June 23, 2010

The Honorable Joseph Lieberman
The Honorable Susan Collins
The Honorable Tom Carper
Senate Committee on Homeland Security and Government Affairs
340 Dirksen Senate Office Building
Washington, DC 20510

RE: Civil Liberties Issues in Cybersecurity Bill

Dear Senators Lieberman, Collins and Carper:

The Homeland Security and Government Affairs Committee will soon consider the Protecting Cyberspace as a National Asset Act, S. 3480. We are privacy, civil liberties and civil rights groups writing to express our concerns about the legislation. Changes are needed to ensure that cybersecurity measures do not unnecessarily infringe on free speech, privacy, and other civil liberties interests.

Scope. The legislation, among other things, creates a National Center for Cybersecurity and Communications (NCCC) with significant authority over covered critical infrastructure (CCI) owners and operators. This makes the determination of what is, and is not, a CCI system or asset important to the scope of the legislation. However, the bill does not adequately define CCI, giving rise to concern that it includes elements of the Internet that Americans rely on every day to engage in free speech and to access information. Some have regarded the national communications system itself as a "critical infrastructure" in other contexts. We ask that you clarify the scope of the legislation by restrictively defining CCI so that cybersecurity responsibilities the bill imposes fall only on truly critical network components.

Preserving Free Speech in Cybersecurity Emergencies. The bill authorizes the NCCC, in an emergency declared by the President, to take unspecified emergency actions to preserve the reliable operation of particular covered critical infrastructure. The government can compel companies that own or operate critical infrastructure systems to take those undefined actions for 30-day periods that may be renewed indefinitely. While the bill makes it clear that it does not authorize electronic surveillance beyond that authorized in current law, we are concerned that the emergency actions that could be compelled could include shutting down or limiting Internet communications that might be carried over covered critical infrastructure systems. This section should be amended to articulate the specific emergency actions the NCCC can compel, and any applicable limits on those actions. It should also be amended to ensure that emergency measures undertaken do not unnecessarily disrupt Internet communications. The Internet is vital to free speech and free inquiry, and Americans rely on it every day to access and to convey information. Any cybersecurity action the government requires that would infringe

on these rights of free speech and free inquiry must meet a traditional First Amendment strict scrutiny test: (i) the action must further a compelling governmental interest; (ii) it must be narrowly tailored to advance that interest; and (iii) it must be the least restrictive means of achieving that interest. Finally, the bill should also be amended to require an independent assessment of the effect on free speech, privacy and other civil liberties of the measures undertaken to respond to each emergency the President declares. It is imperative that cybersecurity legislation not erode our rights.

Information Sharing and Privacy. The bill requires CCI owners and operators to share cybersecurity "incident" information with DHS, which will share some of that information with law enforcement and intelligence personnel. It includes an important limitation: the incident reporting mandate does not authorize any federal entity to compel disclosure relating to an incident or conduct surveillance unless otherwise authorized under the surveillance statutes or other laws. However, the bill does not indicate what might be included in an "incident report" and we are concerned that personally-identifiable information will be included. To minimize the privacy impact of sharing personally identifiable information, we ask that you ensure that information sharing activities be conducted only in accordance with principles of Fair Information Practices as articulated by the DHS Privacy Office.

Transparency. Cybersecurity measures that have an impact on the public should be transparent to the public to the maximum extent possible. Unlike other proposals, your legislation does not appear give the National Security Agency and the Department of Defense an outsized role in securing civilian government and privately-owned networks. Such a role would no doubt mean less transparency about cybersecurity activities, and more concern about whether they comply with the law. While the bill includes several provisions requiring reports to Congress, including reports about cybersecurity emergencies and about monitoring Internet traffic to and from government agencies for cybersecurity purposes, it should clarify that these reports must be made available to the public. We would like to explore with you other reporting requirements that would help the public better assess the impact of cybersecurity measures on civil liberties.

Thank you for considering our views. If you would like to discuss them further, or would like to respond to this letter, please contact Michelle Richardson at the American Civil Liberties Union, 202/715-0825.

Sincerely,
American Civil Liberties Union
American Library Association
American Association of Law Libraries
Association of Research Libraries
Bill of Rights Defense Committee
Center for Democracy & Technology
Citizens Committee for the Right to Keep and Bear Arms

Competitive Enterprise Institute
Constitution Project
Cyber Privacy Project
Defending Dissent Foundation
DownsizeDC.org
Electronic Frontier Foundation
Government Accountability Project
Liberty Coalition
Liberty Guard
Muslim Public Affairs Council
Muslimah Writers Alliance
National Lawyers Guild – National Office
OpenTheGovernment.org
OMB Watch
Political Research Associates
Rutherford Institute
U.S. Bill of Rights Foundation

cc:
Howard Schmidt, Cybersecurity Coordinator, The White House
Philip Reitinger, Deputy Under Secretary, National Protection and Programs Directorate, Department of Homeland Security
Members of Senate Homeland Security and Government Affairs Committee
Rep. Jane Harman
Rep. Peter T. King