



Email Privacy Act Headed For U.S. Senate Consideration

Insights

8.30.18

On July 13, 2018, over 50 civil liberties groups, technology companies, and associations submitted a [joint letter to Congress](#) in support of the Email Privacy Act (EPA), which was recently included in the House-passed version of the National Defense Authorization Act (NDAA) for the Fiscal Year 2019. The list of signatories included such tech giants as Google, Facebook, Amazon, Dropbox, Cisco Systems and Adobe. The EPA, if passed, would amend the Electronic Communications Privacy Act (ECPA) by requiring law enforcement and other government agencies to obtain a search warrant, based upon a showing of probable cause, before seizing emails, texts, and other information stored in the cloud. The EPA has been proposed, yet failed to pass, in prior legislative sessions, but proponents of the bill are hopeful that the time is right for these privacy protections to be put into place.

Under the current version of the ECPA, the government may obtain stored electronic communications more than 180 days old simply by issuing an administrative subpoena to the applicable service provider (e.g., AT&T, Yahoo) or cloud storage service (e.g., Dropbox, iCloud). Also, the government may delay providing notice to the internet user for up to 90 days where it has "reason to believe" notice "may" lead to evidence destruction, tampering or otherwise interfere with the investigation. By contrast, in order for the government to obtain electronic communications in electronic storage for 180 days or less, the government must first obtain a search warrant based on probable cause. The EPA would eliminate the 180-day distinction, requiring probable cause and a warrant for disclosure of all electronic communications, and would require a court order before prohibiting the provider of the electronic communication service from providing notice to the user of the warrant.

Proponents of the bill argue that its passage would update the ECPA, originally passed in 1986, by eliminating the 180 - day rule which they view as an arbitrary and outdated distinction. They also argue that the bill simply codifies existing case law established in 2010 by the Sixth Circuit Court of Appeals in *U.S. v. Warshak*, which found that compelling an internet provider to reveal the contents of tens of thousands of emails pertaining to the criminal investigation of an executive indicted (and later convicted) of fraud violated the executive's Fourth Amendment right to be free from unreasonable search and seizure. Opponents of the bill assert that law enforcement and other government entities need wide latitude to pursue their investigations. Given the current political climate, the EPA still has an uphill battle for passage, but support for the bill as expressed in the letter from these civil liberties groups and influential companies could carry the day.

