



# Department of Justice

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**STATEMENT OF**

**RICHARD W. DOWNING  
ACTING DEPUTY ASSISTANT ATTORNEY GENERAL  
DEPARTMENT OF JUSTICE**

**BEFORE THE**

**SUBCOMMITTEE ON CRIME AND TERRORISM  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE**

**FOR A HEARING ENTITLED**

**“LAW ENFORCEMENT ACCESS TO DATA STORED ACROSS  
BORDERS: FACILITATING COOPERATION AND PROTECTING  
RIGHTS”**

**PRESENTED**

**MAY 10, 2017**

**Statement of  
Richard W. Downing  
Acting Deputy Assistant Attorney General  
Department of Justice**

**Before the  
Subcommittee on Crime and Terrorism  
Committee on the Judiciary  
United States Senate**

**At a Hearing Entitled  
“Law Enforcement Access to Data Stored Across Borders: Facilitating Cooperation  
and Protecting Rights”**

**May 10, 2017**

Good afternoon Chairman Graham, Ranking Member Whitehouse, and distinguished Members of the Committee, and thank you for the opportunity to testify on behalf of the Department of Justice. Americans’ safety and privacy is under attack by criminals who use the Internet to communicate and conspire, to commit serious criminal offenses, and to hide evidence. The need for effective, efficient, and lawful access to data in criminal investigations is paramount in the digital age. Obstacles to obtaining such electronic evidence jeopardize investigations into every category of criminal activity – including terrorism, financial fraud, drug trafficking, child sexual exploitation, human trafficking, and computer hacking.

A recent case from the Second Circuit has effectively hamstrung the ability of law enforcement to obtain data from U.S. communications service providers who store data outside the United States. This is a tremendous problem that is becoming more acute by the day. In my testimony today, I will outline the substantial harms to public safety that the Second Circuit’s decision in *Microsoft v. United States*, 829 F.3d 197 (2d Cir. 2016) has created.

The United States is not alone in facing obstacles to obtaining electronic evidence outside its territory by providers serving millions of its residents. Countries around the world rely on data held by U.S. communications service providers to protect their legitimate public safety interests. However, the Stored Communications Act may preclude U.S. service providers from disclosing U.S.-stored data to foreign countries pursuant to lawful foreign orders. In these instances, the foreign authority would likely use the formal mutual legal assistance process to obtain the data. Yet the Second Circuit’s decision has hindered our ability to obtain content data from U.S. providers on behalf of our foreign partners, just as it has in U.S. investigations.

We welcome Congress’s attention to this important problem that endangers our public safety and national security. We appreciate the complexities of this issue, and hope to work with

you, industry, and the relevant stakeholders to find the best solution. What we must avoid, however, are proposed solutions that do not provide investigators with effective and timely access to digital evidence or cede control over U.S. investigations to foreign governments. Any solution must also address the serious challenges that our allies have in gaining access to data stored in the United States for their criminal investigations, while also seeking to protect legitimate privacy interests. Additionally, several prominent U.S. companies have expressed that conflicts of law that arise from foreign orders for disclosure or content data is a serious problem that can present an obstacle to their ability to compete for business abroad, and we believe it is important to address these concerns in any legal regime that is developed.

Therefore, we propose to build a new framework for effective, efficient cross-border access to data that protects both legitimate privacy interests and our public safety and national security, and benefits U.S. business interests as well. In my testimony today, I will discuss both the need for a legislative fix for the problems created by the *Microsoft* decision as well as the legislative foundation for that new international framework.

## **I. Obstacles to Access of Electronic Evidence Across Borders**

### **A. The *Microsoft* decision and U.S. access to foreign-stored data**

For over thirty years, U.S. courts have issued warrants under the Stored Communications Act (“SCA”, 18 U.S.C. §§ 2701, *et seq.*) that require U.S. providers (such as Google and Microsoft) to disclose emails and other electronic information in their custody to U.S. authorities to be searched for evidence of crime. In July 2016, the Court of Appeals for the Second Circuit for the first time held that Congress did not intend the SCA to require providers to disclose information in their custody that is stored on computers outside the United States. *Microsoft v. United States*, 829 F.3d 197 (2d Cir. 2016). Therefore the government was unable to compel Microsoft to produce data it had stored in Ireland, even though the magistrate judge had found probable cause to believe that evidence of a crime would be found. In January 2017, the Second Circuit (in a rare 4-4 split decision in which all four dissenting judges wrote separately) decided not to rehear the case *en banc*. However, all opinions filed, including those of judges who voted against rehearing, emphasized that the result was unsatisfactory and that Congress should address the issue. *In re Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft*, No. 14-2985, 2017 WL 362765 (2d Cir. Jan. 24, 2017).

The Second Circuit’s decision, as Judge Gerard Lynch wrote in his concurrence to the panel decision, should not “be regarded as a rational policy outcome.” On the contrary, as four judges observed in dissenting from the denial of rehearing *en banc*, it “has substantially burdened the government’s legitimate law enforcement efforts, created a roadmap for the facilitation of criminal activity, and impeded programs to protect the national security of the United States and its allies.” *Microsoft*, 2017 WL 362765, at \*2-3 (Cabranes, J., *dissenting*). The decision also does not enhance privacy. It involved a warrant that met all of the

constitutional and statutory protections built into U.S. law. Indeed, requiring foreign legal process to access the data—as the court’s opinion suggests is required—would not enhance privacy protections for U.S. persons. Foreign legal standards are no more demanding—and often are less demanding—than U.S. standards.

Although the *Microsoft* decision is binding only in the Second Circuit, Microsoft and a number of other providers are applying the decision on a nationwide basis, and refusing to turn over data stored on their servers abroad in response to SCA warrants. The decision has already prevented the U.S. government from obtaining data necessary for criminal investigations across the United States and for our foreign partners pursuant to mutual legal assistance requests. The Department urges Congress to re-examine this issue and pass legislation that restores the status quo before the decision.

The Department has responded by filing a series of motions in districts outside of the Second Circuit seeking to enforce court orders requiring the disclosure of data without regard to where a provider chooses to move it. Other judges examining the Second Circuit’s ruling have concluded that its reasoning is flawed and creates results that Congress could not have intended. In all of the cases decided thus far, the government has prevailed.

- On February 3, 2017, the Department received its first ruling in this series of challenges—a decision rejecting the Second Circuit’s position from Magistrate Judge Rueter of the Eastern District of Pennsylvania. Judge Rueter declined to follow the *Microsoft* ruling, noting that the decision would entirely foreclose the government from obtaining foreign stored data from Google—a result that Congress could not have intended. *See In re Search Warrant No. 16-960-M-01 to Google*, No. 16-1061-M, 2017 WL 471564 (E.D. Pa. Feb. 3, 2017).
- On February 21, 2017, Magistrate Judge Duffin of the Eastern District of Wisconsin authorized warrants under the SCA for one Yahoo and two Google accounts. In authorizing the warrants, Judge Duffin issued a public opinion stating that when a “service provider is subject to the jurisdiction of the court, the court may lawfully order that service provider to disclose, consistent with the SCA, that which it can access and deliver within the United States” and that it “is immaterial where the service provider chooses to store its customer’s data; what matters is the location of service provider.” *In re: Information associated with one Yahoo email address that is stored at premises controlled by Yahoo and In re: Two email accounts stored at Google, Inc.*, 2017 WL 706307 (E.D.Wisc. Feb. 21, 2017).
- On April 7, 2017, Magistrate Judge Smith of the Middle District of Florida similarly issued an order authorizing the issuance of a warrant under the SCA for information associated with a Yahoo account. Judge Smith held that the Second Circuit ruling was wrongly decided, reasoning that, “[b]ecause the focus of § 2703 [of the SCA] is on

compelled disclosure, and the compulsion takes place in the United States, I find the application of § 2703 in this case is not extraterritorial.” *In the matter of the search of premises located at: [redacted]@yahoo.com, stored at premises owned, maintained, controlled, or operated by Yahoo, Inc.*, Case No. 6:17-mj-1238 (M.D. Fla. Apr. 7, 2017).

- On April 19, 2017, Magistrate Judge Beeler of the Northern District of California also declined to follow the Second Circuit, instead agreeing with the four judges who dissented from the denial of rehearing *en banc* that the disclosure of information from a company’s United States headquarters is a domestic application of the SCA. Judge Beeler reasoned, “[e]ven if the SCA’s focus is privacy, the warrant requirement – with its attendant requirement of probable cause – protects privacy. Moreover, an SCA warrant is not a search warrant in the classic sense: the government does not search a location or seize evidence. Instead, the conduct relevant to the focus – and what the SCA seeks to regulate – is disclosure of the data in the service provider’s possession.” *In the matter of the search of content that is stored at premises controlled by Google*, Case No. 16-mc-80263 (N.D. Cal. Apr. 19, 2017).

As every judge outside the Second Circuit to write an opinion on the issue has recognized, the principal flaw in the *Microsoft* decision is the court’s finding that requiring Microsoft to gather data from its servers abroad would constitute an extraterritorial application of the SCA. Because the required disclosure of data in the *Microsoft* case would occur in the United States, the enforcement of the warrant is, in fact, a *domestic* application of the SCA. The government applied for the warrant in the United States, the magistrate judge issued it in the United States, and it was served on Microsoft in the United States. Moreover, the data sought in the warrant is readily accessible to Microsoft’s domestic employees using a computer in the United States and, once produced, would be reviewed by the FBI in the United States.

Although the government has prevailed in all of the more recent cases in lower courts, the providers continue to adhere to the Second Circuit’s ruling and have appealed the other decisions. In the meantime, the providers are still withholding access to data that they have chosen to store overseas that law enforcement needs for criminal investigations across the country.

In litigation with the Department, Google has acknowledged that data on its network is in near-constant transit and is moved between servers and across borders automatically. Google has also conceded that data associated with a single Google account is frequently stored across numerous servers in different countries. In a recent case, Google responded to a Department-issued SCA warrant by providing email messages stripped of many attachments, explaining that while the bodies of the emails were stored domestically, the attachments were stored abroad. The Department’s inability to compel Google – as well as any other provider that structures its network similarly to Google’s – to produce the full content of user accounts is a sea change that continues to harm countless law enforcement investigations.

The Department is aware of dozens of investigations, across the country, in every judicial circuit, in which the impact of the *Microsoft* decision has frustrated those investigations and risked thwarting the pursuit of justice.

- In a drug trafficking investigation involving targets in the United States, Canada, and China, a search warrant issued to and served on Microsoft returned no email content, and Google indicated that it had stored the content overseas. Investigators need the content to identify suppliers and customers.
- In the investigation of a person in the U.S. suspected of sex trafficking by force, fraud and coercion, the defendant was arrested and his phone searched pursuant to a warrant, which revealed photos and videos depicting beatings of trafficked women. A warrant was issued to and served on Google for the content of the defendant's account, and Google withheld the content of photo and video albums in the information returned. The defendant ultimately pleaded guilty, but the withheld Google content would have been vital had the defendant successfully moved to suppress the evidence obtained during the phone search. Despite the fact that there is probable cause to believe that relevant evidence is in the custody of a U.S.-based service provider, Google, the true extent of the evidence of criminal acts contained in the defendant's Google account is unknown.
- In a child exploitation case, a U.S. defendant was arrested and a search warrant was issued to Google for the content of the defendant's account. Google withheld image attachments in the information returned. The investigators need the photos to identify and locate child victims.
- In an investigation involving a foreign national located in the U.S. who was unlawfully accessing a Federal Government database using stolen identities, investigators obtained a search warrant for several Microsoft email accounts believed to contain stolen means of identification and information used to commit Federal tax refund fraud. Microsoft withheld some responsive content, and informed investigators that the missing content was stored overseas. Based on data obtained from other service providers, investigators believe the missing Microsoft data would provide additional evidence of criminal activity and assist with identifying other co-conspirators in the scheme.
- In another child exploitation investigation, the court issued and investigators served a warrant to Google, and Google withheld images stored in the suspect's Google Drive. Investigators need the withheld images to test the veracity of the suspect's statement that he did not possess any child pornography images of the minor child with whom he had been living. The target is in the U.S.

- In the investigation of a fugitive wanted for cutting off his electronic monitoring device and absconding before trial in a child pornography case, investigators issued a search warrant to Google for email and other content that could prove helpful in locating the fugitive. Google withheld all content, and stated in a cover letter that it had stored the fugitive’s content outside the United States. The fugitive remains at large.
- In yet another child exploitation investigation, a search warrant issued to Google resulted in returned information that included several images and videos of child sexual exploitation. The target was indicted and arrested based on this information, and consented to a search of his email account. That search revealed a trove of additional images of child exploitation that had not been turned over by Google, including images of infant rape.

This is merely a sampling of the many investigations frustrated by the effect of the *Microsoft* decision. The impacted investigations run the gamut – from child exploitation and human trafficking, to firearms and drug smuggling, to tax fraud, computer fraud, and identity theft. These cases directly affect public safety and may even affect national security. While the most obvious impact of the *Microsoft* decision may be to frustrate investigations of foreign nationals targeting U.S. victims, these examples make clear that the *Microsoft* decision also thwarts or delays investigations *even where the victim, the offender, and the account holder are all within the United States.*

Some have looked at the international mutual legal assistance (“MLA”) process as an alternative means for the government to obtain the overseas data it seeks. Pursuant to the MLA process, U.S. investigators can ask foreign authorities to gather evidence in their home countries and supply it to us. However, the United States maintains bilateral MLA treaties with less than one-half of the world’s countries. Moreover, even when a treaty is in place, the MLA process can lack the requisite efficiency for time-sensitive investigations and other emergencies, making it an impractical alternative to SCA warrants in many cases. Among other hurdles, some domestic providers—including Google—permit only their U.S.-based personnel to access user data in response to law enforcement requests. This renders MLA requests futile because foreign authorities have no ability to obtain the evidence on our behalf. As I will discuss in more detail, other countries do not restrict their own ability to demand data stored outside their borders, and in fact the *Microsoft* decision takes us outside established international norms in this respect.

## **B. Access by foreign governments to U.S.-located data**

The United States is not alone in confronting serious challenges to gathering the electronic evidence necessary to enforce essential laws in an increasingly international and digital age. Foreign governments investigating criminal activity taking place within their borders

are increasingly concerned about their ability to obtain access to electronic evidence from U.S. companies that provide electronic communications services to millions of their citizens and residents. In fact, the Committee supporting the Budapest Cybercrime Convention is considering whether an additional Protocol to that Convention is necessary to address these issues. Often this data is stored or accessible only in the United States, where U.S. law, including the SCA, limits the companies' ability to disclose it.

The MLA process has frequently been the only mechanism that can provide foreign countries with access to this data, though its structure was not devised to handle the growing demands for digital evidence. Already, the Department faces significant challenges in responding to the enormous volume of foreign demands with the requisite speed. Moreover, the MLA process has been further frustrated by the *Microsoft* decision which impedes the ability of our foreign partners to obtain evidence needed to protect their law enforcement and national security interests. For example, in response to an MLA request from a foreign authority, the U.S. has no way to issue orders to U.S. providers to obtain data that they control but may be stored abroad. Our foreign law enforcement partners are increasingly frustrated that U.S. providers often cannot be compelled by the United States to produce data they seek for important criminal investigations and prosecutions, especially when the providers cannot even tell them where the data they require is stored.

This situation is one of several concerns that encourages countries to adopt data localization policies, which place a significant burden on American providers and disadvantage U.S. law enforcement. Moreover, the United States is not the only country that has recognized the legitimate need to compel providers subject to its jurisdiction to provide evidence from abroad in investigations of serious crime. Even before the *Microsoft* decision, foreign countries across the globe have passed their own domestic laws to compel providers with customers in their territory—including U.S. companies—to disclose data. In the absence of a *Microsoft* fix, the pressure foreign countries face to implement and utilize such laws will only increase.

This dynamic presents challenges. Our companies may face conflicting legal obligations when foreign governments require them to disclose electronic data in the United States that U.S. law prohibits them from disclosing. This legal conflict can occur even if the request is made pursuant to lawful process in the foreign country, involves communications between foreign nationals abroad, and concerns criminal activities outside the United States with no relation to this country other than the fact that the service provider stores the data in the United States. In addition to harming our allies' efforts to investigate terrorism and other serious crimes, this can put our companies in a difficult position. They must either comply with a foreign order, and risk a violation of U.S. law, or refuse to comply and risk violating a foreign law.

The experience of the United Kingdom illustrates why this scenario can be so problematic. A significant portion of the electronic communications service providers used by the U.K. public are based in, and store their data in, the United States (or elsewhere outside the



United Kingdom). As a result, U.K. authorities must frequently come to the United States to access data located here, even if it is relevant to the investigation of conduct taking place entirely outside of the United States and is not related to any U.S. persons. If the data happens to be stored in the United States, U.S. law would control the manner in which that data is available to U.K. authorities, even if only British citizens are involved, the threat is directly to the United Kingdom, and the conduct is taking place entirely outside the United States. U.K. investigators may find their investigations delayed by the cumbersome MLA process even despite the U.S. Government's best efforts to process requests expeditiously. Or, it may be thwarted altogether by the *Microsoft* decision.

The effects of such conflicts are felt acutely by many of our foreign law enforcement partners. They also present unique challenges for U.S. providers who wish to compete for overseas customers, but store data in the United States. Our foreign partners and many U.S. communications providers continue to voice concern that the status quo is unsustainable. It undermines efforts by our foreign partners to protect their citizens, just as it would for U.S. authorities to protect Americans. It gives other countries strong incentives to require data localization. And it exposes U.S. providers to potential enforcement actions and fines by foreign countries for adhering to U.S. law. The *Microsoft* decision compounds all of these harms.

## **II. The Path Forward**

The current situation presents significant challenges. As all of the judges involved in the Second Circuit decision indicated, Congress should address the ongoing and substantial damage to public safety caused by the *Microsoft* decision, and it should act swiftly. However, the Department has significant concerns about some efforts that have been contemplated to address the problem. The issue is complex, and solutions must take into consideration the possible ramifications and consequences. I will discuss some of these concerns in my remaining testimony. Then, I will describe our work on a solution to collectively address both the urgent need of U.S. investigators to access data outside the United States *and* that of foreign countries to access data held by U.S. providers.

### **A. Principles that Should Govern a Solution**

When crafting a solution to the problems created by the Second Circuit's *Microsoft* decision, we believe Congress should be guided by several principles. In the Department's view, some previous legislative proposals attempting to address this solution have not fully addressed these concerns:

- First, a solution must permit law enforcement investigators effectively to obtain digital evidence without undue delay. Waiting months for evidence critical to solving fast-moving investigations – such as terrorism, computer intrusion, and child sexual

exploitation cases, just to name a few – is dangerous and harmful to the safety and security of Americans.

- Second, reliance solely on the MLA process cannot be the solution. Even with our closest partners, lengthy delays occur. For example, Ireland—where Microsoft has indicated it stores its European customers’ data—has reported that the average response times for routine requests are 15-18 *months*. And we do not have MLA treaties with many countries. The MLA process nonetheless remains a vital tool, and we look forward to continuing to work with you to improve its efficiency and effectiveness.
- Third, a solution cannot grant foreign governments a veto authority over U.S. criminal investigations. It makes no sense to allow China or Russia, for example, the authority to prevent U.S. officers from obtaining data pursuant to SCA warrants in relation to violations of U.S. criminal law committed by their nationals and/or persons located in their jurisdictions.
- Fourth, a solution must take into account the reality that investigators often will not know the identity, nationality, or location of the account holder. Suspects commonly use the anonymity provided by internet tools to conceal themselves and their locations. The use of warrants under the SCA is often aimed at uncovering these critical facts.
- Fifth, a solution should avoid creating an incentive for other countries to create “data localization” laws. Such laws are burdensome on U.S. providers, limit access to evidence needed to assure public safety, and have been called out by the U.S. Trade Representative as a key barrier to trade. (For example, see the March 2017 Fact Sheet by the Office of the U.S. Trade Representative (“USTR”) available online at: <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2017/march/key-barriers-digital-trade>.)
- Sixth, a solution should not grant benefits or protections to foreigners that are not also granted to U.S. citizens and residents. We believe that some proposals that have been advanced would afford protections to non-U.S. citizens and residents that exceed those afforded to U.S. citizens and residents.

The Department believes that these principles can guide a legislative solution that protects public safety and national security, allows U.S. industry to compete globally, and provides a clear set of rules to guide access to data by both domestic law enforcement and our international partners.

## **B. Proposed Solutions**

Some countries, like the United States, may have privacy laws that prevent disclosure of electronic data in response to foreign legal process. Conflicts of law in this area are traditionally avoided through mechanisms such as prosecutorial discretion, court supervision, diplomacy, and economic considerations. Strictly limiting the reach of U.S. law to avoid potential conflicts with foreign laws would thus not be consistent with international practice; to the contrary, it would make the United States an outlier by unilaterally hobbling our own public safety functions, including in scenarios where no conflict is presented.

Accordingly, Congress should consider targeted amendments to the SCA that will provide for the legitimate needs of law enforcement agencies in the United States to obtain, through lawful process, electronic communications stored abroad that are relevant to U.S. criminal investigations, as well as address foreign countries' legitimate public safety needs. At the same time, it should reduce the chance that providers will be caught in conflicting obligations between U.S. and foreign laws.

To address the first issue, we recommend a simple legislative fix to reinstate the pre-*Microsoft* status quo by making clear that SCA warrants can be used to obtain data under a provider's custody or control, even if it is stored abroad. To address the needs of foreign countries and providers facing a conflict of laws, we recommend a new bilateral data-sharing framework that would protect both American and foreign citizens' privacy interests.

### *Legislative solution to the Microsoft decision*

As the *Microsoft* decision fundamentally rests on statutory interpretation, Congress can correct it through a clarifying amendment to the statute. The Department recommends legislation that would simply reinstate the status quo in place before the 2016 opinion of the Second Circuit. For years, providers routinely complied with SCA warrants, even for data that was stored outside the United States. The proposal would restore that practice by explicitly requiring providers subject to the jurisdiction of the United States to produce data pursuant to appropriate SCA process, even if the provider chooses to store that data outside the United States. In this manner, the proposal would ensure that SCA warrants remain subject to the traditional rules for compulsory process, under which "[t]he test for the production of documents is control, not location." *In re Grand Jury Subpoena Directed to Marc Rich & Co., A.G.*, 707 F.2d 663, 667 (2d Cir. 1983), *cert. denied*, 463 U.S. 1215 (1983). This proposal would affirm the domestic application of the SCA and clarify that responding to lawful process for data under a provider's custody or control does not constitute an extraterritorial application of the SCA.

### *Arguments against legislative solutions*

Many, including providers like Microsoft, have argued that reinstating the status quo would place providers in an untenable position because of conflicting laws in other jurisdictions, but that concern is overstated for several reasons. First, in many cases, where the foreign country's law does not prohibit the production of data stored in its territory, American providers would not face any conflict of law if required to produce data stored outside the United States to American law enforcement authorities pursuant to SCA process. In the years prior to the *Microsoft* decision, the Department is not aware of any instance in which a provider has informed the Department or a court that production pursuant to the SCA of data stored outside the United States would place the provider in conflict with local law.

Second, in the event there were a true conflict of laws, the Department would have the discretion whether to make a request, and to narrow or modify the request in a manner that avoids the conflict. The Department often confronts such situations in its cross-border investigations, particularly those involving records held by large financial institutions, and has typically been able to resolve them through closer inquiry or good-faith negotiation. Thus, ensuring the ability to compel production of foreign stored data does not imply that such authority will be used in a manner that creates conflict with other countries; in practice, the power is exercised with great restraint and such conflicts are exceedingly rare.

And third, even in the small number of cases in which a resolution is not reached, neither the longstanding interpretation of the SCA nor our proposal would give the Department unilateral authority to compel production in the face of a conflict of laws. Rather, when considering whether to enforce compulsory process for information located outside the United States "where such production would violate the law of the state in which the documents are located," courts apply a multi-factor balancing test based on the Restatement of the Foreign Relations Law of the United States. *United States v. Davis*, 767 F.2d 1025, 1033 (2d Cir. 1985). Under that test, courts balance factors such as "the vital national interests of each of the states", "the extent and the nature of the hardship that inconsistent enforcement actions would impose", "the extent to which the required conduct is to take place in the territory of the other state", "the nationality of the person", and "the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state." *Id.* at 1034. Those principles would continue to apply to SCA warrants, and would ensure appropriate respect for international comity without unnecessarily harming American public safety. By contrast, significantly impairing U.S. authorities' ability to obtain data stored outside the United States creates substantial harms even in cases where there is no colorable conflict of laws.

Nor would reinstating the *status quo* compromise international practice. As noted above, in many, if not most cases, enforcement of SCA process for data stored outside the United States would not create any conflict between American and foreign law, and would thus not implicate comity concerns in the first instance. But even if such a conflict may exist, the Executive Branch is well-suited to weigh international comity concerns and discern when to assert American interests, as it routinely does in cross-border contexts other than the SCA, such as subpoenas to

financial institutions and other multi-national enterprises where foreign laws may restrict disclosure. Indeed, the Department has a rigorous internal review and approval process for requests by prosecutors to compel foreign companies subject to United States jurisdiction to produce records located outside the United States. *See* U.S. Attorneys' Manual 9-13.525; Criminal Resource Manual 279. This process takes into account such factors as the timely availability of alternative methods for obtaining the records, the indispensability of the records to the success of the investigation or prosecution, and the need to protect against the destruction of records located abroad.

In this manner, American law is similar to that of other countries around the world that assert authority to compel the production of data stored outside their territory, but that—like the U.S.—take a more calibrated approach when that authority may result in a conflict of laws. Thus, concerns that reinstating the status quo will result in a “Wild West” scenario are overstated. Countries including Australia, Belgium, Brazil, Canada, Colombia, Denmark, France, Ireland, Mexico, Montenegro, Norway, Peru, Portugal, Serbia, Spain, the United Kingdom, and others already assert the authority to compel production of data stored abroad under their own laws. *See, e.g.,* Winston Maxwell & Christopher Wolf, *A Global Reality: Governmental Access to Data in the Cloud*, 2-3 (Hogan Lovells) (Updated 18 July 2012) (“Notably, every single country that we examined vests authority in the government to require a Cloud service provider to disclose customer data in certain situations, and in most instances this authority enables the government to access data physically stored outside the country’s borders, provided there is some jurisdictional hook, such as the presence of a business within the country’s borders.”). Indeed, the 55 countries around the world – including the United States -- that have joined the Budapest Convention have agreed that national laws should contain the authority for legal process to compel providers in their territory that have possession and control over digital evidence to disclose it, even when the provider chooses to store that data outside of the country. In the face of this widespread practice, restricting the United States’ ability to obtain data stored abroad would amount to a unilateral limitation with considerable disadvantage and no benefit to the American people.

#### *Bilateral frameworks for cross-border data sharing*

Addressing the significant public safety consequences of the *Microsoft* decision is an urgent priority. But we must also do more to meet the legitimate public safety needs of other countries that require access to evidence that happens to be stored or accessible in the United States, without compromising users’ legitimate privacy interests. And we must recognize that U.S. service providers seeking to compete in a global marketplace may, in some instances, face conflicting legal obligations from the many nations in which they choose to do business, and minimize those conflicts where possible. Finding solutions that satisfy both the American people and our allies may be difficult, but we are committed to improving current processes.

In particular, we recommend enacting and implementing a framework under which U.S. providers could disclose data directly to a foreign government for serious criminal investigations when that government is targeting accounts of non-U.S. persons outside the United States, provided that the United States has concluded that the foreign country's laws adequately protect privacy and civil liberties. The framework would require that the foreign government obtain authorization to access the data under its own legal system, which must include review or oversight by an independent authority, require sufficient cause and meet other legal requirements.

It would not permit bulk data collection and would not permit foreign-government targeting of any U.S. persons or persons known to be located in the United States. Moreover, it would not impose any new obligations on providers at all under U.S. law; instead, any requirement to comply with the foreign order would derive solely from the requesting country's law.

The framework would, in turn, permit reciprocal access for U.S. law enforcement to data stored abroad free of any legal barriers that foreign law might otherwise erect, provided that Congress first restores such authority. This access will become increasingly important for data located beyond U.S. borders and subject to foreign law. Under this approach, the United States and a foreign government can negotiate a bilateral agreement setting forth the terms for cross-border access to data, but only with those countries who share the United States' commitment to the rule of law and respect for privacy and civil liberties. These agreements would also be subject to audit and periodic renewal to ensure that they are being properly implemented.

The United States has for some time been working on a proposed agreement of this sort with the United Kingdom, which has made clear that its inability to access data from U.S. providers in an efficient and effective way poses a very serious threat to public safety and national security in the United Kingdom. The United Kingdom has indicated that this framework is of utmost importance, which is underscored by the appearance and testimony of Paddy McGuinness at this hearing today. If the approach proves successful, we would consider it for other appropriate countries as well.

This approach would require amendments to U.S. law, the Wiretap Act, the Stored Communications Act, and the Pen Register Statute. The amendments would lift the statutory prohibition on disclosure of communications data for lawful requests from a foreign partner with which the United States has a satisfactory executive agreement.

To succeed, any framework must establish adequate baselines for protecting privacy and civil liberties, both through the agreement and implementing legislation. For example, legislation should require the foreign country's law to have in place appropriate substantive and procedural protections for privacy and civil liberties; it should require robust targeting and minimization procedures to prevent the targeting of, and ensure the protection of, U.S. person

data; and it should require appropriate safeguards concerning the use of the data that is disclosed. In this way, the framework would ensure that there are sufficient protections for privacy and civil liberties, while permitting countries to maintain appropriate checks and balances for doing so within their existing legal framework. The framework would not require our foreign partners to adhere to standards that mirror the American legal system. However, we expect that one of the benefits of creating such a framework would be to encourage other interested countries to improve their legal protections for communications data to a higher level in order to be eligible for a similar arrangement. Thus, privacy standards abroad could be significantly enhanced.

There are a number of additional benefits to such a framework. Importantly, it would support our partners' ability to investigate serious crime, including terrorism and other transnational crimes—threats that may, in turn, also affect Americans at home and abroad. It is expected to decrease the existing burden on the MLA process. It would reduce the impetus for foreign countries to implement data localization policies, which would be harmful to U.S. commercial interests and public safety and national security, while encouraging them to develop stronger privacy protections. If Congress acts to address the Second Circuit's *Microsoft* decision, the new international framework would also help to secure reciprocal access for the United States to data abroad in an efficient, effective, and privacy-respecting manner. And it would help obviate a potential obstacle to U.S. communications service providers' ability to compete for global business by reducing the risk that providers face from potential international conflicts of laws.

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The two-part solution I have discussed represents an opportunity for Congress to meet the urgent public safety needs of the United States while furthering legitimate access to data for our foreign law enforcement partners, removing conflicts of laws faced by providers, relieving pressure on data localization, and incentivizing new protections for privacy and civil liberties around the world. The Department appreciates the opportunity to further discuss these complex issues with you, and we look forward to continuing to work with you, industry, and other relevant stakeholders. This concludes my remarks. I would be pleased to answer your questions.