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CENTER FOR DEMOCRACY
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1634 Eye Street, NW
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March 23, 2010

The Honorable Jay Rockefeller, Chairman
The Honorable Olympia Snowe
Senate Committee on Commerce, Science & Transportation
508 Dirksen Senate Office Bldg.
Washington, D.C. 20510-1625

Re: S. 773, the Cybersecurity Act of 2009

Dear Chairman Rockefeller and Senator Snowe:

We are writing to express the views of the Center for Democracy & Technology¹ on the Committee Amendment to the Cybersecurity Act of 2009. The amendment, which will be offered as a substitute for the underlying bill at a Commerce Committee mark-up scheduled for March 24, 2010, substantially improves and strengthens the legislation. It addresses almost every concern CDT raised about the original version of the legislation² and adopts a number of suggestions that CDT provided to your staff.

We applaud you and your staff for the open, collaborative, year-long process that led to these dramatic improvements in the legislation. You listened to our concerns. You were willing to consider proposals that CDT and other stakeholders suggested, and you made significant changes.

The bill as amended would drop provisions in the original that would have permitted the President to shut down or limit Internet traffic to a critical infrastructure information system in an emergency or in the interest of national security. Instead, Section 201 of the legislation requires the President to work collaboratively with industry to develop and rehearse emergency response and restoration plans that clarify the roles, responsibilities and authorities of government and private sector actors during a cybersecurity emergency that the President declares. The new provision properly indicates that it does not, and should not be interpreted to, expand the President's existing authorities, but does not spell out those authorities.

¹ CDT is a non-profit, non-partisan organization dedicated to keeping the Internet open, innovative and free.

² CDT's analysis of the original legislation can be found at http://www.cdt.org/security/20090511_rocksnowe_analysis.pdf.



The bill as amended would also drop the provision that would have authorized the Department of Commerce to override any statute to gain access to cybersecurity threat and vulnerability information in its new role under the bill as a cybersecurity clearinghouse. Because this provision would have authorized override of privacy statutes designed to protect sensitive communications, we are pleased to see that it will be omitted. Instead, Section 403 of the substitute requires the President to establish or designate a facility to serve as a threat and vulnerability information clearinghouse for critical infrastructure information systems.³ The facility will issue information sharing rules and procedures that, among other things, expand the Federal Government's sharing of cybersecurity threat and vulnerability information with the private sector and ensure confidentiality and privacy protections for individuals and personally identifiable information. We believe these rules cannot override existing privacy statutes.

The legislation as amended envisions a collaborative, potentially productive cybersecurity role for the National Institute of Standards and Technology. Section 204 of the substitute would authorize NIST to recognize and promote industry-developed risk management measures and techniques, as well as best practices, for critical infrastructure information systems. These measures, techniques, and best practices would have to be auditable, and each owner and operator of a critical infrastructure information system would be required to report semi-annually the results of an independent audit of its compliance with these NIST-recognized industry standards. If NIST can be nimble, and moves quickly as the private sector develops new practices to respond to new threats, this provision opens the door to substantial cybersecurity benefits. Section 204 in the substitute replaces a provision that would have required NIST to issue and enforce detailed software security requirements for critical systems – a requirement that would have stifled innovation and held up deployment of needed security fixes.

We were also pleased to see that the bill as amended will establish a procedure for designating information systems as part of the “critical infrastructure.” As introduced, the legislation gave the President unfettered discretion to make this determination, even though such designation would have significant economic consequences to the owners and operators of such systems. Instead, Section 4 of the bill will require the President to develop a rule-making procedure under the Administrative Procedures Act for designating information systems as “critical” and those rules must permit appeals of such designations to the Circuit Court of Appeals for the District of Columbia.

As the bill advances through Congress, we look forward to working with you, and with other Congressional committees, to further clarify, refine and improve a few provisions of the Cybersecurity Act. In particular, we believe that there should be a statutory time limit on the duration of any cybersecurity emergency the President declares, and that the legislation should specify that the President's authority to access communications in a cybersecurity emergency or otherwise is circumscribed by existing surveillance statutes. We will also work to better define the authority of the cybersecurity clearinghouse to require critical infrastructure

³ We understand that this facility is likely to be the U.S. Computer and Emergency Readiness Team at the Department of Homeland Security.

operators and owners to provide it with information. We view these clarifications and refinements as necessary additions to legislation already much improved.

Sincerely,

A handwritten signature in black ink that reads "Leslie Harris". The signature is written in a cursive style.

Leslie Harris, President & CEO

A handwritten signature in black ink that reads "Gregory T. Nojeim". The signature is written in a cursive style.

Gregory T. Nojeim, Director, Project on Freedom, Security & Technology

cc:

Members of Senate Commerce Committee

Chairman Joseph Lieberman and Ranking Member Susan Collins, Committee on Homeland Security & Governmental Affairs

Chairman Patrick Leahy and Ranking Member Jeff Sessions, Committee on the Judiciary