

## “FBI v. Apple”

**By Jeff Aba-Onu**

Not since Edward Snowden have the twin issues of privacy and national security dominated the news as we are once again debating how much privacy, if any, to give up in the name of security. The FBI has asked Apple to aide in their investigation by creating a back door to defeat the encryption on an iPhone and Apple has said no. Now Apple is being judged both in the court of public opinion and the court of law.

### Court of Public Opinion:

Initial public opinion favored FBI based on FBI’s side of the story. The phone at issue was used by one of the perpetrators of the San Bernardino terrorist attack. The owner of the phone—San Bernardino County Public Health Department—has given FBI permission to access the phone. The only problem is that the FBI cannot access the phone so they have a warrant that simply asks Apple to create a back door into one phone.

Apple’s side of the story is quite different. Apple states that it’s more than one phone as law enforcement agencies nationwide have hundreds of iPhones they want Apple to unlock should the FBI win this case. Furthermore, creating a back-door opens the door for other governments to demand access and for criminals to use the flaw to hack into iPhones. In addition, it is the FBI’s fault that they don’t have access as they changed the iCloud password which removed the possibility of the phone initiating an automatic iCloud back-up. Apple then says that they have already fully cooperated by giving the FBI everything they have, and if the FBI can compel Apple to do this then they can also compel Apple to track a user or to turn on a camera or microphone.

### Court of Law:

Apple argues that neither the FBI nor the courts have the authority to compel Apple to act and they base this argument on three laws: (1) the Communications Assistance for Law Enforcement Act; (2) the All Writs Act; and (3) the U.S. Constitution.

#### a) Communications Assistance for Law Enforcement Act:

The Communications Assistance for Law Enforcement Act (“CALEA”), which Congress in 1994 is a wiretapping law that requires telecommunication carriers to assist law enforcement officials who are conducting electronic surveillance, but the law does not require assistance where the carrier does not possess the information necessary to decrypt the information. (See 47 U.S.C. § 1002(b)(3)). Thus, Apple claims that they are exempted from CALEA because they do not retain a copy of the decryption key, while the FBI argues that they are not relying on CALEA but on the All Writs Act.

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### b) All Writs Act:

The All Writs Act (the “Act”) gives courts the power to issue all writs necessary to enforce a law. However, the Act was limited by U.S. v New York Telephone Company where the Supreme Court asked: (1) how far removed is the company from the underlying controversy; (2) will requiring a company to comply place an unreasonable burden and will acting be against a company’s interests; (3) has the government exhausted all other options; and (4) is requiring the company to act consistent with the will of congress.

#### i Apple’s Connection to Underlying Case:

Apple argues that it is far removed from the controversy as Apple does not own or possess the phone and has no connection to the data that may exist on the phone, and is not related in the events that gave rise to the investigation. However, the FBI can argue that the phone was used by a terrorist and that the phone contains valuable information and that Apple is the manufacturer who might have a master key.

#### ii Unreasonable Burden or Against Interest:

Apple argues that complying will place an unreasonable burden as Apple will have to create a permanent department dedicated to writing and testing the code(s) required to create a back door, and the department will also have to appear in court to testify as a witness. Apple also argues that acting would go against their interest as protecting their client’s privacy is integral to their brand. However, the FBI can argue that Apple is a de facto public carrier and so has a duty to serve the public and that creating a new department is not a huge burden on a company of Apple’s stature.

#### iii Has Government Exhausted All Options:

Apple argues that the FBI has not shown that it received technical assistance from digital forensics experts, while the FBI can argue that it has.

#### iv Will of Congress:

Apple argues that compliance with the order will not be consistent with the congressional action, and this is because congress passed a wiretapping law - CALEA - which explicitly exempts companies from doing what the FBI asks of Apple. The FBI will have to argue that CALEA does not apply to this request.

### c) U.S. Constitution:

Apple makes two constitutional arguments, one based on the First Amendment and the other based on the Fifth Amendment.

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i First Amendment:

Apple argues that coding is speech and so compelling a person to code is similar to compelling a person to speak, and such an act violates the First Amendment. The FBI can argue that there is precedent for government telling a person not to speak and cite President Bill Clinton who issued an Executive Order that led to the Commerce Department Export Administration Regulations (“EAR”) that banned the export of encryption software owned by American companies without the prior approval and licensing of the Commerce Department.

ii Fifth Amendment:

Apple argues that compelling it to code will violate their Fifth Amendment right to be free from arbitrary deprivation of Apple’s liberty by the government. However, the FBI can argue that the government can compel a person to act when there is reasonable justification in the service of a legitimate government objective, and fighting terrorism or maintaining the peace are compelling government interests.

Conclusion:

The San Bernardino case is not the only case in which a law enforcement agency is asking Apple to create a back door into an iPhone and so Apple’s strategy of fighting in court and appealing is a good argument because Apple can afford the legal costs and has a good legal argument. Apple’s constitutional arguments are weak and Apple acknowledges this by insisting that this is an issue that should be resolved by congress and not the judiciary. Apple’s argument against the All Writs Act is quite compelling as complying will create an unreasonable burden and be against Apple’s interest. The burden will be unreasonable because the FBI is requiring Apple to do something that Apple doesn’t do as a business. Also compliance will go against Apple’s interest because Apple prides itself on protecting their client’s privacy. That said, the one threat to Apple’s strategy is the risk that public opinion can turn against Apple should there be another terrorist attack.