

MICROSOFT'S VERY PUBLIC SPAT IN THE CLOUD

A few weeks back, I did a Salon piece laying out how both the US and UK were claiming they can demand data stored in a cloud in any country. The UK is doing that with their new DRIP law, which will increase their ability to demand data from companies within and outside of the UK. The US is doing that by serving warrants on US companies for data stored in their clouds overseas.

The next battle in the latter war will take place on Thursday, at a hearing in NYC. In anticipation, Microsoft's counsel Brad Smith wrote a WSJ op-ed to make the spat good and public. Here's how he describes the government's efforts to use Third Party doctrine to get around border limits on warrants.

Microsoft believes you own emails stored in the cloud, and that they have the same privacy protection as paper letters sent by mail. This means, in our view, that the U.S. government can obtain emails only subject to the full legal protections of the Constitution's Fourth Amendment. It means, in this case, that the U.S. government must have a warrant. But under well-established case law, a search warrant cannot reach beyond U.S. shores.

The government seeks to sidestep these rules, asserting that emails you store in the cloud cease to belong exclusively to you. In court filings, it argues that your emails become the business records of a cloud provider. Because business records have a lower level of legal protection, the government claims that it can use its broader authority to reach emails stored anywhere in the

world.

Courts have long recognized the distinction between a company's business records and an individual's personal communications. For example, the government can serve a subpoena on UPS to disclose business records that show where a customer shipped packages, but it must establish probable cause and get a warrant from a judge to look at what a customer put inside.

[snip]

Microsoft believes the higher legal protection for personal conversations should be preserved for new forms of digital communication, such as emails or text and instant messaging.

This is a battle about cloud storage. But it's also a proxy war for questions of how the government conducts its more secret surveillance – as well as a very public show of opposing the government's more expansive claims (the amici in this case include other companies – like AT&T – that have never complained about the government's surveillance requests but that have good reason to make a good show of complaining here).

Which makes it interesting that Microsoft is so aggressively reaching out to the public.