

FBI Says It Will Ignore Court Order If Told To Reveal Its Tor Browser Exploit, Because It Feels It's Above The Law...

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Body

Apr 26, 2016(Techdirt: <http://www.techdirt.com> Delivered by Newstex) There are a bunch of different cases going on right now concerning the FBI secretly running a hidden Tor-based child porn site[1] called Playpen for two weeks, and then hacking the users[2] of the site with malware in order to identify them. The courts, so far, have been fine[3] with the FBI's overall actions of running the site, but there are increasing questions about how it hacked the users. In FBI lingo, they used a "network investigative technique" or a NIT to hack into those computers, but the FBI really doesn't want to talk about the details.In one case, it was revealed that the warrant used by the FBI never mentions[4] either hacking or malware, suggesting that the FBI actively misled the judge. In another one of the cases, a judge has declared the use of the NIT to be illegal searches[5], mainly based on jurisdictional questions (the warrants were for Virginia, but the individuals were far away from there).In yet another case, the one involving Jay Michaud -- his lawyers have now told the court that the DOJ has made it clear that despite the court ruling earlier this year that the FBI must reveal the details of the NIT/hacking tool, it will not do so[6] (first revealed by Brad Heath[7]). The redacted filing is in response to a (sealed) motion for reconsideration by the DOJ, but reveals more or less what the DOJ said in that filing:

<https://imgur.com/XteQz4Tf> you can't see that, the relevant portion reads:The Government has now made plain that the FBI will not comply with the Court's discovery order... [REDACTED]... The Government further acknowledges that "there may be consequences for this refusal." [REDACTED] Pursuant to the law discussed below, the consequences are straightforward: the prosecution must now choose between complying with the Court's discovery order and dismissing the case....The dilemma is one entirely of the Government's own making, and nothing in its Motion for Reconsideration or renewed requests for secret proceedings changes the analysis.The filing goes on to point out how the FBI has similarly been refusing to reveal details of its Stingray mobile phone surveillance tools (something we've discussed here[8] quite a bit), leading to convictions being overturned. As Michaud's lawyers point out, the situation here is basically the same. If the FBI refuses to obey a court order, then the case should be dropped.As the Maryland court observed, the FBI's obstruction of disclosure 'from special order and/or warrant application through appellate review - prevents the court from exercising its fundamental duties under the constitution.' ... '[I]t is self-evident that the court must understand why and how [a] search was conducted,' and '[t]he analytical framework requires analysis of the functionality of the surveillance device and the range of information potentially revealed by its use.' ... These conclusions mirror the conclusions reached by this Court at the February 17 hearing.The filing also highlights how important it is to get the details, noting that the FBI has a history of incorrectly raiding homes because it doesn't understand how Tor works:The Government's refusal to comply with the discovery order is all the more untenable given the exceptional technical complexities

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that are involved with the Tor network and the FBI's use of sophisticated hacking 'techniques.' Just a few weeks ago, Seattle police raided the home of two people who use the Tor network, based on an allegation that their IP addresses had been linked to child pornography, when in fact illicit traffic had merely passed through their connection to the network.....But perhaps even more amusing, the lawyers point out how the DOJ/FBI's claims here run exactly counter to the DOJ/FBI's arguments about Apple's obligation to respond to the DOJ's court order to help unlock encrypted phones: <https://imgur.com/IX2arTJTheir> complaint is that the DOJ said that Apple could use a secure location to keep the code safe, but rejects such a solution here -- but the comparison could go even deeper. After all, the DOJ kept saying that Apple was acting as if it was above the law in telling the FBI that it would not write special software to help break into a phone. Yet, here, the request is much more straightforward. The FBI doesn't have to write any new code at all... it just has to reveal what it has been told to reveal by a court: the software it used to hack into someone's computer. Of course, there's also the fact that because of the whole Apple/DOJ fight, Senators Dianne Feinstein and Richard Burr started pushing a bill to ban encryption[9] that opens with the following:

<https://imgur.com/CBxkTqOSomehow>, I get the feeling that both Feinstein and Burr will feel differently when it's the FBI/DOJ refusing to comply with court orders, and will claim the government is correct here. I wonder if anyone else in the Senate will now release a companion bill to the Burr/Feinstein bill suggesting that the DOJ itself should start complying with court orders, as it is not "above the law." Permalink[10] | Comments[11] | Email This Story[12] [1]: <https://www.techdirt.com/articles/20160126/14535433436/courts-pretty-much-ok-with-fbis-occasional-stints-as-child-porn-distributors.shtml> [2]: <https://www.techdirt.com/articles/20160107/0641433264/fbi-deploying-large-scale-hacking-with-little-to-no-judicial-oversight.shtml> [3]: <https://www.techdirt.com/articles/20160126/14535433436/courts-pretty-much-ok-with-fbis-occasional-stints-as-child-porn-distributors.shtml> [4]: <https://www.techdirt.com/articles/20160308/09562133834/warrant-fbis-hacking-technique-makes-no-mention-hacking-malware.shtml> [5]: <https://www.techdirt.com/articles/20160421/06595834231/judge-says-fbis-hacking-tool-deployed-child-porn-investigation-is-illegal-search.shtml> [6]: <https://assets.documentcloud.org/documents/2812347/Gov-Uscourts-Wawd-218206-179-0.pdf> [7]: <https://twitter.com/bradheath/status/724727534361911296> [8]: <https://www.techdirt.com/blog/?tag=stingray> [9]: <https://www.techdirt.com/articles/20160408/08381934131/burr-feinstein-release-their-anti-encryption-bill-more-ridiculous-than-expected.shtml> [10]: <https://www.techdirt.com/articles/20160425/18101534272/fbi-says-it-will-ignore-court-order-if-told-to-reveal-tor-browser-exploit-because-it-feels-above-law.shtml> [11]: <https://www.techdirt.com/articles/20160425/18101534272/fbi-says-it-will-ignore-court-order-if-told-to-reveal-tor-browser-exploit-because-it-feels-above-law.shtml#comments> [12]: <https://www.techdirt.com/articles/20160425/18101534272/fbi-says-it-will-ignore-court-order-if-told-to-reveal-tor-browser-exploit-because-it-feels-above-law.shtml?op=sharethis>

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