No. 16-3588

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

GABRIEL WERDENE,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF OF *AMICUS CURIAE* PRIVACY INTERNATIONAL IN SUPPORT OF APPELLANT AND IN SUPPORT OF REVERSAL OF THE DECISION BELOW

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Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Appellate Rule 26.1.1, *amicus curiae* Privacy International certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

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TABLE OF AUTHORITIES

Federal Cases

Fed. Ins. Co. v. Richard I. Rubin & Co., Inc., 12 F. 3d 1270 (3d Cir. 1993).....4

Hutchinson v. Hahn, 402 F. App'x 391 (10th Cir. 2010).....4

United States v. Gorshkov, No. 00-cr-550, 2001 WL 1024026 (W.D. Wash., May 23, 2001).....26

International Cases

Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 3 (Feb. 14).....16

SS Lotus (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)..... 15, 16

Statutes and Rules

18 U.S.C. §1030(a)(2).....26

Fed. R. Crim. P. 41 (2011)..... *passim*

Other Authorities

Michael Abbell, *Obtaining Evidence Abroad in Criminal Cases* (2010).....24

Michael Akehurst, *Jurisdiction in International Law*, 46 Brit. Y. B. Int'l L. 145 (1975).....16

Patricia L. Bellia, *Chasing Bits across Borders*, U. Chi. Legal F. 35 (2001) 18

Steven M. Bellovin et al., *Lawful Hacking: Using Existing Vulnerabilities for Wiretapping on the Internet*, 12 Nw. J. Tech. & Intell. Prop. 1 (2014)..... 5, 9, 11

Sam Biddle, *Can 000000 Secretly Open Your Hotel Safe?*, Gizmodo (Sept. 6,

2011), http://gizmodo.com/5837561/can-000000-secretly-open-your-hotel-safe 5

Susan W. Brenner, *Cyber-threats and the Limits of Bureaucratic Control*, 14 Minn. J.L. Sci. & Tech. 137 (2013).....25

Ian Brownlie, *Principles of Public International Law* (8th ed. 2012).....16

Mike Brunker, *FBI agent charged with hacking*, NBC News (Aug. 15, 2002), http://www.nbcnews.com/id/3078784.....26

Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 Harv. Int'l L.J. 121 (2007).....23

Computer Crime & Intellectual Prop. Section, Dep't of Justice, *Prosecuting Computer Crimes Manual* (2010).....26

Computer Crime & Intellectual Prop. Section, Dep't of Justice, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* (2009) 22

Council on Europe, Convention on Cybercrime, *opened for signature* Nov. 23, 2004, S. Treaty Doc. No. 108-11 (2006), 2296 U.N.T.S. 167 (entered into force July 1, 2004) 17, 18

James Crawford, *Brownlie's Principles of Public International Law* (8th ed. 2012) 18

Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* 44 (2d ed. 2010).....15

Jennifer Daskal, *The Un-Territoriality of Data*, 125 Yale L.J. 326 (2015)..... 18, 19

Dep't of Justice, Office of International Affairs, https://www.justice.gov/criminal-oia 24

Dep't of Justice, U.S. Attorney's Manual, Criminal Resources Manual..... 22, 26

Dep't of State, Foreign Affairs Manual 23

Charles Doyle, Cong. Research Serv., *Extraterritorial Application of American Criminal Law* (2016) 23

The Draft Convention on Research in International Law of the Harvard Law School, 29 Am. J. Int'l L. 435 (Supp. 1935) 14

T. Markus Funk, Fed. Judicial Ctr., *Mutual Legal Assistance Treaties and Letters Rogatory: A Guide for Judges* (2014) 23

Ahmed Ghappour, *Searching Places Unknown: Law Enforcement Jurisdiction on the Dark Web*, 69 Stan. L. Rev. (forthcoming 2017) 24

Oona A. Hathaway et al., *The Law of Cyber-Attack*, 100 Cal. L. Rev. 817 (2012) 17

Susan Hennessey & Nicholas Weaver, *A Judicial Framework for Evaluating Network Investigative Techniques*, Lawfare (July 28, 2016), https://www.lawfareblog.com/judicial-framework-evaluating-network-investigative-techniques 5, 6

Int'l Bar Ass'n, *Report of the Task Force on Extraterritorial Jurisdiction* (2009) 15

The Jargon File (Oct. 1, 2004), http://www.catb.org/jargon/index.html.....6

Henrik W.K. Kaspersen, Council of Europe, *Cybercrime and Internet Jurisdiction* (2009) 17

Brian Krebs, *Espionage Hackers Target 'Watering Hole' Sites*, Krebs on Security (Sept. 25, 2012), https://krebsonsecurity.com/2012/09/espionage-hackers-target-watering-hole-sites/ 9

Zach Lerner, *A Warrant to Hack: An Analysis of the Proposed Amendments to Rule 41 of the Federal Rules of Criminal Procedure*, 18 Yale J.L. & Tech. 26 (2016).....8

Letter from Mythili Raman, Acting Assistant Att'y Gen., Criminal Div., Dep't of Justice, to Reena Raggi, Chair, Advisory Comm. on the Criminal Rules (Sept. 18, 2013)..... 19, 20

Terminology, Malware Attribute Enumeration and Characterization, MITRE (Jan. 2, 2014), http://maec.mitre.org/about/terminology.html 6-7

Frederick A. Mann, *The Doctrine of Jurisdiction in International Law* (1964) 14

The New Hacker's Dictionary (Eric S. Raymond ed., 3d ed. 1996) 6

Lassa Oppenheim, *Oppenheim's International Law* (Robert Jennings & Arthur Watts eds., 9th ed. 1992) 14

Kevin Poulsen, *Visit the Wrong Website, and the FBI Could End Up in Your Computer*, Wired, Aug. 5, 2014, https://www.wired.com/2014/08/operation_torpedo/ 6

Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, delivered to the General Assembly, U.N. Doc. A/70/174 (July 22, 2015) 16, 25

Restatement (Third) of Foreign Relations Law in the United States (Am. Law Inst. 1987) 14, 15, 18

Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations (Michael N. Schmitt ed. 2017) 16, 18

Tor: Hidden Service Protocol, Tor, https://www.torproject.org/docs/hidden-services.html.en (last visited Feb. 3, 2017) 10

Tor: Overview, Tor, https://www.torproject.org/about/overview.html.en (last visited Feb. 3, 2017) 10

Tor Metrics, Tor, https://metrics.torproject.org/userstats-relay-table.html?start=2015-02-01&end=2015-02-28 (last visited Feb. 3, 2017) ..21

What is Tor Browser?, Tor, https://www.torproject.org/projects/torbrowser.html.en 9

Matthew C. Waxman, *Self Defense Force Against Cyber Attacks*, 89 Int'l L. Stud. 109 (2013).....25

STATEMENT OF INTEREST

Privacy International is a nonprofit, non-governmental organization based in London, the United Kingdom ("UK"), which defends the right to privacy around the world. Established in 1990, Privacy International undertakes research and investigations into government and corporate surveillance with a focus on the technologies that enable these practices. It has litigated or intervened in cases implicating the right to privacy in the courts of the United States, the UK, and Europe, including the European Court of Human Rights. To ensure universal respect for the right to privacy, Privacy International advocates for strong national, regional and international laws that protect this right. It also strengthens the capacity of partner organizations in developing countries to identify and defend against threats to privacy.

Privacy International files this brief with the consent of all parties.[1]

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION

The "network investigative technique" ("NIT") used by the government in this case is a novel, sophisticated and awesome power. In particular, it possesses the capability to search and seize data from connected devices located anywhere in the world. The NIT's extraterritorial reach was clear to the government when it sought authority to deploy this technology. And we now know that the NIT infiltrated over 8,700 devices, over 83% of which were located outside of the U.S., in 120 countries and territories.

The NIT warrant therefore authorized the government to undertake extraterritorial action. Well-established international law prohibits the government from undertaking law enforcement functions in other countries, without those countries' consent, which there is no evidence the government sought here. This principle is reflected in the warrant authority, which does not permit judges to authorize extraterritorial action. These legal constraints protect against the foreign relations risks incurred when the U.S. acts extraterritorially, risks that are particularly amplified when the U.S. interferes with the devices of thousands of individuals abroad.

Where the government seeks to use new and complex technology to facilitate searches and seizures, that technology may not fit appropriately into existing categories of authorization. Incongruity should give the courts pause, for

such technology may have unforeseen and powerful consequences, as revealed by a close and clear-eyed examination of the NIT. Here, the NIT's extraterritorial reach renders the warrant invalid and potentially subjects the U.S. to profound foreign relations risks. For these reasons, this Court should reverse the decision below.

FACTUAL BACKGROUND

I. The "Network Investigative Technique."

The NIT comprises multiple distinct processes, involving the use of distinct technical components. These processes render the NIT a technique to:

(1) send an "exploit" to devices in bulk;

(2) deploy the "exploit" to compromise the security of those devices; and

(3) run a "payload" to perform actions on the devices.[2]

Below, we unpack and explain each of these processes and components.

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[2] Privacy International relies primarily on expert declarations and testimony in other criminal proceedings arising out of the government's execution of the NIT warrant to describe the NIT. These statements were elicited in conjunction with motions to compel discovery regarding the NIT pursuant to Federal Rule of Criminal Procedure 16(d). *See, e.g., United States v. Matish*, No. 16-cr-16 (E.D. Va.); *United States v. Michaud*, No. 15-cr-5351 (W.D. Wa.); *United States v. Tippens*, No. 16-cr-5110 (W.D. Wa.). They currently constitute the most detailed technical information in the public domain about how the NIT operates. We rely on representations from experts for both the government, *see* Decl. of Brian Levine, *Tippens* (Sept. 22, 2016), ECF No. 58-1 (PI.Add. 26); Decl. of Special Agent Daniel Alfin, *Matish* (June 1, 2016), ECF No. 74-1 (PI.Add. 4), and various defendants, *see* Decl. of Christopher Soghoian, *Matish* (June 10, 2016), ECF No. 83-1 (PI.Add. 1); Decl. of Matthew Miller, *Michaud* (May 9, 2016), ECF No. 191-1 (PI.Add. 12), and note where these representations diverge from each other. While these statements are not part of the record in this case, the Court may take judicial notice of the filings in related NIT cases. *See, e.g.*, *Hutchinson v. Hahn*, 402 F. App'x 391, 394-95 (10th Cir. 2010) (noting that "a court may take judicial notice of its own records as well as those of other courts, particularly in closely-related cases"); *cf. Fed. Ins. Co. v. Richard I. Rubin & Co., Inc.*, 12 F.3d 1270, 1284 (3d Cir. 1993) (noting "the power to take judicial notice of subsequent developments in related cases").

"PI.Add." followed by a number denotes the relevant page of the addendum to Privacy International's brief.

A. The NIT uses an "exploit" and a "payload."

An "exploit" takes advantage of a security "vulnerability" – *i.e.* weakness or flaw – in a computer system or application.[3] *See* Steven M. Bellovin et al., *Lawful Hacking: Using Existing Vulnerabilities for Wiretapping on the Internet*, 12 Nw. J. Tech. & Intell. Prop. 1, 22-23 (2014) ("A vulnerability is a weakness in a system that can potentially be manipulated by an unauthorized entity to allow exposure of some aspect of the system."). A physical world analogy to an exploit might be a trick to unlock a hotel safe unbeknownst to the user, such as by entering an override code. *See, e.g.*, Sam Biddle, *Can 000000 Secretly Open Your Hotel Safe?*,

[3] Experts for the government do not dispute that it used an exploit, but have not taken a clear position on whether the exploit constitutes part of the NIT itself. *Compare* Levine Decl. ¶4 (PI.Add. 28) ("[M]y understanding of the overall process used by the FBI is as follows. A defendant's computer connected using the Tor network to the Playpen website . . . . Retrieving certain pages from the Playpen website resulted in the download of the FBI's exploit and payload programs.") *with* Alfin Decl. ¶11 (PI.Add. 6) ("[A]n 'exploit' allowed the FBI to deliver a set of instructions – the NIT – to Matish's computer. . . . The NIT instructions and results have been provided to the defense for review; the 'exploit' has not."). Experts for defendants in NIT cases as well as scholars following this wave of litigation agree that the exploit constitutes a component of the NIT. *See, e.g.*, Miller Decl. ¶¶2-3 (PI.Add. 12-13) (agreeing with another expert that there are "four major components" to the NIT and proceeding to discuss the "exploit" as one of those components); Susan Hennessey & Nicholas Weaver, *A Judicial Framework for Evaluating Network Investigative Techniques*, Lawfare (July 28, 2016), https://www.lawfareblog.com/judicial-framework-evaluating-network-investigative-techniques (describing the "exploit" as one of "a number of distinct components" comprising the NIT).

Gizmodo (Sept. 6, 2011), http://gizmodo.com/5837561/can-000000-secretly-open-your-hotel-safe.

An exploit, by taking advantage of a security vulnerability in a computer system or application, permits a "payload" to run. *See* Hennessey & Weaver, *supra* ("[T]he exploit opens a window in the owner's house that the owner believed was locked but which can be removed from the frame . . . and lets in the payload . . . ."). Payloads are sometimes characterized as "malware," a term that may be more familiar to the Court.[4] Malware, a contraction of "malicious software," refers to computer code designed to perform actions on a system that, but for the malware, would not occur. *See* The Jargon File (Oct. 1, 2004), http://www.catb.org/jargon/index.html (entry for "malware").[5] A "payload," in the computer security context, can refer to that part of malware that actually performs

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[4] Experts for the government do not dispute that it used a payload. *See, e.g.* Levine Decl. ¶4 (PI.Add. 28); Alfin Decl. ¶7 (PI.Add. 5). The government has however, in certain circumstances, objected to the use of the term "malware" to describe any part of the NIT. *See*, *e.g.*, Gov't's Surreply to Defendant's Motion to Compel Discovery at 11-12, *Matish* (June 1, 2016), ECF No. 74. Nevertheless, computer security experts have used this term to describe the NIT. *See* Soghoian Decl. ¶¶5-12 (PI.Add. 2-3); Kevin Poulsen, *Visit the Wrong Website, and the FBI Could End Up in Your Computer*, Wired (Aug. 5, 2014) https://www.wired.com/2014/08/operation_torpedo/ ("From the perspective of experts in computer security and privacy, the NIT is malware, pure and simple.") (describing prior FBI operations employing NITs).

[5] The Jargon File is a glossary of computer programming terms, originally compiled by early computer programming communities, which has also been published as *The New Hacker's Dictionary* (Eric S. Raymond ed., 3d ed. 1996).

those actions. *See Terminology*, Malware Attribute Enumeration and Characterization, MITRE (Jan. 2, 2014), http://maec.mitre.org/about/terminology.html ("[A] malware's payload . . . is directly tied into the purpose behind the malware."). Extending the hotel safe analogy above, the exploit could be a method for unlocking the safe, while the payload could be any action taken once the safe is unlocked, including copying or stealing its contents.

B. The NIT sends an exploit to devices in bulk.

The first step of the NIT is to send an exploit to all devices visiting the Playpen website. *See* NIT Aff. ¶32 (App. 131).[6] As the government's warrant application explains, "[i]n the normal course of operations, websites send content to visitors" and "[a] user's computer downloads that content and uses it to display web pages . . . ." *Id.* ¶33 (App. 131). The FBI modified the code on the Playpen site itself so that when visitors requested content from the site, that content was "augment[ed] . . . with additional computer instructions." *Id.*; Motions Hearing Tr.

[6] The NIT warrant and affidavit have been sealed in this case but are available in public filings in other criminal proceedings arising out of the government's execution of the warrant. *See, e.g.*, Gov't Br., *United States v. Levin*, No. 16-1567 (1st Cir.) (Oct. 26, 2016) (including the NIT warrant and affidavit in an addendum to the brief). Appellant's counsel has provided Privacy International with the joint appendix page numbers corresponding to the NIT warrant and affidavit for citation purposes. The joint appendix is cited as "App.".

at 76-77, *Michaud* (Jan. 22, 2016), ECF No. 203 (PI.Add. 16-17) (Alfin test.) ("We configured the NIT to supplement the information being downloaded by the user with the NIT instructions."); *see also id*. at 112 (PI.Add. 18) (Soghoian test.) ("[A] regular person just clicking around is not going to know there has been this new special code added to the web site."). What the government vaguely describes as "additional computer instructions," NIT Aff. ¶33 (App. 131), is, as clarified by one of its own experts, instructions to send an exploit. Levine Decl. ¶4 (PI.Add. 28) ("Retrieving certain pages from the Playpen website resulted in the download of the FBI's exploit . . . .").

This mode of delivery was bulk by nature, as every visitor to the targeted website would receive the exploit. The warrant application observed that, according to historical data about the Playpen site, it received over 1,500 unique users daily and over 11,000 unique users weekly. NIT Aff. ¶19 (App. 125). The application requested "authority to use the NIT, which will be deployed on the TARGET WEBSITE . . . to investigate any user or administrator who logs into the TARGET WEBSITE." *Id*. ¶32 (App. 131). The bulk nature of this technique is why it is commonly known as a "watering hole attack." *See* Zach Lerner, *A Warrant to Hack: An Analysis of the Proposed Amendments to Rule 41 of the Federal Rules of Criminal Procedure*, 18 Yale J.L. & Tech. 26, 41-42 (2016) (describing the FBI's use of watering hole attacks). Such attacks are designed to

target unknown individuals in a group, by identifying websites (*i.e.*, watering holes) that their members frequent and installing code on those sites, which transmit an exploit to visiting devices.[7]

C. The NIT deploys the exploit to compromise the security of devices.

Once the exploit has been sent to a device, it takes advantage of a vulnerability in the Tor Browser program.[8] *See* Motions Hearing Tr. 114 ("[T]he NIT . . . bypassed the security controls within the Tor browser . . . ."); *see also* Mozilla Motion 4 (PI.Add. 11). ("[T]he Exploit took advantage of a vulnerability in the browser software used by the Defendant."). The Tor Browser consists of a

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[7] The term "watering hole attack" is commonly used in the computer security field, even though the government has objected to its use to describe any part of the NIT. *See* Soghoian Decl. ¶10 n.9 (PI.Add. 3) ("The D[OJ] has taken the position that bulk delivery of NITs in operations like Playpen are not watering hole attacks. . . . [T]he D[OJ] and the technical community do not see eye to eye."); *see also* Brian Krebs, *Espionage Hackers Target 'Watering Hole' Sites*, Krebs on Security (Sept. 25, 2012), https://krebsonsecurity.com/2012/09/espionage-hackers-target-watering-hole-sites/ (describing watering hole attacks).

[8] The government has not denied that the exploit takes advantage of a vulnerability in the Tor Browser program but has not disclosed the exploit itself. Accordingly, the exact nature of the exploit remains unclear, which may account for why it has been described as both code and command. *Compare* Alfin Decl. ¶11 (PI.Add. 6) ("As used here, a computer 'exploit' consists of lines of code that are able to take advantage of a software vulnerability.") *with* Mozilla's Motion to Intervene or Appear as *Amicus Curiae* at 4, *Michaud* (May 11, 2016), ECF No. 195 (PI.Add. 11) ("[T]he exploit is not malware or a program, but a command . . . ."); *see generally* Bellovin et al., *supra*, at 23 (explaining that an exploit "can be a software program, or a set of commands or actions").

modified version of Mozilla's Firefox browser and Tor software. *What is Tor Browser?*, Tor, https://www.torproject.org/projects/torbrowser.html.en (last visited Apr. 25, 2017). Through the Tor Browser, users can connect to the Tor network, which protects their anonymity while using the internet. *See Tor: Overview*, Tor, https://www.torproject.org/about/overview.html.en (last visited Apr. 25, 2017). The Tor network also makes it possible for individuals to host websites, known as "hidden services," without revealing the location of the site. *See Tor: Hidden Service Protocol*, Tor, https://www.torproject.org/docs/hidden-services.html.en (last visited Apr. 25, 2017). A user can only visit a "hidden service" by using the Tor network; Playpen was one such hidden service.

In narrow terms, the exploit operated to circumvent the security protections of the Tor Browser, which normally prevents websites from determining certain identifying information of visitors. More broadly, however, by circumventing the security protections of the Tor Browser, the exploit compromised the security of the devices themselves.[9] *See* Motions Hearing Tr. 115-16 (PI.Add. 19-20) ("Q.

[9] Experts for the government do not dispute that the exploit compromised the security of devices, but dispute that the exploit made "*fundamental* changes or alterations to a computer system or to disable its security firewall" (while admitting that these scenarios are "theoretically possible"). Alfin Decl. ¶¶11, 14 (PI.Add. 6) (emphasis added); Levine Decl. ¶6(b) (PI.Add. 29) (stating "there is no evidence to support" the hypothesis that "an FBI exploit or payload made *permanent* changes to the security settings or any other settings of the defendants' computers") (emphasis added).

[T]he NIT bypasses security or overrides security features on the [target] computer. . . . A. That sounds right."); Miller Decl. ¶2 (PI.Add. 12) ("[T]he NIT . . . compromised the security settings on [the defendant's] computer . . . ."); Mozilla Motion 3 (PI.Add. 10) ("Mozilla has reason to believe that the Exploit . . . is an active vulnerability in its Firefox code base that could be used to compromise users and systems running the browser.").

D. The NIT runs a "payload" to perform actions on the compromised devices.

Once the exploit has compromised the security of a device, the NIT runs a payload.[10] *See* Levine Decl. ¶4 (PI.Add. 28) ("Much like a tool to open a locked door to a house, the purpose of the exploit was to allow for the execution of the payload program on a defendant's computer."). Here, the payload was designed in part to locate certain information on the device to assist "in identifying the user's computer, its location, and the user of the computer." NIT Aff. ¶34 (App. 131-32) (listing the information sought by the government); Levine Decl. ¶4 (PI.Add. 28) ("The payload program queried a defendant's computers for certain information . .

[10] In part because the exact nature of the exploit remains unclear, *see supra* note 9, the details of how the payload was delivered to devices are also murky. A "dropper" is a component of malware that typically "installs the payload on the target system." Bellovin et. al, *supra*, at 24. However, a dropper can be "single stage, a program that executes . . . as a direct result of a successful exploit," which "carries a hidden instance of the payload," or "it can be multi-stage, executing on the target system, but downloading . . . the payload . . . from a remote server." *Id.*

. .”). The payload was further designed to copy and transmit that information from the device to the government.[11] *See* Alfin Decl. ¶11 (PI.Add. 6) (describing the NIT as having “gathered specific information . . . and transmitted that information to government controlled computers”).

[11] The “actual IP address,” one of the categories of information sought by the government was not technically seized from the devices themselves. Rather, it appears that as the data copied from the devices was transmitted to the government, the actual IP address attached itself to that data and was thereby revealed to the government. The technical details of this aspect of the NIT are beyond the scope of this brief.

ARGUMENT

I. THE NIT WARRANT IS INVALID BECAUSE IT AUTHORIZED EXTRATERRITORIAL SEARCHES AND SEIZURES.

Much of the litigation around the country challenging the validity of the NIT warrant, including in this case, has centered around the domestic jurisdictional limitations imposed by Rule 41. *See United States v. Werdene*, 188 F.Supp.3d 431, 440 (E.D. Pa. 2016) (citing cases). But absent from this debate is a consideration of the extraterritorial jurisdictional limitations on the warrant authority. These limitations are just as pertinent to an evaluation of the scope of Rule 41 in this case. The government has disclosed that the NIT affected thousands of devices located in 120 countries and territories.[12] Evidentiary Hearing Tr. at 18, *Tippens* (Nov. 1, 2016), ECF No. 103 (PI.Add. 23). Specifically, the NIT returned 8,713 IP addresses, 7,281 (over 83%) of which were foreign. *Id*. at 39 (PI.Add. 25). Below, Privacy International discusses the international and domestic legal bases for extraterritorial jurisdictional limitations on the warrant authority. Privacy International further describes the foreign relations implications of breaching these limitations.

[12] The government made this disclosure in separate criminal proceedings arising out of its execution of the NIT warrant.

A. International law prohibits unilateral extraterritorial searches and seizures.

International law subjects a state to limitations on its authority to exercise extraterritorial jurisdiction. *Restatement (Third) of Foreign Relations Law in the United States* §401 (Am. Law Inst. 1987). Jurisdiction refers to "the authority of states to prescribe their law, to subject persons and things to adjudication in their courts . . . and to enforce their law." *Id*. at pt. IV, Introductory Note; *see also* Lassa Oppenheim, *Oppenheim's International Law* 456 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); *The Draft Convention on Research in International Law of the Harvard Law School*, 29 Am. J. Int'l L. 435, 467-69 (Supp. 1935). Jurisdiction is inextricably linked to the principles of sovereignty and territoriality:

> Jurisdiction is an aspect of sovereignty, it is coextensive with and, indeed, incidental to, but also limited by, the State's sovereignty. As Lord Macmillan said, "it is an essential attribute of the sovereignty of this realm, as of all sovereign independent States, that it should possess jurisdiction over all persons and things within its territorial limits and in all cases, civil and criminal, arising within these limits". If a State assumed jurisdiction outside the limits of its sovereignty, it would come into conflict with other States which need not suffer any encroachment upon their own sovereignty . . . . Such a system . . . divides the world into compartments within each of which a sovereign State has jurisdiction.[13]

Frederick A. Mann, *The Doctrine of Jurisdiction in International La*w 30 (1964).

[13] The principle of sovereignty – and therefore jurisdiction – is also "closely linked with the principle[ ] of . . . non-intervention," which "involves the right of every sovereign State to conduct its affairs without outside interference." *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. US)*, 1986 ICJ 14, para. 202 (27 June); *see also* Oppenheim, *supra*, at 428 (stating that the principle of non-intervention "is the corollary of every state's right to sovereignty, territorial integrity and political independence.").

The scope of a state's extraterritorial jurisdictional competence depends on the type of jurisdiction exercised by the state. *Restatement (Third*), *supra*, at §401 cmt. a ("The limitations on a state's authority to subject foreign interests or activities to its laws differ from those that govern the state's jurisdiction to adjudicate, and [from] the limitations on a state's authority to enforce its law . . . ."). A state can exercise three types of jurisdiction: (1) prescriptive ("*i.e.* to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things"), (2) adjudicative ("*i.e.* to subject persons or things to the process of its courts"), or (3) enforcement ("*i.e.* to induce or compel compliance . . . with its laws or regulations"). *Id*. at §401. In the criminal context, the U.S. exercises enforcement jurisdiction when it seeks to "effect legal process coercively, such as to arrest someone, or to undertake searches and seizures." Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* 44 (2d ed. 2010).

Enforcement jurisdiction is generally constrained by territory. *See* SS Lotus (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10, at 18-19 (Sept. 7). Thus, "[a] state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state . . . ." *Restatement (Third), supra,* at §433(1)(a); *see also* Int'l Bar Ass'n, *Report of the Task Force on Extraterritorial Jurisdiction* 9-10 (2009) ("[A] state cannot investigate a crime, arrest a suspect, or

enforce its judgment or judicial processes in another state's territory without the latter state's permission.") (citing SS Lotus, *supra*, at 18; Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 3, at paras. 4, 49, 54 (Feb. 14)). This jurisdictional constraint – *i.e.* the requirement of consent – is rooted in the principle of sovereignty for any unilateral exercise of enforcement jurisdiction on another state's territory would violate that state's sovereignty by usurping its sovereign powers. *See generally* SS Lotus, *supra*, at 18; Ian Brownlie, *Principles of Public International Law* 478-79 (8th ed. 2012); Michael Akehurst, *Jurisdiction in International Law*, 46 Brit. Y. B. Int'l L. 145, 145-151 (1975).

The territorial constraints on the exercise of enforcement jurisdiction apply to remote searches and seizures of devices located abroad. As a general matter, the principle of "State sovereignty and international norms and principles that flow from sovereignty apply to the conduct by States of [information and communications technology]-related activities and to their jurisdiction over ICT infrastructure within their territory."[14] *Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, ¶ 25, *delivered to the General Assembly*,

[14] For that reason, "cyber activities and the individuals who engage in them are subject to the same jurisdictional prerogatives and limitations as any other form of activity." *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* Rule 8, para. 2 (Michael N. Schmitt ed. 2017).

U.N. Doc. A/70/174 (July 22, 2015); *see also id.* para. 26(b) ("In their use of ICTs, States must observe, among other principles of international law, State sovereignty, sovereign equality . . . and non-intervention in the internal affairs of other States. Existing obligations under international law are applicable to State use of ICTs."). This principle is specifically applied to law enforcement in the digital context in the Council of Europe's Convention on Cybercrime, which was ratified by the U.S. in 2006 and promulgates "a common criminal policy aimed at the protection of society through cybercrime," including through international cooperation. Council on Europe, Convention on Cybercrime pmbl., *opened for signature* Nov. 23, 2004, S. Treaty Doc. No. 108-11 (2006), 2296 U.N.T.S. 167 (entered into force July 1, 2004); *see also* Oona A. Hathaway et al., *The Law of Cyber-Attack*, 100 Cal. L. Rev. 817, 862 (2012) (describing the Convention as "the first international treaty on crimes committed using the Internet and other computer networks"). The Convention drafters, in considering digital searches and seizures, came to "the common understanding . . . that investigative activity of law enforcement authorities of a State Party in international communication networks or in computer systems located in the territory of another state may amount to a violation of territorial sovereignty of the state concerned, and therefore cannot be undertaken without prior consent of" that state. Henrik W.K. Kaspersen, Council of Europe, *Cybercrime and Internet Jurisdiction* 26 (2009). Article 32 of the

Convention reflects this understanding by permitting "trans-border access to stored computer data" only "with consent or where publicly available."[15] Convention on Cybercrime, *supra*, art. 32; *see also* Patricia L. Bellia, *Chasing Bits across Borders*, U. Chi. Legal F. 35, 77-80 (2001) (explaining why "the customary international law rule against one state conducting investigative activities in another state's territory provides a strong basis for states to object to remote cross-border searches of data within their territory").

B. Rule 41 does not authorize extraterritorial searches and seizures.

The warrant authority reflects the "territorial-based limits" of enforcement jurisdiction:

> The overarching rule is that the judiciary's warrant authority is territorially limited. After all, under well-accepted principles of international law, State A can exercise law enforcement actions in State B only if State B consents. As a result, judges are presumed to lack authority to unilaterally authorize extraterritorial searches and seizures.

Jennifer Daskal, *The Un-Territoriality of Data*, 125 Yale L.J. 326, 354 (2015) (citing, *inter alia*, *Restatement (Third)*, *supra*, at §432(2); James Crawford,

[15] An example where "data is not meant to be available" would be "if a law enforcement agency hacks into a suspected criminal's computer located in another State." *Tallinn Manual 2.0*, *supra*, at Rule 11, para. 14. In those circumstances, "it is exercising enforcement jurisdiction in that State and the activity requires the latter State's consent . . . ." *Id*.

Brownlie's Principles of Public International Law 478-49 (8th ed. 2012)). Thus, Rule 41 generally limits search and seizure authorization to persons or property located within the district in which the magistrate judge sits. *See* Fed. R. Crim. P. 41(b)(1)-(2), (4). And "[e]ven in those limited situations . . . in which judges are permitted to issue warrants authorizing out-of-district searches or seizures, such warrants are still widely understood to be subject to territorial-based limitations." Daskal, *supra*, at 355; *see also id*. (noting that the "instances [under Rule 41(b)(5)] in which magistrate judges are explicitly authorized to issue a warrant with extraterritorial reach . . . extend to locations where the United States already exerts significant (if not exclusive) regulatory authority, thereby avoiding potential conflict with foreign jurisdictions and maintaining respect for other nations' sovereign authority to enforce the law"). The government's own commentary on its proposed amendment to Rule 41 – which now permits out-of-district searches where the location of "the media or information . . . has been concealed through technological means" – observes that "[i]n light of the presumption against international extraterritorial application . . . this amendment does not purport to authorize courts to issue warrants that authorize the search of electronic storage media located in a foreign country or countries." Letter from Mythili Raman, Acting Assistant Att'y Gen., to Reena Raggi, Chair, Advisory Comm. on the Criminal Rules 4 (Sept. 18, 2013) (PI.Add. 33); *see also infra* note 17. The

government therefore acknowledges, at least in principle, that Rule 41 does not – and did not prior to its amendment on December 1, 2016 – authorize courts to issue warrants that authorize extraterritorial searches and seizures using techniques such as the NIT.

C. The magistrate judge lacked authority under Rule 41 to issue the NIT warrant because it authorized extraterritorial searches and seizures.

By authorizing the NIT warrant, the magistrate judge authorized the government to conduct extraterritorial searches and seizures.[16] The NIT's extraterritorial reach was foreseeable from the government's warrant application. The government submitted that "[t]he Tor network . . . obscure[e]s a user's true location" and accordingly requested "authority to use the NIT . . . to investigate *any* user or administrator who logs into the TARGET WEBSITE. NIT Aff. ¶¶8, 32

[16] The government accepts that an extraterritorial search or seizure occurs if the device from which information is searched or seized is located abroad. On December 1, 2016, amendments proposed by the DOJ to Rule 41 went into effect, authorizing magistrate judges "to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district if . . . the district where the media or information is located has been concealed through technological means." Fed. R. Civ. P. 41(b)(6). In a letter to the Rules Committee, the DOJ explained that "[i]n light of the presumption against international extraterritorial application . . . this amendment does not purport to authorize courts to issue warrants that authorize the search of electronic storage media located in a foreign country or countries." Raman Letter, *supra*, at 4 (PI.Add. 33). The government therefore submits that "the search of electronic storage media located" abroad constitutes an extraterritorial search.

(App. 118, 131) (emphasis added). The warrant application further explained that the NIT would "reveal to the government . . . information that may assist in identifying the user's computer, *its location*, and the user of the computer." NIT Aff. ¶34 (App. 131-32) (emphasis added); *see also id*. at ¶10 (App. 119) (explaining that as a "hidden service," the Playpen website required visitors to connect to it using the Tor network).

If the physical location of a device is cloaked, it may be anywhere in the world. At the time of the government's warrant application, over 80% of Tor users were connecting to the network from outside the U.S. *Tor Metrics*, Tor, https://metrics.torproject.org/userstats-relay-table.html?start=2015-02-01&end=2015-02-28 (last visited Apr. 25, 2017) (refining search of "Top-10 countries by relay users" to the month of February 2015). Moreover, in its warrant application, the government submitted that among "the sections, forums, and sub-forums" it "observed" on the Playpen website were those dedicated to "Other Languages," including Italian, Portuguese, German, Spanish, Dutch and Russian, suggesting that some portion of visitors to the site were foreign. NIT Aff. ¶14 (App. 123). The NIT warrant application therefore implicitly requested authority to conduct extraterritorial searches and seizures – and indeed those searches and seizures were carried out. Accordingly, the NIT warrant is invalid because the

magistrate judge lacked authority under Rule 41 to issue a warrant authorizing extraterritorial searches and seizures.

D. The foreign relations risks posed by unilateral extraterritorial searches and seizures further counseled against authorization of the NIT warrant.

The magistrate judge's authorization of the NIT warrant has potentially profound foreign relations implications. As discussed above, under well-established principles of international law, the unilateral exercise of extraterritorial enforcement jurisdiction may constitute a violation of sovereignty. *See supra* 13-17. The government itself recognizes and warns its personnel against these risks. The U.S. Attorney's Criminal Resource Manual accordingly instructs:

> The other nation may regard an effort by an American investigator or prosecutor to investigate a crime or gather evidence within its borders as a violation of sovereignty. Even such seemingly innocuous acts as a telephone call, a letter, or an unauthorized visit to a witness overseas may fall within this stricture. A violation of sovereignty can generate diplomatic protests and result in denial of access to the evidence or even the arrest of the agent or Assistant United States Attorney who acts overseas. The solution is usually to invoke the aid of the foreign sovereign in obtaining the evidence.

Dep't of Justice, U.S. Attorney's Manual, *Criminal Resources Manual* §267. The DOJ's Computer Crime and Intellectual Property Section extends this precaution to the digital realm, warning: "[S]ome countries may object to attempts by U.S. law enforcement to access computers located within their borders. Although the search may seem domestic to a U.S. law enforcement officer executing the search

in the United States . . . , other countries may view matters differently." Computer Crime & Intellectual Prop. Section, Dep't of Justice, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* 85 (2009).

Consent helps avoid jurisdictional – and thereby diplomatic – conflict between states.[17] The U.S. traditionally relies on consent-based mechanisms for obtaining evidence located extraterritorially. The principal mechanism is a Mutual Legal Assistance Treaty ("MLAT"), a bilateral agreement containing procedures for obtaining and providing assistance in criminal matters.[18] *See* T. Markus Funk, Fed. Judicial Ctr., *Mutual Legal Assistance Treaties and Letters Rogatory: A Guide for Judges* 5 (2014). The U.S. is also party to a number of multilateral treaties that similarly provide a basis for obtaining and providing assistance in criminal matters among a broader group of countries.[19] *See generally*, Dep't of

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[17] Jurisdiction, in this sense, is "a proxy for state power," defining the "legal relationship" between "the state to other sovereigns." Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 Harv. Int'l L.J. 121, 126 (2007).

[18] The U.S. currently has MLATs in force with over 70 countries. Charles Doyle, Cong. Research Serv., *Extraterritorial Application of American Criminal Law* 23 (2016). MLATs are negotiated by the State Department and implemented by the DOJ's Office of International Affairs. Dep't of State, 7 *Foreign Affairs Manual* §962.1.

[19] Law enforcement agencies may also participate directly in various other types of cooperative arrangements. The U.S. is, for example, a member of the International

Justice, Office of International Affairs, https://www.justice.gov/criminal-oia (last visited Apr. 25, 2017) (describing OIA's role in negotiating and implementing "multilateral conventions regarding assistance in criminal matters"). Here, however, the government unilaterally deployed the NIT, without seeking consent through one of these existing mechanisms. *See* Ahmed Ghappour, *Searching Places Unknown: Law Enforcement Jurisdiction on the Dark Web*, 69 Stan. L. Rev. (forthcoming 2017) (manuscript at 44-45, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2742706) ("A review of applicable treaties and diplomatic communications reveals that no state has consented to the United States' launch of cross-border network investigative techniques. In fact, the only multilateral agreement to address the issue of law enforcement 'remote access' directly – the Council of Europe's Convention on Cybercrime . . . – explicitly refused to authorize remote cross-border searches.").

The government's deployment of the NIT poses particular risks. If the FBI were to conduct a physical search or seizure abroad, the nature of the extraterritorial action would be clear from the outset. But in the digital realm,

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Criminal Police Organization (Interpol), which enables countries to route requests for law enforcement assistance through its network. Michael Abbell, *Obtaining Evidence Abroad in Criminal Cases* 9 & n.47 (2010). Moreover, federal law enforcement agencies, such as the FBI, may transmit requests for investigative assistance through their liaisons or attachés stationed at embassies and consulates abroad. *Id*. at 10 & nn.50-51.

"incidents will probably involve a publicly ambiguous set of facts" because "[m]alicious computer code or actions in cyberspace . . . are opaque to public view, technically very complex and likely to emerge piecemeal." Matthew C. Waxman, *Self Defense Force Against Cyber Attacks*, 89 Int'l L. Stud. 109, 119 (2013); *see also* Susan W. Brenner, *Cyber-threats and the Limits of Bureaucratic Control*, 14 Minn. J.L. Sci. & Tech. 137, 171 (2013) ("[W]hen our activities migrate into cyberspace, it becomes correspondingly difficult for nation-states to ascertain the nature of the threats they confront."). As a result, other states may mischaracterize the NIT and similar techniques. Was the purpose of the hack to conduct surveillance, steal information, or interfere with political institutions? It may also be difficult to identify the actor behind the attack. Was it another state, hackers affiliated with that state, or a group of criminals? These uncertainties can potentially heighten the risk of diplomatic conflict. *See Report of the Group of Governmental Experts*, *supra*, at paras. 16(b), 17 (noting "the risk of misperception, escalation and conflict that may stem from ICT incidents" and recommending enhanced international cooperation with respect to law enforcement investigations).

In addition, as the above excerpt from the DOJ's *Criminal Resources Manual* notes, the use of the NIT may violate the domestic law of other states.[20] *See supra* 21. Reversing the scenario, foreign deployment of a NIT-like technique against U.S. devices in order to locate, copy and transmit information would violate U.S. law. *See, e.g.*, Computer Crime & Intellectual Prop. Section, Dep't of Justice, *Prosecuting Computer Crimes Manual* 16-19 (2010) (describing intentional access to a computer without authorisation to obtain information as a violation of 18 U.S.C. §1030(a)(2), a provision of the Computer Fraud and Abuse Act). The violation of foreign laws carries with it the risk of foreign prosecution. For instance, in 2002, Russia's Federal Security Service ("FSB") filed criminal charges against an FBI agent for remotely accessing and copying data from a Russian server.[21] Brunker, *supra*; *see also United States v. Gorshkov*, No. 00-cr-550, 2001 WL 1024026 (W.D. Wash., May 23, 2001).

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[20] It may also interfere with active criminal investigations by the other countries' authorities.

[21] Russia's reaction can be understood as an assertion of sovereignty. *See* Mike Brunker, *FBI agent charged with hacking*, NBC News (Aug. 15, 2002), http://www.nbcnews.com/id/3078784 (citing FSB sources "describing the criminal complaint as an effort to restore traditional law enforcement borders" and quoting one such source as stating, "[i]f the Russian hackers [who were the subjects of the FBI investigation] are sentenced on the basis of information obtained by the Americans through hacking, that will imply the future ability of U.S. secret services to use illegal methods in the collection of information in Russia and other countries").

Finally, it is worth considering whether the authorization of the NIT warrant – in defiance of well-established international law – will encourage other countries to engage in similar conduct. By asserting an exception to the prohibition against unilateral extraterritorial searches and seizures, the U.S. runs the risk that other countries may claim such an exception for themselves. Would another country's unilateral use of a NIT or similar technique against the devices of Americans – even for law enforcement purposes – be acceptable to the government? Or would the government consider such action to constitute a violation of American sovereignty? As these questions and the discussion above illustrate, the NIT's extraterritorial reach raises complex foreign relations considerations, further counselling against authorization of the NIT warrant.

CONCLUSION

For the reasons set forth above, *amicus curiae* Privacy International respectfully requests that this Court reverse the ruling below.

Dated April 26, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

1. This brief complies with the type-volume limitation of Fed. R. Ap. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 6,493 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) (*i.e.*, cover page, corporate disclosure statement, table of contents, table of authorities, certificates of counsel, signature block, and addendum). Fed. R. App. P. 32(a)(7)(B)(i) provides that "[a] principal brief is acceptable if it . . . contains no more than 13,000 words" and Fed. R. App. P. 29(a)(5) provides that "an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief" (*i.e.* 6,500 words).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14 point, in Microsoft Word 2016.

Dated April 26, 2017

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CERTIFICATE OF SERVICE

I certify that on April 26, 2017, I electronically filed the foregoing brief, as well as the Addendum, with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by operation of the appellate CM/ECF system.

Dated April 26, 2017

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No. 16-3588

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

GABRIEL WERDENE,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

Addendum

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 4:16cr16
	)	
EDWARD JOSEPH MATISH, III	)	

DECLARATION OF DR. CHRISTOPHER SOGHOIAN

I, Christopher Soghoian, declare the following under penalty of perjury:

1. I am a researcher focused on privacy, computer security and government surveillance. I completed a B.S. in Computer Science from James Madison University, a M.S. in Security Informatics from The Johns Hopkins University and a Ph.D. in Informatics from Indiana University. My academic research has been published in a number of law journals, and has been cited by several federal and state courts, including by the 9th Circuit Court of Appeals and the State Supreme Courts of New Jersey and Massachusetts.[1]

2. I am currently employed by the American Civil Liberties Union as the Principal Technologist in the ACLU's Speech, Privacy and Technology Project. I am also a visiting fellow at Yale Law School's Information Society Project. I have previously worked in technical roles at the Federal Trade Commission, Google, Apple, and IBM. I have written this declaration as an unpaid volunteer expert for the defense and submit it to the court in my personal capacity, not on behalf of my employer.

3. I have researched the FBI's use of Network Investigative Techniques ("NITs") for more than three years. In 2014, I organized the first-ever academic conference in the United States focused on hacking by law enforcement, held at Yale Law School.[2] I have given several public talks about the use of hacking and malware by the FBI, including at training events for federal judges organized by the Federal Judicial Center.

[1] *See US v. Pineda-Moreno*, 617 F. 3d 1120, Court of Appeals, 9th Circuit 2010 (Kozinski dissental), *State v. Earls*, 70 A. 3d 630 - NJ: Supreme Court 2013 and *Commonwealth v. Augustine*, 467 Mass. 230 - Mass: Supreme Judicial Court 2014.

[2] *See* Law Enforcement and Hacking, Information Society Project, Yale Law School, February 18, 2014, videos online at https://www.law.yale.edu/yls-today/yale-law-school-videos/hacking-technologies-used-law-enforcement and https://www.law.yale.edu/yls-today/yale-law-school-videos/legal-and-policy-implications-hacking-law-enforcement .

4. In 2014, while researching the history of FBI hacking, I discovered that in a 2007 operation, FBI agents impersonated the Associated Press in an effort to deliver surveillance software to a teenager in Timberline, Washington. My subsequent public disclosure of this information resulted in significant news coverage, a formal complaint to the Attorney General from twenty-five news organizations,[3] a Congressional probe into the incident,[4] and a public defense of the practice by the FBI Director.[5]

Network Investigative Techniques

5. As Special Agent Alfin's declaration makes clear, there is some disagreement between Michaud's technical experts and the FBI about what a NIT is and is not. There is also clear disagreement about whether or not a NIT is "malware".

6. The term "Network Investigative Technique" was created by the US government. While researching the history of NITs, I was informed by a senior DOJ official that the term originated in the Computer Crime and Intellectual Property Section within DOJ's Criminal Division.

7. Outside of the law enforcement community, a number of terms of art are used by technical security experts to describe software that is installed without the knowledge and consent of a computer user, and that covertly extracts information from that person's computer. These terms include "malware," "surveillance software," and "Remote Administration Tools" (RATs). These terms are all functionally equivalent.

8. In his declaration, Special Agent Alfin suggests, without citing any supporting evidence, that an essential component of malware is that the software must make permanent changes to the security settings of the target computer.[6] I disagree with this statement.

9. The Ninth Circuit Court of Appeals has described malware as software that "works by, for example, compromising a user's privacy… stealing identities, or spontaneously opening Internet links to unwanted websites…." *See Zango v. Kaspersky Lab, Inc., 568 F.3d 1169 (9th Cir. 2009)*. Like the malware in *Zango,* the NIT used by the FBI in the Playpen

[3] *See* The Reporters Committee for Freedom of the Press *et al.*, Letter to Eric H. Holder, Jr. and James B. Comey, Jr., November 6, 2014, http://www.rcfp.org/sites/default/files/2014-11-06-letter-to-doj-fbi-regarding-se.pdf
[4] *See* Senator Patrick Leahy, Letter to Eric Holder Jr., October 30, 2014, http://thehill.com/sites/default/files/10-30-14_leahy_to_holder_re_-_fbi_fake_ap_article.pdf.
[5] See James B. Comey, To Catch a Crook: The F.B.I.'s Use of Deception (Letter To The Editor), New York Times, November 5, 2014, http://www.nytimes.com/2014/11/07/opinion/to-catch-a-crook-the-fbis-use-of-deception.html
[6] *See* Alfin Declaration, paragraph 6, page 2.

investigation compromised the privacy and anonymity of the individuals that visited the site, and forced their web browsers to connect to an unwanted site (the FBI's server in Virginia).

10. The capabilities of NITs used by the FBI in other cases include identical surveillance features as malware used by criminals and foreign governments. These capabilities include being able to remotely activate the webcam and microphone on a victim's computer.[7]

11. The FBI has used the same methods as those used by criminal hackers and foreign governments to deliver malware to targets. This includes the impersonation of journalists[8] and the delivery of malware to large numbers of visitors to a particular website (a technique that experts call a "watering hole attack").[9]

12. The primary difference between the FBI's NITs and the malware used by hackers and authoritarian foreign governments appears to be that the FBI's software is used pursuant to court orders issued by a court in the United States. From a technical perspective, the NIT is still malware.

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[7] Compare the features of BlackShades, a malware tool used by criminals to the capabilities of the NIT software used by the FBI. *See US v. Yücel*, 97 F. Supp. 3d 413 - Dist. Court, SD New York 2015 ("The malware included a remote access tool ('RAT'), which enabled users 'to remotely control victims' computers, including [by] captur[ing] the victims' keystrokes as they type'—the 'keylogger' function— 'turn[ing] on their webcams, and search[ing] through their personal files.'") *See also* Ellen Nakashima and Craig Timberg, FBI's search for 'Mo,' suspect in bomb threats, highlights use of malware for surveillance, Washington Post, December 6, 2013 ("The most powerful FBI surveillance software can covertly download files, photographs and stored e-mails, or even gather real-time images by activating cameras connected to computers, say court documents and people familiar with this technology.")

[8] *See* Bill Marczak and John Scott-Railton, Keep Calm and (Don't) Enable Macros: A New Threat Actor Targets UAE Dissidents, Citizen Lab, Munk School of Global Affairs, The University of Toronto, May 29, 2016, https://citizenlab.org/2016/05/stealth-falcon/ (describing attempts by an entity, believed to be the government of the United Arab Emirates, attemping to deliver malware to dissidents by pretending to be a fictious journalis).

[9] *See* Michael Mimoso, Council on Foreign Relations Website Hit By Watering Hole Attack, IE Zero-Day Exploit, Threatpost, December 29, 2012, https://threatpost.com/council-foreign-relations-website-hit-watering-hole-attack-ie-zero-day-exploit-122912/77352/ . The Department of Justice has taken the position that bulk delivery of NITs in operations like Playpen are not watering hole attacks. As with the question of whether a NIT is malware, the Department of Justice and the technical community do not see eye to eye. *See* David Bitkower, Deputy Assistant Attorney General, Memorandum to Reena Raggi, Chair, Advisory Committee on Criminal Rules, December 22, 2014 http://www.uscourts.gov/file/17944/download at 145 ("The ACLU calls this technique a 'watering hole attack' and suggests that it may violate the Fourth Amendment... The Department disagrees both with that label and with the legal conclusion.")

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

NEWPORT NEWS DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO. 4:16cr16
	)	
EDWARD JOSEPH MATISH, III	)	

DECLARATION OF SPECIAL AGENT DANIEL ALFIN

Your affiant, Daniel Alfin, being duly sworn and deposed, states the following:

1. I am a Special Agent of the Federal Bureau of Investigation. I am currently assigned to FBI Headquarters, Criminal Investigative Division, Violent Crimes Against Children Section, Major Case Coordination Unit. My duties involve the investigation of individuals using various types of technology to produce, distribute, and trade child pornography. As an Agent assigned to the FBI Violent Crimes Against Children Section, Major Case Coordination Unit, I routinely analyze network data that has been collected pursuant to court order. I hold a University Degree in Information Technology and multiple industry certifications that are recognized by the United States Department of Defense. Additionally, I have completed all stages of FBI Cyber Training including courses on Advanced Network Investigative Techniques, Network Traffic Analysis, Ethical Hacking, and Malware Analysis.

2. Analysis of network data generally consists of identifying the origin, destination, and content of communications that are sent across the Internet. In addition to performing this type of analysis, I am routinely called upon to assist Agents across the FBI with similar analysis. In the past two years, I have analyzed data from more than 30 court-authorized network intercepts and those analyses have been used in affidavits and court filings in several judicial districts.

3. I have been involved in the FBI investigation of the Playpen website since it came online in approximately August 2014. Playpen was a website that existed on an anonymous network and was dedicated to the advertisement and distribution of child pornography. My duties included the review of Playpen's content on multiple occasions, engagement in undercover activities on Playpen, and the coordination of investigative activity aimed at identifying members of Playpen, including the defendant, Edward Matish.

4. In preparing this declaration, I have reviewed evidence and spoken with FBI personnel familiar with the facts and circumstances outlined below. I provide the following summary of the information I have learned as a result.

5. I have also reviewed the declaration of Messrs. Tsyrklevich and Miller, the defense experts, respectively dated January 13, 2016 and May 23, 2016, (hereinafter "Tsyrklevich Dec." and "Miller Dec.") and noted a number of statements that are inaccurate and/or require clarification. I will address several of these in great detail below but will begin by noting one overarching misconception in these declarations. Specifically, Tsyrklevich and Miller attempt to redefine the NIT as something containing multiple components. The NIT, however, consists of a single component: that is, the computer instructions delivered to the defendant's computer after he logged into Playpen that sent specific information obtained from his computer back to the FBI. Those computer instructions, and the information obtained via their execution, have been made available for review in this case. In his expert declarations, Matish describes that component as a "payload."

6. As another threshold matter, I would note that I do not consider the NIT used by the FBI to be "malware," though the experts retained by Mr. Matish describe the NIT in such terms. The word malware is an amalgamation of the words "malicious" and "software". The NIT utilized in this investigation was court-authorized and made no changes to the security settings of the target computers to which it was deployed. As such, I do not believe it is appropriate to describe its operation as "malicious."

7. The NIT computer instructions provided to the defense on May 26, 2016 comprise the only "payload" executed on Matish's computer as part of the FBI investigation resulting in his arrest and indictment in this case. Accordingly, the defense has been given access to the only "payload" as that term is used by the defense in the Tsyrklevich declaration.

8. After the NIT collected the information that it was permitted to collect via the computer instructions sent to Matish's computer, there was nothing that resided on Matish's computer that would allow the government (or some other user) to go back and further access that computer.

9. I have personally executed the NIT on a computer under my control and observed that it did not disable the security firewall, make any changes to the security settings on my computer or otherwise render it more vulnerable to intrusion than it already was. Additionally, it did not "infect" my computer or leave any residual malware on my computer.

10. Matish claims via his expert declarations that the NIT consisted of four components – an "exploit," a "payload," software that generates a payload and injects a unique identifier into it, and a server component that stores the delivered information. Tsyrklevich Dec. p. 2 ¶ 4.

11. As used here, a computer "exploit" consists of lines of code that are able to take advantage of a software vulnerability. In layman's terms, an "exploit" could be thought of as a defect in a lock that would allow someone with the proper tool to unlock it without possessing the key. Here, an "exploit" allowed the FBI to deliver a set of instructions-the NIT-to Matish's computer. Those instructions then gathered specified information, including Matish's IP address, and transmitted that information to government controlled computers. The NIT instructions and results have been provided to the defense for review; the "exploit" has not.

12. Tsyrklevich claims that he requires access to the government's "exploit" to determine if the government "executed additional functions outside the scope of the NIT warrant." Tsyrklevich Dec. p. 3, ¶ 6. He is wrong. Discovery of the "exploit" would do nothing to help him determine if the government exceeded the scope of the warrant because it would explain how the NIT was deployed to Matish's computer, not what it did once deployed.

13. The Miller declaration states that "[a] computer system that has been exploited has been fundamentally altered in some way." Miller Dec. p. 2, ¶ 5. Miller cites no authority for that premise. It is incorrect. It is possible for an existing vulnerability in a computer system to be exploited without making any fundamental changes or alterations to that computer system. The Miller declaration also speculates about consequences that may occur "if the security firewall on a computer is disabled by an NIT or other malware." Miller Dec. p. 3, ¶ 7.

14. It is theoretically possible for an exploit to make fundamental changes or alterations to a computer system or to disable its security firewall. However, as noted above, the NIT used here and the exploit used to deliver it did not do so. Other than to point to this theoretical possibility, I am aware of no evidence or indication to which either defense expert points to suggest otherwise.

15. The government has advised the defense that it is willing to make available for its review the two-way network data stream showing the data sent back-and-forth between Matish's computer and the government-controlled computer as a result of the execution of the NIT.

16. Review of this data stream reflecting the information transmitted to the FBI from Matish's computer as a result of the deployment of the NIT confirms that the data sent from Matish's computer is identical to the data the government provided as part of discovery.

17. Review of the network data stream also confirms that that no images were transmitted from Matish's computer to a government-controlled computer or from a government-controlled computer to Matish's computer as a result of the execution of the NIT.

18. Discovery concerning the "server component" is unnecessary because there are alternative means of verifying the accuracy of the NIT information.

19. Tsyrklevich claims that he needs access to the server component in order to confirm that the information obtained from Matish's computer by the NIT and sent to the FBI was accurately stored and reproduced. Tsyrklevich Declaration pp. 3-4. The defense does not need access to government servers to do this, however, because the government has agreed to provide an alternative method of verifying that the information obtained from Matish's computer was accurately recorded. Specifically, the government has offered to provide a copy of the data stream sent by Matish's computer to the government as a result of the execution of the NIT. Tsyrklevich can compare the information sent to the government by the NIT to the information provided in discovery to verify that what the government recorded from Matish's computer is in fact what was sent by Matish's computer. I have reviewed that data stream and, as explained below, confirmed that the information sent by Matish's computer as a result of the NIT matches the information that is stored on the government's servers.

20. When two computers communicate via the Internet, they do so using standard network protocols. Communications over the Internet are sent in "packets," which serve as the means by which computers share information over a network. Just as two people communicating over email exchange individual messages, computers exchange network packets. These packet exchanges follow standard network protocols that permit individual computers to process and exchange information with one another. Just like two people meeting on the street, computers wishing to communicate with one another first exchange greetings through a "handshake,"[1] then exchange information, and part ways with a communication exchange that basically consists of the computers saying "goodbye" to each other.

21. Here, when the NIT was delivered to Matish's computer, it had exactly this sort of interaction with a government-controlled computer. The network packets memorializing this exchange, which have been preserved in a standard file format, make it possible to reconstruct that exchange and see exactly what information was transmitted by Matish's computer to the government.

22. A review of the data file, known as a PCAP file, documenting the exchange contains several network packets exchanged between Matish's computer and the government computer. The initial packets correspond to the initial "handshake" that established the connection between Matish's computer and the government computer. Similarly, the final packets in the

[1] Some protocols that are used to communicate via the Internet do not include a "handshake" as described in this declaration. These other protocols are not relevant to the matter at hand as the communications that occurred as a result of the deployment of the NIT did utilize a network protocol that included a "handshake".

communication correspond to the "goodbye" communication between the two computers. The remaining packet(s) thus contains the substance of the communication, namely, the information collected by the NIT after it was delivered to Matish's computer.

23. Reviewing these packets, I was able to confirm that the information collected from Matish's computer matches the information stored on the government servers that has been provided in discovery. Each of the pieces of information the government-controlled computer recorded being collected from Matish's computer by the NIT appears in the packets. If Tsyrklevich's goal is to verify the accuracy of the information stored by the government, then a review of the network data is all that would be required. The data is not encrypted or redacted thus making such a review possible.

24. Tsyrklevich maintains that he needs access to the computer code that "generates a payload and injects a unique identifier" in order to ensure the identifier used was in fact unique. Tsyrklevich Dec. p. 3 ¶ 6. He is wrong because the unique identifier assigned to Matish's NIT results was in fact unique.

25. Prior to deployment of the NIT, a unique identifier is generated and incorporated into the NIT. When the "activating computer"' sends information to the government as a function of the NIT, that unique identifier is included with the response. When the information is received by the government, a check is performed to ensure that the unique identifier contained within the delivered information matches the unique identifier that was generated by the government. In the matter at hand, all identifiers received by the government, including the one sent by Matish's computer, did match identifiers that were generated by the government and they were in fact unique.

26. The ultimate question posed by Tsyrklevich is not how the unique identifier was generated but if the unique identifier sent to Matish's computer was actually unique. I have reviewed the list of unique identifiers generated during the operation and confirmed that there were in fact no duplicate identifiers generated.

27. A query of an FBI database containing the information gathered as part of this investigation through the use of the NIT revealed the following: 1) there are no duplicate unique identifiers within the database, meaning that each identifier assigned to an individual Playpen user is in fact unique; 2) the identifier associated with the username "Broden" was in fact unique; and 3) there are no identifiers in the database other than those generated by the deployment of a NIT as part of this investigation; the significance of which is the fact that this proves no outside entity tampered with or fabricated any of the unique identifiers generated as part of the investigation.

The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, Plaintiff, v. JAY MICHAUD, Defendant.	No. 15-CR-05351-RJB **MOZILLA'S MOTION TO INTERVENE OR APPEAR AS *AMICUS CURIAE* IN RELATION TO GOVERNMENT'S MOTION FOR RECONSIDERATION OF COURT'S ORDER ON THE THIRD MOTION TO COMPEL** **NOTE ON MOTION CALENDAR: Wednesday, May 11, 2016**

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II. CORPORATE DISCLOSURE STATEMENT

Mozilla Corporation states that is a wholly owned subsidiary of the Mozilla Foundation, a 501(c)(3) non-profit (collectively referred to herein as "Mozilla"). No publicly held corporation has an ownership stake of 10% or more in Mozilla.

III. STATEMENT OF INTEREST

Mozilla is a global, mission-driven organization that works with a worldwide community to create open source products like its web browser Firefox. Mozilla is guided by a set of principles that recognize, among other things, that individuals' security and privacy on the Internet are fundamental and must not be treated as optional. Mozilla seeks to intervene to protect the security of its products and the large number of people who use those products that are not a party to this proceeding The security community has publicly speculated that the software exploit that was used to deploy the NIT code ("Exploit") in the Tor Browser implicates an undisclosed vulnerability in Mozilla's Firefox web browser ("Firefox"). Firefox is among the most popular browsers in the world, with several hundred million users who rely on Firefox to discover, experience, and connect them to the internet on computers, tablets, and mobile phones.

IV. ARGUMENT

A. The Exploit Employed Here Likely Relates to a Vulnerability in the Firefox Browser.

The Government has refused to tell Mozilla whether the vulnerability at issue in this case involves a Mozilla product. Nevertheless, Mozilla has reason to believe that the Exploit the Government used is an active vulnerability in its Firefox code base that could be used to compromise users and systems running the browser. On April 13, 2016, based on the government's filings, Motherboard reported that experts believed that the FBI was aware of a vulnerability in the Firefox browser. Joseph Cox, *The FBI May Be Sitting on a Firefox Vulnerability*, Motherboard (Apr. 13, 2016).[4] The article quoted a researcher who noted that the Tor Browser at issue here "is simply Firefox running in a hardened mode." *Id*. (quoting

[4] http://motherboard.vice.com/read/the-fbi-may-be-sitting-on-a-firefox-vulnerability.

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Nicholas Weaver, *The FBI's Firefox Exploit*, Lawfare (Apr. 7, 2016)).[5] Although it is not "simple," it is true that the Tor Browser uses several million lines of code from Firefox. Further, the Government's efforts to resist disclosure here have led commentators to believe that the vulnerability has not been patched and is still effective. *Id*.; Weaver, *supra* ("The[ ] mere fact they are expending energy to do [this] may indicate the exploit is a zero day; if it were already publically known there would be limited strategic value in keeping it secret.") Use of a Firefox vulnerability to investigate Tor users would not be surprising. In 2013, the Guardian published a presentation from the NSA stating that it sought a "native Firefox exploit" to target Tor users effectively. Cox, *supra* (referencing '*Peeling back the layers of Tor with EgotisticalGiraffe*'*—read the document*, The Guardian (Oct. 4, 2013)).[6]

The parties' affidavits and documents likewise provide a reasonable basis for this belief. Special Agent Alfin stated that the NIT is a single component—a single computer instruction delivered to a defendant's computer. (Decl. of FBI Special Agent Daniel Alfin in supp. of Mot. for Reconsideration ("Alfin Dec."), Dkt. 166-2 ¶4). It is an "exploit" that took advantage of a "software vulnerability." (Dkt 166-2 ¶ 6). As such, the exploit is not malware or a program, but a command sent to exploit a vulnerability in the software used by the Defendant. The Defendant used the Tor Browser, and the Tor Browser is based on Mozilla's Firefox code. (Dkt 48-1, Aff. in supp. of Search Warrant, ¶ 7).[7] In other words, the Exploit took advantage of a vulnerability in the browser software used by the Defendant to deploy the NIT on the Defendant's computer.

Thus, caught between a wall of silence from the government, serious public speculation about potential vulnerabilities in Firefox, and evidence in the record that supports the belief that Firefox vulnerabilities are involved, Mozilla petitions the Court because the interests of its users are not adequately represented by the parties to this case.

[5] https://www.lawfareblog.com/fbis-firefox-exploit.
[6] http://www.theguardian.com/world/interactive/2013/oct/04/egotistical-giraffe-nsa-tor-document.
[7] https://www.torproject.org/projects/torbrowser.html.en

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JUDGE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, Plaintiff, v. JAY MICHAUD, Defendant.	No. CR15-5351RJB DECLARATION OF MATTHEW MILLER

I, Matthew Miller, declare under penalty of perjury that:

1. I am an Assistant Professor of Computer Science and Information Technology at the University of Nebraska at Kearney. A copy of my CV is attached to this declaration. Based on my prior work analyzing FBI "Network Investigative Techniques," I have been retained by Mr. Michaud's defense team to speak to the importance of analyzing **all** source code used by the FBI in the deployment of a NIT.

2. As explained in the declaration of Vlad Tsyrklevich that has been previously presented to the Court, an NIT has four major components. Each of these components must be reviewed and verified by the defense for three basic reasons. First, to ensure that the evidence collected by the NIT is valid and accurate. Second, to ensure that the FBI's use of its NIT did not exceed what was authorized in the NIT search warrant, which is an emerging and serious problem with different types of sophisticated search and seizure technology now used by law enforcement agencies. Third, to develop potential defenses at trial based on the NIT having compromised the security settings on Mr. Michaud's computer and rendering it vulnerable to a host of viruses and

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remote attacks that would explain to a jury why a defendant's data storage devices may contain child pornography that he or she did not intentionally download.

3. As the Court is aware, under normal circumstances the FBI would be able to target a specific user on the Internet by using their Internet Protocol (IP) address. This address identifies a user and is allocated to an Internet Service Provider (ISP). The ISP can identify each of their users and then the FBI can investigate that single user. When users use Tor, they are "anonymized" such that the FBI cannot readily identify them by their IP address because that IP address is not transmitted or shared in any retrievable way. The FBI must use an "exploit" in the software that the user is running on his or her computer to seize the IP address and other identifying information from that target computer directly. An exploit is a piece of software that takes advantage of a flaw in a computer system. Among other components, the FBI has not produced the exploit that was used in this case.

4. A computer system that has been exploited has been fundamentally altered in some way. This alteration may cause the computer to crash, lose or alter data, not respond to normal input or it may alter **any of the settings on that system.**[1] Depending on the exploit, it can affect the security posture of the computer going forward.[2]

5. Once a computer system's security has been compromised, the computer and any devices that have been connected to it (such as thumb drives, discs or other data storage devices) are also deemed to have been compromised and vulnerable to attack. As a result, the distinction the government has been trying to draw in various

[1] C. Smith, Dangerous Windows 10 flaw lets hackers secretly run any app on your PC, http://bgr.com/2016/04/25/windows-10-applocker-security-issue/, 2016.

[2] D. Goodin, New exploit leaves most Macs vulnerable to permanent backdooring, http://arstechnica.com/security/2015/06/new-remote-exploit-leaves-most-macs-vulnerable-to-permanent-backdooring/, 2015.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN TACOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. CR15-5351RBJ
	)	
vs.	)	
	)	
JAY MICHAUD,	)	
	)	
Defendant.	)	

MOTIONS HEARING

BEFORE THE HONORABLE ROBERT J. BRYAN
UNITED STATES DISTRICT COURT JUDGE

January 22, 2016

APPEARANCES:

Keith Becker
U.S. Department of Justice Criminal Division
Matthew Hampton
Assistant United States Attorney
Representing the Plaintiff

Colin Fieman
Linda Sullivan
Federal Public Defender's Office
Representing the Defendant

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11:52:13AM **Q. So at some point some FBI agent or tech specialist**
11:52:18AM **set up the NIT to be activated when somebody signed in,**
11:52:23AM **correct?**
11:52:24AM **A. That's correct.**
11:52:25AM **Q. And at the point that the person is signing in, and**
11:52:30AM **the NIT is being activated, you don't have that telephone**
11:52:33AM **number or complete IP address, correct? That's what you**
11:52:36AM **want to get?**
11:52:37AM **A. Prior to a user logging into the website, and prior**
11:52:40AM **to the NIT being activated, we do not have any identifying**
11:52:44AM **information, including an IP address, for that user.**
11:52:48AM **Q. Correct. And the way the NIT works is that it is**
11:52:53AM **then sent, without the user's knowledge, from the site in**
11:52:57AM **Virginia to the user's computer, wherever that may be,**
11:53:02AM **correct?**
11:53:02AM **A. The user after certain conditions are met --**
11:53:05AM **Q. Such as signing in?**
11:53:06AM **A. Correct. As articulated in the warrant.**
Q. Yes.
11:53:10AM **A. And in the case of this defendant, accessing a**
11:53:13AM **particular post on the website. By accessing that post on**
11:53:18AM **the website, that user has triggered actions that causes**
11:53:21AM **his computer to download certain information from the**
11:53:23AM **website. We configured the NIT to supplement the**
11:53:26AM **information being downloaded by the user with the NIT**

11:53:30AM instructions.
11:53:31AM Q. Okay. And, again, I need to go really slowly because
11:53:35AM already we are using words like "supplement" that are a
11:53:37AM little confusing. Just step-by-step. The user has signed
11:53:41AM in, the FBI has set it up so the NIT will be deployed at
11:53:47AM sign in, or at some other point, correct?
11:53:50AM A. After certain conditions are met, yes.
11:53:53AM Q. Then that NIT is really like a package of code or
11:53:56AM data, right?
11:53:57AM A. Yes.
11:53:58AM Q. And when the user is signing in, they don't know that
11:54:03AM they are getting that package of code or data sent to
11:54:06AM them, right? The whole point is it is in the background,
11:54:09AM and secret?
11:54:10AM A. When the user downloads the NIT instructions to their
11:54:13AM computer, it is intended to be invisible to the user.
11:54:16AM Q. It is invisible. Okay. They are signing in and then
11:54:19AM all of a sudden this thing in the background --
11:54:22AM information is being sent from Virginia, to, in this case,
11:54:24AM a Washington computer, by the FBI?
11:54:26AM A. It is being downloaded from the server in the Eastern
11:54:30AM District of Virginia by the user who has accessed the
11:54:33AM website.
11:54:33AM Q. How does the NIT code get from Virginia to
11:54:39AM Washington? It travels, right?

within that web page would have been an instruction for the Tor browser -- not for the defendant, but for the Tor browser.

Q. Let's stop there. When you say "contained," can you see that on the web page?

A. Can a human see it?

Q. Would the user who is looking for, say, a picture on the internet, would they see those instructions?

A. No, there wouldn't have been any instructions visible to a regular user. A high-tech sophisticated person might be able to figure that out, but a regular person just clicking around is not going to know there has been this new special code added to the web page.

Q. So it is hidden code running in the background. When you say "sending instructions," it is not instructions to the user, in this case allegedly Mr. Michaud, it is instructions to the target computer?

A. I want to pause on that word "running." The code does not run on the website. The code always runs on your web browser. So the website tells the web browser, "Do this." The code is downloaded to the web browser, the Tor browser in this case, in this case in the state of Washington. And it is only when the instructions are received by the Tor browser here in the state of Washington that they are run on that computer, and then do

links the computer to a residential internet account. It would be what is called the MAC address, which is a unique serial number associated with your wi-fi card, programmed in the factory of the wi-fi card manufacturer. There would be some other information about the operating system that the special agent read out when he was on the stand, the user name on the computer, which version of Windows you are running, some basic information.

But to learn that information, before the NIT could transmit that information back to the computer in Virginia, it would first have to go and collect it. So if you think of this as information that is in a house, well, maybe one piece of it is in the bedroom, and another piece is in the living room, one piece of it is in the drawer. The NIT first has to go and collect the information from different parts of the computer. And then once it has that information, then it would transmit it back to the server in Virginia.

Q. So if I understand the process, the NIT bypasses security or overrides security features on the Washington computer. First step, right? And then second, it actually collects data or evidence on that computer. And then the third step, after it has seized the Washington data in this case, it then wraps it up in like a little evidence bag and delivers it to the FBI in Virginia?

01:49:45PM 1 **A. That sounds right. Although I'm not sure about the**
01:49:49PM 2 **evidence bag. It transmits it back to the computer in**
01:49:52PM 3 **Virginia.**
01:49:52PM 4 **Q. And then once that data has been transmitted back, it**
01:49:57PM 5 **is stored, apparently, on an FBI server; is that correct?**
01:50:01PM 6 **A. The special agent said that the server is under the**
01:50:06PM 7 **government's control. I am not sure how much I can say in**
01:50:10PM 8 **this room about where we think the server is or which**
01:50:13PM 9 **company we think might have been running the server.**
01:50:15PM 10 **Q. I don't want you to --**
01:50:17PM 11 **A. A computer in Virginia.**
01:50:20PM 12 **Q. Is it then fair to say after this search and seizure**
01:50:24PM 13 **in Washington, then really what is going on is it is in**
01:50:26PM 14 **like an evidence room in Virginia where they keep that**
01:50:28PM 15 **evidence until they need it?**
01:50:31PM 16 **MR. BECKER: Object to leading at this point, your**
01:50:33PM 17 **Honor. I think we are just reiterating testimony.**
01:50:34PM 18 **THE COURT: That is a fair objection.**
01:50:36PM 19 **By Mr. Fieman:**
01:50:36PM 20 **Q. Describe then what the storage in Virginia is about.**
01:50:38PM 21 **A. Once the data has been transmitted by the NIT, I have**
01:50:43PM 22 **no idea what the government would do with it. We know**
01:50:46PM 23 **that it was transmitted to a computer in Virginia. At**
01:50:49PM 24 **that point we have no -- They haven't turned over**
01:50:51PM 25 **information about how it is stored, or who has access to**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, Plaintiff, vs. DAVID TIPPENS, Defendant.	Docket No. CR16-5110RJB Tacoma, Washington November 1, 2016
UNITED STATES OF AMERICA, Plaintiff, vs. GERALD LESAN, Defendant.	Docket No. CR15-387RJB
UNITED STATES OF AMERICA, Plaintiff, vs. BRUCE LORENTE, Defendant.	Docket No. CR15-274RJB

TRANSCRIPT OF EVIDENTIARY HEARING CONTINUED
BEFORE THE HONORABLE ROBERT J. BRYAN
SENIOR UNITED STATES DISTRICT COURT JUDGE

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Proceedings recorded by mechanical stenography, transcript produced by Reporter on computer.

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government is not slipping things by magistrate judges or exceeding their powers without comprehensive judicial oversight. So will the courts require the FBI to be candid and transparent going forward? Will the government be required to follow the rules even if they disagree with them because we live by the rule of law?

When it comes to law enforcement, are we going to start saying the ends justify the means, no matter the collateral consequences or the revictimization that's involved? These are core principles of our judicial system that I believe are seriously implicated in this case. If there aren't some bright lines laid down, then the technology and the secrecy is going to simply get away from us.

Now, what do we know now, Your Honor, six months after the *Michaud* ruling. Every time Your Honor grants a discovery request and we get new information, it's like -- to use an appropriate metaphor, like peeling an onion. There's just another layer of fact there that we did not know about. I mean, we did not know this was a truly global warrant before. There are 120 countries and territories listed outside the United States that the FBI hacked into, and they also hacked into something called a "satellite provider." So now we are into outer space as well.

Now, they did that -- and we've submitted this as an exhibit in our supplemental discovery. They did this in spite

the motion to exclude on the discovery issue related to what the government's expert testified to yesterday. He used two analogies, Your Honor, that I think we can use to support our position. One is that he argued that in a burglary case, you would be concerned with two things: How the burglar got into the house, and what happened after the burglar was there.

The exploit is -- to analogize -- is how the burglar got into the house. And in any burglary case, someone would have to prove both of those things, how the burglar got in and then what happened afterwards. We are being deprived of the evidence regarding how the burglar got in, so to speak.

Going further, their expert analogized the exploit to a key, something that sounds very simple, but he didn't examine the exploit. He agreed he did not see it, he does not know what that code is. And he's coming up with an argumentative analogy: What if that exploit isn't a key, but it's a battering ram? What if it's something that blows the door off of the computer? We don't know that. And that's why it's relevant to the defense, particularly in the search context. So I want the Court to think about that as well.

In terms of the search issues themselves, just last week on October 26th, the government sent us some discovery. And interestingly, there were a couple of memos where the FBI was explaining what this investigation was, and I am going to read just the beginning sentence from that -- those two memos, and

it's the same in each memo.

It says: "Operation Pacifier is an international investigation into a Tor hidden service known as Playpen and its users." The key word there, Your Honor, is "international." Nowhere in any of the warrant documents, the application, the warrant face itself, do they use that word "international." How is a magistrate judge to know, when they know their investigation is international and they never once use that word, the only word that we've heard already is buried on page 29, paragraph 45, that the computers wherever located. That's it. We know under Ninth Circuit law, that particular line cannot expand the warrant. That line cannot expand the warrant. Ninth Circuit law is very strict on interpreting warrants. It was not a magistrate error.

Secondly, some of the additional information they gave -- and I think the Court heard these numbers. There were approximately 8,713 IP addresses derived during this investigation. That's something we learned just late last week. Of those 8,713, 7,281 of them were foreign. So the vast majority, something like 84 percent of the actual materials they got through the NIT, were not on U.S. soil. This was really a truly international warrant, and they never used that word.

Your Honor, it is very clear to me that the government was not engaging in their duty of candor with that magistrate.

The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, Plaintiff, v. DAVID TIPPENS, Defendant.	NO. CR16-5110 RJB **DECLARATION OF BRIAN N. LEVINE, Ph.D.**
UNITED STATES OF AMERICA, Plaintiff, v. GERALD LESAN, Defendant.	NO. CR15-387 RJB **DECLARATION OF BRIAN N. LEVINE, Ph.D.**
UNITED STATES OF AMERICA, Plaintiff, v. BRUCE LORENTE, Defendant.	NO. CR15-274 RJB **DECLARATION OF BRIAN N. LEVINE, Ph.D.**

I, Brian N. Levine, declare as follows:

1. I am a Professor of Information and Computer Sciences at the University of Massachusetts Amherst, where I have been a member of the tenure-track faculty since 1999. I am also the Director of the University of Massachusetts Amherst Cybersecurity Institute. I received my Ph.D. in Computer Engineering from the University of California Santa Cruz, where my dissertation focused on the Internet. My expertise includes the topics of digital forensics, Internet privacy and anonymity, network protocol design, network security, peer-to-peer networks and applications, and Internet-based child sexual exploitation crimes. I have been publishing in peer-reviewed scientific venues on these topics for twenty years. During that time, I have collaborated with industry, government, and academe on topics relevant to these cases, including Tor, network forensics, and child pornography investigations. My contributions range from designing new privacy enhancing technologies (e.g., for users of the Internet, cellular phones, and digital currencies) to quantifying the worldwide Internet-based trade of images of child sexual exploitation. I have designed and taught courses at the University of Massachusetts Amherst on Digital Forensics, Computer and Network Security, Advanced Information Assurance, Computer Networks, Data Structures, and Computer Crime Law. I have chaired major conferences and workshops in my field on digital forensics, mobile computing, and other topics. Since 2008, I have been working with agencies in the Department of Justice, including the Federal Bureau of Investigation, and with Internet Crimes Against Children Task Forces to build and deploy tools for forensic investigation of child pornography trafficking. None of those tools were a part of the above-referenced cases before this Court, and I was not involved in the investigation of the "Playpen" website. These experiences and others are detailed in my attached curriculum vitae. I am currently under contract with the FBI to provide research and development of tools and strategies for network-based investigation of Internet-based crimes against children, particularly on peer-to-peer file sharing networks. My work in reviewing the materials pertinent to this case and preparing this declaration is not being performed pursuant to

that contract. My work is being performed pursuant to a contract with the U.S. Attorney's Office for the Western District of Washington.

2. In preparing this declaration, I have reviewed the following: from *U.S. v. Michaud*, No. CR15-5351RJB, the declaration of Vlad Tsyrklevich dated January 13, 2016 (hereinafter "Tsyrklevich Dec."), the declaration of Robert Young dated May 2, 2016 (hereinafter "Young Dec."), the declaration of Shawn Kasal dated May 9, 2016 (hereinafter "Kasal Dec."), and the declaration of Dr. Matthew Miller dated May 9, 2016 (hereinafter "Miller Dec."); the declaration of Special Agent Daniel Alfin from *U.S. v. Matish*, No. 4:16cr16 filed June 1, 2016 (hereinafter "Alfin Dec."); the network packet capture (PCAP) evidence from the computers of Tippens, Lesan, and Lorente, and the corresponding FBI payload executables for each; excerpts of the Cygnus report for Tippens, Lesan, and Lorente that contain the FBI's recording of information collected by the NIT for each of their computers; the forensic examination reports for the devices of Lorente dated February 28, 2016, Lesan dated December 20, 2015, and Tippens dated July 11, 2016; the NIT warrant application (*In the Matter of the Search of Computers that Access upf45jv3bziuctml.onion*, Case No. 1:15-SW-89 Eastern District of Virginia); and the complaint against Tippens dated February 11, 2016. I am advised that all of that information has been disclosed to or made available to the defendants for review.

3. I have not had access to nor did I review the source code or executable for the FBI exploit that deployed the NIT payloads. I also have not had access to nor did I review the FBI server or any "generator" code used to create unique identifiers.

4. Based on my review of available documents, my understanding of the overall process used by the FBI is as follows. A defendant's computer connected using the Tor network to the Playpen website, logging in with a specific username. Retrieving certain pages from the Playpen website resulted in the download of the FBI's *exploit* and *payload* programs. Much like a tool to open a locked door to a house, the purpose of the exploit was to allow for the execution of the payload program on a defendant's computer. The bespoke payload carried a *unique identifier* that was generated by the FBI, as well as

a *case identifier* common to all payloads generated for the Playpen operation. The payload program queried a defendant's computers for certain information, such as the hostname and operating system type. These details, along with the unique identifier and case identifier were sent by the payload program to an FBI server via the Internet. The action of sending data to the FBI over the Internet revealed the public IP address used by the defendants that was assigned by an Internet Service Provider (ISP) and linked to billing information. The exploit and payload did not persist on the defendants' computers after execution.

5. In this document, my references to "the exploit", "payload", "generator", "NIT", and "server" are reserved to the mechanisms employed by the FBI. My use of the term "malware" is reserved for computer programs that were created or deployed by third parties (i.e., neither the defendants nor the FBI) intending harm by, for example, downloading images of child sexual abuse to a computer unbeknownst to its owner.

6. From the materials available to me, I have concluded the following.

a. When viewed in the context of the facts of these cases, the declarations of Messrs. Tsyrklevich, Miller, Kasal, and Young contain many overbroad generalizations and implausible explanations, which are not rooted in cited or documented facts or evidence, and they are insufficient to support their hypotheses.

b. Specifically, *there is no evidence to support any of the following hypotheses* referenced in the defendants' submissions: the defendants did not visit the Playpen website; the information relayed by the payload to the FBI servers via the Internet was tampered with or altered by a third party; the identifiers generated by the FBI are not reliable; an FBI exploit or payload made permanent changes to the security settings or any other settings of the defendants' computers; an FBI exploit or payload are responsible for images of child sexual abuse found on the defendants' computers and in their residences.

c. A review of the exploit, software that generated unique identifiers, or server software is not necessary to show that these hypotheses are merely speculation

U.S. Department of Justice

Criminal Division

13-CR-B

Assistant Attorney General *Washington, D.C. 20530*

September 18, 2013

The Honorable Reena Raggi
Chair, Advisory Committee on the Criminal Rules
704S United States Courthouse
225 Cadman Plaza East
Brooklyn, NY 11201-1818

Dear Judge Raggi:

The Department of Justice recommends an amendment to Rule 41 of the Federal Rules of Criminal Procedure to update the provisions relating to the territorial limits for searches of electronic storage media. The amendment would establish a court-supervised framework through which law enforcement can successfully investigate and prosecute sophisticated Internet crimes, by authorizing a court in a district where activities related to a crime have occurred to issue a warrant – to be executed via remote access – for electronic storage media and electronically stored information located within or outside that district. The proposed amendment would better enable law enforcement to investigate and prosecute botnets and crimes involving Internet anonymizing technologies, both which pose substantial threats to members of the public.

Background

Rule 41(b) of the Federal Rules of Criminal Procedure authorizes magistrate judges to issue search warrants. In most circumstances, search warrants issue for property that is located within the judge's district. Currently, Rule 41(b) authorizes out-of-district search warrants for: (1) property in the district when the warrant is issued that might be moved outside the district before the warrant is executed; (2) tracking devices, which may be monitored outside the district if installed within the district; (3) investigations of domestic or international terrorism; and (4) property located in a United States territory or a United States diplomatic or consular mission.

Rule 41(b) does not directly address the special circumstances that arise when officers execute search warrants, via remote access, over modern communications networks such as the Internet. Rule 41 should be amended to address two increasingly common situations: (1) where the warrant sufficiently describes the computer to be searched but the district within which that computer is located is unknown, and (2) where the investigation requires law enforcement to coordinate searches of numerous computers in numerous districts.

The first of these circumstances – where investigators can identify the target computer, but not the district in which it is located – is occurring with greater frequency in recent years. Criminals are increasingly using sophisticated anonymizing technologies when they engage in crime over the Internet. For example, a fraudster exchanging email with an intended victim or a child abuser sharing child pornography over the Internet may use proxy services designed to hide his or her true IP address. Proxy services function as intermediaries for Internet communications: when one communicates through an anonymizing proxy service, the communications pass through the proxy, and the recipient of the communications receives the proxy's IP address, rather than the originator's true IP address. There is a substantial public interest in catching and prosecuting criminals who use anonymizing technologies, but locating them can be impossible for law enforcement absent the ability to conduct a remote search of the criminal's computer. Law enforcement may in some circumstances employ software that enables it through a remote search to determine the true IP address or other identifying information associated with the criminal's computer.

Yet even when investigators can satisfy the Fourth Amendment's threshold for obtaining a warrant for the remote search – by describing the computer to be searched with particularity and demonstrating probable cause to believe that the evidence sought via the remote search will aid in a particular apprehension or conviction for a particular offense – a magistrate judge may decline to issue the requested warrant. For example, in a fraud investigation, one magistrate judge recently ruled that an application for a warrant for a remote search did not satisfy the territorial jurisdiction requirements of Rule 41. *See In re Warrant to Search a Target Computer at Premises Unknown,* ___ F. Supp. 2d ___, 2013 WL 1729765 (S.D. Tex. Apr. 22, 2013) (noting that "there may well be a good reason to update the territorial limits of that rule in light of advancing computer search technology").

Second, criminals are using multiple computers in many districts simultaneously as part of complex criminal schemes, and effective investigation and disruption of these schemes often requires remote access to Internet-connected computers in many different districts. For example, thefts in one district may be facilitated by sophisticated attacks launched from computers in multiple other districts. An increasingly common form of online crime involves the surreptitious infection of multiple computers with malicious software that makes them part of a "botnet" – a collection of compromised computers under the remote command and control of a criminal. Botnets may range in size from hundreds to millions of compromised computers, including home, business, and government systems. Botnets are a significant threat to the public: they are used to conduct large-scale denial of service attacks, steal personal and financial data, and distribute malware designed to invade the privacy of users of the host computers.

Effective investigations of these sophisticated crimes often require law enforcement to act in many judicial districts simultaneously. Under the current Rule 41, however, except in cases of domestic or international terrorism, investigators may need to coordinate with agents,

prosecutors, and magistrate judges in every judicial district in which the computers are known to be located to obtain warrants authorizing the remote access of those computers. For example, a large botnet investigation is likely to require action in all 94 districts, but coordinating 94 simultaneous warrants in the 94 districts would be impossible as a practical matter. At a minimum, requiring so many magistrate judges to review virtually identical probable cause affidavits wastes judicial and investigative resources and creates delays that may have adverse consequences for the investigation. Authorizing a court in a district where activities related to a crime have occurred to issue a warrant for electronic storage media within or outside the district would better align Rule 41 with the extent of constitutionally permissible warrants and remove an unnecessary obstruction currently impairing the ability of law enforcement to investigate botnets and other multi-district Internet crimes.

Thus, while the Fourth Amendment permits warrants to issue for remote access to electronic storage media or electronically stored information, Rule 41's language does not anticipate those types of warrants in all cases. Amendment is necessary to clarify the procedural rules that the government should follow when it wishes to apply for these types of warrant.

Language of Proposed Amendment

Our proposed amendment includes two parts. First, we propose adding the following language at the end of subsection (b):

> and (6) a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant, to be executed via remote access, for electronic storage media or electronically stored information located within or outside that district.

Second, we propose adding the following language at the end of subsection (f)(1)(C):

> In a case involving a warrant for remote access to electronic storage media or electronically stored information, the officer executing the warrant must make reasonable efforts to serve a copy of the warrant on an owner or operator of the storage media. Service may be accomplished by any means, including electronic means, reasonably calculated to reach the owner or operator of the storage media. Upon request of the government, the magistrate judge may delay notice as provided in Rule 41(f)(3).

Discussion of Proposed Amendment

The proposed amendment authorizes a court with jurisdiction over the offense being investigated to issue a warrant to remotely search a computer if activities related to the crime under investigation have occurred in the court's district. In other circumstances, the Rules or federal law recognize that it can be appropriate to give magistrate judges nationwide authority to issue search warrants. For example, in terrorism investigations, the current Rule 41(b)(3) allows a magistrate judge "in any district in which activities related to the terrorism may have occurred" to issue a warrant "for a person or property within or outside that district." This approach is also similar to the current rule for a warrant requiring communication service providers to disclose electronic communications: a court with "jurisdiction over the offense being investigated" can issue such a warrant. *See* 18 U.S.C. §§ 2703(a) & 2711(3)(A)(I); *United States v. Bansal,* 663 F.3d 634, 662 (3d Cir. 2011); *United States v. Berkos*, 543 F.3d 392, 397-98 (7th Cir. 2008). Mobile tracking device warrants may authorize the use of tracking devices outside the jurisdiction of the court, so long as the device was installed in that jurisdiction. Fed. R. Crim. P. 41(b)(4); 18 U.S.C. § 3117(a). In the proposed amendment, the phrase "any district where activities related to a crime may have occurred" is the same as the language setting out the jurisdictional scope of Rule 41(b)(3).

The amendment provides that notice of the warrant may be accomplished by any means reasonably calculated to reach an owner or operator of the computer or – as stated in the amendment, which uses existing Rule 41 language – the "storage media or electronically stored information." In many cases, notice is likely to be accomplished electronically; law enforcement may not have a computer owner's name and street address to provide notice through traditional mechanisms. The amendment also requires that the executing officer make reasonable efforts to provide notice. This standard recognizes that in unusual cases, such as where the officer cannot reasonably determine the identity or whereabouts of the owner of the storage media, the officer may be unable to provide notice of the warrant. *Cf.* 18 U.S.C. § 3771(c)(1) (officers "shall make their best efforts to see that the crime victims are notified of … the rights described in subsection (a)").

In light of the presumption against international extraterritorial application, and consistent with the existing language of Rule 41(b)(3), this amendment does not purport to authorize courts to issue warrants that authorize the search of electronic storage media located in a foreign country or countries. The Fourth Amendment does not apply to searches of the property of non-United States persons outside the United States, *see United States v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990), and the Fourth Amendment's warrant requirement does not apply to searches of United States persons outside the United States. *See United States v. Stokes*, ___ F.3d ___, 2013 WL 3948949 at *8-*9 (7th Cir. Aug. 1, 2013); *In re Terrorist Bombings*, 552 F.3d 157, 170-71 (2d Cir. 2008). Instead, extraterritorial searches of United States persons are subject to the Fourth Amendment's "basic requirement of reasonableness." *Stokes*, 2013 WL 3948949 at

*9; *see also In re Terrorist Bombings*, 552 F.3d at 170 n.7. Under this proposed amendment, law enforcement could seek a warrant either where the electronic media to be searched are within the United States or where the location of the electronic media is unknown. In the latter case, should the media searched prove to be outside the United States, the warrant would have no extraterritorial effect, but the existence of the warrant would support the reasonableness of the search.

* * *

We believe that timely and thorough consideration of this proposed amendment by the Advisory Committee is appropriate. We therefore ask that the Committee act at its November meeting to establish a subcommittee to examine this important issue. Criminals are increasingly using sophisticated technologies that pose technical challenges to law enforcement, and remote searches of computers are often essential to the successful investigation of botnets and crimes involving Internet anonymizing technologies. Moreover, this proposal would ensure a court-supervised framework through which law enforcement could successfully investigate and prosecute such crimes.

We look forward to discussing this with you and the Committee.

Sincerely,

Mythili Raman

Mythili Raman
Acting Assistant Attorney General

cc: Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter