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UNITED STATES MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

B. JANICE ELLINGTON
U.S. MAGISTRATE JUDGE

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July 14, 2003

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, D.C. 20544

Re: Federal Rule of Criminal Procedure 41

Dear Mr. McCabe:

As a magistrate judge, I am routinely asked to issue out-of-district search warrants for electronic information (typically in child pornography cases). Many of my colleagues believe that authority to issue such warrants is found in 18 U.S.C. § 2703(a). I do not agree because the statute requires compliance with the Federal Rules of Criminal Procedure, and Rule 41(b) permits the issuance of out of district search warrants only in terrorism cases. I am writing to request that the Committee consider an additional amendment to Fed. R. Crim. P. 41 to align it with the changes made to § 2703(a) by the USA Patriot Act.

Title 18, United States Code, Section 2703(a), requires a search warrant for the contents of electronic communications in storage for 180 days or less:

(a) Contents of wire or electronic communications in electronic storage.— A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications

system for one hundred and eighty days or less, only pursuant to a search warrant using the procedures described in the Federal Rules of Criminal Procedure *by a court with jurisdiction over the offense under investigation* or equivalent State warrant. . . . (emphasis added).

The statute purports to permit the issuance of out-of-district warrants for electronic information in *any* case—not just in a terrorism investigation—but also requires compliance with the Federal Rules of Criminal Procedure. Rule 41(b) is not worded as broadly:

(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge with authority in the district—or if none is reasonably available, a judge of a state court of record in the district – has authority to issue a warrant to search for and seize a person or property located within the district;

(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed; and

(3) a magistrate judge – *in an investigation of domestic terrorism or international terrorism (as defined in 18 U.S.C. § 2331) – having authority in any district in which activities related to the terrorism may have occurred, may issue a warrant for a person or property within or outside that district* (emphasis supplied).

The Rule is silent as to electronic communications. Rather than having to debate (1) whether an electronic communication is property, and if so (2) how its location is determined, I suggest that a fourth subsection, pertaining only to electronic communications, be added to the Rule 41(b):

(4) a magistrate judge in a district with jurisdiction over an offense under investigation may issue a search warrant pursuant to 18 U.S.C. § 2703(a) to a provider of electronic communications inside or outside that district requiring the disclosure by such provider of electronic communications of the contents of a wire or electronic communication that is in

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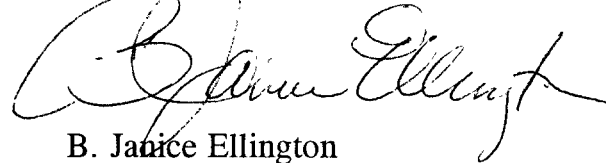
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electronic storage in an electronic communications system for one hundred and eighty days or less.

The language of the proposed amendment is suggestive only. I expect that members of the Committee may be able to improve upon it. Because 18 U.S.C. § 2703(a) is subject to expire December 31, 2005, the reference in the amendment to § 2703(a) would automatically subject the amended rule to the Sunset provision.

Thank you for your consideration. If you or other members of the Committee have any questions or comments, please feel free to contact me.

Yours very truly,

A handwritten signature in cursive script, appearing to read "B. Janice Ellington". The signature is written in black ink and is positioned above the printed name.

B. Janice Ellington