



U.S. Department of Justice

Criminal Division



06-CR-D

Washington, D.C. 20530

January 3, 2006

The Honorable Susan C. Bucklew  
Chair, Advisory Committee  
on the Criminal Rules  
United States District Court  
109 United States Courthouse  
611 North Florida Avenue  
Tampa, FL 33602

Dear Judge Bucklew:

The Department of Justice recommends that Rule 41(b) of the Federal Rules of Criminal Procedure be amended to permit magistrates to issue warrants for property that is within the jurisdiction of the United States, but outside of any judicial district. We hope that the Advisory Committee will consider and vote on this proposal at its next meeting in April 2006.

As part of Department's national security mandate, our prosecutors work closely with the State Department's Bureau of Diplomatic Security to protect the integrity of our borders and immigration processes by investigating and prosecuting cases involving corruption in United States embassies and consulates around the world. The cases typically involve allegations that corrupt consular officers and/or foreign service nationals are selling U.S. visas to foreign individuals who may or may not qualify for a U.S. visa.

These crimes take place overseas, and the most important evidence is often located in the offices or residences associated with a consulate or embassy. Unfortunately, although these locations are within U.S. control, they are not located within any State or U.S. judicial district, and, as currently written, Rule 41(b) does not provide magistrates with the authority to issue warrants for such locations. *See, e.g., United States v. Wharton*, 153 F.Supp.2d 878, 882 (W.D.La. 2001) ("Clearly, Rule 41 did not empower any United States District Court to issue a search warrant for the defendant's property when it was located at the United States Embassy in Port-au-Prince, Haiti."). The USA PATRIOT Act amended Rule 41(b) to provide magistrates with the authority to issue warrants for property outside of the magistrate's district, but only in cases involving certain terrorism offenses. *See* Rule 41(b)(3).

Department prosecutors have faced this troubling limitation in their investigation of serious public corruption offenses involving United States embassies and consulates around the world and in American Samoa, a United States territory that is administered by the Department of the Interior and receives tens of millions of dollars in federal grants and assistance but which has no district court. Although American Samoa is fully within the control of the United States,

there is no express authority to issue warrants for evidence in the territory.

Prosecutors in these cases may attempt to persuade magistrates that they have the inherent power beyond Rule 41(b) to issue warrants for evidence that is relevant to a criminal investigation, but without an express provision in Rule 41(b), this is not a reliable or effective alternative. We thus recommend an amendment to Rule 41(b) that provides magistrates with the express authority to issue warrants for property that is located outside of any judicial district. We recommend that a new paragraph be added to Rule 41(b) which would read:

“(4) a magistrate judge having authority in any district in which activities related to the crime under investigation may have occurred, or in the District of Columbia, may issue a warrant for property that is located outside the jurisdiction of any State or district, but within any of the following: (A) a territory, possession, or commonwealth of the United States; (B) the premises of a United States diplomatic or consular mission in a foreign state, and the buildings, parts of buildings, and land appurtenant or ancillary thereto, used for purposes of the mission, irrespective of ownership; or (C) residences, and the land appurtenant or ancillary thereto, owned or leased by the United States, and used by United States personnel assigned to United States diplomatic or consular missions in foreign states.”

The proposed amendment uses language from the existing paragraph (3) of Rule 41(b), which was added pursuant to the USA Patriot Act, and from the definition of the special maritime and territorial jurisdiction of the United States contained in 18 U.S.C. § 7, which includes United States consulates and embassies. We include the District of Columbia because that is the default jurisdiction for venue under 18 U.S.C. § 3238.

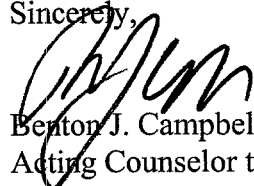
A similar amendment was approved by the United States Judicial Conference in 1990, which recommended that the Supreme Court adopt the new rule. The Supreme Court did not adopt the new provision, however, and instead concluded that this matter required “further consideration.” The 1990 amendment read as follows: “a magistrate judge [may issue a warrant] for a search of property that is located outside the United States if the property is lawfully subject to search and seizure by the United States and is relevant to a criminal investigation in the district in which the warrant is sought.”

Like the proposed 1990 amendment, our current proposal does not include warrants for persons, which could be viewed as inconsistent with extradition requirements. As a substitute for the earlier proposal’s phrase “lawfully subject to search and seizure by the United States,” our proposal is limited to U.S. territories and possessions; embassy and consular offices; and certain residences used by embassy and consular employees. These are all locations in which the United States has a legally cognizable interest or exerts lawful authority and control.

We believe this proposal warrants timely and thorough consideration by the Advisory Committee, as it relates to important matters of national security. We appreciate your assistance

with this proposal and look forward to continuing our work with you to improve the federal criminal justice system.

Sincerely,



Benton J. Campbell  
Acting Counselor to the  
Assistant Attorney General

cc: Professor Sara Sun Beale  
Mr. John Rabiej ✓