Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
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On the Pending NSA Legislation
At the Senate Judiciary Committee Markup

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Mr. Chairman, I know the time remaining in this Congress is limited, but we should not be moving forward on these NSA bills.

My position on this is no mystery. I oppose your legislation, S. 2453. This bill makes the FISA system entirely optional, and I cannot support any proposal that gives the executive branch the power to wiretap our citizens' phones and search their homes without any judicial involvement.

I want to remind the Committee that when we reauthorized the Patriot Act earlier this year, we had a great deal of debate about controversial issues like the standards for obtaining library records, issuing National Security Letters, and conducting sneak and peek searches. This bill sends the message that those debates, and the resulting legislation, were essentially pointless because we are going to let the executive branch decide for itself, with no judicial oversight whatsoever, how it will exercise some of the most intrusive government powers.

I strongly believe that the legislative response to a President who has decided to ignore current law should not be to blindly grant the executive branch expansive new powers, especially when we have no way of even knowing whether the President will comply. And that is exactly what both the Specter bill, and in a different way the DeWine bill, would do.

The fact that the President has agreed to submit the program to the FISA court if we pass this bill without amendment, does not provide much comfort. Senator Leahy made the point before the recess - the President has basically said: I'll agree to let a court decide if I'm breaking the law if you pass a law first that says I'm not breaking the law. That won't help reestablish a healthy respect for separation of powers. It will only make matters worse.

Furthermore, of course, during the August recess, a federal judge ruled that the NSA spying program violates the law. That decision will be appealed. It is almost certainly headed to the Supreme Court. So it seems this legislation is not needed to get a judicial ruling on the program. Indeed, passing this bill could interfere with the ongoing legal process.

As for the legislative process, this Committee is still legislating in the dark. The hearing we had on July 24 on FISA was very helpful, Mr. Chairman, and I appreciate that you called the hearing

and that you brought in both the current and former directors of the NSA. That was important. But I think in many ways the hearing raised far more questions than it answered about your legislation.

Mr. Chairman, it took Congress years to pass FISA, and much of that work was done at the Committee level. There were any number of closed committee sessions, as well as open hearings. I think we owe it to the American people to take equal care before we essentially gut FISA, which is what this legislation would do.

Mr. Chairman, you said at the end of the July hearing that you would be willing to hold additional hearings on this, and I appreciate that. I know that hearing was not the first one you have held on the NSA program. But the prior hearings were several months ago now, and were held long before we saw the new version of your bill containing the new, and very complex, Section 9 changes to the existing FISA structure. So I agree we need more hearings, and we need them before we mark up this bill, not after.

That is also the view of a bipartisan group of six Senators, including three Republicans, Sen. Craig, Sen. Sununu, and Sen. Murkowski, that delivered a letter to you yesterday asking for further hearings. This is not a partisan delaying tactic. It is a sincere request, a recognition that this bill is extremely important, and should not be rushed through the Committee to fit a politically designed schedule. The Judiciary Committee is the place where careful and detailed work on these issues can be done. Once we report these bills, our ability to fine tune them is significantly reduced.

In addition, prior to the recess, I sent a series of detailed questions to the witnesses from the FISA hearing in July. My questions go to the details of the bill, particularly the new Section 9 -- how it works, what it is intended to do, what effect it will have. I think, at the least, we are entitled to answers to our questions about this bill before we mark it up. I have not received answers to my questions yet, nor any indication when they might be provided.

With regard to the new provisions in Section 9 of the bill, we need to understand the full ramifications of the many, very complex changes made by the bill. The testimony at the hearing made clear that very technical changes in language can have a very significant impact on the breadth of the government's authority, and we need to consider those changes very carefully.

Just to give a couple of examples, I want to read some of the questions that I submitted as questions for the record of the hearing - questions I think we must have an answer to, before we proceed with this legislation. First -
The Specter bill, in section 9(b)(2), modifies section 1801(f) of FISA, defining "electronic surveillance." The opening language of the definition in 1801(f)(1) - "the acquisition by an electronic, mechanical or other surveillance device" - is replaced with "the installation or use of an electronic, mechanical or other surveillance device." Please explain the effect you think this would have on the FISA process, and any reason you see for the change in definitional language.

And here is another -
The Specter bill, in section 9(c), makes a number of changes to section 1802 of FISA. The current section 1802 requires the Attorney General to certify that "the electronic surveillance is

solely directed at" the acquisition of certain covered communications. The Specter bill strikes the "solely directed at" phrase. Given this modification, what showing about the surveillance do you believe the Attorney General would have to make to meet the requirements of this provision? Please explain whether you support this change, and if so, why.

And there are many, many more. Some can be answered publicly. Some in a classified setting. But if we don't know the answer to these questions, I can't see how we can vote on this bill today.

So I think we need to get the answers from the hearing witnesses, and I think some additional hearings are necessary, and I think cleared Judiciary staff should sit down with the NSA to discuss Section 9, line by line, in a closed setting, as well. What I heard from the NSA at the July hearing was that there may be some discrete issues that we could address, like the question of foreign to foreign communications that pass through the United States. But the proposal on the table goes much, much further than addressing that identified problem.

Of course, we need more than just information about what the NSA thinks Section 9 of the bill does. I think the members of this Committee should be provided at least some basic information about the NSA warrantless wiretapping program before we move forward with legislation.

At this point, at least as far as I am aware, only four members of this Committee know anything about the NSA program that the legislation is trying to address, other than what has been reported in the newspapers. I really do not understand how we can do our work under those circumstances.

As a member of the Intelligence Committee, I am one of those four members who is being briefed on the NSA program. The decision to begin to comply with the clear requirements of the National Security Act and brief the entire Intelligence Committee was long overdue. But even I don't have the answers to all my questions yet, and I haven't received all the information that I need to evaluate fully the program and this legislation.

Based on what I do know about this program, I remain convinced that it is illegal, and that the surveillance can be accommodated within FISA. Other than those basic conclusions, I am prohibited from sharing anything that I know with the other members of this Committee. So I sent a letter in July asking the Attorney General and the Director of National Intelligence to brief the Judiciary Committee. And when he was before this Committee shortly thereafter, I asked the Attorney General again if he would commit to a briefing for this Committee. And he refused.

I don't understand this. It is indefensible that with regard to this one NSA program, a program that the Administration has acknowledged exists, the vast majority of this Committee remains in the dark and we're being asked to amend the law supposedly to accommodate the program.

I firmly believe that the Committee cannot do its job without more information, including a candid exchange with Administration officials about the basis for bypassing FISA.

Now, I don't think the members of the Judiciary Committee need to have the detailed knowledge of operational issues that the Intelligence Committee should and must delve into. But this

Committee does need a deeper understanding than it has about what the Administration is doing, and why it did not follow the law.

We need to see the historical legal memoranda and other documents to understand what happened. We need to hear from former Administration officials who, according to news reports, raised objections about this program.

And with regard to Section 9 of the bill, we need much more information from the NSA about what it intends by those changes, even if some of that information can only be shared in a closed setting. And we need to consider any FISA court decisions - again, classified if necessary - that contain legal interpretations of any of the statutory provisions that the bill amends, so that we can understand the full ramifications of the statutory changes.

So, for all these reasons, I do not think we should be considering this legislation. But since we are, I want to take some time to address the substance of these bills.

I will start with the new version of S. 2453 that the Committee adopted as a complete substitute in July. Mr. Chairman, I appreciate that you have been working hard to address this difficult issue. But the complete substitute to S. 2453 that we are working from today is a dramatic change from existing law and a dramatic expansion of presidential power.

You have said repeatedly that your goal has been to get the FISA court to assess the constitutionality of the President's program. That is a commendable goal. But your bill doesn't require this or any other President to submit this or any other program to the court. Nor does it merely allow the program to be submitted to the FISA court. It goes much further, and actually embraces the concept of a "program warrant." It authorizes the FISA court to issue court orders approving an entire surveillance program, but without individual approval of each surveillance target. It is not limited to investigations of al Qaeda, and isn't even limited to terrorism investigations. And it would allow for warrantless surveillance of purely domestic calls. That would be a dramatic change in the law that goes far beyond what even the President has said he has authorized.

But the bill goes much, much further than that. Not only does it not guarantee that the FISA court will review the legality of the program, it basically makes the entire FISA statute entirely optional. It would overturn the entire premise of FISA, and all of the settled expectations of the past 30 years, and explicitly allow the President to decide unilaterally whether to obey FISA, or for that matter, the new program-wide warrant authority that is in the bill.

This would be a radical change in the law, and one that would essentially hand the Administration a blank check. Let's be clear about what it would do. It would leave it entirely to the discretion of the executive branch to decide whose communications to monitor. If the executive branch didn't want to get a court's approval, or even tell a court what it was doing, this bill authorizes it to cut the courts out entirely. And forget Congress - this body would be rendered even more irrelevant than we already are in the eyes of this Administration.

Mr. Chairman, if this version of your bill were to pass, we would quite literally be right back where we were before the Church Committee and the enactment of FISA. This new version of

the bill would even reinstate a provision of law that was repealed by FISA in 1978. That provision said, prior to the enactment of FISA, that nothing contained in statute "shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities."

FISA repealed that provision because, as the Senate Judiciary Committee report said at the time, Congress intended "to put to rest the notion that Congress recognizes an inherent Presidential power to conduct such surveillances in the United States outside of the procedures contained" in FISA and the criminal wiretap statute.

This new version of the bill would take us right back to where we were in the 1970s, when for years neither Congress nor the courts nor the American people had any idea what intelligence wiretaps the President was authorizing, only to discover through the work of the Church Committee that abuses of executive power had become commonplace.

Let me read the provision in the latest version of the Specter bill that would do this. It says: "Nothing in this Act shall be construed to limit the constitutional authority of the President to collect intelligence with respect to foreign powers and agents of foreign powers."

That is a shocking grant of power to the President. FISA may not have been perfect, but it did seek in part to protect Americans and control the President's domestic surveillance authority through the use of a secret court and congressional oversight, and to establish clear rules for conducting intelligence investigations inside the United States. I strongly oppose any move to reinstate language that would essentially gut these protections.

Another part of this proposal with a similar effect would repeal the "exclusive means" provision that was enacted as part of FISA back in 1978. That provision was designed to make clear that Congress intended that the President conduct electronic surveillance inside the United States only in accordance with the requirements of the criminal wiretap law and FISA.

The new proposal also would change the provisions in the Wiretap Act and in FISA that make it a crime to conduct a wiretap without following those statutes, and instead immunize anyone acting "under the Constitution."

At a minimum, this Committee should be clear that this proposal would up-end FISA and 30 years of settled law, and raise grave constitutional questions. It took years of hearings and negotiations to enact FISA. We should not undo all that work without serious consideration.

I also have serious concerns about Section 9 of the bill, which appears to vastly expand the government's authority to conduct warrantless wiretaps, and possibly even warrantless searches of Americans' homes, under the existing FISA law. As I have already indicated, we still need a great deal more information about what these provisions are intended to do. But some of them certainly appear very troubling.

Just to take one example, the bill includes a new blanket exception to the FISA warrant requirement for any individual who is inside the United States but is not a U.S. citizen or legal permanent resident. Under the bill, such individuals could be wiretapped at any time, without judicial review, upon a declaration by the Attorney General or his designee once a year that they may have information about a foreign territory that relates to the conduct of U.S. foreign affairs. And in that same provision, the bill repeals a requirement that there be "no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party."

I do not know what is intended by these changes, but they appear to be extremely broad and I've heard no justification for such a sweeping change to the law. They also raises serious Fourth Amendment questions. Are we really prepared to say to every foreign student, every tourist, every foreigner here, that they can be wiretapped without any suspicion that they are doing anything wrong and without any court review at all?

And there are many other provisions in Section 9 that concern me and, as I said earlier, that we need more information about in order to properly analyze.

Mr. Chairman, please don't misunderstand me. You are one of the few who have been willing to stand up and say, absolutely correctly in my view, that Congress has been "inert" on this issue. But the dramatic expansion of presidential power that is in your bill is the wrong response to the problem.

I also want to express briefly my concerns about the DeWine bill, S. 2455, which would explicitly permit the Attorney General to authorize warrantless surveillance under certain circumstances in intelligence investigations, and create a new subcommittee of the Intelligence Committee to oversee the program.

I fundamentally disagree with the core concept of this bill, which is to remove oversight of domestic intelligence wiretaps from the FISA court and put it solely in the hands of a congressional subcommittee. The courts - and the FISA court in particular - serve as a critical check on the power of the executive branch. Congressional oversight, even if it is robust, is not a substitute for judicial review. Congress cannot do the kind of case-by-case, individualized evaluation that a court can.

I also fear that the bill creates some odd incentives. It requires that a surveillance target be submitted to the FISA court for approval only once the criteria for a FISA warrant are met, but permits warrantless surveillance beyond that time if the lower standard in the bill is satisfied. This means, effectively, that the weaker the government's case, the less judicial oversight there is.

I also am concerned that the provision in the DeWine bill that establishes a subcommittee within the Intelligence Committee to review this type of programmatic, warrantless surveillance might be interpreted to mean that the Administration need not inform the full committee. In and of itself, expanded congressional oversight is a good thing. It may be useful to create subcommittees within the congressional intelligence committees to conduct more detailed oversight of particular programs. But all members would have to have access to information

about the program, as current law requires. The National Security Act requires that the full congressional intelligence committees be fully informed of all intelligence activities, other than covert actions. After months of pressure, the Administration finally came around to that view with respect to the NSA program, and I would not want the subcommittee provision in the DeWine bill to be viewed as an excuse to carve out an exception to this twenty-five-year old law.

Mr. Chairman, you have been very patient. I know you are sincere in your desire to address these issues fairly. But even though we have been discussing them for most of this year, this committee still is not in a position to legislate responsibly. And the consequences for the rights and freedoms of the American people of legislating in haste, without full information, without a full understanding of what we are doing, are very serious. And that is the message of the bipartisan letter you received yesterday.

So I hope we can continue to work on this issue, but I will oppose reporting your bill and Senator DeWine's bill today. And I have a number of amendments that I will want to offer at the appropriate time. Thank you.