

A Bias for Liberty. The US Government's Spyware

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Three weeks ago, this column reported on warnings issued by the Biden administration about the dangers of spyware. Spyware is software that permits the user to hack a computer unseen, unheard and undetected. The manufacturer of the warned-about spyware is an Israeli company called NSO, and its product is called Pegasus.

Pegasus permits its users to type in anyone's cell number and, without requiring a response from the operator of the mobile device, gain complete access to the full contents of that device. Even though doing this in America or to an American is a federal crime — commonly called computer hacking — the Israelis have used it as part of their intelligence services for about six years.

They have also sold it to about a dozen foreign government entities who have used it for law enforcement, spying and harassing political opposition and journalists.

One of the government entities that purchased Pegasus is the FBI.

When the Biden administration warned against being victimized by Pegasus, it did not tell the American public that the government owns this spyware. We now know — thanks to dogged reporting by Ronen Bergman and Mark Mazzetti of The New York Times — that the FBI experimented with Pegasus from a warehouse in New Jersey for about two years before abandoning it.

For two years, Phantom — the American version of Pegasus — was used on two tracks. It was employed experimentally by the FBI and debated theoretically by lawyers at the Department of Justice and the White House during the presidencies of Donald Trump and Joseph R. Biden. The Biden administration must have known of the coming Times expose, hence its recent odd warning.

Pegasus and Phantom have a sordid history, nearly all of which involves former Israeli **Prime Minister Benjamin Netanyahu**. Suffice it to say that the Israeli government acquired new international friends by permitting NSO to sell Pegasus to foreign governments that had never been aligned diplomatically with Israel.

Suffice it also to say that Netanyahu and his government looked the other way when the purchasers of this software — including the Israeli government itself — used it to spy on political opponents and journalists.

While foreign governments were having a field day with this, lawyers in the Trump and the Biden administrations were debating privately whether the use of Phantom violated federal computer hacking laws and violated the Fourth Amendment.

The government defends its \$5 million purchase by arguing that its use lets it avoid needing the permission of Big Tech in order to spy on Americans. The government told the Times reporters that it needs to know about spy tools so it can “combat crime and ... protect both the American people and our civil liberties.”

This is an absurd defense for the acquisition of tools that on their face present no lawful purpose. It is also absurd to think that the government even remotely cares about civil liberties. The history of human freedom is the history of government assaulting civil liberties.

There is no lawful purpose to this spyware because the Fourth Amendment requires a search warrant for all surveillance, and it requires that the warrant specifically describe the place to be searched and the person or thing to be seized. Because Phantom does not focus on narrow data, but gives its users full access to the contents of one’s mobile device, it is a per se violation of the Fourth Amendment.

Notwithstanding the facial unconstitutionality of this software, government lawyers took two years to advise the FBI to stop using it. We know from the Times’ reporters that the FBI conducted experiments and tests before the DOJ told it to cease doing so, but we do not know on whom the tests and experiments were conducted.

The reason the feds gave for telling the FBI to cease using Phantom is the need to balance civil liberties with public safety. It was apparently the consensus of DOJ and White House lawyers that balance favored civil liberties.

Whenever a government official or politician suggests the need to balance civil liberties against public safety, get ready for a red herring, and note that he is either a deceiver or a fool. There is no such thing as a balance between liberty and safety. The relationship between the two is not balance; it is bias — a bias for liberty.

Because our rights come from our humanity, and our humanity is a gift from God, our rights are natural to us. For those who do not recognize the existence of a Supreme Being, you know that humans are the most intelligent beings on earth, and we can reason and act freely upon our reasoning. Those human characteristics — reason and freedom — come from within us.

Hence, whether divinely given or humanly crafted, freedom comes from within us, and not from the government. Because it is natural to us — like our hair and feet and faces — it is not subject to the whims of our neighbors or the caprice of government.

Thus, since freedom is the default position, we can see the natural bias in favor of it. Government is the opposite. It is, as Ludwig von Mises famously said, the negation of freedom.

This is not theoretical hairsplitting. It goes to the core of the relationship of all persons to the state, whether the issue is masks on the face, chemicals in the veins, travel in times of fear, or work in times of tumult, the government must recognize that our freedoms are natural and its incursions upon them are no more than the arbitrary use of force to gain political favor or power.

All government domestic spying is a violation of personal freedom; and that conclusion should not have taken lawyers two years and \$5 million to reach. Then again, those lawyers work for the government.

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