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CROSS-BORDER DATA REQUESTS: EVALUATING REFORMS TO IMPROVE LAW ENFORCEMENT ACCESS

Arthur Rizer and Anne Hobson

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INTRODUCTION

Access to electronic evidence has been critical for enforcement efforts for more than a decade, especially in international investigations. Of course, the need for transnational data flow is complicated by the very nature of the borderless internet, the high volume of data and requests and long wait-times for results. These complications put pressure on domestic governments, international relations and companies engaged in internet commerce—all of which have implications for national security, international trade, privacy, human rights and innovation. Accordingly, this study analyzes different proposals for full or partial reform of the system of cross-border law enforcement demands.

THE GROWING CHALLENGE OF CROSS-BORDER DATA REQUESTS

As more and more of our activity takes place in cyberspace,[1] so too does criminal activity, and the efforts of governments to address it. To fight crime in today's world, law enforcement agencies must routinely reach outside of their national jurisdiction to get evidence or other information stored in the cloud by private companies. This presents a unique challenge for how we balance the speedy execution of these requests with civil liberties and human rights, such as privacy and due process, particularly where other governments may not share our legal systems or underlying values.

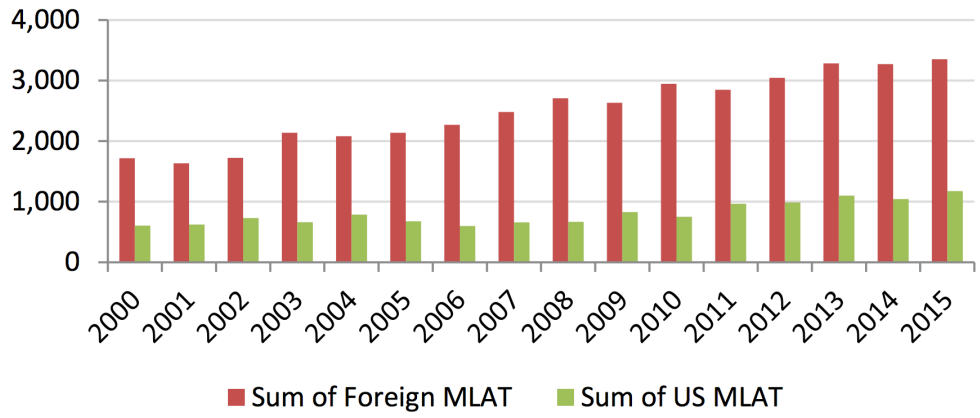
In order to obtain information across borders, law enforcement agencies rely on mutual legal assistance (MLA) requests. These are the principal mechanisms used to obtain data from another country in connection with a criminal investigation, prosecution or other proceeding. The procedures by which these requests are fulfilled are enforced through formal agreements, typically Mutual Legal Assistance Treaties (MLATs), which are ratified by Congress or sometimes through executive agreements.[2]

Formal MLA agreements are typically bilateral, but can sometimes be multilateral documents that set the terms by

1. *Measuring the Information Society Report* 2016, International Telecommunications Union, 2016. http://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2016/MISR2016-w4.pdf.

2. The main difference between MLATs and MLAAs is the manner into which the agreement is entered. In the former case, a "treaty" enters into force in the United States only after two-thirds of the Senate has given its advice and consent under Article II. On the other hand, International agreements are those entered into on any other constitutional basis. This categorizes them as "international agreements other than treaties" but they are often referred to as "executive agreements." See, e.g., "Treaty vs. Executive Agreement," U.S. Dept. of State, 2017. https://www.state.gov/s/l/treaty/faqs/70133.htm.

FIGURE I: NEW MLAT REQUESTS BY FISCAL YEAR



SOURCE: U.S. Justice Department

which governments obtain and exchange evidence or other criminal information.[3] Presently, the U.S. Department of State has established MLATs with over 60 countries.[4] While there is not an official standard process for countries without such an agreement, countries can still engage in joint investigations, ad hoc assistance or exchanges of existing data through international bodies, such as INTERPOL. Additionally, information that is determined to have value for intelligence or counterterrorism purposes is shared between nations through separate channels and may be used in criminal investigations. Notwithstanding such alternatives, MLA requests are the principal mechanism for the increasingly regular processing and exchange of criminal information between countries, particularly where making a new data request to a private company is required.

Despite its continued and growing utility, the MLA process, which was devised in the 1970s is in serious need of modernization and reform. As a 2013 report by the President's Review Group on Intelligence and Communications Technologies noted, MLA requests take an average of "10 months to fulfill, with some requests taking considerably longer" due to lack of resources and general inefficiency.[5] Furthermore, as global demands for cross-border data increase, the frustration of working within the current system is pushing nations[6] toward undesirable alternatives, such as data localization, informal information channels and stricter controls on the internet. Such a status quo is unsustainable.

While nearly all involved stakeholders are interested in reforming MLATs, they do not all agree on how it should be accomplished. Indeed, the reform debate spans a dizzying mix of industries, nationalities, civil society and other interest groups. In view of this, the present study will attempt to untangle this debate and to detail the current usage and legal context of MLATs, including relevant laws (both foreign and domestic) and significant legal cases. In so doing, we will provide a framework with which to evaluate proposals for reform through the lens of common goals. These include minimization of the compliance burden for companies or costs to government, clarification of jurisdictional legal discrepancies, limitation of secondary consequences such as data localization, the implementation of measures for transparency, the streamlining and simplification of the current MLA process, and the protection of civil liberties, such as privacy and due process of law. However, rather than to endorse a particular blueprint for reform, we will present and analyze each component proposal with these various considerations in mind.

MLATS: ORIGINS AND CURRENT USES

In the most basic terms, MLATs codify responsibilities between nations when one nation's investigative body seeks

3. While this paper primarily discusses the issue of reforming MLATs, the same issues largely apply to MLAAs, as well.

4. Office of the Legal Adviser, "Treaties in Force" U.S. Dept. of State, Jan. 1, 2016. https://www.state.gov/documents/organization/267489.pdf.

5. Richard A. Clarke, Michael J. Morrel, et al., *Liberty and Security in a Changing World: Report and Recommendations of the President's Review Group on Intelligence and Communications Technologies*, Dec. 12, 2013, pp. 226-29. https://obamawhitehouse.archives.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf.

6. For instance, the Chinese government passed a new cyber law in November 2016 that has cross-border, data-sharing restrictions and data localization requirements. However, it should be noted that the most current reporting indicates that the Chinese government is delaying the enforcement of those provisions. See, e.g., Samm Sacks, "China's Cybersecurity Law Takes Effect: What to Expect," *Lawfare*, June 1, 2017. https://www.lawfareblog.com/chinas-cybersecurity-law-takes-effect-what-expect; and Tim Starks, "Making Sense of the New Chinese Cybersecurity Law that Goes into Effect Today," Politico, June 1, 2017. http://www.politico.com/tipsheets/morning-cybersecurity/2017/06/01/making-sense-of-the-new-chinese-cybersecurity-law-that-goes-into-effect-today-220604.

information pertaining to criminal activity that is held within the jurisdiction of another. Once entering into an MLAT, the requested party must do "everything in their power" to secure the evidence being sought by the nation making the request.[7] Notably, these agreements only apply to criminal matters, although there has been some movement to expand them to include civil ones.[8]

The earliest MLAT between the United States and Switzerland was negotiated in 1973 and went into effect in 1977.[9] Other early treaties, such as those with Colombia, the Netherlands Antilles and Panama were largely driven by the war on drugs and the corresponding need to prosecute traffickers and track down laundered funds.[10]

Before MLATs, governments used letters rogatory or "letters of request" to ask for assistance from the judiciary of a foreign country.[11] Because MLA requests are pursuant to a formal treaty or agreement, the receiving party is obliged to respond.[12] On the other hand, letters rogatory are informal requests that rely on the goodwill of the court involved. For this reason, they take even longer than MLA requests to process—typically more than a year, if they are answered at all. Nevertheless, they remain widely used in countries where no relevant treaty or executive agreement is in place or when dealing with civil or administrative matters.[13]

Procedurally, the domestic effect of an MLA request is the transformation of a foreign request for information concerning criminal enterprises into enforceable court orders applicable to domestic companies or individuals. As designed, requests come to the U.S. Department of Justice (DOJ) Office for International Affairs (OIA), which routes them to the appropriate jurisdictional prosecutor or to the federal court in the District of Columbia. Then, the court secures a court order for the discovery request and returns the data to the requester.[14] The DOJ also reviews the discovery to ensure that privacy standards are met, that no civil rights are violated, that excess data are removed and any classified information is redacted.

However, MLATs are not just a tool leveraged by the U.S. government. In fact, the United States receives more than twice as many MLA requests than it makes.[15] The lengthy turnaround time for data requests has become a growing source of frustration for foreign law enforcement officials, who sometimes resort to direct contact with companies for data associated with criminal investigations. When a foreign country—whether an MLAT country or not—demands that a U.S. provider disclose communication content that is barred by U.S. law, companies must decide whether to comply with U.S. law or with a conflicting foreign one.

Concerns about the extraterritorial applicability of U.S. warrants is another jurisdictional legal issue. As more activity becomes internet-based and data-driven, the acuteness of cross-border tensions increases. For example, in *Microsoft v. United States*[16] prosecutors sought to use a U.S. warrant instead of the MLA process to force the company to produce data from an email account that was maintained on Irish servers.[17] In its refusal to comply with the U.S. warrant, Microsoft argued that a "search" takes place where the information is hosted, not where it is viewed. Microsoft lost at the district court level only to prevail in the circuit court by claiming that the district court's order had forced the company to choose between obeying the laws of one nation over another. The DOJ then filed a petition for a writ of certiorari with the U.S. Supreme Court, asking the Court to reverse the circuit court's decision, which was granted. Unless Congress acts first, the case will be decided by the Supreme Court in the 2017-2018 term.

Microsoft is not the only company adversely affected by the conflicts in the current system. Following a disputed

7. See e.g., United States-Ukraine, *Treaty with Ukraine on Mutual Legal Assistance in Criminal Matters*, S. Treaty Doc. No. 106-16, Jul. 22, 1998.

8. While MLATs are generally only used in criminal cases, some civil enforcement authorities will piggyback requests for information under the guise of a criminal matter. See, e.g., Office of Chief Counsel, Enforcement Division, *Enforcement Manual*, U.S. Securities and Exchange Commission, Oct. 28, 2016, pp.67-68. https://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

9. United States-Switzerland, *Treaty on Mutual Assistance in Criminal Matters*, 27 U.S.T.S. 2019, T.I.A.S. No. 8302 (hereinafter *Mutual Assistance Treaty*), signed May 25, 1973; United States-Switzerland, *Treaty between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters*, 27 U.S.T. 2019, T.I.A.S. 8302, Jan. 23, 1977.

10. Ethan A. Nadelmann, *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement* (University Park, PA: Penn State University Press, 1993), pp. 341-75; see also, Jimmy Gurulé, "The 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances--A Ten Year Perspective: Is International Cooperation Merely Illusory?", 22 *Fordham Int'l. L.J.* 74:55 (1998), 90-91.

11. 28 U.S.C. §§ 1781 and 1782.

12. Federal Judicial Center, "Mutual Legal Assistance Treaties and Letters Rogatory: A Guide for Judges," *International Litigation Guide*, 2014. http://www.ca9.uscourts.gov/judicial_conference/2015/reference_materials/Day3/human_trafficking/mlat-lr-guide-funk-fjc-2014.pdf. See also, Michael A. Rosenhouse, "Annotation, Validity, Construction, and Application of Mutual Legal Assistance Treaties (MLATs)," 70 A.L.R. FED. 2D 375, at §§ 6-7.

13. New York City Bar Association, "28 U.S.C. § 1782 As a Means of Obtaining Discovery in Aid of International Commercial Arbitration—Applicability and Best Practices," Committee on International Commercial Disputes," February 29, 2008. http://www.nycbar.org/pdf/report/1782_Report.pdf.

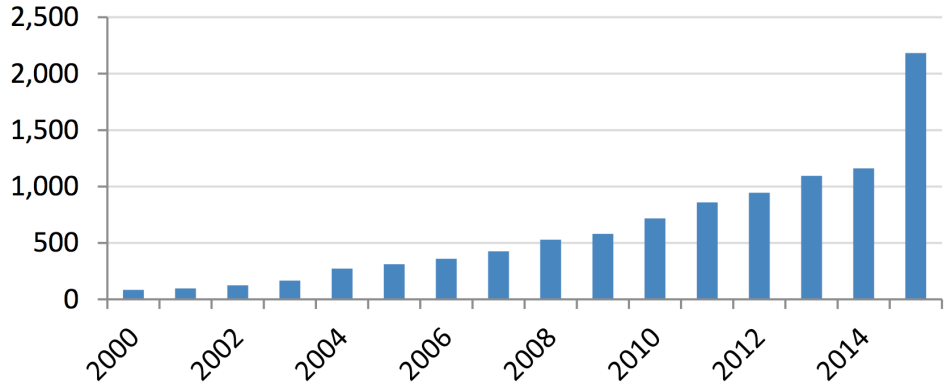
14. For a general description of the OIA and its mission see the Office's webpage at https://www.justice.gov/criminal-oia.

15. *Performance Budget: FY 2017 President's Budget*, U.S. Department of Justice Criminal Division, 2017, p. 24. https://www.justice.gov/jmd/file/820926/download.

16. No. 14-2985 (2d. Cir. 2016); See, *In re Warrant to Search a Certain E-mail Account Controlled & Maintained by Microsoft Corp.*, 15 F. Supp. 3d 466, 475 (S.D.N.Y. 2014) [hereinafter *Microsoft Case*] wherein Magistrate Judge Francis opined that the U.S. had only sixty official MLATs and concluded that since U.S. law enforcement officials did not have any other legislative means when executing a search or seizure in foreign nations, Congress must have intended for the Stored Communications Act to apply extraterritorially.

17. See *Microsoft Case*, p. 468. This is interesting considering the Irish Government made it known that they would consider a data transfer to U.S. law enforcement officials "should [an MLAT request] be made." Ibid.

FIGURE 2: FOREIGN MLAT REQUESTS FOR COMPUTER RECORDS BY FISCAL YEAR



SOURCE: U.S. Justice Department

2016 court order, Brazilian authorities arrested a Facebook executive regarding a data request for messages.[18] Accordingly, companies that provide global internet services, like Facebook, Microsoft and Google, face the increased costs of doing business associated with the navigation of such legal and jurisdictional quagmire.[19]

The problem is only getting worse. According to the DOJ, the caseload for attorneys that process MLA requests increased 81 percent over the past six years.[20] Additionally, it estimates that by 2020, the projected extradition and MLAT backlog will reach 18,000 requests.[21] While the OIA has a policy to triage and even refuse less serious cases on *de minimis* grounds, this nevertheless causes tension internationally. Indeed, the current MLAT agreements did not adequately contemplate capacity issues and have no such exceptions built in to adjust for backlog.[22]

Notably, there have been some reforms made in recent years. In 2009, Congress passed the Foreign Evidence Efficiency Act.[23] This statute was designed to streamline the MLA process by permitting "the United States to respond to requests by allowing them to be centralized and by putting the process for handling them within a clear statutory system."[24] This added new flexibility into the system. For instance, a single prosecutor can now pursue data in multiple jurisdictions within the United States, which makes the process more efficient. It also created a venue in D.C.'s District Court to issue orders to compel foreign assistance requests.[25] This allows OIA to directly request information rather than to work with local U.S. Attorneys. Yet, OIA claims that due to a lack of resources, they have been unable to actualize many of these changes fully and still rely on the 93 U.S. Attorney's Offices (USAOs) to handle many of the requests.[26] According to OIA, the Assistant U.S. Attorneys (AUSAs) assigned to these cases often neglect their MLAT cases due to active caseloads with speedy trial and public safety restrictions. Moreover, the system contains certain inefficient redundancies, as work handled by USAOs is duplicated by the OIA in its efforts to ensure that foreign requests are consistent with DOJ and federal policy. While these reforms have helped, they fall short of what is needed to diffuse international tensions over the inefficiency of the current process.

Put simply, all stakeholders are underserved by the current legal process for MLATs. If nothing is done, we are likely to see a greater proliferation of data localization laws or other undesirable controls on the internet. But while there are numerous proposals for reform, different actors have different priorities and the vast array of stakeholders have not yet consolidated around one particular approach. While some reforms can be instituted unilaterally through executive orders, agency rules, or passing new legislation in Congress, many others will require the participation and assent

18. Brad Haynes, "Facebook executive released from jail in Brazil," *Reuters*, March 2, 2016. http://www.reuters.com/article/us-facebook-brazil-idUSKCN0W4188. In 2014, a Microsoft executive was arrested in Brazil for his company's refusal to produce Skype data that related to the target of a criminal investigation. See, e.g., Elias Groll, "Microsoft vs. the Feds, Cloud Computing Edition," Foreign Policy, January 2016. http://foreignpolicy.com/2016/01/21/microsoft-vs-the-feds-cloud-computing-edition/.

19. See, e.g., Andrew K. Woods, *Data Beyond Borders: Mutual Legal Assistance in the Internet Age*, Global Network Initiative, January 2015. https://globalnetworkinitiative.org/sites/default/files/GNI%20MLAT%20Report.pdf.

20. *FY 2016 President's Budget*, U.S. Department of Justice Criminal Division, pp. 26-27. https://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/02/02/10._criminal_division_crm.pdf.

21. Ibid.

22. Ibid. For example, Germany sent a letter criticizing DOJ's *de minimis* policy stating that the agreement creates an obligation to give legal assistance and does not provide a mechanism to refuse merely on the grounds that the crime is not serious enough.

23. 18 U.S.C. § 3512 (2009).

24. 155 Cong. Rec. S6809–10 (statement of Sen. Whitehouse, daily ed. June 18, 2009).

25. 18 U.S.C. § 3512.

26. Offices of the United States Attorneys, "Executive Office for United States Attorneys," United States Department of Justice, August 17, 2016. https://www.justice.gov/usao/eousa; *FY 2016 President's Budget*. https://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/02/02/10._criminal_division_crm.pdf .

of other nations, a process that would require updates to dozens of existing treaties and agreements.

The following sections examine MLAT reform proposals that fall into two broad categories: unilateral MLA process reforms in the United States and the reform of international agreements to which the United States is a party.

MLA PROCESS REFORMS IN THE UNITED STATES

Direct Data Requests

A legislative proposal released in July 2016 by the DOJ suggests that bilateral international agreements can help to resolve cross-border tensions.[27] To do so, it proposes that the United States would negotiate information-sharing agreements with countries that meet certain standards. To determine their eligibility, the DOJ would evaluate certain human rights, rule of law and due process factors established by Congress before the United States could enter into an agreement with the particular country. If these conditions are deemed satisfactory, these "pre-screened" nations would be permitted to make direct data demands of U.S. providers under their own domestic laws.

While some proponents proffer this would take the burden off the current system by alleviating the volume of MLA requests, the proposal has been criticized by civil liberties groups for lack of transparency and human rights protections.[28] In particular, critics have argued that the proposed standards are not stringent enough and that participating countries should have to meet higher ones that include the respect of human rights and the rule of law, and the preservation of the free flow of data.[29] Other experts have suggested allowing countries to make requests to U.S. providers in serious cases without U.S. government intervention if they commit to baseline privacy, human rights and fundamental due process equities. [30] This reform would actually incentivize nations to raise their privacy, human rights and due process principles in order to avail them themselves of the more efficient process.[31]

Currently, the United States and the United Kingdom are negotiating such an agreement in accordance with the DOJ proposal.[32] This will serve as an opportunity to codify new data-sharing norms and set the stage for their adoption elsewhere. The agreement allows U.K. law to apply when the only connection to the United States is the location of the data. Critics argue this agreement still amounts to a reduction of protections for U.S. citizens if the target of a data request is communicating with a U.S. person.[33]

If the debate over transparency and accountability can be resolved, the agreement itself can serve as a framework for other countries who are eligible to meet the preset standards, and Congress could facilitate this process with enabling legislation.[34] This could have a significant impact to reduce stress on the MLAT system. Other MLAT agreements due for renegotiation are further opportunities for reform, however, not all countries will be able to meet the requirements for this process.

Another challenge for the direct request approach is modernizing the statutory language that governs email privacy in the United States. This falls under the Electronic Communications Privacy Act of 1986 (ECPA). However, originally a forward-thinking bill designed to protect privacy, the ECPA has gone three decades without a major update and thus is out-of-step with today's technology.[35]

As it is currently written, the ECPA poses a significant challenge to this approach for MLA requests. In particular, it contains a blocking provision that prevents disclosure to foreign law enforcement of the contents of an electronic communication without the issuance of a U.S. warrant.[36] Notably, however, metadata is treated differently from content and companies may disclose metadata to a foreign government if they choose to do so with or without a warrant.[37] Indeed, the ECPA only bars disclosing metadata to U.S. governmental entities, defined specifically as a "department or agency of the United States or any State or political subdivision thereof," thereby excluding foreign law enforcement officials from

27. Office of Legislative Affairs, "Letter from Peter J. Kadzik, Assistant Attorney General to Joseph R. Biden," United States Department of Justice, July 15, 2016. http://www.netcaucus.org/wp-content/uploads/2016-7-15-US-UK-Legislative-Proposal-to-Hill.pdf.

28. Drew Mitnick notes that a bypass would decrease already lacking transparency issues because the determination of whether a country qualifies would likely be at the discretion of the DOJ, and would most likely lack any judicial review. See, Drew Mitnick, "A diagnosis: Why current proposals to fix the MLAT system won't work," Access Now, May 2, 2017. https://www.accessnow.org/diagnosis-current-proposals-fix-mlat-system-wont-work.

29. Center for Democracy and Technology, "Cross-Border Law Enforcement Demands: Analysis of the U.S. Department of Justice's Proposed Bill," August 17, 2016. https://cdt.org/files/2016/08/DOJ-Cross-Border-Bill-Insight-FINAL2.pdf.

30. Google, "Digital Security and Due Process: Modernizing Cross-Border Government Access Standards for the Cloud Era," June 22, 2017, 7. https://blog.google/documents/2/CrossBorderLawEnforcementRequestsWhitePaper_2.pdf.

31. Ibid.

32. Jennifer Daskal, "A New UK-US Data Sharing Agreement: A Tremendous Opportunity, If Done Right," Just Security, February 8, 2016. https://www.justsecurity.org/29203/british-searches-america-tremendous-opportunity/.

33. Ibid.

34. Ibid.

35. Orin S. Kerr, "The Next Generation Communications Privacy Act," *University of Pennsylvania Law Review* 162:373 (2014). http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1546&context=penn_law_review.

36. 18 U.S.C. 2702.

37. 18 U.S.C. 2702(c)(6); 18 U.S.C. 2711(4).

the definition.[38] This provision is currently utilized by U.S.-headquartered companies to disclose "data that ranges from things like subscriber names and addresses, IP addresses, and credit card information."[39]

On April 27, 2017, the unanimous passage of a broadly-supported ECPA reform bill, the Email Privacy Act, by the House of Representatives presents a necessary opportunity for reform in the 115th Congress.[40] As the bill moves into the Senate, there is an historic opportunity to amend its language to address how the MLA process interfaces with U.S.-based email service providers. Specifically, it could address the blocking provision by permitting companies to disclose electronic data in response to law enforcement requests from countries with which the U.S. has made reciprocal bilateral agreements regarding the transfer of such data. Additionally, it could close the metadata provision and allow for the creation of a regular legal process for its disclosure. This is not to suggest that there is widespread abuse of this provision or that, as a general rule, companies are cavalier in disclosing metadata to non-U.S. government entities. In fact, it is likely that the ability to release metadata relieves pressure from foreign governments who would potentially be more aggressive in bringing actions against U.S. companies and their employees.

One proposed framework for updating the blocking provision would be to permit U.S.-based providers to respond directly to foreign government requests for data if three conditions are met:[41] 1) the requesting government has to have a legitimate interest in the stored content of communications for criminal activity; 2) the target must be physically located outside the United States; and 3), the target must not be a U.S. citizen or legal permanent resident. Furthermore, the requesting country must meet basic human rights and due process standards, as well as comply with minimal standards governing data requests. Such standards require that the type, amount and target of the data be specified, that the crime in question is severe and punishable by law, that the data are relevant and that collection is authorized by an independent or judicial body.

There have been criticisms of this approach. Depending on how each provision is enacted, these reforms could remove the probable cause requirement for a wider range of requests by foreign governments. Thus, countries with a lower legal standard than the United States could qualify for favorable treatment. In some cases, this would apply a lower burden of proof to demands for information about nationals from a third-party country. In purely domestic cases, it makes sense to replace this requirement with the standards of the requesting country when a non-U.S. target is in question. For those countries that do not have adequate privacy protections, this proposal could allow them to circumvent the more stringent human rights standard now employed by the United States.[42] In the end, reform only makes sense if it both ensures civil liberties and human rights protections are met, and the reform makes the system more efficient.

DOJ Transparency for U.S. Data Requests

The percentage of MLA requests that relate to electronic data rather than physical evidence is not known, however, filling this dearth of knowledge will allow policy makers to be better informed about how to approach reform. In 2013, the advocacy group Access Now sent a Freedom of Information Act request to the DOJ asking for a list of countries that have requested information and the type of information sought in the MLA process.[43] The DOJ responded that there were no such records, however, Access Now appealed the decision and won, though they have not yet received the requested information. Access to the "metadata" of MLAT filings can illuminate the nature of the problem and guide us to a more targeted solution. The DOJ should categorize and report its reasons for denying MLA requests. For example, if the DOJ provided data on the number of requests filed incorrectly, then educational campaigns or direct outreach to law enforcement could serve as a short-term solution.

Some information on the number of certain types of data requests is voluntarily provided by tech companies in the form of transparency reports. The issuance of a similar DOJ transparency report could be a good vehicle to provide aggregate information on the quantity of data requests made, the type of data sought, categories of crimes for which data

38. 18 U.S.C. 2711(4).

39. Jennifer Daskal, "Law Enforcement Access to Data Across Borders: The Evolving Security and Rights Issues," *Journal of National Security Law and Policy* 8:473 (2016), 478-79. http://jnslp.com/wp-content/uploads/2016/11/Law_Enforcement_Access_to_Data_Across_Borders_2.pdf; Apple, *Report on Government Information Requests: July 1-December 31*. 2014, 2015. http://www.apple.com/legal/privacy/transparency/requests-20141231-en.pdf; Facebook, *Government Requests Report: June 2013-December 2016*, 2017. https://govtrequests.facebook.com/; Google, *Transparency Report: Requests for User Information* (Dec. 2009 – June 2015), https://transparencyreport.google.com/user-data/overview; Microsoft, *Law Enforcement Requests Report: Jan. 2013 – Dec. 2016*, 2017. https://www.microsoft.com/en-us/about/corporate-responsibility/lerr/. Metadata is powerful and can reveal extensive information pertaining to religion, social positions and even sleep patterns. See, e.g., Ellen Nakashima, "Metadata Reveals the Secrets of Social Positions, Company Hierarchy, Terrorist Cells," *Washington Post*, June 15, 2013. https://www.washingtonpost.com/world/national-security/metadata-reveals-the-secrets-of-social-position-company-hierarchy-terrorist-cells/2013/06/15/5058647c-d5c1-11e2-a73e-826d299ff459_story.html?utm_term=.6a1d3e1b19aa.

40. H. R. 387, Email Privacy Act, 115th Cong. https://www.congress.gov/115/bills/hr387/BILLS-115hr387ih.xml. However, the House version currently lacks substantive measures specific to improving MLA requests.

41. Jennifer Daskal and Andrew K. Woods, "Cross-Border Data Requests: A Proposed Framework," Just Security, November 24, 2015. https://www.justsecurity.org/27857/cross-border-data-requests-proposed-framework/.

42. Greg Nojeim, "MLAT Reform Proposal: Eliminating U.S. Probable Cause and Judicial Review," *Lawfare*, December 4, 2015. https://www.lawfareblog.com/mlat-reform-proposal-eliminating-us-probable-cause-and-judicial-review.

43. "FOIA Request to U.S. Department of Justice," Access Now, February 21, 2013. https://www.accessnow.org/cms/assets/uploads/archive/docs/foia/MLAT%20original%20-%20DOJ.pdf?redirected.

are sought and the countries making the requests.[44] To get an idea of the number of cases stalled by backlogged requests would allow policymakers to understand the severity of the issue so that they may pursue reform or allocate resources to address specific challenges.

Modernization of the DOJ's Internal Process

A number of specific proposals have been suggested to improve the DOJ's internal process.

These suggest that the streamlining of systems, and the addition of more resources and better training for law enforcement officials (foreign and domestic) have the potential to reduce backlog and expedite the fulfillment of requests within the DOJ.

One of the major reasons MLAs take so long is because the apparatus for requests is not standardized. One offered solution is to digitize and simplify the MLA request process through standardized electronic forms and online tracking.[45] This could be as simple as adding fields for probable cause, the communications requested and the statute of the particular crime being investigated. A move to an electronic system would have the added benefit of making a searchable MLAT database where attorneys could use search terms to find other legally-related requests and borrow from them. This, coupled with better training, may help to reduce the submission of incomplete requests and limit the waste of resources consumed by their review.[46]

Some commentators recommend the creation of a specialized court or a "rocket docket" that has particular institutionalized experience in the MLAT field.[47] Proponents argue that staff and jurists will develop expertise in the MLA process and over time, will develop consistency and speed in their rulings.

Yet, there is a major flaw with such a jurisdictional concentration scheme: bad law can fester when there is legal tunnel vision and split circuits[48] are prevented.[49] A trade-off of this protection for better efficiency may seem worth it, but it is important to remember that MLA requests involve the transfer of information that is often used to put people in jail. Accordingly, it is an important safeguard to avoid bad precedent.

Furthermore, there is already expertise built into the MLAT system. In the OIA, specialized attorneys review all requests to ensure they meet certain thresholds. This is not to say, however, that the involvement of field prosecutors (AUSAs) is a bad thing. Having secondary reviews of these important requests by non-OIA attorneys ensures that MLA requests do not fall prey to the insularity of the OIA.[50]

Most importantly, these streamlining proposals are partial solutions and lack long-term structural fixes, as transnational data flow and retention will only increase. For this reason, to reform the MLAT system as a whole is necessary not to keep up with demand, but to guarantee the endurance of this important law enforcement tool.

We should also not assume that merely allocating more staff and resources to the DOJ is all it will take to fix the underlying problems. *More* government rarely translates into a *more efficient* government. More attorneys may be a necessary component, but this must go hand in hand with the development of a more efficient and flexible process that is capable of keeping up with the ever-changing technical landscape.

Differing Treatment for Purely Domestic Requests

One way to approach the issue of cross-border requests from law enforcement would be to apply different rules to different categories of data, rather than to different countries. Such a proposal would apply to requests for content and non-content and could apply special rules to emergency requests.[51] A proposal laid out by the Center for Democracy and Technology, for example, would allow a foreign government's laws to apply for purely domestic requests (i.e., requests where the citizenship, location of the victim, subject and perpetrator are in the same requesting country), which could alleviate some of the current backlog.[52] In order to ensure reciprocity, the foreign government would have to agree to treat an equivalent U.S. request in the same way, and would also have to meet the applicable human rights standards. The proposal recognizes that human rights standards for surveillance laws would have to be developed in a manner that has international credibility. While it is unclear how many requests this would affect, it would alleviate some of the concern associ-

44. This type of transparency is proposed in S. 2986, International Communications Privacy Act, 114th Cong. https://www.congress.gov/bill/114th-congress/senate-bill/2986/text.

45. Andrew Woods, "Data Beyond Borders," Global Network Initiative, pp. 8-9 https://globalnetworkinitiative.org/sites/default/files/GNI%20MLAT%20Report.pdf.

46. Ibid. Much of this reform is offered in the International Communications Privacy Act. S. 2986, https://www.congress.gov/bill/114th-congress/senate-bill/2986/text.

47. Yonatan L. Moskowitz, "MLATS and the Trusted Nation Club: The Proper Cost of Membership," Yale Journal of International Law 41:1 (2016), 6. https://campuspress.yale.edu/yjil/files/2016/09/moskowitz-macro-finished-1-1s9vmcy.pdf.

48. A circuit split occurs when two or more appeals courts issue conflicting rulings. This acts as a primary mechanism for cases to reach the Supreme Court.

49. Diane P. Woods, "Is It Time to Abolish the Federal Circuit's Exclusive Jurisdiction in Patent Cases?", *Chicago-Kent Journal of Intellectual Property* 13:1 (2013), 3.

50. Moskowitz, 6.

51. It should also be noted that U.S. legal standards often differ from the rest of the world. In view of this, if we require foreign law enforcement to apply U.S. standards we may want to consider training programs to help facilitate such a requirement.

52. Greg Nojeim, "MLAT Reform: A Straw Man Proposal," Center for Democracy & Technology, September 3, 2015. https://cdt.org/insight/mlat-reform-a-straw-man-proposal/.

ated with the application of U.S. standards and procedures to situations outside our borders.

The DOJ would still receive the disclosed information from U.S. companies and apply its standards for dual criminality, human rights and freedom of expression. It would also continue to ensure that the requests comply with applicable foreign laws. Further, the DOJ would still be responsible for removing any information provided that is not relevant to the specific request.

This proposal alleviates request backlog, improves flow, sets baseline human rights requirements for participating countries, clarifies the role of companies in this specific class of investigations, helps U.S. cases through reciprocity standards and reduces the pressure to localize data. And perhaps most importantly, it would not require new treaty negotiations, only an amendment to U.S. law.

REFORMS TO INTERNATIONAL AGREEMENTS

Standardized Multilateral Legal Assistance Protocols

International cooperation is a necessary component of mutual legal assistance for law enforcement. Thankfully, we already have vehicles to define and enhance this cooperation. In a 2013 policy brief, the European Centre for International Political Economy points out that ongoing international discussions, such as free trade agreements, can ease the establishment of a multilateral legal assistance protocol (MLAP).[53] Historically, free trade agreements and treaty negotiations have served as internationally binding documents that lay out standards of engagement and cooperation, along with safeguards for individual rights. The respect of certain safeguards would be a precondition of a successful MLAP in an agreement. This proposal is unique in its advancement of "negative rules" that prevent governments from requiring data localization or from advancing other efforts to fragment the internet or apply laws extraterritorially.[54]

One such protocol is the development of an international treaty to set a new warrant standard for government access to consumer data held by tech companies.[55] This would allow international judges to operate on a clear standard, as opposed to interpreting the current variety of problematic state-issued warrants.

Most Favored Nation Design

Another proposal that would help alleviate the backlog and ensure more efficient processes in the future is the creation of a membership of nations who agree to give other members expedited MLA request processing. Member states would screen applicant states who desire inclusion. Once a member, law enforcement would be entitled to faster transfer of data for particular cases.[56] Some variants of this recommendation allow for member states to directly request data from companies within other member states. States could also increase MLAT scrutiny for nations who have a history of abuse and lower process thresholds for trusted allies.[57]

The Visa Waiver Program is a current example of "most favored nation" design that can serve as a model for cross-border exchange of data by law enforcement. As global travel became a norm, this system was devised to allow people to cross borders more easily.[58] Individuals from one of 38 participating countries can travel to and from the United States without completing a visa interview. The selected nations meet prescribed standards that allow them to participate, and in exchange, provide reciprocal treatment of U.S. citizens traveling abroad. Similarly, countries can be required to meet baseline standards in order to more easily access electronic evidence.[59] These could include adherence to probable cause, dual criminality and consistency with U.S. free speech requirements.[60] Whereas the Visa Waiver Program is a policy response to increased movement of people across

53. Hosuk Lee-Makiyama, "A Multilateral Legal Assistance Protocol: Preventing Fragmentation and Re-territorialisation of the Internet," *European Centre for International Political Economy Policy Briefs* No. 9/2013, September 2013. http://www.ecipe.org/app/uploads/2014/12/PB9.pdf.

54. These are rules that prevent governments from "re-territorializing" data, or from creating regulations with the intent of localizing data.

55. George Lynch, "UN Privacy Office Seeks Global Data Warrant Standard," *Bloomberg Law: Privacy & Data Security*, March 9, 2017. https://www.bna.com/un-privacy-office-n57982084972/.

56. Ian Brown and Douwe Korff, "Digital Freedoms in International Law: Practical Steps to Protect Human Rights Online," Global Network Initiative, 2012. https://globalnetworkinitiative.org/sites/default/files/Digital%20Freedoms%20in%20International%20Law.pdf

57. Moskowitz, 6.

58. Bureau of Consular Affairs, "Visa Waiver Program," U.S. Dept. of State, 2017. https://travel.state.gov/content/visas/en/visit/visa-waiver-program.html.

59. Peter Swire and Justin D. Hemmings, "Mutual Legal Assistance in an Era of Globalized Communications: The Analogy to the Visa Waiver Program," *Georgia Tech Scheller College of Business Research Paper* No. WP 38, April 18, 2016, pp. 694-95. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2728478.

60. Further, MLATs often have a dual-criminality requirement built in. That is, the act being investigated is a crime in both the requesting and requested nation (or a substantially similar crime). See e.g., United States-Switzerland, *Treaty on Mutual Assistance in Criminal Matters*, May 25, 1973, 27 U.S.T. 2019 ch. I, art. 4, para. 2 [entered into force on Jan. 23, 1977], which states that an action is compulsory if an offense "would be punishable under the law in the requested State if committed within its jurisdiction and is listed in the Schedule"); United States-Hong Kong, *Agreement on Mutual Legal Assistance in Criminal Matters*, Apr. 15, 1997, 1997 U.S.T. 115, art. 3, para. 1(d), (1997) [entered into force on Jan. 21, 2000]; United States-South Korea, *Treaty on Mutual Legal Assistance in Criminal Matters*, Nov. 23, 1993, 1993 U.S.T. 135, art. 3, para. 1(d), (1995) [entered into force on May 23, 1997]. However, some MLATs have eliminated the dual-criminality requirements. See *Inter-American Convention Against Terrorism*, art. 11, June 3, 2002, S. Treaty Doc. No. 107-18. Indeed, some commentators have noted that the dual- criminality protection has quietly disappeared in recent treaties. See, e.g., Sarah Cortes, "MLAT Jiu-Jitsu and Tor: Mutual Legal Assistance Treaties in Surveillance," *Richmond Journal of Law and Technology* 22:2 (2015), 123. Some fear the abandonment of dual criminality will open the United States to partner with law enforcement investigations that relate to homosexuality or other status offenses.

borders, MLAT reform is a policy response to the increased movement of data across borders. To pursue a visa waiver model through statutory change may allow more flexibility than to renegotiate or re-ratify a treaty, and may also be easier to amend after the fact.[61] One clear drawback is that a similar program for criminal data sharing would take years to implement and even longer for countries to meet eligibility requirements.

Qualified Single Point of Contact

The establishment of an office in a foreign country that can act as a single point of contact (SPOC) for requests can also simplify and streamline the MLA process.[62] The concept of an SPOC is not foreign to the MLA process, as they have been used for administrative purposes.[63] A request from a designated SPOC office in a foreign country would benefit from streamlined procedures and could receive different legal treatment and training, much like we see with nations who participate in the Visa Waiver model. The assessment, monitoring and sanctioning of a single office is an easier task for the United States, especially with respect to large countries that otherwise would be more fragmented and require greater resources. More direct communication can build trust, cooperation and expertise.

Promoting the Adoption of Civil Liberties Standards

To ensure that civil liberty interests are still central to the reform effort is critical to building just bilateral agreements. Legal access to evidence in all forms is vital to the function of the justice system. When cases fall through the cracks because of lagging data requests, criminals evade jail and individuals are harmed. In other cases, digital evidence can clear a defendant and prevent individual suffering. For these reasons, it is important to keep in mind the impact this process can have on individual lives across the globe, and to include safeguards for civil liberties, such as privacy, due process and human rights in any framework for cross-border law enforcement requests for data.[64] Accordingly, requests must be limited in target and in timeframe, must conform with U.S. probable cause standards, must be related to a punishable crime that is also a crime in the United States and must not be used to infringe upon free speech. The U.N.'s "Necessary and Proportionate" principles include 13 guidelines applicable to cross-border communications that can serve as a framework to ensure that countries participating in agreements respect human rights.[65] Further, foreign governments must notify the target of the request, and limit the collection and storage of the target's data. Finally, a system of audits, transparency requirements and sanctions must be included to enforce these baseline standards.

CONCLUSION

In the absence of MLAT reform, countries will find other less-desirable ways to access data at the expense of individual privacy, human rights and the growth of the digital economy.

The status quo serves as a diplomatic thorn in the side of the United States and it hampers continued U.S. leadership and competitiveness in the data-driven economy. The alternative to U.S. leadership with respect to reform is the further pursuance by foreign governments of laws that mandate data localization, increased surveillance, the implementation of anti-encryption regimes and efforts to circumvent legal frameworks through which to access user data.[66]

What we have historically understood as "jurisdiction" has been upended—the very nature of data are now transnational and gone is the assumption that data related to a particular crime will be physically located in close proximity to where it took place. This change has created a barbed system that is badly in need of reform.

Bilateral agreements, such as the one between the United States and the United Kingdom can create avenues for the exchange of electronic evidence that clarify legal discrepancies and jurisdictional issues, as they provide baseline rights protections. This can simplify the process for the submission of data requests and allow law enforcement to receive necessary evidence faster. It can also relieve pressure for countries to implement data localization policies or turn to international bodies[67] to exert control over internet policy debates. However, there are still hurdles and issues that need to be addressed.

During the construction of the international agreement and underlying standards, it is important to be transparent about progress and provide opportunities for industry, the

61. Ibid.

62. Peter Swire and Deven Desai, "A 'Qualified SPOC' Approach for India and Mutual Legal Assistance," *Lawfare*, March 2, 2017. https://www.lawfareblog.com/qualified-spoc-approach-india-and-mutual-legal-assistance.

63. Ibid.

64. Google, "Digital Security and Due Process: Modernizing Cross-Border Government Access Standards for the Cloud Era," June 22, 2017, 7. https://blog.google/documents/2/CrossBorderLawEnforcementRequestsWhitePaper_2.pdf

65. "Necessary and Proportionate: International Principles on the Application of Human Rights to Communications Surveillance," United Nations' Human Rights Council, May 2014. https://necessaryandproportionate.org/files/2016/03/04/en_principles_2014.pdf. These principles were developed by civil society groups. See, e.g., Amie Stepanovich, "Access releases implementation guide to be used for surveillance legal reform and advocacy," Access Now, May 3, 2015. https://www.accessnow.org/access-releases-implementation-guide-surveillance-necessary-proportionate/.

66. Daskal, "A New UK-US Data Sharing Agreement." https://www.justsecurity.org/29203/british-searches-america-tremendous-opportunity.

67. Like, for example, the International Telecommunication Union or the United Nations.

DOJ, civil society and other stakeholders to give feedback. To obscure this process can result in agreements that fail to respect due process or baseline human rights.[68] Accordingly, to ensure stakeholder engagement while developing data request frameworks abroad can help to identify and mitigate concerns.

Further, an ideal reform proposal will balance a variety of sometimes competing needs. In particular, it should: increase the transparency of the MLA process; enable law enforcement legal access to electronic evidence in an efficient manner; decrease compliance and administrative costs to industry and government; simplify the process for submitting data requests and receiving responses; clarify legal discrepancies and jurisdictional issues; and advance human rights protections.

In the short term, unilateral efforts to lower transaction costs and increase funding for U.S. agencies engaging in the MLA process will alleviate international frustrations and encourage the use of legal channels for acquiring electronic evidence. Yet, as more activity moves online, long-term structural reform regarding the way we handle cross-border data requests—beyond the low-hanging fruit—will be necessary. These are difficult questions that will involve a variety of trade-offs, technical considerations and the intricacies of global diplomacy. While there are no easy solutions, the status quo is untenable in the long term and thus we must chart a path forward.

Despite formal constraints, the United States has great power to institute and encourage reform because email service providers and other internet companies are predominantly headquartered here. Additionally, we can shape a new reform standard by starting with the largest countries, or by creating new multilateral agreements or updating existing ones, such as those with the European Union.[69] Because of the United States' status in the world, it has both the power and responsibility to take the lead.

ABOUT THE AUTHORS

Arthur Rizer is a senior fellow and the national security and justice director at the R Street Institute. Arthur also worked as a federal prosecutor for the U.S. Department of Justice, as a police officer and a law professor.

Anne Hobson is an associate fellow of the R Street Institute. Anne is currently a doctoral student in economics at George Mason University.

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68. Nojeim, "MLAT Reform Proposal." https://www.lawfareblog.com/mlat-reform-proposal-eliminating-us-probable-cause-and-judicial-review.

69. "Agreement on mutual legal assistance Between the European Union and the United States of America," *Official Journal of the European Union* L181/34 (July, 19, 2003). http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:181:0034:0042:EN:PDF.