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Fact Sheet from U.S. Senator Russ Feingold: Senator Specter's NSA Wiretapping Bill Still a Failure

A new version of the Senator Specter's S.2453, the National Security Surveillance Act, was introduced in the Senate on Friday, September 22. But the changes to the bill do nothing to address its core problems, and in some ways make it worse. Here are some of the ways that the new version of Senator Specter's bill still fails

- **Courts and Congress Become Irrelevant:** Even with the most recent changes, the bill still strongly bolsters the Administration's argument that the executive branch doesn't have to follow the laws that Congress writes, and can wiretap Americans without judicial involvement. First, the bill repeals the existing law that says that FISA and the criminal wiretap statute are the exclusive means for conducting electronic surveillance. Second, the bill amends the criminal provisions that currently make it a crime to conduct a warrantless wiretap, so that anyone conducting a warrantless wiretap under the asserted authority of the President would be immune from criminal liability. In combination, these changes amount to congressional approval of the executive branch conducting wiretaps without complying with FISA.
- **Allows Wiretapping of Americans Without Demonstrating a Connection to Terrorism:** The bill still authorizes the government to obtain constitutionally suspect and broadly defined "program" warrants which would permit Americans to be wiretapped without the government proving to a judge that they have any connection to terrorism or espionage. In addition, it now states that if the Attorney General determines that the executive branch can satisfy the requirements for a FISA warrant, then the government must go to the FISA court. That means that if the government cannot prove probable cause that an American is a terrorist or a spy, it does not need a warrant to read their email and listen to their phone calls. But if it can meet the probable cause standard, then it would have to get a warrant. In other words, the weaker the evidence that the government is relying on, the less likely it is that the government has to get a warrant to conduct surveillance. This would put the privacy of Americans' phone conversations and emails at great risk.
- **Enormous Loopholes to the Warrant Requirement:** The bill still makes the surveillance statutes optional, meaning the Administration is no longer required to obey the laws that Congress writes in this area. If that goes even further and dramatically expands the statutory authority of the government to read emails and listen in on the phone conversations of innocent Americans without a warrant. The most recent changes do not solve this problem.
- **Repeals Patriot Act "Fix":** As part of the Patriot Act reauthorization process, many Senators advocated for a change to FISA to ensure that the government could not conduct "John Doe" roving wiretaps, where neither the individual to be wiretapped nor the particular phone or computer is identified in the wiretap order. That change was made in the reauthorization package that became law earlier this year. The new version of the NSA bill would repeal that change and reopen the possibility of statutorily authorized John Doe roving taps.

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