Much Ado About 1782: A Look at the Recent Problems with Discovery in the United States for Use in Foreign Litigation under 28 U.S.C. 1782

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MUCH ADO ABOUT 1782: A LOOK AT RECENT PROBLEMS WITH DISCOVERY IN THE UNITED STATES FOR USE IN FOREIGN LITIGATION UNDER 28 U.S.C. § 1782


The United States has long recognized the need to make available to foreign courts and litigants before such courts, information located in the United States. The availability of information located in the United States enables legal decisionmakers in foreign
courts to possess the full facts and, therefore, to achieve the fairest possible adjudication of the claims before them.\footnote{Since 1855, a federal statute has existed with the specific purpose of facilitating discovery in the United States for use in a foreign forum. The 1877 version of the statute was highly formalistic in its requirements. Judicial assistance was available to litigants in a foreign court only where the request was made, through a letter rogatory, by a foreign government that was a party to the foreign action and where the foreign action was for the recovery of money or property. However, by 1948, the statute had been expanded for use in any foreign civil proceeding, revised so that it no longer required the foreign government to be a litigant in the foreign action, and renumbered section 1782, title 28 of the United States Code.}

Since 1855, a federal statute has existed with the specific purpose of facilitating discovery in the United States for use in a foreign forum. The 1877 version of the statute was highly formalistic in its requirements. Judicial assistance was available to litigants in a foreign court only where the request was made, through a letter rogatory, by a foreign government that was a party to the foreign action and where the foreign action was for the recovery of money or property. However, by 1948, the statute had been expanded for use in any foreign civil proceeding, revised so that it no longer required the foreign government to be a litigant in the foreign action, and renumbered section 1782, title 28 of the United States Code.

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2. See Act of March 2, 1855, ch. 140, 10 Stat. 630. The original federal statute was a subsection of this Act, and it merely gave the power to compel witnesses to a commissioner who had been appointed by a circuit court to gather information at the request of a foreign country. For a comparison of the texts of the different versions of the statute, see In re Letter Rogatory From Justice Court, District of Montreal, Canada, 523 F.2d 562, 566-69 (6th Cir. 1975). See also In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago, 848 F.2d 1151 (11th Cir. 1988), aff'd 648 F. Supp. 464 (S.D. Fla. 1986), motion for relief from judg't denied, 117 F.R.D. 177 (S.D. Fla. 1987), cert. denied, 109 S. Ct. 784 (1989).


4. In 1948, the statute read:

The deposition of any witness residing within the United States to be used in any civil action pending in any court in a foreign country with which the United States is at peace may be taken before a person authorized to administer oaths designated by the district court of any district where the witness resides or may be found.

The practice and procedure in taking such depositions shall conform generally to the practice and procedure for taking depositions to be used in courts of the United States.


This section was amended in 1949 "by striking out 'residing' . . . and by striking out . . . the words 'civil action' and in lieu thereof inserting 'judicial proceeding'." Act of May 24, 1949, ch. 139, 63 Stat. 103.

The statute appeared in this form until the 1964 amendment, which replaced this section entirely and repealed former § 1785, which had contained a provision that prevented the taking of evidence in violation of a legal privilege. For the text of the statute after the 1964 amendment, including the rewritten privilege provision, see infra note 7.

The term "pending" was omitted by the 1964 amendment. Most courts and commentators have concluded that the statute no longer requires that the foreign case for which the material is sought be pending. See, e.g., In re Request for Assistance From Ministry of Legal Affairs of Trinidad and Tobago, 648 F. Supp. 464 (S.D. Fla. 1986), motion for relief from judg't denied, 117 F.R.D. 177 (S.D. Fla. 1987), aff'd, 848 F.2d 1151 (11th Cir. 1988), cert. denied, 109 S. Ct. 784 (1989). However, at least one court has held otherwise. In the district court decision in In re Letters of Request to Examine Witnesses From Court of Queen's
By combining the 1949 and 1964 amendments to section 1782, Congress placed the United States on the cutting edge of assisting in international discovery. The 1949 amendment made the statute available for use in foreign criminal proceedings, and the 1964 amendment seems to have removed the requirement that the foreign case be pending, thereby allowing any person "interested" in the foreign litigation to simply apply directly to a federal district court for a discovery order, without the need for a letter rogatory from the foreign court. In its present form, section 1782 gives the

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6. But see infra notes 36-48 and accompanying text.


Assistance to foreign and international tribunals and to such litigants before such tribunals.

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him. June 25, 1948, ch. 646, 62 Stat. 949; May 24, 1949, ch. 139, § 93, 63 Stat. 103; Oct. 3, 1964, Pub. L. 88-619, § 9(a),
district court virtually complete discretion to decide whether it will aid the foreign fact-finding process; this nearly unbridled discretion is the root of the problems discussed in this Comment.

The 1949 amendment omitted from the statute the phrase "to be used in any civil action." Courts and commentators have interpreted this phrase to mean that section 1782 can be utilized to obtain information for use in foreign and international criminal proceedings as well as civil proceedings, thereby vastly expanding the reach of foreign discovery in the United States. Indeed, presently, the statute is being used as much to obtain information pursuant to foreign criminal proceedings as it is for foreign civil proceedings.

The statute is not to be used for purposes other than discovery. For example, section 1782 cannot be used to enforce a foreign judgment. Moreover, section 1782 is not the exclusive means by

78 Stat. 997.
8. See infra notes 75-79 and accompanying text.
9. The 1948 version of the statute stated that "the deposition of any witness residing within the United States to be used in any civil action pending in any court in a foreign country . . . may be taken . . ." Act of June 25, 1948, ch. 646, 62 Stat. 949. The 1949 amendment stated that "[s]ection 1782 of title 28, United States Code, is amended by . . . striking out from the same paragraph the words 'civil action' and in lieu thereof inserting 'judicial proceeding.'" Act of May 24, 1949, ch. 139, 63 Stat. 103.
10. See In re Letters Rogatory From Tokyo District, Tokyo, Japan, 539 F.2d 1216 (9th Cir. 1976) (citing In re Letter Rogatory From Justice Court, District Court of Montreal, Canada, 523 F.2d 562 (6th Cir. 1975)); Montreal (holding that the omission of the phrase "civil action" meant that the statute could be used to gather information for criminal actions as well as civil actions). See also U.S. CODE CONG. & ADMIN. NEWS, supra note 5, at 3789; Amram, Public Law No. 88-619 of October 3, 1964 — New Developments in International Judicial Assistance in the United States of America, 32 J.B.A. D.C. 24, 32 (1965) [hereinafter New Developments]; Smit, International Litigation Under the United States Code, 65 COLUM. L. REV. 1015, 1026 n.71 (1965); Comment, Judicial Assistance: Obtaining Evidence in the United States, Under 28 U.S.C. § 1782, for Use in a Foreign or International Tribunal, 5 B.C. INT'L & COMP. L. REV. 175, 182 n.34 (1982).
11. See infra notes 57-69 and accompanying text. See also In re Grand Jury Proceedings, Doc. No. 700, 817 F.2d 1108 (4th Cir. 1987) (Grand Jury investigation of former Philippine President Ferdinand Marcos for possible fraud and corruption); Commission to Take Evidence Pursuant to Criminal Code of Canada and U.S. Code and Federal Rules, 788 F.2d 566 (9th Cir. 1986) (information gathered by U.S. intelligence sources pursuant to the Foreign Intelligence Surveillance Act sought for use in Canadian prosecution of three terrorists for the murder of a Turkish diplomat in Canada); In re Letters Rogatory From the Supreme Court of Ontario, Canada, 661 F. Supp. 1188 (E.D. Mich. 1987) (information sought for use in Canadian income tax evasion prosecution).
12. In re Civil Rogatory Letters Filed by Consulate of United States of Mexico, 640 F. Supp. 243 (S.D. Tex. 1986). In Mexico the Mexican Consulate filed a letter rogatory on behalf of a Mexican citizen, to enforce a Mexican judgment against another Mexican citizen then living in Texas. The court relied on a letter from the United States Department of State stating that "foreign judgments, decrees, or orders cannot be enforced . . . by means
which discovery can be obtained in the United States for use in a foreign proceeding. In fact, there are treaties and federal statutes other than section 1782 that can be used to conduct discovery for use in foreign actions. However, such treaties and statutes often require discovery requests to observe certain formal, often burdensome requirements. By contrast, section 1782 was intended to provide an efficient, rapid means for the gathering of information in both civil and criminal matters by allowing the requesting party to apply directly to a United States district court.

The statute permits the taking of physical evidence, depositions, and other evidentiary testimony for use in foreign proceedings. The primary thrust of section 1782 is to provide a means to compel uncooperative witnesses and parties to produce information of a request for judicial assistance...” Id. at 244. The court went on to point out that normal means of enforcement (i.e., a civil suit with proper notice and opportunity to contest) were still available to the Mexican citizen.


Although there is some overlap among the various “discovery” treaties and § 1782, neither the treaties nor the statute controls as the sole or primary method for the production of discovery. In Societe Nationale Industrielle Aerospatiale v. United States District Court, 107 S. Ct. 2542 (1987), the Supreme Court held that § 1782 was still a viable means of facilitating discovery in the United States in a foreign legal proceeding.

14. For example, requests made under the Hague Evidence Convention must be executed by letter rogatory sent to the United States Department of Justice. The Department of Justice processes the request, deciding whether to present it to the court. The letter must be presented either in French or in English; if the request is in French, it first must be translated into English before it can be processed, thus prolonging an already time-consuming process. See generally Hague Evidence Convention, supra note 13.

15. The Colombian Minister of Exchange Control attempted to use § 1782 to obtain a suitcase filled with cash in Fonseca v. Blumenthal, 620 F.2d 322 (2d Cir. 1982). See infra notes 62-65 and accompanying text.

16. See Comment, supra note 10, at 178. (“The procedures of Section 1782 apply only when an individual possessing sought-after information is uncooperative.”) If the person refusing to cooperate with the discovery order is a party to the foreign litigation, the courts will compel discovery only when that party is first adjudged to be in contempt of court for failing to comply with the discovery order. The courts have held that prior to the citation for contempt, there is no final, appealable order that they can enforce. See, e.g., In re Let-
tion. However, the statute provides expressly that any witness who so wishes may voluntarily produce evidence without a court order.\textsuperscript{17} As a way to compel discovery, the person, tribunal, or court desiring information either may file a section 1782 request in the appropriate district court, or, if a foreign tribunal or court is seized of the case, have the foreign court send a request by letter rogatory.\textsuperscript{18}

Although the statutory language states that any United States district court judge may issue a section 1782 order to "a foreign or international tribunal or upon the request of any interested person,"\textsuperscript{19} the district court seems, actually, to be given complete discretion\textsuperscript{20} in deciding whether, and to whom it shall grant a section 1782 request. The statute states that the district court "may"\textsuperscript{21} grant a request without explaining when it "may" do so. At least one district court\textsuperscript{22} has construed this language to mean that two explicit prerequisites must be met before a request can be granted: "(1) the request must be made either through a letter rogatory or by a foreign or international tribunal or by an interested person;

\textsuperscript{17} Section 1782(b) states that it "does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him." 28 U.S.C. § 1782(b) (1982).

\textsuperscript{18} For an extensive explanation of the mechanics of presenting a § 1782 request to United States district courts, see Comment, supra note 10.

\textsuperscript{19} 28 U.S.C. § 1782(a) (1982).


\textsuperscript{21} The statute states that the "district court of the district in which a person resides or is found may order him to give his testimony . . . ." 28 U.S.C. § 1782(a) (1982) (emphasis added).

and (2), the evidence must be for use in a foreign or international tribunal."²³

After deciding to grant a section 1782 request, the district court may, if it chooses, appoint a commissioner to facilitate the gathering of evidence in compliance with its order. The court has absolute discretion regarding the decisions of whether to appoint a commissioner, whom to select as the commissioner,²⁴ and what procedures will be followed in the gathering of the evidence. It is not required that the evidence be taken in accordance with the Federal Rules of Procedure (either Civil or Criminal). In fact, the procedure prescribed by the district court may be that of the foreign tribunal whence the request came.²⁵ However, if the court fails to prescribe an alternate procedure, the Federal Rules of Civil Procedure will govern, even in criminal cases.²⁶

This comment will examine section 1782 jurisprudence and shall discuss some of the problems that have resulted from the drafting of the statute and from its application. For instance, courts have been at a loss to explain the phrase "interested person," leaving unresolved the fundamental issue of who may present a section 1782 request. In addition, federal courts appear to doubt that Congress intended to give them the unbridled discretion suggested by the statutory language. As a result, the courts have struggled to construe²⁷ the statute consistently.

²³. Id. at 465. Compare the district court's holding in Trinidad with the statutory language, supra note 7.
²⁴. Smit, supra note 10, at 1027.
²⁶. Id.
²⁷. One of the primary functions of a judge is to interpret statutes. Frequently, the words of a statute are bare until meaning is given to them by judicial construction. In this context, statutory construction is the process by which courts analyze statutes and determine their meaning. The goal of this process is to identify what the legislature intended to accomplish by enacting a particular statute and to interpret the statute in such a way as to effectuate that intent. To this end, courts over the years have developed certain canons of construction. These rules of construction are not rules of law but are “merely axioms of experience.” Properly applied, they guide a court as it goes about its search for that most elusive of quarries, the quarry called legislative intent. Cross, The Views of a Statutes Draftsman: The Missing Link in the Statutory Interpretation Process, 26 N.H.B.J. 267 (1985) (footnotes omitted).

There are varying views of precisely how much deference is to be accorded the plain meaning of the words of the statute itself, and how much one is bound by the intent of the drafters as expressed in the legislative history. Compare Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 522, 543 (1947) ("spurious use of legislative
Moreover, the statute states that the requested information shall not be given "in violation of any legally applicable privilege." This Comment raises the issue of whether state law is to be considered when privilege is examined. In addition, if the applicable privilege in the foreign jurisdiction is different from a privilege provided for under United States law (either state or federal), various dangers arise regardless of whether the court chooses to give effect to the more expansive privilege or to the less expansive privilege. In this connection, a particularly worrisome problem arises where one of the parties may be given an undue advantage.

A similar problem exists with regard to the court's authority to appoint a commissioner to collect the requested information. Because the court may appoint anyone of its choosing to serve as commissioner, an individual with a personal interest in obtaining the requested information could be appointed, thereby giving that person access to information which then could be used by that person in other foreign or domestic litigation.

Finally, in its present form, section 1782 can be utilized by parties to the foreign action as a method of circumventing the normal restrictions on discovery. Indeed, there is a danger that the parties could use section 1782 as a ruse to get information for use in unrelated actions, either in the United States or abroad.

Ultimately, this Comment will propose solutions to some of the problems presented by the formulation and implementation of section 1782. It is the conclusion of the authors that Congress should revise section 1782, and in so doing, adopt the solutions herein suggested.

history must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute.")) with Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 412 (1971) (where the legislative history is ambiguous the court must look to statutes to find intent") One author has noted that "there has been a sharp decline in judicial reliance on the plain meaning rule, which in the past was commonly employed to preclude resort to legislative history in ascertaining the legislative intent of 'unambiguous' statutory language." Grabow, Congressional Silence and the Search for Legislative Intent: A Venture Into "Speculative Uncertainties," 64 B.U.L. Rev. 737, 737 n.3 (1984).

For discussions of the many theories of statutory construction, see E. Crawford, The Construction of Statutes (1940); R. Dickerson, The Interpretation and Application of Statutes (1975); J. Hurst, Dealing with Statutes (1982); Blatt, The History of Statutory Interpretation; A Study in Form and Substance, 6 Cardozo L. Rev. 799 (1985). For a critical analysis of the canons of statutory construction, see Posner, Statutory Interpretation-In the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800 (1953).

II. Judicial Interpretation of 28 U.S.C. § 1782

Until 1964, section 1782 contained a requirement that the requested information be for use in "any judicial proceeding pending in any court in a foreign country." However, by 1964, it had become quite clear that this language was too restrictive because the statute could not be used to aid the growing number of foreign administrative or quasi-judicial proceedings. The legislative history of the 1964 amendment indicates that "[a] rather large number of requests for assistance emanate from investigating magistrates." Because investigating magistrates and other quasi-adjudicative bodies were not courts in the strict sense, proceedings before them could not be characterized as "judicial proceedings" as contemplated by the 1949 version of the statute. The 1964 amendment attempted to accommodate this perceived new need by rephrasing the statutory language to require only that the information be "for use in a proceeding in a foreign or international tribunal." The legislative history of the 1964 amendment explains that "the word 'tribunal' is used to make it clear that assistance is not confined to proceedings before conventional courts. For example, it is intended that the court have discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries."

Obviously, the easy cases under section 1782 have involved instances in which there were actual proceedings pending before a readily identifiable court or a foreign or international tribunal. However, the majority of section 1782 cases has involved three distinct but interrelated jurisprudential difficulties: 1) the 1964 amendment appears to have removed the requirement that the foreign case be pending at the time the section 1782 request is presented; 2) it is not clear how broadly the drafters intended to

30. U.S. CODE CONG. & ADMIN. NEWS, supra note 5, at 3788.
31. Id. (citing LETTERS ROGATORY 13 (Grossman ed. 1956)). See infra note 52 and accompanying text.
33. U.S. CODE CONG. & ADMIN. NEWS, supra note 5, at 3788.
define "tribunal," therefore it is difficult for the courts to determine which foreign quasi-administrative bodies ought be considered as tribunals; and 3) the 1964 amendment introduced a statement indicating who may present a section 1782 request: in essence, either a foreign or international tribunal or an "interested person." The latter term was defined neither in the statute itself nor in the legislative history. Thus, it is not at all clear who may use the mechanisms of section 1782. Each of these problems, analyzed individually, provides an interesting study in jurisprudential concerns; but taken together, they present a clear threat to some of the basic notions upon which the U.S. judicial system is founded. Specifically, if there is no longer a requirement that the foreign case be pending, and if the terms "interested person" or "tribunal" are defined broadly (as the courts have done), a foreign prosecutor could come to the United States and conduct discovery "fishing expeditions" as a way of finding grounds upon which to base a prosecution. Such a danger is compounded by the unbridled discretion given under the statute to the district court. Because there is almost no limit on what the court may deem discoverable, a foreign prosecutor could conduct widespread discovery at tremendous cost to the privacy interests and pocketbooks of U.S. citizens. It is unlikely that Congress intended such a result, even though a number of section 1782 cases have involved personal and financial deprivations.

A. Must the Foreign Case Be Pending?

The language of the 1949 version of section 1782 required that the sought-after information be "for use in any judicial proceeding pending in any court . . . ." However, after the 1964 amendment, the statute required only that the sought-after information be "for use in a proceeding in a foreign or international tribunal." Notably, the word "pending" was deleted. Thus, the current wording of the statute, taken literally, represents a drastic departure from its former version as well as from the underpinnings of the U.S. legal system. Yet, the significance of the omission of the word

35. The statute indicates that the information cannot be given in violation of any legally applicable privilege. See 28 U.S.C. § 1782(a) (1982). This provision does not work in practice and can potentially result in harmful discovery. See infra notes 128-44.
"pending" depends, in part, on the theoretical model used to explain the omission.

Recently, the Court of Appeals for the Eleventh Circuit, using traditional canons of statutory construction, addressed the problem in In re Request for Assistance From Ministry of Legal Affairs of Trinidad and Tobago.\textsuperscript{38} Citing well-known authorities on statutory construction, the court explained that "[w]hen the legislature deletes certain language as it amends a statute, it generally indicates an intent to change the meaning of the statute."\textsuperscript{39} The court relied on this argument to support its affirmation of the United States District Court for the Southern District of Florida,\textsuperscript{40} which had refused to quash a subpoena of the bank records of a U.S. citizen.\textsuperscript{41} The Minister of Legal Affairs of Trinidad and Tobago sought the records for use in an investigation of the possible violation of Trinidadian exchange control laws. The investigation was merely in the infantile stage and no criminal proceedings were pending. Nevertheless, the district court granted the request, finding that the statute did not require proceedings to be pending.\textsuperscript{42} The district and appellate courts relied on the commentary of the Reporter to the Commission on International Judicial Procedure that drafted the amendment, who said: "It is not necessary, however, for the proceeding to be pending at the time the evidence is sought, but only that the evidence is eventually to be used in such a proceeding."\textsuperscript{43}

A very different result would have been reached had either the district court or the court of appeals viewed the 1964 amendment in a more critical light. Congress played no role in redrafting the statute. Rather, the new draft was written entirely by an advisory committee and adopted summarily.\textsuperscript{44} Instead of reviewing the bill for substantive accuracy, Congress merely adopted the drafters' report as the legislative history.\textsuperscript{45} Therefore, one must question pre-

\textsuperscript{38} 848 F.2d 1151 (11th Cir. 1988).
\textsuperscript{39} Id. at 1154 (citing United States v. Canadian Vinyl Indus., 555 F.2d 806, 810 (C.C.P.A. 1977); 1A Singer, Sutherland Statutory Construction § 22.01 (4th ed. 1984)).
\textsuperscript{40} 648 F. Supp. 464 (S.D. Fla. 1986).
\textsuperscript{41} Id.
\textsuperscript{42} Id. at 467. Accord In re Letter of Request From the Crown Prosecution Service of the United Kingdom, 683 F. Supp. 841 (D. D.C. 1988).
\textsuperscript{43} Smit, supra note 10, at 1026 (footnote omitted).
\textsuperscript{45} Because the legislative history is the only evidence of Congressional intent, one
cisely how much Congress truly "intended" to allow the use of section 1782 without a pending proceeding.

One commentator has suggested that a solution to the "pending" problem would be to read the word "eventual" into the statute, thereby forcing the requesting party to make a good faith showing that the information is intended for eventual use in a foreign proceeding.46 It is possible that neither Congress nor the drafters intended to remove the "pending" requirement.47 The legislative history states clearly that "it is intended that the court . . . grant assistance when proceedings are pending before investigating magistrates."48 Hence, it might be better for the courts to adopt such an interpretation, or ideally, for Congress to make its intentions known.

B. Who May Make the Request?: The Tribunal/Interested Person Distinction

The 1964 amendment added a new twist to the statute by purporting to specify who could use the statute to conduct discovery in the United States. Section 1782 states currently that a request for information located in the United States must be made either "by a foreign or international tribunal or upon the application of any interested person."49 The legislative history indicates that the word "tribunal" was added in place of the word "court" in the 1964 amendment because Congress wanted the assistance of section 1782 to be available to judicial or administrative officials in quasi-judicial proceedings, in addition to traditional courts.50 The legislative history indicates, "[f]or example, it is intended that the court have discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries."51

must assume that what is stated in the legislative history represents the intent of Congress at the time that the statute was passed.

46. See generally Comment, supra note 10.


50. U.S. Code Cong. & Admin. News, supra note 5, at 3788. See also In re Letter Roga- tory From Justice Court, District of Montreal, Canada, 523 F.2d 562 (6th Cir. 1975); Comment, supra note 10, at 182-86.

This reference was directed to requests from French juges d'instruction. The juge is an official who conducts investigations, interviews witnesses, and performs other quasi-judicial functions. The juge also has the power — similar to a U.S. grand jury — to evaluate evidence proffered against an individual, and to decide whether a prosecution should proceed.\textsuperscript{52} It is not clear whether the broad powers of the juge encompass the powers of a foreign prosecutor before the prosecutor has filed formal charges in the foreign tribunal. In this regard, although the juge has investigative powers, the foreign prosecutor does not seem to possess the same quasi-adjudicative power as an investigating magistrate.\textsuperscript{53}

The cases construing section 1782 have expended a great deal of effort trying to determine who is qualified to request assistance.\textsuperscript{54} The instant discussion is based upon the premise that many of these courts, instead of asking whether the requesting party is a tribunal or an interested person, have skewed the analysis by asking whether the information is for use in a "tribunal."

The first reported case involving a judicial attempt to define "tribunal" in the context of section 1782 and asking whether the information sought was for use in a "tribunal," was \textit{In re Letters Rogatory Issued by Director of Inspection of India}.\textsuperscript{55} In that case, the Indian Tax Assessor was the requesting party, seeking information for proceedings before him. Thus, the request originated allegedly from a "tribunal." The Court of Appeals for the Second Circuit denied the request, concluding that proceedings before an Indian tax assessor were not "before a tribunal" and, therefore, that such proceedings did not meet the first test under the statute. The court reasoned that the tax assessor had no discretion to de-

\textsuperscript{52} In civil law systems, "evidence gathering for civil litigation is a judicial function." Prescott \& Alley, \textit{Effective Evidence-Taking Under the Hague Convention}, 22 \textit{Int'l Law} 939, 959 (1988). In fact, "[t]he taking of evidence by private persons . . . or U.S. government officials . . . is considered an infringement on an area of exclusive judicial sovereignty, in some cases even where taken from a willing witness." \textit{Id.} at 959-60. \textit{See} \textit{In re Letters Rogatory Issued by Director of Inspection of Government of India}, 385 F.2d 1017, 1020 (2d Cir. 1967); Comment, \textit{supra} note 10, at 182-83 nn. 35-46 and accompanying text; \textit{Letters Rogatory 13} (Grossman ed. 1956), cited in \textit{U.S. Code Cong. \& Admin. News, supra} note 5, at 3788.

\textsuperscript{53} \textit{But see infra} notes 56-57 and accompanying text.

\textsuperscript{54} For a thorough discussion of many of the pre-1982 cases not discussed herein, see Comment, \textit{supra} note 10. In this connection, the authors of the instant Comment disagree respectfully with several of the case holdings and conclusions drawn in Comment, \textit{supra} note 10. \textit{See generally infra} note 61.

\textsuperscript{55} 385 F.2d 1017 (2d Cir. 1967) (reversing 272 F. Supp. 758 (S.D.N.Y.)).
cide whether a violation had been committed; his sole responsibilities were to collect taxes owed and protect the government’s interest. Further, the court reasoned, the tax assessor did not possess the power to adjudicate any litigation between the citizen and the state. Therefore, the tax assessor possessed none of the relevant characteristics of a tribunal.

A similar argument was put forward by the Court of Appeals for the Ninth Circuit in *In re Letters of Request to Examine Witnesses From Court of Queen’s Bench for Manitoba, Canada*, where the request for information came from a commission possessing the power to investigate and make recommendations, but not having power to bring charges or adjudicate the case. The court of appeals held that bodies which conduct investigations and make non-binding recommendations on whether to prosecute, but possess no adjudicative power, do not constitute tribunals. Hence, the requested information was not for use in a tribunal. Notably, the court of appeals made no attempt to analyze whether the commission was an “interested party.”

By contrast, a Tokyo court requested information on behalf of a Tokyo prosecutor in *In re Letters Rogatory From Tokyo District, Tokyo, Japan*. In that case, the Court of Appeals for the Ninth Circuit granted the request, distinguishing its prior decision in *Manitoba*, because the Tokyo requesting prosecutor had discretion to decide whether to prosecute. Yet, as in other cases, the information was sought only in furtherance of an investigation; no charges had yet been filed. Although the court of appeals’ result appears on its face to be inconsistent with the previous cases, the court seemed actually to base its ruling on the prospective defendant’s failure to meet his burden to produce evidence showing why

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56. *Id.* This case is frequently cited for the test of whether there is “the absence of any degree of separation between the prosecutorial and adjudicative functions [of the requesting governmental party].” *Id.* at 1021. However, such a transparent test was not the ground upon which the court seemed to rest its decision.

57. 488 F.2d 511 (9th Cir. 1973). In *Manitoba*, the request came from a commission that had been established to investigate suspected general wrongdoing in all aspects of the Pas Forestry and Industrial Complex, a multi-million dollar forestry and industrial project in Manitoba. The Commission did not have the power to bring charges if such wrongdoing was found; it merely reported the facts it learned and made non-binding recommendations on whether to prosecute.

58. *Id.* at 512.

59. 539 F.2d 1216 (9th Cir. 1976). In Tokyo, the Japanese prosecutor was investigating officials of U.S.-based Lockheed Aircraft Corporation for bribery of certain Japanese individuals who also were under investigation.
the matter was "unrelated to a judicial or quasi-judicial controversy."\(^{60}\) Stated differently, the Court of Appeals for the Ninth Circuit seemed concerned that the information was not going to be used in a proceeding before a "tribunal" because the granting of such a request would violate the statute.\(^{61}\)

Relying on its previous opinion in \textit{India}, the Court of Appeals for the Second Circuit held in \textit{Fonseca v. Blumenthal},\(^{62}\) that an investigation conducted by the Colombian Superintendent of Exchange Control was not a proceeding before a tribunal; hence, the request could not be granted.\(^{63}\) Yet, presumably, the superintendent had discretion to decide whether to proceed with prosecution, as did the prosecutor in \textit{Tokyo} but not the tax assessor in \textit{India}. Nevertheless, the court denied the request, premising its decision on the grounds that the superintendent was responsible solely for representation of the government's interest and thereby possessed no adjudicative powers. In truth, the court may have been bothered by the fact that there was no pending case, no present investigation, nor any reasonable suspicion for an investigation of Fonseca. Interestingly, the inquiry of Fonseca started only after the superintendent attempted to use section 1782 to claim that a suit-

\(^{60}\) \textit{Id.} at 1219 (quoting \textit{Manitoba}, 488 F.2d at 512).

\(^{61}\) \textit{Id.} Such a conclusion departs clearly from the analysis of \textit{Tokyo} presented in Comment, \textit{supra} note 10 where the author states that the court decided not to resolve the primary issue of whether the information was "for use in a proceeding." The Comment takes out of context the statement, "[t]he use to which the depositions are put in Japan does not appear presently to deserve the court's attention since the witnesses are neither defendants nor subjects of investigation." \textit{Tokyo}, 539 F.2d at 1219. This quotation was actually the conclusion to a discussion of whether the court should consider whether a § 1782 order here would violate the fifth amendment rights of the individuals being deposed. The court had earlier satisfied itself that the information was, according to the requestor, "intended for use in a tribunal," see Comment \textit{supra} note 10, at 185, by stating that "[t]he information sought for the depositions is for use in the completion of the investigation and in future trials." \textit{Tokyo}, 539 F.2d at 1218. The objector apparently failed to present evidence to rebut this. It seems that the true dilemma posed by the decision is that Congress has left the courts with absolutely no indication as to how to resolve a request emanating from a prosecutor prior to the filing of a case.

\(^{62}\) 620 F.2d 322 (2d Cir. 1982). The Superintendent of Exchange Control of Colombia sought to recover, through the use of § 1782, Fonseca's suitcase, which had been rerouted accidentally to New York by the airline on which Fonseca was travelling. When no one claimed the suitcase, United States Department of Customs officials seized it and found that the suitcase contained over $250,000.00 in U.S. currency. Upon learning of the seizure, the Colombian Superintendent became suspicious and wanted to investigate Fonseca for possible violations of Colombian exchange control laws. Fonseca had not been under investigation prior to the seizure. The Superintendent sought recovery of the suitcase as a way of beginning the investigation.

\(^{63}\) \textit{Id.} at 323.
case containing a large amount of currency was to be the subject of investigation.

Recently, the United States District Court for the Southern District of Florida held, on facts similar to Fonseca, that a request made by the Attorney General and Minister of Legal Affairs of Trinidad and Tobago should be granted even though the information was to be used in an investigation prior to the filing of the case.\textsuperscript{64} The district court reasoned "that the requested documents are to be used at trial, and the obvious interest in obtaining these records in admissible form, also substantiate beyond question that the documents requested will be 'for use in a proceeding in a foreign tribunal.'"\textsuperscript{65} On the simplest level, Trinidad is consistent with the holding in Tokyo, in that a request for information by a prosecutor was granted prior to trial; but because Tokyo was decided actually on the basis of the defendant's failure to meet the requisite burden of proof, Trinidad extends the statute further than any other section 1782 case heard previously. The Trinidad opinion blurs the distinction between the statutory requirements that the information be for use in a proceeding before a court or tribunal and that the request come from a "tribunal or interested person." Moreover, disagreeing with the Fonseca court,\textsuperscript{66} Judge Thomas E. Scott, in Trinidad, stated that "the pivotal inquiry... is whether the evidence sought will eventually be used in a proceeding in a foreign or international tribunal."\textsuperscript{67} Conversely, the underlying concern in Fonseca seemed to have been that a proceeding had to be pending actually before a tribunal in order to grant a request.

In another Southern District of Florida case, In re Letter of Request for Judicial Assistance From the Tribunal Civil de Port-Au-Prince, Republic of Haiti,\textsuperscript{68} Judge Edward B. Davis granted the request of the Haitian juge d'instruction who was investigating former Duvalier government officials.\textsuperscript{69} Judge Davis determined

\textsuperscript{65} Id. at 466.
\textsuperscript{66} Id. at 465 n.2.
\textsuperscript{67} Id. at 467 (emphasis added).
\textsuperscript{68} 669 F. Supp. 403 (S.D. Fla. 1987).
\textsuperscript{69} The Haitian juge d'instruction, like the French juge d'instruction, is similar to a U.S. grand jury in that he "investigates the case, and eventually decides whether any of the accused should be criminally prosecuted." Id. at 405. For a description of the French juge d'instruction see Comment, supra note 10. The juge, under French law, also prepares evi-
that the juge was an investigating magistrate because he “is empowered to evaluate from the information he receives whether or not there is sufficient evidence to proceed [with criminal charges].” Accordingly, under the district court’s calculus, because the juge is an independent investigator, he should be covered by section 1782. In other words, the juge would be a foreign tribunal making the request for use in proceedings before him.

It is important to note that in Trinidad, the Attorney General and Minister of Legal Affairs was conducting an investigation without a pending case; thus, the alternative statutory requirement of a case before a tribunal or court was not met. Therefore, the district court was forced to ask whether the Attorney General and Minister of Legal Affairs was an “interested person.” In contrast, in Haiti, the district court had before it a pending proceeding before an impartial tribunal and was not forced to make further inquiry.

C. Suggested Solutions

It is unclear whether the courts have been following any identifiable standard in defining who is an “interested person,” under the statute. Recent section 1782 requests have been received by U.S. district courts from foreign officials who appear to serve in prosecutorial capacities. In this regard, the courts have been forced to choose whether to aid in “fishing expeditions” conducted by such foreign officials who are attempting to build foreign criminal cases, a choice due directly to the lack of definition of the term “interested person” which has, in turn, forced the courts to resort to the ruse of deciding whether the information is for use in a tribunal.

One possible solution would be to grant the request when presented, thereby recognizing that a prosecutor would have access to the information once the case is filed, either because he would then be a litigant in a pending proceeding or because the tribunal itself would make the request. Simply put, to deny a particular tribunal’s section 1782 request for information when the request is presented prior to trial is merely to advocate form over substance. This judicial economy argument would prevent the U.S. courts
dence for trial.

70. Haiti, 669 F. Supp. at 406.
from having to hear the request twice — once during the investigation and once when the proper circumstances are present. This solution also would be consistent with the apparent intent behind the omission of the term "pending."

Another solution would be to interpret narrowly the term "interested person" to mean either (a) one who has an independent interest in a potential case (such as an investigating magistrate or juge); or (b) one who is an actual litigant in a pending case. Although foreign prosecutors would not be covered by such a standard, the possibility of foreign prosecutors obtaining needed information before proceedings are filed is not foreclosed entirely. Indeed, other means such as international police cooperation and inter-governmental assistance still would be available to the investigating foreign prosecutor. Moreover, although the instant solution does not eliminate the "form over substance" distinction, it is more consistent with U.S. notions of due process.

III. Current Problems

Recently, a number of cases addressing issues other than the "tribunal" question have become harbingers of the unforeseen problems in section 1782. The effect of the statute's broadly drafted language has been the granting of complete discretion to the district court in evaluating section 1782 requests. Noticeably absent are proper guidelines for the exercise of this discretion. The courts have attempted to construe the statute in a manner suited to their constitutional role by creating various tests to be used in evaluating section 1782 requests. However, judicial interpretation of the statute has not been uniform. In fact, some courts, interpreting the same statutory words, have drawn opposing conclu-

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71. This solution applies only to criminal cases. The statute was amended to eliminate the term "pending." The omission was aimed at making available to entities like the French juge d'instruction, the assistance of U.S. courts. See supra notes 36-48. It does not seem possible that Congress intended to allow a discovery "free-for-all" in civil matters where no action has been filed. A broad reading of the significance of the omission of the word "pending" to apply to civil as well as criminal matters could permit any overly litigious individual who entertained such a notion to come to the U.S. and search for actionable cases. But see Greig & Stahr, U.S. Discovery in Overseas Litigation, INT'L FIN. L. REV. 27, 28 (Jan. 1988) (implying that this would be not only a plausible interpretation, but an acceptable practice as well). See infra note 166.

72. Smit, supra note 10, at 1034-35. There is some question as to whether such means are sufficient in light of the pressing need for access to information to be used to arrest the international drug smuggling problems which have now reached epic proportions.
sions;\textsuperscript{73} still other courts have applied the statute in a fashion which seems at odds with the policy behind it. Therefore, there is a need for Congress to elucidate standards\textsuperscript{74} upon which district courts can rely when considering a section 1782 request.

A. Discretion and the Lack of Standards

The statute states, in part, that "The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal."\textsuperscript{75} The statute itself gives the district court no further guidance as to the granting or denial of a request, and gives the district court complete discretion in the consideration of a section 1782 request. In this context, a number of interesting questions arise concerning the exercise of discretion. For instance, if the minimal requirements\textsuperscript{76} of the statute are met (i.e., where the request comes from a "foreign or international tribunal"\textsuperscript{77} or "any interested person,"\textsuperscript{78} and the information is for use in a proceeding in a foreign or international tribunal\textsuperscript{79}) is the district court then compelled to grant the request? If the answer is in the negative, and the court denies the request, upon what standards should it base its decision?

1. Standards Suggested by Congress

The legislative history of section 1782 calls for a literal reading of the word "may."\textsuperscript{80} Encompassed within Congress' explanation of the intent behind the statute is an acknowledgment of the broad

\textsuperscript{73} Compare Haiti, 669 F. Supp. 403 (state law which provides for a privilege is not considered when it is inconsistent with federal law) with In re Request for Judicial Assistance from Seoul District Criminal Court, Seoul, Korea, 555 F.2d 720 (9th Cir. 1977) (in the absence of a federal privilege, state law supplements). Compare In re Court of Commissioner of Patents for Republic of South Africa, 88 F.R.D. 75 (E.D. Pa. 1980) (admissibility in the foreign court is a requirement) with John Deere, Ltd. v. Sperry Corp., 754 F.2d 132 (3d Cir. 1985) (admissibility is not a requirement).

\textsuperscript{74} See Comment, supra note 10, at 192-93.


\textsuperscript{76} See supra notes 21-22 and accompanying text.


\textsuperscript{78} Id.

\textsuperscript{79} Id.

\textsuperscript{80} U.S. Code Cong. & Admin. News, supra note 5, at 3788.
discretionary powers given to the district court. However, the legislators alluded to several factors which they may have intended as standards to guide the court:

In exercising its discretionary power, the court may take into account the nature and attitudes of the government of the country from which the request emanates and the character of the proceedings in that country, or in the case of proceedings before an international tribunal, the nature of the tribunal and the character of the proceedings before it.

Congress did not explain what these vague terms meant or how such terms should be applied. Rather, the individual courts applying these criteria have taken upon themselves the duties of interpreting the ends that the criteria were designed to achieve, and determining how much weight should be given to each factor. In the extreme instance, application of these vague guidelines can lead to judgments of a politically sensitive character because, by suggesting that the judge examine the nature and attitudes of foreign governments and judicial proceedings, Congress has placed the judiciary in the position of having to interpret and even determine foreign policy, duties which are not within the province of the

81. Id. See also In re Letters Rogatory From Tokyo District, Tokyo, Japan, 539 F.2d 1216, 1219 (9th Cir. 1976) ("the district court is given discretion in determining whether letters rogatory should be honored"); John Deere, Ltd. v. Sperry Corp., 100 F.R.D. 712, 714 (E.D. Pa. 1983) ("the use of permissive, as opposed to mandatory language in the provision makes it clear that there is no automatic right to a section 1782 order. Instead, section 1782 grants the district courts broad discretion to issue or decline to issue, a discovery order."); In re Request for Judicial Assistance from Seoul District Criminal Court, Seoul, Korea, 428 F. Supp. 109, 112 (N.D. Cal. 1977) ("the discretion to order or deny assistance is lodged in the district court . . ."); In re Letter Rogatory from Justice Court, District of Montreal, Canada, 383 F. Supp. 857, 858 (E.D. Mich. 1974) (quoting U.S. CODE CONG. & ADMIN. NEWS, supra note 5, at 3788); In re Letters Rogatory Issued by Director of Inspections of Government of India, 272 F. Supp. 755, 762 (S.D.N.Y. 1967) ("28 U.S.C. § 1782 leaves the granting of relief to the discretion of the court in each instance.").

82. U.S. CODE CONG. & ADMIN. NEWS, supra note 5, at 3788 (emphasis added).

83. Congress states that the court, "in proper cases, may refuse to issue an order or may impose conditions it deems desirable." Id. Congress then suggests the ambiguous factors, supra note 81 and accompanying text, presumably for use in deciding whether to refuse an order. By contrast, Congress was very specific in suggesting conditions that the district court might impose, such as "provisions for fees for opponents' counsel, attendance fees of witnesses, fees for interpreters and transcribers of the testimony . . . ." U.S. CODE CONG. & ADMIN. NEWS, supra note 5, at 3788.

84. For example, the Reporter to the Commission that drafted the 1964 amendment to 28 U.S.C. § 1782 commented that "a district court might properly have refused to order the production of evidence for use in the Soviet Union's criminal prosecution of Gary Powers." Smit, supra note 10, at 1029 n.82.
courts under the American system of separation of powers.\textsuperscript{85}

Further, when section 1782 was amended in 1964, Congress eliminated language which sanctioned judicial cooperation only where the evidence sought was to be used "in a foreign country with which the United States is at peace."\textsuperscript{86} The drafters reasoned that although the United States might not be technically at war with another country, relations might be so strained that the granting of assistance would be inappropriate.\textsuperscript{87} The power to make such a determination expands substantially the district court's discretionary role, for the court is then placed in a position to make outright political decisions. However, this not only violates the separation of powers, but also presents a threat to the goal of section 1782: to encourage other nations to open their doors to international discovery by exhibiting the fairness and evenhandedness of U.S. discovery practices.\textsuperscript{88} A possible solution to this quandary is to allow the district court to request an advisory opinion from the State Department whenever the court senses that it is being asked to make a politically-sensitive judgment pursuant

\textsuperscript{85} See generally The Federalist No. 47 (J. Madison) and No. 48 (J. Madison). Foreign policy is within the purview of the executive and legislative branches. It is not appropriate for the courts to make such decisions. See generally Goldwater v. Carter, 444 U.S. 996 (1979); United States v. Belmont, 301 U.S. 324 (1937); United States v. Curtis-Wright Export Corp., 299 U.S. 304 (1936). But cf. Baker v. Carr, 369 U.S. 186, 217 (1962) ("The doctrine . . . is one of 'political questions,' not one of 'political cases'.").


\textsuperscript{87} U.S. Code Cong. & Admin. News, supra note 5, at 3789. See also Smit, supra note 10, at 1028. See generally Trading with the Enemy Act, ch. 106, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. app. §§ 1-40 (1969), as amended 50 U.S.C. app. §§ 6-44 (Supp. V, 1964)). This concept is illustrated by several hypothetical cases, both civil and criminal, that could place a federal district court in the position of having to choose between the United States and a country with which U.S. relations are presently tenuous. For example, it seems highly unlikely that a U.S. court would grant a § 1782 request from the Nicaraguan government to aid in a trial of Ronald Reagan for alleged crimes against the Nicaraguan people, or a request by Panamanian General Manuel Noriega for information to be used in the prosecution of U.S. citizens in Panama for alleged crimes against the Noriega government. It is equally unlikely that a U.S. court would help Nicaragua locate U.S. assets upon which to execute pursuant to a civil judgment rendered against the United States in the International Court of Justice.

\textsuperscript{88} As Hans Smit, Reporter to the Commission that drafted the 1964 amendments, noted:

in most cases, however, refusal to lend assistance because of political differences between the United States and the country from which the request for assistance emanates would be an inappropriate form of retaliation inconsistent with the general broad-minded attitude of the United States in matters of international cooperation in litigation.

Smit, supra note 10, at 1029 n.82.
to a section 1782 request. To date, the courts never have implemented such a plan, but have relied instead on other, ineffective solutions.

2. Reciprocity

Thus far, the courts have been reluctant to use as a guideline the language suggested by Congress. Rather, the courts have devised their own criteria to determine whether a section 1782 request should be granted.

89. This concept has been employed by the courts in other circumstances, for example, the "Bernstein letter exception" to the Act of State Doctrine. For a discussion of the origins of the Act of State Doctrine see Underhill v. Hernandez, 168 U.S. 250 (1897). The "Bernstein letter exception" allows the state department to provide an advisory opinion as to whether the court may hear an action against a foreign sovereign. The exception arose in Bernstein v. Nederlandsche-Amerikansche Stoomvaart Maatschappij, 210 F.2d 375 (2d Cir. 1954), where the court was willing to hear the case only because the State Department explicitly indicated that to do so would not be detrimental to U.S. foreign policy interests. (The case concerned a post-WWII claim by a Jewish plaintiff to set aside the forced taking of his property by the Nazi government.) Thus, one can conclude that, even where a case concerns the actions of a government that is no longer in existence, U.S. courts are uncomfortable passing judgment regarding the actions of foreign governments and would prefer to have the help of the State Department.


90. One commentator, contrasting judicial decision-making with legislative decision-making, has made painfully clear that it is completely inappropriate for judges to make decisions without some objective factors to act as guideposts or safety nets:

The difference between legislative and judicial choice lies rather in the range of criteria that are available to the decisionmaker for the making of choices . . . . It might, for example, be unobjectionable for a legislator to take his fourteen-year-old daughter's advice about how to vote on an issue, but intolerable for a judge to decide a difficult case on the same basis.


91. It has been nearly 25 years since Congress suggested the "standards" referred to in the text preceding supra note 82. In that time, nearly all of the courts interpreting section 1782 have declined to base their decisions upon Congress' standards, yet Congress has taken no action to let the courts know that the legislature is displeased with the alternative tests used by the courts. According to one commentator, "Congress' failure to act in response to a judicial or administrative construction of a statute has been interpreted as legislative acquiescence in that interpretation." Grabow, supra note 27, at 741. Perhaps Congress thinks that the current version of § 1782 gives the district courts too much discretion and has acquiesced to the judicially-created tests.
One point of distinction has been whether the foreign government and its courts or tribunals have been receptive to letters rogatory from the United States (i.e., whether there is demonstrated reciprocity on the part of the forum country). A few early cases held that the lack of reciprocity is outcome-determinative: that where there is no demonstrable policy of reciprocation on the part of the forum nation, the court must deny the request.\footnote{92} However, the majority of courts considering the issue have stated that reciprocity is merely one factor in the determination.\footnote{93} Yet, any consideration of whether reciprocity exists seems to be inconsistent with the purpose of the statute, for the statute was intended specifically to encourage other nations to follow the lead of the United States\footnote{94} and open their courts to letters rogatory or other discovery requests.\footnote{95}

It is not unfair to say that [section 1782] is a one-way street. It grants wide assistance to others, but \textit{demands} nothing in return. It was deliberately drawn this way . . . .\footnote{96} However, the sponsors of the act were not unmindful of the need for parallel action abroad, so that United States litigants could expect the same generous treatment. As the Senate Committee stated: "It is hoped that the initiative taken by the United States in improving its procedures will invite foreign countries similarly to adjust their procedures."\footnote{96}


\footnote{93. For example, one court has held that "Congress did not intend section 1782 orders to depend upon reciprocal agreements. Nor should the practice of [foreign] courts in refusing to render judicial assistance, be the determinative factor in the construction given section 1782 by an American court." John Deere, Ltd. v. Sperry Corp., 754 F.2d 132, 135-36 (3d Cir. 1985). The court went on to hold that "although the district court was not prohibited from giving the absence of reciprocity some consideration in the exercise of its discretionary power, its decision should not have been predicated upon a finding of reciprocity." \textit{Id}. at 135.}

\footnote{94. According to one of the drafters, the statute was intended to be "an example of unilateral, non-reciprocal, internal legislation . . . which other countries \textit{may} wish to follow." \textit{New Developments, supra} note 10, at 33.}

\footnote{95. See \textit{U.S. CODE CONG. \& ADMIN. NEWS, supra} note 5, at 3782.}

\footnote{96. \textit{Service of Documents, supra} note 13, at 651. See also Degnan, \textit{supra} note 13, at 232 ("the United States decided over a decade ago to act unilaterally, without requiring reciprocity or even comity."); Letter from Oscar Cox to President John F. Kennedy (Jan. 28, 1963), \textit{reprinted in H.R. Doc. No. 88, 88th Cong., 1st Sess. 17, 19 (1963)} ("The commission hopes that . . . [section 1782] will \textit{invite} foreign countries similarly to adjust their procedures . . . . Enactment of . . . [section 1782] should \textit{encourage} foreign nations to follow the example of the United States." (emphasis added)), also \textit{reprinted in U.S. CODE CONG. \& ADMIN. NEWS, supra} note 5, at 3799.}
Hence, denial of a section 1782 request because the requesting foreign government, court, or tribunal has no history of reciprocity violates the intent and spirit of this statute.

Furthermore, foreign countries (particularly those with civil law systems) have not been receptive historically to American pre-trial discovery requests where the courts of such countries do not permit pre-trial discovery and, frequently, do not understand the practice fully. Because of the strong interest of the United States in conducting pre-trial discovery abroad, the statute must be applied in a way that sets an example by stimulating reciprocity. The foreign or domestic policy interests of the United States would not be served by demanding reciprocity from foreign countries. Hence, it is inappropriate for U.S. courts to consider the existence of reciprocity in the calculus of determining whether to honor requests for information based on section 1782.

3. Due Process of Law

In the attempt to create judicial standards pursuant to section 1782, some courts have taken the legislative history's vague references to "the nature and attitudes of the [foreign] government" and the "character of the proceedings" to mean that it is proper for U.S. courts to consider whether the foreign proceedings comport with American notions of due process of law. For example, after making mention of these vague references, the Court of Appeals for the Third Circuit, in *John Deere, Ltd. v. Sperry Corp.*, stated that "[a]s long as the discovered information is intended for use in a foreign proceeding which comports with [our] notions of due process, the requirements of 28 U.S.C. § 1782 have been met and an appropriate order should issue." This statement was cited in *Trinidad* when the district court stated that a section 1782 order to produce bank records for possible use in a prosecu-

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97. See In re Letter of Request for Judicial Assistance from Tribunal Civil de Port-au-Prince, Republic of Haiti, 669 F. Supp. 403, 408 (S.D. Fla. 1987); *Taking of Evidence*, supra note 13. One way to promote understanding of this practice and make foreign courts more receptive to American pre-trial discovery requests, would be to demonstrate the policy of the free flow of information in the interest of justice underlying the practice of pre-trial discovery, and to make a showing of goodwill without regard for reciprocity.

98. U.S. CODE CONG. & ADMIN. NEWS, supra note 5, at 3788.

99. Id.

100. 754 F.2d 132 (3d Cir. 1985).

101. Id.

tion in Trinidad would not "conflict with our concept of fundamental fairness and due process."\textsuperscript{103}

However, at least one court has been unwilling to consider whether due process is available in the foreign forum. In \textit{Haiti},\textsuperscript{104} the district court refused to decide the prospective defendant's issue of whether the defendant would receive due process in Haiti if the requested information eventually provided the basis for a Haitian prosecution of him.\textsuperscript{105} The district court opined:

[e]vidence in the record indicates that the proceedings in Haiti may lack certain procedural protections over the rights of the accused. However, this Court will not engage in advisory opinions.

Should the [Haitian prosecutor] decide that prosecution of [the prospective defendant] is appropriate, [the prospective defendant] may then contest the Haitian judicial procedures [in the Haitian forum].\textsuperscript{106}

Whether the defendant would have a truly adequate opportunity to contend that the requested information was going to be used improperly is arguable if, in fact, there existed no due process in the foreign forum. However, the \textit{Haiti} court was correct nonetheless in refusing to look at the foreign court's proceedings. District courts should question neither the existence nor the adequacy of due process available in the foreign forum, for the statute clearly is intended to be a bridge between very different forms of judicial process. Moreover, the interests of comity and the free flow of information require tolerance of different legal systems. Further, the due process inquiry by a district court is, by its very nature,

\textsuperscript{103} \textit{Id.} at 180. One court has stated implicitly that the availability of due process in the foreign court is a proper subject for investigation by U.S. courts. In \textit{re Letter Rogatory from Justice Court, District of Montreal, Canada}, 523 F.2d 562, 566 (6th Cir. 1975). In \textit{Montreal}, the court dismissed the defendant's claim of deprivation of the right of confrontation in Canadian court, reasoning that the defendant presented no evidence to support his claim and, therefore, failed to convince the court that he was being deprived of his rights. Presumably, if the defendant had offered evidence regarding the availability of sixth amendment rights, the court would have considered whether such rights were available in Canadian courts.

\textsuperscript{104} 669 F. Supp. 403 (S.D. Fla. 1987).

\textsuperscript{105} Another court has left the issue open, and could be construed as agreeing with the \textit{Haiti} opinion. In \textit{in re Request for Judicial Assistance from Seoul District Criminal Court, Seoul, Korea}, 555 F.2d 720 (9th Cir. 1977) the court stated that "[i]f departures from our concepts of fundamental due process and fairness are involved, a different question is presented - one that is not presented here and which we do not reach." \textit{Id.} at 724.

\textsuperscript{106} \textit{Haiti}, 669 F. Supp. at 406.
extremely political. Questioning whether there exists due process in the foreign forum risks offending the foreign tribunal as well as the policy at the heart of the statute.  

Finally, because the due process inquiry is political, one might presume that the due process inquiry would be made by the State Department in its determination of whether to provide a district court with an opinion letter regarding the section 1782 request. Therefore, a marked lack of due process in the foreign forum would not remain unnoticed by the United States government. If the executive branch has chosen to remain silent about the foreign forum's lack of due process, an announcement by a district court that no due process exists could be damaging to the foreign policy interests of the United States. Thus, the opinion letter solution is consistent with both section 1782 and the constitutional separation of powers doctrine, and would prevent the due process issue from becoming a political problem.

4. Admissibility

Another question asked by the courts in their search for standards under section 1782 is whether the courts should examine foreign law and decide if the evidence sought would be admissible in the foreign court or tribunal. Neither the statute nor the legislative history makes reference to the admissibility of evidence as a criterion for granting a request; rather, the question has been introduced by the courts in deciding section 1782 cases. In In re Court of the Commissioner of Patents for the Republic of South Africa, the district court held that it was unable to grant the section 1782 request because it could not determine whether the evidence sought would be admissible in the South African proceeding. The court stated:

Clearly, if, as in the usual case of letters rogatory, the foreign tribunal were represented here, the task of this Court would be very much simpler. Were that the situation, and the foreign tri-

108. See supra note 89 and accompanying text.
109. None of the reported decisions or commentators have discussed the issue of whether the courts should ask if the information sought would be admissible in U.S. courts.
110. 88 F.R.D. 75 (E.D. Pa. 1980). The material sought was to be used in a pending South African patent hearing. The plaintiff in the patent action was an American company with offices in the Eastern District of Pennsylvania. The defendant in that suit brought a § 1782 request to obtain records from the plaintiff's Pennsylvania offices.
bunal could instruct this Court in its law, this Court would not hesitate to order discovery consistent with South Africa [sic] law.\textsuperscript{111}

The \textit{South Africa} court thought that consideration of admissibility under foreign law was essential to the decision-making process. However, other courts seem less certain whether such an inquiry ought be made at all. In \textit{Trinidad}, the Court of Appeals for the Eleventh Circuit relinquished jurisdiction over the case temporarily to permit the district court to consider whether section 1782 requires an examination of the domestic law of the forum country to determine whether the information sought is properly discoverable.\textsuperscript{112} On remand, the district court held:

As a matter of law and policy, United States courts should refrain from undertaking an extensive analysis of foreign law in determining whether to honor a request for judicial assistance and should confine its [sic] inquiry solely to whether the evidence requested comports with the language of 28 U.S.C. § 1782 . . . . Our courts should not become entangled in interpreting foreign law when deciding whether to grant requests for judicial assistance.\textsuperscript{113}

The court of appeals also specifically requested the district court to determine whether the evidence sought would in fact be admissible under Trinidad and Tobago law. The court of appeals was uncertain as to how it planned to rule on the primary issue of whether foreign law should be considered. Essentially, the court wanted to know what result would obtain if, in fact, it held that district courts must decide the question of admissibility. To provide the court of appeals with a complete record upon which to base its decision, the district court, on remand, conducted extensive hearings with several witnesses who were experts on Trinidad law. None of the experts agreed on whether the requested evidence would be admissible, and at the conclusion of the hearings, the district court stated:

\textit{T}he battle of experts witnessed in this case is compelling evidence for abstention and deference [to foreign courts]. This issue is better left to a judicial tribunal in Trinidad, which through its expertise and knowledge of domestic law, can more

\textsuperscript{111} \textit{Id.} at 77 n.1.
\textsuperscript{112} \textit{Trinidad}, 117 F.R.D. 177 (S.D. Fla. 1987).
\textsuperscript{113} \textit{Id.} at 178.
fully explore and decide the complex evidentiary and legal issues presented in this instance.\textsuperscript{114}

Several courts have agreed in principle with the \textit{Trinidad} district court's holding that it simply is not feasible for federal district courts to examine admissibility because of the hopelessly complex and particularly burdensome task of construing foreign law,\textsuperscript{115} especially where the issue is one of evidentiary admissibility in the trial court.\textsuperscript{116} As a result, some courts have called for a rule stating that the issue of admissibility in the foreign forum is simply irrelevant to deciding a section 1782 request. For example, the court in \textit{In re Letters Rogatory from the Supreme Court of Ontario, Canada}\textsuperscript{117} held:

There is no authority on my part to make substantive ruling [sic] as to the admissibility or inadmissibility of evidence in the proceeding. The admissibility or inadmissibility of evidence is subject solely — is a matter solely for the Canadian Judicial authorities.

Congress in the enactment of 28 U.S.C. § 1782 did not intend that a United States District Judge become involved in making a substantive ruling as to the admissibility or inadmissibility of evidence in a foreign proceeding.\textsuperscript{118}

The same view was adopted by the Court of Appeals for the Third Circuit in overturning the district court opinion in \textit{John Deere},\textsuperscript{119} which held that because the information sought seemed inadmissible in a Canadian court, the section 1782 request could

\textsuperscript{114} Id. at 180.
\textsuperscript{115} U.S. lawyers and courts alike have great difficulty mastering and applying the U.S. federal evidentiary rules and exceptions. It is not unreasonable to assume that similar complexities could exist under foreign evidentiary codes. Certainly, then, U.S. courts are not in a position to master and apply foreign codes.
\textsuperscript{116} Very often, evidence which would be inadmissible under one U.S. rule can be admitted under another theory, or to prove another issue. For example, under FED. R. EVID. 802 (the "hearsay" rule), an out-of-court assertion can not be admitted into evidence at trial if it is offered to prove the truth of the matter asserted. However, with a proper foundation, such evidence might be admissible under one of the various exceptions to the hearsay rule (e.g., the "business records exception" embodied in FED. R. EVID. 803(6)). Thus, information that appears inadmissible on its face could be admitted if the proper use is made of it at trial. The danger, then, is that a U.S. court would deny a § 1782 request because, according to the court's interpretation of the foreign evidentiary rules, the information appears inadmissible. Yet, if the foreign attorney had obtained the information through discovery, he might have been able to get it admitted by his skillful use of the governing rules.
\textsuperscript{118} Id. at 1174.
\textsuperscript{119} 754 F.2d 132 (3d Cir. 1985).
not be granted.\textsuperscript{120} The appellate court stated: "[N]or [should federal district courts] determine the admissibility before such tribunals of the evidence sought."\textsuperscript{121}

For policy reasons, the courts are well counseled in refusing to consider the issue of admissibility under foreign law. First, attempts by U.S. courts to construe foreign evidentiary codes and rules results in a gross waste of judicial resources,\textsuperscript{122} particularly where even experts on the foreign law in question often disagree on the potential admissibility of the evidence sought.\textsuperscript{123} Second, a clear danger to comity and international relations is presented where a court familiar with one system of law attempts to declare the meaning of the laws of another legal system. Consider the district court's comments in \textit{Trinidad}:

Foreign tribunals are far more competent to decide issues of their own making than are United States courts. If the situation were reversed, this court would certainly prefer to interpret United States law rather than have a foreign tribunal sit in judgment.\textsuperscript{124}

5. A Proposed Solution to the Problem of Judicial Standards

The tests employed currently in the judicial consideration of section 1782 requests (i.e., those tests suggested by Congress and those suggested by the courts) either create a strain on judicial resources or result in the contravention of the statute's policy and intent. In actuality, the unbridled discretion given to the district courts under section 1782 has increased the difficulty of obtaining information located in the United States because, in developing standards to guide their discretion, the courts have erected roadblocks in the path of the free flow of information.

However, there is an alternative which might prove less destructive, not only in application but in result as well. The alternative is to limit the discretion of the district court. Under this solution, as a general rule, the court should grant a section 1782

\textsuperscript{120} 100 F.R.D. 712 (E.D. Pa. 1983).
\textsuperscript{121} \textit{John Deere}, 754 F.2d at 136. Accord In re Request for Judicial Assistance from Seoul District Criminal Court, Seoul, Korea, 555 F.2d 720, 723 (9th Cir. 1977); In re Letters Rogatory from the Tokyo District, Tokyo, Japan, 539 F.2d 1216, 1219 (9th Cir. 1976).
\textsuperscript{122} See supra notes 115-16 and accompanying text.
\textsuperscript{123} See text preceding supra note 114.
\textsuperscript{124} 117 F.R.D. 177, 178 (S.D. Fla. 1987).
request — without consideration of the issues of reciprocity, due process, or admissibility — whenever the request is presented by a proper entity.\textsuperscript{125} If the district court receives a request that it believes could have political ramifications, then the court may stay the request pending the issuance of an advisory opinion or \textit{amicus curiae} brief from the State Department.\textsuperscript{126} However, in the interest of preserving the independence of the judiciary, a revised version of section 1782 should indicate that although a State Department opinion is very persuasive, such an opinion is not binding upon the court. This solution still leaves some discretion in the hands of the district court, but removes from the purview of the judiciary the initial political question.\textsuperscript{127}

\textbf{B. Under Whose Law is Privilege Determined?}

The second paragraph of subsection (a) of section 1782 states that the information sought shall not be given “in violation of any legally applicable privilege.”\textsuperscript{128} Because of the ambiguous wording of that phrase, the law governing the application of privilege, pursuant to a section 1782 request, is difficult for the district court to delineate. Should the court look to the law of the United States, or to that of the foreign forum? If U.S. law is to be considered, should such consideration be limited to federal law, or should it include state law as well?

The legislative history states that section 1782 “provides for the recognition of all privileges to which the person may be entitled, including privileges recognized by foreign law.”\textsuperscript{129} Further-

\textsuperscript{125} See supra notes 68-70 and accompanying text.

\textsuperscript{126} As noted previously, the opinion letter ostensibly would address politically sensitive issues such as whether due process exists in the foreign forum. See supra note 89 and accompanying text.

\textsuperscript{127} Removing this decision from the courts would prevent the United States from sending mixed signals from the different branches of U.S. government to foreign governments. Under the current scheme, there is danger that foreign governments might perceive the judgment of the district court as the position of the United States government.


\textsuperscript{129} U.S. Code Cong. & Admin. News, supra note 5, at 3790. Congress indicated that there must be a reasonable connection between the person asked to produce the evidence and the state or country under the laws of which the accused claims the possibility of incarceration. To determine whether such a connection exists, the Congress suggested that the court consider, “the nationality, domicile, forum, and the place of relevant events.” Id. at 3792. The mere fact that the Congress suggests the consideration of nationality adds weight
more, former section 1785,\textsuperscript{130} which was replaced by the privilege provision in amended section 1782, specifically stated "under the laws of any State or Territory of the United States or any foreign state."\textsuperscript{131} In 1964, Congress wrote the privilege provision into section 1782, incorporating former section 1785. In this regard, the specific reference to "any legally applicable privilege"\textsuperscript{132} was intended to encompass the scope of the former provision.\textsuperscript{133} Had Congress intended to narrow the scope of the privilege to exclude state law privileges, it would have done so by limiting the language in section 1782; it did not.\textsuperscript{134} Therefore, it follows that the court also must consider whether a state law privilege exists.

Such an issue arose in \textit{In re Request for Judicial Assistance from the Seoul District Criminal Court, Seoul, Korea},\textsuperscript{135} where the district court said that, because the statutory language of, and case law on, section 1782 are "unclear" on the question of applicable privilege, the court would follow the Ninth Circuit practice of looking at state law in other, non-section 1782 privilege cases.\textsuperscript{136} Yet, in \textit{In re Letter of Request for Judicial Assistance from Tribunal Civil de Port-au-Prince, Republic of Haiti},\textsuperscript{137} the district court held, contrary to Seoul, that, "the subpoena was issued pursuant to a federal statute, namely 28 U.S.C. Section 1782. Consequently, to the argument that foreign law privilege must be considered.

\begin{itemize}
\item[130.] 28 U.S.C. § 1785 (1958) stated in pertinent part:
  Privilege against incrimination.
  A witness shall not be required on examination under letters rogatory to disclose or produce any evidence tending to incriminate him under the law of any State or Territory of the United States or any foreign state.
\item[131.] \textit{Id.} (emphasis added).
\item[132.] See supra notes 128-29.
\item[133.] "The last sentence of subsection (a) of Section 1782 replaces former 28 U.S.C. § 1785, which is repealed by Section 12 of the Act." Smit, supra note 10, at 1029 (footnote omitted). The drafters only intended omission was that of the vague language of section 1785, which allowed a litigant to cite the law of any country to that person's advantage, regardless of the cited country's connection to the proceedings. \textit{Id.} at 1031.
\item[134.] Congress declined to name specific privileges because the general doctrinal body of privilege law was still emerging. In fact, the Federal Rules of Evidence were still in the conceptual stage when the 1964 amendment to § 1782 was passed. See U.S. Code Cong. & Admin. News, supra note 5, at 3790.
\item[135.] 428 F. Supp. 109 (N.D. Cal.), aff'd, 555 F.2d 720 (9th Cir. 1977).
\item[136.] As a matter of first resort, the courts of the Ninth Circuit follow state law in deciding issues of evidentiary privilege. \textit{See, e.g., In re Michaelson}, 511 F.2d 882 (9th Cir. 1975), \textit{cert. denied}, 421 U.S. 978 (1975). \textit{Cf. United States v. Jones}, 517 F.2d 666 (5th Cir. 1975) (after recognizing that the federal common law generally governed the case before it, the court stated that where there was no common law in the Fifth Circuit on the attorney-client privilege issues presented, state law should be examined).
\item[137.] 669 F. Supp. 403 (S.D. Fla. 1987).
\end{itemize}
federal law governs this case. To the extent that state law is inconsistent, it is preempts.\textsuperscript{138} Clearly, there is no problem when the boundaries of protection are the same under federal and state law. However, where the limits of federal and state protections differ, the argument for recognizing the greatest existing privilege arises.\textsuperscript{139} The concept of recognizing privilege is, in the first instance, meant as a protective measure. Thus, if there is a privilege available, the protection ought be given.\textsuperscript{140} The same argument also justifies looking at foreign law privileges as well as U.S. law privileges pursuant to a section 1782 request. In other words, where a privilege exists under any law, whether federal, state, or foreign, that privilege should be recognized. A U.S. court's failure to recognize a foreign law privilege could be interpreted by foreign courts as contempt for foreign laws; certainly, the perception that practice would create would not further the goals of the statute.

Ironically, there also exists the possibility that a broad application of the privilege clause in section 1782 could result in hostility on the part of foreign governments toward the U.S. legal system and foreign discovery in general. Indeed, if in considering a section 1782 request a district court gives effect to a U.S. privilege which is not recognized abroad, there is a danger that the foreign courts could perceive the United States as giving foreign litigants less information than such litigants could receive in their own countries. Hence, foreign courts could conclude that although the United States purports to be opening its doors to the world in the interest of the free flow of information, the broad application of privilege by U.S. courts pursuant to section 1782 requests is eliciting the opposite effect. A perception of this nature could offend seriously

\textsuperscript{138} Id. at 407.

\textsuperscript{139} In this regard, state law is preempted only where “a ‘significant conflict’ exists between an identifiable ‘federal policy or interest and the [operation] of state law’ . . . or the application of state law would ‘frustrate the specific objectives’ of federal legislation.” Boyle v. United Technologies, 108 S. Ct. 2510, 2515 (1988); Schneidewind v. ANR Pipeline, 108 S. Ct. 1145 (1988). Moreover, although it is true that “congressional intent to preempt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress ‘left no room’ for supplementary state regulation,” California Fed. Sav. & Loan v. Guerra, 107 S. Ct. 683, 689 (1987), such “congressional intent to preempt” cannot be inferred in the instant case. Where there is no “outright or actual conflict between federal and state law,” Louisiana Pub. Serv. Comm’n v. F.C.C., 106 S. Ct. 1890, 1898 (1986), one can infer that the application of state privilege law is not preempted in cases involving § 1782 requests for information.

\textsuperscript{140} But see In re Request for Judicial Assistance from Seoul District Criminal Court, Seoul, Korea, 428 F. Supp. 109, 112 (N.D. Cal.), aff’d, 555 F.2d 720 (9th Cir. 1977) (any applicable privilege is not absolute; rather it is to be weighed against other factors).
the foreign courts and could discourage foreign countries from enacting policies similar to section 1782.\footnote{141}

Additionally, it can be argued that U.S. courts should not consider foreign law because U.S. courts are not in the best position to evaluate it. In the extreme situation, where the existence of the privilege is a central issue in the foreign dispute, examining whether a privilege exists could involve the district court in a trial of the merits of the foreign case.\footnote{142} Such a result is undesirable for three reasons:

1) U.S. district courts are not the best-suited authority to interpret foreign law;

2) Allowing U.S. district courts to interpret and apply foreign law could lead to inconsistent statements of the rights and obligations of the parties to the foreign action; and,

3) A foreign court might be offended by the lack of comity displayed by the U.S. court considering the section 1782 request.

Admittedly, the trial-on-the-merits example is at the extreme of possibility. As a general rule, the district court should consider foreign law privileges. However, when it appears to a district court that a trial on the merits must be held to determine whether the requested information is privileged, the district court might, in its

\footnote{141. See Smit, \textit{supra} note 10, at 1033.}

\footnote{142. For example, assume patient \textit{X} was seeing psychiatrists \textit{A} and \textit{B} (partners) in a foreign country. Over time, the three became friends and saw one another socially. On one occasion (at a social function), \textit{X} told \textit{A} and \textit{B} certain information. Under the law of the foreign jurisdiction, therapist/patient privilege covers only information told within the context of treatment. Sometime later, \textit{B} moved to the United States. Then, \textit{A} — without \textit{X}'s consent — authored a book containing some of the information told to him by \textit{X}. Subsequently, \textit{X} filed a lawsuit in the foreign country, against \textit{A}, for breach of the privilege and the harm caused (i.e., emotional distress and slander). As part of his defense to the lawsuit, \textit{A} wanted to depose \textit{B} about what \textit{X} had said and the circumstances under which he said it. To that end, \textit{A} filed a \textsection 1782 request to depose \textit{B} in the United States. \textit{X} tried to prevent the deposition by asserting that the information sought by \textit{A} was told in the context of treatment. Therefore, \textit{B}'s testimony still would be covered by the privilege (\textit{X} did not want \textit{B} to testify because \textit{X} did not want released the remainder of the information which \textit{A} had not published).

A U.S. court, in determining whether to grant such a \textsection 1782 request, first must decide whether the information sought is privileged. To do so, the court must determine whether a privilege was created when \textit{X} told the information to \textit{A} and \textit{B} (i.e., whether the information was told in the context of treatment). If so, \textit{B}'s testimony would be prohibited by the privilege. Yet, this is precisely the question at issue in the foreign case. Hence, the U.S. court would have to decide the merits of the case in order to grant the \textsection 1782 request. Clearly, such a result is undesirable.}
discretion, simply deny the request. Alternatively, district courts considering section 1782 requests could elicit expert testimony regarding the application of foreign law privilege under the foreign law.¹⁴³

Thus, there are equally compelling arguments both for and against the recognition of privileges in general. In assessing whether the current version of section 1782 best effectuates its intended policy, Congress should consider the extensive body of state and federal privilege law that has developed since the 1964 amendment to section 1782.¹⁴⁴

C. 28 U.S.C. § 1782 Requests Made with Ulterior Motives

The order may . . . direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.¹⁴⁵

This language leaves at the district court's discretion the decisions of whether to appoint a commissioner, and — if a commissioner is appointed — who the commissioner will be. The district court may appoint a federal magistrate¹⁴⁶ to serve as commissioner or it may appoint some other individual, such as a person suggested by the

¹⁴³. But see Trinidad, 117 F.R.D. 177 (S.D. Fla. 1987), where the court was caught in a quagmire of conflicting opinions from experts on foreign law. See supra text preceding note 114.

¹⁴⁴. The Federal Rules of Evidence, which codified inter alia privileges recognized by the federal courts, did not come into existence until 1974, some ten years after the privilege clause was written into § 1782.


¹⁴⁶. The court may appoint as commissioner a federal magistrate. Federal magistrates act as support personnel for district court judges. The position of magistrate was created in 1968 by the Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1108 (1968) (codified at 28 U.S.C. § 636 (1968)). Included in the list of "experimental" duties that the judge may assign to the magistrate is the "supervision of proceedings or requests for letters rogatory in civil or criminal cases [a special designation is required by the district court under 28 U.S.C. § 1782(a).]" 28 U.S.C. § 636(b)(3) (1968) See also Sear, Supporting Personnel, in Proceedings of Seminar for Newly Appointed District Judges, 75 F.R.D. 89, 237-59 (1976). Although the magistrate may require the parties to do what is necessary to carry out the district court's § 1782 order, it is not within the magistrate's power to deny the request after the judge has granted it. See In re Request for Judicial Assistance from the Seoul District Criminal Court, Seoul, Korea, 428 F. Supp. 109, 112 (N.D. Cal.), aff'd, 555 F.2d 720 (9th Cir. 1977) (the discovery request from the Korean court stated that it would expire December 31, 1976; thereafter a new request would have to issue if discovery had not yet been completed. In January 1977, the magistrate charged with complying with the district court's discovery order stated that the request would not be honored because the underlying writ had expired. The district court overruled the magistrate, holding that, in denying the request, the magistrate had exceeded his authority under the statute).
requesting party or a person designated by foreign law to give
oaths and take evidence. In its present form, section 1782 is in
several ways susceptible to abuse.

1. Commissioner's Personal Use of Information Discovered

There is the potential for a conflict of interest when the per-
son appointed as commissioner has an interest in other pending or
future U.S. litigation outside of, but similar to, the case for which
the information is requested, because the information that such a
commissioner learns may later be used improperly in the other lit-
gation. Moreover, the commissioner maintains responsibility for
ensuring that the district court's section 1782 order is complied
with fully. Presumably, this responsibility includes compliance
with all safeguards ordered to protect the rights of the parties,
such as protecting privileged information.

To place in charge of the enforcement and protection of rights
and privileges a commissioner who might have an interest in ob-
taining that information for other purposes, is to put the prover-
bial fox in the henhouse. Yet, this very situation occurred in Ha-
iti, where the law firm of Stroock & Stroock & Lavan (Stroock)
was appointed commissioner to oversee the gathering of informa-
tion about the U.S. bank records of former Duvalier government

147. U.S. CODE CONG. & ADMIN. NEWS, supra note 5, at 3789.
where the court stated that the "commissioner's primary function is to represent the inter-
ests of Haiti in conducting the requested discovery." Id. at 848.

In Haiti, Crown Charters was the defendant in an action brought by the current Hai-
tian government to recover the yacht "Niki." The vessel allegedly was purchased by former
Haitian President Jean-Claude Duvalier with funds embezzled from Haiti, and later was
sold to Crown for $1 million. The Haitian government was represented originally by the law
firm of Stroock & Stroock & Lavan, see infra notes 149-50 and accompanying text, but the
firm withdrew due to an unrelated conflict-of-interest. Stroock maintained contact with Ha-
iti's new counsel, with which it shared information. This fact was distressing particularly to
the defendant, because Stroock had been appointed as commissioner to gather evidence in a
§ 1782 case with direct relevance to the action in which the defendant was involved. See In-
re Letter of Request for Judicial Assistance from Tribunal Civil de Port-au-Prince, Republic
of Haiti, 669 F. Supp. 403 (S.D. Fla. 1987); infra notes 149-50 and accompanying text.

Crown moved to depose the Stroock attorneys so that Haiti's present counsel did not
have an unfair advantage over it in the instant litigation. The court commented that there
was no impropriety in having Stroock sit as commissioner, yet reasoned that the imbalance
of information could be detrimental to Crown. Thus, the court allowed Crown to depose the
Stroock attorneys. For an interesting discussion of the case from the perspective of the im-
 pact on Florida law, see Jarvis, International Law: 1987 Survey of Florida Law, 12 NOVA L.
REV. 547 (1988).
149. 669 F. Supp. 403.
officials. In *Haiti* one such former official argued that Stroock was not a proper party to sit as commissioner because the firm was representing the present government of Haiti in its efforts to collect funds taken out of Haiti by the ousted Duvalier regime. Stroock was to receive a percentage of all monies that the firm assisted in recovering.\textsuperscript{150} Clearly, then, if Stroock was in charge of conducting discovery of the former Duvalier official's bank records, the firm was in a position to learn information from which it could have profited.\textsuperscript{151} However, the *Haiti* court held:

> [t]his argument is unpersuasive in light of this Court's recent ruling that even where the party requesting judicial assistance is an "interested party" and not "neutral," the grant of assistance under Section 1782 is appropriate. In *re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago.*\textsuperscript{152}

Simply stated, the *Haiti* court misconstrued the holding in *Trinidad*. The *Haiti* court was apparently under the impression that the *Trinidad* opinion was dispelling the notion that the section 1782 request had to come from an impartial tribunal; this was simply not the issue at hand in *Trinidad*.\textsuperscript{153} In addition, the statute expressly states that a litigant before a tribunal may request information. Thus, where a litigant is obviously an "interested" party, the *Haiti* court's conclusion is not only legally unsound but superfluous as well. The court's holding in *Trinidad* is not applicable to the question of whether the commissioner may be an interested, non-neutral party. Such an interpretation would allow anyone who merely had a passing interest in the information, for use in this or other proceedings, to act as commissioner where that person is an "interested party."

In a worst-case scenario, U.S. district courts ordering discovery pursuant to section 1782 could become information clearinghouses where discovery can be obtained by anyone with an "interest" in receiving it. Taken to the logical extreme, such a policy

\textsuperscript{150} Id. at 407.

\textsuperscript{151} The court chose not to give effect to state law privilege, see *supra* notes 137-40 and accompanying text. However, in discussing state law, Judge Davis made clear that the information sought would have been privileged under Florida law. Consequently, by sitting as commissioner, Stroock was able to discover privileged matter. Stroock could use this information to great advantage in its U.S. litigation to recover embezzled funds on behalf of the current Haitian government.

\textsuperscript{152} *Haiti*, 669 F. Supp. at 407.

\textsuperscript{153} See *supra* notes 37-47 and accompanying text.
could encourage a discovery-for-sale network to take root.\textsuperscript{154} Interested parties could obtain information and disclose such information to others who are conducting "fishing expeditions." As a way of preventing this serious misuse of section 1782, the district court should avoid appointing as commissioner a person with a current or potential "interest" in the information discoverable pursuant to the district court's order. In this regard, if a person with an interest in the requested information was appointed nonetheless, that person should remove himself from the case.

2. Litigant's Use of the Information Obtained

The district court has complete discretion to prescribe the procedure to be followed in carrying out the order. Section 1782(a):

permits, but does not command, following the foreign or international practice. If the court fails to prescribe the procedure, the appropriate provisions of the Federal Rules of Civil Procedure are to be followed, irrespective of whether the foreign or international proceeding or investigation is of a criminal, civil, administrative, or other nature.\textsuperscript{155}

This provision was drafted probably to accommodate the varied forms of procedure around the world. The evidentiary codes of the many different legal systems of the world are complex and often formalistic. If the statute were to mandate that the information

\textsuperscript{154} One might argue that as long as the shared information is not privileged matter, sharing of information is actually beneficial. Such a contention is based on the notion of free flow of information in the interest of having the decisionmaker possess all of the relevant facts to facilitate an informed decision. Ward v. Ford Motor Co., 93 F.R.D. 579, 580 (D. Colo. 1982) ("Efficient administration of justice requires that courts encourage, not hamstring, information exchanges . . . .").

Another argument is presented in Cipollone v. Liggett Group, 106 F.R.D. 573 (D. N.J. 1985). The court in Cipollone refused to order the plaintiff's attorney not to disclose information which indicated that tobacco companies had concealed information regarding the risks of smoking. The court was concerned that other, similarly situated litigants might not have the resources to conduct similar discovery to recover such information for use in other suits. (However, the court issued a caveat intimating that the Supreme Court has abandoned the notion that discovery should be presumed "open.") Id. at 587 (citing Seattle Times v. Rhinehart, 467 U.S. 20 (1984)). The Cipollone court was sensitive to the problem of discovery-for-sale networks: "[A]t least one court has permitted the very evil here cited by defendants - the sale of discovery materials." Cipollone, 106 F.R.D. at 586 (discussing Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig. 81 F.R.D. 482, 484-85 (E.D. Mich. 1979), aff'd, 664 F.2d 114 (6th Cir. 1981)). However, the Cipollone court cited a number of decisions indicating that discovery should occur unless it is clear that the present proceeding is a sham designed to get information.

\textsuperscript{155} U.S. Code Cong. & Admin. News, supra note 5, at 3789.
had to be taken in accordance with domestic rules of procedure, the information could be rendered useless in the foreign court.\textsuperscript{156} Consequently, the district court maintains discretion in determining the form of the order.

Difficulties have arisen from the fact that an order for discovery issued pursuant to section 1782 does not have to comply with the foreign forum's process. Indeed, litigants making requests under section 1782 have been accused of conducting \textit{ad hoc} discovery in an attempt to circumvent the governing foreign court's prescribed process regarding the gathering of evidence. In \textit{Verson Int'l Ltd. v. Allied Prods. Corp.},\textsuperscript{157} the district court refused to grant an order permitting the requesting litigant to take an \textit{ex parte} deposition because the law of the forum nation would not permit the compulsion of a third party to sit for an \textit{ex parte} statement.\textsuperscript{158} Thus, the court entered an order commanding that the deposition be taken in accordance with the Federal Rules of Civil Procedure, reasoning that to do so would avoid offending English law.\textsuperscript{159}

Foreign courts also have recognized the problem of differing discovery procedures among differing legal systems. In \textit{South Carolina Ins. Co. v. Assurantie Maatschapij "De Zeven Provincien" NV},\textsuperscript{160} the plaintiff, an insurance carrier, sought an injunction from the British courts as a method of preventing the defendant from initiating a section 1782 request to depose third parties located in the United States.\textsuperscript{161} The House of Lords refused to issue the injunction and held that while procedural differences regarding discovery existed between the United States and England, the Lords would not prevent a party from gathering information necessary to prove its case.\textsuperscript{162} Interestingly, although the House of Lords refused to aid the plaintiff in halting the depositions,\textsuperscript{163} neither would the Lords help the defendant by ordering the discovery. It is important to note that the House of Lords found that an application under section 1782 to do what could not be done under British

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{156} See \textit{New Developments}, supra note 10, at 31. See also supra notes 115-16.
\item \textsuperscript{157} No. 87-C-7549 (N.D. Ill. Sept. 25, 1987) (WESTLAW, Genfed lib. #17837).
\item \textsuperscript{158} Id.
\item \textsuperscript{159} Id.
\item \textsuperscript{160} [1987] 1 App. Cas. 24 (H.L.).
\item \textsuperscript{161} Id. The U.S. district court stayed its decision on the § 1782 petition pending the House of Lords' decision.
\item \textsuperscript{162} Id.
\item \textsuperscript{163} "The \textit{South Carolina} case thus establishes that, except in extraordinary circumstances, U.K. courts will not enjoin attempts by U.K. litigants to obtain evidence from third parties in the United States under § 1782." \textit{Overseas Litigation}, supra note 71, at 28.
\end{itemize}
\end{footnotesize}
law was not an affront to the sovereignty of the English courts. Unfortunately, other foreign courts may not maintain the same favorable view, and might consider the section 1782 request to be an attempt to evade the constraints of the foreign forum's process.

There also exists the possibility that litigants before the foreign court could use section 1782 as a device to get around U.S. discovery rules. For example, where one party is involved in concurrent, related actions pending before both U.S. and foreign courts, that party might be tempted to file a section 1782 request as a way of obtaining information otherwise unavailable under the appropriate U.S. discovery rules. The requesting party then could use the discovered information to his advantage in the U.S. proceeding. This scenario is particularly worrisome where the particular U.S. court granted the section 1782 request in violation of some applicable U.S. privilege.

Finally, it is possible that a litigant in a foreign action would file a section 1782 request to obtain information which can be utilized as the basis for a legal action in the United States. Such abuse of section 1782 is at odds with U.S. notions of fair play and the manner in which U.S. courts permit discovery to be taken.

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164. "[I]t could not possibly have been said that there had been any interference with the English court's control of its own process." South Carolina, [1987] 1 App. Cas. at 42.

165. See supra note 140 and accompanying text. If the information is of a nature that harm can be avoided by quashing such material at trial (e.g., evidence seized in violation of the fourth amendment) the concern is not so grave. However, where harm can be avoided only by refusing to release the information, such as material covered under the work product privilege, Fed. R. Civ. P. 26(b), there is genuine cause for concern.

It can be argued that if the information was given as a result of a court order issued pursuant to §1782, the order constitutes judicially-conferred immunity. See, e.g., 18 U.S.C. § 6002 (1970). However, once the information becomes part of the public record in a foreign court, the privilege no longer exists because the information is no longer concealed.

166. But see Overseas Litigation, supra note 71, at 28, suggesting that this is perfectly appropriate behavior. See also supra note 72. Such conduct has been forbidden strictly in other contexts. For example, "the powers of the grand jury may be used only to further its investigation, and . . . a court may quash a subpoena used for some other purpose." United States v. (Under Seal) Antitrust Grand Jury Investigation, 714 F.2d 347, 349 (4th Cir. 1983). "[P]ractices which do not aid the grand jury in its quest for information bearing on the decision to indict are forbidden. This includes use of the grand jury by the prosecutor . . . as a means of civil or criminal discovery." Id. (citing United States v. Procter & Gamble, 356 U.S. 677 (1958) (other citations omitted)). Moreover, the Right to Financial Privacy Act of 1978 (codified at 12 U.S.C. § 3420 (1982)), specifically provides that when a grand jury subpoenas bank records, those records "shall be used only for the purpose . . . of prosecuting a crime for which that indictment or presentment is issued . . . ." 12 U.S.C. § 3420 (2) (1982).

However, this argument faces difficulty when the threat of a second suit is not yet realized. See Grand Jury Subpoena Duces Tecum Addressed to Armada Petroleum Corp., 520 F. Supp. 253 (S.D. Tex. 1981), where the court refused to quash a grand jury subpoena,
Unfortunately, this scenario could become more commonplace as the federal courts apply, with increasing frequency, sanctions under Federal Rule of Civil Procedure 11.\textsuperscript{167} Rule 11 requires an attorney to maintain a good-faith belief in the validity of what he and his client are asserting.\textsuperscript{168} Hence, where an attorney in the United States knows that he does not have enough information to support a good faith claim, the attorney might be tempted to file the case in a foreign court and make a section 1782 request to obtain information upon which to build a case in a U.S. court.

It would be impractical, if not impossible, for Congress to prescribe, in advance, the appropriate procedure to avoid the aforementioned difficulties. However, district courts should be sensitive particularly to the possibility that the pertinent section 1782 request is being used to circumvent foreign or domestic restrictions on discovery. To aid the district court in such a situation, Congress could prescribe one of the following standards:

1) upon motion by the other party, the requesting party should be forced to make a good faith showing that the information sought is for use in the foreign proceeding; or,

2) the district court should grant the request only where there is a reasonable basis for believing that the information sought is for use in the foreign proceeding; or

3) the district court should grant the request only where there exists a reasonable possibility that the information will be used in the foreign proceeding.

distinguishing Procter & Gamble because "the latter company was not indicted by a grand jury, but was subsequently sued in a civil action. Indeed, Armada might be indicted and can only hypothesize concerning a civil suit." Grand Jury Subpoena, 520 F. Supp. at 255. Thus, it seems that the threat of prosecution must be real. See Johnson Foils, Inc. v. Huyck, Corp., 61 F.R.D. 405, 410 (N.D.N.Y. 1973) ("unless it can be shown that this discovering party is exploiting the instant litigation solely to assist in other litigation before a foreign forum, the federal courts do not allow full use of the information in other forums.").

\textsuperscript{167} Rule 11 states:

The signature of an attorney or party constitutes a certificate by him that . . . to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction . . . .


\textsuperscript{168} Id.
Thus, the district court would not need to question for what other purposes the information sought might be utilized as long as such information is for use in the foreign proceeding.\(^{169}\) Where the district court finds that the requesting party cannot satisfy one of the standards, the court should apply its discretion and deny the request. In context, the suggested standards would constitute limited exceptions to the rule proposed previously, in essence, that the district court grant all requests meeting the two statutory requirements unless the court is informed otherwise by the State Department and wishes to follow its advice on the matter.\(^{170}\)

## IV. CONCLUSION

Congress had in mind a noble purpose when it passed section 1782. The statute was to be a spark which other nations would kindle, joining the United States in clearing the path for the free flow of information on an international scale. Unfortunately, the present version of the statute is not well suited to the facilitation of such a task. Indeed, as the statute is used with increasing frequency, the possibilities for abuse shall become more apparent. This Comment has noted both the current problems under section 1782 and the problems which the courts may face in the near future, and has suggested some possible remedies. This Comment also has explained that there is a clear need for Congressional action.

Section 1782 should be reexamined and redrafted with greater specificity,\(^{171}\) bearing in mind the following:

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169. Each of these proposed standards represents a relevancy test. The standards differ only in the degree of proof which the party must present. The standard for appellate review would remain "abuse of discretion."

170. See supra note 89 and accompanying text.

171. The abstract nature of the words of the statute necessitates that Congress take affirmative steps to memorialize its intent by doing more than simply adopting the drafters' statement of purpose:

Legislators should take an active role in preserving and documenting a record of their purpose in drafting and enacting legislation. By providing the courts with a panoply of reliable legislative history, the legislature will enable judges to understand and apply legislative intent, furthering the constitutional mandate for separation of powers.


1) There are competing arguments as to whether the phrase "interested person" should apply to a foreign prosecutor seeking the aid of section 1782 to build his case before proceedings have begun:

a) Argument that the request be denied: The prosecutor should rely upon international police cooperation or intergovernmental assistance to obtain information with which to create his case. This argument takes into account strong U.S. concerns regarding protection of privacy and protection from unnecessary governmental interference.\(^{172}\)

b) Argument that the court grant the request: Once the case is pending, the prosecutor would be a litigant before the foreign tribunal and would then be entitled to assistance under section 1782. In this regard, it is pointless to deny the prosecutor's present request where the prosecutor will be later entitled to the section 1782 order. This argument advocates substance over form\(^{173}\) and, by eliminating the need for the court to examine the request twice, takes into account the scarcity of judicial

The words of a statute are always relevant, often decisive, and usually the most important evidence of what the statute was meant to accomplish. I merely object to the proposition that one must always begin with the words, and I am reasonably confident that more often than not the judge - the good judge as well as the bad judge - in fact begins somewhere else. . . . [Furthermore, because,] the statute is a compromise between one group of legislators that holds a simple remedial objective but lacks a majority and another group that has reservations about the objective, a court that construed the statute broadly would upset the compromise that the statute was intended to embody.

Posner, supra note 27, at 808-89.

Another interesting view of statutory interpretation is presented in Eskridge, Dynamic Statutory Interpretation, 135 U. Pa. L. Rev. 1479 (1987):

Like other texts, statutes are dynamic things: they have different meanings to different people at different times, and in different legal and societal contexts. It is a significant departure from current doctrine to assert, as I do, that federal courts should interpret statutes in light of their current as well as historical context.

Id. at 1554. As Justice Holmes once observed: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918).

172. See generally U.S. CONST. amends. I-X.

173. Formal justice is associated with rules that are based on ascertainable facts, restrain official arbitrariness, and provide certainty. Substantive justice is associated with standards that direct courts to assess a particular fact situation in terms of the overall objectives of the legal order. In the modern consciousness neither form nor substance emerges completely triumphant . . . . In the realm of statutory interpretation, formal justice is associated with following the letter of the statute and substantive justice with its "spirit." Blatt, supra note 27, at 799-800.
resources.\textsuperscript{174}

2) If a section 1782 request calls for a political decision, the district court should seek an \textit{amicus curiae} brief or opinion from the executive branch (i.e., the State Department) as a way of removing political questions from consideration by the judiciary and preventing U.S. foreign policy inconsistencies. However, the court should retain discretion in deciding how much deference to give the advisory opinion.

3) The court should consider all applicable privileges — federal, state, and foreign — in reaching a decision. However, where the privilege inquiry threatens to force the U.S. court to hear the merits of the case, the court should use its discretion and deny the request.

4) The court should not appoint as commissioner for the gathering of information a person who has an interest in obtaining such information for his or her own use.

5) There are several possible alternatives which could be adopted in response to the danger that the information to be discovered is desired by the requesting party for purposes other than the claimed foreign litigation:

   a) Upon motion by the other party, the requesting party should be forced to make a good faith showing that the information is sought for use in the foreign proceeding; or,

   b) The district court should grant the request only where there is a reasonable basis for believing that the information sought is for use in the foreign proceeding; or

   c) The district court should grant the request only where there exists a reasonable possibility that the information will be used in the foreign proceeding.

Because of the growing need for greater cooperation in transnational litigation, the legal system of each nation must change to accommodate such cooperation. The passage of section 1782 was

\footnote{174. Ultimately, the decision regarding adoption of either of these solutions is a matter of policy and, therefore, must be performed by Congress.}
the first step toward that goal; a revision of the statute consistent with the solutions here proposed would be another.

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