US at odds with Google on computer search-warrant proposal

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In this Feb. 12, 2015 file photo, FBI Director James Comey speaks at Georgetown University in Washington. The Justice Department is at odds with Google and privacy groups over the government's push to make it easier to locate and hack into computers in criminal investigations. (AP Photo/Cliff Owen, File)

A Justice Department proposal that could make it easier to locate and hack into computers that are part of criminal investigations is raising constitutional concerns from privacy groups and Google, who fear the plan could have broad implications.

Federal prosecutors say their search warrant proposal is needed at a time when computer users are committing crimes in online anonymity while concealing their locations. But civil libertarians fear the rule change, under consideration by a federal advisory committee, would grant the government expansive new powers to reach into computers across the country.

The proposal would change existing rules of criminal procedure that, with limited exceptions, permit judges to approve warrants for property searches only in the districts where they serve. The government says those rules are outdated in an era when child pornographers, drug traffickers and others can mask their whereabouts on computer networks that offer anonymity. Such technology can impede or thwart efforts to pinpoint a suspect's geographic location.

The Justice Department wants the rules changed so that judges in a district where "activities related to a crime" have occurred could approve warrants to search computers outside their districts. The government says that flexibility is needed for cases in which the government can't figure out the location of a computer and needs a warrant to access it remotely, and for investigations involving botnets—networks of computers infected with a virus that spill across judicial districts.

"There is a substantial public interest in catching and prosecuting criminals who use anonymizing technologies, but locating them can be impossible for law enforcement absent the ability to conduct a remote search of the criminal's computer," Justice Department lawyers wrote in one memo explaining the need for the change.

The advisory committee considering the rule change is meeting this month.

In this June 5, 2014 file photo, a man walks past a Google sign at the company's headquarters in Mountain View, Calif. The Justice Department is at odds with Google and privacy groups over the government's push to make it easier to locate and hack into computers in criminal investigations. (AP Photo/Marcio Jose Sanchez, File)

The proposal has generated fierce pushback from privacy organizations, including the American Civil Liberties Union, which contend the rule change could violate a constitutional requirement that search warrant applications be specific about the property to be searched. They also argue the proposal is unclear about exactly what type of information could be accessed by the government and fails to guarantee the privacy of those not under investigation who might have had access to the same computer as the target, or of innocent people who may themselves be victims of a botnet.

"What procedural protections are going to be in place when you do these

types of searches? How are they going to be limited?" asked Alan Butler, senior counsel at the Electronic Privacy Information Center.

Another critic, Google, says the proposal "raises a number of monumental and highly complex constitutional, legal and geopolitical concerns that should be left for Congress to decide."

Privacy groups are also concerned that the proposal would lead to more frequent use by the FBI of surveillance technology that can be installed remotely on a computer to help pinpoint its location. Such tactics caught public attention last year when FBI Director James Comey acknowledged that in 2007 an agent posing as an Associated Press reporter had sent to a bomb-threat suspect a link to an article that, once opened, revealed to investigators the computer's location and Internet address.

"To the extent that the government has been prevented from doing lots of these kinds of searches because they didn't necessarily have a judge to go to, this rule change raises the risk that the government will start using these dubious techniques with more frequency," said ACLU lawyer Nathan Freed Wessler.

The Justice Department says such concerns are unfounded. It says the proposal simply ensures that investigators have a judge to go to for a warrant in cases where they can't find a computer, and that the proposal wouldn't provide the government with new technological authorities that it doesn't already have.

It's hard to quantify the scope of the problem, though the Justice Department says their concerns are more than abstract.

In 2013, a magistrate judge in Texas rejected a request to search a computer that the government said was being used to commit bank fraud

but whose location was unknown. Prosecutors sought authority to install software on the machine that would have extracted records and location information.

The judge, Stephen Smith, said he lacked the authority to approve the search for a computer "whose location could be anywhere on the planet" but said "there may well be a good reason to update the territorial limits of that rule in light of advancing computer search technology."

The proposal is before a criminal procedure advisory committee of the Judicial Conference of the United States. If approved, it will then be forwarded to the Supreme Court and ultimately to Congress, which does not have to approve it but can block it. It would take effect in December 2016.