

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ORDER REQUIRING APPLE INC
TO ASSIST IN THE EXECUTION
OF A SEARCH WARRANT
ISSUED BY THE COURT, ET AL

- - - - - X 15 MC 1902

United States Courthouse
Brooklyn, New York
October 26, 2015
11:30 o'clock a.m.

TRANSCRIPT OF ARGUMENT
BEFORE THE HONORABLE JAMES ORENSTEIN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Government:

ROBERT L. CAPERS
United States Attorney
271 Cadman Plaza East
Brooklyn, NY 11201

BY: SARITHA KOMATIREDDY
LAUREN H. ELBERT
AMEET KABRAWALA
Assistant US Attorneys

For Apple:

ZwillGen
1900 M Street NW
Washington, DC 20036

BY: MARC J. ZWILLINGER, ESQ.
JEFFREY LANDIS, ESQ.

1 Court Reporter: Gene Rudolph
2 225 Cadman Plaza East
3 Brooklyn, New York
(718) 613-2538

4 Proceedings recorded by mechanical stenography, transcript
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9 THE CLERK: Civil cause for oral argument,
10 15 Miscellaneous 1902, In Re Order Requiring Apple Inc to
11 Assist in the Execution of a Search Warrant.

12 THE COURT: Good morning.

13 May we have the appearances, please? For the
14 government?

15 MS. KOMATIREDDY: Good morning, Your Honor.

16 Saritha Komatireddy for the United States. I am
17 joined by Lauren Elbert and Ameet Kabrawala, both Assistant
18 United States Attorneys.

19 THE COURT: Welcome to all of you.

20 MR. ZWILLINGER: Good morning, Your Honor.

21 Marc Zwillinger for Apple. I am joined at counsel
22 table with my colleague Jeffrey Landis.

23 THE COURT: Good morning to both of you.

24 All right, folks. First I want to thank you all for
25 the briefing that you have provided, very informative, very

1 helpful. I know it has been on a somewhat quick schedule, so
2 I appreciate that. It's really helped me get a handle on some
3 of these issues and also made it clear to me how very close
4 some of them are, to my mind.

5 I will have some questions for both sides as we go
6 along but I do want to hear from you. As we get started
7 though I want to bring to your attention something that one of
8 my colleagues alerted me to because I do intend to ask about
9 it. I will ask my deputy to hand a copy down.

10 It is a letter from the government and some
11 testimony in a hearing before Judge Johnson in a case in this
12 district. The letter is dated July 9, 2015, and the testimony
13 was taken on September 3rd of this year in United States
14 against Djibo.

15 I bring it to your attention because the basic
16 assertion on the part of the government that brings us here is
17 the proposition that the iPhone at issue here is one that the
18 DEA and FBI have tried and failed to unlock because of the
19 pass code and the government expands from that in its brief to
20 say that the government, broadly speaking I suppose, is simply
21 unable to unlock the phone at issue here.

22 So the reason I bring the Djibo materials to your
23 attention is because on page five of the letter the government
24 writes, HSI, Homeland -- Department of Homeland Security -- I
25 always forget what the I stands for. In any event, HSI is in

1 possession of technology that would allow its forensic
2 technicians to override the pass codes security feature on the
3 subject iPhone and obtain the data contained therein.

4 In other words, even if HSI agents did not have the
5 defendant's pass code, they would nevertheless have been able
6 to obtain the records stored in the subject iPhone using
7 specialized software. The software works to bypass the
8 bi-code entry requirement and unlock the cellular telephone
9 without having to enter the code. Once the device is
10 unlocked, all records in it can be accessed and copied.

11 Then in the testimony in the Djibo case the
12 government's forensic expert expanded on that and explained
13 something about how it works, including under
14 cross-examination by the defendant's counsel in that case, and
15 made clear that the software version in that case was
16 running -- the iPhone in that case was running, the software
17 version of IOS 8.1.2, if I am not mistaken.

18 I am giving this to you now. I learned of it since
19 your briefing. If you have some thoughts on it I am happy to
20 hear it but I don't want to put you on the spot. I want you
21 to know that this has come to my attention and I'll, of
22 course, afford both sides here an opportunity to submit
23 something further on it if they like.

24 That's where I am starting from. I am going to have
25 a number of questions, I'm sure. But Ms. Komatireddy, or one

1 of your colleagues, or whoever wants to be heard, why don't
2 you start.

3 MS. KOMATIREDDY: Thank you, Your Honor.

4 We would like to make some introductory remarks and
5 of course we are happy to answer any questions the Court may
6 have.

7 THE COURT: Yes.

8 MS. KOMATIREDDY: In this case, the most important
9 thing to remember is that a federal court issued a federal
10 search warrant commanding agents to search a phone for
11 evidence of crime, a crystal meth conspiracy.

12 THE COURT: The search warrant has expired over a
13 year ago, correct?

14 MS. KOMATIREDDY: There were two search warrants
15 issued. There was one search warrant issued in 2014.

16 THE COURT: That is the one attached to the
17 application.

18 MS. KOMATIREDDY: No, sir. The first search warrant
19 was for the home and the devices.

20 THE COURT: No. I am talking about the one attached
21 to the application now before me.

22 MS. KOMATIREDDY: Yes.

23 THE COURT: I should note, by the way, the
24 application said it is attached as Exhibit A. It is not on
25 the docket. It should be. I will ask you to correct that.

1 But it was attached to the email by which I initially got the
2 application.

3 Anyway, that warrant has expired over a year ago,
4 hasn't it?

5 MS. KOMATIREDDY: The warrant was issued July 6th.
6 It has to be executed within two weeks of the issuance date.
7 With electronic evidence you can initiate the execution of the
8 search warrant by attempting to search the device, turning it
9 on and placing it in airplane mode. The agents here began
10 that search but were unable to complete that search because of
11 the password bypass.

12 THE COURT: So you are saying it's already started
13 and you can finish it at any time?

14 MS. KOMATIREDDY: Yes, sir.

15 THE COURT: I am not sure I agree with that. I
16 don't think it matters a bit. Even if it expired, I would
17 assume that you are making a request for a renewed warrant.

18 But it does raise the question, why is it the
19 government waited from July of 2014 until October of 2015 to
20 ask Apple for this assistance as recounted in your brief only
21 then to tell me that you need me to issue an expedited
22 decision.

23 MS. KOMATIREDDY: Fair enough, Your Honor.

24 The government, as noted in the brief, there are two
25 agencies involved in this case, the DEA and the FBI. The DEA

1 first primarily attempted to enter into the phone using its
2 own technology. After being unable to do so, it consulted
3 with the FBI.

4 I want to note that there were ten cellphones seized
5 from the defendant's home. That search warrant at issue on
6 July 6th was for all ten cellphones. They were in the process
7 of executing a search warrant on the other phones. That took
8 some time. It also took some time for the government to
9 explore the reasonable alternatives available to it in order
10 to execute the search warrant without having asking for
11 third-party assistance.

12 Once it determined, both agencies determined that
13 they could not get into the phone without Apple's assistance,
14 the government reached out to Apple. I do think it's
15 important to note the government reached out to Apple first
16 before ever applying for any relief in this Court and asked if
17 it could bypass the pass code and do so within time for trial.
18 Apple stated that it could and would with a Court order and
19 stated that it would do within one to two weeks. To
20 accommodate the revised schedule here in the briefing, Apple
21 now stated it can actually do it in one day. That's the
22 turnaround time we now expect.

23 In that process of those conversations, Apple
24 provided the government with specific language from its legal
25 process guidelines that it required, that it insisted on,

1 requested for what it would consider an order that it could
2 follow in executing the government's request for assistance.
3 When the government applied to this Court for an order, it
4 used that language.

5 Now, this was a textbook example of Apple's
6 long-standing and responsible corporate practice of bypassing
7 locked cellphones when it has a Court order requiring it to do
8 so.

9 Since 2008, our initial estimates are that Apple has
10 received at least 70 court orders requiring it to assist in
11 this manner, has never objected to them and has complied. I'm
12 sure counsel for Apple has the exact number available for you.
13 That number is based on an initial survey, an ongoing query of
14 government prosecutors around the country.

15 THE COURT: I take it, that fact, you are not
16 saying, I don't think you are saying, that it constitutes any
17 sort of waiver. It's really just a question of burden.

18 MS. KOMATIREDDY: That is correct. It's not a
19 waiver per se.

20 It's worth noting that Apple in that process since
21 2008, and we quoted the very first email we have on record,
22 where Apple provided this guidance, throughout that time
23 period it had an established procedure for routinely taking in
24 these requests, complying with them, processing them and
25 informing the public about this practice by continually

1 publishing and updating its legal process guidelines.

2 During that same timeframe that it has been
3 processing these requests Apple has grown to become the
4 biggest company in the world. So plainly any burden in terms
5 of employee resources or time or reputation was minimal.

6 The government's application in this case followed
7 that same template, that same routine procedure. It was not
8 secret. It was not new. It did not invoke any new legal
9 authority. It did not seek any new broad surveillance
10 authority. It did not ask Apple to create any capability that
11 it did not already have. It was just a simple routine request
12 for assistance in carrying out a valid search warrant issued
13 by a federal court, as Apple has done so many times before.

14 For years Apple has provided this assistance and
15 until two weeks ago Apple indicated to the government that it
16 would provide that assistance again in this case. Apple's
17 position in Court today represents what we consider to be a
18 stunning reversal of that position, and Apple's stated reason
19 for this reversal is a concern for its brand. This is
20 unfortunate. American consumers should expect that American
21 companies protect their privacy and their safety.

22 THE COURT: Your brief goes to a surprising length
23 to questioning the patriotism of a company that stands on its
24 rights in this way. Whether I agree or disagree with it
25 really doesn't help me resolve the legal issue. But it does

1 create an atmosphere I think that, it isn't helpful. You
2 don't think they are patriotic to question. You have made
3 that clear in your brief. I'd really just as soon focus on
4 the legal question.

5 MS. KOMATIREDDY: It's not a question of patriotism,
6 Your Honor. It's a suggestion, Apple states in its brief that
7 it is happy to -- it takes seriously its responsibility of
8 assisting where there is legal access, there is a legal form
9 of access to data, and it takes a stand against improper
10 access. There is no improper access here. There is a valid
11 federal search warrant.

12 Of course, we welcome this debate and we welcome the
13 opportunity to explore these issues but we are a little bit
14 surprised only because in this case -- Apple has for a long
15 time complied with lawful Court orders requiring and
16 requesting exactly what we are requesting in this case.

17 THE COURT: I take it -- forgive me for
18 interrupting. I take it, there is no question that, leaving
19 aside any possibility of an appeal to the higher court, if the
20 end result of this case is a court order that Apple must do
21 what the government seeks, Apple is going to comply here,
22 right?

23 MR. ZWILLINGER: That is correct, Your Honor. Apple
24 would comply with an order of this court.

25 THE COURT: Okay. That's why I am not sure I

1 understand. You are not saying that there is some sort of
2 waiver or estoppel based on past practice. I am not sure that
3 what Apple has done before goes to anything other than giving
4 some insight into the burden.

5 MS. KOMATIREDDY: That's exactly right, Your Honor.

6 THE COURT: I get that.

7 MS. KOMATIREDDY: I want to add one more point, Your
8 Honor, which is the comment on what American consumers expect
9 for the company. It's not a comment about patriotism. It's a
10 comment on what Apple has perceived as damage to their brand.
11 This Court shouldn't condone the notion that a company has a
12 negative impact on its brand when it follows US law or that --

13 THE COURT: It is such a tendentious way of putting
14 things. It's just not going to help me.

15 Look, there is a wonderful argument to be made, as
16 you make it, that Americans expect that corporate citizens
17 will comply with law. Apple will do so here. There is no
18 question about it.

19 But there is a competing interest that they have
20 identified and, I take it, you would acknowledge that any
21 private entity called on to be pressed into service by the
22 government is in the best position to identify what its
23 interests are, whether or not they should give way to them.
24 They are in the best position to tell us, here is what we
25 value, here is what is important to us. You may say well,

1 that's not a good value. We don't think Americans share that
2 value, all right thinking Americans at least.

3 How does it help me understand the legal issue here?

4 MS. KOMATIREDDY: It is a comment on the burden,
5 Your Honor. Our position is, it doesn't actually damage the
6 brand. There is not actually a burden in terms of
7 reputational burden.

8 THE COURT: Is that based on any kind of data, any
9 evidence or is it just -- it can't be that people won't
10 appreciate it if Apple complies with the law and helps you
11 promote an investigation.

12 MS. KOMATIREDDY: It's based on a couple of things.
13 First, in the last seven years Apple has published its
14 practice of complying with these sorts of orders, providing
15 assistance to law enforcement to get into locked phones when
16 there are valid search orders. That practice has been public.
17 It's reasonable to assume that customers have been aware of
18 that. Even a cursory search of Apple support blogs or
19 discussion forums --

20 THE COURT: So why did the government announce that
21 it's not seeking to seek backdoor legislation?

22 MS. KOMATIREDDY: That is a separate issue. Here,
23 this is not a backdoor.

24 THE COURT: It's not a backdoor. It's the same
25 basic idea, which is the government for reasons sufficient to

1 itself -- this is another reason why I don't think it is
2 useful to have the conversation about whose values are better.
3 But the government announced a decision, surprisingly unknown
4 to me, on the same day that this application was made that
5 they are not going to seek authority from Congress to require
6 a company like Apple to provide access that gets past password
7 or encryption.

8 If you are saying that look, all right thinking
9 Americans are going to want a company like Apple to do just
10 that, I don't understand why the government would balk at
11 asking Congress to require it.

12 But it doesn't matter. The question is, Apple says
13 it is a burden. If you can say look, here is some evidence
14 that shows it really doesn't hurt them, we have done some
15 market research or they have and they are not telling you
16 about it, I get it. But if it is just look, we don't think
17 Americans would like this, I understand the argument. You
18 have made it well. But what more does it get me?

19 MS. KOMATIREDDY: I think the basic point, you are
20 right, Your Honor, that the -- whether or how the government
21 sought backdoor legislation is irrelevant. The basic point --

22 THE COURT: That's what I said? Okay.

23 MS. KOMATIREDDY: Here -- the basic point here is,
24 Apple has been doing this for a long time and it has been
25 public for a long time. The brand hasn't hurt. That is

1 evidence in itself there is no reputational burden.

2 THE COURT: Okay. You are saying the brand hasn't
3 been hurt because it's grown, the company?

4 MS. KOMATIREDDY: The company has grown.

5 THE COURT: You have done some regression analysis
6 that factors out other things that may affect the value of the
7 brand?

8 MS. KOMATIREDDY: I have not, Your Honor.

9 THE COURT: Okay. Why don't you move on to another
10 point then. I think I understand this one.

11 MS. KOMATIREDDY: Okay. The Court has made
12 several -- made observation that Congress although it didn't
13 expressly ban what -- the assistance that the government is
14 requesting here, that there is not a gap in the law because
15 recent debate has shown that Congress has refused to authorize
16 what the government is requesting here. We believe that the
17 Congressional statements that have been made so far are just
18 that, a few Congressional statements, a few proposed bills,
19 but no actual legally cognizable action.

20 THE COURT: I had a question about that. This I
21 think gets to the heart of one of the most important issues,
22 which is the applicability of the act.

23 You are saying, that what we have here is
24 Congressional silence and silence is meaningless.

25 MS. KOMATIREDDY: Yes, Your Honor.

1 THE COURT: If I mischaracterizing, please do
2 correct me.

3 What level of Congressional action or inaction
4 speaks loudly enough for the Court to take into account in
5 deciding whether there is some gap that the All Writs Act
6 fills?

7 MS. KOMATIREDDY: Actual law.

8 THE COURT: So short of Congress passing a law
9 prohibiting what you want here, it's fair game? Anything else
10 that Congress may have done in terms of considering
11 legislation one way or the other, because it doesn't result in
12 a statutory prohibition, wouldn't be enough to say, it's off
13 limits for the All Writs Act?

14 MS. KOMATIREDDY: Yes. Short -- essentially yes.

15 Because all that Congress has done so far here is
16 start a debate. There are 535 members of Congress. A few
17 have commented. A few have heard testimony, and there are
18 four proposed bills. The four proposed bills that the Court
19 cites in its opinion never even were voted on. They were
20 referred to committee and died there.

21 THE COURT: How far does this go? This won't be the
22 last time the government seeks to use the All Writs Act, and
23 as we all know by now, pretty thin list of cases that provide
24 guidance. So how far does this go?

25 If, for example, Congress voted decisively to reject

1 a bill that would explicitly confer the authority that you
2 want the Court to allow here, took a vote on a bill and
3 rejected it, 434-to-1, is that still Congressional silence
4 because you can't parse why people voted against it?

5 MS. KOMATIREDDY: I think so, Your Honor. The
6 reason is this. Because if there is a Congressional will to
7 actually prohibit this practice, those 435 people could simply
8 pass a law prohibiting it. In fact, Your Honor has actually
9 cited three bills that have been proposed in the current
10 Congress to ban the exact access we are requesting here.
11 Those bills were not passed. They did not get out of
12 committee. They were not the subject of floor debates. They
13 got no traction. That can reasonably be read as Congress
14 saying for now, for whatever reasons, all 435 people have, for
15 now the status quo should remain.

16 It's also reasonable to assume Congress is aware of
17 the government practice of government obtaining All Writs Act
18 orders and aware of that background when it makes the decision
19 to act or not act. In fact, when you look at the hearings
20 that Your Honor cited, part of the testimony at one of those
21 hearings actually made clear that testimony by the FBI
22 executive assistant director made clear that in the past
23 companies had the ability to decrypt devices when the
24 government obtained a search warrant and a court order.
25 Congress is aware of that practice. The debate that was going

1 on about the so-called going dark issue was about when you get
2 a Court order, the company not being able to get into a device
3 and whether there should be legislation to address that.

4 So I think with all of that in mind, given that
5 Congress doesn't have a developed debate on this, in fact a
6 debate I would say is preliminary, there are no bills that
7 went past committee and in fact bills that were proposed to
8 prohibit this practice were not passed, were not debated, were
9 not voted on. All that's left is the status quo.

10 THE COURT: Last -- not last probably, but one more
11 question on how far does this go.

12 Another variation on the scenario I posed before.
13 If you have -- a bill goes through Congress that started out
14 with language conferring the authority you seek here, and
15 unanimous agreement to strip it out of the bill before it is
16 passed, so we still don't have legislation one way or the
17 other on it. We have a very clear record to take it away from
18 a bill that otherwise would have it. Still Congressional
19 silence that makes it fair game for a Court to grant the
20 authority under the All Writs Act?

21 MS. KOMATIREDDY: The hypothetical is, that there is
22 language to prohibit what we are requesting?

23 THE COURT: No. Say the government can force a
24 company like Apple to break into one of its phones, where the
25 user won't and has forgotten the password. So basically, this

1 case codified as part of a larger bill and that provision is
2 unanimously stripped out before it passes. So we still have
3 the same statutory regime that we have now but we have
4 everyone in Congress voting to take away something that would
5 give you this authority.

6 Still Congressional silence?

7 MS. KOMATIREDDY: It is, Your Honor, because
8 everyone in Congress could easily vote the other way.
9 Everyone in Congress could easily make an affirmative law that
10 states that it grants this authority.

11 THE COURT: Okay. If in doing that they say you
12 know what this is a separate bill. We are going to do it next
13 week. It's on the agenda. We are going to vote on it in the
14 intervening week; still can do this under the All Writs Act?

15 MS. KOMATIREDDY: Yes, sir.

16 THE COURT: Okay.

17 MS. KOMATIREDDY: Because Congressional silence is
18 Congressional silence. There are a number of examples of
19 Congress considering bills and doing nothing about them. But
20 that doesn't undermine the current legal authority. A simple
21 example is the House has passed at least 30 times a bill
22 seeking the repeal of the Affordable Care Act. That doesn't
23 undermine the Affordable Care Act's reasonable effect.

24 THE COURT: Obviously the concern is as Congress
25 goes longer and longer due to influences we are all familiar

1 with that we needn't rehearse here, it goes longer and longer
2 without revisiting statutes that are daily getting more and
3 more outstripped by the technology. It's taking -- this use,
4 this proposed use of the All Writs Act takes away the
5 legislative authority from Congress and puts it squarely in
6 the courts. It just seems to be so at odds with the
7 separation of powers that we have that it's hard to believe
8 that it squares with the intent of the All Writs Act.

9 MS. KOMATIREDDY: The All Writs Act was passed as
10 parts of the Judiciary Act of 1789. Some call it antiquated.
11 It's actually foundational. It comports with the separation
12 of powers.

13 THE COURT: It initially passed in 1789. It has
14 been updated as recently -- Congress passed this version in
15 1949.

16 MS. KOMATIREDDY: Right.

17 My point is, when Congress created the federal
18 courts it also ensured that whatever orders the federal courts
19 issued it could make those orders effective. If federal court
20 issues a search warrant, it could to do what it needed to make
21 that search warrant effective if doing so was reasonable,
22 didn't cause unnecessary burden, there were no alternatives to
23 the government, et cetera.

24 So with that in mind it's not unreasonable for a
25 Court to do what is necessary to effectuate its orders. I

1 don't think that affects separation of powers.

2 As to Congress moving too slowly and therefore
3 delegating what the Court may consider undue authority to the
4 judiciary on this matter, Congress also has to engage in its
5 own agenda setting and prioritization. Given the number of
6 issues that they have to take up, if they feel -- assuming
7 background knowledge that Congress legislates against the
8 background of current law, if they realize and know how
9 current law operates, which is reasonable to assume they do in
10 this case, and they are fine with it operating the way that
11 they are, there is no reason for them to prioritize this
12 particular issue at the top.

13 In fact, that's what you are seeing here. Because
14 this application is about IOS 7 and before, which in a few
15 years will probably be an obsolete issue. In a few years
16 Apple devices aren't even going to carry IOS 7. So the --

17 THE COURT: I hope so. I hope they won't. Because
18 the Court here won't let me update to eight. Definitely won't
19 let me get nine.

20 But go ahead.

21 MS. KOMATIREDDY: You see my point, Your Honor.
22 Because this particular issue is actually probably dwindling
23 in importance. It's reasonable for Congress to let the All
24 Writs Act continue to apply and debate what it has been
25 debating, the more salient issue of the future of IOS 8 and

1 beyond and devices where even when you have a court order you
2 cannot get access.

3 THE COURT: One other slightly different question
4 about the Congressional silence here. Do we actually have
5 Congressional silence? This is something where I can really
6 use your help. I acknowledge, I could so easily be getting it
7 wrong.

8 Under CALEA, two related questions. First, Verizon
9 is a, or AT&T, they are clearly covered by CALEA.

10 MS. KOMATIREDDY: Yes, Your Honor.

11 THE COURT: If they were to manufacture the same
12 kind of device with the same sort of software carrying
13 password encryption, would Calea's provision against forcing a
14 provider, telecom carrier to engage in this decryption,
15 prevent the Court from ordering Verizon to do what you want
16 Apple to do?

17 MS. KOMATIREDDY: CALEA wouldn't address that
18 situation because CALEA only requires the telecommunications
19 carriers retain the capability to intercept realtime
20 communications, data and motion. Think Title III wiretap.

21 THE COURT: No. I know what it requires them to do.
22 But I thought -- this is where my own note-taking has failed
23 me. I thought there was a provision in CALEA that
24 specifically addressed decryption and it exempted from other
25 obligations of a telecom provider any obligation to provide

1 such encryption services.

2 MS. KOMATIREDDY: There is a provision in the House
3 and Senate reports that accompanied CALEA where it
4 states -- Congress states that telecommunications carriers
5 have no responsibility to decrypt encrypted communications
6 that are the subject of court ordered wiretaps unless the
7 carrier provided the encryption and can decrypt it.

8 In essence, when considering those realtime
9 communications that are being intercepted on a prospective
10 Title III wiretap, the provider has the obligation to decrypt
11 communications that it is capable of decrypting but not
12 otherwise.

13 (Continued on next page.)
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1 THE COURT: Okay. And that may moot the second
2 question. I will tell you what I have in mind. On any of
3 this, both sides, if there is something that you think that
4 needs a supplemental submission, you know, I welcome it. We
5 can talk about scheduling for that later. I'm sensitive to
6 the need to expedite.

7 Is Apple an information service within the meaning
8 of CALEA? The reason I ask, because I have that sort of-- the
9 understanding, maybe mistaken, that I asked just a moment ago,
10 whether decryption, there is an exception for decryption.

11 But, so, does Apple qualify as information service,
12 within the statute?

13 MS. KOMATIREDDY: Your Honor, I don't believe it
14 does. I am just looking for the specific statutory
15 definition. CALEA's definition of information service
16 restricts it to telecommunications carrier, classic public
17 utilities, not device manufacturers.

18 THE COURT: Okay.

19 That was a very long diversion from what I-- an
20 argument you were making, if you can find your place, I
21 welcome you going back to it.

22 MS. KOMATIREDDY: Fair enough.

23 THE COURT: If not, I have other questions I could
24 ask. I wanted you to get to your points.

25 MS. KOMATIREDDY: I'm a happy to answer any

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1 questions from the Court. We will rely on our briefs for our
2 legal basis.

3 THE COURT: Okay. Then I will -- I have to go
4 through my notes.

5 One of the things, just about the burden, I
6 apologize, I will skip around. You stated the vast majority
7 of cases, where you have gotten assistance from Apple and have
8 been resolved without Apple having to testify. That makes
9 intuitive sense.

10 Where they have been required to testify, what kind
11 of level of detail is required to authenticate what you get
12 from their services. Does it ever put them in the position of
13 having to reveal something that is a trade secret or something
14 like that?

15 MS. KOMATIREDDY: Interesting question, Your Honor.

16 In our survey so far of Government prosecutors, we
17 have not actually identified a specific instance where they
18 have been required to testify. I have had many prosecutors in
19 those 70-cases say, they were not. A few say, yet to be
20 determined because the cases are not yet resolved. Perhaps
21 Apple's counsel has an example.

22 THE COURT: If you don't mind, do you have a number?

23 MR. ZWILLINGER: We believe that Apple has been
24 required to testify about twenty times, in cases where they
25 have done these device extractions in the past. It is not a

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1 comprehensive count either, that is asking the people who have
2 gone to testify.

3 THE COURT: Do you know if there has ever been an
4 issue in any of those cases, where the nature of the testimony
5 has itself implicated Apple's interests?

6 MR. ZWILLINGER: From Apple's perspective there is
7 an issue in all cases, to the extent, to prepare people to
8 testify to not go into information that would implicate
9 Apple's proprietary interests. But, they have managed to find
10 a way to introduce some testimony.

11 THE COURT: In terms of the burden, it is not a
12 realistic prospect that if you're ordered to do what the
13 Government wants here, at the trial in the case, you are going
14 to have to reveal, how to break a pass code for example.

15 MR. ZWILLINGER: The burden would not be that that
16 would impose, you know, it would infringe Apple's proprietary
17 interests.

18 On the other hand, in the cases where Apple doesn't
19 have to testify, there is still significant back and forth,
20 signing of declarations, negotiating stipulations. It is not
21 that every case, where they do a bypass involve the several
22 hours process of a bypass, there is usually extensive work
23 after that, even in cases where they don't have to testify.

24 THE COURT: Ms. Komatireddy, a separate issue that
25 I'm struggling with here. Just in terms of how the analysis

1 goes.

2 There seems to be sort of two halves to the
3 analysis, one is, does the act apply at all. And the second
4 is, if it applies, then we are under New York Tel and the
5 three prong test.

6 There is a part of the burden analysis that keeps --
7 I keep losing my place, trying to figure out if-- is burden or
8 applicability. It is this. What you want them to do is not
9 give over information or do something that they do anyway for
10 their own business purposes or make available to you,
11 facilities that are their's, right?

12 Those three characteristics, capture all of the
13 cases you have cited under the All Writs Act.

14 What you are asking them to do is do work for you.
15 I am-- so there are two questions. One is, analytically where
16 does that fall? Does it fall into the category, applicability
17 that the All Writs Act either does or doesn't allow that? Or
18 does it fall into category of, is it an unreasonable burden
19 for purposes of New York Tel. Do you see the difference I'm
20 trying to get at?

21 MS. KOMATIREDDY: I do see the difference. I think
22 analytically it falls under the burden. The All Writs Act
23 does not specify the nature of the assistance. The case law
24 simply says from New York Telephone and onwards, a third party
25 can be required to assist. There is all sorts of situations,

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1 even the cases that New York Telephone cites of third parties,
2 really run the gambit of various cases we have cited about
3 corporations giving corporate records, credit cards, video
4 tapes. But also cases of individuals being asked to answer
5 questions, New York--

6 THE COURT: Give over information.

7 MS. KOMATIREDDY: Give over information, there is
8 actually one of the cases that New York Telephone cites,
9 involves an order requiring parents, this is Board of
10 Education versus York, 429 F2D 66 in the 10th Circuit, 1970.
11 Order requiring parents to send their son to a particular
12 school, to further a desegregation. That is not necessarily
13 information that is not use of a facility.

14 But, so I do think that the All Writs Act doesn't
15 specify or limit the nature of the assistance, it simply
16 provides for assistance. The nature of assistance is
17 appropriate consideration under the burden analysis.

18 THE COURT: Look, clearly if it is not part of
19 applicability, it is part of burden.

20 New York Tel also, somewhat confusingly, cites the
21 Battington case, which to me is the clearest example, you know
22 conscripting work. The cop gets on the running board of the
23 cab, says follow that car.

24 And that is to me is the clearest example in New
25 York Tel of the Court saying, you know, here is a way you can

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1 use the All Writs Act. What they don't talk about there,
2 surprising to me is Battington, there was actually a statute
3 that said it is unlawful for a private citizen to disobey that
4 kind of command. Exactly sort of the opposite of the
5 application of the All Writs Act which is saying as long as it
6 is consistent with use-- so, that is what got me wondering
7 frankly if the idea of conscripted service, as opposed to the
8 other kinds of assistance that have been afforded under the
9 All Writs Act is sort of a categorical limit on the
10 applicability.

11 So you are saying-- anything-- I'm sorry, anything--
12 10th Circuit.

13 MS. KOMATIREDDY: Board of Education versus York.

14 THE COURT: Anything besides York that I should look
15 at?

16 MS. KOMATIREDDY: I will go back and we can provide
17 further briefing, we will.

18 THE COURT: Okay.

19 MS. KOMATIREDDY: May I also supplement my answer?

20 THE COURT: Please.

21 MS. KOMATIREDDY: Which is, the Court characterized,
22 this as not a situation where Apple is giving over
23 information. The actual process of extracting this data is
24 just that, extracting data. Apple doesn't--

25 THE COURT: Talking about information that they

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1 currently have. All of these cases are, you know, third
2 party, give me information that you have, or let me use your
3 facilities, right? Or usually combined with one of the other.
4 In any event, you do this anyway.

5 MS. KOMATIREDDY: So this is a combination of giving
6 over information and letting the user facilities --

7 THE COURT: Not information they have.

8 You want them to go into this phone that you have,
9 and do something that you can't do. You said you can't do.
10 Or here his can't do it.

11 But, this is not information they have. You could
12 not execute any search warrant in Apple's servers right now
13 and get the information you wanted, right?

14 MS. KOMATIREDDY: That's correct, Your Honor.

15 THE COURT: Let me ask you this related question,
16 could you subpoena or use some other form of court process, a
17 warrant, perhaps an All Writs Act order, to have Apple
18 disclose to you, how to get the information from the phone?

19 MS. KOMATIREDDY: I think the federal Government has
20 authority to issue a Grand Jury subpoena, if not a trial
21 subpoena to call a Apple witness and walk us through exactly
22 how they bypass the software.

23 THE COURT: There is existing procedure that allows
24 you to do what you want to do here.

25 MS. KOMATIREDDY: But I think that would be more

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1 burdensome to Apple, Your Honor, involving --

2 THE COURT: Yes, but under Pennsylvania versus
3 Marshals, you can't use the All Writs Act to do something for
4 which there is a procedure available under more specific law,
5 right?

6 MS. KOMATIREDDY: Under Pennsylvania versus
7 Marshals, you can't use the All Writs Act to do something that
8 a statute curtails you from doing.

9 THE COURT: There is a statute that establishes Rule
10 41. You are saying that under Rule 41, you can call them into
11 the Grand Jury, and have them walk you through how to do this?
12 Why doesn't that end the analysis?

13 MS. KOMATIREDDY: Well, Your Honor, you can call
14 them into the Grand Jury. There are a couple of things to
15 consider. First of all, it is not clear having-- called them
16 into the Grand Jury, we don't believe that we have the
17 technical, actual technical capability by which I mean, the
18 device that Apple uses to bypass the pass code.

19 So, there is still a question about whether it is
20 feasible for the Government to do so.

21 Second, calling them into the Grand Jury could cause
22 a higher burden to Apple in terms of their trade secret
23 concerns.

24 THE COURT: That is their call, right?

25 Look, this is such a complicated area, we need to

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1 keep the analytic lines clean, right? You are wrapping into
2 burden, there is something that could be worse for them. I'm
3 talking about applicability. Under Pennsylvania versus
4 Marshals, if there is another statutory path available to you,
5 you have to take it, don't you?

6 MS. KOMATIREDDY: If there is a statutory path that
7 doesn't permit what is being asked for. That is not-- what is
8 happening here.

9 THE COURT: That is because what you are asking for
10 is being defined so specifically, right? What you are asking
11 for is for Apple to do it for you.

12 MS. KOMATIREDDY: We are asking--

13 THE COURT: If what you are asking for is let us get
14 at the information in the phone for which we have a warrant.
15 It sounds like you are saying you do have a way to do that
16 without application of the All Writs Act.

17 MS. KOMATIREDDY: So, under that theory, Your Honor,
18 you can subpoena, you can use any prior All Writs Act
19 precedent.

20 Take for example, issuing an All Writs Act order to
21 get the credit card records from the credit card company.
22 Under that theory, you can subpoena the credit card witness to
23 testify about the credit card records as opposed to actually,
24 as opposed to actually produce the records. Or you can
25 subpoena the credit card custodian to come into the Grand Jury

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1 and explain how they accessed those credit card records in the
2 internal system. But that testimony alone we believe will not
3 be sufficient to then go use the system or give the federal
4 Government to use the system to get into the record.

5 THE COURT: You need the records.

6 MS. KOMATIREDDY: Yes.

7 THE COURT: You might need to authenticate those
8 records for, you know, for use in litigation. The testimony
9 about them is not going to be admissible.

10 But here, what you need is the know how to get to
11 this phone.

12 MS. KOMATIREDDY: And the technology, Your Honor.

13 Apple uses this technology in its facilities. It is
14 specific, it can't do this at any Apple store. You have to go
15 to Cupertino headquarters in their facilities, which I suspect
16 can involve a Faraday room, because of remote wire requests.

17 THE COURT: Let's get rid of the remote wipe
18 request. They said, that they essentially block that request
19 that is pending. Are you saying they are wrong?

20 MR. ZWILLINGER: Your Honor, if I can clarify that
21 briefly. The brief wasn't intended to suggest that Apple did
22 anything to cause the remote wipe request to not work. It is
23 just a matter of fact that the remote wipe request will not
24 work given the state the device is in. The Court is correct
25 it will not work, but it is not because of action that Apple

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1 took.

2 THE COURT: If it is not in a bag or room, and
3 connects to the internet.

4 MR. ZWILLINGER: It will not work.

5 THE COURT: Do you have any reason to doubt that
6 representation?

7 MS. KOMATIREDDY: If that is the representation
8 Apple is making, no.

9 THE COURT: So you were saying though why it would
10 not work because they have technology you don't.

11 MS. KOMATIREDDY: That's right. We don't believe
12 testimony alone allows us to get into the device.

13 THE COURT: Okay.

14 You know, this goes back to the thing I will ask you
15 to get back to me on. But, Bower, the his agent who
16 testifies. Says they have the device that will do this.

17 MS. KOMATIREDDY: Yes, I notice-- we will follow up
18 with the assistant who has that case. I can tell you from my
19 own personal knowledge, that the particular IOS involved in
20 that case, 8.1.2, there are certain -- this is all very
21 operating system specific. There are-- I have been informed
22 that there are certain technologies that allow the Government
23 independent of Apple, to get into that particular IOS.

24 But based on our investigation, and what the FBI and
25 DEA has told us about the IOS 7 system on the target phone, we

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1 are not able to do that.

2 THE COURT: Is your representation about what the
3 Government can do based on what the FBI and DEA can do, or are
4 you making this representation on behalf of every, I am using
5 the broadest language deliberately. You make this
6 representation on behalf of every deponent of the Government?

7 MS. KOMATIREDDY: No, Your Honor, I would not dare.

8 THE COURT: That is an issue.

9 Look, I don't expect you to easily navigate, the
10 possibility that on the Intel side, the Government has this
11 capability. I would be surprised if you would say it in open
12 court one way or the other.

13 But, you have to make a representation for purposes
14 of the All Writs Act. You have them.

15 MS. KOMATIREDDY: That's correct.

16 THE COURT: The Government cannot do this.

17 MS. KOMATIREDDY: When we--

18 THE COURT: To make that representation, you need to
19 be right about it.

20 MS. KOMATIREDDY: We are making that representation
21 as the prosecution team.

22 THE COURT: You are not the prosecution team.

23 You want to conscript a third party. Before I do
24 that, don't we have to know that you don't have actually have
25 the capability, and by "you", I mean the United States

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1 Government?

2 MS. KOMATIREDDY: I think you have to know the
3 prosecutors in this case and the prosecuting agencies, the FBI
4 and DEA do not have a reasonable available tool.

5 THE COURT: If Southern District U.S. Attorneys'
6 office has the technology and know how, you can still make the
7 representation, you have just made. That really allows me to
8 issue an order under the All Writs Act?

9 MS. KOMATIREDDY: That is a interesting
10 hypothetical. I think it is unrealistic, the agency is the
11 same.

12 THE COURT: In terms of which office, not
13 unrealistic.

14 But, that is a joke.

15 MS. KOMATIREDDY: I got it.

16 THE COURT: Look, we can slice it finely or not.
17 But, as opposed to your Brady obligation, Second Circuit law
18 clearly saying you are not responsible for everything in every
19 Government office. This is different. You are seeking
20 affirmative relief on representation that the Government can't
21 do this.

22 Why don't you have to make that representation for
23 the entire Government?

24 MS. KOMATIREDDY: Well, because-- at the end of the
25 day, the question for us is, what is the burden on Apple, and

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1 is this assistance necessary to effectuate the warrant.

2 THE COURT: The necessity prong.

3 MS. KOMATIREDDY: It is the necessity prong, Your
4 Honor, but federal prosecutors don't have an obligation to
5 consult the intelligence community in order to investigate
6 crime. And in fact, in doing so --

7 THE COURT: You can ignore it. But, when you come
8 to the Court and say it is necessary, because we can't do it,
9 why does that excuse you from saying, well, wait a minute, we
10 can do it, as a Government, but we have organized ourselves
11 for reasons that may make a lot of sense in a way that we
12 choose not to.

13 MS. KOMATIREDDY: Because fundamentally the All
14 Writs Act is a practical gap filling statute. This is not an
15 academic debate about what is possible.

16 THE COURT: You are trying to have it both ways on
17 the All Writs Act. On the one hand, you a few minutes ago,
18 you were saying, you look at it narrowly. If Congress is
19 silent, even in the face of lots of evidence, that they really
20 thought about this, decided not to do what is at issue here.

21 You know, it is fair game, the All Writs Act. Now
22 you are saying, look at it practically. I think you have to
23 choose one or the other.

24 It gets to an interpretive question that I had which
25 is, the reading of it that says if it is not explicitly

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1 prohibited by Congress, it is fair game, is one that, I don't
2 have the statute in front of me. Is one that would be
3 achieved by saying, agreeable to the law. But we had these
4 other two words, agreeable to principles and usage of law
5 which seems to go beyond just what is in the statutory text.

6 And, you know I wonder if you have a definition of
7 those terms that your, your view of the statute doesn't read
8 out of the text.

9 MS. KOMATIREDDY: So in terms of whether you're
10 looking at the All Writs Act in a practical way or impractical
11 way, our approach is consistent. It is a practical approach.

12 The reason we don't accept congressional inaction as
13 having legal force, is because that is a practical approach to
14 Congress. Congress has all kinds of reasons it doesn't pass
15 statutes including allowing the status quo to continue when
16 they can't agree on a different way.

17 THE COURT: Right. But I guess my question is, this
18 is where we get to technical issue principles and usages.

19 We have for example in CALEA, that broadly regulates
20 an industry with respect to electronic surveillance, and then
21 carves out in some respects, the encryption and puts, you
22 know, clearly defined boundaries on when third parties can be
23 conscripted into the task.

24 There is a sense of what is the spirit, what is the
25 principles and usages.

1 And to my mind that, that is a coherent
2 understanding of the statute. That where you can infer what
3 Congress was intending, from what they have done and what they
4 have not done, you can fill in the gaps to the extent it is
5 consistent with that overall understanding of legislation.

6 I'm trying to understand how you get to, as long as
7 Congress hasn't explicitly prohibited it, a Court can do it,
8 and make that coherent under the text of the statute.

9 I phrased it badly.

10 Make that consistent with a statute that includes
11 not just agreeable to the law but agreeable to principles and
12 usages of law.

13 MS. KOMATIREDDY: I understand the Court's concern.
14 I think when looking at CALEA that way, I think there is
15 something to be said, if you have a comprehensive legislative
16 scheme. The key there is actually a legislative scheme, one
17 passed into law like CALEA that addresses the issue. If there
18 is in fact comprehensive and addresses ten possible iterations
19 of a particular requested authority, and leaves one out,
20 perhaps there is reasonable inference as a matter of statutory
21 interpretation for an actual statute to say that there is an
22 implied prohibition. We don't have that here. CALEA doesn't
23 even come close to addressing the issue we have here. We
24 don't have a comprehensive statutory scheme about Federal
25 Court's requiring third parties to assist in the execution of

1 a valid search warrant.

2 For as long as that has been happening it has been
3 governed by the All Writs Act. In this particular context
4 with request to bypass of a pass code where a company is
5 already capable of conducting that bypass. There is no
6 specific expressed or implied Congressional action on that
7 issue, which is why the law is left where it is.

8 THE COURT: I do have a couple of more questions. I
9 don't want you to lose things that you want to say.

10 MS. KOMATIREDDY: No, that is all right Your Honor.

11 THE COURT: Your last answer reminded me of this.
12 In terms of, we have a scheme where courts effectuate warrants
13 by calling on third parties. I asked you before about give me
14 an example, if you have one, requiring a service from a third
15 party.

16 Your argument on this, this goes to the first
17 element of the New York Telephone which we have not discussed
18 yet, how closely related.

19 You have inserted into this, I don't mean that
20 pejoratively at all. You sort of cast the argument in terms
21 of something New York Tel doesn't talk about. At least not
22 explicitly. Apple is in a position to thwart your
23 investigation.

24 I want to make sure I understand. First of all, are
25 they in a position to do anything going forward to thwart the

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1 investigation or is it simply that before you got the warrant
2 they had done something, created this operating system, that
3 gave somebody else the possibility to thwart an investigation,
4 by turning on encryption.

5 MS. KOMATIREDDY: We are not making an allegation
6 that Apple would affirmatively do something.

7 THE COURT: There is nothing that they can do to
8 stand in the way of your investigation other than not take
9 action.

10 MS. KOMATIREDDY: I can't represent what they are
11 capable of doing in terms of, that is not within my kin. I
12 can say-- the issue, the reason we believe there is cross
13 connection and the way New York Tel frames it, is where a
14 company's services or facilities are being used as part of an
15 ongoing criminal enterprise.

16 And, in fact, this is more fully discussed in one of
17 the other case, United States versus Hall, which is the credit
18 card records case. It talks at length about the close
19 connection because in that case, it actually says, you know,
20 the case involves federal law enforcement trying to get the
21 credit card records, not of the defendant, but another person,
22 companion.

23 THE COURT: Come on, in Hall the bank was extending
24 credit to a fugitive, while that person was a fugitive. It
25 was making it possible on a go forward basis, for the fugitive

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1 to escape the law. What is Apple doing here that is
2 comparable to that? They are taking some action going forward
3 prospectively that is helping the defendant in your case.

4 MS. KOMATIREDDY: So it was not actually extending
5 credit to the fugitive. It was extending credit to a
6 companion that would have location information.

7 THE COURT: While you were trying to catch this
8 person, the bank is taking actions prospectively. What is
9 Apple doing here that is comparable?

10 MS. KOMATIREDDY: The common thread is that it is
11 the company's services that are being used by the criminal.

12 THE COURT: What services of Apple, what service is
13 Apple now providing to the defendant in this case?

14 MS. KOMATIREDDY: There are three services. One,
15 the actual pass code lock feature. The operating system which
16 Apple currently owes and currently licences to the owner of
17 that cellphone.

18 THE COURT: Can they do anything without taking back
19 something they have sold to the defendant or to somebody who
20 gave it to him, short of taking back something they have
21 already sold, can they do anything to defeat the encryption
22 here?

23 MS. KOMATIREDDY: I'm sorry, short of taking? They
24 can assist us by bypassing the lock.

25 THE COURT: Yes, for them to do that they have to

1 take it back, you have to give it to them.

2 MS. KOMATIREDDY: You are saying, take back the
3 phone. They already own the software.

4 THE COURT: What can they do to the software? I
5 have to say, of all the very good arguments in your brief, the
6 thing about the end user license agreement struck me as a
7 total red herring. I don't get at all, why what the license
8 agreement does in terms of regulating what any of the parties
9 here can do or can't do, that is of any relevance to the
10 dispute here.

11 MS. KOMATIREDDY: The relevant point is that Apple
12 owns and currently operates the software that is preventing
13 the federal warrant from being executed. Because the pass
14 code lock is enabled and still active. Because the pass code
15 feature that deletes the contents of the phone after ten
16 failed attempts, is possibly enabled and could thwart
17 execution of the search warrant. I understand that Apple has
18 represented that the remote wipe is no longer available. So,
19 we can take that out of-- assuming that is true, we can take
20 that out of the analysis.

21 The argument stands that it is Apple's software that
22 is currently operating, that stands between a Federal Court's
23 warrant being executed, and evidence of crime being --

24 THE COURT: Let me ask you, I think we have all been
25 searching for analogies one way or another here. I have seen

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1 some suggestions about the safe and you know conscripting the
2 locksmith. It seems fanciful.

3 But here is one that I think is not fanciful. The
4 last company that makes lethal injection drugs, decides to
5 stop doing it. In fact Justice Alito referred to this in
6 recent cases, gorilla warfare by these companies. Right.

7 So the last company that has been providing drugs
8 for execution, says to the Government, we are no longer going
9 to help you out when it is time to execute somebody in Terre
10 Haute.

11 Can -- are they thwarting a lawful death sentence by
12 doing that, and can they therefore be compelled under the All
13 Writs Act to re-import something that is held abroad or
14 release something from existing stock or actually manufacture
15 the drug anew?

16 MS. KOMATIREDDY: So, with each of these, it is a
17 case by case analysis. I think we have to return to the
18 factors under New York Telephone and the factors in the All
19 Writs Act. I think you have to look at what the relevant
20 applicable law is and I have to concede in this area I'm not
21 familiar with the expansive 8th Amendment Law on this.

22 THE COURT: In terms it is fact specific under the
23 burden, is that relationship close enough for purposes of the
24 first element of New York Tel, to say look, this company, you
25 know they have got the monopoly on this point on doing it, on

1 making these drugs. Now they are out of business. They are
2 thwarting us from carrying out a lawful death sentence.

3 Does that get you passed the first step?

4 MS. KOMATIREDDY: Your Honor, I have to be honest
5 with you here, it is hard to say. Here is the reason I
6 hesitate with this analysis. The analogy is different because
7 there, we are not talking about an order that is a warrant
8 that can-- that can be simply executed but for one step in
9 between. We are talking about a potential death sentence
10 issued by a jury.

11 THE COURT: Sorry. Look, that is not right. It is
12 an order of the Court. The sentence is, a Court order just as
13 the warrant is a Court order.

14 MS. KOMATIREDDY: And the question is, whether the
15 company that makes the injection.

16 THE COURT: They are the last company around and
17 there are fewer of them. We get to the point where there is
18 one. They say, you know what, they are not going to do it,
19 deliberately to try to frustrate public policy, right. We
20 don't want there to be executions, so we are going to withdraw
21 the drug from availability. The All Writs Act, can tell them
22 to do otherwise.

23 MS. KOMATIREDDY: That would depend on the law of
24 whether you can require a company. That could depend on
25 several things. The relevant Food and Drug law, whether you

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1 can require a company to develop a drug in that manner.

2 THE COURT: There is silence on this. We are in the
3 exact same position as we are here. You have silence.

4 You are doing a really wonderful job of representing
5 the Government here, but you understand the question I'm
6 trying to ask.

7 MS. KOMATIREDDY: I do understand the question. It
8 is a tough question.

9 The thing that is particularly tough about that
10 question is, it is hard to say, so there are two questions,
11 you have asked. One, does the All Writs Act permit that
12 order. That requires considering all three of the factors. I
13 have.

14 THE COURT: But that is not the question I asked.
15 The question I asked is, does the intent to thwart the
16 execution of that death sentence, bring the company closely
17 enough to thwarting of a lawful court order that you satisfied
18 the first element of New York Tel. Not does it satisfy all
19 three elements, just the first.

20 MS. KOMATIREDDY: So, I don't think it is intended
21 to thwart, but establishes the connection. Based on the case
22 law I reviewed from New York Tel and United States versus
23 Hall. It is when the company's facilities are being used in
24 some way. I mean this context, in some way, for an illegal
25 purpose. So in that context it would be the company so called

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1 facilities, drug making features are being used or not being
2 used.

3 THE COURT: Right.

4 MS. KOMATIREDDY: So, the difficult part of that
5 question is, understanding who is sufficiently closely
6 connected. It may be that company, it may be someone else is
7 more closely connected.

8 So I --

9 THE COURT: Like who?

10 MS. KOMATIREDDY: It may be that you can-- the
11 Federal Government can develop those things on its own.

12 THE COURT: You mean like here, the Government might
13 be able to find the technology and know how on its own,
14 perhaps by asking his.

15 MS. KOMATIREDDY: So.

16 THE COURT: Right?

17 MS. KOMATIREDDY: I think I have addressed the his
18 point.

19 THE COURT: I know. Theoretically the Government
20 can do this.

21 MS. KOMATIREDDY: No, Your Honor.

22 THE COURT: Theoretically, in the hypothetical, the
23 Government can do it on its own. The same here.

24 MS. KOMATIREDDY: Based on our investigation, we
25 can't bypass the pass code on this particular phone.

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1 THE COURT: Right. I am positing a scenario, where
2 there is nobody else who is making this drug. So I'm trying
3 to make it as close as possible. I just-- instead of fighting
4 the hypo, I really appreciate addressing the question I'm
5 trying to ask, which is, does it satisfy the first test, that
6 first prong of the New York Tel test in the -- that drug
7 scenario, context.

8 (Pause.)

9 MS. KOMATIREDDY: I apologize for taking a moment.

10 THE COURT: These are hard questions. No problem.

11 If you want to consider it and get back to me, I
12 completely understand and that is fine.

13 MS. KOMATIREDDY: Your Honor, the hypothetical is so
14 inflammatory, I would like to consider it and get back to you.

15 THE COURT: It is purposefully so. Because to some
16 extent, what you are talking about, and this gets to very much
17 the burden in New York Tel. You are saying, it is not much of
18 a burden. And part of how you get there is, well, the
19 American people would not think that, you know, a company
20 would not want to help law enforcement.

21 But, at some point, not just a matter of marketing
22 and dollars and cents. At some point, a private actor, I'm
23 not saying necessarily Apple has. Somebody can say we don't
24 want to do this. As a matter of conscience, this is something
25 we don't think should be done.

1 I'm trying to draw parallels intentionally to the
2 company that says, we don't think our drugs should be used to
3 kill people.

4 Can the All Writs Act compel service over a
5 conscientious objection which is very different from saying,
6 can it compel information or the use of a facility. There is
7 something just categorically different about compelling
8 service.

9 So, yes, it is intentionally a tough and
10 inflammatory hypothetical because I want to get a sense of how
11 far you are -- understanding of the All Writs Act goes.

12 MS. KOMATIREDDY: I'm happy to consider that further
13 and get back to you on that Your Honor.

14 But I would note that in this case, there is no
15 conscientious objection. Apple has been doing this for years
16 without any objection.

17 THE COURT: Right.

18 MS. KOMATIREDDY: And they are more concerned about
19 public perception, which is a fair concern, but that is not
20 the law. And, the law shouldn't change that perception.

21 THE COURT: I don't know if it is or not. I really
22 don't know.

23 I am almost not completely exhausted the questions I
24 wanted to ask you, I very much appreciate how responsive you
25 have been, especially, you have indulged sort of my jumping

1 all over the place.

2 The last one, this goes back belatedly to
3 Congressional inaction.

4 There is a case from the Ninth Circuit, 1970, that
5 is cited but not really taken on analytically in New York Tel,
6 called application for United States for relief, Ninth
7 Circuit, 1970.

8 And, in that case, the Ninth Circuit did what I was
9 suggesting before, sort of like looking at the sort of overall
10 state of the legislation, what has been done and what hasn't,
11 and denied the refund of the All Writs Act there.

12 What was going on there, was a request for telecom
13 assistance for a wire tap after the original statute was
14 passed in 1968, but before Congress acted to-- partly in
15 response to this case, to require telecom assistance.

16 New York Tel cites it, but I don't think they are
17 really saying they were wrong. They weren't saying they were
18 right either. But it does have a reading of the All Writs Act
19 that seems to be disagreeing with you, about the meaning of
20 Congressional silence or the lack of affirmative legislation.

21 Again, if you don't have a case clearly in mind that
22 is fine, I will let you respond later.

23 Did the Ninth Circuit get it wrong there, or can you
24 square it somehow with your understanding of the meaning of
25 Congressional inaction here.

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1 MS. KOMATIREDDY: I need to review the case to get
2 back to you. The distinction that pops out from the outset is
3 if it is a case about requiring assistance for Title III wire
4 tap and there is a Title III wire tap statute which in itself
5 is an extensive statute already in place. You have the
6 presence of a complicated relatively exhaustive statutory
7 scheme. So there is something to be said there for reading
8 it, that the entirety of that statutory scheme and absence of
9 specific authority which would otherwise be obvious, missing
10 from that statutory scheme.

11 I am happy to review the case and follow up on that.

12 THE COURT: I may well have skipped some things, but
13 I want to hear from Apple, give it a chance as well.

14 But, if you have not had a chance to get to some
15 arguments, I want to hear them.

16 MS. KOMATIREDDY: Your Honor, we are happy to hear
17 from Apple.

18 THE COURT: You have been very patient there Apple.

19 MR. ZWILLINGER: Thank you, Your Honor.

20 There were two points I wanted to emphasize and the
21 Court touched on both of them. But I just would take a little
22 time to underscore them.

23 We do believe that providing expert services on a
24 device in the Government's custody, is different than
25 providing access to records or facilities that are in our

1 possession and control.

2 In all of the cases that you mentioned, the
3 Government cites, involve records or facilities that are in
4 the third party's control. For example, there were logs from
5 the phone company, there are credit card transactions from a
6 credit card company, there were surveillance tapes in an
7 apartment complex. They were not only in the possession and
8 control of a third party, but they were in the normal course
9 of their business.

10 Here we put a device in the stream of commerce. The
11 Government is asking us to essentially do what they want and
12 would like to have their own agents do, which is perform
13 forensics services and unlock it. That type of conscription
14 does not have a precedent in the All Writs Act cases that have
15 been cited. So I wanted to focus on that.

16 The second is, the most important difference between
17 this and what was set out in New York Telephone, is that there
18 is no indication that Congress intended the Government to have
19 this power here.

20 In New York Telephone, there was a greater included
21 power. There was a greater power which was the power to wire
22 tap the contents of communications. And the Government said
23 that surely has to include the lesser included power of
24 performing a pen register. And not performing the pen
25 register would have frustrated the intent of Congress.

1 In this situation it is the exact opposite. Law
2 enforcement is seeking an order that the Congress has never
3 authorized, and it is not a subset of the authority that
4 Congress has already granted.

5 We are talking about CALEA. We agree, that this is
6 outside the bounds of CALEA, but we draw completely different
7 conclusions from that.

8 CALEA only covers data in transmissions, but only
9 providers, only certain types of providers, providing certain
10 types of services, were given the obligation to build in a way
11 to assist law enforcement.

12 And, Ms. Komatireddy points out that Apple is
13 outside that scope.

14 (Transcript continues on next page.)
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1 THE COURT: Are you inside the scope of the
2 information service?

3 MR. ZWILLINGER: I need to get back to the Court on
4 that. I don't think we've taken a position on that, but we're
5 outside the scope of what's a required actor under CALEA.

6 THE COURT: Go ahead.

7 MR. ZWILLINGER: And CALEA is where Congress has
8 been debating making amendments or amending the statute to
9 encompass a wider variety of services and a wider variety of
10 providers and that's the debate that Congress needs to have.

11 What's going on here is this is not a gap in the law
12 that the All Writs Act would fill in. This is pushing the law
13 to a new frontier and if the government wants these types of
14 authorities to require providers to provide forensic services
15 to the government, I think the place to go is Congress because
16 we can't use the All Writs Act which, as we had some
17 discussion, was passed in 1789 and amended in 1946, to
18 circumvent this question. This is the question of the time
19 which is what is the balance between privacy and government
20 access today and Congress needs to speak on that and if we
21 give the government the power they're asking under the All
22 Writs Act, we circumvent that entire debate.

23 THE COURT: Can I ask, on the issue of burden, even
24 if you're not sort of legally foreclosed in any way from
25 making the arguments you are making, I am troubled by the fact

1 that there is a history here and it's not just, you know,
2 saying here is what you need to do, government, if you want
3 something from us. You are writing a request for them and it
4 is hard for me to think of an analogous situation where
5 somebody who does not want to do something says, but I'll tell
6 you how to get it done.

7 MR. ZWILLINGER: Let me address that.

8 THE COURT: What explains why you are providing this
9 kind of help? Is it not that, hey, you know, we want to
10 foster law enforcement, we do, we just don't want to be seen
11 out there as, you know, compromising the privacy of our users'
12 devices?

13 MR. ZWILLINGER: Right. So let me address that in
14 two ways.

15 First, the legal backdrop of this, by the way, is
16 under New York Tel, the question was is the activity something
17 that the provider does in their normal course of business and
18 is it offensive in any way to the provider.

19 Apple doesn't do this and never did this
20 voluntarily. Apple was always compelled by a court order to
21 perform these services when it did it and all of that was done
22 in an ex parte proceeding, the same type of proceeding that
23 would result in the authorization of a search warrant.

24 THE COURT: I'm sorry. It's not just these are
25 ex parte proceedings. You get one of these orders. If you

1 don't like it, you know you can go to a court and say, you
2 know, relieve us from this obligation or, if you've had
3 several of these things and you don't want to keep doing it,
4 you can seek declaratory judgment, right, because there's
5 clearly the ongoing controversy that will get you past the
6 jurisdictional bar.

7 If you didn't want to do this, if it was really
8 burdensome to you, do you disagree that you had steps
9 available to you that you have just not taken?

10 MR. ZWILLINGER: Apple could have challenged the
11 order that they received, there's no question it could have,
12 but also the weight of the authority was that Apple was
13 regularly receiving these orders from magistrates, receiving
14 these orders from courts indicating that Apple was being
15 compelled to do this and no court and no state court or
16 federal court had invited Apple to submit its views.

17 THE COURT: But, clearly, you don't need to be
18 invited to court when you think your interests are at stake
19 and you have been getting these orders but from the very few
20 that I have seen with the exception of the one in the Southern
21 District which I don't think was to Apple, whatever XXX Inc.
22 was, it appears not to be Apple, but there has been one that's
23 been publicly available out of Oakland.

24 From all I can see in these cases, there are
25 boilerplate applications and boilerplate orders and nothing

1 about them, again, from the limited slice of it I've seen,
2 that would have suggested to you, I think, well, it's futile
3 for us to go to court and try to win the case because they've
4 decided the issue.

5 MR. ZWILLINGER: Well, I would think the fact that
6 we were repeatedly getting these orders and being contacted by
7 law enforcement did play into the fact that it seemed that
8 this had been somewhat settled views and settled authority
9 from multiple judges.

10 THE COURT: But, look, you know how it works,
11 especially at the magistrate level. There are plenty of just
12 very pro forma applications and orders that get signed and the
13 fact that that happens doesn't necessarily indicate that the
14 issue has been given the kind of thought that would be
15 required if you were to challenge it and seek to vindicate
16 your perceived rights.

17 So, I am just trying to understand why I shouldn't
18 read something into the fact that you have never tried to
19 challenge these orders.

20 MR. ZWILLINGER: Let me make one comment about the
21 language though because I think it's important.

22 One of the reasons for the language that we offered
23 to law enforcement is because we were getting so many orders
24 and the orders were not consistent as to what Apple was and
25 wasn't required to do, and because there were questions

1 related to, you know, does Apple have to decrypt the device,
2 does Apple have to do X or Y, certain language was come up
3 with so that if Apple saw that in an order, it would be clear,
4 one, that it was being compelled to perform these services,
5 and it wasn't, you know, any voluntary action on its part,
6 two, exactly what services it was being required to do and
7 what it wasn't required to do.

8 So, the point of the standardized language was, in
9 fact, because we were getting these with such frequency, that
10 we wanted to accomplish that and make it clear that we were
11 being compelled.

12 THE COURT: Okay.

13 MR. ZWILLINGER: So I don't think giving the
14 language is a concession to the fact that the All Writs Act
15 provides authority to issues those types of orders.

16 THE COURT: Look, your language doesn't invoke the
17 All Writs Act, I get that, but in terms of the burden, first,
18 you haven't challenged it and you still haven't explained why
19 not. Second, you provided language for reasons I understand
20 about consistency, but you also did not say anything about
21 burdens beyond the immediate expense.

22 If you are saying we want to craft language that is
23 going to say here's exactly what we have to do, you require,
24 if I'm not mistaken -- I don't have the language in front of
25 me. Do you require compensation?

1 MR. ZWILLINGER: No, we've never required
2 compensation.

3 THE COURT: But you can, and you don't do anything
4 about that.

5 I mean, the point is well taken that Apple is a
6 pretty darn big company, maybe they don't care so much about
7 the costs of these 70 things in the big picture. It just
8 seems to me that there's a dog that didn't bark here.

9 MR. ZWILLINGER: I think the way to address this,
10 Your Honor, is the following.

11 Right now, Apple is aware that customer data is
12 under siege from a variety of different directions. Never has
13 the privacy and security of customer data been as important as
14 it is now. And, in fact, Apple built an operating system
15 which is why we're only talking here about IOS 7 systems,
16 operating systems IOS 8 and IOS 9, that puts Apple in a
17 position where it cannot do this, that is, going forward with
18 390 percent of the devices involved, Apple cannot perform
19 these services. So, Apple has taken itself out of the middle
20 of being in a position where it can be used as an attack
21 vector or in any way to compromise the security and privacy of
22 customer devices.

23 So, when the court asks Apple today does the All
24 Writs Act provide authority to force it to do this, Apple says
25 no, it does not, because what we are being forced to do is

1 expert forensic services, we're being forced to become an
2 agent of law enforcement and we cannot be forced to do that
3 with our old devices or with our new devices.

4 THE COURT: One of the arguments you make about
5 burden is that complying with the order implicates the trust
6 relationship that you have with your customers. I'm not sure
7 I understand why.

8 I mean, as you have taken pains to make clear in the
9 language you propose, you only break into one of these phones
10 if you're compelled by law. Well, we all have an obligation
11 to follow the law. So how does that imperil the trust
12 consumers have?

13 MR. ZWILLINGER: Well, it's a somewhat ironic
14 question in light of the prior question which is why hasn't
15 Apple been challenging these in the past. That is, if Apple
16 in a position where it is no longer going to be able to turn
17 these devices and bypass them and give data to law enforcement
18 and now Apple is being invited by this court to comment on its
19 views, I think Apple's views are we are not in the business of
20 accessing our customers' data, we have never been in the
21 business of accessing our customers' data and we shouldn't be
22 in that business either on our own or being conscripted by law
23 enforcement.

24 THE COURT: Okay. Explain to me sort of the path
25 from you're ordered to do something unwillingly to because you

1 did so, consumers lose confidence in you.

2 MR. ZWILLINGER: I think it's the same question you
3 asked me a minute ago, why didn't Apple challenge the prior
4 orders.

5 THE COURT: No, it's not. It's really a different
6 question. That's why I'm asking it again.

7 In other words, tell me the thought process in some
8 hypothetical consumer's head.

9 MR. ZWILLINGER: Well, I think a hypothetical
10 consumer could think if Apple is not in the business of
11 accessing my data and if Apple has built a system to prevent
12 itself from accessing data, why is it continuing to comply
13 with orders that don't have a clear lawful basis in doing so.

14 THE COURT: Well, clear lawful basis, but when a
15 court says you must do it, and I have considered your
16 arguments about a lawful basis, and still saying, sorry, you
17 have an obligation or you're paying a fine or somebody is
18 going to jail, how does that imperil trust?

19 MR. ZWILLINGER: So I think the answer is if it
20 becomes crystal clear, if you say and whatever other court
21 this goes to after you say that the All Writs Act provides
22 clear authority to do this and that we have found that there's
23 sufficient basis in law to conscript you into government
24 service, then it wouldn't undermine customer trust, but at
25 this point, it does because right now, it's not clear.

1 THE COURT: But, see, that's why I'm having trouble
2 and it does go back to the earlier question.

3 The thing that does seem to imperil consumer trust
4 is not that you comply with a court order, but that you don't
5 take all the steps available to you to fight that order before
6 complying.

7 Here, you're doing that at invitation and I don't
8 know what plans, if any, and you don't have to tell me what
9 lies ahead if I grant the government's motion, but you have
10 had apparently 70 prior instances where you have not taken the
11 steps available to you. That I can see imperils the trust,
12 but complying with an order after you fight it, how is that
13 going to do it? And if you want, address why doesn't it
14 imperil trust to the point that it's hard for me to put much
15 weight on your burden argument if in the past you haven't
16 taken these steps.

17 MR. ZWILLINGER: Well, I think of two things.

18 One is having been in this area of law a while, we
19 have seen the law evolve. Right? There was a time when cell
20 site data was available with a mere subpoena by the
21 government. There was a time when contents of communications
22 was available with a subpoena or court order by the government
23 and now it's accepted as somewhat orthodoxy that a warrant is
24 required for contents of communications.

25 So, the law evolves and by understanding that the

1 All Writs Act doesn't provide the clear cut authority that
2 Apple once may have thought it did, I think Apple has to
3 continue to say that if Apple is forced to do what it does not
4 want to do -- right? The court posited the question before,
5 is Apple saying it does not want to do this. Apple is saying
6 it does not want to do this. It does not want to be in the
7 business of being a mechanism by which customer data is
8 disclosed. Although it will comply with lawful orders when
9 required to do so, it doesn't think that that's the position
10 that Apple should be in and Apple has communicated to its
11 consumers that it doesn't want to be in that position.

12 THE COURT: I was discussing with Ms. Komatireddy
13 alternate means that might be available.

14 MR. ZWILLINGER: Yes.

15 THE COURT: What's your take on, from both a
16 technical level and the legal one, the alternative of subpoena
17 or other process ordering Apple to tell the government how to
18 break into the phone?

19 MR. ZWILLINGER: So, before I address that, can I
20 clarify something on the record --

21 THE COURT: Yes.

22 MR. ZWILLINGER: -- with regard to the question you
23 asked about the Djibo case?

24 THE COURT: Yes.

25 MR. ZWILLINGER: It was my understanding that

1 Ms. Komatireddy said that this concerns an IOS 8 system.
2 Apple is not aware of any mechanism to break into an IOS 8 or
3 IOS 9. Not aware of it at all. I think this was speculation
4 in the testimony, but the testimony did say that the declarant
5 here or the person testifying, the forensic expert, said that
6 he personally broke an IOS, an iPhone 4S running 7.0.

7 THE COURT: But he was also saying that he
8 understands that it has been used successfully for 8.1.2 which
9 is the phone --

10 MR. ZWILLINGER: We're not aware of that. We're not
11 aware of that indication. We have heard that there were third
12 parties advertising the ability, forensic service providers
13 the ability to access a 7.0 phone. We have no independent
14 verification of that, but we had heard that as well. So there
15 may be other means for this case for this phone although we
16 don't think those exist in the future.

17 As to your question, however, we do agree with the
18 government that we do not think there's an easy mechanism by
19 which Apple can disclose to the government the method of
20 access.

21 THE COURT: Technically or legally?

22 MR. ZWILLINGER: Well, we don't think, legally, we
23 can be forced but, technically, we don't think it would work.
24 The way the system is configured, it requires certain
25 authentication from our servers and on that point, I think

1 Ms. Komatireddy was correct that we couldn't provide the
2 instruction manual that would just work.

3 THE COURT: Just to close the loop, why, legally?
4 What would be the bar to the subpoena or even an All Writs Act
5 order because information is clearly something that an All
6 Writs Act order covers obviously?

7 MR. ZWILLINGER: I think it would be forcing the
8 company to disclose some of the most confidential trade
9 secrets it has and I think Apple would find that the legal
10 justification in this case wouldn't be there for that type of
11 order, we would argue.

12 THE COURT: Burden or just not --

13 MR. ZWILLINGER: Even more. I mean, we're talking
14 about at this point, you know, the most confidential trade
15 secret issue, but we don't think we have to get there. We
16 agree with the government that the system requires Apple
17 authentication.

18 THE COURT: Okay. There was another burden question
19 I wanted to ask you and it slipped my mind unfortunately.

20 MR. ZWILLINGER: If I could, Your Honor.

21 THE COURT: Yes. Go ahead, please.

22 MR. ZWILLINGER: I do think Ms. Komatireddy's
23 argument or review of what Congress has been discussing is far
24 too narrow. She said the debate was just about providing law
25 enforcement access to certain types of communications. I

1 don't think that's what the debate has been about. The debate
2 has been an entire societal debate about the role of providers
3 and being required to assist law enforcement and I think the
4 debate covers this topic and a variety of other topics.

5 So, this doctrine that Congressional inaction can't
6 be used as a basis for making this decision I think doesn't
7 apply in All Writs Act. The whole point of All Writs Act is
8 to figure out what Congress has passed and hasn't passed and
9 are you filling in a scheme that has some interstitial
10 problems or are you giving authority that Congress never
11 intended. So I think you have to look at what Congress has
12 done and hasn't done. CALEA is a comprehensive scheme by
13 which certain types of providers are required to provide
14 assistance for law enforcement. That's the title of the
15 statute.

16 So, I don't think her view is correct. I think,
17 one, you have to consider what Congress has chosen not to do
18 and, two, you have to look at CALEA and say what was the
19 bargain struck with CALEA, who was required to perform
20 services and who was not, and then decide whether this is an
21 issue that the court can fill in.

22 THE COURT: This does remind me of the question I
23 had before and it was somewhat related.

24 Look, is it really burdensome for you in a bigger
25 picture sense to do what the government wants here? And there

1 are two things I have in mind.

2 One is, in sort of a narrower sense, your brief
3 almost makes the argument. It's an advertisement for buying
4 our new phones, right, because we won't be able to do this.
5 If you just get our newer phone, we can't do this for the
6 government. So, yes, sell more phones.

7 The second one, and not quite as facetiously, there
8 is a broader societal debate and it seems that it's reached a
9 point somewhat to your liking quite recently which is as
10 things currently stand, the administration isn't seeking
11 back-door legislation.

12 Are you worried at all that a decision here and in
13 other courts like it saying you can't rely on the All Writs
14 Act which the government may have been assuming it could would
15 reopen the question for the government and for Congress to
16 have back-door legislation.

17 In other words, are you better off having the
18 transitory orders under the All Writs Act?

19 MR. ZWILLINGER: I think on the second point first,
20 Apple is better off for having a robust public debate that if
21 new authority is going to be granted and we do this, leading
22 down the road to all sorts of new authorities, it should be
23 done by Congress. So whether advantageous -- the result is
24 advantageous or not, the process is right to go to Congress
25 and have a public debate and not to do it this way.

1 THE COURT: Okay.

2 MR. ZWILLINGER: Going back to your first point
3 about the advertisement for the new phones, one of the
4 problems with the type of authority that the government is
5 seeking is that it's hard to draw the line where it stops.
6 Would it stop at unlocking? Why wouldn't the government say
7 all the same things about modifying software? Why wouldn't
8 they claim we have a Title III order and the only way to get
9 it to be implemented is if we ask you to you make changes to
10 the product?

11 THE COURT: There was a case like that, wasn't
12 there? I'm blanking on it. It was essentially trying to set
13 down an update to the phone that would allow the government to
14 do something that it had gotten authority for. Does that ring
15 any bells?

16 MR. ZWILLINGER: We're not aware.

17 THE COURT: I'm sorry. I hope I'm not making it up.
18 Go ahead.

19 MR. ZWILLINGER: The point is that the line drawing
20 question, that is, the authority they're seeking, if Apple
21 stays sufficiently involved with a product that's admittedly
22 locked and in a draw, the argument under New York Tel prong
23 one that we're sufficiently involved in this product, we're
24 doing nothing with this device right now. It's sitting in a
25 drawer locked. We're providing no services to it. If the

1 government thinks that we're sufficiently entangled with it
2 such that we can be ordered to take affirmative steps, it
3 doesn't seem obvious where that line stops.

4 So, the question is isn't this just solved,
5 everybody will just buy the new phone, no, not if this
6 authority that the government is seeking is granted because it
7 is not clear how far it will extend.

8 THE COURT: All right. I didn't want to keep you
9 from making other arguments you wanted to make.

10 MR. ZWILLINGER: If you would give me one moment.

11 THE COURT: Sure. Yes.

12 (Pause.)

13 MR. ZWILLINGER: Your Honor, I think we've made all
14 the affirmative points.

15 THE COURT: Do you want to add something in
16 response?

17 MS. KOMATIREDDY: Yes, Your Honor. I just wanted to
18 make two points to supplement the record.

19 First, I know the Court's main question was what All
20 Writs Act authority is there to require actual assistance,
21 services, not just information.

22 THE COURT: Yes.

23 MS. KOMATIREDDY: And I think a fair way to
24 characterize what's going on here is that we are asking for
25 technical assistance. We're also asking for information as

1 counsel just represented, the actual bypass and process
2 information required from Apple's servers that it has.

3 If you look at New York Telephone and one of the
4 other cases that we've cited from the District of Puerto Rico,
5 In Re Application, which orders the phone company to assist in
6 essential monitoring, in those cases, the court issues All
7 Writs Act orders both for information and for technical
8 assistance in order to effectuate that particular obtaining of
9 information. So, labor is conceived as part of the types of
10 assistance that a court can require.

11 MR. ZWILLINGER: Your Honor, I'm very glad she
12 brought up that District of Puerto Rico case because I think
13 she's reading it exactly wrong. The court denied authority
14 under the All Writs Act in that case. The court ruled that
15 the All Writs Act did not provide a basis for authority and
16 said Rule 41 provided the authority.

17 THE COURT: I'm reminded of Judge Nickerson who
18 argued before the Supreme Court. One Justice thought a case
19 said one thing and another one thought it said something. The
20 lawyers argued very different readings of the same case and a
21 Justice said, well, how are we supposed to resolve this? And
22 Judge Nickerson said, I'm afraid Your Honor will just have to
23 read the case. I have to do that.

24 MR. ZWILLINGER: I would proffer that but the
25 language is fairly clear. The government has -- issuance of

1 the requested order directly under the All Writs Act would not
2 be necessary or appropriate in aid of this court's
3 jurisdiction where no jurisdiction exists thus, there must be
4 a separate jurisdictional basis for me to grant this
5 application.

6 MS. KOMATIREDDY: You're right, and the separate
7 jurisdictional basis is Rule 41.

8 I mean, the thing is with these All Writs Act
9 orders, historically what's happened is the government has
10 asked for two things. One, it's asked for the court to
11 provide, to allow it to obtain a certain amount of information
12 and provide, through the All Writs Act, access and authority
13 to get that information and then, second, for the court to
14 instruct a third party to assist in obtaining that
15 information.

16 Here, we don't have to do that. This case is
17 actually more narrow because the government has separate legal
18 authority, a search warrant, to obtain the data. All we're
19 asking for is technical assistance.

20 THE COURT: I get it. One last thing.

21 The Pennsylvania versus Marshals case, the court
22 ended up saying there that the court could not require the
23 Marshal Service to transport a prisoner who was required to be
24 in federal court. Right?

25 MS. KOMATIREDDY: Right, but, Your Honor, in that

1 case, there was actually a habeas statute that was directly on
2 point and the habeas statute had a provision that said that
3 state court personnel were required to do the transfer. So in
4 that instance, again, you have a statute that is not on point.
5 Very different from here.

6 THE COURT: If not by statute, I know it's
7 counterfactual, would it pass the burden test and all the
8 other prongs of New York Tel?

9 MS. KOMATIREDDY: I think so. It depends a little
10 bit on the burden. I think the question about close
11 connection is easier there because if it's a transfer as it
12 was in that case of a state prisoner to a federal facility, at
13 least the United States Marshals have some relation to the
14 federal, to that part of the system.

15 THE COURT: But they're not standing in the way of
16 the transport. They're just not doing it.

17 MS. KOMATIREDDY: Yes.

18 THE COURT: In other words, in that way, it seems to
19 be very analogous to this case.

20 MS. KOMATIREDDY: That's true, Your Honor, and I
21 think this is why it's important to look at all of the factual
22 situations of that particular circumstance because in all
23 likelihood, if I were to suppose what would happen in that
24 situation, the court gives an order to transfer a particular
25 prisoner, the government probably would just send an agent as

1 opposed to request the assistance of marshals.

2 THE COURT: Right. You said there was a second
3 case.

4 MS. KOMATIREDDY: Yes, Your Honor. We followed up
5 with the Assistant who handled the case in Djibo, 15-CR-088,
6 and I'll at least provide some additional information on how
7 we believe we got into this pass code, but I want to represent
8 to the court that I'll personally follow it up after our
9 hearing is over.

10 My understanding is I'm advised the technology in
11 that case worked by trying every possible pass code. In that
12 case, they did not have a reason to believe that the feature
13 that initiates a wipe after ten failed attempts was activated.
14 Here --

15 THE COURT: The testimony, and I know you haven't
16 had a chance to read it, but the testimony talks about that
17 and defeating that, I won't pretend to have followed exactly
18 the technical explanation, but to defeat that, rather than it
19 wasn't turned on.

20 MS. KOMATIREDDY: All right. You know, in terms of
21 better practice, let me consult with the AUSA and I'll get
22 back to you.

23 THE COURT: Okay.

24 All right. Everybody, this has been very, very
25 helpful and really wonderful advocacy by both sides. I am

1 happy to set a schedule for you to get back to me on the
2 various items that have come up, just a letter from each side.

3 How long do you want? I would like simultaneous
4 letters rather than giving one side priority over the other.

5 MS. KOMATIREDDY: We would request two days so
6 Wednesday.

7 THE COURT: Wednesday. Would that work for you
8 guys?

9 MR. ZWILLINGER: I think we can do Wednesday.

10 THE COURT: Okay. Great.

11 MR. ZWILLINGER: Thank you, Your Honor.

12 THE COURT: All right. Then I will get a decision
13 out as quickly as I can.

14 Thank you all. Have a very good day.

15 MS. KOMATIREDDY: Thank you, Judge.

16 (Matter concluded.)
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