

Senate and House Intelligence Committee: NSA Spying and the Fourth Amendment

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Intel Committee Heads Walk Away Rather than Square NSA Programs with Fourth Amendment

Sunday morning I questioned Sen. Dianne Feinstein and Rep. Mike Rogers — the chairs of the Senate and House intelligence committees — as they walked out of ABC studios:

“Many Americans are concerned about the revelations of this week and how they square with the Fourth Amendment of the Constitution. Let’s start there. What does the Fourth Amendment of the Constitution say?”

Feinstein said it was “protection against search and seizure,” which is true but very limited. I tried to interject, “the measure is probable cause” — but she went on at some length about the alleged legality of the programs that became public this week, while avoiding the question of their Constitutionality. [transcript below]

The Fourth Amendment states:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

That would seem to totally contradict the programs exposed this week. It’s as though the government photocopies all of your papers.

The attitude of defending unconstitutional programs that in effect have been made legal gives new meaning to the old Kissinger quote:

“Illegal we do immediately; unconstitutional takes a little longer.” See: Bush-Era Spying ‘Made Legal’ Under Obama.

In the course of my trying to get them to address the Fourth Amendment, I attempted to read it, which didn’t seem as though it was to their liking and they walked away.

But first, Rep. Rogers claimed that the programs reported on this week are “not targeted on

Americans. It has to be a non-U.S. person that is believed to be on foreign soil. That is a huge difference from what is being portrayed in the media.”

I noted that this was clearly false, certainly for the phone metadata story. This seemed to upset him.

I then read most of the Fourth Amendment, Rogers appeared extremely uncomfortable, said he didn’t want a “debate” — I said it wasn’t a debate, I wanted them to square the programs with the Fourth Amendment. Feinstein said they would do this “another time.”
Update:

Marcy Wheeler who has written extensively about this notes: “Just about every time Dianne Feinstein and Mike Rogers talk about these programs, they confuse the dragnet of American’s contacts with PRISM, which isn’t supposed to involve Americans. That says something about how closely they understand them.”

Shahid Buttar of the Bill of Rights Defense Committee states:

“There’s a reason that Senator Feinsten and Rep. Rogers keep dodging questions about secret government spying: it simply can’t be squared with the Fourth Amendment. Neither has acknowledged the full extent of the government’s surveillance operations, which extend well beyond last week’s disclosures. And while those programs have gained legal cover, it’s only because the congressional committees they lead have utterly failed their responsibility to check & balance executive abuses.”

Note: Then-head of NSA Michael Hayden claimed the Fourth Amendment didn’t contain the phrase “probable cause” when questioned by Jonathan Landay in 2006. Video; Report by FAIR.

Transcript:

Sam Husseini: Good morning.

Sen. Dianne Feinstein: Good morning.

SH: Senator, many Americans are concerned about the revelations this week and how they square with the Fourth Amendment of the Constitution. Let’s start there. What does the Fourth Amendment of the Constitution say?

Sen. Dianne Feinstein: Well, it’s protection against search and seizure. The program here -

SH: — and the measure is probable cause -

DF: The program here is legal. It has been passed by the Department of Justice as a legal program. It is carefully audited. You have inspectors generals independently looking at it. It is reviewed by the court every three months. And the court — when they pass out one document which was the document that was revealed — which said it could continue for another three months, the court also passes another statement which puts strictures on the program for the remaining three months.

SH: — The Fourth -

Rep. Mike Rogers: Can I interject there: the important part of that as well-as all of this is right — is that is not targeted on Americans. It has to be a non-U.S. person believed to be on foreign soil. That is a huge difference from what is being portrayed in the media.

SH: That is not the case with the program pertaining to phone data. The Fourth Amendment stipulates that people's papers shall not be violated but upon probable cause.

MR: I'm not sure who you are with. I am not sure, we're getting into a debate here.

SH: I am quoting the Fourth Amendment here.

MR: — I understand. But case law also -

SH: — supported by oath or affirmation -

DF: I think there's no sense -

MR: If you want a debate we can do that later.

SH: I don't want a debate -

DF: We'll do that another time.

SH: I'm just quoting the Fourth Amendment. I want you to square this program with the Fourth Amendment.

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