

SADNESS IN THE NSA-TELECOM BROMANCE

In his report on an interview with the new Director of NSA, Admiral Mike Rogers, David Sanger gets some operational details wrong, starting with his claim that the new phone dragnet would require an “individual warrant.”

The new phone dragnet neither requires “warrants” (the standard for an order is reasonable suspicion, not probable cause), nor does it require its orders to be tied to “individuals,” but instead requires “specific selection terms” that may target facilities or devices, which in the past have been very very broadly interpreted.

All that said, I am interested in Rogers’ claims Sanger repeats about NSA’s changing relationship with telecoms.

He also acknowledged that the quiet working relationships between the security agency and the nation’s telecommunications and high technology firms had been sharply changed by the Snowden disclosures – and might never return to what they once were in an era when the relationships were enveloped in secrecy.

Oh darn!

Sadly, here’s where Sanger’s unfamiliarity with the details makes the story less useful. Publicly, at least, AT&T and Verizon have had significantly different responses to the exposure of the dragnet (though that may only be because Verizon’s name has twice been made public in conjunction with NSA’s dragnet, whereas AT&T’s has not been), and it’d be nice if this passage probed some of those details.

Telecommunications businesses like AT&T and Verizon, and social media companies,

now insist that “you are going to have to compel us,” Admiral Rogers said, to turn over data so that they can demonstrate to foreign customers that they do not voluntarily cooperate. And some are far more reluctant to help when asked to provide information about foreigners who are communicating on their networks abroad. It is a gray area in the law in which American courts have no jurisdiction; instead, the agency relied on the cooperation of American-based companies.

Last week, Verizon lost a longstanding contract to run many of the telecommunications services for the German government. Germany declared that the revelations of “ties revealed between foreign intelligence agencies and firms” showed that it needed to rely on domestic providers.

After all, under Hemisphere, AT&T wasn’t requiring legal process even for *domestic* call records. I think it possible they’ve demanded the government move Hemisphere under the new phone dragnet, though if they have, we haven’t heard about it (it would only work if they defined domestic drug dealer suspects as associated with foreign powers who have some tie to terrorism). Otherwise, though, AT&T has not made a peep to suggest they’ll alter their decades-long overenthusiastic cooperation with the government.

Whereas Verizon has been making more audible complaints about their plight, long before the Germans started ending their contracts. And Sprint – unmentioned by Sanger – even demanded to see legal support for turning over phone data, including, apparently, turning over foreign phone data under ECPA’s exception in 18 U.S.C. § 2511(2)(f)’s permitting telecoms to voluntarily provide foreign intelligence data.

Given that background – and the fact ODNI

released the opinions revealing Sprint's effort, if not its name – I am curious whether the telecoms are really demanding process. If courts really had no jurisdiction then it is unclear how the government could obligate production

Though that may be what the Microsoft's challenge to a government request for email held in Ireland is about, and that may explain why AT&T and Verizon, along with Cisco and Apple – for the most part, companies that have been more reticent about the government obtaining records in the US – joined that suit. (In related news, EU Vice President Viviane Reding says the US request for the data may be a violation of international law.)

Well, if the Microsoft challenge and telecom participation in the request for data overseas is actually an effort to convince the Europeans these corporations are demanding legal process, Admiral Rogers just blew their cover.

Admiral Rogers said the majority of corporations that had long given the agency its technological edge and global reach were still working with it, though they had no interest in advertising the fact.

Dear Ireland and the rest of Europe: Microsoft – which has long been rather cooperative with NSA, up to and including finding a way to obtain Skype data – may be fighting this data request just for show. Love, Microsoft's BFF, Mike Rogers.