

Apple, the FBI, and the Crypto Debate

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Recent EPIC Activities

EPIC Supreme Court *amicus* brief - *Spokeo v. Robbins*, No. 13-1339 ("standing" to enforce a federal privacy law)

EPIC Supreme Court *amicus* brief - *Utah v. Strieff*, No. 14-1373 (search of a government database following unlawful stop)

Argument before D.C. Circuit Court of Appeals - EPIC v. FAA, No. 15-1075 (EPIC petition for drone privacy regulations)

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TOP NEWS

Apple Opposes FBI Decryption Order

Today Apple filed a "[motion to vacate](#)" a [court order](#) that would require the company to make changes to the iPhone to enable law enforcement access to personal information. In its brief, Apple asserts that this case is about "the ability to force companies like Apple to undermine the basic security and privacy interests of hundreds of millions of individuals around the globe." Apple argued that the FBI's requested court order violates the First and Fifth Amendments. Consumer Reports [found](#) that more than 3.1 million cellphones were stolen in 2013, and noted that "efforts by the telecom industry to reduce thefts don't seem to be helping matters." In 2015, EPIC gave the [Champion of Freedom Award](#) to Apple CEO, Tim Cook, for his work protecting privacy and promoting encryption.

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Chronology

- Dec 2, 2015 Shooting in San Bernardino, CA
- Feb 16, 2016 Justice Dept. motion to compel Apple to assist
- Feb 16 Court order to Apple
- Feb 16 Apple letter to customers
- Feb 19 Justice Dept. motion to compel compliance
- Feb 25 Apple motion to vacate court order
- Mar 22 Court hearing scheduled

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FBI (Feb. 16)

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In the hopes of gaining crucial evidence about the December 2, 2015 massacre in San Bernardino, California, the government has sought to search a lawfully-seized Apple iPhone used by one of the mass murderers. Despite both a warrant authorizing the search and the phone owner's consent, the government has been unable to complete the search because it cannot access the iPhone's encrypted content. Apple has the exclusive technical means which would assist the government in completing its search, but has declined to provide that assistance voluntarily. Accordingly, the government respectfully requests that this Court issue an order compelling Apple to assist in enabling the search commanded by the warrant.

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DOJ Motion (Feb. 19)

⁷ The four suggestions that Apple and the FBI discussed (and their deficiencies) were: (1) to obtain cell phone toll records for the SUBJECT DEVICE (which, while the government has of course done so, is insufficient because there is far more information on the SUBJECT DEVICE than simply toll records); (2) to determine if any computers were paired with the SUBJECT DEVICE to obtain data (which the government has determined that none were); (3) to attempt an auto-backup of the SUBJECT DEVICE with the related iCloud account (which would not work in this case because neither the owner nor the government knew the password to the iCloud account, and the owner, in an attempt to gain access to some information in the hours after the attack, was able to reset the password remotely, but that had the effect of eliminating the possibility of an auto-backup); and (4) obtaining previous back-ups of the SUBJECT DEVICE (which the government has done, but is insufficient because these backups end on October 19, 2015, nearly one-and-a-half months prior to the IRC shooting incident, and also back-ups do not appear to have the same amount of information as is on the phone itself). After subsequent conversations, though, Apple conceded that none of these suggestions would work to execute the search warrant or to sufficiently obtain the information sought.

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Apple (Feb. 25)

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is not a case about one isolated iPhone. Rather, this case is about the Department of Justice and the FBI seeking through the courts a dangerous power that Congress and the American people have withheld: the ability to force companies like Apple to undermine the basic security and privacy interests of hundreds of millions of individuals around the globe. The government demands that Apple create a back door to defeat the encryption on the iPhone, making its users' most confidential and personal information vulnerable to hackers, identity thieves, hostile foreign agents, and unwarranted government surveillance. The All Writs Act, first enacted in 1789 and on which the government bases its entire case, "does not give the district court a roving commission" to conscript and commandeer Apple in this manner. *Plum Creek Lumber Co. v. Hutton*, 608 F.2d 1283, 1289 (9th Cir. 1979). In fact, no court has ever authorized what the government now seeks, no law supports such unlimited and sweeping use of the judicial process, and the Constitution forbids it.

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Apple

The order demanded by the government compels Apple to create a new operating system—effectively a “back door” to the iPhone—that Apple believes is too dangerous to build. Specifically, the government would force Apple to create new software with functions to remove security features and add a new capability to the operating system to attack iPhone encryption, allowing a passcode to be input electronically. This would make it easier to unlock the iPhone by “brute force,” trying thousands or millions of passcode combinations with the speed of a modern computer. In short, the government wants to compel Apple to create a crippled and insecure product. Once the process is created, it provides an avenue for criminals and foreign agents to access millions of iPhones. And once developed for our government, it is only a matter of time before foreign governments demand the same tool.

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Issues

Apple’s obligation to comply with the Feb 16 Court order

Scope of All Writs Act of 1789 (Relation to 1994 law “CALEA”)

Constitutional claims - First Amendment (compelled speech - “viewpoint discrimination”); Fifth Amendment (deprivation of liberty)

Consumer protection (EPIC and others)

Implications for law enforcement (what if “ticking bomb”?)

Implications for device design (require companies to upload malware as part of “security update”?)

Search for a limiting principle (if San Bernardino, why not NYC?
If US, why not China?)

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Washington Dimension

TODAY — House Judiciary Committee, “International Conflicts of Law Concerning Cross Border Data Flow and Law Enforcement Requests” with DOJ Bitkower, Microsoft CEO Smith, former DHS Chertoff, Mr.Kris, Prof. Daskal

TODAY — House Intelligence Committee, “World Wide Threats,” DNI, CIA, FBI, NCC, DIA, NSA

TODAY — House Homeland Committee, “Emerging Cyber Threats to the United States,” RAND, Symantec, FireEye

March 1 — House Judiciary Committee, “The Encryption Tightrope: Balancing American’s Security and Privacy” with FBI Director Comey, Apple VP Sewell, Prof. Landau, NY DA Vance

(Senate Judiciary Committee — a small nomination issue)

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Past as Prologue

1991 Congress considers resolution 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.”

1993 NSA pursues key escrow encryption standard (“Clipper Chip”)

1994 Congress enacts Communications Assistance for Law Enforcement Act (“CALEA”) requires “wiretap friendly” telco services and hardware but no decryption mandate

1996 National Academies CRISIS Report rejects key escrow encryption - “the costs outweigh the benefits”

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References

Feb. 16 DOJ Motion - <http://www.justice.gov/usao-cdca/file/826836/download>

Feb. 16 Court Order - <https://assets.documentcloud.org/documents/2714005/SB-Shooter-Order-Compelling-Apple-Asst-iPhone.pdf>

Feb. 19 Apple Letter - <http://www.apple.com/customer-letter/>

Feb. 19 DOJ Motion to Compel - <https://assets.documentcloud.org/documents/2715926/Motion-to-Compel-Apple-Compliance.pdf>

Feb. 25 Apple Motion - <https://assets.documentcloud.org/documents/2722203/Motion-to-Vacate-Brief-and-Supporting-Declarations.pdf>

National Research Council, "Cryptography's Role in Securing the Information Society" Report (1996) - <http://www.nap.edu/read/5131/chapter/1>

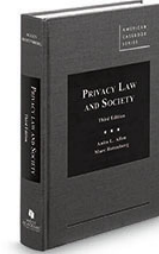
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