

January 27, 2015

The Honorable Al Franken
U.S. Senator
309 Hart Senate Office Building
Washington, DC 20510

Dear Senator Franken,

Effective cybersecurity laws are critical to maintaining both the national security and economic advancement of the United States. But this security should not come at the expense of civil liberties and innovation. The Computer Fraud and Abuse Act (CFAA) does just that—it unnecessarily sacrifices civil liberties and innovation in the name of cybersecurity. Unfortunately, the White House's recent proposal to modify the CFAA does not solve these issues—in fact, the proposal worsens the law in several areas. A growing number of civil liberties groups, members of the public, and elected officials, all spanning the ideological divide, are calling for CFAA reform.

The upcoming hearing of Ms. Loretta Lynch, on her nomination for U.S. Attorney General, will provide a unique opportunity to shine a spotlight on this ongoing tension between attempts to expand the CFAA's provisions and the need for meaningful reform. We, the undersigned civil rights, human rights, and other public interest groups, therefore ask that you question Ms. Lynch on how, under her leadership of the Department of Justice (DOJ), federal law enforcement will interpret the CFAA, treat cases like that of Aaron Swartz, and respond to legislative proposals seeking to amend the CFAA.

Enacted in 1986, the CFAA is written so broadly that prosecutors can use it to criminalize violations of Terms of Service, privacy enhancing ad blockers, automation, and many other common uses of technology. For example, the terms of service agreement of *The New York Times* website requires readers be over the age of 13. Should it be a federal crime for a young student to use the *New York Times* website in violation of these terms? This lack of clarity has practical implications for everyday citizens. Further, due to its far-reaching provisions, the CFAA has been used to target technologies that can help improve security and functionality, such as security reporting, web crawlers, and other automated tools.

Although Congress may not have intended the CFAA to be applied to insignificant or innocuous behavior, the unfortunate reality is that DOJ's interpretation of the statute gives it the authority to do so. But the overly broad reach and vagueness of the CFAA's provisions are by no means its only problems. The statute's draconian sentencing regime is deeply troubling, and the redundant offense provisions can lead to stacking of charges that inflate potential sentences. As a result, the CFAA can be used as a club by prosecutors to elicit plea agreements and deter individuals from exercising their trial right.

A prominent example is the case of Aaron Swartz, a well-known technologist, entrepreneur, writer, and activist. Aaron committed suicide during an aggressive prosecution for allegedly downloading too many articles from JSTOR, a digital library of academic journals to which he had access through the MIT open network. According to DOJ's own press release, Aaron was facing 35 years in federal prison when he took his life. Because of the CFAA's unnecessarily harsh penalties, and prosecutors' pursuit of inflated sentences, the punishment Aaron faced was wildly out of proportion to his actions.

Shortly after Aaron's death, you pushed then-Attorney General Eric Holder for an explanation of the

prosecutor's behavior. You followed up on your questions with a letter in March 2013, calling the prosecution "remarkably aggressive." In the two years since Aaron's death, you have supported attempts to rein in the CFAA and sought reform through the Grassley-Franken Amendment to the Personal Data Privacy and Security Act. You are not alone in this effort. For example, one year after Aaron's death, Representatives Zoe Lofgren and Jim Sensenbrenner and Senator Ron Wyden introduced Aaron's Law, which sought to significantly reform the CFAA. While Aaron's Law has not yet been enacted, there is a growing chorus of civil liberties groups, members of the public, and elected officials who believe the CFAA's status quo simply is not acceptable.

Proposals to change the CFAA may soon be before the 114th Congress. Already, the Administration has proposed numerous changes to the CFAA, under the guise of reform and cybersecurity needs. This proposal attempts to clarify some of the Terms of Service problems mentioned above, but would still allow for prosecutions of Terms of Service violations in some circumstances (such as for any computer owned by the government, including state universities, public libraries, or municipal Wi-Fi networks). The White House Proposal would increase the CFAA's already harsh sentences, while making the CFAA a RICO predicate, expanding the forfeiture provisions, and broadening the law's offenses in a manner that could chill helpful cybersecurity research and academic publishing. The White House proposal is a far cry from the reform that is so desperately needed in this area.

If confirmed as our next Attorney General, Ms. Lynch will play a crucial role in determining how our nation adapts our cyber laws and protects our civil rights. She will lead the Department in negotiations concerning any proposals to reform, expand, or change the CFAA. Her confirmation hearing offers a unique opportunity to jump start that debate and to push for meaningful CFAA reform. Given your admirable record on these issues, we ask you to take the lead once again by pressing these important issues at this critical moment.

Sincerely,

Access
Bob Swartz
Center for Democracy and Technology
Credo Action
Demand Progress
Electronic Frontier Foundation
Fight for the Future
National Association of Criminal Defense Lawyers
New America's Open Technology Institute
Noah Swartz
Progressive Change Campaign Committee