



NEW YORK
CITY BAR

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February 28, 2007

The Honorable Patrick Leahy
Chairman
Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Arlen Specter
Ranking Minority Member
Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Senator Kyl's Proposed Amendment to S. 236

Dear Senators Leahy and Specter:

I write on behalf of the Association of the Bar of the City of New York ("the Association") to urge you to oppose the amendment to S. 236 proposed by Senator Jon Kyl, which is scheduled to be considered by the Judiciary Committee on Thursday, March 1.

Senator Kyl's proposed amendment would broaden Section 798(a) of Title 18 of the United States Code -- a narrow provision which criminalizes the disclosure of classified communications intelligence collection *methods* -- to impose criminal penalties on any public disclosure of *classified information* "concerning efforts by the United States to identify, investigate, or prevent terrorist activity." This amendment would represent a sweeping expansion of a narrow espionage statute into areas of urgent public concern, and would raise serious constitutional issues. We urge you to reject the proposed amendment because it serves no legitimate purpose and in our view would be unconstitutionally overbroad.

Section 798(a), as currently in effect, makes it a felony to disclose or publish classified information concerning "any code, cipher or cryptographic system of the United States," 18 U.S.C. § 798(a)(1), concerning the "design" or "use" of "any device, apparatus, or appliance" used "for cryptographic or communications intelligence purposes," § 798(a)(2), concerning "communications intelligence activities," § 798(a)(3), or concerning information "obtained by processes of communications intelligence from the communications of any foreign government," § 798(a)(4). Section 798 is thus narrowly targeted to impose

criminal penalties on the unauthorized disclosure of the government's most sensitive intelligence gathering activities.¹

The proposed amendment would represent a sweeping expansion of this narrow espionage statute. Unlike the highly sensitive communications intelligence methods already covered by Section 798, there is nothing in the proposed amendment that would limit its sweep to sensitive intelligence information. On the contrary, the proposed amendment applies broadly to all classified information, of any level of secrecy, and would criminalize the disclosure of a great deal of information that could be classified simply at the discretion of government officials. Such discretion has repeatedly been used in our Nation's history to classify information crucial to the free discussion of governmental affairs that is at the core of the First Amendment, including at times to keep secret potential wrongdoing or illegal conduct on the part of the government.

Indeed, the government frequently discloses classified information that would be covered by the proposed amendment when it serves its purposes, whether in the course of criminal proceedings, in press conferences called by government officials, or on a background basis in media interviews. It is clear that the proposed amendment is targeted, not at such uses of classified information by the government, but at the individuals who disclose classified information that the government is attempting to suppress, and the media that publish that information. The proposed amendment thus seeks to stifle, with the threat of criminal prosecution, informed public debate about the most serious matters concerning the legality and effectiveness of government counterterrorism efforts.

Thus, the proposed amendment would sweep far too broadly into public discussion of some of the most important functions of our government, in violation of fundamental First Amendment concerns. Accordingly, the Association urges the Committee to vote to reject the proposed amendment to Section 798(a).

Sincerely,



Barry Kamins

¹ Section 798 is one of a series of provisions that impose criminal penalties for espionage activities directed against the most sensitive and militarily significant classified information. See, e.g., 18 U.S.C. § 794 (relating to “gathering or delivering defense information to aid [a] foreign government”); 18 U.S.C. § 795 (relating to “photographing and sketching defense installations”); 18 U.S.C. § 796 (“use of aircraft for photographing defense installations”); 18 U.S.C. § 797 (“publication and sale of photographs of defense installations”).

cc: The Honorable Edward M. Kennedy
The Honorable Joseph R. Biden, Jr.
The Honorable Herb Kohl
The Honorable Dianne Feinstein
The Honorable Russell D. Feingold
The Honorable Charles E. Schumer
The Honorable Hillary R. Clinton
The Honorable Richard J. Durbin
The Honorable Benjamin L. Cardin
The Honorable Sheldon Whitehouse
The Honorable Orrin G. Hatch
The Honorable Charles E. Grassley
The Honorable Jon Kyl
The Honorable Jeff Sessions
The Honorable Lindsey Graham
The Honorable John Cornyn
The Honorable Sam Brownback
The Honorable Tom Coburn