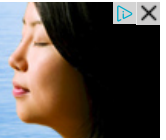


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FRIDAY, SEPTEMBER 27, 2013

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Breach or Debate

It's time for Congress to use its freedom of speech power to force the intelligence debate out into the open.

BY BRUCE ACKERMAN | AUGUST 1, 2013



The massive NSA surveillance program revealed in June by Edward Snowden may have narrowly survived an up-or-down vote in the House of Representatives last week, but the battle is far from over. As the House Judiciary Committee **mulls** a second bill limiting NSA telephone intrusions, it's worth revisiting the ground rules governing the ongoing debate. In particular, should members of Congress use their special constitutional powers of free speech to force the facts about the government's secret activities out into the open?

Up until now, Congress has allowed Barack Obama's administration to say one thing in secret sessions and something very different in public. The most notorious instance involved Director of National Intelligence James Clapper, who **brazenly denied** in a March hearing before the Senate Select Committee on Intelligence that the National Security Agency was collecting data on millions of Americans. Clapper has since **apologized** to Sen. Ron Wyden (D-Ore.) for lying to his face.

Clapper's confession spurred **calls** for his resignation. But now that the White House has **stood firmly behind** the director of national intelligence, the ball is in Congress's court. Clapper, moreover, doesn't seem to have learned his lesson. On Tuesday, Wyden reported that Clapper's response to a more recent inquiry by 26 senators was **inadequate**. In his view, Clapper minimized the extent to which intelligence agencies have been violating court orders. Wyden **claims** that these infractions "are significantly more troubling than the

government has stated."

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Wyden knows what he is talking about. As a member of the Intelligence Committee, he has been briefed on the ins and outs of domestic snooping operations at secret sessions. Given Clapper's continuing evasions, Wyden should no longer content himself with telling us that the administration is misrepresenting the facts. He should instead let Americans know the truth, even at the cost of revealing some classified information presented to him in secret sessions.

The U.S. Constitution guarantees that elected representatives "shall not be questioned in any other Place ... for any Speech or Debate in either House." In other words, they cannot be prosecuted for reading classified material into the public record -- and it is up to them, and them alone, to decide what is worth talking about.

This principle has deep roots. During the run-up to the English Civil War, members of the House of Commons were imprisoned in the Tower of London for as long as 11 years between 1629 and 1640. Their offense: insisting on their right to debate central questions of religious freedom, despite King Charles I's claim that these issues lay within his royal prerogative. The freedom of parliamentary

debate was therefore an important principle of the Glorious Revolution, leading to its codification in the epochal Bill of Rights of 1689. This provision was the **model** for the American founders' constitutional text.

In the United States, congressional freedom of speech was last put to the test during the Pentagon Papers affair at the time of the Vietnam War. Invoking the "speech or debate clause," Daniel Ellsberg -- with whom Snowden has been compared -- approached members of Congress and tried to persuade them to submit the Pentagon Papers into the Congressional Record. Only after they refused did he leak them to the *New York Times* and *Washington Post*. When Richard Nixon's administration obtained injunctions in the lower courts, Ellsberg returned to Congress with more success. With the decision still pending before the Supreme Court, Sen. Mike Gravel (D-Alaska) **placed** 4,000 pages of the Pentagon Papers into the record at a committee hearing. Even if the court had failed to protect the newspapers, Gravel's action ensured that the truth would come out. A year later, the Supreme Court unanimously affirmed Gravel's right to publish documents labeled "Top-Secret: Sensitive" under the speech or debate clause.

In exercising his privilege, Gravel **refused** to publish parts of the Pentagon Papers that still endangered national security. If future congressmen act irresponsibly, the House or Senate has the authority to sanction them, since the Constitution only protects against reprisals in "any *other* place." At the extreme, the Constitution authorizes the expulsion of lawmakers by a two-thirds majority -- though this hasn't happened, except in **two House cases** involving bribery and corruption, since the Civil War.

Wherever the House or Senate draws the line, this much should be clear: Members should certainly have the right to tell the truth when administration officials have lost their credibility. This not only serves the cause of democracy, but it will deter further fabrications and distortions. When voters go to the polls in 2014, surveillance will be high on the agenda. They should not cast their ballots amid a haze of doubt as to the basic facts.

At an earlier stage in the debate, the administration might have had a powerful weapon to defeat congressional watchdogs. In response to the risk of exposure, officials might have refused to cooperate even in secret committee sessions, leaving members entirely in the dark. But such threats are no longer credible. The House only preserved the NSA program by a vote of 217 to 205 after an all-out lobbying campaign by the White House -- and the fight has just begun.

If administration officials refuse to testify at secret sessions in the future, they will most likely alienate the fence-sitters. A boycott would also doom the renewal of the Patriot Act when it comes up for reconsideration in 2015.

For almost 500 years, the people's representatives have spoken out against the abuse of executive prerogative. It took courage to create this great tradition, and it will take courage to sustain it. The moment of truth is now.

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EPA/MICHAEL REYNOLDS

*Bruce Ackerman is a professor of law and political science at Yale University and the author of **The Decline and Fall of the American Republic**.*

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**shekissesfrogs**

If only one person from inside those committees had as much courage in their pinkie fingers as Bradley Manning, or Edward Snowden, or Mike Gravel who read the pentagon papers into the record from the senate floor.

2 MONTHS AGO

Like

Reply

**brmull**

At the very least it would cost Wyden his spot on the committee. Then where would we be. We know now they're collecting everything and lying about it. It's up to us as citizens to carry this forward from here.

2 MONTHS AGO

Like

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**tovangar2**

So? Pick someone near the end of their career to be "courageous" then. I'm sick to death of the dithering. The information is ours.

2 MONTHS AGO

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**CasperMarlowe**

Thanks for this constitutional perspective, but you fail to point out the essential point: No one in Congress -- not Bernie Sanders, not Ron Wyden, not Alan Grayson -- will ever risk their membership in the "club" in order to protect the U.S. Constitution or their constituents. They simply don't have that kind of conscience, their oaths of office notwithstanding. You have to turn to the lowly but honest and courageous -- a Bradley Manning or an Edward Snowden -- for the truth. Members of Congress are entirely and naturally at home with sociopathic lying, and even their calls for more openness with regard to the national

security state are hedged with cowardly self-interest.

Like

Reply



JonAdams1

CasperMarlowe

Many members of Congress are ENTIRELY OWNED by wealthy interests.

Like

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CinWarren

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CasperMarlowe

Agreed... they're either being bought or blackmailed.

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Reply



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CasperMarlowe

bought ... like many of the "journalists" at the "top of the heap" in the Mainstream Media.

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CasperMarlowe

JonAdams1

Self-interest at its simplest, uncomplicated by any questions of law, justice or democracy.

Like

Reply



shekissesfrogs

CasperMarlowe

Maybe they're afraid of triggering a saturday night massacre in the Administration, or perhaps another round of Amerithrax sent to congress members from the Military Pharmaceutical Intelligence Industrial complex.

Like

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