

AMENDMENT NO. _____ Calendar No. _____

Purpose: To amend title 18, United States Code, to safeguard data stored abroad, and for other purposes.

IN THE SENATE OF THE UNITED STATES—114th Cong., 2d Sess.

S. 356

To improve the provisions relating to the privacy of electronic communications.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENTS intended to be proposed by

Viz:

1 Strike section 3.

2 At the end, add the following:

3 **SEC. ____ . INTERNATIONAL COMMUNICATIONS PRIVACY**

4 **ACT.**

5 (a) **SHORT TITLE.**—This section may be cited as the
6 “International Communications Privacy Act”.

7 (b) **CONGRESSIONAL FINDINGS AND DECLARATION**
8 **OF PURPOSE.**—Congress finds the following:

9 (1) The Electronic Communications Privacy Act
10 of 1986 (Public Law 99–508; 100 Stat. 1848) (re-

1 ferred to in this section as “ECPA”) was intended
2 to protect the privacy of electronic communications
3 stored with providers of electronic communications
4 services and remote computing services, while bal-
5 ancing the legitimate needs of law enforcement to
6 access records stored by such providers.

7 (2) To strike this balance, ECPA authorized
8 governmental entities to obtain certain categories of
9 communications data from providers using estab-
10 lished, pre-existing forms of process warrants and
11 subpoenas. It also created a new form of court
12 order, in section 2703(d) of title 18, United States
13 Code, that governmental entities could use to obtain
14 additional types of communications data.

15 (3) Congress recognizes the legitimate needs of
16 law enforcement agencies in the United States to ob-
17 tain, through lawful process, electronic communica-
18 tions relevant to criminal investigations, as well as
19 the privacy interests of citizens of foreign countries.
20 Therefore, where the Government seeks to obtain
21 the contents of electronic communications of foreign
22 citizens located outside of the United States, this
23 Act authorizes the use of search warrants only if the
24 foreign government does not have a Law Enforce-
25 ment Cooperation Agreement with the United States

1 or, if it does have such a Law Enforcement Coopera-
2 tion Agreement, the foreign government does not ob-
3 ject to disclosure.

4 (c) EXTENSION AND CLARIFICATION OF WARRANT
5 REQUIREMENT.—

6 (1) IN GENERAL.—Chapter 121 of title 18,
7 United States Code, is amended—

8 (A) in section 2703—

9 (i) by striking subsections (a) and (b)

10 and inserting the following:

11 “(a) CONTENTS OF WIRE OR ELECTRONIC COMMU-
12 NICATION IN ELECTRONIC STORAGE.—A governmental
13 entity may require the disclosure by a provider of elec-
14 tronic communication service or remote computing service
15 of the contents of a wire or electronic communication that
16 is in electronic storage with or otherwise stored, held, or
17 maintained by the provider, regardless of where such con-
18 tents may be in electronic storage or otherwise stored,
19 held, or maintained, only pursuant to a warrant issued
20 using the procedures described in the Federal Rules of
21 Criminal Procedure (or, in the case of a State court,
22 issued using State warrant procedures) by a court of com-
23 petent jurisdiction. An application for a warrant under
24 this section shall include a full and complete statement
25 of the facts and circumstances relied upon and the inves-

1 tigative steps taken to ascertain the nationality and loca-
2 tion of the subscriber or customer whose contents are
3 sought by the warrant. Any such warrant may be used
4 to require the disclosure of contents of a wire or electronic
5 communication only if the court finds that—

6 “(1) the governmental entity has taken all rea-
7 sonable steps to establish the nationality and loca-
8 tion of the subscriber or customer whose contents
9 are sought; and

10 “(2) at the time the warrant application is
11 made—

12 “(A) there are reasonable grounds to be-
13 lieve that the subscriber or customer whose con-
14 tents are sought by the warrant is—

15 “(i) a United States person;

16 “(ii) physically located within the
17 United States;

18 “(iii) a national of or located in a for-
19 eign country or countries where any of
20 those countries has an applicable Law En-
21 forcement Cooperation Agreement with the
22 United States (or in the case where the
23 warrant application is made on behalf of a
24 foreign government pursuant to a Law En-
25 forcement Cooperation Agreement with the

1 United States, any of those countries has
2 an applicable Law Enforcement Coopera-
3 tion Agreement with the requesting foreign
4 government) and the Central Authority for
5 each such country with such a Law En-
6 forcement Cooperation Agreement provides
7 written certification that the disclosure
8 may be had or does not object to the dis-
9 closure within 60 days after formal sub-
10 mission of a request for such certification;
11 or

12 “(iv) a national of and located in a
13 foreign country or countries where none of
14 those countries have an applicable Law
15 Enforcement Cooperation Agreement with
16 the United States (or in the case where the
17 warrant application is made on behalf of a
18 foreign government pursuant to a Law En-
19 forcement Cooperation Agreement with the
20 United States, none of those countries
21 have an applicable Law Enforcement Co-
22 operation Agreement with the requesting
23 foreign government); or

24 “(B) there are no reasonable grounds on
25 which to base a belief as to either the nation-

1 ality or the location of the subscriber or cus-
2 tomer whose contents are sought.

3 “(b) WARRANT REQUIREMENTS.—Upon a motion
4 made promptly by the service provider, a court issuing a
5 warrant under this section shall modify or vacate such
6 warrant if—

7 “(1) the court finds that the warrant does not
8 meet the requirements of this section or is otherwise
9 unlawful; or

10 “(2) the service provider presents additional in-
11 formation about the subscriber’s or customer’s phys-
12 ical location, status as a United States person, or
13 status as a national of a foreign country that would
14 cause the court to find that the warrant application
15 would not comply with the requirements of this sec-
16 tion.”;

17 (ii) in subsection (d), in the first sen-
18 tence—

19 (I) by striking “(b) or”;

20 (II) by striking “the contents of
21 a wire or electronic communication,
22 or”; and

23 (III) by striking “sought, are”
24 and inserting “sought are”; and

1 (iii) by adding at the end the fol-
2 lowing:

3 “(h) RULE OF CONSTRUCTION.—Nothing in this sec-
4 tion or in section 2702 shall be construed to limit the au-
5 thority of a governmental entity to use an administrative
6 subpoena authorized under a Federal or State statute or
7 to use a Federal or State grand jury, trial, or civil dis-
8 covery subpoena to—

9 “(1) require an originator, addressee, or in-
10 tended recipient of an electronic communication to
11 disclose the contents of the electronic communication
12 to the governmental entity; or

13 “(2) require an entity that provides electronic
14 communication services to the officers, directors, em-
15 ployees, or agents of the entity (for the purpose of
16 carrying out their duties) to disclose the contents of
17 an electronic communication to or from an officer,
18 director, employee, or agent of the entity to a gov-
19 ernmental entity, if the electronic communication is
20 held, stored, or maintained on an electronic commu-
21 nications system owned or operated by the entity.”;

22 (B) in section 2704(a)(1), by striking “sec-
23 tion 2703(b)(2)” and inserting “section 2703”;
24 and

25 (C) in section 2711—

1 (i) in paragraph (3)(B) by striking
2 “warrants; and” and inserting “war-
3 rants;”;

4 (ii) in paragraph (4) by striking
5 “thereof.” and inserting “thereof;” and

6 (iii) by adding at the end the fol-
7 lowing:

8 “(5) the term ‘United States person’ means a
9 citizen of the United States or an alien lawfully ad-
10 mitted for permanent residence (as defined in sec-
11 tion 101(a) of the Immigration and Nationality Act
12 (8 U.S.C. 1101(a));

13 “(6) the term ‘Law Enforcement Cooperation
14 Agreement’ means—

15 “(A) a mutual legal assistance treaty, mu-
16 tual legal assistance agreement, adherence to
17 the Convention on Cybercrime, signed Novem-
18 ber 21, 2001; or

19 “(B) an executive agreement or treaty be-
20 tween the United States and one or more coun-
21 tries designed to establish a reciprocal process
22 for notifying and obtaining the consent of the
23 other country or countries in order to obtain
24 the contents of electronic communication pursu-
25 ant to section 2703(a)(1)(A)(iii), provided that

1 the Attorney General shall maintain a list of
2 countries with which the United States has
3 such agreements and shall submit such list, as
4 and when amended, to the Committees on the
5 Judiciary and Foreign Relations of the United
6 States Senate and the Committees on the Judi-
7 ciary and Foreign Affairs of the United States
8 House of Representatives, and shall make it
9 available to the public;

10 “(7) the term ‘Central Authority’ means the
11 agency, department, office, or authority of a country
12 responsible for administering a particular Law En-
13 forcement Cooperation Agreement between that
14 country and another; and

15 “(8) the term ‘national of a foreign country’
16 means a citizen, a lawful resident, or an entity orga-
17 nized under the laws of a foreign jurisdiction.”.

18 (2) RULE OF CONSTRUCTION.—Nothing in this
19 Act or the amendments made by this Act shall be
20 construed to expand the investigative authority of
21 any governmental entity.

22 (d) MUTUAL LEGAL ASSISTANCE TREATY RE-
23 FORMS.—

24 (1) MUTUAL LEGAL ASSISTANCE TREATY
25 TRANSPARENCY AND EFFICIENCY.—

1 (A) IN GENERAL.—Not later than 180
2 days after the date of enactment of this Act,
3 the Attorney General shall establish—

4 (i) a form for use by a foreign govern-
5 ment filing a mutual legal assistance treaty
6 request (referred to in this section as an
7 “MLAT request”), which shall—

8 (I) be made available on the
9 website of the Department of Justice;
10 and

11 (II) require sufficient information
12 and be susceptible for use by a foreign
13 government to provide all the informa-
14 tion necessary for the MLAT request;

15 (ii) an online docketing system for all
16 MLAT requests, which shall allow a for-
17 eign government to track the status of an
18 MLAT request filed by the foreign govern-
19 ment; and

20 (iii) a process through which certified
21 approval may be sought for disclosure pur-
22 suant to warrants issued under section
23 2703(a).

24 (B) ANNUAL PUBLICATION.—Beginning
25 not later than 1 year after the date of enact-

1 ment of this Act, and each year thereafter, the
2 Attorney General shall publish on the website of
3 the Department of Justice statistics on—

4 (i)(I) the number of MLAT requests
5 made by the Department of Justice to for-
6 eign governments for the purpose of ob-
7 taining the contents of an electronic com-
8 munication or other information or records
9 from a provider of electronic communica-
10 tions or remote computing services; and

11 (II) the average length of time taken
12 by foreign governments to process the
13 MLAT requests described in subclause (I);
14 and

15 (ii)(I) the number of MLAT requests
16 made to the Department of Justice by for-
17 eign governments for the purpose of ob-
18 taining the contents of an electronic com-
19 munication or other information or records
20 from a provider of electronic communica-
21 tions or remote computing services; and

22 (II) the average length of time taken
23 by the Department of Justice to process
24 the MLAT requests described in subclause
25 (I).

1 (C) NOTICE TO DEPARTMENT OF STATE.—

2 The Attorney General shall notify the Secretary
3 of State not later than 7 days after the date on
4 which disclosure of electronic communications
5 content to a foreign government is made pursu-
6 ant to an MLAT request.

7 (2) PRESERVATION OF RECORDS.—The Attor-
8 ney General may issue a request pursuant to section
9 2703(f) of title 18, United States Code, upon receipt
10 of an MLAT request that appears to be facially
11 valid.

12 (3) NOTIFICATION TO PROVIDER OF MLAT RE-
13 QUEST.—When the Attorney General makes use of
14 the process provided in section 2703 of title 18,
15 United States Code, to obtain information from an
16 electronic communications provider or a remote com-
17 puting provider based on an MLAT request, the At-
18 torney General shall notify that provider in writing
19 that the request has been made pursuant to a mu-
20 tual legal assistance treaty.

21 (e) SENSE OF CONGRESS.—It is the sense of Con-
22 gress that—

23 (1) data localization requirements imposed by
24 foreign governments on data providers are—

1 (A) incompatible with the borderless na-
2 ture of the Internet;

3 (B) an impediment to online innovation;
4 and

5 (C) unnecessary to meet the needs of law
6 enforcement; and

7 (2) the Department of Justice, the Department
8 of State, and the United States Trade Representa-
9 tives should pursue open data flow policies with for-
10 eign nations.