



Judge Andrew Napolitano Answers Listener Questions

Guest: Judge Andrew Napolitano

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

WOODS: My listeners have submitted some interesting questions that I'd like to throw at you and get your thoughts. First of all, what kind of advice you would give to a good guy who's in law school today? You know, someone who more or less holds our views. Do you have any advice for navigating through law school these days?

NAPOLITANO: Well, I certainly have a lot of experience there, having taught at a number of law schools. The most recent, and the one I teach at now, is Brooklyn Law School in Brooklyn, New York.

The first thing you ought to think about is how seriously you want to be a lawyer. The profession is not what it was when I went to law school. The opportunities are no longer there. Most traditional law firms are shrinking rather than growing. If you've decided that this is what you want to do, whether you want to practice or you like the academic discipline of law school for whatever future purpose, the first year of law school is brutal. Intentionally so. You need to study six days a week. You maybe can take Sunday afternoon or a Sunday evening off, but that would just be to give your brain a rest. You really need to work extremely hard. You need to master a new way of thinking. You need to master a whole new set of terminology. And if you can do that you'll get a leg up on your classmates, who are effectively your competitors in the second and third year of law school.

I've often suggested to the students that the purpose of law school is to teach them to think like lawyers. To teach them the basics. And to get them past the bar exam. It is not to teach them to *be* lawyers. One of the defects of law school, which is not a defect of medical school, is that you learn how to practice law on the job. You learn how to *think* like a lawyer in law school. So don't expect to learn how to do a house closing or how to try a case, but you'll learn real estate law and you'll learn the courtroom procedures. You just won't have an opportunity to apply them.

WOODS: And what about a field like constitutional law, where you're likely to encounter some ideas that run contrary to the ideas you yourself may hold? I know a lot of students who have a liberty background might be inclined to challenge their professors. But I wonder if there's much point in doing that when what the professor is trying to do is show you that these are the arguments that are current these days in the legal world and if you want to win a case, you'd better be familiar with them.

NAPOLITANO: Well, the professors obviously can't change constitutional law. Their job is to, again, teach you what the law is, and teach you what the trends are, familiarize you with the various theories of how the Constitution can be approached, and familiarize you with the dissents. But the professor can no more change the law than a doctor can change biology. So, sometimes it's helpful to challenge the professors and challenge the law because it's a good exercise in thinking, but your challenge is not going to get you a good grade and it's not going to get you past the bar exam because you have to demonstrate a knowledge of what the law is, not what you want the law to be. And constitutional law, in particular, has taken an unfortunate turn since the FDR era, with a couple of minor corrections, but for the most part, the vector of its travel has been in the direction of big government and using the Constitution as a guideline rather than

as the supreme law of the land. So you can certainly understand that and comment on it, but you can't deny that the law is what it is, or you won't pass the exam.

WOODS: Judge, I know you've commented on the NSA lawsuit. I have a question from a listener about that. Do you think there's any potential here or is this just a bit of political theater?

NAPOLITANO: No, I think there is potential here. When the government boasts that the NSA's massive spying program has been found constitutional by 15 judges, 14 of those judges sit in secret and had nobody arguing in front of them that it was unconstitutional—those would be the FISA court judges. Only one judge has found this constitutional actually heard a case and had the government seriously being challenged. So Senator Paul and his fellow plaintiffs have every right to be doing what they're doing and have every reason to believe that they can be successful. It's a very, very interesting technique. You know, it's a class action, not always something that people who believe in small government like, but it enables a small group of people—Senator Paul and a half dozen named plaintiffs—to sue on behalf of everyone who has been injured by the NSA. Now, that everyone would be almost everyone in the United States. It's certainly everyone with a cell phone, or a landline, or a bank account, or a utility bill, or a credit card, or a computer. It will be very interesting to see what the courts do with it.

It may be that this is nothing more, Tom, than an effort to get this to the Supreme Court. And the more lower-court rulings there are, and the more lack of consistency there is among the lower-court rulings, the greater the likelihood that the Supreme Court will have to hear this and rule on it.

The government does not want this to go to the Supreme Court. The prevailing view, amongst those of us who watch these things for a living, is if the NSA program, as we understand it, gets to the Court, it will be found unconstitutional.

WOODS: Wow, interesting. I was thinking: this will test the theory that we have to vote Republican so that we get good Supreme Court justices. I would think that the NSA has got to be the litmus test as to whether that strategy has worked.

NAPOLITANO: Well, one of the justices who has already spoken out very aggressively about this, and has indicated a willingness to put the NSA in its place is Justice Sotomayor, appointed by President Obama. And one of the justices who has spoken out vociferously in the other direction—now, they don't speak out in great specifics, because they don't want to be the object of a motion to remove them from the case on the grounds that they've made up their minds already. But in terms of things they say about the Fourth Amendment, my good buddy, Justice Scalia, has opined that we might all be safer because of the NSA.

So you can't always go by the pigeon hole in which we put the justice, or the political party who appoints the justice when you're talking about civil liberties.

WOODS: That's true, especially with civil liberties. Sometimes, Republican appointees seem to favor a strong executive and give the executive a free hand in a variety of areas.

NAPOLITANO: Yes, yes, it's regrettable, but that is the case.

WOODS: I have a listener whose birthday it is today and he said that a great birthday gift would be if I can ask you his question, which is: suppose you had the power to introduce one amendment to the U.S. Constitution, what would that amendment be?

NAPOLITANO: It would be very difficult for me to introduce just one. I have often said that if I could tinker with the Constitution I would do the following: I would change the third word from "We, the People" to "We, the States"; I would add a modifier to "commerce among the States" by describing it as the movement of goods between merchants as they cross interstate borders, something like that....

WOODS: Good!

NAPOLITANO: I would add the word "expressly" into the Tenth Amendment, and I would repeal the Sixteenth Amendment and the Seventeenth Amendment. So, that's the popular election of senators and income tax.

So I don't know that you could do all of that in one amendment. You probably couldn't, but those are the five areas where the government has hung its hat in the march towards big government.

Although the first is merely symbolic. There are many Supreme Court cases that stand for the proposition that the preamble means nothing; it's just a recitation of words. But that is such a historical anachronism and it is such a profound inaccuracy to suggest that the Constitution was enacted by the people. It was not. It was enacted by the states and was only written to enable the federal government to do certain things between and among the states; not to have any interaction with private persons whatsoever.

WOODS: Now, Judge, you've been a guest on the Peter Schiff Show when I've guest hosted and I've been able to ask you a lot of my own questions. I'm keeping myself to the questions people have suggested. And I know that you and I've talked about this before, but inevitably when I mention your name people are curious about what you think about jury nullification and if and how it can be used in the present day.

NAPOLITANO: Well, there's many published opinions affirming jury nullification. I shouldn't say many, I know about a half dozen. I'm a *strong* believer in it.

There are some states, New Hampshire for example, that expressly, expressly permits it. In fact, in New Hampshire, the defendant is entitled to an instruction to the jury from the court: you may nullify if you want, meaning if you think the government has applied the wrong law or if you think the defendant did what the government said he did but you think it shouldn't be illegal, you may find him not guilty. There are other states where state court opinions prohibit jury nullification. To me, jury nullification is one of the last peaceful barriers we have from the tyranny of the executive branch and I wholeheartedly endorse it.

WOODS: So, you think it's a situation where if you're in New Hampshire, you can openly use it, but in other states—

NAPOLITANO: Well, you need to know the law of the state that you're in. I only know about New Hampshire because it is well known that New Hampshire permits this in the constitution. In some states, there are opinions of the Supreme Court of the state prohibiting it. In some states there are no opinions, it's really going to be up to the trial judge. In some states the opinions are equivocal, you know, you're really going to have to finesse how you apply them. But most trial judges, unless they are serious small government people or libertarians are against this because they view it as taking the role of the judge away and putting it into the hands of laypeople. Having been a trial judge, I can understand that, but my sense of values are more towards the history of individuals standing up to big government and the jury is one of the last peaceful ways to do that.

WOODS: Now let's flip this on its head and ask: what about—this is another question somebody had—you as a judge, in your career as a judge, when you're dealing with a case in which the law that's at stake is one that you don't agree with or you think is wrong on one level or another, how have you handled that? Do you have to leave that outside the courtroom?

NAPOLITANO: Sometimes you do, it depends on how much of your system is aggravated by it. You can simply recuse yourself. The decision to recuse, that is, to remove yourself from the case, is not appealable. The decision not to recuse is appealable, but the decision to recuse is not appealable. And not only is it not appealable, but you don't have to give a reason.

So in New Jersey I regularly recused myself from cases involving abortions because I simply could not bear to sign an order authorizing an abortion. Nor could I sign an order stopping it knowing it was going to be reversed immediately and I was just wasting everyone's time and effort and money, so I simply recused myself from it. Sometimes you hold your nose and do the right thing according to your oath, which is to uphold the law as it is, not as you want it to be. So you have that recusal stopgap.

Occasionally, you can take a case where you disagree with the law and invalidate the law, and just sort of roll the dice in the appellate court and see if they agree with you. But not every case presents the appropriate vehicle with which to invalidate the law. And if you invalidate the law knowing that you're going to be reversed you have just wasted everyone's time and money.

WOODS: All right Judge, here comes the fun one. This is the most commonly asked question after “How did he get to be so awesome,” after “We want him to have another show,” “Will he run for president?” Let’s put those aside because I know you’re not really interested in those questions, but I want to ask: People want to know where you stand on Rothbardian anarchism and could you imagine a situation in which the law is not monopolized by the state, etc.? Where do you stand on the libertarian spectrum, in other words? People want to know and I’m just conveying that.

NAPOLITANO: Even when Lew Rockwell and I and you are dining together, I am the most libertarian person in the room.

WOODS: [Laughs] Okay!

NAPOLITANO: That’s the short answer to that question. The long answer is that I am the quintessential Rothbardian. I believe that you have the right to avoid, to avoid the government, the absolute moral right to do so. And I believe that the natural laws and the natural rights of individuals, enforced by the natural law is a natural stopgap on anything the government wants to do. Now, this doesn’t always work out practically and this can’t change tomorrow, and insisting on this may land you in jail or in the poorhouse, but my beliefs are steadfast. We’d have a fair, more just, more prosperous society if those values were part of society’s as well as mine.

WOODS: Judge, before I let you run I’ve got just one more quickie: but somebody wants to know: you’re a Catholic; do you feel like there could be any kind of contradiction or anything that needs to be reconciled between Catholicism and your libertarian views?

NAPOLITANO: No, nothing whatsoever. I mean, the social teachings of Holy Mother Church are imperative on private, individual action, not on government action. If the government enacts a statute claiming that the government suddenly owns 39 percent of my income, to me it’s theft. And it gives some of that money away to people, well, that’s no credit to me. I only paid it because they came after me with a gun, or threatened to come after me with a gun if I didn’t pay it. But if I personally give that money to poor people I’m building up treasure in heaven. If the Church were to suggest that the government has the right to take this money from me against my will, and give it away against my will, the Church would be venturing into an area beyond its competence, but it has never said that. I agree with and accept the social teachings of the popes because it is a moral imperative on individuals. As long as the Church recognizes the separation between Church and state it is the individual’s choice to comply with Church teaching or not. Though the present Holy Father has indicated that he might want some involvement with the government, but it has just been some disjointed statements of his. There’s been no formal teachings on that, as far as I know.

WOODS: Judge, I waited so long to have you on the program because I know you’re working on a new book and I wanted to wait until we could promote that book. Can you tell us anything about it?

NAPOLITANO: Oh, sure. The working title is *Suicide Pact: The Constitution and the Radical Expansion of Presidential Power After 9/11*.

WOODS: Fantastic.

NAPOLITANO: The first part of the book is a review of presidential excess from George Washington to LBJ. The second half of the book is a review of presidential excess under George Bush and Barack Obama. We basically took their executive orders—the ones we could lawfully get our hands on—and compared them to tradition, compared them to federal law, compared them to Supreme Court cases, and compared them to the wording of the Constitution, and found them grossly and seriously lacking.

Here’s the interesting thing: NYU Law School has gotten a hold of this and is going to publish it as a 120-page law review article in the spring of this year. And then my publisher, which is Thomas Nelson—now a division of HarperCollins—will publish it as a 350-page book in early summer or around Labor Day.

It’s a bit of a magnum opus, Tom. There’s 1800 footnotes, so the Tom Woodses of the world will love it. It’s a treasure trove of research and it’s pretty Rothbardian, if I say so myself.

WOODS: Well, Judge, when it's ready we will promote the heck out of that thing. And I want to thank you for your time and your generosity, and for being such a good sport and taking these random questions.

NAPOLITANO: Oh, I'm happy to do it. Anytime, my friend.

WOODS: I forgot to say: my wife says hi. I had to point that out; she's hanging on in the throes of pregnancy, but she was thrilled to know you were going to be on the show.

NAPOLITANO: Your wife always seems to be in those throes, which again, of course, is a great joy in heaven.

WOODS: Indeed, indeed.

NAPOLITANO: Tell her I love her as I love you, Tom. All the best.

WOODS: Thank you very much, Judge.