

115TH CONGRESS
1ST SESSION

S. 1671

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

IN THE SENATE OF THE UNITED STATES

JULY 27, 2017

Mr. HATCH (for himself, Mr. COONS, and Mr. HELLER) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

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

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “International Commu-
5 nications Privacy Act”.

6 **SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF**
7 **PURPOSE.**

8 Congress finds the following:

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

ferred to in this section as “ECPA”) was intended to protect the privacy of electronic communications and related records stored with providers of electronic communications services and remote computing services, while providing law enforcement agencies with the appropriate legal tools to compel production of information from such providers.

(2) ECPA authorized governmental entities to obtain certain categories of communications data from providers using established, pre-existing forms of process, including search warrants and subpoenas. It also created a new form of court order, in section 2703(d) of title 18, United States Code, that governmental entities could use to obtain additional types of communications data.

(3) Congress recognizes that there are often many interests that must be recognized when law enforcement agencies seek information from providers, such as—

(A) the legitimate needs of law enforcement agencies in the United States to obtain, through lawful process, electronic communications relevant to criminal investigations;

1 (B) the privacy interests of all customers
2 of the services offered by electronic communica-
3 tion service providers; and

4 (C) the legitimate interests of governments
5 to protect the human rights, civil liberties and
6 privacy of their nationals and residents.

7 (4) Therefore, where the Government seeks to
8 obtain the contents of electronic communications of
9 a national of a qualifying foreign government who is
10 located outside of the United States, this Act au-
11 thorizes the use of search warrants to compel pro-
12 duction of that information only if the foreign gov-
13 ernment receives prior notice of the request and does
14 not object or a judge determines that the interests
15 of the United States in obtaining the information
16 outweigh the interests of the qualifying foreign gov-
17 ernment in preventing the disclosure.

18 **SEC. 3. EXTENSION AND CLARIFICATION OF WARRANT RE-**
19 **QUIREMENT.**

20 (a) IN GENERAL.—Chapter 121 of title 18, United
21 States Code, is amended—

22 (1) in section 2702(a), by amending paragraph
23 (3) to read as follows:

24 “(3) a provider of remote computing service or
25 electronic communication service to the public shall

1 not knowingly divulge to any governmental entity
 2 the contents of any communication described in sec-
 3 tion 2703(a), or any record or other information
 4 pertaining to a subscriber or customer of such serv-
 5 ice.”;

6 (2) in section 2703—

7 (A) by striking subsections (a) and (b) and
 8 inserting the following:

9 “(a) REQUIRED DISCLOSURE.—A governmental enti-
 10 ty may require the disclosure by a provider of electronic
 11 communication service or remote computing service of the
 12 contents of a wire or electronic communication that is
 13 stored, held, or maintained by the provider, regardless of
 14 where such contents may be in electronic storage or other-
 15 wise stored, held, or maintained, only pursuant to a war-
 16 rant issued using the procedures described in the Federal
 17 Rules of Criminal Procedure (or, in the case of a State
 18 court, issued using State warrant procedures) by a court
 19 of competent jurisdiction.”;

20 (B) by redesignating subsections (c)
 21 through (g) as subsections (b) through (f), re-
 22 spectively;

23 (C) in subsection (c), as so redesignated,
 24 in the first sentence—

25 (i) by striking “(b) or”;

1 (ii) by striking “the contents of a wire
2 or electronic communication, or”; and

3 (iii) by striking “sought, are” and in-
4 serting “sought are”; and

5 (D) by adding at the end the following:

6 “(g) APPLICATION FOR WARRANT SEEKING CON-
7 TENTS OF WIRE OR ELECTRONIC COMMUNICATION.—

8 “(1) IN GENERAL.—An application for a war-
9 rant under this section seeking the contents of a
10 wire or electronic communication of a subscriber or
11 customer of an electronic communication service pro-
12 vider or remote computing service provider that is
13 stored, held, or maintained by such provider shall
14 state the nationality and location of the subscriber
15 or customer whose communications are being
16 sought, unless the nationality and location cannot
17 reasonably be determined.

18 “(2) NATIONALITY AND LOCATION NOT REA-
19 SONABLY DETERMINED.—If the nationality and loca-
20 tion of the subscriber or customer cannot reasonably
21 be determined, the application shall include a full
22 and complete statement of the investigative steps
23 taken to ascertain the nationality and location of the
24 subscriber or customer.

25 “(3) EFFECTIVE DATE.—

1 “(A) IN GENERAL.—The requirements of
 2 paragraphs (1) and (2) shall take effect 14
 3 days after the date on which the Attorney Gen-
 4 eral first publishes a list of not less than 1
 5 qualifying foreign country under section
 6 2703A(e)(3).

7 “(B) APPLICABILITY.—The requirements
 8 of paragraphs (1) and (2) shall not apply dur-
 9 ing any period of time in which no country is
 10 determined by the Attorney General to be a
 11 qualifying foreign country.

12 “(4) JURISDICTION OVER OFFENSE.—A court
 13 may issue a warrant under this section for the con-
 14 tents of a wire or electronic communication only if
 15 the warrant application was made—

16 “(A) by a governmental entity in connec-
 17 tion with an investigation of a criminal offense
 18 for which that entity has jurisdiction; or

19 “(B) on behalf of a foreign government in-
 20 vestigating a criminal offense for which that
 21 foreign government has jurisdiction.

22 “(h) RULE OF CONSTRUCTION RELATED TO LEGAL
 23 PROCESS.—Nothing in this section, section 2702, or sec-
 24 tion 2703A shall be construed to limit the authority of
 25 a governmental entity to use an administrative subpoena

1 authorized under a Federal or State law or to use a Fed-
 2 eral or State grand jury, trial, or civil discovery subpoena
 3 to—

4 “(1) require an originator, addressee, or in-
 5 tended recipient of an electronic communication to
 6 disclose the contents of the electronic communication
 7 to the governmental entity; or

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

17 (3) by inserting after section 2703 the fol-
 18 lowing:

19 **“§ 2703A. Special rule for communications of non-**
 20 **United States subscriber or customer in**
 21 **qualifying foreign country**

22 “(a) IN GENERAL.—

23 “(1) NOTICE AND OPPORTUNITY TO OBJECT.—
 24 Except as provided in paragraph (2), if a subscriber
 25 or customer whose communications are being sought

1 is physically located outside the United States, is not
2 a United States person, and is a national of or lo-
3 cated in a qualifying foreign country, the court may
4 issue a warrant under section 2703 for the contents
5 of such communications only if—

6 “(A) the qualifying foreign country has
7 been provided notice of the warrant application;
8 and

9 “(B)(i) the Central Authority of the quali-
10 fying foreign country has provided written cer-
11 tification that the disclosure may be had;

12 “(ii) 14 days have passed since the date on
13 which the notice was provided under subpara-
14 graph (A) and the Central Authority of the
15 qualifying foreign country has not initiated a
16 challenge under subsection (c)(1); or

17 “(iii) the Central Authority of the quali-
18 fying foreign country has initiated a challenge
19 under subsection (c)(1) and the court has de-
20 nied the challenge.

21 “(2) NATIONALITY AND LOCATION NOT REA-
22 SONABLY DETERMINED.—Paragraph (1) shall not
23 apply if—

24 “(A) the nationality and location of the
25 subscriber or customer whose communications

1 are being sought cannot reasonably be deter-
2 mined; and

3 “(B) the requirements of section
4 2703(g)(2) have been met.

5 “(b) CONTENTS OF NOTICE.—The notice required
6 under subsection (a)(1)(A) shall include—

7 “(1) the name, nationality, and location of the
8 subscriber or customer whose communications are
9 being sought;

10 “(2) the name, nationality, and location of the
11 service provider; and

12 “(3) a description of the events or offenses
13 under investigation and how the communications
14 sought are relevant and material to the investiga-
15 tion.

16 “(c) CHALLENGE TO WARRANT SEEKING CONTENTS
17 OF WIRE OR ELECTRONIC COMMUNICATION.—

18 “(1) IN GENERAL.—Upon a motion made
19 promptly by a service provider or by the Central Au-
20 thority of a qualifying foreign country, a court re-
21 ceiving a warrant application under section 2703 or
22 issuing a warrant under section 2703 for the con-
23 tents of a wire or electronic communication of a sub-
24 scriber or customer who is physically located outside
25 the United States and who is not a United States

1 person shall deny, modify, or quash the warrant, as
2 appropriate, if the court finds that—

3 “(A) the subscriber or customer is a na-
4 tional of or located in a qualifying foreign coun-
5 try and the qualifying foreign country was not
6 provided notice of the warrant application in ac-
7 cordance with subsection (a)(1)(A), unless the
8 court issued an order under subsection
9 (d)(2)(A) waiving the requirements of sub-
10 section (a)(1); or

11 “(B)(i) disclosure would cause the service
12 provider to violate the laws of a foreign country;
13 and

14 “(ii) based on the totality of the cir-
15 cumstances, the warrant should not be issued
16 or enforced because the interests of the foreign
17 country in preventing the disclosure and the
18 penalties the service provider or any employees
19 of the service provider would likely suffer as a
20 result of violating the laws of the foreign coun-
21 try outweigh the investigative interests of the
22 governmental entity seeking to compel the dis-
23 closure.

1 “(2) COMITY ANALYSIS.—For purposes of mak-
2 ing a determination under paragraph (1)(B)(ii), the
3 court shall take into account, as appropriate—

4 “(A) the laws of the foreign country;

5 “(B) the investigative interests of the gov-
6 ernmental entity seeking to compel the disclo-
7 sure;

8 “(C) the interests of the foreign govern-
9 ment in preventing the disclosure;

10 “(D) the reasons, if any, for the objection
11 of the foreign government;

12 “(E) the penalties the provider or any em-
13 ployees of the provider would likely suffer as a
14 result of violating the laws of the foreign coun-
15 try;

16 “(F) the location and nationality of the
17 subscriber or customer whose communications
18 are being sought;

19 “(G) the location and nationality of the
20 victims;

21 “(H) the location of the offense;

22 “(I) the seriousness of the offense;

23 “(J) the importance of the sought-after
24 data to the investigation; and

1 “(K) the possibility of timely accessing the
2 data through other means.

3 “(3) DISCLOSURE OBLIGATIONS DURING PEND-
4 ENCY OF CHALLENGE.—A service provider shall not
5 be obligated to produce the contents of the commu-
6 nications sought during the pendency of a challenge
7 brought under this subsection.

8 “(d) EXCEPTIONS TO 14-DAY NOTICE PERIOD.—

9 “(1) EXPEDITED TREATMENT.—

10 “(A) IN GENERAL.—A court may issue an
11 order shortening the time period described in
12 subsection (a)(1)(A) to a time period not less
13 than 7 days, if the court finds, based on specific
14 and articulable facts, that such expedited treat-
15 ment is necessary to avoid one or more of the
16 adverse results identified in section 2705(a)(2).

17 “(B) NOTICE.—An order issued under
18 subparagraph (A) shall be served upon a rep-
19 resentative of the Central Authority of the
20 qualifying foreign country in a timely manner.

21 “(2) DELAY OF NOTICE IN EXCEPTIONAL CIR-
22 CUMSTANCES.—

23 “(A) DELAY OF NOTICE.—

24 “(i) IN GENERAL.—A court receiving
25 an application for a warrant under section

1 2703 for the contents of a wire or elec-
2 tronic communication of a subscriber or
3 customer who is physically located outside
4 the United States, who is not a United
5 States person, and who is a national of or
6 located in a qualifying foreign country may
7 issue an order waiving the requirements of
8 subsection (a)(1) for 90 days, if the court
9 finds, based on specific and articulable
10 facts, that providing notice of the warrant
11 application to the qualifying foreign coun-
12 try would—

13 “(I) jeopardize national security;

14 or

15 “(II) result in one or more of the
16 adverse results identified in section
17 2705(a)(2) because—

18 “(aa) the potential criminal
19 activity under investigation is
20 sponsored or directed by the
21 qualifying foreign country; or

22 “(bb) there is reason to be-
23 lieve that, notwithstanding the
24 certification required under sub-
25 section (e)(1)(A)(ii), the quali-

1 fying foreign country would no-
2 tify the subject of the investiga-
3 tion of the existence of the inves-
4 tigation, the existence of the war-
5 rant application, or both.

6 “(ii) ISSUANCE OF WARRANT.—Upon
7 a finding described in clause (i), and fol-
8 lowing issuance of an order under clause
9 (i), the court may issue the warrant forth-
10 with.

11 “(B) EXTENSION OF ORDER DELAYING
12 NOTICE.—An order waiving the requirements of
13 subsection (a)(1) may be extended in 90-day in-
14 crements until the investigation is completed.
15 Any extension of an order under this subpara-
16 graph shall be made only upon a finding by the
17 court, based on specific and articulable facts,
18 that providing notice to the qualifying foreign
19 country would lead to one or more of the ad-
20 verse results identified in subparagraph
21 (A)(i)(II).

22 “(C) EFFECT OF EXPIRATION OR NON-
23 RENEWAL.—

24 “(i) IN GENERAL.—Upon expiration
25 or nonrenewal of an order issued under

1 subparagraph (A) the court shall suspend
2 the warrant.

3 “(ii) DURATION OF SUSPENSION.—
4 The suspension of a warrant under clause
5 (i) shall remain in effect until—

6 “(I) the qualifying foreign coun-
7 try is provided notice of the warrant
8 application; and

9 “(II)(aa) the Central Authority
10 of the qualifying foreign country pro-
11 vides written certification that the dis-
12 closure may be had;

13 “(bb) the end of the 14-day pe-
14 riod beginning on the date on which
15 the notice described in clause (i) was
16 provided to the qualifying foreign
17 country, if during the 14-day period
18 the Central Authority of the quali-
19 fying foreign country does not initiate
20 a challenge under subsection (c)(1); or

21 “(cc) the Central Authority of
22 the qualifying foreign country initiates
23 a challenge under subsection (c)(1)
24 and the court rules on the challenge.

1 “(iii) IMMEDIATE LIFT OF SUSPEN-
2 SION.—For purposes of clause (ii)(II)(cc),
3 if the court denies the challenge, the court
4 shall immediately lift the suspension.

5 “(e) QUALIFYING FOREIGN COUNTRY.—

6 “(1) DEFINITION.—In this section, the term
7 ‘qualifying foreign country’ means a foreign country
8 that—

9 “(A) has certified to the Attorney General
10 that—

11 “(i) it will provide to the United
12 States Government substantive and proce-
13 dural opportunities similar to those under
14 this section when the foreign country is
15 seeking information about United States
16 persons from electronic communications
17 service providers or remote computing
18 service providers subject to its jurisdiction;
19 and

20 “(ii) in the event it is provided notice
21 of an application for a warrant under sub-
22 section (a)(1)(A), upon request from the
23 United States Government it will not no-
24 tify the subject of the investigation of the

1 existence of the investigation, the existence
2 of the warrant application, or both; and

3 “(B) the Attorney General, in consultation
4 with the Secretary of State, has determined—

5 “(i) affords robust substantive and
6 procedural protections for privacy and civil
7 liberties;

8 “(ii) adheres to applicable inter-
9 national human rights obligations and
10 commitments;

11 “(iii) provides to the United States
12 Government substantive and procedural
13 opportunities similar to those under this
14 section when the foreign country is seeking
15 information about United States persons
16 from electronic communication service pro-
17 viders or remote computing service pro-
18 viders subject to its jurisdiction; and

19 “(iv) will not unnecessarily impede le-
20 gitimate criminal investigations or other-
21 wise undermine the foreign relations of the
22 United States as a result of receiving no-
23 tice of warrant applications and the oppor-
24 tunity to initiate a challenge to such appli-
25 cations.

1 “(2) DETERMINATION REQUIRED.—Not later
2 than 60 days after the date on which the Attorney
3 General receives the certifications described in para-
4 graph (1)(A) from a foreign country, the Attorney
5 General, in consultation with the Secretary of State,
6 shall determine whether the country satisfies the re-
7 quirements described in paragraph (1)(B). If the At-
8 torney General determines a country satisfies the re-
9 quirements described in paragraph (1)(B), the At-
10 torney General shall add the country to the list of
11 qualifying foreign countries under paragraph (3).

12 “(3) LIST OF QUALIFYING FOREIGN COUN-
13 TRIES.—The Attorney General shall—

14 “(A) publish and make publicly available a
15 list of the countries that satisfy the require-
16 ments described in paragraph (1);

17 “(B) add to the list published under sub-
18 paragraph (A) any country that comes into
19 compliance with the requirements described in
20 paragraph (1); and

21 “(C) remove from the list published under
22 subparagraph (A) any country that ceases to
23 comply with the requirements described in para-
24 graph (1).

1 “(f) RULE OF CONSTRUCTION RELATED TO NA-
 2 TIONAL SECURITY AND INTELLIGENCE OPERATIONS.—
 3 Nothing in this section shall be construed to affect, im-
 4 pact, or in any way impede terrorism investigations, mili-
 5 tary operations, or operations or activities under the For-
 6 eign Intelligence Surveillance Act of 1978 (50 U.S.C.
 7 1801 et seq.).”;

8 (4) in section 2704(a)(1), by striking “section
 9 2703(b)(2)” and inserting “section 2703”; and

10 (5) in section 2711—

11 (A) in paragraph (3)(B) by striking “war-
 12 rants; and” and inserting “warrants;”;

13 (B) in paragraph (4) by striking “thereof.”
 14 and inserting “thereof;” and

15 (C) by adding at the end the following:

16 “(5) the term ‘United States person’ means a
 17 citizen of the United States or an alien lawfully ad-
 18 mitted for permanent residence (as defined in sec-
 19 tion 101(a) of the Immigration and Nationality Act
 20 (8 U.S.C. 1101(a)));

21 “(6) the term ‘Central Authority’ means the
 22 agency, department, office, or authority of a country
 23 responsible for administering law enforcement re-
 24 quests between that country and another country;
 25 and

1 “(7) the term ‘national of a foreign country’
 2 means a citizen, a lawful resident, or an entity orga-
 3 nized under the laws of a foreign jurisdiction.”.

4 (b) TECHNICAL AND CONFORMING AMENDMENTS.—
 5 Title 18, United States Code, is amended—

6 (1) in section 2258A(h)(1), by striking “section
 7 2703(f)” and inserting “section 2703(e”;

8 (2) in section 2705—

9 (A) in subsection (a)(1), by striking “sec-
 10 tion 2703(b)” each place the term appears and
 11 inserting “section 2703”; and

12 (B) in subsection (b), by striking “section
 13 2703(b)(1)” and inserting “section 2703”;

14 (3) in section 2707—

15 (A) in subsection (a), by striking “section
 16 2703(e)” and inserting “section 2703(d”;

17 (B) in subsection (e)(1), by striking “sec-
 18 tion 2703(f)” and inserting “section 2703(e”;

19 and

20 (4) in section 3486(a)(1)(C)(i), by striking
 21 “section 2703(c)(2)” and inserting “section
 22 2703(b)(2”.

23 (c) RULE OF CONSTRUCTION.—Nothing in this Act
 24 or the amendments made by this Act shall be construed

1 to expand the investigative authority of any governmental
2 entity.

3 (d) TABLE OF SECTIONS.—The table of sections for
4 chapter 121 of title 18, United States Code, is amended
5 by inserting after the item relating to section 2703 the
6 following:

“2703A. Special rule for communications of non-United States subscriber or
customer in qualifying foreign country.”.

7 **SEC. 4. MUTUAL LEGAL ASSISTANCE TREATY REFORMS.**

8 (a) MUTUAL LEGAL ASSISTANCE TREATY TRANS-
9 PARENCY AND EFFICIENCY.—

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

13 (A) a form for use by a foreign govern-
14 ment filing a mutual legal assistance treaty re-
15 quest (referred to in this section as an “MLAT
16 request”), which shall—

17 (i) be made available on the website of
18 the Department of Justice; and

19 (ii) require sufficient information and
20 be susceptible for use by a foreign govern-
21 ment to provide all the information nec-
22 essary for the MLAT request;

23 (B) an online docketing system for all
24 MLAT requests, which shall allow a foreign

1 government to track the status of an MLAT re-
2 quest filed by the foreign government; and

3 (C) a process through which certified ap-
4 proval may be sought for disclosure pursuant to
5 warrants issued under section 2703(a).

6 (2) ANNUAL PUBLICATION.—Beginning not
7 later than 1 year after the date of enactment of this
8 Act, and each year thereafter, the Attorney General
9 shall publish on the website of the Department of
10 Justice statistics on—

11 (A)(i) the number of MLAT requests made
12 by the Department of Justice to foreign govern-
13 ments for the purpose of obtaining the contents
14 of an electronic communication or other infor-
15 mation or records from a provider of electronic
16 communications or remote computing services;
17 and

18 (ii) the average length of time taken by
19 foreign governments to process the MLAT re-
20 quests described in clause (i);

21 (B)(i) the number of MLAT requests made
22 to the Department of Justice by foreign govern-
23 ments for the purpose of obtaining the contents
24 of an electronic communication or other infor-
25 mation or records from a provider of electronic

1 communications or remote computing services;
2 and

3 (ii) the average length of time taken by
4 foreign governments to process the MLAT re-
5 quests described in clause (i); and

6 (C)(i) the number of MLAT requests made
7 to the Department of Justice by foreign govern-
8 ments for the purpose of obtaining the contents
9 of an electronic communication or other infor-
10 mation or records from a provider of electronic
11 communications or remote computing services;
12 and

13 (ii) the average length of time taken by the
14 Department of Justice to process the MLAT re-
15 quests described in clause (i).

16 (3) NOTICE TO DEPARTMENT OF STATE.—The
17 Attorney General shall notify the Secretary of State
18 not later than 7 days after the date on which disclo-
19 sure of electronic communications content to a for-
20 eign government is made pursuant to an MLAT re-
21 quest.

22 (b) PRESERVATION OF RECORDS.—The Attorney
23 General may issue a request pursuant to section 2703(e)
24 of title 18, United States Code, as so redesignated by sec-

tion 3, upon receipt of an MLAT request that appears to be facially valid.

(c) NOTIFICATION TO PROVIDER OF MLAT REQUEST.—When the Attorney General makes use of the process provided in section 2703 of title 18, United States Code, to obtain information from an electronic communications provider or a remote computing provider based on an MLAT request, the Attorney General shall notify that provider in writing that the request has been made pursuant to a mutual legal assistance treaty.

SEC. 5. SENSE OF CONGRESS.

It is the sense of Congress that—

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

(A) incompatible with the borderless nature of the Internet;

(B) an impediment to online innovation; and

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

(2) the Department of Justice, the Department of State, and the United States Trade Representatives should pursue open data flow policies with foreign nations.

○