitution. Now, George W. Bush has made this boast. Barack Obama has been smart enough not to make the boast publicly because he knows there is no source of presidential power outside the Constitution. John Yoo claims that somehow there are powers inherent in the presidency not articulated in the Constitution, and the president in wartime can tap those powers and, Tom Woods, author of *Who Killed the Constitution?*, you and your co-author Kevin Gutzman will vomit at this. The non-written powers that the president has, the ones that aren’t in the Constitution, the ones that are inherent in the presidency, can trump the guarantees of freedom in the Constitution. It just sounds like it was written by Vladimir Putin, but it was written by George Bush’s enabler and now a professor at Berkeley, of all places.

**WOODS:** Let me play a neoconservative devil’s advocate here and say, look, judge, I know that what you’re describing sounds dystopian. It sounds Orwellian that America could be doing

these things with torture and spying and killing Americans. But let's look at the real specifics. The killing of Americans: well, we're talking about people who were open jihadists. We have a war that's been waged upon us by radical jihadists, and given the severity of that war, I'd say our leaders have actually been astonishingly restrained in their exercise of power.

**NAPOLITANO:** I know you're role playing, so I'll role play in the beginning as well. Have you been hanging out with Bill O'Reilly?

**WOODS:** (laughs)

**NAPOLITANO:** (laughs) I couldn't resist. But your argument, Tom, is a good one, and the reason it's a good one, whether role playing or not, is because it's a common one. It is particularly common at my day job, where I happen to be as we're recording this, at FOX News, because so many of my colleagues and so many FOX viewers who are basically honest, decent, patriotic Americans do accept that sort of diabolical trade that we can trade in due process for safety. Once we begin wearing away at "the chains"—Jefferson's words—that the Constitution imposes on the government in little areas where it may be popular—these are jihadists, they are bad people, they are never going to come back to the U.S. If we leave them unmolested, they may end up killing people. Why do they need a trial? Once we begin wearing away at the protections of the Constitution for people we don't like, what is to stop them from wearing away at protections to the Constitution for people we do like? What is to stop them from wearing away at the constitutional protections for people that they don't like just because they don't like them? Stated differently, the due process clause of the Fifth Amendment couldn't be clearer. If the government wants life, liberty, or property, it can only take it by a jury trial. We're not talking about declaring war, because that actually did not happen in a sense. Obviously, declaring war authorizes the government to use its troops to shoot government troops. It's irrelevant here because this guy was not a soldier. It was a civilian who was born in Mexico. I am speaking of Anwar al-Awlaki. So once we make an exception to the due process clause, the government will drive a Mack truck through that exception and destroy the very fabric of freedom. Again, stated differently, it's far better that he be free to say whatever he wants in Yemen than we fear the government executing us here because it has the power to abrogate the guarantee of due process.

**WOODS:** Judge, let me change my character, my persona here. Let's say instead I am a long-time Obama supporter, and I am a supporter of his because I believe in progressive values, and now I confront Judge Andrew Napolitano, who is critical of Obama not necessarily for the traditional reasons, although also for those. But in this book you're in effect saying that this guy doesn't have progressive credentials at all if progressivism means anything in terms of foreign policy and domestic civil liberties. How would you make that case to a progressive Obamaite?

**NAPOLITANO:** There are certain areas where progressives agree with us, and you may recall my late beloved show *Freedom Watch*. We would post on the *Freedom Watch* website the various clips. The most popular one we ever posted was a dual interview of Ron Paul and Ralph Nader.

The second most popular one was a dual interview of Ron Paul and Dennis Kucinich. Now, Nader and Kucinich are anything but libertarian. They are classic progressives. They are in the Theodore Roosevelt/Woodrow Wilson mold. They basically believe that the Constitution unleashes the federal government to address any problem it can, and the only restraints on the federal government are the specific, express guarantees in the Constitution.

So when you talk to a progressive, you must talk about those specific, express guarantees in the Constitution and that articulate areas where both George W. Bush and Barack Obama, in the stated name of safety, have transgressed them. So things like free-speech zones should be condemned by progressives. They don't want George W. Bush limiting their free speech or Dick Cheney limiting their free speech any more than I want Barack Obama limiting mine. Things like empire-building should be catnip to progressives. They don't want tax dollars spent to tell other people how to live, whether that's being done by George Bush or Barack Obama, any more than I do or you do or the vast majority of people listening to us do. I attempted in these joint interviews with Congressman Paul and Ralph Nader and the other one with Congressman Paul and Congressman Kucinich is to find common ground. I will tell you another common ground, which is not the subject of this book. The out-of-control Federal Reserve: Progressives are as much in favor of auditing the Fed and finding out who it's giving money to, whose funds it's buying, what government it's shoring up, what concocted, diabolical deals it's making as are libertarians. I don't think that's a difficult argument to make. I think Barack Obama is not a progressive. I think he is just a left-wing authoritarian, either cowed by the American intelligence community or seduced by the American intelligence community into behaving lawlessly under the excuse that he is doing so to keep us safe. His first job is to keep us free. If he keeps us safe but unfree, he's not doing his job at all.

**WOODS:** All right, let's go back a little bit in history, if we might. There are a lot of people, conservatives, who these days, like Ron Paul, might favor non-intervention. They understand all the arguments against foreign intervention. But during the Cold War they would say with Bill Buckley that now we have to make an exception. There is always a reason for an exception. We have to make an exception now because of the Soviet threat. And that's a very, very hard thing to argue against with conservatives, to argue against intervention there. So talk about some of the domestic consequences of the Cold War. What were some of the problems in terms of the expansion of executive power during the Cold War?

**NAPOLITANO:** Well, one of the problems during the era of the Cold War was the violation of the 13th Amendment, which prohibits slavery, when the government reinstated the draft, because drafting people is a form of involuntary servitude. If it were voluntary, you wouldn't need the draft. It was not voluntary, so they basically said you will serve in the military or you will go to jail, or you'd better escape to Canada and hope that we'll let you back in.

Another consequence of the Cold War is debt. Now, this is almost always a consequence of war. Governments do not pay for war. Presidents do not pay for war. When the bills come due, they push the obligation to pay the bills on a future generation. If the current generation had to

pay for the war, the war would stop at about six or seven months. LBJ actually sold Fannie Mae and Freddie Mac in order to finance the Vietnam War in one year when the Congress was giving him difficulty with his money. That was probably a good thing, because we shouldn't have had Fannie Mae and Freddie Mac to begin with, but the money should have been used to reduce the country's debt.

So perpetual war leads to perpetual debt, and war leads to slavery. There are, of course, many instances of government surveillance during the Cold War, not nearly as pervasive as it is now in today's world. The infamous J. Edgar Hoover instituted a program called COINTELPRO, which basically was black-bag jobs. They didn't have the wireless ability to do it today. They basically had to break into the building where the phone was in order to tap the phone call. They infiltrated antiwar groups. The FBI even infiltrated the military when it thought that members of the military might be antiwar. So these are all violations of basic civil liberties—the progressives prefer to call them human rights; without getting too detailed into natural law theory, I prefer, as you do, to call them civil liberties—that had adverse domestic consequences, and what is the precedent for it? Woodrow Wilson during World War I actually began all of this. You had the slavery of the draft. You had the debt with his brand new printing press at the Federal Reserve. And you had the suppression of speech and the surveillance, all started in World War I, exacerbated again by FDR, picked up again by LBJ and Nixon. Now, of course, taken by Bush and Obama to truly Orwellian heights that we could never have imagined.

**WOODS:** On the other hand, couldn't a devil's advocate say, actually, things have gotten better, because it would be inconceivable to imagine a perennial presidential candidate being thrown in prison for giving a speech, as happened under Woodrow Wilson, or an entire race of people being confined in relocation camps on the West Coast. It seems inconceivable that such a thing could happen. So, yeah, we have some abuses we have to live under, but it could be worse. We could be living under FDR or Woodrow Wilson.

**NAPOLITANO:** Well, it could always be worse, absolutely. I think the Supreme Court has recognized that the Japanese internment that was found constitutional at the time would never be upheld today. That internment on the basis of race would never be upheld. You could argue that the Devil's Island off the coast of Key West, Florida called Guantanamo Bay—the detainees there are on there on the basis of race or ethnicity, and you could also look at the six Supreme Court cases construing it, which the Bush Administration lost five of them, and the sixth that it didn't win was on a procedural issue. All of those cases basically going to the principle that whatever the government is doing and for whatever reason it wants to do it, it has to give these people a basically fair trial, as the Supreme Court says. Yes, I don't think a Barack Obama would lock up Rand Paul for what he says about him the way Woodrow Wilson locked up, I guess it was Eugene Debs, either Eugene Debs or Norman Thomas.

**WOODS:** Yeah, Eugene Debs, right.

**NAPOLITANO:** I think it was both. It was Eugene. Whichever one he didn't lock up at the time, I am sure he thought about it. But these were evils that we know about, Tom. The most pernicious ones are the ones we don't know about, and we would know nothing about but for the bravery and courage of the great Edward Snowden, unfortunately now living in Moscow in order to save himself from the reach of American injustice; American political justice.

**WOODS:** Judge, one last thing. I am going to try to see if I can get some good news out of you. When we look at people who are appointed to the Supreme Court or nominated to the Supreme Court, when we look at conservative justices, they tend to be good on some things, but they tend in general to favor a strong executive. So if you're going to look to them to protect you against a strong executive, you're sometimes going to be disappointed. There doesn't seem to be any prospect of that changing. Where are the good guys in this story?

**NAPOLITANO:** Well, if you're talking about the book, I am sorry to tell you it does not have a happy ending.

**WOODS:** I didn't want to give away the ending.

**NAPOLITANO:** The book ends about a year ago, when my friend who was helping me with it unfortunately passed away in the middle of this, and I finished writing it. He was my on-site editor. The good guys are those who might succeed Barack Obama in the form of Rand Paul and who might appoint people who are faithful to the Constitution to federal courts. There is no avowed lover of the natural law, self-proclaimed libertarian on the Supreme Court at the present time. The closest person to that is Justice Clarence Thomas. He is not always on the same side that I would be on, but he's the closest person to that absolute fidelity to the Constitution. There are a half dozen of a thousand—a half dozen federal judges who are self-proclaimed devotees of the natural law and small government libertarian folks sitting in the courts today, but the greatest thing we can hope for is that Senator Paul becomes President Paul and appoints people who love freedom and believe that the Constitution means what it says to the highest court in the land. Then and only then will the executive branch stop breaking the laws that are catalogued in this book.

**WOODS:** Well, another thing we can hope for is people read your book *Suicide Pact* featuring a forward by Senator Paul. The subtitle is *The Radical Expansion of Presidential Powers and the Assault on Civil Liberties*. A lot of this is stuff students are not going to learn in law school, and they are not going to learn in their history classes, but we need to learn all this stuff for the sake of our liberties, and as usual, Judge, you're on the front lines of this, and we're deeply grateful to you both for this book and for your conversation with us today.

**NAPOLITANO:** I am deeply grateful for you time, your effort, your enthusiasm, and above all, your friendship. All the best.

**WOODS:** Thank you, Judge.