



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 27, 2009

The Honorable Sheldon Whitehouse
United States Senate
Washington, DC 20510

Dear Senator Whitehouse:

Per your request, the Department of Justice (the Department) has examined the draft bill entitled "To improve Title 18 of the United States Code". The Department strongly supports early introduction and consideration of the proposed legislation "[t]o improve title 18 of the United States Code" which clarifies procedures for executing and fulfilling foreign requests for evidence. We firmly believe this legislation will facilitate the ability of the United States to assist foreign investigations, prosecutions and related proceedings involving organized crime, trafficking in child pornography, intellectual property violations, identity theft, and all other serious crimes. The ability of the United States to assist foreign authorities to obtain evidence and other assistance in an effective and timely manner will improve reciprocal treatment when we seek assistance in foreign countries in all types of U.S. criminal investigations. Thus, facilitating our ability to provide assistance to foreign investigators has a direct impact on the safety and security of Americans.

The proposed legislation will complement the existing authority in current statutes and self-executing Mutual Legal Assistance Treaties and multilateral conventions. It will greatly facilitate the ability of the U.S. government to meet its obligations under these valuable international instruments and will ensure that we can provide, at our discretion, similar assistance to our non-treaty foreign law enforcement partners. In addition, the filing provision of the new section 3512 will permit the U.S. government to execute foreign assistance requests with greater efficiency than at present, thereby contributing to the effective administration of the federal courts and the Offices of the United States Attorneys.

The statutes that currently govern the obtaining of electronic and other evidence based upon a foreign request for evidence have two limitations. First, existing law does not make it clear which district court can participate in fulfilling legitimate foreign requests for assistance in criminal and terrorism investigations. The sole statute regarding international requests for evidence is 28 U.S.C. § 1782, which was designed essentially to accommodate the execution of letters rogatory in civil cases via the issuance of subpoenas. Under the statute, the Department is largely relegated to civil practice rules that require prosecutors to file in every district in which evidence or a witness may be found. In complex cases, this inefficiency means involving several U.S. Attorneys' Offices and District Courts in a single case. Even in less complex cases, referring the requests out to the field wastes scarce attorney resources and creates delays.

Second, in 2001, Congress changed the wording of 18 U.S.C. § 2703 in a way that inadvertently introduced confusion in routine mutual legal assistance cases. For example, section 2703(a) requires that the court issuing a search warrant for stored electronic evidence have “jurisdiction over the offense”. As a U.S. court often has no jurisdiction to try a foreign offender, the wording of 2703(a) needlessly complicates the use of this sort of court process.

The proposed legislation addresses both of these difficulties by clarifying which courts have jurisdiction and can respond to appropriate foreign requests for evidence in criminal investigations. Under this proposal, a legitimate request for assistance can be filed in the District of Columbia, in any of the districts in which any of several records or witnesses are located, or in any district in which there is a related federal criminal case. The proposal would clarify the ambiguity in section 2703 by re-articulating the bases for courts to act without changing any of the procedural safeguards present in U.S. law.

We note that the proposed legislation would not in any way change the existing standards that the government must meet in order to obtain evidence, nor would it alter any existing safeguards on the proper exercise of such authority. Moreover, it would not expand the nature or kind of assistance the Department provides to foreign law enforcement agencies. Indeed, the proposed legislation would not alter U.S. obligations or authorities under existing bilateral and multilateral law enforcement treaties. Instead, by streamlining procedures, the amendment would eliminate needless confusion and wasted time in the government's response to those requests.

The proposed legislation references “provider of electronic communication service”. The current reference, however, fails to address the presence of wire services, though 18 U.S.C. 3124(a), (b) references “provider of wire or electronic service”. To provide consistency throughout Title 18, United States Code, and to cover more fully the providers involved, the Department recommends adding “wire or” before “electronic communication service” each place it appears.

Thank you for the opportunity to comment on this proposed legislation. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration’s program to the submission of this letter.

Sincerely,



M. Faith Burton
Acting Assistant Attorney General