

February 27, 2007

The Honorable Patrick Leahy, Chairman
The Honorable Arlen Specter, Ranking Member
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

Dear Senator Leahy and Senator Specter:

We, the undersigned organizations, are writing to oppose a proposed amendment to S. 236 offered by Sen. Kyl. The Judiciary Committee has held no hearings or debate on the practical or constitutional implications of this amendment that would unconstitutionally and unnecessarily expand existing espionage statutes.

The amendment offered by Senator Kyl to S. 236 would amend Section 798(a) of Title 18 of the U.S. Code (18 U.S.C. § 798(a)), which criminalizes disclosure of communications intelligence collection and processing methods. The amendment would broaden that section to criminalize the disclosure to the public of any classified information “concerning efforts by the United States to identify, investigate, or prevent terrorist activity.” The proposed amendment is unnecessary and in our opinion would be unconstitutionally overbroad.

Unlike the highly sensitive communications intelligence methods already covered by section 798, the proposal would criminalize the disclosure of information that could be classified simply at the discretion of government bureaucrats, including the possibility of wrongdoing or illegality on the part of the government. Such discretion has repeatedly been used to classify information crucial to the free discussion of governmental affairs that is at the core of the First Amendment. Indeed, much of the information that would be covered by this amendment is disclosed by the government itself in the course of criminal proceedings or press conferences called by the Attorney General. The proposal thus seeks to stifle, with the threat of criminal prosecution, informed public debate about the most serious matters of the effectiveness of government counterterrorism efforts.

Section 798(a) already covers dissemination of specifically identified intelligence sources and methods; it is a targeted provision that seeks to deter the disclosure of communications intelligence methods, which are seen as more serious than disclosures of other classified information. There is no justification for broadening the reach of that section. Indeed, the purpose and effect of this proposed amendment appears to be to chill the press and other members of the public who receive and share information “concerning efforts by the United States to identify, investigate, or prevent terrorist activity.” The Justice Department itself has concluded that no new legal authorities are necessary to protect against disclosures of such information. (“I conclude that current statutes provide a legal basis to prosecute those who engage in unauthorized disclosures,

if they can be identified." ("Report to Congress on Unauthorized Disclosures," Attorney General John D. Ashcroft, U.S. Department of Justice, October 15, 2002."). Thus the amendment is unnecessary to protect classified information.

We strongly urge you to reject the proposed amendment.

Please contact Steven Aftergood (202-454-4691), Meredith Fuchs (202-994-7059) or Kate Martin (202-721-5650), if you have any questions.

Sincerely,

American Association of University
Professors
American Booksellers Foundation for Free
Expression
American Civil Liberties Union
American Library Association
Association for Community Networking
Illinois Community Technology Coalition
Association of American Publishers
Association of Research Libraries
Californians Aware
Center for National Security Studies
Chicago Digital Access Alliance
Coalition for Civil Rights & Democratic
Liberties
Emerging Futures Network
EnviroJustice
Feminists for Free Expression
Government Accountability Project
Liberty Coalition
Media Law Resource Center
National Coalition Against Censorship
National Freedom of Information Coalition
National Security Archive
NPOTechs
OMB Watch

OpenTheGovernment.org
PEN American Center
People for the American Way
Project on Government Oversight
Federation of American Scientists, Project
on Government Secrecy,
Public Employees for Environmental
Responsibility (PEER)
ReclaimDemocracy.org
Society of American Archivists
Society of Professional Journalists
The National Press Club
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Charles E. Grassley, Dianne Feinstein, Jon Kyl, Russell D. Feingold, Jeff Sessions,
Charles E. Schumer, Lindsey Graham, Richard J. Durbin, John Cornyn, Benjamin L.
Cardin, Sam Brownback, Sheldon Whitehouse, Tom Coburn.