July 13, 2018

Chairman John McCain
Ranking Member Jack Reed
Senate Committee on Armed Services

Chairman Mac Thornberry
Ranking Member Adam Smith
House Armed Services Committee

Dear Chairman McCain, Chairman Thornberry, Ranking Member Reed and Ranking Member Smith,

We, the undersigned civil society organizations, companies and trade associations, write to express our support for the Email Privacy Act which was recently included in the House passed version of the National Defense Authorization Act (NDAA) for Fiscal Year 2019. The Act updates the Electronic Communications Privacy Act (ECPA), the law that sets standards for government access to private internet communications, to reflect internet users’ reasonable expectations of privacy with respect to emails, texts, notes, photos, and other sensitive information stored in “the cloud.”

The bill would end ECPA’s arbitrary “180-day rule,” which permits email communications to be obtained without a warrant after 180 days. The Act would also reject the Department of Justice interpretation of ECPA that the act of opening an email removes it from warrant protection. These reforms would ratify the Sixth Circuit’s decision in U.S. v. Warshak, which held that email content is protected by the Fourth Amendment and that law enforcement access requires a probable cause warrant. Moreover, the changes reflect current practices: DOJ and FBI policies already require law enforcement officials seeking content to obtain a search warrant, and many service providers will not relinquish their users’ content without one.

The bill passed by the House does not achieve all of the reforms we had hoped for. Indeed, it removes key provisions of the proposed bill, such as the section requiring notice from the government to the customer when a warrant is served, which are necessary to protect users. However, it does impose a warrant-for-content rule with limited exceptions. It represents a carefully negotiated compromise which preserves existing exceptions to the warrant requirement, provides a new ability for civil agencies to obtain access to previously public commercial content, and maintains the government’s ability to preserve records and obtain emails from employees of corporations. We are particularly pleased that the bill does not carve out civil agencies from the warrant requirement, which would have expanded government surveillance power and undermined the very purpose of the bill, or contain
unnecessary and overbroad mandatory emergency exceptions. Such changes or other broad warrant exceptions would represent a step back from the status quo, particularly in light of the recent *Carpenter* decision where a majority of the justices on the Supreme Court endorsed a lower court decision applying a warrant standard when law enforcement seek emails.

For these reasons, we support the Email Privacy Act and urge that it be included in the final NDAA without any amendments that would weaken the protections afforded by the bill.

Sincerely,

ACT | The App Association
Adobe
ALEC Action
American Civil Liberties Union
Americans for Prosperity
Amazon
American Association of Law Libraries
American Library Association
Americans for Tax Reform
Association of Research Libraries
Box Inc.
Brennan Center for Justice at NYU School of Law
BSA | The Software Alliance
Center for Democracy & Technology
Cisco Systems, Inc.
Committee for Justice
CompTIA
Computer & Communications Industry Association
Consumer Action
Consumer Technology Association
Council for Citizens Against Government Waste
Data Foundry
Digital Liberty
Discovery Institute
Dropbox
Due Process Institute
Electronic Frontier Foundation
Engine
Facebook
FreedomWorks
Future of Privacy Forum
Giganews
Golden Frog
Google
Information Technology and Innovation Foundation
Information Technology Industry Council (ITI)
Institute for Policy Innovation
Internet Association
Internet Infrastructure Coalition
National Association of Criminal Defense Lawyers
National Taxpayers Union
NetChoice
New America's Open Technology Institute
Oath
Rapid7
Reform Government Surveillance
Software & Information Industry Association
Sonic
Taxpayers Protection Alliance
TechFreedom
TechNet
U.S. Chamber of Commerce
Wikimedia Foundation