BREAKING IPHONES UNDER CALEA AND THE ALL WRITS ACT: WHY THE GOVERNMENT WAS (MOSTLY) RIGHT

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During the investigation of the 2015 San Bernardino shooting, the government asked a district court to order Apple to draft code that would bypass the password protection system of the iPhone of one of the shooters. This request was preceded by the holding of a United States District Court in New York, which found that the All Writs Act (AWA) and the Communications Assistance for Law Enforcement Act (CALEA) prohibited the court from issuing the order. This finding was supported by Apple, amici in support of Apple in the San Bernardino investigation, and numerous experts. Although sympathetic to Apple, I argue in this Article that these entities misinterpreted CALEA, and that the government's interpretation of that statute was correct. The New York court's ultimate ruling in favor of Apple, however, was the right one based on the discretionary factors governing the AWA's applicability, set forth by the United States Supreme Court in United States v. New York Telephone Co.

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INTRODUCTION

In December 2015, Syed Rizwan Farook and Tashfeen Malik killed fourteen people and wounded twenty-two others in a mass shooting.[1] During a shoot-out with law enforcement responders, both suspects were killed.[2] The subsequent investigation uncovered a password-protected iPhone that Farook's employer had issued to him.[3]

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1 Loulla-Mae Eleftheriou-Smith, *Syed Rizwan Farook: Apple Ordered to Unlock San Bernardino Gunman's Phone*, INDEPENDENT (Feb. 17, 2016, 8:49 PM), http://www.independent.co.uk/news/world/americas/syed-rizwan-farook-apple-ordered-to-unlock-san-bernardino-gunman-s-phone-a6878701.html.

2 *Id.*

3 Joel Rubin, James Queally & Paresh Dave, *FBI Unlocks San Bernardino Shooter's iPhone and Ends Legal Battle with Apple, for Now*, L.A. TIMES (Mar. 28, 2016, 10:39 PM), http://www.latimes.com/local/lanow/la-me-ln-fbi-drops-fight-to-force-apple-to-unlock-san-bernardino-terrorist-iphone-20160328-story.html.

As it had many times in the past, the government asked Apple for help in bypassing the password protection.[4] Apple had been able to provide this assistance when dealing with earlier model iPhones that ran older operating systems.[5] Apple's latest iPhone and operating system, however, had updated password protections that Apple could not immediately bypass.[6] Farook's iPhone was one of these later models.[7] Apple refused to assist the government this time, claiming that it would have to draft code that would undermine the privacy protections that all iPhone users enjoyed, that Apple promised, and that many government officials and agencies generally supported.[8]

Therefore, the government, in February 2016, sought a court order to require Apple to draft the code.[9] It claimed that the court could issue the order under the All Writs Act (AWA),[10] which was part of the Judiciary Act of 1789 and provided that courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[11] The court initially granted the government's request,[12] but received a new round of pleadings from the parties and many amici—most of which supported Apple, and many fewer of which supported the government.

Apple argued, correctly, that the AWA could not be used to circumvent limitations found in other federal statutes.[13] It then argued that Congress's consistent refusal to require "backdoors" to enable access to electronically protected areas, culminating in the strictures contained in the Communications Assistance for Law Enforcement Act (CALEA), provided just that statutory limitation.[14] Apple's amici argued

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4 Shane Harris, *Apple Unlocked iPhones for the Feds 70 Times Before*, DAILY BEAST (Feb. 17, 2016, 7:05 PM), http://www.thedailybeast.com/articles/2016/02/17/apple-unlocked-iphones-for-the-feds-70-times-before.html.

5 *Id.*

6 Arash Khamooshi, *Breaking Down Apple's iPhone Fight with the U.S. Government*, N.Y. TIMES (Mar. 21, 2016), https://www.nytimes.com/interactive/2016/03/03/technology/apple-iphone-fbi-fight-explained.html?_r=0.

7 *Id.*

8 Apple Inc.'s Motion to Vacate Order Compelling Apple Inc. to Assist Agents in Search, and Opposition to Government's Motion to Compel Assistance, *In re* Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, California License Plate 35KGD203, No. 5:16-cm-00010-SP (C.D. Cal. Feb. 25, 2016).

9 Government's Motion to Compel Apple Inc. to Comply with this Court's February 16, 2016 Order Compelling Assistance in Search, *In re Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300*, No. 5:16-cm-00010-SP.

10 *Id.* at 7.

11 28 U.S.C. § 1651(a) (2012).

12 Government's Motion to Compel Apple Inc. to Comply with this Court's February 16, 2016 Order Compelling Assistance in Search, *supra* note 9, at 6.

13 Apple Inc.'s Motion to Vacate Order Compelling Apple Inc. to Assist Agents in Search, and Opposition to Government's Motion to Compel Assistance, *supra* note 8, at 15.

14 *Id.* at 16.

that a court order that favored the government would: run counter to CALEA and the AWA;[15] violate Apple's First Amendment rights;[16] violate Apple's due process rights;[17] undermine freedom of speech in the digital age;[18] create a public safety threat;[19] damage the American economy;[20] undermine Apple's business strategy and corporate identity;[21] encourage cell phone theft;[22] undermine consumers' trust in tech companies and their products;[23] undermine free press;[24] and enable rogue countries to invent vulnerability-creating backdoors.[25]

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15 Brief of Amici Curiae Airbnb, Inc.; Atlassian Pty. Ltd.; Automattic Inc.; Cloudflare, Inc.; EBay Inc.; Github, Inc.; Kickstarter, PBC; LinkedIn Corporation; Mapbox Inc.; A Medium Corporation; Meetup, Inc.; Reddit, Inc.; Square, Inc.; Squarespace, Inc.; Twilio Inc.; Twitter, Inc.; and Wickr Inc., *In re Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300*, No. 5:16-cm-00010-SP.

16 Brief of the Center for Democracy & Technology as Amicus Curiae in Support of Apple Inc.'s Motion to Vacate and in Opposition to Government's Motion to Compel Assistance, *In re Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300*, No. 5:16-cm-00010-SP; Brief of Amici Curiae Electronic Frontier Foundation and 46 Technologists, Researchers, and Cryptographers, *In re Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300*, No. 5:16-cm-00010-SP.

17 Brief of Amici Curiae American Civil Liberties Union, ACLU of Northern California, ACLU of Southern California, and ACLU of San Diego and Imperial Counties, in Support of Apple, Inc., *In re Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300*, No. 5:16-cm-00010-SP.

18 Brief of Amici Curiae Access Now and Wickr Foundation in Support of Apple Inc.'s Motion to Vacate, *In re Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300*, No. 5:16-cm-00010-SP-1.

19 Brief of Amici Curiae iPhone Security and Applied Cryptography Experts in Support of Apple Inc.'s Motion to Vacate Order Compelling Apple Inc. to Assist Agents in Search, and Opposition to Government's Motion to Compel Assistance, *In re Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300*, No. 5:16-cm-00010-SP.

20 Brief of *Amicus Curiae* ACT | The App Association in Support of Apple Inc.'s Motion to Vacate Order Compelling Assistance, *In re Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300*, No. 5:16-cm-00010-SP.

21 *See generally* Brief of Amici Curiae Amazon.com, Box, Cisco Systems, Dropbox, Evernote, Facebook, Google, Microsoft, Mozilla, Nest, Pinterest, Slack, Snapchat, Whatsapp, and Yahoo in Support of Apple, Inc., *In re Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300*, No. 5:16-cm-00010-SP; *see also* Brief of Amicus Curiae Lavabit L.L.C. in Support of Apple Inc.'s Motion to Vacate, *In re Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300*, No. 5:16-cm-00010-SP.

22 Corrected Brief of Amicus Curiae Electronic Privacy Information Center (EPIC) and Eight Consumer Privacy Organizations, *In re Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300*, No. 5:16-cm-00010-SP.

23 Brief of Amicus Curiae Lavabit L.L.C. in Support of Apple Inc.'s Motion to Vacate, *supra* note 21.

24 Brief Amicus Curiae of the Media Institute in Support of Apple, Inc., *In re Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300*, No. 5:16-cm-00010-SP.

25 Brief of Amici Curiae Privacy International and Human Rights Watch, *In re Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300*, No. 5:16-cm-00010-SP.

The government claimed that CALEA did not apply to the Apple case, and it therefore did not limit the court's authority under the AWA.[26] The government's amici appeared to make primarily a policy, rather than a legal, argument for the order.[27]

Early in this litigation, public opinion matched the court's inclination to side with the prosecution, appearing to favor the government's attempts to fight terrorism over Apple's recalcitrant interest in bucking the government for ideological or profit-based motivations.[28] This case (in what I will call the "California court" or "California case") was poised to contradict a recent decision in a United States District Court in New York. Faced with virtually the same fact pattern and legal arguments, that court (in the "New York court" or "New York case") ruled in favor of Apple on statutory grounds, finding that CALEA limited its authority under the AWA, and on discretionary grounds, finding that even if CALEA didn't limit the court's authority, the AWA could not be read to impose such a burden on Apple.[29]

Public opinion had, perhaps, been shifting in Apple's favor.[30] Possibly anticipating another loss, the government surprisingly found an unknown source who could bypass the iPhone's protection for around $1 million[31] (this was surprising because the government had previously claimed that Apple's assistance was necessary[32]). The

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26 Government's Motion to Compel Apple Inc. to Comply with this Court's February 16, 2016 Order Compelling Assistance in Search at 22–24, *supra* note 9.

27 The California Sheriffs, strikingly, wrote:

> The ultimate decision to mandate that all companies such as Apple be compelled to create a back door to their operating systems is clearly a political, not a judicial, function. However, vacating this Order on that premise while we as a nation await congressional action (or inaction) would be a disservice to the American public. In order to adequately do their job, law enforcement needs to be able to use the existing tools at their disposal to gain access to critical information on a case by case basis.

Brief of Amici Curiae and Memorandum of Points and Authorities in Support of Amici Curiae Brief at 4, *In re Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300*, No. 5:16-cm-00010-SP.

28 *More Support for Justice Department than for Apple in Dispute over Unlocking iPhone*, PEW RES. CTR. (Feb. 22, 2016), http://www.people-press.org/2016/02/22/more-support-for-justice-department-than-for-apple-in-dispute-over-unlocking-iphone.

29 *In re* Order Requiring Apple, Inc. to Assist in the Execution of a Search Warrant Issued by this Court, 149 F. Supp. 3d 341 (E.D.N.Y. 2016).

30 Philip Elmer-DeWitt, *Apple vs. FBI: What the Polls Are Saying—Updated*, FORTUNE (Feb. 23, 2016), http://fortune.com/2016/02/23/apple-fbi-poll-pew.

31 Mark Hosenball, *FBI Paid Under $1 Million to Unlock San Bernardino iPhone: Sources*, REUTERS (May 4, 2016, 4:03 PM), http://www.reuters.com/article/us-apple-encryption-idUSKCN0XQ032.

32 Edvard Pettersson, Alex Webb & Chris Strohm, *U.S. Drops Apple Case After Getting into Terrorist's iPhone*, BLOOMBERG (Mar. 28, 2016, 5:54 PM), http://www.bloomberg.com/news/articles/2016-03-28/u-s-drops-apple-case-after-successfully-accessing-iphone-data-imcj88xu.

protection was bypassed, the government's request for an order became moot, and the California court never issued a final ruling.

The dispute at the center of the Apple litigation is certain to recur. Prosecutors and law enforcement officials have said they have hundreds of iPhones and other smartphones that need bypassing[33]; smartphone password protection will only get stronger while law enforcement investigations will continue to require access to those phones[34]; some in government have remained resistant to imposing system-wide backdoors on phones, other digital devices, and the Internet itself[35]; and a certain measure of congressional gridlock[36] promises no imminent fix to the statutory gap in the AWA and CALEA that Apple suggested this case has revealed.

This Article argues that, at least as to the Apple litigation and others like it, no gap exists because the government's interpretation of CALEA and the AWA was correct. This contradicts the ruling of the New York court, Apple's amici, and numerous other experts. Albert Gidari, writing for the Stanford Law School Center for Internet and Society, argued that the government's position was "entirely wrong."[37] Harvard Law School Professor Susan Crawford wrote that "the law is clear" that CALEA doesn't permit a court to issue the government's requested order.[38] A reporter for *Motherboard* argued that CALEA

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33 Cyrus R. Vance, Jr., Jackie Lacey & Bonnie Dumanis, Opinion, *Congress Can Put iPhones Back Within Reach of Law Enforcement*, L.A. TIMES (May 11, 2016, 5:00 AM), http://www.latimes.com/opinion/op-ed/la-oe-vance-congress-act-on-iphones-20160511-story.html.

34 James Billington, *Apple's "Unhackable" iPhone Could Be the Future of Smartphone Security*, INT'L BUS. TIMES (Feb. 26, 2016, 10:10 PM), http://www.ibtimes.co.uk/apple-working-unhackable-future-iphones-that-even-tech-giant-could-not-crack-1546017.

35 Erin Kelly, *Congress Shouldn't Force Encryption "Backdoors," Says Key House Democrat*, USA TODAY (Feb. 2, 2016, 11:58 AM), http://www.usatoday.com/story/news/2016/02/02/congress-shouldnt-force-encryption-backdoors-says-key-house-democrat/79689604; Nicole Perlroth & David E. Sanger, *Obama Won't Seek Access to Encrypted User Data*, N.Y. TIMES (Oct. 10, 2015), https://www.nytimes.com/2015/10/11/us/politics/obama-wont-seek-access-to-encrypted-user-data.html?_r=0.

36 Drew Desilver, *Congress' Productivity Improves Somewhat in 2015*, PEW RES. CTR. (Dec. 29, 2015), http://www.pewresearch.org/fact-tank/2015/12/29/congress-productivity-improves-somewhat-in-2015.

37 Albert Gidari, *CALEA Limits the All Writs Act and Protects the Security of Apple's Phones*, CTR. FOR INTERNET & SOC'Y (Feb. 19, 2016, 6:26 PM), http://cyberlaw.stanford.edu/blog/2016/02/calea-limits-all-writs-act-and-protects-security-apples-phones (arguing that CALEA isn't limited to telecommunications carriers, but applies to manufacturers and providers of telecommunications support services as well, and that CALEA limits the government's ability to dictate equipment design or software configuration, including device security).

38 Susan Crawford, *The Law Is Clear: The FBI Cannot Make Apple Rewrite Its OS*, BACKCHANNEL (Mar. 16, 2016), https://backchannel.com/the-law-is-clear-the-fbi-cannot-make-apple-rewrite-its-os-9ae60c3bbc7b#.ofbwe89p2 (arguing that CALEA does not allow the government to dictate phone or software design or configurations, and that a court shouldn't be able to order what the executive branch cannot).

protected Apple, and the government was using the case to rewrite the statute in its favor.[39] *Techdirt* has argued the same, noting that "it seems clear that CALEA preempts the All Writs Act and explicitly forbids what the FBI is requesting."[40]

Even though, as I argue, the New York court was wrong on the CALEA and AWA limits, its ultimate ruling in Apple's favor was correct, based on the factors for discretionary application of the AWA that the United States Supreme Court set forth in *United States v. New York Telephone Co.*[41]

In the pages that follow, I set forth the law on the AWA, showing when it would permit a court to issue an order like that considered in the Apple litigation. I then brief the New York case and argue that the court got the law on CALEA and the AWA wrong, but that it ultimately reached the correct conclusion in favor of Apple on fact-laden, discretionary grounds. Finally, I apply my interpretation of the AWA and CALEA to the California case, ultimately arguing that the prosecutors got the law right, and that under certain circumstances Apple and other similar entities could be required to abide by orders like the one the government requested.

I. THE AWA

A. *AWA Basics*

The AWA provides that "[t]he Supreme Court and 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."[42] This permits federal courts "to issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained."[43] The AWA "fill[s] the interstices of

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39 Matthew Braga, *The FBI Is at War with Apple Because It Couldn't Change Wiretap Law*, MOTHERBOARD (Mar. 1, 2016, 6:00 AM), http://motherboard.vice.com/read/calea-my-old-friend (suggesting that the Apple litigation is part of the government's attempt to get CALEA amended to allow for greater surveillance).

40 Mike Masnick, *How Existing Wiretapping Laws Could Save Apple from FBI's Broad Demands*, TECHDIRT (Feb. 24, 2016, 2:45 PM), https://www.techdirt.com/articles/20160223/23441033692/how-existing-wiretapping-laws-could-save-apple-fbis-broad-demands.shtml (arguing that Apple does not possess the information necessary to break the iPhone, and would have to build a system to do so).

41 United States v. N.Y. Tel. Co., 434 U.S. 159 (1977).

42 28 U.S.C. § 1651(a) (2012).

43 *N.Y. Tel. Co.*, 434 U.S. at 172.

federal judicial power when those gaps threaten[] to thwart the otherwise proper exercise of federal courts' jurisdiction."[44] However, "[w]here a statute specifically addresses the particular issue at hand, it is that authority, and not the [AWA], that is controlling."[45]

The AWA is part of the Judiciary Act of 1789,[46] which Justice O'Connor once called "the last of the triad of founding documents, along with the Declaration of Independence and the Constitution itself."[47] The AWA is, therefore, a foundational law, but a limited one. Designed to fill in the gaps of federal judicial power where such power has not been explicitly established, the AWA cannot be all-expansive. It is, therefore, limited in three ways. First, it gives courts power to act only to further the exercise of their jurisdiction which they already possess; the AWA cannot create jurisdiction where there is none.[48] Second, the

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44 Pa. Bureau of Corr. v. U.S. Marshals Serv., 474 U.S. 34, 41 (1985).

45 *Id.* at 43.

46 *Id.* at 40.

47 Sandra Day O'Connor, *The Judiciary Act of 1789 and the American Judicial Tradition*, 59 U. CIN. L. REV. 1, 3 (1990).

48 The AWA authorizes a court to issue writs that are necessary or appropriate to effectuate orders the basis of which is the exercise of jurisdiction that the court already had. *N.Y. Tel. Co.*, 434 U.S. at 172. The AWA cannot serve as an independent basis of jurisdiction. *See, e.g.*, Clinton v. Goldsmith, 526 U.S. 529, 534–35 (1999). For example, in *Hillman v. Webley*, the Tenth Circuit considered a federal district court's assumption, based on the AWA, of jurisdiction from a claim brought in state court. 115 F.3d 1461, 1467–68 (10th Cir. 1997). The appellate court noted that in complex class action suits, federal courts have used the AWA in two ways. First, they rely on their jurisdiction over the original class action suit to enjoin class members from pursuing state court actions. *Id.* at 1468. Second, they use "the [AWA] to 'remove' actions from state court to federal court, and to subsequently bar litigation of the removed action." *Id.* The district court in *Hillman* took the latter approach. *Id.* The Tenth Circuit held that this was impermissible because it entailed a district court acquiring jurisdiction over someone who "had not been served with process and was not in any manner before the court." *Id.* at 1469. The AWA, said the appellate court, could not be used to confer jurisdiction where none existed ex ante. *Id.* In another case, *Doe v. INS*, the Ninth Circuit considered whether a district court had the power under the AWA to equitably undue a valid judgment of conviction to avoid deportation. 120 F.3d 200, 201–02 (9th Cir. 1997). In that case, the defendant sought a writ of *audita querela* to vacate his prior conviction, and thus to avoid deportation back to Mexico where, he claimed, his life would be in danger. *Id.* The district court granted the writ because of "the specific facts and equities of th[e] case." *Id.* at 202. The Ninth Circuit reversed, holding that the writ of *audita querela* was unavailable to provide relief for purely equitable reasons. *Id.* at 204. The AWA could not assist Doe because he had "identified no independent source in law that empowers federal courts to vacate convictions to shield defendants from deportation." *Id.* at 205. However, *La Buy v. Howes Leather Company*, a 1957 Supreme Court case, runs contrary to the rule that the AWA only supports preexisting jurisdiction and does not itself provide an independent basis of jurisdiction. 352 U.S. 249 (1957). In that case, a district court, faced with a particularly congested calendar, referred two consolidated lawsuits to a master to take evidence and report his findings of fact and conclusions of law. *Id.* at 253. All parties objected to the reference to the master, and mandamus actions were filed in the Court of Appeals. *Id.* at 254. These applications to the appellate court were grounded on the AWA. *Id.* The district court judge had refused to vacate the reference at the parties' request, arguing that the reference was performed in exercise of his

AWA cannot be used to legitimize the exercise of judicial power where a federal statute has precluded that exercise.[49] Third, the power must be "agreeable to the usages and principles of law."[50] This article is concerned only with the last two limits, as the court's jurisdiction in the Apple case was never in dispute.

Historically, the AWA has been invoked primarily in four situations. It has been invoked where an interlocutory appeal or writ of mandamus is considered,[51] where a lawsuit has been removed from state to federal court,[52] and in relation to the authority of military courts.[53] The Apple litigation reflects the fourth way the AWA has been invoked, which is to compel nonparties to litigation to act or refrain from acting. Determining the extent of judicial authority in this regard is not easy, in part because "there is an extreme dearth of case law interpreting the substantive parameters of the [AWA]."[54]

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jurisdiction under Rule 53(b) of the Federal Rules of Civil Procedure. *Id.* The judge also argued that his reference could only be reviewed on appeal and not by writ of mandamus, since "by congressional enactment appellate review of a District Court's orders may be had only after a final judgment." *Id.* at 254–55. The Supreme Court confirmed the power of the appellate court to hear the case on writ of mandamus, writing, "The [AWA] confers on the Courts of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here." *Id.* at 260. This despite the fact that 28 U.S.C. §§ 1291 and 1292 establish the scope of appellate review authority and seems to preclude the interlocutory review that was performed in *La Buy*. *Id.* at 263 (Brennan, J., dissenting) ("This holding that an independent appellate power is given by the [AWA] not only discards the constraints upon the scope of the power to issue extraordinary writs . . . but, by the very fact of doing so, opens wide the crack in the door which, since the Judiciary Act of 1789, has shut out from intermediate appellate review all interlocutory actions of the District Courts not within the few exceptional classes now specified by the Congress in s 1292.").

49 *Pa. Bureau of Corr.*, 474 U.S. 34, 43 ("Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.").

50 28 U.S.C. § 1651(a) (2012).

51 *La Buy*, 352 U.S. 249; Bankers Life & Cas. Co. v. Holland, 346 U.S. 379 (1953); *In re* Lott, 424 F.3d 446 (6th Cir. 2005); Stephen I. Vladeck, *Military Courts and the All Writs Act*, 17 GREEN BAG 2D 191, 193 (2014) ("Consider one of the most common examples of All Writs Act authority: Federal appeals courts may issue writs of mandamus to confine lower courts to the lawful exercise of their jurisdiction *at any point* in the lower-court proceedings, even though the circuits' appellate jurisdiction over district courts is carefully circumscribed, and generally only available after a 'final' judgment.").

52 Sygenta Crop Prot., Inc. v. Henson, 537 U.S. 28 (2002); Henson v. Ciba-Geigy Corp., 261 F.3d 1065 (11th Cir. 2001); Lonny Sheinkopf Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. PA. L. REV. 401 (1999).

53 Major Thomas M. Rankin, *The All Writs Act and the Military Judicial System*, 53 MIL. L. REV. 103 (1971); Major Gilbert D. Stevenson, USAF, *The Inherent Authority of the Military Judge*, 17 AIR FORCE L. REV. 1 (1975); Vladeck, *supra* note 51, at 193; Hon. James A. Wynn, Jr., *Military Courts and the All Writs Act*, 45 JUDGES' J., Summer 2006, at 36.

54 United States v. Hardage, 58 F.3d 569, 574 (10th Cir. 1995).

1. Statutory Preclusion

In its original form, the AWA provided that courts have power to issue writs "not specifically provided for by statute."[55] This phrase remained in the statute until 1948, when it was removed.[56] It appears, however, that Congress's removal of the phrase was part of a consolidation of various provisions and changes to phraseology, through which no substantive amendment was intended.[57]

The legislative history around the 1948 changes does state that the new AWA section is "expressive of the construction recently placed upon [the AWA provision] by the Supreme Court in" *U.S. Alkali Export Association. v. United States*.[58] In *U.S. Alkali*, the Court rejected the use of the AWA to enable the Court to review a lower court's ruling where jurisdiction did not lie under an express statutory provision.[59] The Court wrote:

> The [AWA] writs may not be used as a substitute for an authorized appeal; and where, as here, the statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment, review by certiorari or other extraordinary writ is not permissible in the face of the plain indication of the legislative purpose to avoid piecemeal reviews.[60]

Ultimately, in 1985, the Court concluded that Congress intended to leave the AWA substantially unchanged in its 1948 consolidation.[61] Even if a writ under the AWA is "appropriate," it is invalid if it contradicts any other federal statute.[62] Thus, "[w]here a statute specifically addresses the particular issue at hand, it is that authority, and not the [AWA], that is controlling."[63]

The Supreme Court, however, has probably provided a rare exception to this rule. In *Pennsylvania Bureau of Correction v. United States Marshals Service*, the Supreme Court determined that the AWA did not allow a district court to compel the U.S. Marshals to transport state prisoners to the federal courthouse.[64] The district court had issued

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55 Judiciary Act of 1789, ch. 20., § 14, 1 Stat. 73, 81–82 (1789) (current version at 28 U.S.C. § 1651 (2012)).

56 Pa. Bureau of Corr. v. U.S. Marshals Serv., 474 U.S. 34, 41 (1985).

57 *Id.*

58 *See* H.R. REP. NO. 80-308, at A145 (1947).

59 U.S. Alkali Export Ass'n v. United States, 325 U.S. 196, 203 (1945).

60 *Id.*

61 *Pa. Bureau of Corr.*, 474 U.S. at 42.

62 *Id.*

63 *Id.* at 43.

64 *Id.* at 35, 37.

writs of habeas corpus *ad testificandum* to produce witnesses who were in state custody.[65] The court ordered that state agents transport the witnesses from state prison to the county jail nearest to the federal courthouse, and that the Marshals should then transport the inmates from county jail to the courthouse.[66] The Marshals moved for reconsideration of the latter part of the order, which the district court denied.[67] The Third Circuit reversed, holding that the AWA "did not confer power upon the District Court 'to compel *non-custodians* to bear the expense of [the production of witnesses] simply because they have access to a deeper pocket.'"[68] The Pennsylvania Bureau of Correction petitioned the Supreme Court for a writ of certiorari.[69]

Pennsylvania argued that the Marshals had "a statutory obligation to obey the lawful orders and writs of the federal courts," pursuant to 28 U.S.C. §§ 569(b) and 567.[70] The Supreme Court rejected this argument, however, because those statutes

> merely enumerate obligations of the Marshals. . . . The courts' authority to issue such writs, however, must derive from some independent statutory source. We therefore must look to the habeas corpus statute or the [AWA] to see if they authorize federal courts to order the transportation of state prisoners to the federal courthouse.[71]

The Court then observed that the AWA is a "residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the [AWA], that is controlling."[72] Finding that the habeas corpus statute controlled, the Court found no residual authority in the AWA.[73]

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65 *Id.* at 35–36.

66 *Id.* at 36.

67 *Id.*

68 *Id.* (alteration in original) (quoting Garland v. Sullivan, 737 F.2d 1283, 1287 (3d Cir. 1984)).

69 *Id.* at 37.

70 *Id.*

71 *Id.* at 38.

72 *Id.* at 43.

73 *Id.* The Court did, however, leave open the possibility that the AWA could, in rare circumstances, trump the authority of other statutes. It wrote: "There may be exceptional circumstances in which a district court can show clearly the inadequacy of traditional habeas corpus writs, such as where there are serious security risks. In such circumstances, a district court may find it 'necessary or appropriate' for Marshals to transport state prisoners." *Id.* Like the Supreme Court in *Pennsylvania Bureau*, the Second Circuit has understood the AWA to have the potential to overcome statutory limitations. Its approach to the AWA's applicability in *United States v. International Brotherhood of Teamsters* (IBT) was twofold. 907 F.2d 277, 280 (2d Cir. 1990). First, it would determine whether a writ under the AWA is "necessary,"

2. Agreeable to the Usages and Principles of Law

Where a federal court has preexisting jurisdiction to act and is not precluded by another federal statute, the AWA permits the court to "issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of" a previously-issued order.[74]

An AWA order need not be "'necessary' in the sense that the court could not otherwise physically discharge its . . . duties."[75] At the other extreme, the AWA does not permit a court to issue a writ "whenever compliance with statutory procedures appears inconvenient or less appropriate."[76] Which orders are agreeable often depends upon the circumstance: some exceptional circumstances may call for a broader application of the AWA.[77] Under normal circumstances, however, AWA writs need not be strictly necessary, but at the same time they must also respond to some extraordinary need.[78] It appears that courts will evaluate the propriety of AWA writs on an ad hoc basis.[79] Where alternative means of relief are available, courts should not issue writs under the AWA.[80]

In *United States v. New York Telephone Co.*, the Supreme Court considered whether the United States District Court could order a

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meaning that it "should not be used simply to avoid the inconvenience of following statutory procedures that govern the particular circumstances." *Id.* (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 273 (1942)). Second, where another statutory procedure is available, the AWA may provide an alternative avenue for court action in "exceptional circumstances" that "show clearly the inadequacy" of that statutory procedure. *Id.* (quoting *Pa. Bureau of Corr.*, 474 U.S. at 43). It is unclear whether this expansive reading of the AWA is necessary (whether or not it is legally correct). In *In re Baldwin-United Corporation*, the Southern District of New York presided over a class action against various securities dealers, ultimately issuing an injunction preventing anyone with knowledge of the injunction from commencing any action against the dealers. 770 F.2d 328, 331 (2d Cir. 1985). A number of state attorneys general sued, objecting that they were nonparties but were nevertheless subject to the injunction. *Id.* The Second Circuit upheld the injunction, holding that the AWA permitted the district court to issue the injunction in order to preserve that court's jurisdiction and authority over an ongoing legal matter. *Id.* at 335–38. This reasoning was closely aligned with the AWA's purpose of facilitating the exercise of a court's preexisting jurisdiction. *See id.* at 338. It did not assume the court's position in *IBT* that the AWA can, in some cases, trump other statutory procedures. Given the similarities between *IBT* and *Baldwin-United*, it is doubtful that the *IBT* court needed to interpret the AWA as expansively as it did. The *Baldwin-United* reasoning, it seems, would have sufficed.

74 United States v. N.Y. Tel. Co., 434 U.S. 159, 172 (1977).

75 Adams v. United States *ex rel.* McCann, 317 U.S. 269, 273 (1942).

76 *Pa. Bureau of Corr.*, 474 U.S. at 43.

77 *Id.*

78 *Id.*; *IBT*, 907 F.2d at 280.

79 *Pa. Bureau of Corr.*, 474 U.S. at 43 ("We . . . leave open the question of the availability of the [AWA] to authorize such an order where exceptional circumstances require it.").

80 *Id.* at 43.

telephone company to provide federal law enforcement officials the facilities and technical assistance necessary for the implementation of its order authorizing the use of pen registers to investigate federal criminal offenses.[81] In that case, the Court of Appeals reversed a District Court order, apparently "concerned that sustaining the District Court's order would authorize courts to compel third parties to render assistance without limitation regardless of the burden involved and pose a severe threat to the autonomy of third parties who for whatever reason prefer not to render such assistance."[82]

Although the Supreme Court shared the appellate court's concern that AWA writs could be used to impose "unreasonable burdens" on third parties—which would likely constitute an impermissible use of the AWA[83]—it found that the order would impose no such burden on New York Telephone Co.[84]

To determine whether the burden of an AWA writ was unreasonable, the Court first established that the AWA expansively authorized writs that are appropriate to effectuate previously issued orders and are designed to achieve "the rational ends of law"[85] given the "sound judgment [of the issuing court] to achieve the ends of justice entrusted to it."[86] The Court, therefore, applied the AWA "flexibly,"[87] but approved of its use only "under appropriate circumstances."[88]

Some orders requiring innocent third parties to assist law enforcement are appropriate. The Court affirmed the order requiring New York Telephone to assist in the placement of the pen register because the phone company's lines were being used for criminal purposes; the assistance required would be "meager"; the phone company was "a highly regulated public utility with a duty to serve the public" and had no "substantial interest in not providing assistance"; the phone company itself used pen registers for billing and fraud and crime prevention; the company agreed to supply the FBI with all the information required to install its own pen registers; and, finally, there was no way, other than obtaining New York Telephone's assistance, that the FBI could have successfully engaged in the surveillance that the district court authorized.[89]

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81 United States v. N.Y. Tel. Co., 434 U.S. 159, 161 (1977).

82 *Id.* at 171.

83 *In re* Grand Jury Proceedings, 654 F.2d 268, 277 (3d Cir. 1981).

84 *N.Y. Tel. Co.*, 434 U.S. at 172.

85 *Id.* (quoting Harris v. Nelson, 394 U.S. 286, 299 (1969)).

86 *Id.* at 173 (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 273 (1942)).

87 *Id.*

88 *Id.* at 174.

89 *Id.* at 174–75.

The Court majority's approach was primarily a quantitative one: finding only a minor disruption to New York Telephone, it approved of the AWA order. Justice Stevens, dissenting in part, took a qualitative approach. He wrote that AWA writs must not be "'of a different kind' or 'on a different principle' from that accorded by the underlying order."[90] His concern was over the conscription of innocent third parties to assist law enforcement. He wrote:

> [T]he courts have consistently recognized and applied the limitation that whatever action the court takes must be in aid of *its* duties and *its* jurisdiction. The fact that a party may be better able to effectuate its rights or duties if a writ is issued never has been, and under the language of the statute cannot be, a sufficient basis for issuance of the writ.[91]

For Justice Stevens, "citizen cooperation is always a desired element in any government investigation," but "there is simply no basis for concluding that the inability of the Government to achieve the purposes for which it obtained the pen register order in any way detracted from or threatened the District Court's jurisdiction."[92] This qualitative leap into forcing citizen assistance had precedent, for Justice Stevens, only based on the writs of assistance, and was "deeply troubling as a portent of the powers that future courts may find lurking in the arcane language of . . . the [AWA]."[93]

B. *The AWA and Third Parties*

New York Telephone, just as the Apple litigation does, focused on the extent to which the AWA may be used to compel innocent third parties to assist law enforcement. While the assistance implicated in that case might have been normatively acceptable (leaving aside, for now, the issue of legal permissibility), Justice Stevens' concern is well placed. Other courts have indicated their willingness to use the AWA to compel nonparties to act or not to act. For example, the Eleventh Circuit has looked to *New York Telephone* for the proposition that an AWA injunction may be issued against anyone, party or nonparty, who is "in a position to frustrate the implementation of a court order or the proper administration of justice, . . . even those who have not taken any

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90 *Id.* at 188 (Stevens, J., dissenting in part) (quoting Root v. Woolworth, 150 U.S. 401, 411–12 (1893)).

91 *Id.* at 189 (citing Sampson v. Murray, 415 U.S. 61, 94 (1974)).

92 *Id.* at 190.

93 *Id.* at 191.

affirmative action to hinder justice."[94] This meant for the Eleventh Circuit that to issue a valid AWA injunction, a district court "must simply point to some ongoing proceeding, or some past order or judgment, the integrity of which is being threatened by someone else's action or behavior."[95] This includes the ability of courts to "enjoin almost any conduct 'which, left unchecked, would have . . . the practical effect of diminishing the court's power to bring the litigation to a natural conclusion.'"[96] The Second Circuit, strikingly, has observed that "[t]he [AWA's] grant of authority is plainly broad and, on its face, makes no distinction between parties and nonparties."[97]

Consider *United States v. City of Detroit*[98]: In that case, the Sixth Circuit held that the AWA permits district courts to "bind nonparties in order to prevent the frustration of consent decrees that determine parties' obligations under the law."[99] The case dealt with a consent decree between the City of Detroit, the Detroit Water and Sewage Department, the State of Michigan, and the United States, which stipulated that Detroit had violated the Clean Water Act and required Detroit to dispose of contaminated sediment from a channel connected to the Detroit River.[100]

Detroit was required to dispose of the sediment "as soon as possible," and asked the Army Corps of Engineers if it could dispose of the sediment at the Confined Disposal Facility, which was operated by the Corps.[101] The Corps refused to accept the sediment due to the elevated amounts of lead and cadmium.[102] Detroit explored other options and discovered one, which faced "[v]igorous community opposition,"[103] which a dissenting judge noted was "driven in large part by the Bayview Yacht Club."[104] The city, therefore, returned to the Corps with a new plan. The Corps expressed concern, but agreed to work with the city to find a solution.[105] Negotiations between the Corps

94 Klay v. United Healthgroup, Inc., 376 F.3d 1092, 1100 (11th Cir. 2004) (quoting *N.Y. Tel. Co.*, 434 U.S. at 174).

95 *Id.*

96 *Id.* at 1102 (quoting ITT Cmty. Dev. Corp. v. Barton, 569 F.2d 1351, 1359 (5th Cir. 1978)).

97 United States v. Int'l Bhd. of Teamsters, 266 F.3d 45, 50 (2d Cir. 2001).

98 329 F.3d 515 (6th Cir. 2003).

99 *Id.* at 517.

100 *Id.* at 518.

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.* at 531 (Norris, J., concurring in part and dissenting in part).

105 *Id.* at 519 (majority opinion).

and Detroit, which included another project that Detroit undertook, entailed a forty million dollar bill to the taxpayers.[106]

Because of the Corps' hesitance to participate in handling the sediment, Detroit and the State filed a motion seeking to compel the Corps to accept the sediment. The district court found that the Corps was frustrating the consent decree and ordered it to accept the sediment, refusing to approve the Corps' conditions.[107]

The Sixth Circuit looked to *New York Telephone* for the proposition that the AWA "permits courts to issue orders to nonparties in certain situations."[108] The court gave weight to four factors mentioned in *New York Telephone* as determinative of the AWA's scope as applied to nonparties: the "nonparty's relationship to the controversy," the "burden that cooperation would impose on the nonparty," the nonparty's "interest in not providing assistance both from an ideological and financial perspective," and the "importance of the nonparty's assistance to fulfilling the goals of the order."[109] It found that each of these four factors was satisfied, and the Corps could be compelled to accept the sediment.[110]

Consider also *Yonkers Racing Corporation v. City of Yonkers*, in which the Second Circuit reviewed a case involving a consent decree between the City of Yonkers, the United States, and the Yonkers chapter of the NAACP arising from a determination that there had been a pattern and practice over forty years of deliberately concentrating federal subsidized low income housing in one quadrant of Yonkers in order to maintain racial segregation.[111] The City initiated condemnation proceedings in state court against sites owned by the Yonkers Racing Corporation and the St. Joseph's Seminary.[112] The case was removed to federal court, and the Corporation and Seminary moved to remand it back to state court.[113] The motion was denied, with the district court finding that removal was authorized under the AWA, and the two entities appealed to the Second Circuit.[114]

The Second Circuit affirmed the district court's order denying the motion.[115] It based its finding on its own precedent and *New York Telephone*, holding that the AWA authorizes action against a non-party

106 *Id.*
107 *Id.*
108 *Id.* at 523 (citing United States v. N.Y. Tel. Co., 434 U.S. 159, 174 (1977)).
109 *Id.* at 524–25.
110 *Id.* at 525.
111 858 F.2d 855, 858 (2d Cir. 1988).
112 *Id.*
113 *Id.*
114 *Id.*
115 *Id.*

to the original action in "exceptional circumstances" where the non-parties are "in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice."[116] It further looked to *U.S. Alkali Export Association v. United States* for the proposition that "extraordinary power" of the AWA may be invoked even when another federal statute ordinarily would govern the issue.[117]

Although the Corporation and the Seminary had not been responsible for the racial segregation, the Second Circuit held that "[t]he obligation of the City of Yonkers under the Constitution of the United States to remedy violations of civil rights is paramount."[118] Therefore,

> [t]he fact that [the Corporation and Seminary] were not parties to—and in their words "had absolutely no connection with"—the underlying discrimination lawsuit is of little consequence. The Raceway and the Seminary are in a position now—whether willingly or not—to frustrate implementation of the Consent Decree. We believe this is just the sort of extraordinary circumstance envisioned by the [AWA].[119]

Thus, and as a result of Second Circuit precedent, the court observed that the AWA enables courts in exceptional cases to "issue orders against non-parties to a civil rights action in order to vindicate the constitutional rights of existing parties."[120]

In *Association for Retarded Citizens of Connecticut, Inc. v. Thorne*, the Second Circuit considered whether a district court could join a party to an action pursuant to the AWA after a final order had already been entered on the basis of a consent decree and settlement agreements of which the party to be joined was not a part.[121] The consent decree was between the Association and state agencies responsible for overseeing the welfare of mentally disabled people.[122] The state Department of Health Services (DHS) had been a party, but its motion to be dismissed from the suit on the ground that it was not essential to the court's resolution of the disputed issues was granted before final judgment.[123]

After the final order issued, which resulted in a consent decree involving the use of do-not-resuscitate orders for mentally disabled people, the Association sought to join DHS as a defendant, since many

116 *Id.* at 863 (quoting Benjamin v. Malcolm, 803 F.2d 46, 53 (2d Cir. 1986)).
117 *Id.*
118 *Id.*
119 *Id.* at 864.
120 *Id.* (citing *Benjamin*, 803 F.2d at 53).
121 30 F.3d 367, 368 (2d Cir. 1994).
122 *Id.*
123 *Id.*

mentally disabled individuals had been transferred to DHS facilities, and DHS neither abided nor was bound by the terms of the consent decree.[124] The judge joined DHS pursuant to the AWA, finding that DHS was "in a position to render the Final Order meaningless."[125] It then found "that DHS had violated the Final Order and was required to abide by it in the future."[126]

The Second Circuit observed that the AWA can be used to compel nonparties to comply with orders to ensure that courts' "legally-mandated directives are not frustrated."[127] The AWA could not, however, be used to extend the terms of a consent decree to a nonparty, because such decrees are "privately-negotiated" and do "not determine that the obligations assumed by the parties are required by law. Indeed, consent decrees often impose rights and obligations greater than those required by law."[128] The terms of consent decrees are "voluntarily assumed rather than legally imposed, [so] there is no basis for extending the negotiated outcome to a nonparty."[129]

The court therefore drew a distinction: the AWA could compel nonparties where the compulsion is necessary to ensure obedience to the law, but not to privately-negotiated consent decrees. As for such consent decrees, the court drew another distinction: nonparties could be bound by consent decrees "where the interests of nonparties have been adequately represented by parties to the consent decree."[130]

Finally, in *Williams v. McKeithen*, a district court ordered a number of Louisiana sheriffs to remove prisoners held in parish jails

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124 *Id.* at 369.

125 *Id.*

126 *Id.* at 370.

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.* at 372 (citing United States v. Int'l Bhd. of Teamsters, 931 F.2d 177, 185–86 (2d Cir. 1991)). This case was similar to *In re "Agent Orange" Product Liability Litigation*, in which the Second Circuit considered a settlement agreement that forever barred class members from instituting or maintaining an action against the defendant manufacturers of Agent Orange. 996 F.2d 1425, 1429 (2d Cir. 1993). After the agreement issued, two overlapping class actions were brought in Texas courts. *Id.* at 1430. They were removed to federal court, in part pursuant to the AWA. *Id.* The Second Circuit held that this was an appropriate use of the AWA because

> [i]f Agent Orange victims were allowed to maintain separate actions in state court, the deleterious effect on the *Agent Orange I* settlement mechanism would be substantial. The parties to the settlement implicitly recognized this when they agreed that all future suits by class members would be permanently barred. It is difficult to conceive of any state court properly addressing a victim's tort claim without first deciding the scope of the *Agent Orange I* class action and settlement. The court best situated to make this determination is the court that approved the settlement and entered the judgment enforcing it.

Id. at 1431.

pursuant to contracts with one district and the Immigration and Naturalization Service.[131] This order emerged from prisoners' §§ 1981 and 1983 lawsuits, claiming that conditions of their confinement violated the 8th and 14th Amendments.[132] The litigation had not addressed conditions at parish jails, but the court ordered the sheriffs to address the problem of overcrowding at those jails.[133] It did so pursuant to the AWA,[134] but gave the sheriffs no notice of the hearing at which the order issued.[135]

The Fifth Circuit vacated the order, finding that the order at issue did not have "the same close nexus to an underlying order as was the case in *New York Telephone Co.*, for here there is no finding or evidence that [the sheriffs] had refused or been unable to receive any state penitentiary prisoners whom the district court had ordered transferred."[136] The court concluded that the AWA cannot support an order "that is not 'directed at conduct which, left unchecked, would have had the practical effect of diminishing the court's power to bring the litigation to a natural conclusion.'"[137] Finally, it referred to the Supreme Court's opinion in *Milliken v. Bradley*, that remedies imposed on parties "not shown to have committed any constitutional violation" is "wholly impermissible."[138]

C. *The AWA as Expansive and Normatively Bound*

Except for *Williams*, these cases do not bode well for an AWA of limited coercive authority over innocent nonparties to litigation. The best that can be said is that AWA jurisprudence does not appear to be the model of consistency. The Supreme Court has, indeed, suggested that its application is flexible, and is based, at least in part, on normative considerations. In *Barnes v. E-Systems, Inc. Group Hospital Medical & Surgical Insurance Plan*, the Court wrote that under the AWA, a stay of judgment "issues not of right but pursuant to sound equitable discretion; 'it requires,' as Chief Justice Taft said, 'a clear case and a decided balance of convenience.'"[139] In *Hohn v. United States*, a

131 939 F.2d 1100, 1101 (5th Cir. 1991).
132 *Id.* at 1102.
133 *Id.*
134 *Id.* at 1103.
135 *Id.*
136 *Id.* at 1104.
137 *Id.* at 1104–05 (quoting ITT Cmty. Dev. Corp. v. Barton, 569 F.2d 1351, 1359 (5th Cir. 1978)).
138 *Id.* at 1104 (quoting Milliken v. Bradley, 418 U.S. 717, 745 (1974)).
139 501 U.S. 1301, 1302 (quoting Magnum Import Co. v. Coty, 262 U.S. 159, 164 (1923)).

dissenting Justice Scalia would have applied the AWA only if a different statute did not preclude the application and where relief under the AWA is "appropriate" because its need is "exceptional."[140] In *Stringfellow v. Concerned Neighbors in Action*, a concurring Justice Brennan observed that a writ of mandamus may be available "under the [AWA]" but only where there are "extraordinary circumstances giving rise to a compelling demand for pretrial relief."[141] The writ may issue, wrote Brennan, when a district court action "tends to frustrate or impede the ultimate exercise by the Court of Appeals of its appellate jurisdiction granted in some other provision of the law."[142] The *New York Telephone* Court wrote that the AWA may be invoked when necessary in a court's "sound judgment to achieve the ends of justice entrusted to it" and is to be applied "flexibly in conformity with these principles."[143] The Third Circuit has observed that although orders made pursuant to the AWA "must be 'agreeable to the usages and principles of law,'" the AWA "tolerates a flexible approach" unrestrained by "the ordinary forms and purposes of legal process."[144] Finally, and not to put too fine a point on it, the Seventh Circuit has called the language of the AWA "obscure and anachronistic."[145]

II. FROM THE AWA TO CALEA: *IN RE ORDER REQUIRING APPLE, INC. TO ASSIST IN THE EXECUTION OF A SEARCH WARRANT ISSUED BY THIS COURT*

A. *The Facts of the Case and the AWA's Reach*

Most cases involving CALEA have involved government attempts to obtain pen registers, trap and trace orders, or cell site data.[146] These

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140 524 U.S. 236, 264 (1998) (Scalia, J., dissenting).

141 480 U.S. 370, 383 (1987) (Brennan, J., concurring in part and concurring in the judgment).

142 *Id.* at 384 (quoting La Buy v. Howes Leather Co., 352 U.S. 249, 264 (1957) (Brennan, J., dissenting)).

143 United States v. N.Y. Tel. Co., 434 U.S. 159, 173 (1977) (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 273 (1942)).

144 *In re* Grand Jury Proceedings (*Wright II*), 654 F.2d 268, 276 (3d Cir. 1981) (citing Price v. Johnston, 334 U.S. 266, 268, 283–84 (1948)).

145 *In re* Application of the County Collector of the County of Winnebago, Illinois, 96 F.3d 890, 899 (7th Cir. 1996).

146 *See, e.g.*, *In re* Application of the United States for an Order Authorizing (1) Installation & Use of a Pen Register and Trap and Trace Device or Process, (2) Access to Customer Records, and (3) Cell Phone Tracking, 441 F. Supp. 2d 816 (S.D. Tex. 2006); *In re* Application of the United States for an Order Authorizing the Installation & Use of a Pen Register and/or Trap & Trace for Mobile Identification Number (585) 111-1111 & the Disclosure of Subscriber

cases are of little use to understand whether CALEA authorizes the government's proposed order in the Apple litigation. The New York court has offered an early but erroneous argument that CALEA prohibits the proposed order under the AWA.

In *In re Order Requiring Apple, Inc. to Assist in the Execution of a Search Warrant Issued by this Court*, the New York court considered a request by the government to order Apple to assist in the execution of a search warrant on an iPhone.[147] This request was to facilitate the warranted search of the iPhone of a drug trafficker, whose phone was password protected.[148] After government attempts to bypass the password proved unsuccessful, it asked Apple for help.[149] Apple informed the government that it had the technology to bypass the password and that it would unlock the phone if the government obtained a valid court order.[150] Apple assisted the government in drafting appropriate language to include in the application for this order.[151]

In October 2015, the government filed its application, relying exclusively on the AWA for authority.[152] After briefing and oral argument throughout October, the court requested post-hearing submissions to flesh out additional factual and legal issues that had been raised.[153] At the end of October, however, the defendant decided to plead guilty and, for reasons unclear, the iPhone order application progressed no further for several months.[154]

On February 12, 2016, in the midst of the debate regarding whether Apple should assist the government in the San Bernardino case[155] and, more broadly, the balance between privacy and security versus law

and Activity Information under 18 U.S.C. § 2703, 415 F. Supp. 2d 211 (W.D.N.Y. 2006); *In re* Application for Pen Register & Trap/Trace Device with Cell Site Location Authority, 396 F. Supp. 2d 747 (S.D. Tex. 2005); *In re* Application of the United States for an Order (1) Authorizing the Use of a Pen Register & a Trap and Trace Device and (2) Authorizing Release of Subscriber Information and/or Cell Site Information, 396 F. Supp. 2d 294 (E.D.N.Y. 2005).

147 149 F. Supp. 3d 341, 344 (E.D.N.Y. 2016).

148 *Id.* at 344–45.

149 *Id.* at 345–46 (this request came after the expiration of the two-week period during which agents were permitted to execute the warrant, but this fact is of no moment to the instant inquiry).

150 *Id.* at 346.

151 *Id.*

152 *Id.*

153 *Id.* at 347.

154 *Id.*

155 Zac Hall, *Apple at Center Stage of Republican Presidential Debate over Encryption & National Security*, 9TO5MAC (Jan. 15, 2016, 8:59 AM), https://9to5mac.com/2016/01/15/tim-cook-republican-debate-encryption.

enforcement interests,[156] and four days before the California court issued its preliminary order requiring Apple to assist,[157] Apple reversed course in the New York case. "[A]pparently unprompted by any development in [the New York] case, but just as apparently, in hindsight, reacting to developments elsewhere,"[158] Apple began to oppose the government's requested assistance. The New York court considered the issue pursuant to the AWA and CALEA, and ultimately denied the government's application to compel Apple to assist its efforts to bypass the iPhone's password protection.[159]

The court first considered the scope of the AWA. As a threshold matter, the AWA's plain text, said the court, conferred upon courts the authority to issue orders where three requirements were satisfied: the order is (1) "'in aid of' the issuing court's jurisdiction"; (2) "'necessary or appropriate' to provide such aid to the . . . court's jurisdiction"; and (3) "agreeable to the usages and principles of law."[160]

Second, if all three factors are satisfied, then the court "may," pursuant to its discretion, issue the requested order, but it is never required to do so.[161] The court's discretion should be based on a consideration of three factors, which arose from *New York Telephone*: "(1) the closeness of the relationship between the person or entity to whom the proposed [order] is directed and the matter over which the court has jurisdiction; (2) the reasonableness of the burden to be imposed on the . . . subject [of the order]; and (3) the necessity of the requested writ to aid the court's jurisdiction."[162]

The court found that the government satisfied the first two threshold textual requirements,[163] but failed on the third: the proposed order, said the court, was not "agreeable to the usages and principles of law."[164] The court noted that the limits of the AWA's gap-filling authority are clearly bounded at their extremes. On one end, "the AWA cannot be interpreted to empower courts to do something that another statute already authorizes (but that might have threshold requirements

156 Eric Geller, *FBI Director Invokes San Bernardino Attack in Defense of Anti-Encryption Narrative*, DAILY DOT (Feb. 10, 2016, 8:36 AM), http://www.dailydot.com/layer8/intelligence-community-senate-hearing.

157 Order Compelling Apple, Inc. to Assist Agents in Search, *In re* Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, California License Plate 35KGD203, 2016 WL 618401, No. ED 15-0451M (C.D. Cal., Feb. 16, 2016).

158 *In re Apple, Inc.*, 149 F. Supp. 3d at 348.

159 *Id.* at 351.

160 *Id.* at 350 (quoting 28 U.S.C. § 1651(a) (2010)).

161 *Id.* at 351.

162 *Id.*; *accord* United States v. Hall, 583 F. Supp. 717, 719 (E.D. Va. 1984).

163 *In re Apple, Inc.*, 149 F. Supp. 3d at 351–52.

164 *Id.* at 352–54.

that cannot be satisfied in the circumstances of a particular case)."[165] "At the other end," the AWA cannot be relied upon "to issue an order that is explicitly or implicitly prohibited under a federal statute."[166]

The Apple case fell into the gap between these poles. For Apple and the court, the novel issue was whether "a court order that accomplishes something Congress has considered but declined to adopt—albeit without explicitly or implicitly prohibiting it—is . . . agreeable to the usages and principles of law."[167] The court was referring to CALEA and the legislative history around it.[168]

B. *CALEA's Text*

In relevant part, CALEA requires a "telecommunications carrier" to ensure that its equipment "that provide[s] a customer or subscriber with the ability to originate, terminate, or direct communications" can enable the government, pursuant to lawful authorization, "to intercept, to the exclusion of any other communications, all wire and electronic communications carried by the carrier within a service area to or from equipment, facilities, or services of a subscriber of such carrier concurrently with their transmission to or from the subscriber's equipment."[169] The carrier must also ensure that the government can

> access call-identifying information that is reasonably available to the carrier . . . before, during, or immediately after the transmission of a wire or electronic communication . . . except that, with regard to information acquired solely pursuant to the authority for pen registers and trap and trace devices . . . such call-identifying information shall not include any information that may disclose the physical location of the subscriber.[170]

CALEA, furthermore, does

> not authorize any law enforcement agency or officer . . . to require any specific design of equipment, facilities, services, features, or system configurations to be adopted by any provider of a wire or electronic communication service . . . or . . . to prohibit the adoption

165 *Id.* at 353.
166 *Id.*
167 *Id.*
168 *Id.* at 353–54.
169 47 U.S.C. § 1002(a)(1) (2012).
170 47 U.S.C. § 1002(a)(2).

> of any equipment, facility, service, or feature by any provider of a wire or electronic communication service.[171]

Furthermore, "[a] telecommunications carrier shall not be responsible for decrypting, or ensuring the government's ability to decrypt, any communication encrypted by a subscriber or customer, unless the encryption was provided by the carrier and the carrier possesses the information necessary to decrypt the communication."[172]

C. *CALEA's Legislative Record*

The purpose of CALEA was "to make clear a telecommunication carrier's duty to cooperate in the interception of communications for law enforcement purposes."[173] In making this clarification, CALEA was "to preserve the government's ability . . . to intercept communications involving advanced technologies such as digital or wireless transmission modes, or features and services such as call forwarding, speed dialing and conference calling, while protecting the privacy of communications and without impeding the introduction of new technologies, features, and services."[174] The House Report on CAELA was, in fact, explicit that CALEA sought to balance the three "key policies" of (1) "preserv[ing] a narrowly focused capability for law enforcement agencies to carry out properly authorized intercepts"; (2) "protect[ing] privacy in the face of increasingly powerful and personally revealing technologies"; and (3) "avoid[ing] impeding the development of new communications services and technologies."[175]

The legislative record noted that *New York Telephone* generated the novel question "whether companies have any obligation to design their systems such that they do not impede law enforcement interception."[176] When FBI Director Freeh testified before the congressional committee in 1994, he provided a list of problems that his agency had encountered when attempting to perform CALEA-related surveillance. Breaking a phone password or similar problem did not appear on the list.[177] The record did reflect, however, an appreciation that the ability of law enforcement to carry out wiretaps in the digital age would become

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171 47 U.S.C. § 1002(b)(1).
172 47 U.S.C. § 1002(b)(3).
173 H.R. REP. NO.103-827, pt. 1, at 1 (1994) (CALEA House Report).
174 *Id.* at 12.
175 *Id.* at 15.
176 *Id.*
177 *Id.* at 16–17.

increasingly difficult, if not impossible.[178] CALEA was designed to "preserve the government's ability . . . . to conduct wiretaps."[179] According to Director Freeh, CALEA "was intended to preserve the status quo . . . to provide law enforcement no more and no less access to information than it had in the past."[180]

To that end, Director Freeh made clear that CALEA "[e]xplictly states that it does not limit the rights of subscribers to use encryption," nor does it "require mobile service providers to reconfigure their networks to deliver the content of communications occurring outside a carrier's service area."[181] CALEA, furthermore,

> expressly provides that law enforcement may not dictate system design features and may not bar introduction of new features and technologies . . . . Courts may order compliance and may bar the introduction of technology, but only if law enforcement has no other means reasonably available to conduct interception and if compliance with the standards is reasonably achievable through application of available technology. This means that if a service of technology cannot reasonably be brought into compliance with the interception requirements, then the service or technology can be deployed. This is the exact opposite of the original versions of the legislation, which would have barred introduction of services or features that could not be tapped.[182]

Detailing the assistance that telecommunications carriers would be obligated to provide to law enforcement, the Committee "urge[d] against [an] overbroad interpretation of the requirements."[183] It "expect[ed] industry, law enforcement and the FCC to narrowly interpret the requirements," one of which was that "law enforcement agencies are not permitted to require the specific design of systems or features, nor prohibit adoption of any such design, by wire or electronic communication service providers or equipment manufacturers."[184]

The report also made explicit that "telecommunications carriers have no responsibility to decrypt encrypted communications . . . unless the carrier provided the encryption and can decrypt it. This obligation is consistent with the obligation to furnish all necessary assistance under 18 U.S.C. [§] 2518(4)."[185] This would not

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178 *Id.* at 17.
179 *Id.* at 17–18.
180 *Id.* at 23.
181 *Id.* at 19.
182 *Id.* at 20.
183 *Id.* at 23.
184 *Id.* at 23–24.
185 *Id.* at 25.

> prohibit a carrier from deploying an encryption service for which it does not retain the ability to decrypt communications for law enforcement access . . . Nothing in [CALEA] is intended to limit or otherwise prevent the use of any type of encryption within the United States. Nor does the Committee intend [CALEA] to be in any way a precursor to any kind of ban or limitation on encryption technology. To the contrary, [CALEA] protects the right to use encryption.[186]

A court that is considering issuing a wiretap order pursuant to CALEA would have to "find that law enforcement has no alternatives reasonably available for implementing the order through use of other technologies or by serving the order on another carrier or service provider."[187] The court must also find that compliance with an order is "reasonably achievable through application of available technology."[188] This "will involve a consideration of economic factors" and "is intended to excuse a failure to comply with the assistance capability requirements or capacity notices where the total cost of compliance is wholly out of proportion to the usefulness of achieving compliance for a particular type or category of services or features."[189]

CALEA's legislative record clearly evinces a concern for privacy, innovation around the encryption question, and protecting industry products and business models. This is, of course, to Apple's benefit. This legislative record, however, raises fundamental questions that must be answered to determine whether the Apple litigation is governed by CALEA, and thus whether CALEA might limit the scope of AWA coverage. First, is CALEA intended to govern orders to facilitate the search of data on a smartphone as in the Apple litigation? Second, is Apple a "telecommunications carrier" covered under CALEA? Third, does the Committee's mention of *New York Telephone* mean that the Committee implicitly rejected the validity of the government's requested order against Apple? Fourth, does Apple "possess" the ability to break an iPhone's password protection system not because it already can break the system but because it has the *ability to create the ability* to break the system? Fifth, if the government's requested order against Apple is, as a threshold matter, valid under CALEA, is it nevertheless unreasonable, and must the government exhaust all other alternative methods to achieving its aim? The first three questions can be answered by asking the first. The fourth question remains unclear. The fifth question can be

186 *Id.*
187 *Id.* at 28.
188 *Id.*
189 *Id.*

answered by considering the discretionary factors set forth in *New York Telephone*.

D. *Does CALEA Govern Orders to Facilitate the Search of Data on a Smartphone as in the* Apple *Litigation?*

In the New York Apple case, the government argued that CALEA governs only surveillance of data "in motion," whereas the Apple litigation involves government attempts to seize evidence "at rest," or already stored on a cell phone.[190] The government in the California case made the same argument.[191] According to the government, since CALEA governs only data in motion (the traditional target of wiretaps and trap and trace devices), it does not cabin the court's authority to issue the requested order pursuant to the AWA.[192]

The New York district court disagreed, noting that although CALEA didn't regulate data at rest, Congress did enact legislation elsewhere.[193] The Stored Communications Act (SCA), 18 U.S.C. § 2703, guides the private sector's responsibilities in assisting law enforcement's attempts to access data both in motion and at rest.[194] None of the SCA's provisions required Apple to provide the requested assistance, and CALEA provided that "information services" are exempt from any "assistance requirement."[195] This latter point was pertinent because Apple persuasively argued that it was engaged in providing information services.[196]

Thus, while the government was correct that CALEA did not speak to its request to compel Apple's assistance, the court concluded that a complex statutory scheme, which imposed *some* duties on entities like Apple, but not the duty in question, implicitly prohibited the order in question because it could have included such a provision but did not.[197]

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190 *In re* Order Requiring Apple, Inc. to Assist in the Execution of a Search Warrant Issued by this Court, 149 F. Supp. 3d 341, 355 (E.D.N.Y. 2016).

191 Government's Motion to Compel Apple Inc. to Comply with this Court's February 16, 2016 Order Compelling Assistance in Search, *supra* note 9, at 22–23.

192 *Id.*

193 *In re Apple, Inc.*, 149 F. Supp. 3d at 355–56.

194 *Id.*

195 *Id.* at 356.

196 *Id.*

197 *Id.* at 357 ("To be sure, CALEA by itself has limits that render that one statute less than comprehensive. But considered together with other statutes prescribing the extent to which law enforcement may secure access to a wide array of data—both 'in motion' and 'at rest'—as well as the obligations of some private entities but not others to provide affirmative assistance to such investigations, the statute is easily seen as part of a comprehensive legislative scheme. The

For the court, it was not explicit language in a statute that cabined the AWA's scope, but what was left out of the statute in the legislative process during which Congress could have readily included the authority to issue the order against Apple. The AWA, wrote the court,

> requires an order issued under its aegis to be agreeable not merely to some part of the entire body of law, but to the law's "usages" and "principles"—which must mean something else. The most natural reading gives meaning to the whole phrase by limiting the permissible orders to those that not only fail to violate legislative prohibitions, but that also are consonant with both the manner in which the laws were developed (that is, the "principles" that the laws reflect) and the manner in which the laws have been interpreted and implemented (that is, the "usages" of the various laws).[198]

To interpret the AWA's scope any differently would, according to the court, produce absurd results.[199] Of necessity, then, the AWA's "usages and principles" language must mean, at least, that the AWA "cannot be a means for the executive branch to achieve a legislative goal that Congress has considered and rejected."[200] To allow the government's argument that the AWA confers upon the executive branch

> any investigative authority Congress has decided to withhold, so long as it has not affirmatively outlawed it—would transform the AWA from a limited gap-filling statute . . . into a mechanism for upending the separation of powers by delegating to the judiciary a legislative power bounded only by Congress's superior ability to prohibit or preempt.[201]

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absence from that comprehensive scheme of any requirement that Apple provide the assistance sought here implies a legislative decision to prohibit the imposition of such a duty.").

198 *Id.* at 358.

199 *Id.* at 360 ("If, for example the President sent to Congress a bill explicitly authorizing a court to issue the kind of order the government seeks here, and if every single member of the House and Senate were to vote against the enactment of such a law citing the kinds of data security and personal privacy concerns that Apple now embraces, the government would nevertheless describe the order sought here as permissible because Congress had merely rejected the bill—however emphatically, and however clear its reasons for doing so—rather than affirmatively passing legislation to prohibit the executive branch's proposal. Yet in such circumstances, it would be absurd to posit that the authority the government sought was anything other than obnoxious to the law.").

200 *Id.*

201 *Id.* at 360–61.

E. *Apple's Ability to Decrypt*

CALEA provides that "[a] telecommunications carrier shall not be responsible for decrypting, or ensuring the government's ability to decrypt, any communication encrypted by a subscriber or customer, unless the encryption was provided by the carrier and the carrier *possesses the information* necessary to decrypt the communication."[202] At the same time, the CALEA House report noted that "telecommunications carriers have no responsibility to decrypt encrypted communications . . . unless the carrier provided the encryption and *can* decrypt it."[203]

These provisions suggest four very different outcomes. Possession of "the information necessary to decrypt the communication" suggests either possession of the code that the government would have wanted Apple to develop—meaning that the code already exists—or it could mean possession of the knowledge and technological ability to develop the code. Whether Apple "can" decrypt a phone's password protection suggests the same divergent conclusion. This divergence comes from considering what it takes to be able to do something.

To analogize: Julia Child has been asked to make a Baked Alaska, which requires pound cake, strawberry ice cream, egg whites, lemon juice, and sugar.[204] Julia Child is currently suffering from a debilitating bout with influenza. Being Julia Child, she clearly possesses the information necessary to make a Baked Alaska, but being sick, she has neither the energy to cook nor to go to the store to purchase the ingredients (which she does not have on hand). To power through her illness and make the Baked Alaska would mean that she gets even sicker, and cannot film her television show the next day. This would hurt her ratings and undermine her business as a television cooking star. What would we say about Julia Child's ability to make the Baked Alaska?

One reading of CALEA is that because Julia Child "possesses the information" necessary to make the dessert, she can do so. Under this "informational" reading, Apple might be compelled to produce the code necessary to break the iPhone. Another reading is that an ability to act depends not only upon one's information, but also one's material ability to act. Julia Child does not have the ingredients for the dessert so, however skillful a baker she is, she literally "can" not make the dessert. Under this "material" reading, Apple would not be compelled to

202 47 U.S.C. § 1002(b)(3) (2012) (emphasis added).

203 H.R. REP. NO. 103-827, pt. 1, at 24 (1994) (emphasis added).

204 *See Baked Alaska*, EPICURIOUS (June 2001), http://www.epicurious.com/recipes/food/views/baked-alaska-105132.

generate code that does not now exist. A third reading is that Julia Child, because she is sick, lacks the realistic physical ability to make the dessert. Under this "physicality" reading, a court would have to determine whether Apple could physically comply with the order. This is a real question, as it appeared possible that had Apple been compelled to comply, its key engineers would have resisted or even left the company rather than produce the requested code.[205] A fourth reading is that Julia Child is unable to make the Baked Alaska because to do so would undermine her legitimate business interests. According to Apple and many of its amici, this "business" reading would mean that Apple cannot be compelled to write the code, since it would undermine a major consumer attraction of one of its marquee products.

It appears that no court has considered the "possession" question in the context of CALEA. The New York district court did not consider it. It did, however, consider *New York Telephone*'s discretionary factors, which touch upon, at least, the business reading of the possession question.[206]

F. *Even if CALEA Permits a Court to Order Apple to Comply, Would the Order Nevertheless Be Unreasonable?*

Having found that CALEA and the statutory context foreclosed the government's use of the AWA to obtain its requested order, the New York district court also found that *New York Telephone*'s discretionary factors would also disallow the order.[207]

First, Apple's relationship to the defendant's criminal activity was too attenuated to compel Apple's assistance.[208] The phone belonged to the defendant, not Apple; Apple is not a highly regulated public company like New York Telephone, and thus has no duty to serve the public as the telephone company did; Apple played no role in the defendant's crime; and Apple took no affirmative action to thwart the government's search of the defendant's phone.[209] Apple, furthermore, was not sufficiently close to the underlying criminal conduct to compel assistance.[210] Apple did not thwart the government's investigation, did

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205 John Markoff, Katie Benner & Brian X. Chen, *Apple Encryption Engineers, if Ordered to Unlock iPhone, Might Resist*, N.Y. TIMES (Mar. 17, 2016), https://www.nytimes.com/2016/03/18/technology/apple-encryption-engineers-if-ordered-to-unlock-iphone-might-resist.html?_r=0.

206 *In re Apple, Inc.*, 149 F. Supp. 3d at 351.

207 *Id.* at 363–64.

208 *Id.* at 364.

209 *Id.* at 364–69

210 *Id.* at 365.

nothing to hinder the investigation, and did not conspire with the defendant to make his phone's data inaccessible.[211] The government's complaint, indeed, was that Apple was "doing nothing at all."[212]

Second, the requested order would be unreasonably burdensome on Apple.[213] Apple is not a highly regulated public utility with a duty to serve the public; Apple contended that it was in its interests as a private company not to provide the assistance; breaking the password protection is not something that Apple would do in the normal course of its business operations and is offensive to those operations; Apple had not offered and would never offer to the government the information needed to bypass an iPhone's password security on its own; engineering such a bypass would impose labor, hardware, and software costs on Apple, which would be diverted from its normal business operations; and the requested order would post a severe threat to Apple's autonomy.[214]

Third, the court found that the government had the duty to show that Apple's assistance was necessary.[215] The government, said the court, was unable to make this showing, in part because in an earlier pleading in another case the government claimed that the Department of Homeland Security possessed the requisite technology, and in part because government representations in the Apple case were that its ability to break the password protection on its own depended upon the device and software in place.[216] The government, said the court, "has made so many conflicting statements in the two cases as to render any single one of them unreliable."[217] Necessity was not, therefore, shown.

III. THE AWA AND CALEA APPLIED TO THE CALIFORNIA *APPLE* LITIGATION

The New York court's ultimate denial of the government's requested order was the right outcome, but for an incomplete and partially wrong reason. While the court was correct to side with Apple on the AWA's discretionary factors, it erred in concluding that the statutory complex prohibited it from issuing the government's requested order. The New York court's reasoning, based as it was on

211 *Id.* at 366–67.
212 *Id.* at 366.
213 *Id.* at 368–69.
214 *Id.* at 368–73.
215 *Id.* at 373.
216 *Id.* at 374–75.
217 *Id.* at 375.

facts nearly identical to the California case, applies to its West Coast relative.

There are six issues to consider to determine whether, and under what circumstances, the government's requested order could legally issue. First, would the AWA, on its own, permit a court to grant the government's order? Second, what is the validity of the government's claim that CALEA does not govern the Apple litigation? Third, what role does the SCA play in this litigation? Fourth, what is the validity of the New York court's contention that the broad statutory framework, including as it does the AWA, CALEA, SCA, and the legislative record regarding what is *not* explicit in these statutes, prevents the government from obtaining its requested order? Fifth, do *New York Telephone*'s discretionary factors militate in favor of Apple's position under the AWA? Sixth, does the AWA's "usages and principles" provision, which encompasses both constitutional concerns and political-economic interests in business autonomy and profitability, prohibit the government's requested order from issuing?

A. *The AWA's Scope, on Its Own*

The AWA, at its most conservative, is a gap-filling measure that operates where no other statute cabins it and where the operation is in aid of a court's jurisdiction, appropriate to that aid, and agreeable to the usages and principles of law. If CALEA, the SCA, and the statutory framework (both positive and negative) arising from these statutes did not exist, the AWA would clearly permit a court to grant the government's requested order. The government had obtained a valid warrant to search the iPhone, and the issuing court had jurisdiction over the search. The iPhone's password protection limited the ability of law enforcement to execute the warranted search, so the order would be in aid of that jurisdiction. The order would be limited to the single iPhone and scope of the search warrant, so would be appropriate to that aid. Finally, in the absence of any countervailing statute or legal structure, the order would be agreeable to the usages and principles of law. In reality, the New York court easily found in favor of the government as to the "aid of" and "appropriate" prongs. The next question became whether CALEA limits the operation of the AWA to permit the government's requested order.

B. *Does CALEA Apply to the* Apple *Case?*

The New York Court and Apple's amici in the California litigation assumed that CALEA applies to this case. That, however, is not clear for four reasons.

First, the government's point that CALEA was meant to govern data "in motion" is relevant. CALEA's legislative record was clear that the law was meant to clarify and modernize the law on wiretaps and trap and trace devices. Such law enforcement tools are used to surveille and capture the contents, sources, and destinations of communications. FBI Director Freeh and the congressional committee overseeing CALEA were clear that CALEA was not supposed to govern or be read to govern anything beyond the authority that the government already had based on extant wiretap and trap and trace laws.[218]

Second, and arising from the first, CALEA governs "telecommunications carriers." It is doubtful that Apple, at least in the context of this litigation, is a telecommunications carrier. Indeed, Apple itself has eschewed the label telecommunications carrier in the California litigation, preferring to call itself an entity that provides information services.[219] CALEA does not govern information service providers.[220] Rather, the SCA does.[221] If CALEA does not govern the type of entity that Apple claims it is, then even a negative reading of CALEA, compelling as it might be regarding the (non)-duty of a telecommunications carrier to decrypt, is irrelevant.

Third, even if CALEA did govern information service providers, Congress specifically exempted only telecommunications carriers from the duty to decrypt—it could have, but did not, exempt information service providers.[222] The New York court's insistence that CALEA imposes obligations on telecommunications carriers, but not

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218 Peter T. King, *Remembering the Lessons of 9/11: Preserving Tools and Authorities in the Fight Against Terrorism*, 41 J. LEGIS. 173, 178–80 (2014) ("CALEA is not viewed as applying to data contained on smart phones, and there has been a great deal of debate about whether it should be expanded to cover this content.").

219 Apple Inc.'s Motion to Vacate Order Compelling Apple Inc. to Assist Agents in Search, and Opposition to Government's Motion to Compel Assistance, *supra* note 8, at 8 n.13.

220 47 U.S.C. § 1002(b)(2) (2012); Deborah F. Buckman, Annotation, *Allowable Use of Federal Pen Register and Trap and Trace Device to Trace Cell Phones and Internet Use*, 15 A.L.R. Fed. 2d 537, Art. 1, § 2 (2006) ("It is noteworthy that CALEA does not cover 'information services' such as e-mail and Internet access.").

221 *In re* United States for an Order Authorizing Prospective and Continuous Release of Cell Site Location Records, 31 F. Supp. 3d 889, 892 n.11 (S.D. Tex. 2014) (citing Nathaniel Gleicher, Comment, *Neither a Customer nor a Subscriber Be: Regulating the Release of User Information on the World Wide Web*, 118 YALE L. J. 1945, 1947 (2009) (The SCA "only regulates information pertaining to customers or subscribers of covered information services")).

222 47 U.S.C. § 1002(b)(3).

information service providers,[223] is undoubtedly true. But it is equally true that CALEA's protection of telecommunications carriers from any duty to decrypt does not extend to information service providers.

Fourth, even if CALEA does govern this case and the protection from the duty to decrypt extends to Apple, it may provide that Apple nevertheless has a duty to decrypt, depending upon the definition of "possess," discussed in Section II.E above. The answer to this will depend upon future judicial interpretations of that term.

The New York court, Apple, Apple's amici in the California case, and numerous experts erred in concluding that CALEA applies to this case. Apple, as an information service provider, is not the type of entity envisioned by CALEA, and the government's requested order has nothing to do with wiretapping or trapping and tracing phone call signals. Rather, the order at issue should have been viewed as a mandate to assist in the search of a mere digital container (however strong the lock is).

C. *If Apple Is an Information Services Provider, then Does the SCA Govern the Scope of the AWA's Operation?*

The privacy of stored Internet communications is governed by the SCA[224] by limiting what entities "providing an electronic communication service to the public" or a "remote computing service" may divulge.[225] A "'remote computing service' means the provision to the public of computer storage or processing services by means of an electronic communications system."[226] Services that entail "providing storage or computer processing services" are also covered.[227] Through either a warrant (in some cases) or a subpoena (in other, inapplicable cases), law enforcement may require a provider of a remote computing service to disclose the contents of "any wire or electronic communication."[228]

Given these provisions, the Apple litigation—and the scope of the AWA's applicability—seems more properly governed by the SCA, if anything, than CALEA. However, the SCA "does not apply to

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223 *In re* Order Requiring Apple, Inc. to Assist in the Execution of a Search Warrant Issued by this Court, 149 F. Supp. 3d 341, 356 (E.D.N.Y. 2016).

224 Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1208 (2004).

225 18 U.S.C. § 2702(a)(1)–(2) (2012).

226 18 U.S.C. § 2711(2).

227 18 U.S.C. § 2702(a)(2)(B).

228 18 U.S.C. § 2703(b).

government access to records held by a party to the communication."[229] Rather, it applies to third parties that hold customers' information.[230]

The New York district court noted that Apple does not own the iPhones of its users,[231] a proposition to which, because it serves Apple's argument, Apple has never objected. Apple's attenuation argument, and the New York court's conclusion on the same point, pulls Apple away from SCA governance—if, indeed, there were ever an argument to be made that the SCA *did* apply. Finally, even if the SCA did apply, there is no provision in that statute regarding encryption and a service provider's duty or non-duty to decrypt.

D. *Does the Statutory Complex, Including CALEA, the SCA, and the New York Court's Negative Reading of These Statutes Suggest that Apple Is Protected from the Government's Requested Order?*

The text of CALEA evinces a clear concern with privacy, industry innovation and customer service, and protection of encryption technology. The statute's legislative record, furthermore, responded to *New York Telephone*, an AWA case, suggesting that CALEA provides a meaningful boundary to the AWA's authority in cases like Apple's.[232] However, as noted above, CALEA itself and the SCA itself do not govern the Apple case. There is, furthermore, no evidence in the legislative record that Congress considered a specific case like Apple's and intentionally rejected the possibility of the type of order the government is requesting. There is, in short, no statutory protection Apple can invoke, nor is there a clear negative penumbra that Apple can refer to in order to glean Congress's implicit intent to protect Apple in this case.

The lack in the statutory complex of any protection for Apple in this case is highlighted by two bills currently pending in Congress.

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229 RICHARD M. THOMPSON II & JARED P. COLE, CONG. RESEARCH SERV., R44036, STORED COMMUNICATIONS ACT: REFORM OF THE ELECTRONIC COMMUNICATIONS PRIVACY ACT (ECPA), at summary (2015).

230 *Id.* at 1 (The SCA, for example, governs "when the government can demand that Google turn over emails; when social media sites like Facebook must provide private posts; when video-sharing sites like YouTube must provide stored videos; and when cell phone companies must turn over cell location information").

231 *In re* Order Requiring Apple, Inc. to Assist in the Execution of a Search Warrant Issued by this Court, 149 F. Supp. 3d 341, 364 (E.D.N.Y. 2016).

232 This was, of course, Apple's argument in its motion to vacate. Apple Inc.'s Motion to Vacate Order Compelling Apple Inc. to Assist Agents in Search, and Opposition to Government's Motion to Compel Assistance, *supra* note 8, at 16.

The Secure Data Act of 2015 would "prohibit Federal agencies from mandating the deployment of vulnerabilities in data security technologies."[233] This bill would prohibit the government from "mandat[ing] that a manufacturer, developer, or seller of covered products design or alter the security functions in its product or service to allow the surveillance of any user of such product or service, or to allow the physical search of such product, by any agency."[234] "Covered products" include "any computer hardware, computer software, or electronic device that is made available to the general public."[235] This bill is intended to be integrated into CALEA, such that it does not trump any provision in that law.[236]

The End Warrantless Surveillance of Americans Act of 2015 is intended to amend the Foreign Intelligence Surveillance Act of 1978.[237] This bill uses the same language and provides the same protection for manufacturers of covered products that the Secure Data Act of 2015 would provide.[238]

The New York district court, in a preliminary order, referred to these bills for the proposition that CALEA "did not anticipate later technological advancement and therefore omits from its extensive regulation of private actors the authority to compel the exact kind of assistance to law enforcement the government" was seeking from Apple.[239] Since the passage of CALEA in 1994, it appeared "that members of the executive and legislative branches have considered updating that statute to allow . . . the judicial authorization of the precise investigative technique at issue here—and have not reached a consensus that such action is warranted."[240] The Apple case, therefore, "falls in the murkier area in which Congress is plainly aware of the lack of statutory authority and has thus far failed either to create or reject it."[241]

The New York court further referred to an article written by United States Representative Peter King, which summarized CALEA's pertinent legislative history. King observed that after the first iPhone was released in 2007, "the FBI briefed Congress about the 'Going Dark'

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233 Secure Data Act of 2015, S. 135, 114th Cong., preamble (2015).

234 *Id.* § 2(a).

235 *Id.* § 2(c)(2).

236 *Id.* § 2(b).

237 End Warrantless Surveillance of Americans Act, H.R. 2233, 114th Cong., preamble (2015).

238 *Id.* § 4.

239 *In re* Order Requiring Apple, Inc. to Assist in the Execution of a Search Warrant Issued by this Court, No. 1:15-mc-01902-JO, 2015 WL 5920207, at *3 (E.D.N.Y. Oct. 9, 2015).

240 *Id.*

241 *Id.*

problem, and drafted legislation to amend CALEA."[242] This briefing pertained to new forms of electronic communications and the government's ability to conduct lawful wiretapping[243] but the legislation was never given to Congress.[244] King also cited then-Senator Biden's Comprehensive Counter-Terrorism Act of 1991, which aimed to "ensure that communications systems permit the government to obtain the plain text contents of voice, data, and other communications when appropriately authorized by law."[245] "Going Dark," therefore, referred to the government's decreasing ability to wiretap, intercept, or otherwise detect communications, though it did in smaller part refer to the increasing inability to "break the encryption algorithm resident in . . . device[s], or because the device[s do] not fall under CALEA or the developer has not built the access route."[246]

The New York court asserted that the question of Apple's protection under CALEA is a "close call,"[247] but it seems clear that the law compels the call that the court did not make. CALEA, its legislative history, and attempts to amend it focus on surveillance of communications "in motion" and are not concerned with the duty of one entity to decrypt the device of a person who purchased a device from that entity.

E. *Do* New York Telephone*'s Discretionary Factors Protect Apple Under the AWA?*

While the New York court was incorrect in finding that the statutory complex prohibited it from issuing the government's requested order, it was correct in finding that *New York Telephone*'s discretionary factors prohibit it.

First, Apple's relationship with the San Bernardino shooter and the crime at issue is as attenuated as would be any company's relationship with one of its millions of customers. To claim otherwise would be to invite private industry liability arising from the use of its products.

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242 King, *supra* note 218, at 178.

243 *Id.* at 178–79.

244 *Id.* at 179.

245 *Id.*

246 *Id.* at 180 (quoting *Addressing Remaining Gaps in Federal, State, and Local Information Sharing: Hearing Before the Subcomm. on Counterterrorism and Intelligence of the H. Comm. on Homeland Sec.*, 114th Cong. 1. (2015) (statement of Chief Richard Beary, President, International Association of Chiefs of Police)).

247 *In re* Order Requiring Apple, Inc. to Assist in the Execution of a Search Warrant Issued by this Court, 149 F. Supp. 3d 341, 357 (E.D.N.Y. 2016).

While some companies, like cigarette,[248] foreign and unlicensed gun,[249] and certain chemical manufacturers[250] have been actually or potentially liable, that liability arose from the inherent danger or misuse of the products. In the Apple case, an iPhone is not inherently dangerous, nor did the shooter "misuse" the iPhone in a way that generated a risk of harm.

Second, Apple and its amici offer convincing arguments that acceding to the requested order would be very burdensome. It would divert immediate labor, hardware, and software resources; promise the need to divert resources in the future to deal with other similar orders; undermine Apple's business model and product attractiveness; and defeat the efficacy of Apple's password protection system, which represents value added for iPhone customers.

Third, the necessity of the requested order is clearly absent, since the government found a third party to bypass the iPhone's password protection system.[251]

To be sure, future orders requesting that companies like Apple assist the government in breaking password protection systems may satisfy *New York Telephone*'s discretionary factors. The New York and California litigation, however, were not those cases.

F. *Do Other "Usages and Principles" of Law Undermine the Government's Position?*

The New York court found that the statutory complex of CALEA, the SCA, and their negative reading implied a set of usages and principles of law such that application of the AWA as the government requested would contradict.[252] Although I disagree with the court's ultimate conclusion regarding the limitations that this complex placed upon the AWA's application, I agree that the relevant usages and principles that cabin the AWA are not limited to explicit statutory provisions.[253] The AWA's scope is, indeed, cabined by the common law,[254] canons of statutory interpretation,[255] statutes, the Constitution

248 Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

249 Ileto v. Glock, Inc., 565 F.3d 1126 (9th Cir. 2009).

250 Gibson v. Dow Chemical Co., 842 F. Supp. 938 (E.D. Ky. 1992).

251 Eric Lichtblau & Katie Benner, *F.B.I. Director Suggests Bill for iPhone Hacking Topped $1.3 Million*, N.Y. TIMES (Apr. 21, 2016), https://www.nytimes.com/2016/04/22/us/politics/fbi-director-suggests-bill-for-iphone-hacking-was-1-3-million.html?_r=0.

252 *In re Apple, Inc.*, 149 F. Supp. 3d at 352–53.

253 *Id.* at 353 n.10 (quoting United States v. Hayman, 342 U.S. 205, 221 n.35 (1952) (looking to the common law for relevant usages and principles)).

254 *Hayman*, 342 U.S. at 221 n.35.

itself,[256] the "rational ends of law," and the "ends of justice."[257] This means that courts should apply the range of legal rules, suggestions, principles, and norms to determine the scope of the AWA. This approach will be based on the totality of the legal context, with a court balancing the relevant interests and engaging in wide discretion to find that the AWA does or does not provide the authority for a given requested order.[258]

There are four constitutional provisions that should inform the scope of the AWA to govern future potential orders like the one in the Apple case. First, prohibitions on compelled speech and the recent treatment of corporations as possessive of constitutional rights indicates a First Amendment implication. Second, a Fifth Amendment taking may be implicated. Third, the Thirteenth Amendment's prohibition on involuntary servitude is implicated. Fourth, the economic due process right to contract is implicated.

The Electronic Frontier Foundation's (EEF) amicus brief in support of Apple provided the most detailed exposition of the implications for the First Amendment. It argued that the requested order would have required Apple to draft code[259] and then electronically sign the code, signaling Apple's "trust in that code. . . . its endorsement and stamp of approval that communicates the company's assurance that . . . [the] code was . . . approved by Apple."[260] For EFF, this compelled speech[261] would require Apple "to express itself in conflict with its stated beliefs."[262] In addition to the *message* that the government would require Apple to send, the order would also require Apple to create speech content, since computer code is a form of protected speech under the First Amendment.[263] Furthermore, the Supreme Court in *Citizens United v. Federal Election Commission* reaffirmed its holding that corporations have First Amendment rights that are as protected as

255 *In re* Ozenne, 818 F.3d 514, 531 (9th Cir. 2016) (Bybee, J., concurring in judgment).

256 Harris v. Nelson, 394 U.S. 286, 299–300 (1969) (citing Price v. Johnston, 334 U.S. 266, 282 (1948)).

257 United States v. N.Y. Tel. Co., 434 U.S. 159, 172–73 (1977).

258 This discretion is, indeed, built into the AWA itself, as it provides that a court "may," but is never required to, issue a requested order. 28 U.S.C. § 1651 (2012); *In re* Order Requiring Apple, Inc. to Assist in the Execution of a Search Warrant Issued by this Court, 149 F. Supp. 3d 341, 351 (E.D.N.Y. 2016).

259 Brief of Amici Curiae Electronic Frontier Foundation and 46 Technologists, Researchers, and Cryptographers, *supra* note 16, at 5.

260 *Id.* at 4.

261 *Id.* at 8.

262 *Id.* at 7.

263 *Id.* at 13.

much as an individual's rights.[264] This holding was bolstered in *Burwell v. Hobby Lobby Stores, Inc.*, in which the Court held that for-profit corporations have religious liberty rights under the Religious Freedom Restoration Act.[265] Congress concurred, establishing in statute that "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[266]

A number of amici for Apple expressed concern that the government's requested order would undermine Apple's business model. The government, for its part, accused Apple of espousing a *Lochner*-era theory of anti-regulation.[267] Apple denied this accusation, advancing not a "theory of unfettered economic right to marketing activity," but rather a due process objection to "the government's attempted conscription of it to send individual citizens into a super-secure facility to write code for several weeks on behalf of the government on a mission that is contrary to the values of the company and these individuals."[268]

Apple's objection was made to sound like one based on the First Amendment and the Thirteenth Amendment's prohibitions of involuntary servitude—the image Apple portrayed may evoke for some the specter of forced mining at government gunpoint. Yet Apple's argument was, to be sure, inevitably tied to Lochnerianism. While that strain of early 20th century thought had been rejected with the advent of the New Deal, it made what some thought was a potential resurgence in 1996 with *BMW of North America, Inc. v. Gore*.[269] Two commentators, as recently as 2015, argued that modern conservative thought is "ready, once again, to embrace *Lochner*—although perhaps not in name—by recommitting to some form of robust judicial protection for economic

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264 558 U.S. 310, 349 (2010) ("Political speech is 'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.'" (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 (1978))).

265 134 S. Ct. 2751, 2785 (2014) (finding in favor of Hobby Lobby on RFRA grounds, so not reaching the First Amendment question).

266 1 U.S.C. § 1 (2012).

267 Government's Reply in Support of Motion to Compel and Opposition to Apple Inc.'s Motion to Vacate Order at 35, *In re* Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, California License Plate 35KGD203, No. 5:16-cm-00010-SP (C.D. Cal. Mar. 10, 2016).

268 Apple Inc.'s Reply to Government's Opposition to Apple Inc.'s Motion to Vacate Order Compelling Apple Inc. to Assist Agents in Search at 25, *In re Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300*, No. 5:16-cm-00010-SP.

269 517 U.S. 559, 600–01 (1996) (Scalia, J., dissenting) (striking down the finding of a state civil jury); David M. Driesen, *Regulatory Reform: The New Lochnerism?*, 36 ENVTL. L. 603, 623 & n.123 (2006); Michael J. Phillips, *The Slow Return of Economic Substantive Due Process*, 49 SYRACUSE L. REV. 917, 950 (1999).

rights."[270] Surely there is merit to this, as numerous high-profile conservative groups have advanced an anti-regulation agenda.[271] Lochnerianism never left the law; it was just rebalanced in favor of regulation, and may now be reversing course. Economic due process remains a consideration for future courts who face AWA-based requests like the one in the Apple case.

Apple probably intended to invoke only the specter of the Thirteenth Amendment, knowing that an order like the one the government requested would be highly unlikely to rise to a constitutional violation. Since the *Slaughter-House Cases*, the Thirteenth Amendment has been read narrowly, and does not encompass business regulations[272] or apparently, as in *New York Telephone*, the duty to assist law enforcement. Rather, it prohibits "forced labor through physical coercion."[273] Peonage, which entails forced labor through legal coercion, is also prohibited under the Thirteenth Amendment.[274] As the Supreme Court has pointed out, the critical factor is whether the victim's only choice is between performing the labor on the one hand and physical or legal sanctions on the other.[275]

No individual at Apple would likely be forced to write the code the government wanted. They might have left the company for other employment, or simply refused to write the code. Apple itself might have been held in contempt, but it's far from certain that the theory of corporate personhood would be extended from its First Amendment realm to protect corporations from Thirteenth Amendment implications. Nevertheless, the possibility that an order would require Apple to perform work that is qualitatively and quantitatively greater than that which New York Telephone was required to perform implicates the notion of forced labor, if it does not rise to an actual Thirteenth Amendment violation.

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270 Thomas B. Colby & Peter J. Smith, *The Return of* Lochner, 100 CORNELL L. REV. 527, 531 (2015).

271 Americans for Prosperity advocates for "lower taxes [and] less government regulation." AMERICANS FOR PROSPERITY, https://americansforprosperity.org (last visited Feb. 5, 2017). The Heritage Foundation works for "[f]ree enterprise, limited government, [and] individual freedom." HERITAGE FOUND., https://secured.heritage.org/join-heritage-parallax/?gclid=CKux9dm4ls0CFdgQgQodE1YPAg (last visited Feb. 5, 2017). And the Federalist Society pushes a policy of "individual liberty" and libertarianism. *About Us*, FEDERALIST SOC'Y, http://www.fed-soc.org/aboutus (last visited Feb. 5, 2017).

272 83 U.S. 36 (1872) (interpreting the Thirteenth Amendment to be limited only to actual slavery, not economic or labor regulations).

273 Steirer v. Bethlehem Area Sch. Dist., 987 F.2d 989, 998 (3d Cir. 1993).

274 Clyatt v. United States, 197 U.S. 207, 215 (1905).

275 United States v. Kozminski, 487 U.S. 931, 943 (1988).

Finally, the Fifth Amendment's Takings law is implicated. Takings doctrine is "in disarray,"[276] so it can be difficult to predict what type of novel government action will comprise a taking. The Court has, in an apparent contradiction, found a taking where a claimant is deprived of an intangible economically valuable resource, such as a trade secret,[277] but not when the government requires someone to perform economically valuable services.[278]

One theory is that courts will find a taking "where the government legitimately targets merely one or a few owners to bear a unique legal burden for the benefit of the general community."[279] A regulation, in turn, is not a taking "if it is generally applicable throughout an entire jurisdiction, or if it applies to a group of owners who are specially benefited by the regulation."[280] Another theory concludes that "fairness" determines whether a court will find a taking.[281] This means that courts will find a taking when the government forces a person or entity to give up property, unless the governmental action seeks to prevent or punish conduct that the public might reasonably consider wrongful or blameworthy.[282]

Apple could make a takings claim based on the argument that (1) the code it would have to write would destroy the market value of its password protection system, and (2) drafting the code would entail providing the government with a valuable economic service. Indeed, Apple and its amici amply made the first argument, and the government, in paying around $1 million to an unnamed entity to break the iPhone's system, put a price tag on the code-breaking service. Furthermore, Apple could argue that it is being singled out, as the government seeks an order against it alone, and not generally applicable legislation that would require all tech companies to provide similar password decryption technology. On the other hand, the takings doctrine is unpredictable, and the use of the AWA to compel Apple's assistance might be viewed as fair. Given takings' "ad hoc, factual

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276 Andrea L. Peterson, *The Taking Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CALIF. L. REV. 1299, 1341 (1989).

277 Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

278 Hurtado v. United States, 410 U.S. 578 (1973).

279 John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1007 (2003).

280 *Id.* at 1066.

281 Peterson, *supra* note 276, at 1341.

282 *Id. But see* AmeriSource Corp. v. United States, 525 F.3d 1149, 1154 (Fed. Cir. 2008) ("[T]he inquiry remains focused on the character of the government action, not the culpability or innocence of the property holder.").

inquir[y]"[283] that looks to whether a regulation has gone "too far,"[284] it is entirely possible that a court would find no taking.

I do not contend that the government's requested order against Apple entails a First, Fifth, Thirteenth, or Fourteenth Amendment violation. If it did, then the order should likely be invalidated on that ground. Instead, I argue that the legal complex against which the question of the AWA's scope is tested ought to include reference to these constitutional structures. In some cases, this complex will entail serious constitutional stresses, and a court should therefore find a limit to the AWA's authority. In other cases, the balance will favor the government, allowing courts to issue AWA-based orders.

I do not, furthermore, opine as to whether the constitutional constraints discussed above should have compelled the court to deny the government's requested order. It did so on sub-constitutional grounds. I refrain, just as courts do, from offering a theoretical constitutional opinion about a set of facts that now presents a moot question. The point, however, is to establish the complex legal system in which the Apple litigation found itself, and its potential impact on that system.

CONCLUSION

The fight between the government and private industry over the type of decryption at the center of the New York and California cases is not over: government agents have indicated that they have hundreds of digital devices they would like access to,[285] private industry is geared up to resist these efforts,[286] encryption technology will only get stronger,[287] and Congress has shown no signs of resolving the issue legislatively.[288]

It is important, therefore, to understand the true scope of the relevant law. This Article has argued that the New York court, Apple, Apple's amici, and numerous experts erred in finding that the AWA, limited by CALEA, prevented the government from obtaining Apple's assistance. Based, however, on the discretionary factors that the United States Supreme Court set forth in *New York Telephone* to govern AWA

283 Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

284 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

285 Vance, Lacey & Dumanis, *supra* note 33.

286 Farhad Manjoo, *In this Standoff, Tech Firms have a Long-Term Advantage*, N.Y. TIMES, Feb. 18, 2016, at A1.

287 Billington, *supra* note 34.

288 *See generally* Desilver, *supra* note 36.

applicability, the New York court's ultimate ruling in Apple's favor was correct.

The analysis advanced in this Article bodes well for both private industry and law enforcement endeavors in the future. Instead of an all-or-nothing interpretation of law that would either render innocent third parties unprotected from harmful court orders or hobble legitimate law enforcement investigations, the ad hoc balancing inquiry that is entailed in an accurate understanding of the law enables a valuable mediation that preserves private industry integrity while ensuring effective law enforcement. Until Congress addresses any lingering gaps, this inquiry is justified by law and workable.