

THE CASE OF THE IMPENETRABLE APPLE IPHONE

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The United States Government and Apple are in the midst of a *significant* standoff.

The Government has in its possession an iPhone used by Syed Rizwan Farook who was killed in a shootout with police after he and his wife murdered fourteen people on December 2, 2015 in San Bernardino, California. The Government also has in its possession a warrant, giving it the legal authority to search the iPhone. Needless to say, the Government is pretty interested in what might be inside that phone.

There's only one problem...

the Government doesn't know Syed's passcode.

That's where Apple comes in...right? Unfortunately, according to Apple, they don't know the passcode either—by design. In 2014, Apple unveiled a brand new operating system—iOS 8—and a bold new privacy policy.

While Apple had previously complied with court orders to unlock iPhones, Apple defiantly proclaimed,

"Unlike our competitors, Apple cannot bypass your passcode and therefore cannot access this data...So it's not technically feasible for us to respond to government warrants for the extraction of this data from devices in their possession running iOS 8."

Apple is refusing to voluntarily comply with the Government's demand that they build a "backdoor" into Syed's encrypted iPhone. Accordingly, the Government sought and obtained an Order compelling Apple to assist federal agents in their search of the iPhone.

The Order, signed by Magistrate Judge Sheri Pym of the United States District Court for the Central District of California, requires Apple to provide "reasonable technical assistance" to FBI agents desperately trying to access the contents of the iPhone. In response, Apple filed a Motion to Vacate the Order.

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The Fourth Amendment to the United States Constitution provides,

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

In short, the Fourth Amendment only prevents the Government from conducting “unreasonable” searches and seizures. By obtaining a warrant, based on probable cause, particularly describing the gadget to be searched, the Government has, ostensibly, complied with the mandate of the Amendment.

In other words,
the search of this iPhone seems *reasonable*.

The more difficult legal issue presented by this case, however, is just **how much assistance** the Government can demand from a third-party—wholly unrelated to the underlying criminal activity—to assist in carrying out a search. That’s where the All Writs Act—enacted in 1789—comes in.

All Writs Act

The All Writs Act, 28 U.S.C. § 1651(a), provides, in part, that,

“all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”

In other words—at least according to the Government—the All Writs Act permits a court to order a third-party to provide assistance to the Government in carrying out a lawful search.

United States v. New York Telephone Company

In its Application, the Government relies heavily on *United States v. New York Telephone Company* in support of its argument that it is perfectly reasonable to compel Apple’s assistance in unlocking this iPhone.

In *New York Telephone*, the Supreme Court held that it was reasonable, pursuant to the All Writs Act, to require a phone company to assist the Government by installing a “pen register device” designed to record dialed numbers because:

- (1) the phone company was not too “far removed from the underlying controversy”;
- (2) the assistance requested would not impose an “unreasonable burden” on the company; and
- (3) the company’s assistance was “necessary” to effectuate the warrant.

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The Government contends that application of the *New York Telephone* factors to the instant controversy makes clear that Apple should be ordered to provide assistance, while Apple—unsurprisingly—argues just the opposite.

Apple's Position

In addition to arguing that the *New York Telephone* factors actually lend strength to Apple's position, Apple also contends that the Government's request, if granted, might set in motion a chilling series of events.

iven the government's boundless interpretation of the All Writs Act, it is hard to conceive of any limits on the orders the government could obtain in the future. For example, if Apple can be forced to write code in this case to bypass security features and create new accessibility, what is to stop the government from demanding that Apple write code to turn on the microphone in aid of government surveillance, activate the video camera, surreptitiously record conversations, or turn on location services to track the phone's user? Nothing. (Motion to Vacate at 4).

Apple further asserts that decisions such as these are best left to the legislative, rather than the judicial branch, explaining that history is replete with examples of society "opting *not* to pay the price for increased and more efficient enforcement of criminal laws."

For example, society does not tolerate violations of the Fifth Amendment privilege against self-incrimination, even though more criminals would be convicted if the government could compel their confessions. Nor does society tolerate violations of the Fourth Amendment, even though the government could more easily obtain critical evidence if given free rein to conduct warrantless searches and seizures. At every level of our legal system—from the Constitution, to our statutes, common law, rules, and even the Department of Justice's own policies—society has acted to preserve certain rights at the expense of burdening law enforcement's interest in investigating crimes and bringing criminals to justice. Society is still debating the important privacy and security issues posed by this case. The government's desire to leave no stone unturned, however well intentioned, does not authorize it to cut off debate and impose its views on society. (Motion to Vacate at 35).

It recently came to light that the Government is currently requesting Apple's assistance in unlocking at least *nine* other iPhones. Furthermore, since Apple filed its Motion to Vacate, Magistrate Judge James Orenstein in the United States District Court for the Eastern District of New York, denied the Government's request for an order compelling Apple to assist in unlocking an iPhone seized in connection with a drug case. This timely ruling will likely lend strength to Apple's argument in the San Bernardino iPhone case.

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Regardless of your personal opinion on this matter, most will agree that the decision reached will likely carry with it meaningful implications.

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