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In Search of International Evidence: A Lawyer's Guide Through the United States Department of Justice

Edward C. Weiner*

I. Introduction

Nations of the world often must cooperate in order to achieve their objectives. Foreign alliances, trade agreements, economic assistance pacts, private business ventures, and a multitude of other complex relationships require good faith on both sides of the street. The field of international cooperation in litigation is no different. The United States and other countries are increasingly discovering that their citizens engage in transnational activities that often result in lawsuits. Obtaining evidence from foreign nations is necessary to conduct such litigation. Many of the largest American businesses (such as the major oil companies) have foreign subsidiaries or order goods and materials from abroad. If an accident or a contract dispute occurs and a civil suit is brought in the United States, it may be essential to obtain testimony and documentary evidence from another country. Little cooperation will be forthcoming from abroad unless the United States is itself prepared to render effective judicial assistance to foreign litigants. This article examines the American side of the street of international judicial assistance;¹ that is, the processing of foreign evidence requests in the United States.²

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¹ The term "international judicial assistance" is defined as servicing documents in foreign states and obtaining evidence in foreign states. 1 U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION PRACTICE MANUAL § 3-12.1 (1976). This article will not consider the procedures for servicing documents abroad. See U.S. Department of Justice Memorandum No. 386, Revision 3, July 1979 (on file in all United States Marshals' offices).

This article samples and analyzes a group of foreign cases in which litigants seek access to evidence in the United States. Part II explains the procedures used to complete the foreign request, in order to familiarize the reader with the way in which evidence is gathered in the United States. The methodology for the empirical analysis attempted is set forth in Part III. Part IV then presents a number of case studies. These include summaries of the actual cases pending in foreign courts in which American evidence is sought.

II. Procedures for Processing Evidence Requests

The Civil Division of the United States Department of Justice [hereinafter "Civil Division"] has established an Office of Foreign Litigation which operates as Central Authority under the Hague Evidence Convention for processing evidence requests in civil and commercial matters. The Civil Division performs the same function in processing evidence requests from countries which have not ratified the Hague Evidence Convention and instead must use 28 U.S.C. §§ 1781-1782. The author has obtained special access to the files of the Civil Division for purposes of this project and has discovered

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4 28 C.F.R. § 0.49 (1981).

5 According to James G. Hergen, the attorney who has monitored the processing of evidence requests in civil and commercial matters for the Civil Division's Office of Foreign Litigation for the past seven years, requests from foreign countries in the area of criminal matters at first were handled by the Civil Division but since mid-1979 have been handled by the Criminal Division's Office of International Affairs. Interview with James G. Hergen, Attorney for the Civil Division's Office of Foreign Litigation, Washington, D.C. (Mar. 26, 1982) [hereinafter cited as Hergen Interview].

6 The Civil Division's authority to perform these activities is set out in 28 C.F.R. § 0.49 (1981), which states:

The Assistant Attorney General in charge of the Civil Division shall direct and supervise the following functions:

(a) The functions of the "Central Authority" under the Convention between the United States and other Governments on the Taking of Evidence Abroad in Civil and Commercial Matters, TIAS 7444, which entered into force on October 7, 1972.

(b) The functions of the "Central Authority" under the Convention between the United States and other Governments on the Service Abroad of Judicial and Extrajudicial Documents, TIAS 6638, which entered into force on February 10, 1969.

(c) To receive letters of requests issued by foreign and international judicial authorities which are referred to the Department of Justice through diplomatic or
that, although there are two separate mechanisms in place,⁸ the gathering of evidence in the United States for foreign tribunals is carried out in essentially the same way under both mechanisms.

The Hague Evidence Convention is presently in force among thirteen countries.⁹ It applies only to civil and commercial matters, and makes it possible to obtain evidence "for use in judicial proceedings, commenced or contemplated."¹⁰ In fiscal year 1979, the Civil Division processed ninety-four evidence requests. In fiscal year 1980, it processed sixty-seven; and in fiscal year 1981, it processed sixty-four requests.¹¹ By comparison, the Hague Service Convention¹² generates approximately 2,800 requests each year for the service of foreign

other governmental channels, and to transmit them to the appropriate courts or officers in the United States for execution.

(d) To receive and transmit through proper channels letters of request addressed by courts in the United States to foreign tribunals in connection with litigation to which the United States is a party.

7 The author is employed by the Criminal Division of the United States Department of Justice and has been given permission to examine the files of the Civil Division.

8 Hague Evidence Convention, supra note 3; 28 U.S.C. §§ 1781-1782 (1976). It is interesting to note that although the Department of Justice is designated as the Central Authority under both the Hague Evidence Convention, supra note 3, and the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, signed by the United States November 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163, the Department of State continues to be the appropriate authority for the reception of letters rogatory (see 28 U.S.C. § 1781 (1976)) from those countries that are not parties to the Conventions. The process is actually the same, since the Department of State forwards all requests to the Department of Justice for execution. Hergen Interview, supra note 5, on February 12, 1982 and March 8, 1982.

9 Thirteen countries have ratified the Hague Evidence Convention. These are: Czechoslovakia, Denmark, Finland, France, Germany (Federal Republic), Israel, Luxemburg, Netherlands, Norway, Portugal, Sweden, United Kingdom, and United States. Twelve other countries are signatories to the Convention but have not yet ratified it: Austria, Belgium, Canada, Egypt, Greece, Ireland, Italy, Japan, Spain, Switzerland, Turkey, and Yugoslavia. In addition, provision is made in the Convention for non-signatory countries to accede to the Convention. These countries include Barbados and Singapore. Hergen Interview, supra note 5, on March 26, 1982. The reduction in cases processed in the Civil Division from fiscal year 1979 to fiscal year 1980 is due to the creation of the Criminal Division's Office of International Affairs in 1979. See note 5 supra.

10 Hague Evidence Convention, supra note 3, at art. I.

11 Telephone interview with Jane Eckert, para-legal specialist for James G. Hergen (March 29, 1982). Both categories of evidence requests are lumped together in the Civil Division's files. In addition to the countries listed in note 9 supra, and listed in Appendix A, the Civil Division (in the spirit of international cooperation) has in the past processed evidence requests from Argentina, Australia, Bolivia, Chile, Columbia, Honduras, India, Korea, Malta, Poland, Thailand, Uruguay, and Venezuela. Hergen Interview, supra note 5, on March 26, 1982. The reduction in cases processed in the Civil Division from fiscal year 1979 to fiscal year 1980 is due to the creation of the Criminal Division's Office of International Affairs in 1979. See note 5 supra.

judicial documents in the United States.  
28 U.S.C. § 1781 provides:

(a) The Department of State has power, directly, or through suitable channels—

1) to receive a letter rogatory issued, or request made, by a foreign or international tribunal, to transmit it to the tribunal, officer, or agency in the United States to whom it is addressed, and to receive and return it after execution; and

2) to receive a letter rogatory issued, or request made, by a tribunal in the United States, to transmit it to the foreign or international tribunal, officer, or agency to whom it is addressed, and to receive and return it after execution.

The Hague Evidence Convention uses the term “Letter of Request” instead of “letter rogatory.” The only difference seems to be that a letter rogatory within 28 U.S.C. §§ 1781-1782 may encompass criminal matters, whereas the Letter of Request under the Convention is specifically limited to civil and commercial matters.

An evidence request makes its way to the Department of Justice. The Civil Division’s Office of Foreign Litigation reviews the request for completeness, to certify a translation into English or French, to determine if it is necessary to notify someone as to the time and place of the proceedings, and to determine whether execution of the letter falls within the functions of the judiciary.

In some instances, the requesting authority may attach portions of its own internal law to advise the witness of any applicable privilege. The requesting authority may ask that the witness be given

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13 Hergen Interview, supra note 5, on February 11, 1982, February 12, 1982, and March 8, 1982. Service requests processed by the Civil Division are transmitted to the United States Marshal’s office for the district in which the person is located. Evidence requests are transmitted to the United States Attorneys’ offices. See text accompanying notes 20-23 infra.

14 In re Letters Rogatory from the Justice Court, District of Montreal, Canada, 523 F.2d 562 (6th Cir. 1975).

15 See Hague Evidence Convention, supra note 3, at art. 3. Article 5 seems to require the Central Authority to either verify completeness or make objections. Id. at art. 5.

16 See id. at art. 4. The United States will accept a translation into Spanish if the letter of request is to be executed in Puerto Rico.

17 See id. at art. 7. Either the requesting authority is so notified or, if requested, the parties are notified directly.

18 See id. at art. 8.

19 The witness may invoke any privilege available to him under the laws of the country of origin or the United States, or any other privileges which the country of origin declares it will respect. Id. at art. 11.
an oath, but in other cases (especially among civil law countries) an unsworn statement is preferred.\textsuperscript{20}

The Civil Division transmits the foreign court's request, together with appropriate instructions, to the office of the United States Attorney for the district in which the witness resides or in which the evidence is located. There are ninety-five such federal litigation offices in the United States. Most Assistant U.S. Attorneys in the field specialize in either civil or criminal cases; typically the foreign evidence request is handled by a Civil Assistant. Transmission of the material from Washington, D.C. is usually fairly rapid. Every six months the Civil Division asks for a status report on unexecuted cases and attempts to encourage expedition of the evidence requests.\textsuperscript{21} These efforts are often met with resistance by busy Assistant U.S. Attorneys who often are not impressed with the foreign policy implications of their unresponsiveness to evidence requests. At times, the witness cannot be located or moves out of the district. At other times, there are lost files or reassignments of Assistant U.S. Attorneys.\textsuperscript{22} Sometimes, the process is smooth and the completed request comes back to Washington, D.C. for transmission to the foreign tribunal within two weeks.\textsuperscript{23}

The Civil Division usually advises Assistant U.S. Attorneys to exercise discretion as to when to seek court orders to compel production of evidence. The Civil Division's position was that better and more expeditious responses from witnesses might be achieved if an informal approach were adopted.\textsuperscript{24} For many years, the Civil Division did not seek court orders when foreign countries requested a blood test from parties in the United States. For many years the Civil Division advised Assistant U.S. Attorneys to refrain from seeking court orders for blood testing because of constitutional problems involving illegal search and seizure issues.\textsuperscript{25} With recent court decisions in the United States and more efficient and scientific standards for blood testing, that policy has recently changed and court orders

\textsuperscript{20} Hergen Interview, supra note 5, on February 12, 1982. See also Hague Evidence Convention, supra note 3, at art. 3(h). The case files examined by the author indicated that when a defendant's testimony was sought there was a preference that the statement be unsworn. When a third party's testimony was sought, an oath was sometimes requested. Some religions prohibit using oaths, and this may explain the preference for unsworn statements.

\textsuperscript{21} Hergen Interview, supra note 5, on March 26, 1982.

\textsuperscript{22} Id.

\textsuperscript{23} Id.

\textsuperscript{24} Id.

\textsuperscript{25} Id.
are now sought for blood samples.\textsuperscript{26}

The Department of Justice and the Department of State have determined that it is in the foreign policy interest of the United States to honor all requests referred by means of diplomatic channels. This is done on the basis of international comity.\textsuperscript{27}

All foreign requests under the Hague Evidence Convention must be reviewed and approved by the Civil Division (the Central Authority under the Convention). This requirement's purpose is to insure uniformity and to help reduce the time involved in processing such requests by guiding the Assistant U.S. Attorneys in the field.\textsuperscript{28} The field attorneys are instructed to execute the requests promptly, and in no event should their execution be delayed more than sixty days from the date of receipt.\textsuperscript{29} The following additional guidelines are paraphrased from the Civil Division Practice Manual:\textsuperscript{30}

After the request has been screened at the Department of Justice, it is transmitted to the appropriate United States Attorney's office for execution, with a brief explanatory memorandum. The memorandum sets forth the nature of the request and the procedures to be followed. It also refers specifically to the Civil Division Practice Manual.

Most foreign tribunals expect that the request will be executed by an American judicial authority (a district judge or United States Magistrate). The law of most foreign countries places great weight on the fact that the witness actually appears before a judge (even though no oath may be administered).\textsuperscript{31} But since foreign letters of

\begin{footnotesize}
\begin{enumerate}
\item[26] Id.
\item[27] In general, principle of comity is that courts of one state or jurisdiction will give effect to laws and decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect. . . . [Comity in the legal sense is] [t]he recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws. \textsc{Black's Law Dictionary} 242 (rev. 5th ed. 1979).
\item[28] The Civil Division also reviews "civil and commercial" requests under 28 U.S.C. §§ 1781-1782 (1976) and sends those out to the various United States Attorneys' offices. The Criminal Division's Office of International Affairs reviews the criminal requests and processes them from Washington, D.C. instead of sending them out to the United States Attorney's offices. Hergen Interview, supra note 5, on March 26, 1982. Mr. Hergen stated that there are few of these requests. Because of their sensitivity, the Criminal Division lawyers prefer to handle them rather than sending them out to busy Assistant U.S. Attorneys.
\item[29] Hergen Interview, supra note 5, on February 12, 1982 and March 26, 1982.
\item[31] See note 20 supra.
\end{enumerate}
\end{footnotesize}
request are, as a rule, executed in accordance with American law, and considering that district judges by tradition delegate the examination of witnesses to the parties, the Civil Division seeks wherever possible to obtain a witness' testimony through his voluntary cooperation. To that end, the Assistant U.S. Attorney to whom a foreign letter of request is referred for execution is encouraged to contact the witness, advise him of the nature of the request, and ascertain whether he will agree to furnish his responses informally, in affidavit form. If the witness agrees to this procedure, no court order is necessary. If he does not agree, he is apprised that the evidence can be compelled under 28 U.S.C. § 1782. Application for orders under that statute are made ex parte. The order can designate as "commissioner" a United States Magistrate\textsuperscript{32} (the preferred method) or the Assistant U.S. Attorney.

The commissioner should subpoena the witness (or documents), inform him of the nature of the proceedings, advise him of his rights to assert any applicable privilege which he may have either under United States law or the laws of the foreign country involved, direct his attention to any testimonial privilege or other rights which may be set forth in the letter of request, propound the interrogatories, record the witness' answers, and certify the transcript or affidavit.

Upon execution of the request, two copies of the certified transcript or the affidavit, together with one copy of the foreign letter of request and any court orders or memoranda issued by the court or commissioner, are transmitted to the Civil Division for return to the requesting authority. Any fees or expenses incurred in connection with executing the request (reporters' or witness' travel fees) are billed to the appropriate foreign authority.\textsuperscript{33}

\section*{III. Methodology}

In order to fully analyze the types of foreign evidence requests being processed in the United States, the author sought access to all the Civil Division files, hoping to have a large universe of cases to study. Unfortunately, once a request is completed all substantive documents are sent back to the originating country.\textsuperscript{34} The Civil Division files are stripped of any narrative concerning the litigation,

\textsuperscript{32} There is no known statutory authority for the United States Magistrate to so act, but the Judicial Conference of the United States has approved use of United States Magistrates as "judicial" officers. \textit{See} H.R. Doc. No. 124, 92nd Cong., 1st Sess. 20 (1971).

\textsuperscript{33} \textit{See} Hague Evidence Convention, \textit{ supra} note 3 (request for execution is not chargeable but fees for experts and interpreters are chargeable).

\textsuperscript{34} \textit{See} note 7 \textit{ supra}. 
the questions requested to be propounded to witnesses, and any
description of physical evidence to be obtained. The closed files
merely contain copies of letters of transmittal to and from the inter-
ested parties.35 The choice was made, therefore, to study the pending
or open files of the Civil Division—that is, those files which were set
up and are maintained until the evidence request is completed by the
Assistant U.S. Attorney in the field. The author did read all of these
pending files, numbering fifty-nine cases from fifteen different
countries.

Appendix A infra charts the fifty-nine cases studied: thirty-nine
were processed under the Hague Evidence Convention and twenty
under 28 U.S.C. §§ 1781-1782. For purposes of this analysis, they are
treated together. Thirty-three of these fifty-nine cases are catego-
ized as family matters,36 eighteen are contract matters, six are tort
matters, and two are criminal matters. The family matters are fur-
ther broken down in Appendix B infra. Nineteen of the foreign evi-
dence requests seek the assistance of the United States in establishing
paternity. Although to the American corporate lawyer paternity and
matrimonial matters may seem trivial, many foreign countries (espe-
cially the Scandinavian nations) must provide support for illegiti-
mate or abandoned children. It thus may be an extremely important
foreign policy matter to locate and establish the paternity of Ameri-
can residents.37 If paternity is established, the foreign government
can recoup substantial social welfare funds from the biological fa-
ther, who is obligated to pay monthly support payments until the
child reaches majority.

The eighteen contract matters and the six tort actions were diffi-
cult to categorize further. They encompass fairly routine civil or
commercial disputes involving partnership proceeds, employment
termination, insurance coverage, and auto accidents. The two crimi-
nal matters were processed by the Civil Division under 28 U.S.C.
§§ 1781-1782 prior to the time the Criminal Division of the Depart-
ment of Justice began to exercise that responsibility.38

35 Hergen Interview, supra note 5, on February 11-12, 1982.
36 An interesting threshold question is whether family matters are civil or commercial
matters. If not, they are not covered by the Hague Evidence Convention. One can reason
that family matters are civil matters because paternity and matrimonial cases are handled in
the civil courts of all the nations where pending requests were analyzed. However, a contrary
view is possible; for example, religious courts in Egypt handle family law matters. See Hor-
37 Hergen Interview, supra note 5, on March 26, 1982.
38 See note 5 supra.
Appendix C *infra* is a summary of the length of time that the fifty-nine cases have been pending. More than half (thirty-one) have been pending for six months or less. However, many requests have been pending longer, and some for over two years. Appendix D *infra* is a breakdown of where the pending requests are sent for execution. It is noted that twenty of the fifty-nine cases are in the New York area (Connecticut, New Jersey, New York-Eastern, and New York-Southern). Three of the paternity matters found their way to the Eastern District of North Carolina, where Fort Bragg is located and where American servicemen stationed abroad have later been transferred. Thirty-three of the fifty-nine cases involve the testimony of parties to the litigation, while twenty-six involve the testimony of third parties. Thirty of the thirty-three cases seeking testimony of parties are family law matters, such as paternity suits.

Many foreign litigants probably never utilize the evidence-gathering mechanisms provided by the Department of Justice. Under 28 U.S.C. § 1781(b)(1), foreign authorities may transmit requests directly to the appropriate United States district court by mail, by formal presentation to the court by a consular or diplomatic agent, or by a locally-retained American attorney.

A representative sample of seventeen of the total of fifty-nine files is presented here. Names of parties will not be disclosed pursuant to request of the Civil Division. Facts will only be stated in a very general way for the same reason. The cases were assigned numbers according to the order in which the files were reviewed by the author. The files of the Civil Division are organized alphabetically by country, so Case Number 1 is the first file from Austria and Case Number 59 is the last file from Turkey. Of the fifty-nine numbered

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39 28 U.S.C. § 1781 (1976) states: "(b) This section does not preclude—(1) the transmission of a letter rogatory or request directly from a foreign or international tribunal to the tribunal, officer, or agency in the United States to whom it is addressed and its return in the same manner."

40 Although 28 U.S.C. § 1781 (1976) does not specifically mention local counsel, using local counsel is clearly a preferred method, especially among English-speaking countries. Some general statutory authority for using local attorneys is found in 28 U.S.C. § 1782 (1976), which states: "(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."

41 Hergen Interview, *supra* note 5, on February 12, 1982 and March 26, 1982. Mr. Hergen's major concern was to protect the privacy of the litigants, who expect that the Department of Justice will process evidence requests under a treaty or a statute with the utmost propriety.
files, the author has selected to report here on what are believed to be the most interesting and varied cases.

IV. Case Studies

Case Number 2

Country: Austria (pursuant to 28 U.S.C. § 1781).
Type of Request: Contract (claim for plumbing work performed).

This case involves a suit by an Austrian plumbing company against a ski lodge in Kitzbuehel, Austria, arising out of the installation of laundry facilities and alterations to the hotel’s cellar. The summary of the case (German with an English translation) indicates that the plumbing company did extensive work at the ski lodge based on the former manager’s instructions. The defendant claims that it paid for the work it ordered for the laundry but gave no instructions to alter the cellar. On April 17, 1981, the Austrian embassy forwarded the request for the testimony of the former manager of the ski resort, who now resides in Hawaii. The witness is given thirteen specific questions to answer under oath. Pertinent provisions of the Austrian Code of Procedure are attached. The request was withdrawn on August 26, 1981, and the United States Attorney’s office for the District of Hawaii was instructed to cancel any action on the matter because the former hotel manager voluntarily returned to Austria to give his testimony.

Case Number 3

Country: Austria (pursuant to 28 U.S.C. § 1781).
Type of Request: Paternity (with request for blood testing).

This case involves a paternity matter initiated by a social welfare agency in Austria against a resident of New York. The summary of the case (German with an English translation) indicates that the defendant fathered a minor child. Seventeen specific questions are to be propounded to him under oath. The request also asks for a blood specimen to be sent directly to a medical facility in Austria for testing. The questions inquire into the defendant’s employment, income, sexual relationship with the mother, and willingness to pay child support. The Austrian court sent out the request on September 9, 1980, but the Austrian embassy did not forward it to the United States until June 22, 1981. It is pending with the United States Attorney’s office for the Southern District of New York.
Case Number 6

Country: Austria (pursuant to 28 U.S.C. § 1781).
Type of Request: Tort (auto accident).
This case involves a suit for damages brought by the plaintiff against an insurance company arising out of an auto accident in Salzburg on October 7, 1978. The summary of the case (German with an English translation) indicates that the plaintiff claims that the insured crossed over the double yellow line and struck the plaintiff's BMW auto, causing damage in the amount of 10,000 Austrian schillings. The Austrian embassy forwarded the request for the testimony of three witnesses (passengers in the cars, now residing in Southern California) on January 11, 1982. The testimony of the insured (claiming that it was the plaintiff who crossed over the double yellow line) is attached, as is the policeman's drawing of the accident. Pertinent provisions of the Austrian Code of Procedure are also attached. The witnesses are given twenty-two questions to answer and are also asked to draw a sketch of the accident. There is no request that the statements be taken under oath. The questions inquire into whether the witnesses were present at the time of the accident, their relationships to the parties, the speed of the cars, the visibility, and which (if any) car crossed over the double yellow line. It is pending with the United States Attorney's office for the Central District of California.

Case Number 9

Type of Request: Contract (termination of employment).
This case involves a suit for lost wages and travel reimbursements brought by the plaintiff against the company which formerly employed him. Excerpts from the pleadings (Portuguese with an English translation) indicate that the plaintiff was fired from his job by the defendant and that he was not given back salary, vacation pay, and travel expenses for which he was entitled. The defendant's pleadings claim that the plaintiff did not work for it but for subsidiary companies located outside of Brazil. The defendant also contends that the plaintiff was terminated for just cause—that is, failure to exercise fiscal control and supervision over other employees.

The court sent the request out on March 20, 1981, and the Brazilian embassy forwarded it on August 20, 1981. Documents from the defendant's New York subsidiary are sought, and thirty-six specific questions are to be propounded to the New York division head.
No oath is requested. The questions inquire into the organization of the company, the duties of the New York division head, the plaintiff's former activities as New York division head, and the amount and nature of the losses while the plaintiff was in charge. The request is pending with the United States Attorney's office for the Southern District of New York.

**Case Number 10**

*Country: Denmark (pursuant to Hague Convention).*  
*Type of Request: Paternity (with request for blood testing).*  

This case involves a paternity matter brought by a Danish woman against a resident of New York. The Civil Division received the request on December 16, 1981. The summary of the case (Danish with an English translation) contains the statement of the plaintiff that the defendant lived with her for six years during which time they had frequent sexual intercourse and that he is the father of twins born on November 22, 1979. There are no specific questions, but instead there is a request for a blood specimen to be sent directly to Denmark for testing. The request is pending with the United States Attorney's office for the Eastern District of New York.

**Case Number 11**

*Country: France (pursuant to Hague Convention).*  
*Type of Request: Child custody.*  

This case involves a suit to determine the lawful custody of a minor child who was abandoned by his real mother and father. The summary of the case (French with an English translation) indicates that the parents abandoned their son at birth. The French juvenile court sent the request out on March 10, 1978. Four specific questions are to be propounded to the mother and father inquiring into the reasons for not taking an interest and not contributing to the support of the child. On August 23, 1978, the Civil Division sent the request to the United States Attorney's office for the Northern District of California. After the Federal Bureau of Investigation determined that the parents had moved from California to Texas, the request was transferred to the United States Attorney's office for the Western District of Texas, where it is now pending.

**Case Number 15**

*Country: France (pursuant to Hague Convention).*
Type of Request: Divorce (with request for return of personal property).

This case involves an attempt by the wife to finalize a petition for a divorce decree. The description of the case (French with an English translation) states that the wife desires to inform the husband of the petition for divorce, to hear his explanation or claims, and to obtain her clothes and jewelry from him. There are no specific questions to be propounded. The court sent the request out on January 26, 1981, and the French Embassy forwarded it to the Civil Division on March 10, 1981. It is pending with the United States Attorney's office for the Eastern District of California.

Case Number 18


Type of Request: Divorce (with modification of child visitation).

This case involves a final divorce decree of a French court dated April 26, 1978, and a move of the wife and minor child to the United States. The husband seeks to investigate the changed circumstances and to modify his visitation rights. The court sent the request out on October 3, 1981, and the French Embassy forwarded it on November 27, 1981. It is pending with the United States Attorney's office for the Northern District of California. The summary of the case (French with an English translation) contains the husband's allegation that the wife is unstable, has moved six times within the past three years, and has endangered the child's well-being. He seeks greatly expanded access to the child, including a lengthy Christmas visit. The wife claims that the child is happy and well-balanced. No specific questions are sent. Instead, there is a request for a social investigation of the wife and child including the moral situation of the wife, her income and employment, and the child's development. The instructions from the Civil Division to the United States Attorney contain a suggestion that the California social welfare office be enlisted to conduct the social investigation.

Case Number 22

Country: Germany (pursuant to Hague Convention).

Type of Request: Contract (indemnification for services rendered).

This case involves a suit by the father of a sixteen-year-old girl against an international student exchange program for indemnifica-
tion for services performed by the girl. The summary of the case (German with an English translation) indicates that the plaintiff sent his daughter to the United States on a year-long student exchange program but that she returned home after only five weeks. The plaintiff claims that instead of being treated as a student by the host family the girl had to work as a domestic servant, and seeks payment for the girl's services. The defendant organization alleges that the girl was treated as a student and that she may be mentally ill. The court sent the request to the Civil Division on July 15, 1981. The head of the American host family is given ten specific questions focusing on whether the girl worked as a domestic servant in the household. It is requested that the witness not be sworn. Pertinent provisions of the German Code of Civil Procedure (advising the witness of the right to refuse to answer questions) are attached. The request is pending with the United States Attorney's office for the Southern District of California.

Case Number 25

Country: Germany (pursuant to Hague Convention).
Type of Request: Contract (insurance claim).

This case concerns an insurance claim involving a lost diamond ring. The summary of the case (German with an English translation) indicates that the plaintiff insured his diamond ring for 92,000 Deutsch marks but the ring was covered only if he wore it or kept it in a bank safe. The plaintiff and his wife were visiting New York and staying in a hotel when there was a fire alarm. The plaintiff was in the shower at the time and quickly dried himself off and left the hotel. The plaintiff claims that the ring was on his finger while he was showering but that it was missing when he returned to his room after the fire alarm. The defendant insurance company claims that the plaintiff took the ring off and put it on the bathroom sink and thus the loss is not within the coverage of the policy.

The German court sent the request to the Civil Division on October 7, 1981. Five witnesses, including two hotel employees and three New York policemen (who took the report on the missing ring), are given nine specific questions. It is requested that the witnesses not be sworn. The questions concern the plaintiff's statements to the witnesses indicating that he took his ring off and put it on the bathroom sink while showering, and also focus on the plaintiff's fluency in and understanding of English. Police reports are also sought as docu-
mentary evidence. The request is pending with the United States Attorney's office for the Southern District of New York.

**Case Number 26**

Country: Germany (pursuant to Hague Convention).
Type of Request: Paternity (court order for blood testing).

This case is a paternity suit in a German court against a resident of North Carolina. The court sent the request out on April 22, 1980, and the ten specific questions (German with an English translation) were answered and sworn to by the defendant on January 25, 1981 before an Assistant U.S. Attorney for the Eastern District of North Carolina. The defendant admitted sexual intercourse with the mother of the minor child but said that contraceptives were used. He contested paternity and claimed that other men had had intercourse with the woman. He said that he had acknowledged paternity to the Army only so that there would be no delay in his transfer from Germany to the United States. On November 13, 1981, the Civil Division sent the request back to the United States Attorney's office with instructions to obtain a court order under 28 U.S.C. § 1782 for a blood sample and a suggestion that the blood be analyzed by a doctor at the University of Tennessee. Apparently, this case marks the first departure from the former Civil Division policy of requesting voluntary consent to blood testing rather than using compulsory process.42

**Case Number 35**

Country: Germany (pursuant to Hague Convention).
Type of Request: Contract (film royalties).

This case involves a suit for an accounting of film royalties. The summary of the case (German with an English translation) indicates that the plaintiff owned the rights to certain pre-Hitler motion pictures. He alleges that the defendant earned 185,000 Deutsch marks from exploiting and showing the films. The defendant claims that the contract relationship protecting the plaintiff's rights was terminated in 1965 and that a third party (in Los Angeles, California) was authorized by the plaintiff to show the motion pictures. The court sent the request out on January 21, 1982. Six specific questions are propounded (with a request that the answers be sworn) to this third party. He is asked whether the plaintiff authorized him to exploit

42 See text accompanying note 26 supra.
the films and whether he assigned the rights to the defendant. The request is pending with the United States Attorney's office for the Central District of California.

**Case Number 37**

Country: Italy (pursuant to 28 U.S.C. § 1781).

Type of Request: Criminal (documents and grand jury transcripts).

This request involves a criminal case against notorious financier Michele Sindona. Both Italian and American law enforcement authorities were investigating Sindona for fraud involving the collapse of his financial empire, which included Franklin National Bank. The Italian court first sent out the request on October 26, 1976 (Italian with an English translation), and it went to the United States Attorney's office for the Southern District of New York on December 20, 1976. The request was put on hold because the United States Attorney was investigating Sindona during this time. Sindona was eventually indicted and fled New York (falsely alleging that he was kidnapped). He returned and was convicted and sentenced in United States district court to a twenty-five year term of imprisonment. The original Italian request in 1976 was followed by several inquiries from the Italian embassy and several status requests by the Civil Division to the United States Attorney in the Southern District of New York asking that the documents and grand jury testimony be provided. While the grand jury was investigating Sindona, the United States Attorney's office was prohibited by the Federal Rules of Criminal Procedure\(^\text{43}\) from complying with the request. The United States Attorney's office never explicitly denied the request. Thus, the 1976 request is still in the pending files of the Civil Division and so far as is known the Italian government never obtained the information. The files, however, indicate that Italy was very cooperative to American law enforcement officials and contributed to the successful American prosecution of Sindona.

**Case Number 39**

Country: Italy (pursuant to 28 U.S.C. § 1781).

Type of Request: Contract (adjustment for damaged goods).

This case concerns a claim by a boot and shoe supplier brought against a freight company which delivered damaged goods. The case

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\(^{43}\) See Fed. R. Crim. P. 6(e).
file contains letters and documents (originally in English) from the plaintiff to ten New York merchants indicating that the plaintiff’s boots had arrived at the merchants’ stores damaged and partially water-logged. The plaintiff made adjustments in price and credited the merchants’ accounts for the damaged goods. The Italian embassy forwarded the request for the testimony of the ten New York merchants on June 19, 1981. The same specific questions (Italian with an English translation) are propounded to each of the ten third party witnesses, asking them to authenticate the documents and verify that the plaintiff credited their accounts. The request is pending with the United States Attorney’s office for the Southern District of New York.

Case Number 48

Country: Norway (pursuant to Hague Convention).
Type of Request: Contract (business profits).

This case involves a suit for an accounting of profits. The summary of the case (Norwegian with an English translation) indicates that the plaintiff and the defendant were in the oil-rig business together and were to share profits evenly. The plaintiff claims that the defendant sold oil rigs to two Houston, Texas companies and received profits of $199,000 but did not split the proceeds. The defendant denies that any sale took place. The court sent the request out on September 7, 1981, and the Norwegian Ministry of Justice transmitted it on November 6, 1981. Two individual third-party witnesses are given nine specific questions to answer concerning their relationships to the plaintiff and the defendant, meetings concerning Norwegian financing of certain projects, and whether the defendant brokered a sale of oil rigs. The two Houston companies are asked to provide relevant documents. The request is pending with the United States Attorney’s office for the Southern District of Texas.

Case Number 57

Country: Sweden (pursuant to Hague Convention).
Type of Request: Paternity (with request for blood testing).

This case is a paternity suit brought in a Swedish court against a resident of New York. The court sent the request out on January 19, 1979, and the thirteen specific questions (Swedish with an English translation) were answered and sworn to by the defendant on February 27, 1981 (with a supplemental affidavit on March 9, 1981) before an Assistant U.S. Attorney for the Eastern District of New York. The
defendant denied ever having sexual intercourse with the mother of the minor child, although he admitted meeting her in a bar and having several dates. He contested paternity and said that he would be willing to submit to a blood test. The request was, therefore, sent back to the United States Attorney's office for the blood testing.

Case Number 58

Country: Sweden (pursuant to Hague Convention).
Type of Request: Contract (insurance claim).

This case involves an insurance claim for a large shipment of stereo cassette tapes destroyed by arson. The plaintiff insurance company contested the payment of $595,452 (American) in claims. The summary of the case (Swedish with an English translation) indicates that there was an arson on September 19, 1975, which resulted in a prison sentence for a Chicago man. The defendant supply company collected the insurance proceeds but the plaintiff insurance company contends that the goods were not covered by insurance because of the arson and that the defendant never had title to the goods.

The court sent the request out on January 28, 1982. Nineteen questions are proposed to be asked of the Chicago man who was convicted of the arson. Anticipating his assertion of the fifth amendment privilege against self-incrimination, specific questions are also to be asked of four others (including an attorney in the arson trial) concerning the arson, the storage of the cassette tapes during shipping, and the financial condition of the defendant company. The request is pending with the United States Attorney's office for the Northern District of Illinois.

V. Analysis of Data

There are some important generalizations that follow from the case studies. The types of civil litigation (which were broken down into family, contract, and tort matters) are fairly typical of the kinds of cases handled by American courts. These are matters of utmost interest and urgency to the individual litigants and of less significance to the general populace. Although two criminal cases were reviewed in the pending files, no attempt will be made to draw any inferences concerning criminal cases in which international judicial cooperation is sought.44 More than half of the cases (thirty-three of fifty-nine) fell into the category of family law matters, and nineteen

44 See note 5 supra.
of the thirty-three were paternity cases. In addition, there was a noticeable absence of cases involving large businesses or sizeable sums of money. Evidence must be obtained in some other way (or not at all) in the "big" case.

Some inferences can be drawn concerning the countries involved in certain types of litigation. First, there were no pending requests from the United Kingdom (a member of the Hague Evidence Convention) or Canada. Do English-speaking countries have no need for the Justice Department's assistance? Second, there were the most requests from the German-speaking countries (Germany and Austria). A total of twenty-three requests, of which almost half were not family-related matters, were received from these countries. These submissions were well-organized and some involved relatively large sums of money. The family matters for the most part involved the determination of paternity of American servicemen who were at one time stationed in Germany. Based on a rough analysis of population, there was about one request per two million people in the population from the German-speaking countries. Third, family-related requests were a majority of those from France (six of nine), but most of these involved matrimonial disputes, such as finalizing a divorce or determining child custody, rather than paternity. Two of the case studies from France indicated that it is a criminal offense for a parent to keep his own child longer than the normal visitation period set forth in the divorce decree. Based on a rough analysis of the population, there was about one request per two million people in the population from France. Fourth, there were mostly paternity/blood testing requests from the Scandinavian countries (Denmark, Norway and Sweden)—eight of the ten requests were in this category. The social welfare agency would initiate the lawsuit on behalf of the minor child to establish paternity and thus relieve the government of supporting an illegitimate child. Some of these cases involve American servicemen, but most do not. Based on a rough analysis of popula-

45 See text accompanying notes 36-38 supra.

46 Mr. Hergen believes that American courts and American attorneys exhibit a great deal of cooperation in obtaining evidence for foreign litigation, but that the Civil Division is not used in the process. Hergen Interview, supra note 5, on May 2, 1982. See note 40 supra.

47 See note 42 supra.


49 The population of France is estimated to be 53.9 million. Id.
tion,\textsuperscript{50} there was about one request per one and three-quarter million people in the population from the Scandinavian countries. Fifth, there were mostly commercial/contract disputes from the "Romance" countries (Italy, Portugal, and Spain)—eight of the ten requests were in this category. Only one request involved a family matter (divorce), which may reflect the predominant Catholic aversion to divorce in these countries. Based on a rough analysis of population,\textsuperscript{51} there was about one request per ten million people in the population from the "Romance" countries.

The identified goal of the Hague Evidence Convention was to bridge the gap between the common law practice of the parties securing the evidence and the civil law concept of judicial sovereignty, in which evidence is obtained primarily by the courts.\textsuperscript{52} The object was to provide a standardized framework in which evidence could be obtained in a foreign country and used in the home country. The analysis of the fifty-nine files studied indicates that the goal has been achieved. The foreign requests clearly enable the testimony and documents to be obtained in the United States, and the Hague Evidence Convention insures that the evidence will be admissible in the foreign court. There is a recognized problem for countries not members of the Hague Convention—litigants from those countries can easily obtain evidence in the United States under 28 U.S.C. §§ 1781-1782 but may not be able to use it because the evidence-gathering might have been a judicial act performed by an unauthorized person. If the evidence-gathering were accomplished by a United States Magistrate instead of an Assistant U.S. Attorney,\textsuperscript{53} there might not be a breach of judicial sovereignty.

VI. Conclusion

The case studies described in this article show that fairly routine

\textsuperscript{50} The population of Denmark is estimated to be 5.1 million; Norway, 4 million; and Sweden, 8.3 million. \textit{Id}.

\textsuperscript{51} The population of Italy is estimated to be 57.2 million; Portugal, 9.8 million; and Spain, 37.7 million. \textit{Id}.


\textsuperscript{53} Mr. Hergen has suggested to the author that the Civil Division is considering the use of United States Magistrates for this purpose. Hergen Interview, \textit{supra} note 5, on March 26, 1982. Such use would eliminate the sometimes lengthy delay caused by confused and busy Assistant United States Attorneys. Magistrates often perform certain judicial functions for district court judges. \textit{See} note 32 \textit{supra}. They can administer oaths, examine witnesses, appoint experts, and have subpoena power. 28 U.S.C. § 636 (1976).
cases which are of utmost significance to the foreign litigants are being processed by the Civil Division of the Department of Justice. Many of these cases involve the determination of paternity of American residents and are important to foreign countries that would otherwise be burdened with supporting minor children through the age of majority. The United States' participation in processing these foreign evidence requests is well worth the effort.

This empirical analysis of the processing of foreign evidence requests constitutes the first time any significant data have been collected concerning the work of the United States' Central Authority under the Hague Evidence Convention. Although many of the evidence requests pending in the Civil Division of the United States Department of Justice may be routine matters, their processing is vital to fostering judicial resolution of problems which arise among citizens of different nations. The growth of international trade as well as important foreign alliances are dependent on and nurtured by international cooperation in litigation.
### APPENDIX A

Breakdown of Evidence Requests Analyzed By Country and Type of Litigation

<table>
<thead>
<tr>
<th>Country</th>
<th>Number of Pending Requests</th>
<th>Hague Convention §§ 1781-1782</th>
<th>28 U.S.C. §§ 1781-1782</th>
<th>Type of Litigation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>6</td>
<td>0</td>
<td>6</td>
<td>2 Family</td>
</tr>
<tr>
<td></td>
<td></td>
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</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>2 Contract</td>
</tr>
<tr>
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<td>1 Family</td>
</tr>
<tr>
<td>Brazil</td>
<td>2</td>
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<td>2</td>
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</tr>
<tr>
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<td></td>
<td></td>
<td></td>
<td>1 Criminal</td>
</tr>
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<td>1</td>
<td>0</td>
<td>1 Family</td>
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<td></td>
<td>1 Criminal</td>
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</tr>
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<td>2 Contract</td>
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<td></td>
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</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1 Family</td>
</tr>
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<td>Romania</td>
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<td>0</td>
<td>1</td>
<td>1 Family</td>
</tr>
<tr>
<td>Spain</td>
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<td>0</td>
<td>2</td>
<td>2 Contract</td>
</tr>
<tr>
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<td>2</td>
<td>0</td>
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</tr>
<tr>
<td></td>
<td></td>
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</tr>
<tr>
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<td></td>
<td>2 Criminal</td>
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<td>Turkey</td>
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<td></td>
<td>18 Contract</td>
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<td></td>
<td></td>
<td>6 Tort</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>2 Criminal</td>
</tr>
<tr>
<td><strong>TOTALS</strong></td>
<td><strong>59</strong></td>
<td><strong>39</strong></td>
<td><strong>20</strong></td>
<td></td>
</tr>
</tbody>
</table>
APPENDIX B

Breakdown of Family Matters Analyzed by Category

[Note: Of the fifty-nine separate files of pending evidence requests, thirty-three, or fifty-six percent, fell in the general category of family-related matters.]

<table>
<thead>
<tr>
<th>Categories of Family Matters</th>
<th>Number of Pending Requests</th>
</tr>
</thead>
<tbody>
<tr>
<td>Paternity</td>
<td>1954</td>
</tr>
<tr>
<td>Divorce/Child Support</td>
<td>9</td>
</tr>
<tr>
<td>Custody</td>
<td>3</td>
</tr>
<tr>
<td>Others</td>
<td>2</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>33</strong></td>
</tr>
</tbody>
</table>

APPENDIX C

Length of Time of Requests Pending as of March 21, 1982

<table>
<thead>
<tr>
<th>Time Pending</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-6 months</td>
<td>31</td>
<td>52%</td>
</tr>
<tr>
<td>7-12 months</td>
<td>6</td>
<td>10%</td>
</tr>
<tr>
<td>1-2 years</td>
<td>11</td>
<td>19%</td>
</tr>
<tr>
<td>Over 2 years</td>
<td>11</td>
<td>19%</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>59</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

54 Seventeen of these also requested blood tests.
APPENDIX D

United States Attorneys' Offices Where Requests Are Pending

<table>
<thead>
<tr>
<th>DISTRICT</th>
<th>NUMBER</th>
</tr>
</thead>
<tbody>
<tr>
<td>California, Central</td>
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</tr>
<tr>
<td>California, Eastern</td>
<td>1</td>
</tr>
<tr>
<td>California, Northern</td>
<td>2</td>
</tr>
<tr>
<td>California, Southern</td>
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</tr>
<tr>
<td>Connecticut</td>
<td>1</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>1</td>
</tr>
<tr>
<td>Georgia, Southern</td>
<td>1</td>
</tr>
<tr>
<td>Hawaii</td>
<td>1</td>
</tr>
<tr>
<td>Illinois, Northern</td>
<td>3</td>
</tr>
<tr>
<td>Kansas</td>
<td>1</td>
</tr>
<tr>
<td>Kentucky, Western</td>
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</tr>
<tr>
<td>Louisiana, Eastern</td>
<td>1</td>
</tr>
<tr>
<td>Maryland</td>
<td>2</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>3</td>
</tr>
<tr>
<td>Michigan, Eastern</td>
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<tr>
<td>New Jersey</td>
<td>5</td>
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<tr>
<td>New York, Eastern</td>
<td>3</td>
</tr>
<tr>
<td>New York, Southern</td>
<td>11</td>
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<tr>
<td>North Carolina, Eastern</td>
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</tr>
<tr>
<td>Ohio, Northern</td>
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<td>Oklahoma, Western</td>
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<td>Pennsylvania, Eastern</td>
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<td>Tennessee, Middle</td>
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<td>Texas, Northern</td>
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<td>Texas, Southern</td>
<td>1</td>
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<tr>
<td>Texas, Western</td>
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</tr>
<tr>
<td>United States Customs Service</td>
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</tr>
<tr>
<td>United States Patent Office</td>
<td>1</td>
</tr>
<tr>
<td>Virginia, Eastern</td>
<td>1</td>
</tr>
<tr>
<td>Wisconsin, Western</td>
<td>2</td>
</tr>
</tbody>
</table>

**TOTAL** 59

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55 The Civil Division’s Office of Foreign Litigation sent this rather technical request directly to the Customs Service instead of to a regional United States Attorney’s office.

56 The Civil Division’s Office of Foreign Litigation sent this request directly to the Patent Office instead of to a regional United States Attorney’s office.