

**VFI Executive Briefing**  
**A weekly roundup of technology news**  
**January 23 – 27, 2017**

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### SPECIAL COVERAGE – Search Warrant Case

On January 24, Microsoft won a victory in Second Circuit Court of Appeals case as the court split 4-4 on whether to rehear arguments from the Department of Justice in the “search warrant” case. The split upholds the court’s previous 3-0 ruling in July which favored Microsoft. The issue concerns the global application of US search warrants for people’s email. To learn more, you can read the July 14 [blog](#) authored by Brad Smith.

#### Key Quotes

*“We recognize at the same time that in many ways the [Stored Communications Act] has been left behind by technology. It is overdue for a congressional revision that would continue to protect privacy but would more effectively balance concerns of international comity with law enforcement needs and service provider obligations in the global context in which this case arose.”*

– [Judge Susan L. Carney](#)

*“We welcome today’s decision. We need Congress to modernize the law both to keep people safe and ensure that governments everywhere respect each other’s borders. This decision puts the focus where it belongs, on Congress passing a law for the future rather than litigation about an outdated statute from the past.”*

– [Brad Smith Microsoft President and Chief Legal Officer](#)

*“In cases of conflict, the U.S. government should be required to make a mutual legal assistance request for the data, absent a finding of an urgent need for the data and absent a workable alternative for accessing the data in a timely matter. Such an approach reflects the notion that the United States should be permitted to access, pursuant to a valid warrant, the stored communications of its citizens and residents in the investigation of criminal activity, regardless of where the data is located. This offers both a shield and a sword—ensuring that the relatively robust warrant requirement applies when the law enforcement seeks the data of U.S. citizens and residents and also guaranteeing that the government can access that data when the warrant standard is met.”*

– [Jennifer Daskal, law professor, American University](#)

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Search Warrant Article Roundup

**Politico** [Legal battle over overseas Microsoft data could be headed for Supreme Court](#)

A federal appeals court is letting stand a ruling in a closely-watched case holding that Microsoft need not comply with a U.S. government demand for data stored overseas. The New York-based 2nd Circuit Court of Appeals announced Tuesday that its judges voted, 4-4, on the government's request for a full-bench or "en banc" rehearing of the case that led to the ruling last July in favor of the tech giant and against the feds. A majority of the court was needed to proceed with a rehearing of the case. Three judges recused, the court said in an order. The decision clears the way for the government to ask the Supreme Court to take up the case.

**The Hill** [Appeals court thwarts DOJ in Microsoft email case](#)

In a 4-4 split, the Second Circuit Court of Appeals declined Tuesday to reconsider a watershed decision limiting the ability of law enforcement to request data stored on foreign servers. The earlier ruling had found Microsoft did not have to provide emails stored in Ireland in response to a domestic warrant. Microsoft had argued it was bound to abide by the law of Ireland and that the Department of Justice should have requested the evidence through the United States' treaty with Ireland to provide assistance whenever needed evidence was on foreign soil.

**Reuters** [Microsoft victory in overseas email seizure case is upheld](#)

An equally divided federal appeals court refused to reconsider its landmark decision forbidding the U.S. government from forcing Microsoft Corp and other companies to turn over customer emails stored on servers outside the United States. Tuesday's 4-4 vote by the 2nd U.S. Circuit Court of Appeals in Manhattan let stand a July 14 decision that was seen as a victory for privacy advocates, and for technology companies offering cloud computing and other services worldwide. But the dissenting judges said that decision by a three-judge panel could hamstring law enforcement, and called on the U.S. Supreme Court or Congress to reverse it.

**Digital Trends** [MICROSOFT MAINTAINS RIGHT TO PROTECT OVERSEAS DATA FROM LAW ENFORCEMENT](#)

A federal appeals court ruled the U.S. government cannot search a server in another country, upholding the original verdict. The case pertained to a Microsoft server in Dublin that was reportedly central to an ongoing narcotics investigation. Law enforcement wanted to access emails of a suspect that were stored on the server but Microsoft denied access. Microsoft stated that U.S. law did not allow for search warrants to be issued for servers in other countries, even if it's an American company and the data belonged to an American citizen. The company and its supporters believed that allowing such access would set a bad precedent.

**Slate** [Congress Needs to Fix Our Outdated Email Privacy Law](#)

On Tuesday, the 2nd U.S. Circuit Court of Appeals denied, by a 4-4 split, the government's petition for rehearing en banc in a suit against Microsoft. It's a result that is bad for privacy, security, and the future growth of the internet—and calls out for Congress to take action in response. The denial was accompanied by one concurrence and four dissents—the tenor of which highlights the contentiousness, importance, and unsettled nature of the key issues. The end result: The 2nd Circuit panel decision stands. U.S. warrant authority only extends to stored communications content (like emails) that are physically located in the United States—even if U.S. law enforcement is seeking access to the data of a

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U.S. resident in the investigation of a local crime, and the only foreign government connection is that the sought-after data happens to be held in that foreign country's jurisdiction.

## HILL UPDATE

### **ZDNet** [Trump's attorney general nominee in favor of encryption backdoors](#)

ZDNet reported that Attorney General nominee Sen. Jeff Sessions declared his support for encryption backdoors in a written [testimony](#) he submitted to Sen. Patrick Leahy. In response to a question posed by Leahy regarding Session's stance on encryption, Sessions wrote that while encryption is valuable, "it is also critical, however, that national security and criminal investigators be able to overcome encryption, under lawful authority, when necessary to the furtherance of national-security and criminal investigations." The Electronic Frontier Foundation published a [blog](#) reinforcing the group's opposition to any legislative or regulatory proposal forcing companies to put backdoors in encryption.

### **IOTI.com** [U.S. House and Senate IoT Bills Would Coordinate Public-Private Approach](#)

Bipartisan bills aimed at helping Congress to plan for and encourage the growth of the Internet of Things have been reintroduced in the House and Senate, with the Senate version already sailing through a committee. The Developing Innovation and Growing the Internet of Things (DIGIT) Act would convene a working group of federal entities and private-sector stakeholders to make recommendations to Congress on potential regulatory barriers, current, and future spectrum needs, and security concerns. It would also encourage information-sharing among government agencies.

## ARTICLE SUMMARY

### **Forbes** [Trump Is Killing Obama's Plans For World Privacy Rights](#) and [IDG Trump's executive order won't destroy Privacy Shield, says EU](#)

Multiple outlets published articles reporting that [President Trump signed an executive order](#) that could potentially jeopardize the US-EU Privacy Shield Agreement. Two articles linked above offer different perspectives. Outlets noted comments made by MEP Jan Phillip Albrecht who published a [tweet](#) yesterday calling for the European Commission (EC) to suspend the agreement and issue sanctions against the U.S. for breaking the US-EU umbrella agreement. The EC issued an official statement in response, noting that it was "aware" of Trump's order and the US Privacy Act has "never offered data protection rights to Europeans." The EC went on to say the EU-US Privacy shield and the EU-US Umbrella Agreement, which comes into force on February 1, were set-up to protect the privacy of European citizens.

### **Ars Technica** [DOJ: Microsoft isn't harmed when it can't tell users what data we want](#)

Ars Technica reported that a federal judge in Seattle is set to hear arguments on a Department of Justice motion to dismiss Microsoft's lawsuit challenging the U.S. government's routine use of broad and indefinite secrecy orders.

### **Lawfare** [Recommendations for Healing the DC-Silicon Valley Rift](#)

Lawfare published a blog by Adam Segal, director of the Digital and Cyberspace Policy Program at the Council on Foreign Relations, on ways that Silicon Valley and the U.S. government can mend their rift on tech policy issues, including forced data localization and lawful access to data. Segal suggests that the

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U.S. government amend provisions of ECPA, using the U.S.-U.K. data sharing agreement as a model, to enable tech companies to share data with foreign governments.

#### **Fortune** [China Says It Will Lead the World Economy If Western Nations Stand Down](#)

A top Chinese diplomat has said that China is ready to lead the world economy if other nations should retreat from globalization. Zhang Jun, the Chinese foreign ministry's head of international economic affairs, told foreign reporters in Beijing that "if it's necessary for China to play the role of leader, then China must take on this responsibility," reports the Wall Street Journal. Zhang's comments come just days after President Donald Trump pledged to put "America first" in his inaugural address, which followed Chinese President Xi Jinping's plea for the continuation of global trade at last week's World Economic Forum in Davos, Switzerland.

#### **Washington Post** [Trump taps net neutrality critic to lead the FCC](#)

President Trump has named Ajit Pai, an advocate of deregulation and a critic of the government's net neutrality rules, as the next chairman of the Federal Communications Commission. Pai's new position will give him control over the nation's most powerful telecom and cable regulator, with a 2-to-1 Republican majority that is widely expected to begin undoing some of former president Barack Obama's most significant tech policies. The Indian American who grew up in Kansas had until now been a sitting Republican commissioner at the FCC — meaning he will not need to be confirmed by the Senate before serving as the agency's 34th chairman. Pai was a staunch critic of Democratic efforts aimed at breaking the dominance of some of America's biggest Internet providers, including AT&T, Comcast and Verizon.

#### **Electronic Frontier Foundation** [EFF To Patent Office: Supreme Court Limits On Abstract Patents Are a Good Thing](#)

EFF has submitted comments to the Patent Office urging it not to support efforts to undermine the Supreme Court's recent decision in Alice v. CLS Bank. The Patent Office had called for public submissions regarding whether "legislative changes are desirable" in response to recent court decisions, including Alice. We explain that, far from harming the software industry, Alice has helped it thrive.

#### **Recode** [President Trump's anti-regulation policies might actually be good for tech startups](#)

Well, it happened. I thought it was a joke when he started campaigning, and I was aghast when he was elected, but that's all history at this point: Donald Trump is president. Rather than spend time on sour grapes, I think it's more productive to make a clear-eyed appraisal of what his administration might mean for my industry. I know that what I say next risks being taken out of context, but from my vantage as a longtime tech entrepreneur and venture capitalist, I believe that there's a real chance Trump will be — I'm begging you to read till the end and not take me out of context — good for startups. First off, change in general is good for entrepreneurs, because it creates new circumstances for them to exploit or gaps for them to fill. Regulatory change, more specifically, is ripe with opportunity.

#### **The Verge** [Donald Trump used a Gmail address to secure @POTUS](#)

For the past week, the official @POTUS Twitter account has been linked to a private email address, raising serious questions about the security of the closely watched account. The link was first discovered by a security researcher, WauchulaGhost, who reported similar weaknesses in the @FLOTUS and @VP accounts. Users can see the first letters and associated domain of the accounts by attempting to log in and choosing the Forgot Password option. The account was moved to Whitehouse.gov addresses at roughly 1PM today, after many observers had raised questions about the security of the Gmail address.

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**The Hill** [Trump White House senior staff have private email accounts: report](#)

At least four senior officials in President Trump's White House have active accounts on a private Republican National Committee (RNC) email system, according to a new report. Counselor Kellyanne Conway, White House press secretary Sean Spicer, chief strategist and senior counselor Stephen Bannon and senior adviser Jared Kushner — Trump's son-in-law — all have [rnchq.org](http://rnchq.org) email accounts, Newsweek reported Wednesday. Trump repeatedly attacked 2016 Democratic presidential nominee Hillary Clinton last year for using a private email server during her tenure as secretary of State.

**Fortune** [What Trump Means for the U.S. Patent System](#)

Patent rights are an important part of U.S. innovation policy: If they're too weak, America's inventors may decide its not worth sharing their discoveries. But if patent rights are too strong, monopolists can smother new entrepreneurs and erect barriers to research. To find the right balance, many look to the White House for guidance. But unlike his predecessor, who shared many of the tech industry's ideas for reform, President Trump has offered no policy papers on patents, so his views about them are pretty much unknown.

**Washington Post** [Trump names Maureen Ohlhausen as acting FTC chairwoman](#)

President Trump has designated Maureen Ohlhausen as the Federal Trade Commission's acting chairwoman, putting her in charge of a powerful consumer protection agency that in recent years has become a major technology and privacy watchdog. Ohlhausen, a Republican, had been serving as an FTC commissioner since 2012. She is a noted critic of government regulation, such as the Federal Communications Commission's net neutrality rules, and frequently uses the phrase "regulatory humility" to describe her philosophy on federal policymaking.

**The Hill** [Five worries for tech under Trump](#)

The Hill published an article detailing the top five areas of concern for the tech industry under the new Trump administration, one of which was privacy rights. The others are trade, immigration, mergers and net neutrality.

**Computing** [Should the government should be able to access encrypted communications? Yes, say a small majority of Americans](#)

Computing, reported on a new [Pew Research Center study](#) showing that 46 percent of Americans believe the government should be able to access encrypted communications connected to a criminal investigation. The report found that Republicans were more likely to support law enforcement access to encryption, while Democrats and younger adults were more like to support unbreakable encryption.

**Christian Science Monitor** [Trump's hiring freeze blunts rush to recruit cybersecurity talent](#)

President Trump's blanket civilian hiring freeze may hurt federal agencies already struggling to recruit enough skilled cybersecurity professionals for the nation's digital defenses. While agencies can allow exemptions for national security reasons, some of the 1,099 unfilled cybersecurity jobs in the government may not fall into the category of essential personnel. When it comes to cybersecurity, says Davis Hake, a former National Security Council (NSC) aide, "we can't afford a brain drain and we can't afford to slow down."

**Wired** [For the Next Election, Don't Recount the Vote. Encrypt It](#)

LET'S BE HONEST: The 2016 election wasn't a sterling display of American democracy. Its problems

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extended beyond Russian hackers and trolls trying to thumb the scale, and the winner's baseless, ongoing claims of voter fraud. For computer scientist Ben Adida, the most troubling part came afterward, when voting security experts and Green Party candidate Jill Stein called for a recount of the vote in three thin-margin swing states, raised millions of dollars to do it—and still mostly failed. While Stein successfully triggered a Wisconsin recount, federal judges in Pennsylvania and Michigan put an early stop to her efforts. In the latter case, a judge ruled that Stein had “not presented evidence of tampering or mistake” in the electronic voting machines.

## Notable Quotes

*“The challenge for the Trump administration is on the one hand they want good jobs. On the other hand ... [Trump] has talked about getting tough on terror and strong law enforcement and those things can be in contradiction. He could support not just a law that creates a backdoor but also a law that supports intel collection so much so that it could weaken the tech community overseas because they could be seen as tools of law enforcement and security.”*

— [Dr. Robert Atkinson, president, Information Technology and Innovation Foundation](#)

*“A key sticking point in the lengthy EU-US Privacy Shield negotiations was the need for the arrangement to ensure essential equivalence of privacy protections for European citizens’ data in the U.S. — so there really can be little doubt that a presidential order seeking to strip privacy protections from Europeans (regardless of the stated intent) will be viewed very dimly by EU officials.”*

— [Natasha Lomas, reporter, TechCrunch](#)

*“[Electronic Frontier Foundation] obviously think[s] that providers should be able to raise the rights of their customers. Otherwise you’re cutting customers out of the equation when the government comes to companies with these secret gag orders.”*

— [Andrew Crocker, attorney, Electronic Frontier Foundation](#)

*“As we’ve done for more than two decades, we will strongly oppose any legislative or regulatory proposal to force companies or other providers to give [Sen. Jeff Sessions] what he’s demanding: the ability to “overcome encryption.” Code is speech, and no law that mandates backdoors can be both effective and pass constitutional scrutiny. If Sessions follows through on his endorsement of “overcoming” encryption, we’ll see him in court.”*

— [Electronic Frontier Foundation](#)

*“The Silicon Valley-Washington rift has real implications for U.S. cybersecurity and foreign policy. An ugly fight between the two sides makes it more difficult to share cyber threat information, counter online extremism, foster global technology standards, promote technological innovation, and maintain an open internet.”*

— [Adam Segal, director of the digital and cyberspace policy program, Council on Foreign Relations](#)

*“But as encryption becomes more ubiquitous without people necessarily even knowing, it will be harder for tech companies to reverse their trajectories on security and privacy. And now with a new*

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*administration in power and [policies set to shift](#), it'll be interesting to see how people's opinions change down the line -- if at all."*

[—Zach Whittaker, reporter, ZDNet](#)

*"Many argue that citizens don't really care about privacy. But survey after survey shows they do. In the US, 84 per cent of a sample of US consumers recently told analyst IDC that they are concerned about the security of their personal data, with 70 per cent indicating it's a greater concern now than a few years ago."*

[—Karlin Lillington, reporter, The Irish Times](#)

## Social Highlights

- [@arstechnica: DOJ: Microsoft isn't harmed when it can't tell users what data we want by @cfarivar](#)
- [@dnvolz: .@RonWyden: Pompeo believes CIA can conduct warrantless searches under Section 702 of FISA if reasonably believed to return foreign intel!](#)
- [@EFF: The new CIA director has a troubling record on privacy and surveillance](#)
- [@Gizmodo: Trump's Attorney General pick wants to give cops encryption backdoors](#)
- [@micahflee: So all the anti-encryption people in the government are on Signal now, huh?](#)
- [@ZDNet: Trump's attorney general nominee is in favor of encryption backdoors @zackwhittaker](#)
- [@pewresearch: "Americans 'divided' on government access to encrypted messages" - @zdnet on our report](#)
- [@techdirt: Appeals Court Upholds Its Denial Of DOJ's Demand For Microsoft's Overseas Data](#)
- [@zackwhittaker: Just in: Americans "divided" on giving feds access to encrypted messages, but opinions are shifting.](#)
- [@zackwhittaker: I remember when Wyden said there was a "secret" Patriot Act. People shrugged it off. But three years later...](#)
- [@JanAlbrecht: If this is true @EU\\_Commission has to immediately suspend #PrivacyShield & sanction the US for breaking EU-US umbrella agreement. #CPDP2017](#)
- [@Slate: This messy court case shows why Congress needs to reform email privacy law](#)
- [@Snowden: EU silent as US government suspends legal framework enabling the US-EU data-sharing pact \(#PrivacyShield\)](#)
- [@TechCrunch: Trump order strips privacy rights from non-U.S. citizens, could nix EU-US data flows by @riptari](#)