

# VFI Executive Briefing

## A weekly roundup of technology news

### May 22 – 26, 2017

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## SPECIAL COVERAGE – Senate Hearing on Digital Privacy

On Wednesday, May 24, Microsoft President and Chief Legal Officer Brad Smith participated in a [Senate Judiciary Hearing on digital privacy](#). The hearing focused on international challenges around data privacy and access. The hearing featured 5 total witnesses offering different perspectives on the topic. All agreed on the need for Congress to act to provide clarity through modernizing outdated laws. Senator Orrin Hatch (R-Utah) spoke at the hearing as he plans to re-introduce the “International Communications Privacy Act (ICPA)” legislation in the next couple of weeks.

Here is a link to the [Voices for Innovation blog](#) summarizing the hearing and Brad’s testimony. Embedded in the blog is a video of Senator Hatch discussing ICPA at the hearing. Brad made the following key points:

- The current legal framework undermines law enforcement’s ability to obtain information over the long term.
- The current legal framework creates conflicting legal obligations.
- The current legal framework ultimately undermines the privacy of U.S. citizens.
- The current legal framework drives customers to foreign competitors.
- The current legal framework impedes American allies’ legitimate law enforcement investigations.

### Additional Coverage

- **Deseret News:** [Op-ed: Utah's tech renaissance threatened unless Congress acts to update archaic law](#)
- **FITS News:** [Steve Sherman: Lindsey Graham Should Stand For Privacy Rights](#)
- **Bloomberg BNA:** [Cloud Companies Hit Hard by Languishing Email Privacy Update](#)
- **Law360:** [Senate Hears Microsoft's Take On Overseas Data Warrants](#)
- **Lawfare:** [Senate Judiciary Committee Hearing on Law Enforcement Access to Data Stored Across Borders](#)
- **IAPP:** [Reverse Microsoft v. US? Judiciary subcommittee wrestles with cross-border data sharing](#)
- **The Hill:** [DOJ pitches agreements to solve international data warrant woes](#)
- **Just Security:** [Preview: Senate Judiciary Committee Hearing \(5/24\) on Cross-Border Access to Data](#)
- **Lawfare:** [Why Cross-Border Government Requests for Data Will Keep Becoming More Important](#)

### Notable Quotes

- *“Customers want their rights protected by their own country’s laws. Americans want that, citizens everywhere want that. So the fundamental challenge that we’ve been dealing with is concerns by other people that their rights are not being protected by laws when you have these extraterritorial warrants.”*  
-[Brad Smith, president, Microsoft](#)

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- *“What we need is a sensible regime with clear rules that determine access based on factors that actually matter to the person whose data is being sought.”*  
– [Senator Orrin Hatch](#)
- *“Notably, Senator Coons urged the Department of Justice not to appeal the latest denial for re-hearing en banc of the 2nd Circuit Court of Appeals decision in the Microsoft-Ireland case, communicating the view to DOJ’s witness that he, at least, would not view a continued litigation strategy consistent with a serious effort at working collaboratively with Congress to achieve a legislative compromise.”*  
– [Carrie Cordero, counsel, ZwillGen PLLC](#)
- *“I’ll make a bet. I’ll bet if Congress understands we can fix this, we will.”*  
– [Senator Lindsey Graham](#)
- *“[The U.K.] is committed to resolving this issue in a way that preserves an open internet and protects privacy and freedom of speech.”*  
– [Paddy McGuinness, deputy national security adviser for the U.K.](#) (testimony from hearing)
- *“Implemented in 1986, years before the cloud was even invented, the Electronic Communications Privacy Act (ECPA) is outdated and ambiguous and proving harmful to the success of our business, the trust of our customers, and the ability of law enforcement to do their jobs effectively. Because of the ambiguities codified within this statute, companies providing cloud services are caught precariously between international legal jurisdictions.”*  
– [Jeff Hadfield, founder, 1564b](#)
- *“Just how far around the world does a U.S. warrant reach? Obviously, it can’t reach across borders without another country agreeing to respect the warrant. If warrants are issued to other countries, will that impact the way South Carolinians feel about the safety from federal government eyes on their emails, pictures and data stored in the “cloud?” When the government has a legitimate interest in seizing data for national security purposes, do they have a way to get that data today or do they need new tools? Are there ways to seize data that they have no right to see? All of these issues should be explored at the hearing.”*  
– [Steve Sherman, conservative commentator](#)
- *“Steven Wasserman, treasurer of the National Association of Assistant U.S. Attorneys, told Bloomberg BNA that although there should be a “warrant requirement for accessing emails,” email privacy bills so far don’t take into account warrant exceptions in emergency situations. Law enforcement requests for data “should be treated as any other search warrant under the Fourth Amendment,” he said.”*  
– [Dan Stoller, reporter, Bloomberg BNA](#)
- *“In order to accomplish this urgent requirement, it will require Congress taking the necessary legislative steps to allow it to happen... While we are starting with our closest ally, the framework may allow future expansion to other like-minded countries.”*  
– [Homeland Security Advisor Tom Bossert](#)
- *“It is essential to ensure that legal safeguards are maintained when reforming an existing model of cooperation such as the Mutual Legal Assistance Treaties. Otherwise, reform has the potential to weaken civil rights by seeking the lowest common denominator among systems.”*  
– [Susan Vergnolle, assistant professor, Pantheon-Sorbonne University](#)

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## HILL UPDATE

### Politico Morning Tech [HATCH ON ICPA](#)

On Tuesday, Politico's Morning Tech noted Chairman of the Senate Republican High-Tech Task Force Orrin Hatch (R-Utah) will explain his introduction of the International Communications Privacy Act on the Senate floor. ICPA would set a framework for accessing such data, a current gray area that's produced mixed court decisions

### Recode [A new privacy bill in Congress has some companies preparing for a long political fight](#)

A new push in the U.S. Congress to subject AT&T, Comcast\*, Facebook and Google to more online privacy oversight has tech giants, internet providers and consumer groups all preparing for a political fight. The effort is the brainchild of Rep. Marsha Blackburn, a Republican lawmaker from Tennessee; her bill, dubbed the Browser Act, seeks to ensure consumers have a say before a broadband company, search engine, social network or other website can sell their sensitive information, including their web-browsing histories, to advertisers. If it all feels like a bit of deja vu, that's because it is: It was Blackburn, after all, who led Congress on a campaign this year to quash similar privacy protections put in place under former President Barack Obama.

## ARTICLE SUMMARY

### Wall Street Journal [How Alleged Russian Hacker Teamed Up With Florida GOP Operative](#) (subscription required)

The hacking spree that upended the presidential election wasn't limited to Democratic National Committee memos and Clinton-aide emails posted on websites. The hacker also privately sent Democratic voter-turnout analyses to a Republican political operative in Florida named Aaron Nevins. Learning that hacker "Guccifer 2.0" had tapped into a Democratic committee that helps House candidates, Mr. Nevins wrote to the hacker to say: "Feel free to send any Florida based information." Ten days later, Mr. Nevins received 2.5 gigabytes of Democratic Congressional Campaign Committee documents, some of which he posted on a blog called HelloFLA.com that he ran using a pseudonym.

### New York Times [U.S. top court tightens patent suit rules in blow to 'patent trolls'](#)

WASHINGTON The U.S. Supreme Court on Monday tightened rules for where patent lawsuits can be filed in a decision that may make it harder for so-called patent "trolls" to launch sometimes dodgy patent cases in friendly courts, a major irritant for high-tech giants like Apple and Alphabet Inc's Google. In a decision that upends 27 years of law governing patent infringement cases, the justices sided with beverage flavoring company TC Heartland LLC in its legal battle with food and beverage company Kraft Heinz Co (KHC.O). The justices ruled 8-0 that patent suits can be filed only in courts located in the jurisdiction where the targeted company is incorporated. The decision overturned a 2016 ruling by the U.S. Court of Appeals for the Federal Circuit, a Washington-based patent court, that said patent suits are fair game anywhere a defendant company's products are sold.

### Washington Post [The Supreme Court's big ruling on 'patent trolls' will rock businesses everywhere](#)

Tech companies and app developers everywhere are breathing a sigh of relief after Monday's major Supreme Court ruling on a topic that's close to their hearts: patents. More specifically, patent lawsuits — a rising number of which analysts say are bogus and threaten to strangle new start-ups and inventions before they have a chance to succeed. The ruling could wind up having a significant effect on which companies and innovations thrive and which get sued into oblivion. Here's what you need to know.

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#### **PBS [The Supreme Court ruling on patents could help curb 'patent trolls.' Here's how.](#)**

Amid headlines Monday about President Donald Trump's trip through the Middle East, and the deep budget cuts he had proposed back home, the U.S. Supreme Court issued something of a landmark ruling on patent infringement lawsuits. In a unanimous decision, the justices said patent owners can only bring such cases in states where the companies they are suing are incorporated. (Justice Neil Gorsuch, weeks into his tenure on the bench, did not take part in the case.) The case didn't grab much as much attention as some others. But the decision could have huge implications for so-called "patent trolls," companies that make money by using patents they've bought to file infringement lawsuits and collect licensing fees.

#### **The Hill [FCC opens public comment period for net neutrality](#)**

The Federal Communications Commission released the text of its proposal to repeal the agency's net neutrality rules Tuesday, opening it up to comments from the public. The commission voted along party lines Thursday to move forward with the proceeding to eliminate the regulations, which reclassified internet service providers as telecommunications companies and required them to treat all web traffic equally. Republican FCC Chairman Ajit Pai's proposal would undo the reclassification, which would eliminate the commission's legal authority to prevent internet service providers from blocking or throttling web content or creating "fast lanes" that websites can buy into.

#### **Washington Post [Democrats want to turn net neutrality into the next GOP health care debacle](#)**

Now that federal regulators have released their official proposal to repeal the government's net neutrality rules, Democrats are vowing, Churchill-style, to fight that measure in the courts, at the Federal Communications Commission and in the realm of public opinion. Sensing they've hit on a white-hot campaign issue, liberals are seeking to stir up a grassroots firestorm around net neutrality that can thwart the GOP plan — or at least make it incredibly costly for Republicans to support. Democrats argue that conservatives want to strip consumers of key online protections and hand more power back to large Internet providers, and liken the issue to another hot-button topic: former president Obama's health care law.

#### **Forbes [Inside Google's Fight To Keep The US Government Out Of Gmail Inboxes](#)**

Forbes published an article outlining Google's legal efforts challenging searching warrants for customer data, in particular its pending cases in Pennsylvania and Wisconsin. It notes that in addition to the company's three public cases, the company has at least three federal cases still under seal, as well as several state cases. A source close to Google's legal efforts expects a final decision in the Philadelphia case by the end of the month. Microsoft's warrant litigation features prominently throughout the article, with an unnamed DOJ official saying that the Second Circuit ruling and subsequent legal battles from other tech companies have become "really problematic."

#### **Lexology [Executive Order 13800 - Strengthening the Cybersecurity of Federal Networks and Critical Infrastructure](#)**

With President Trump's executive order on cybersecurity, and with his statements and positions taken during the campaign, it is clear that cybersecurity will be a key area of focus during his administration. Executive Order 13800, with its requirement for federal agencies to use the NIST Cybersecurity Framework, raises questions about the use of the framework by government contractors, and other government agencies: will various agencies now require use of the NIST Cybersecurity Framework by the vendors which they rely upon? And how will agencies resolve conflicts between the framework and other regulations/requirements?

#### **GovTech [Federal Cybersecurity Directive Looms Over Contractors](#)**

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A looming new federal security directive will require businesses working with the federal government to protect their cyber data, or have a detailed plan for doing so, by year's end. The directive is called "NIST 800-171" — or sometimes just "rule 171" — and it will control whether companies from defense engineering firms to janitorial outfits can do business with the federal government. [...] "We are finding that a lot of companies are not aware of this requirement and face losing their government contracts," said Tamara Wamsley, a strategist with Fastlane. "This issue could impact the success of many local companies, could result in lost jobs. This is a big deal."

## NOTABLE QUOTES

- *"What all parties agree on, though, is that clarity is needed regarding the statutes that delineate what data it can and can't access. The law simply hasn't kept up with the technology."*  
– [Thomas Fox-Brewster, reporter, Forbes](#)
- *"The overarching point is that data can live ephemerally, in many copies and in many places. Some of our most important Internet applications, from search functions to communications, rely on those places being across a national border."*  
– [Dillon Reisman, independent research engineer](#)
- *"There are many who call for backdoors to be built into encrypted communications technologies on the premise that law enforcement agencies would be the sole entities with access. However, the inability to guarantee the absolute safety of vulnerabilities like those that led to WannaCry — no matter who holds the information — applies equally to the encryption debate."*  
– [Michael Beckerman, president and CEO, the Internet Association](#)
- *"Apple is one of a handful of Silicon Valley giants, including Amazon and Microsoft, who have supported Google in its attempts to oppose FBI demands it supply Gmail data stored abroad. Decisions in myriad court cases fought by Google will likely have significant ramifications for all comms vendors and their customers. And so fight between tech firms and the government over what information can be accessed by feds and what can't looks set to continue unabated."*  
– [Thomas Fox-Brewster, reporter, Forbes](#)
- *"This is important for personal privacy and for public governance of surveillance. These cases illustrate our reliance and dependence on intermediaries actually taking our privacy seriously. I applaud companies for fighting for their users' privacy."*  
– [Lee Tien, senior staff attorney, Electronic Frontier Foundation](#)

## SOCIAL HIGHLIGHTS

- **@fordm:** [We've got new SCOTUS orders shortly. Here's my preview of a major Fourth Amendment dispute they could take up:](#)
- **@iblametom:** [Google's fighting more than six federal cases and a handful of state cases where the government wants it to hand over Gmail data.](#)
- **@iblametom:** [Turns out this Google v Gov data grabs is much bigger than just this one case, the biggest of the Silicon Valley giants involved. Story soon](#)
- **@JoeBeOne:** [IN THE MATTER OF THE SEARCH OF CONTENT THAT IS STORED AT PREMISES CONTROLLED BY GOOGLE](#)
- **@kennwhite:** [Not true. See Microsoft v United States.](#)
- **@kennwhite:** [Federal judge: storage location of Google data is decided by an algorithm not a person, so non-U.S. data is not exempt from U.S. warrants](#)

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- **@Lawfare:** [Dillon Reisman: Where Is Your Data, Really?: The Technical Case Against Data Localization](#)
- **@ChertoffGroup:** [ICYMI: Chertoff argues that "cross-border law enforcement cooperation is hampered by inadequate laws and conflicting jurisdictional demands"](#)
- **@senorrhatch:** [Didn't catch Senator Hatch live? Watch his entire speech on Protecting American Data Privacy here](#)