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Statement on Proposed Kyl Amendment to S. 236

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The amendment that Senator Jon Kyl (R-AZ) intends to propose as an amendment to S. 236, a bill dealing with federal data mining efforts, would in effect create an “Official Secrets Act” that criminalizes the publication of classified information. There have been no public hearings or discussions about this proposal.

Specifically, the amendment would prohibit unauthorized disclosure, publication or use of any information "concerning efforts by the United States to identify, investigate, or prevent terrorist activity." It also doubles from 10 to 20 years in prison the criminal penalty for violating any aspect of Section 798 of the Espionage Act, which is very narrowly drawn to prohibit disclosures of information relating to communications intelligence.

The media understand that leaks of some government information about the war on terror can cause harm. But existing laws are adequate to protect the information that truly needs protecting. The Kyl amendment is so broad that it would make criminal the unauthorized disclosure of virtually any government information relating to terrorism. The amendment would also fundamentally alter the espionage statutes of the United States - a statutory regime that has served us well for over 80 years.

Easing tensions over media coverage of national security matters involves better dialogue between government and the media, not new laws. Some conflict between government and the media is inevitable, and even healthy, in our democracy. At the same time, representatives of the media have supported and continue to support ongoing discussions among media and government representatives to reduce some of the current tensions and better serve the interests in both our nation’s security and an informed public. This dialogue has been formalized into an ongoing series of meetings now hosted by the Aspen Institute and involving high-level leaders in government and the media. This approach shows promise. We urge Congress’ continued support of and involvement in these discussions as a constructive way to address concerns over the potential harm from disclosure of legitimate national security secrets.

Discussion Points

The amendment is vague and overbroad. By defining the information whose disclosure or publication is prohibited to include any information “concerning efforts by the United States to identify, investigate or prevent terrorist activity,” virtually any activity by government plausibly linked to security and other anti-terrorism activities would be covered by the statute. Such information would include emergency response planning, security failures, public safety and

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health threats and government funding of related activities and other matters routinely discussed in the media. The amendment would give government officials a powerful tool to hide actions or facts that could be embarrassing to an agency.

The proposed language is inconsistent with the existing statute it would amend.

This amendment is completely inconsistent with the information that Congress sought to protect by enacting Section 798. The statute is very narrowly limited to protection of communications intelligence information – codes, ciphers and the like. In contrast, the proposed amendment encompasses a breathtakingly broad array of information that could plausibly be linked to anti-terrorism efforts.

Senator Kyl seeks to amend 18 USC 798, which is very narrowly drawn to criminalize the disclosure of communications intelligence information, or “COMINT” e.g., codes, cyphers and intercepted communications of our adversaries. When Congress enacted 798, they recognized the extremely important role that communications intelligence plays in our national security and so incorporated elements of proof that make it easier to prosecute an individual for disclosing COMINT than for disclosing other more routinely classified information - crimes that are prosecuted under 18 other parts of the Espionage Act, specifically USC 793 and 794.

For the most part, sections 793 and 794 require the government to prove that the individual intended to harm the United States. By contrast, section 798 requires the government to prove only that the information was “classified” and that it relates to COMINT. If the Kyl amendment is adopted, the government would have vast power to prosecute an individual merely for “communicating” or “publishing” any information “concerning” terrorism. The potential for abuse is significant and the chilling affect on the public’s - and Congress’ - right to know would be substantial.

This amendment is so broad that it may be unconstitutional. At a minimum, its vagueness imperils the effectiveness of section 798, a statute that seeks to protect some of our most vital secrets. For example, if the amendment is adopted and the government seeks to prosecute an individual for disclosing COMINT relating to terrorism, the courts may well throw out the prosecution on constitutional grounds.

The amendment would greatly increase the likelihood of prosecution under the Espionage Act. Anyone who discloses information related to efforts by the United States to identify, investigate or prevent terrorist activity – whether related to communications or not – could be punished.

This amendment may hamper the flow of information to the Congress and the general public. The amendment precludes the public from obtaining information about government activities of great public interest. The language prevents the American public and likely many members of Congress from being fully informed about and knowledgeably discussing actions taken in the name of the “war on terror.” The amendment would work to constrain critical reporting on homeland security – even information as basic as homeland security grants – as well as national security and foreign policy matters.

The published stories that have attracted the greatest criticism for revealing sensitive information are unquestionably within the public interest and were published after careful consideration of government arguments for protecting specific information. Individuals with knowledge of the government activities in question raised significant questions regarding to their legality. At the very least, the stories have triggered a healthy national debate as to tension between security and liberty.

The amendment hampers public involvement in anti-terrorism efforts. This will make the “war on terror” the exclusive province of a handful of intelligence agencies. It will further discourage information sharing in an area that has already been seriously hurt by a stovepipe culture within and among the agencies. The language runs counter to key 9/11 Commission recommendations that the federal government engage the public more effectively in anti-terrorism efforts.

A proposal of this magnitude should have full and open public debate. In fairness to the American people and the seriousness of the issues involved, a measure of this magnitude and consequence should not be appended to a totally unrelated piece of legislation. The proposal would dramatically alter the relationship between the government and the press. This relationship has been defined in the U.S. constitution and any significant change to it that is proposed should enjoy full and open debate.

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