ARTICLE

DECODING PANDORA'S BOX: ALL WRITS ACT AND SEPARATION OF POWERS

JENNIFER X. LUO*

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I. INTRODUCTION

For much of history, locks have existed to guard our homes and personal belongings. We display enormous ingenuity in the design of the most

* B.A., Rice University; J.D., Yale Law School.

complex locks, all for a sense of security in our physical belongings and by extension, ourselves. In the twenty-first century, physical locks and the items they guard are increasingly digitalized and stored in electronic devices and digital clouds. The companies that create these devices have in turn become the modern equivalents of locksmiths. And sometimes, even these "locksmiths" do not have the key to such locks. This phenomenon raises some interesting questions, such as—what are the duties of these "locksmiths" to assist the government in decrypting the locks that they and their consumers have created? Is Congress, the Judiciary, or the Executive Branch best positioned to decide this question? And as non-democratic states implement draconian and purposely ambiguous laws that require tech companies to hand over encryption keys to monitor their citizens,[1] how can we develop solutions that will stay true to the values of our democracy?

The Executive Branch's answer, at the moment, is the All Writs Act. Since 2008, the government has filed more than sixty applications under the All Writs Act to compel private companies such as Apple, Google, and even a major bank, to decode consumer login information.[2] While recent publicity in the San Bernardino shooting may have brought the All Writs Act to the national spotlight,[3] the fact is that "the alleged crimes in these cases have ranged from drugs to counterfeiting."[4] As the frequency of such orders increased since 2008, the government has also become bolder in the scope of requests sought.[5]

One explanation for this aggressive use of the Act is Congress's recent failure to mandate encryption backdoors.[6] More alarmingly, many such orders were issued on the same day that the government sought them, were

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[1] *See* Joel Schectman, Dustin Volz & Jack Stubbs, *Under Pressure, Western Tech Firms Bow to Russian Demands to Share Cyber Secrets*, REUTERS (June 23, 2017, 5:06 AM), https://www.reuters.com/article/us-usa-russia-tech-insight/under-pressure-western-tech-firms-bow-to-russian-demands-to-share-cyber-secrets-idUSKBN19E0XB [http://perma.cc/82BJ-8W88].

[2] *See* Matthew Segal, *Lessons from the Government's 63 Prior Attempts to Make Tech Companies Unlock Devices*, SLATE (Mar. 31, 2016, 11:01 AM), https://www.slate.com/blogs/future_tense/2016/03/31/the_government_s_63_prior_attempts_to_use_the_all_writs_act_to_make_companies.html [http://perma.cc/SL97-DBD6]; *see also All Writs Act Orders for Assistance from Tech Companies*, ACLU (Mar. 21, 2016), https://www.aclu.org/issues/privacy-technology/internet-privacy/all-writs-act-orders-assistance-tech-companies [http://perma.cc/YGU2-YLPP] (compiling data showing a map of All Writs Act decryption orders issued around the country).

[3] Segal, *supra* note 2.

[4] *Id.*; *see also* Letter to Court at *1, *In re Apple Inc.*, 149 F. Supp. 3d 341, 346 (E.D.N.Y. Feb. 17, 2016) (No. 1:15-MC-1902) (stating that the government has filed multiple applications for similar orders, some of which are pending).

[5] *See* Segal, *supra* note 2. *Compare In re* Order Requiring Apple, Inc. to Assist in the Execution of A Search Warrant Issued by This Court, No. 14-1760-WGC, at *1 (D. Md. Aug. 29, 2014) (specifying that Apple would not be required to "enable law enforcement's attempts to access any encrypted data"), *with* Government's Ex Parte Application for Order Compelling Apple Inc. to Assist Agents in Search, *In re* Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, No. 15-0451M (C.D. Cal. Feb. 15, 2016).

[6] *See* Segal, *supra* note 2; *see also* Erin Kelly, *Congress Wades into Encryption Debate with Bill to Create Expert Panel*, USA TODAY (Jan. 11, 2016, 4:10 PM), https://www.usatoday

sealed, and received no objections from the companies the orders targeted,[7] shielding these cases from public discourse. While the Legislative Branch has failed to mandate decryption by private technology companies, the Executive Branch has resorted to a little-known statute from the eighteenth century to accomplish the same end.

With its roots going back to two sections of the Judiciary Act of 1789,[8] the All Writs Act is perhaps one of the most vaguely worded statutes in existence. The text of the Act, as amended, provides in its entirety:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.[9]

Until the recent trend to invoke the Act to compel the decryption of personal devices, the government used the Act sparingly and often referred to it as a "statute of last resort."[10] For example, the Act has been used to compel a telephone company to install a pen register where no legislation specifically gave the government such powers.[11] In recent years, prosecutors have increasingly drawn on the Act's authority to seek judicial orders to compel private technology companies to decode consumer devices.[12] Meanwhile, Congress has yet to provide a legislative solution that addresses whether private entities can be compelled to decode consumer devices in

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.com/story/news/2016/01/11/congress-wades-into-encryption-debate-bill-create-expert-panel/78627460/ [http://perma.cc/Z49U-6AD8].

[7] *See* Segal, *supra* note 2.

[8] *See* Judiciary Act of 1789, ch. 20, §§ 13–14, 1 Stat. 73, 80–82; *see also* United States v. N.Y. Tel. Co., 434 U.S. 159, 179 (1977); Lonny S. Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. PA. L. REV. 401, 433 (1999). Sections 13 and 14 of the First Judiciary Act provided the antecedents for 28 U.S.C. § 1651(a). *See* Hoffman, *supra*, at 401 n.4. In 1940, the two provisions were essentially consolidated into what is now referred to as the All Writs Act, promulgated in its current form in § 1651(a), which substantially mirrors the language of section 14. *See* Michael D. Sousa, *A* Casus Omissus *in Preventing Bankruptcy Fraud: Ordering a Search of a Debtor's Home*, 73 OHIO ST. L.J. 93, 111–12 (2012); *see also* Pa. Bureau of Corr. v. U.S. Marshals Serv., 474 U.S. 34, 40–42 (1985) (discussing the legislative history of § 1651 as consolidating section 14 and various provisions without substantial change in meaning or purpose). As a result of the 1948 revisions, the All Writs Act is the sole statutory authority on which a court may base its issuance of an extraordinary writ, with the exception of 28 U.S.C. § 2241(a) concerning writs of habeas corpus. *See* Hoffman, *supra*, at 434–35.

[9] 28 U.S.C. § 1651 (2012). A "writ" is a court's written order commanding the addressee to do or refrain from doing some specified act in the name of a state or other competent legal authority. *Writ*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[10] *See, e.g.*, Mongelli v. Mongelli, 849 F. Supp. 215, 220 (S.D.N.Y. 1993) ("[T]he All Writs Act must be invoked only as a last resort—it is not a 'catch-all' statute granting jurisdiction when all else fails.").

[11] *See N.Y. Tel. Co.*, 434 U.S. at 159.

[12] *See* Amy D. Sorkin, *The Dangerous All Writs Act Precedent in the Apple Encryption Case*, NEW YORKER (Feb. 19, 2016), https://www.newyorker.com/news/amy-davidson/a-dangerous-all-writ-precedent-in-the-apple-case [http://perma.cc/HY8E-822P].

certain situations. This is perhaps not surprising given the ultra-sensitive nature of data privacy and consumer protection.

Case law applying the Act also offers little guidance. Thus far, the Court has only discussed application of the Act in the pre-internet era.[13] Various courts and legal scholars have derived the following requirements for the usage of the All Writs Act:

> (1) no other law applies; (2) the issuing court has jurisdiction over the underlying matter on an independent basis and the order is "in aid of" that jurisdiction; (3) exceptional circumstances are present that make issuance under the Act necessary or appropriate; and (4) the issuance of relief is done in conformity with the "usages and principles of law."[14]

However, the latter three prongs are intrinsically vague and ambiguous. Their amorphous qualities offer little guidance to courts in the decryption context and can be easily used to justify either the issuance or denial of an order.

Yet the question of whether the Act in fact provides such authority implicates jurisdictional and separation of powers concerns. While most critics of the Act as applied to decryption orders object based on privacy concerns, I argue that courts have little jurisdictional basis to compel private entities that have no public or statutory duty to provide law enforcement assistance. Additionally, the existing framework of analysis fails to take into account areas where a gap is not necessarily intentional or inadvertent, but rather the result of legislative battles and Congress's inability to arrive at a consensus.

This Article argues that the issuance of decryption orders under the All Writs Act does not merely enforce the issuing court's existing jurisdiction but threatens to violate the separation of powers doctrine by enabling the executive branch to bypass legislative consensus. In doing so, the court also violates the freedom of third-party corporations not to assist. To safeguard the original function of the All Writs Act as a gap-filler, courts should take into account whether a pre-existing gap in legislation is the result of unresolved legislative battle rather than an unintended gap in legislation. Only in this way can courts address the issue of compelled decryption orders without undermining the safeguards of our democracy.

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[13] *See, e.g.*, *N.Y. Tel. Co.*, 434 U.S. at 172.

[14] John L. Potapchuk, *A Second Bite at the Apple: Federal Courts' Authority to Compel Technical Assistance to Government Agents in Accessing Encrypted Smartphone Data Under the All Writs Act*, 57 B.C. L. Rev. 1403, 1423 (2016) (citations omitted); *see id.* at 1423 n.112 (noting that this area of law is under-theorized in secondary literature, and that no fully consistent articulation of the prerequisites for an All Writs Act injunction has been announced by the lower courts); *see also* Pa. Bureau of Corr. v. U.S. Marshals Serv., 474 U.S. 34, 40–43 (1985); *N.Y. Tel. Co.*, 434 U.S. at 187–90; *In re* Application for Location Info., 849 F. Supp. 2d 526, 580–82 (D. Md. 2011); Dimitri D. Portnoi, Note, *Resorting to Extraordinary Writs: How the Act Rises to Fill the Gaps in the Right of Enemy Combatants*, 83 N.Y.U. L. Rev. 293, 299–303 (2008) (discussing the Supreme Court's approach to the All Writs Act).

To set the stage, Part II discusses the history of the All Writs Act, including the predecessors to the Act and their common usage by federal courts before 1948—when the Act was amended to take its current form. In part, it offers a brief overview of how the Act's predecessors were limited to the issuance of writs of mandamus and injunction. Part III then examines applications of the Act in Supreme Court jurisprudence and discusses the role of the Act as a statutory gap-filling device. It studies how the Court first applied the Act to the area of privacy in *United States v. New York Telephone Co.*,[15] where the Court compelled a telephone company to install a pen register in order to wiretap criminal suspects. It then analyzes how the Court subsequently drew the boundaries around application of the Act as a gap-filler. Finally, it summarizes recent lower courts' application of the Act to compel decryption by private third-party corporations.

Part IV questions whether application of the Act in the privacy context thus far truly enforces the court's existing jurisdiction, or if it furthers the agenda of the government and undermines the separation of powers doctrine. In particular, it considers the tenuous grounds for ancillary and inherent jurisdiction under the Act to adjudicate decryption cases. Part V explains the practical issues that defendants face to effectively challenge an All Writs Act order, the lack of incentives for third-party corporations to challenge such orders, and the implications of establishing a new judicial norm that assesses the cost of decryption on a case-by-case basis. Finally, Part VI analyzes the legislative history of the Communications Assistance for Law Enforcement Act ("CALEA")[16] and proposes a modified *New York Telephone Co.* test that takes into account the reason and nature of a gap. Here, I suggest that where a gap is the result of legislative gridlock, courts lack jurisdiction to fill such a gap under the All Writs Act.

II. Background of the All Writs Act

The All Writs Act provides that, "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[17] The Act traces its lineage back to the Judiciary Act of 1789.[18]

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[15] 434 U.S. 159 (1977).

[16] Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (codified at 47 U.S.C. §§ 1001–1010 (2012)).

[17] 28 U.S.C. § 1651 (2012).

[18] *See* Hoffman, *supra* note 8, at 433–39; *see also* 16 Charles Alan Wright et al., Federal Practice and Procedure § 3933, at 535 (2d ed. 1996) (explaining that "§ 1651(a) is a combination of two provisions that trace back to sections 13 and 14 of the First Judiciary Act"). In fact, the Act was entangled with controversy and confusion even from its birth. "[C]hief Justice Marshall declared section 13 unconstitutional to the extent it sought to enlarge the Court's original jurisdiction." *Id.*; *see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175–80 (1803) (noting that the Constitution allows Congress to extend the Supreme Court's appellate, but not original, jurisdiction).

Its exact predecessors are sections 13 and 14 of the Judiciary Act of 1789,[19] which would later be consolidated into section 1651(a).[20] Specifically, section 13 authorized the Supreme Court:

> [T]o issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.[21]

Section 13 thus provided district courts with two types of power: (1) to issue writs of prohibition in courts of admiralty and maritime jurisdiction; and (2) to issue writs of mandamus "in cases warranted by the principles and usages of law."[22]

Similarly, section 14 authorized federal courts to "issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."[23] The operative words are "all other writs not specially provided for by statute," which are then limited by the qualifiers that they must be "necessary" for the court's exercise of jurisdiction and "agreeable" to the ends of the law. Thus, while section 13 gave courts the power to issue writs of mandamus, section 14 provided broader power to issue any writ not already provided for by statute. However, both sections also limited courts' power to issue such writs by requiring that they be agreeable to the "principles and usages of law."[24] Section 14 additionally requires that any writs issued must be "necessary" for the courts' existing jurisdiction.[25]

The current All Writs Act was codified in the Judicial Code in 1948 when provisions of sections 13 and 14 were consolidated into section 1651 without substantive amendment.[26] The original phrase "not specifically provided for by statute" was removed in this consolidation.[27] The legislative history appears to be scant and Congress made "necessary changes in phra-

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[19] Hoffman, *supra* note 8, at 433; *see also* Judiciary Act of 1789, ch. 20, §§ 13–14, 1 Stat. 73, 80–82.

[20] Hoffman, *supra* note 8, at 433; *see also* Pa. Bureau of Corr. v. U.S. Marshals Serv., 474 U.S. 34, 40 (1985) (remarking that the "All Writs Act originally was codified in § 14 of the Judiciary Act of 1789"); Akhil R. Amar, *Marbury, Section 13 and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 458 (1989) (observing that section 14 of the First Judiciary Act is "the precursor of today's All Writs Act").

[21] Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 81.

[22] *Id.*

[23] *Id.* at 81–82.

[24] *Id.*

[25] *Id*.

[26] 28 U.S.C. § 1651(a) (1948) (Reviser's Note); *see also* Hoffman, *supra* note 8, at 434, n. 146 ("The 1948 codification consolidated sections 342, 376, and 377 of the 1940 version of the Code which, in turn, were derived from sections 234, 261, and 262 of the Judicial Code of 1911.") (citing Act of March 3, 1911, ch. 231, 36 Stat. 1156, 1162).

[27] *Compare id*. § 1651(a) (1948) *with* 28 U.S.C. § 377 (1940).

seology" without substantive amendment.[28] However, the legislative history did provide that the new section was "expressive of the construction recently placed upon [the all writs provision] by the Supreme Court in *U.S. Alkali Export Assn. v. U.S.* [sic] . . . ."[29] In *U.S. Alkali Export Association,*[30] the petitioner argued that a statute stripped the district court of jurisdiction and sought cert review from the Supreme Court after the district court denied the motion to dismiss.[31] The Court affirmed the district court's jurisdiction and found that interlocutory review under section 262 of the Judicial Code was appropriate where the underlying question involved the propriety of the court's equity jurisdiction.[32] Nevertheless, the Court stated the traditional use of writs under section 262 was "to confine inferior courts to the exercise of their prescribed jurisdiction or to compel them to exercise their authority when it is their duty to do so."[33] Chief Justice Stone wrote:

> The writs may not be used as a substitute for an authorized appeal; and where, as here, the statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment, review by certiorari or other extraordinary writ is not permissible in the face of the plain indication of the legislative purpose to avoid piecemeal reviews.[34]

Indeed, the Supreme Court reiterated in *Pennsylvania Bureau of Correction v. U.S. Marshals Service* that Congress's consolidation of sections 13 and 14 into the All Writs Act was "intended to leave the all writs provision substantially unchanged" and "that the 1948 changes in phraseology do not mark a congressional expansion of the powers of federal courts to authorize issuance of any 'appropriate' writ."[35]

Thus, Congress's consolidation of sections 13 and 14 into section 1651 has been interpreted to maintain, rather than expand or limit, the powers of the federal courts under the All Writs Act.[36] Section 1651 also became the only existing statutory authority on which a court may base its issuance of

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[28] H.R. Rep. No. 80-308, at A144 (1947); *see also* Pa. Bureau of Corr. v. U.S. Marshals Serv., 474 U.S. 34, 41 (1985).

[29] H.R. Rep. No. 80-308, at A145 (1947); *see also Pa. Bureau of Corr.*, 474 U.S. at 40 (noting that the legislative history of the 1948 codification of § 1651 indicates that the new section should be interpreted in line with the *Alkali* holding).

[30] U.S. Alkali Exp. Ass'n v. United States, 325 U.S. 196 (1945).

[31] *Id.* at 202–04.

[32] *See id.* at 203 ("The questions now presented involve the propriety of the exercise, by the district court, of its equity jurisdiction, and an asserted conflict between its jurisdiction and that of an agency of Congress said to be charged with the duty of enforcing the antitrust laws . . . .").

[33] *Id.* at 202.

[34] *Id.* at 203.

[35] Pa. Bureau of Corr. v. U.S. Marshals Serv., 474 U.S. 34, 42 (1985).

[36] *See id.* at 41–42 (stating that Congress intended to maintain the powers of the federal courts under the All Writs Act, not to expand them).

extraordinary writs (aside from writs of habeas corpus codified in section 2241(a)).

Prior to 1948, the Supreme Court frequently had to police lower courts' unauthorized use of section 14 to issue writs of mandamus.[37] For example, in *Roche v. Evaporated Milk Association*,[38] the Supreme Court reversed the circuit court's issuance of a writ of mandamus directing the district court to reinstate guilty pleas in abatement based on violations of the final judgment rule.[39] Indeed, circuit courts sometimes issued writs of mandamus to district courts even though appellate jurisdiction was only available after a "final" judgment.[40] In addition, parties often sought to enforce state court judgments by seeking writs of mandamus from federal courts, which would unwittingly grant them despite a lack of jurisdiction.[41] As an example, the Supreme Court in *McIntire v. Wood*[42] invalidated a district court's issuance of a writ of mandamus under section 14 to a state office.[43] Finding the lower court lacked original jurisdiction in the first place, the Court concluded that the lower court's issuance of a writ of mandamus was improper because the court's authority was "confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction."[44] In doing so, the Court emphasized that section 14 was not intended to be an independent source of jurisdiction.[45] Prior to 1948, the Supreme Court frequently had to reverse the lower courts' issuance of mandamus under section 14.

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[37] *See, e.g.*, De Beers Consol. Mines v. United States, 325 U.S. 212, 225 (1945) (invalidating injunction issued by lower court based on lack of jurisdiction); Rosenbaum v. Bauer, 120 U.S. 450, 459 (1887) (affirming an order remanding the case for lack of jurisdiction); Bath Cty. v. Amy, 80 U.S. 244, 247 (1871) ("The Circuit Courts of the United States have no power to issue writs of mandamus to State courts, by way of original proceeding, and where such writ is neither necessary nor ancillary to any jurisdiction which the court then had."); Riggs v. Johnson Cty., 73 U.S. (6 Wall.) 166, 197–98 (1867) (describing when a lower court would lack jurisdiction to issue writ of mandamus).

[38] 319 U.S. 21 (1943).

[39] *Id.* at 32; *see also* Stephen I. Vladeck, *Military Courts and the All Writs Act*, 17 GREEN BAG 191, 193, n.6 (2014) (citing Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25–31 (1943)).

[40] *See* Vladeck, *supra* note 39, at 193.

[41] *See, e.g.*, McIntire v. Wood, 11 U.S. (7 Cranch) 504, 505–06 (1813) (reversing lower court's grant of writ of mandamus for lack of jurisdiction); Kendall v. U.S. ex rel. Stokes, 37 U.S. 524 (1838) (reversing lower court's grant of mandamus for lack of jurisdiction).

[42] 11 U.S. (7 Cranch) 504 (1813).

[43] *Id.* at 505–06 (holding that the Court lacked jurisdiction because of the absence of a statute specifically conferring jurisdiction).

[44] *Id.* at 506.

[45] Similarly, in *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598 (1821), the Court reiterated that Section 14 was not intended to be an independent source of jurisdiction. *Id.* at 600–01 (1821). There, the state court issued a writ of mandamus citing section 14, and the Supreme Court invalidated the writ based on the court's lack of jurisdiction. *Id.* at 605; *see also* Amar, *supra* note 20, at 457–58 (pointing out that sections 14, 15, and 17 of the First Judiciary Act reveal a distinction between the word "power" and "jurisdiction"). Thus, under Section 14, federal courts have the "power" to issue writs which may be necessary for the exercise of their respective "jurisdictions." Amar, *supra* note 20, at 457–58. Parsing the Act's text in this manner, Professor Amar concludes that "it is clear from context that the Act is investing courts with certain authority if and when they have independently founded jurisdiction . . . . 'Jurisdiction' must be established first, and independently; 'power' then follows, derivatively." *Id.*

After 1948, "orders under the All Writs Act typically took the form of injunctions."[46] Injunctions issued under the Act were relatively rare because they could "only be issued when necessary to protect a court's underlying subject matter jurisdiction."[47] Thus, they had to aid a court's existing jurisdiction on some independent ground such as original jurisdiction, diversity jurisdiction, or statutory jurisdiction.[48] Furthermore, these injunctions were typically issued "to safeguard ongoing proceedings or to effectuate already-issued orders."[49] Specifically, where a party's conduct violates a previously issued court order, the court may use the Act to enjoin such conduct.[50] For example, the Act had been used to issue injunctions to enjoin a proposed merger so as to maintain the status quo.[51] It was also used to issue injunctions against expelled members of a union in order to enforce a consent decree under the Racketeer Influenced and Corrupt Organizations Act.[52]

III. Application of the All Writs Act to Privacy

The application of the All Writs Act to the area of privacy is perhaps unexpected given its historical use as a mandamus- or injunction-issuing mechanism. But its relevance to privacy is also not surprising given its vague and amorphous qualities as a jurisdiction-preserving tool. This Section discusses in depth the first case that applied the All Writs Act to the area of privacy—*United States v. New York Telephone Co.*—the Supreme Court's subsequent readings of the All Writs Act, and recent applications of the Act in the area of privacy.

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[46] *See* 1-10A Moore's Manual: Federal Practice and Procedure § 10A.05 [hereinafter 1-10A Moore's Manual] (discussing ancillary injunctions under the All Writs Act, which are used to prevent conduct that could frustrate the court's jurisdiction); Potapchuk, *supra* note 14, n.99, at 1421 (citing Klay v. United Healthgroup, Inc., 376 F.3d 1092, 1099–1100 (11th Cir. 2004).

[47] *See* Potapchuk, *supra* note 14, at 1421.

[48] *See, e.g.*, 28 U.S.C. §§ 1337–1338, 1340 (2012) (providing district courts with original jurisdiction); *see also* Dimitri D. Portnoi, Note, *Resorting to Extraordinary Writs: How the All Writs Act Rises to Fill the Gaps in the Rights of Enemy Combatants*, 83 N.Y.U. L. Rev. 293, 301 (2008); Potapchuk, *supra* note 14, at 1451 n.100 (citing Clinton v. Goldsmith, 526 U.S. 529, 534–35 (1999); ITT Cmty. Dev. Corp. v. Barton, 569 F.2d 1351, 1358–59 (5th Cir. 1978)).

[49] *See* Potapchuk, *supra* note 14, at 1420–21, n.101 (citing *Klay*, 376 F.3d at 1099; *Barton*, 569 F.2d at 1359–60) (noting that the All Writs Act permits a district court to issue any order "necessary to enable the court to try the issue [in a pending case] to final judgment" and "develop the material issues and to bring them to a complete resolution"); *see also* United States v. N.Y. Tel. Co., 434 U.S. 159, 172 (1977) (noting the long-recognized authority of the federal courts to issue orders under the All Writs Act to "effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained").

[50] *See* Harris v. Nelson, 394 U.S. 286, 300 (1969) (quoting Price v. Johnston, 334 U.S. 266, 282 (1948)) ("[The All Writs Act] has served . . . as a legislatively approved source of procedural instruments to achieve 'the rational ends of law.'"); Marshall v. Local Union No. 639, 593 F.2d 1297, 1302 (D.C. Cir. 1979); Potapchuk, *supra* note 14, at 1420, n.96–97 (citing *N.Y. Tel. Co.*, 434 U.S. at 188 (Stevens, J., dissenting in part)).

[51] *See* FTC v. Dean Foods Co., 384 U.S. 597, 601 (1966).

[52] *See* United States v. Int'l Bhd. of Teamsters, 266 F.3d 45, 50 (2d Cir. 2001).

A. How New York Telephone Co. *Opened Pandora's Box*

The seminal case that provides the doctrinal support for forced decryption took place in the pre-digital era in the 1970s. In *New York Telephone Co.*, the government sought an order under the All Writs Act to compel a public telephone company to install a pen register on two telephone lines in order to wiretap suspects in a gambling operation.[53] The government argued that such an order was necessary in order to carry out a prior warrant to wiretap the suspects' phone conversations.[54] The district court authorized the All Writs Act order directing the New York Telephone Co. (the "Company") to furnish the FBI with "all information, facilities and technical assistance necessary to employ the pen registers unobtrusively."[55] The Company declined to install the pen register, though it provided the information necessary for the government to do so.[56] The government determined that it was not feasible for it to install the pen register without alerting the suspects and insisted that the Company install unused telephone lines to monitor the suspects.[57]

The Company moved in the Southern District of New York:

> [T]o vacate that portion of the pen register order directing it to furnish facilities and technical assistance to the FBI in connection with the use of the pen register on the ground that such a directive could be issued only in connection with a wiretap order conforming to the requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[58]

The district court ruled that the Wiretap Act did not govern pen registers but that it had jurisdiction to authorize the installation of the pen registers based on a showing of probable cause and the court's inherent power under the All Writs Act.[59] The Second Circuit subsequently held that the district court abused its discretion in ordering the Company to assist in the installation and

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[53] 434 U.S. at 174–78. A "pen register" is a device that "records the numbers dialed on a telephone by monitoring the electronic impulses caused when the dial of the telephone is released" and "does not overhear oral communications and does not indicate whether calls are actually completed." *Id.* at 161 n.1.; *see also* Hoffman, *supra* note 8, at 416–19 (discussing *N.Y. Tel.* in the context of All Writs Act); Ian J. McCarthy, *IOS Fear the Government: Closing the Back Door on Governmental Access*, 49 U. TOL. L. REV. 179, 194–96 (2017) (same); Stephen J. Otte, *Whether the Department of Justice Should Have the Authority to Compel Apple Inc. to Breach Its iPhone Security Measures*, 85 U. CIN. L. REV. 877, 880 (2017) (same); Potapchuk, *supra* note 14, at 1428–30 (same).

[54] 434 U.S. at 175–76.

[55] *Id.* at 161.

[56] *Id.* at 162–63.

[57] *Id.* at 163.

[58] *Id.*

[59] *Id.*

operation of pen registers "in the absence of specific and properly limited Congressional action."[60] It expressed concerns that:

> [S]uch an order could establish a most undesirable, if not dangerous and unwise, precedent for the authority of federal courts to impress unwilling aid on private third parties," and that "there is no assurance that the court will always be able to protect [third parties] from excessive or overzealous Government activity or compulsion.[61]

The Supreme Court reversed the Second Circuit.[62] It held the Company could be compelled to install pen registers under the All Writs Act.[63] First, it analyzed the removability of the Company from the underlying controversy. Because there was probable cause that the Company's pen registers were being used to facilitate a criminal enterprise, the Company was not removed from the underlying matter.[64] Second, the Court took into account the nature of the Company as a highly regulated public utility. Finding that such an entity has a duty to serve the public, the Court held that the Company lacked any "substantial interest in not providing assistance."[65] Third, the order was not burdensome for the Company because the Company regularly employed pen registers to check billing operations and detect fraud.[66] Furthermore, the order required that the government fully reimburse the Company at prevailing rates.[67] Thus, compliance with the order would not disrupt the Company's business operations. Fourth, without the Company's compelled assistance, the authorized surveillance could not have been accomplished.[68] Finally, the order was not inconsistent with "recent congressional actions" since Congress, in the Wiretap Act, commanded assistance necessary to accomplish an electronic interception, even though it did not specifically provide for the installation of pen registers.[69] Thus, the Court affirmed the use of the All Writs Act after examining the removability and nature of the third party, the burdensomeness of the order, whether the order could be accom-

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[60] *Id.* at 164 (quoting Application of the U.S. in the Matter of an Order Authorizing the Use of a Pen Register or Similar Mech. Device, 538 F.2d 956, 961 (2d Cir. 1976) (No. 1068, Docket 76-1155)).

[61] *Id.* (alterations in original) (quoting Application of the U.S. in the Matter of an Order Authorizing the Use of a Pen Register or Similar Mech. Device, 538 F.2d at 962–63 (No. 1068, Docket 76-1155)).

[62] *Id.* at 178.

[63] *Id.* at 174–78.

[64] *Id.* at 174.

[65] *Id.*

[66] *Id.* at 175.

[67] *Id.*

[68] *Id.*

[69] *Id.* at 176.

plished without the third party's assistance, and whether the order was consistent with congressional intent.[70]

B. The Role of the All Writs Act as a Gap-Filling Jurisdictional Device

Eight years after *New York Telephone Co.*, the Supreme Court decided another landmark case involving the All Writs Act in *Pennsylvania Bureau of Correction v. U.S. Marshals Service*. There, the Court clarified the role of the All Writs Act as a gap-filling device and warned against the use of the Act to expand jurisdiction.[71] A lower court issued an order under the All Writs Act directing the United States Marshals Service to transport state inmates from a county facility to the federal court to testify as witnesses.[72] After the Marshals objected to the order, the Third Circuit reversed in part and held that "the All Writs Act did not confer power upon the District Court 'to compel *non-custodians* to bear the expense of [the production of witnesses] simply because they have access to a deeper pocket.'"[73] Recognizing that the All Writs Act may be "necessary or appropriate" to enforce the court's exercise of jurisdiction, the Court emphasized the limited role of the Act to "fill[ ] the interstices of federal judicial power when those gaps threatened to thwart the otherwise proper exercise of federal courts' jurisdiction."[74] Because the Act is a "residual source of authority to issue writs," where a statute specifically addresses the issue at hand, that statute is the controlling authority.[75] Unlike in *New York Telephone Co.*, where there was "a gap in federal statutes," here the habeas corpus statute already provided for the issuance of a writ.[76] Thus, the use of the All Writs Act was inappropriate because it supplanted a federal statute rather than fill a gap in jurisdiction.

While *Pennsylvania Bureau of Correction* is an instance where the Court underscored the limited role of the All Writs Act, another case decided a decade before *New York Telephone Co.—FTC v. Dean Foods Co.*[77]—stands for the view that the All Writs Act should be used to issue orders where Congress failed to provide a solution. There, the newly created Fed-

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[70] Justice Stevens, joined by Justice Brennan and Justice Marshall, dissented from the opinion. Writing for the minority, Justice Stevens pointed out that the Court's usage of the All Writs Act was unprecedented both in terms of "purpose" and "means." *Id.* at 187 (Stevens, J., dissenting in part). He argued that the purpose of the order was not in aid of the court's jurisdiction and duties, but rather in aid of the government's interest. *Id.* Moreover, the means exceeded the court's historical usage of a common-law writ. *Id.* at 188–89. Finally, the minority pointed out that the order in such a form was similar to a writ of assistance under colonial rule, which was specifically outlawed in the nation's history. *Id.* at 190.

[71] 474 U.S. 34, 43 (1985).

[72] *Id.* at 35–36.

[73] *Id.* at 36 (alteration in original) (citation omitted).

[74] *Id.* at 41.

[75] *Id.* at 43.

[76] *Id.* at 42 n.7.

[77] 384 U.S. 597 (1966).

eral Trade Commission sought a preliminary injunction under the All Writs Act to stop the respondents, Dean Foods Company and Bowman Dairy Company, from merging until it reviewed the legality of the merger.[78] The FTC argued that if the merger was subsequently ruled illegal after its consummation, it would be impossible to restore the merged entities' separate status, which meant the court of appeals would thus be deprived of its appellate jurisdiction.[79] However, respondents argued the fact that Congress did not give the FTC express statutory authority to request preliminary relief under the All Writs Act meant no such relief would be available.[80] The Court, on the other hand, reasoned that Congress could not have entrusted the enforcement of the Clayton Act to the FTC without allowing the court of appeals to exercise its derivative power under the All Writs Act.[81] Thus, in the absence of explicit congressional direction, courts may exercise their authority under the All Writs Act to ensure effective judicial review of administrative agencies.[82]

Although *Pennsylvania Bureau of Correction* and *Dean Foods* do not concern the subject of privacy, they both underscore the role of the All Writs Act as a gap-filling device while drawing boundaries around the Act's usage. At one end of the spectrum, *Dean Foods* and *New York Telephone Co.* may stand for the idea that the All Writs Act should apply as long as Congress is silent on a particular legislative issue and where there is a gap in jurisdiction. At the other end, *Pennsylvania Bureau of Correction* states that courts should not use the All Writs Act where Congress has already provided a legislative solution. What these cases have not addressed, however, is a scenario where Congress has engaged in significant legislative debate on an existing "gap" but has failed to take action. Such a scenario is the current situation in the data decryption context.

C. Application of the All Writs Act to Data Decryption

Although the significance of *New York Telephone Co.* dissipated after Congress passed the Electronic Communications Privacy Act ("ECPA")[83] to regulate surveillance involving pen registers, its framework can still apply to data privacy cases.[84] Indeed, the government has increasingly sought All Writs Act orders compelling third-party device manufacturers like Apple to

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[78] *Id.* at 599.
[79] *See id.* at 599–600.
[80] *See id.* at 605–06.
[81] *Id.* at 606–07.
[82] *See id.* at 607–08.
[83] *See* 18 U.S.C. §§ 3121–3127 (2012).
[84] *See* Potapchuk, *supra* note 14, at 1429 n.138 (citing Smith v. Maryland, 442 U.S. 735, 741 (1979); *In re* Application of the U.S. for an Order Authorizing (1) Installation & Use of a Pen Register & Trap & Trace Device or Process, (2) Access to Customer Records, & (3) Cell Phone Tracking, 441 F. Supp. 2d 816, 831 (S.D. Tex. 2006)).

decode defendants' password-protected consumer devices.[85] One of the few cases to have addressed this issue in depth is *In re Order Requiring Apple, Inc. to Assist in the Execution of a Search Warrant Issued by this Court* ("*In re Apple, Inc*.").[86] There, the government secured search warrants for the defendant's residence and seized an iPhone 5 that used Apple's software for its operating system.[87] It then sought a warrant to search the device but was unable to bypass the iPhone's passcode security.[88] The government requested that Apple unlock the device. Apple's response—consistent with its past practice in at least seventy instances[89]—was that it would unlock the iPhone only if a court issued a lawful order requiring it to do so.[90] Subsequently, the government filed an application to compel Apple to decode the iPhone under the All Writs Act, which the district court denied.

The district court analyzed the order application with a two-tiered test. First, the warrant had to meet the statutory requirements of the All Writs Act, which the court broke down into three elements: the issuance of the writ must be (1) "in aid of" the issuing court's jurisdiction; (2) "necessary or appropriate" to provide such aid to the issuing court's jurisdiction; and (3) "agreeable to the usages and principles of law."[91] Second, if the warrant satisfied these threshold requirements, the court could issue the writ after considering three discretionary factors: (1) the closeness of the relationship between the directed entity and the matter; (2) the reasonableness of the burden imposed on the writ's subject; and (3) the necessity of the writ to aid the court's jurisdiction.[92] The first three elements came from the statutory text of the All Writs Act, and the next three factors arose out of the Court's holding in *New York Telephone Co*.[93]

Analyzing the order under this framework, the district court concluded that although the application was "in aid of" and "necessary or appropriate" to the court's jurisdiction, it was not "agreeable to the usages and principles of law."[94] Additionally, all three discretionary factors weighed against the government.[95] Two primary concerns drove the court's denial of the All

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[85] *See* Sorkin, *supra* note 12; *see also In re Apple Inc.*, 149 F. Supp. 3d 341, 348 (E.D.N.Y. 2016) (citation omitted) ("Apple alluded to 'additional requests similar to the one underlying the case before this Court' and the fact that it has 'been advised that the government intends to continue to invoke the All Writs Act in this and other districts in an attempt to require Apple to assist in bypassing the security of other Apple devices in the government's possession.'").

[86] 149 F. Supp. 3d 341 (E.D.N.Y. 2016).

[87] *Id.* at 345–46.

[88] *Id.*

[89] *Id.* at 346.

[90] *Id.*

[91] *Id.* at 350.

[92] *Id.* at 351; *see also id.* (recognizing that the third discretionary factor replicates the second statutory element).

[93] 149 F. Supp. 3d at 350–51.

[94] *Id.* at 351–54.

[95] *Id.* at 350–51.

Writs Act order. First, it was arguable that another statute, the CALEA,[96] exempted Apple from forced decryption and implicitly prohibited compelled decryption by private entities.[97] Second, the burdens imposed on Apple were significantly higher than those imposed on the Company in *New York Telephone Co*.[98]

The district court's application of the *New York Telephone Co.* framework is interesting because instead of treating the *New York Telephone Co.* test as a three-prong test that interprets the All Writs Act, the court created a six-prong test, with three mandatory factors based on the text of the All Writs Act, and three discretionary factors derived from the *New York Telephone Co.* framework.[99] This six-prong test is therefore a little redundant because the three discretionary factors were originally used to help the *New York Telephone Co.* Court assess whether a writ is "necessary or appropriate" and "agreeable to the usages and principles of law." Nevertheless, the court's analysis of CALEA and the concerns it raised pose valid questions for future decryption cases under the All Writs Act. Whether the Act provides means to compel decryption is a pressing issue that courts around the country are increasingly facing.[100]

After *In re Apple, Inc.*,[101] the first and only appellate decision to address this issue in depth thus far was *United States v. Blake*.[102] The Eleventh Circuit applied a five-prong test derived from *New York Telephone Co.* and *Pennsylvania Bureau of Correction*, examining whether the use of the All Writs Act was (1) necessary or appropriate to carry out an issued order, (2) not otherwise covered by statute, (3) not inconsistent with the intent of Congress, (4) whether the third party was too far removed from the underlying case, and (5) whether any burden imposed on the compelled party was reasonable.[103] The court held that the use of the All Writs Act was appropriate. There was no other way for the FBI to execute the district court's warrant to search the contents of the iPad, no statute expressly permitted or prohibited it, compelling decryption was not inconsistent with the intent of Congress, Apple was not too far removed from the case as a non-party because its

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[96] Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified at 47 U.S.C. §§ 1001–1010 (2012)).

[97] *In re Apple, Inc.*, 149 F. Supp. 3d at 354.

[98] *Id.* at 368–72.

[99] *Id.* at 350–51.

[100] Sorkin, *supra* note 12; *see also* Ben Hancock, *What's Next: All Writs Goes Abroad?*, LAW.COM (Dec. 13, 2017), https://www.law.com/sites/almstaff/2017/12/12/whats-next-all-writs-goes-abroad-ico-unplugged-predicting-a-discrimination-case/ [http://perma.cc/4HFB-QC67].

[101] Since *In re Apple, Inc.,* a federal magistrate court judge granted an All Writs Act order compelling Apple to decode the iPhone of a defendant in the 2015 San Bernardino attack. *See In re* Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, No. ED 15-0451M, at *1 (C.D. Cal. Feb. 16, 2016). However, the judge did not issue any opinion explaining the rationale for granting such an order and no further adjudication on the matter took place. *Id.*

[102] 868 F.3d 960 (11th Cir. 2017).

[103] *Id.* at 970–71.

technology provided the means by which the iPad was locked, and complying with the order was not costly for Apple.[104] In applying this test, the court devoted most of the discussion to the third prong, which analyzed whether the use of the Act as a gap-filler would be inconsistent with the intent of Congress.[105] It examined the CALEA, which required "'telecommunication carrier[s]' to provide certain forms of assistance to law enforcement, while exempting 'information services' companies—a category that includes Apple—from those same requirements."[106] The court reasoned this exemption did not run counter to using the All Writs Act to compel decryption because section 1002 merely evinced Congress's intent to exempt device manufacturers from designing a back-end decryption channel for law enforcement.[107] In doing so, the court described section 1002 to be "all about design choices" and created a "distinction between initial design and later access" not discussed in the statute.[108] Only after creating this artificial distinction could the court justify why the exemption in section 1002 did not prohibit forced decryption under the All Writs Act.

The court's interpretation of section 1002 requirements as solely concerning "design choices" at the pre-manufacturing stage lacks evidentiary support in the text of the statute. First, section 1002(a) makes clear it is about "capability requirements," which broadly include "enabling the government, pursuant to a court order or other lawful authorization, to intercept, to the exclusion of any other communications, all wire and electronic communications."[109] Nowhere does this provision limit its applications solely to the design stage. In fact, this provision requires broad cooperation by telecommunication carriers to supply law enforcement agencies with "authorized communications interceptions,"[110] to "deliver[] intercepted communications and call-identifying information to the government,"[111] and to "enabl[e] the government, pursuant to a court order or other lawful authorization, to access call-identifying information."[112] Additionally, section 1002(b) lays out three exemptions to section 1002(a), one of which has a paragraph on "[d]esign of features and systems configurations."[113] This exempts any tele-

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[104] *See id.* at 971–73.
[105] *Id.* at 971–72.
[106] *Id.* at 972 (alteration in original).
[107] *Id.*
[108] *Id.*
[109] 47 U.S.C. § 1002(a)(1) (2012). Additional provisions require that carriers provide specific information such as "call-identifying information" and "intercepted communications," *id.* § 1002(a)(3), pursuant to court orders "unobtrusively and with a minimum of interference with any subscriber's telecommunications services and in a matter that protects—

(A) the privacy and security of communications and call-identifying information not authorized to be intercepted; and
(B) information regarding the government's interception of communications and access to call-identifying information," *id.* § 1002(a)(4).

[110] *Id.* 47 U.S.C. § 1002(a)(4).
[111] *Id.* § 1002(a)(3).
[112] *Id.* § 1002(a)(2).
[113] *Id.* § 1002(b)(1)(A).

communications equipment provider from section 1002(a)'s requirements to "require any specific design of equipment, facilities, services, features, or system configurations to be *adopted*."[114] If section 1002(a) is solely about design choices, then section 1002(b)(1)'s exemption from the provision applicable to the design stage of equipment for telecommunication carriers would defeat the purpose of section 1002(a). Therefore, it cannot be the case that section 1002(a) requirements are all about design choices.[115]

IV. The Role and Jurisdictional Basis for Judicial Review Under the All Writs Act

It is the role of courts to function as neutral arbiters of power. But this role can be complicated in the context of the All Writs Act. This section argues that it is a legal fiction to justify decryption orders under the All Writs Act as mere instruments to enforce the court's jurisdiction. This legal fiction treats third-party private corporations as an extension of the government with a duty to assist law enforcement despite the lack of any statutory duty. Additionally, it is unclear what jurisdictional framework applies in the decryption context and whether those frameworks can provide any limits at all.

A. Whose Right Is the All Writs Act Enforcing?

A decryption order under the All Writs Act does not just involve the simple question of whether the order enforces the court's prior search warrant, but also whether it imposes additional responsibilities on third parties that have no obligations to the court or the underlying matter. Although the All Writs Act is ambiguously worded, its text nonetheless provides some limitations: it can only be used to issue "writs" and such writs must be "in aid of [the courts'] respective jurisdictions."[116] As Section II shows, the predecessors to the All Writs Act—sections 13 and 14 of the Judiciary Act—were primarily used to issue writs of mandamus or prohibition that enforced or invalidated a pre-existing court order.[117] In this sense, the All Writs Act helped enforce the court's underlying jurisdiction by making sure that a pre-existing order was carried out within the court's jurisdiction. How-

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[114] *Id.* (emphasis added).

[115] *See In re Apple, Inc.*, 149 F. Supp. 3d 341, 354, 354 n.12 (E.D.N.Y. 2016) (interpreting section 1002(a) to prescribe general, not design-specific, responsibilities on telecommunications service providers).

[116] 28 U.S.C. § 1651(a) (2012).

[117] *See supra* Section II; *see also Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93 (1807) ("[C]ourts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court; and with the decisions heretofore rendered on this point, no member of the bench has, even for an instant, been dissatisfied.").

ever, in the forced decryption context, the use of the All Writs Act to carry out a pre-existing search warrant goes beyond enforcing the court's rights because it violates the rights of third-party providers in a way not provided for by the original search warrant.

An order compelling a third party to decode a defendant's device arguably functions rather like a writ of mandamus in that it compels a party to carry out a specific performance. However, whereas a writ of mandamus compels actions from another government entity, a decryption order directs action from a private entity that is otherwise free from any similar public or statutory duty. The validity underlying a writ of mandamus rests on the petitioner's judicially enforceable and legally protected right. For example, in *New York Telephone Co.*, the subject of the All Writs Act order was a "highly regulated public utility" and thus subject to "a duty to serve the public."[118] By not providing a pen register, the Company deprived the government of a legal right under public law. This refusal explains why the government had a valid grievance when it petitioned the Court to order the Company's compliance with the All Writs Act order. Compelled decryption cases, on the other hand, involve private entities that are otherwise not subject to any similar statutory or public duty. Although companies like Apple and other technology companies provide services to vast members of the public, whether they should be subject to public and statutory duties is a normative question for the Legislative Branch. After all, at the beginning of the twentieth century, privately owned utility companies were not considered governmental agencies until various state and federal legislative bodies began regulating them.[119] Whether technology companies should have similar duties as public utilities is a question for the Legislative Branch and, ultimately, the electorate. Until such laws are passed, companies like Apple do not have any statutory duty to comply with decryption orders. A petitioner can only be aggrieved when she is denied a legal right by someone who has a legal duty to either perform or refrain from performing. Here, the petitioner is the government, which, without any statutory law, lacks a legal right to demand any action from private entities in a courtroom setting. It is therefore questionable that any writ can be issued under the All Writs Act to a private entity at all.

In this regard, a writ directing a private corporation with no public or statutory duty to specific performance is closer to the historically abhorred writ of assistance rather than a writ of mandamus. The Fourth Amendment's prohibition of general warrants was a direct reaction to the oppressive British practice of allowing courts to issue "writs of assistance" in the colonial period.[120] The same principle explains why our Constitution requires that Congress must pass specific legislation to allow federal courts the power to

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[118] United States v. N.Y. Tel. Co., 434 U.S. 159, 174 (1977).
[119] *See* Shelley Welton, *Public Energy*, 92 N.Y.U. L. Rev. 267, 287–91 (2017).
[120] *See N.Y. Tel. Co.*, 434 U.S. at 180 n.3–4 (Stevens, J., dissenting).

issue search warrants.[121] Such legislation must also specify the grant of authority and limitations on the places to be searched, the objects of the search, and the requirements for the issuance of a warrant.[122]

B. Jurisdictional Issues as Applied to Private Entities

The text of the All Writs Act requires that the writ must be "necessary or appropriate in aid of . . . jurisdiction[],"[123] but it does not specify the nature of this jurisdiction. However, the All Writs Act does not provide federal courts with an independent grant of jurisdiction.[124] Thus two types of jurisdiction may support an All Writs Act order: (1) ancillary jurisdiction, which allows the court to assert jurisdiction over a subject matter that is different from, but related to, a matter properly before the court; and (2) inherent jurisdiction, which is the inherent power of a court to issue remedies to effectuate its existing jurisdiction. The rationale for ancillary jurisdiction rests on the argument that an All Writs Act order is only issued when necessary to protect the court's underlying jurisdiction.[125] Similarly, the rationale for inherent jurisdiction stems from a court's inherent power to issue extraordinary writs.[126] The Supreme Court in *New York Telephone Co.* did not specify what jurisdiction the All Writs Act order was premised on.[127] Since an All Writs Act order in the decryption context ostensibly seeks to

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[121] *See id.* at 180–81 (Stevens, J., dissenting); *see also* Harris v. United States, 331 U.S. 145, 158 (1947) (Frankfurter, J., dissenting).

[122] *See N.Y. Tel. Co.*, 434 U.S. at 181 n.6 (Stevens, J., dissenting) (citing Espionage Act of 1917, ch. 30, tit. XI, § 2, 40 Stat. 217, 228 (repealed [1921])) (stating that provisions of the Espionage Act "formed the basis of [Federal Rule of Criminal Procedure] 41").

[123] 28 U.S.C. § 1651 (2012).

[124] *See* Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 33 (2002) ("Because the All Writs Act does not confer jurisdiction on the federal courts, it cannot confer the original jurisdiction required to support removal pursuant to [28 U.S.C.] § 1441."); Clinton v. Goldsmith, 526 U.S. 529, 534–35 (1999) (explaining that express terms of the All Writs Act confine a court "to issuing process 'in aid of' its existing statutory jurisdiction; the Act does not enlarge that jurisdiction"); Rosenbaum v. Bauer, 120 U.S. 450, 453–54, 458–59 (1887); McIntire v. Wood, 11 U.S. (7 Cranch) 504, 505–06 (1813).

[125] *See* Dugas v. Am. Sur. Co., 300 U.S. 414 (1937); Labette Cty. Comm'rs v. United States *ex rel.* Moulton, 112 U.S. 217, 223–24 (1884); Board of Education v. York, 429 F.2d 66, 69 (10th Cir. 1970) (affirming use of the All Writs Act to order appellants to send their son to a specific public school was 'necessary and appropriate' in aid of the court's jurisdiction over the underlying segregation problems" and that "[t]he equitable powers of the federal courts exist independently of the 1964 Act."); Morrow v. District of Columbia, 417 F.2d 728, 737 (D.C. Cir. 1969) (holding that All Writs Act order to compel a judge to vacate an existing order is premised on the court's "ancillary jurisdiction"); *see also N.Y. Tel. Co.*, 434 U.S. at 187 n.18 (citing 9 J. MOORE, ET AL., MOORE'S FEDERAL PRACTICE ¶¶ 110.27–110.28 (2d ed. Supp. 1975)) ("Here, we are faced with an order that must be necessary or appropriate in the exercise of a district court's original jurisdiction.")

[126] *See Morrow*, 417 F.2d at 738 n.36 ("It has been a traditional common law power of appellate courts to use extraordinary writs like writs of mandamus in aid of their appellate jurisdiction.") (citing State *ex rel.* Gillette v. Niblack, 53 N.E.2d 542, 542 (Ind. 1944); People *ex rel.* Earle v. Circuit Court, 48 N.E. 717, 719 (Ill. 1897)).

[127] *See N.Y. Tel. Co.*, 434 U.S. at 251 n.19 (Stevens, J., dissenting) ("The Court never explains on what basis the District Court had jurisdiction to enter this order. Possibly, the

compel a private company to decode a consumer device in connection with a pre-existing warrant, both ancillary and inherent jurisdiction may exist as potential grounds for jurisdiction.[128] However, there are also various issues with applying either jurisdictional framework to the decryption context.

1. Ancillary Jurisdiction Analysis—Lack of Statutory Duty on Technology Companies

The theory of ancillary jurisdiction springs from the equitable doctrine that a court may consider a subject matter over which it has no independent jurisdiction when it is necessary in order to dispose of the principal case or do complete justice in the principal case.[129] Because ancillary jurisdiction is a common law doctrine that was created out of necessity, there is no "general, all-encompassing jurisdictional rule."[130] Thus, it is unclear what the limits of ancillary jurisdiction are to aid the court's original jurisdiction, and whether orders to compel decryption fall within those limits. Ancillary jurisdiction does not "turn[] on whether the court has . . . original equity powers."[131] However, the Supreme Court has found ancillary jurisdiction where "an additional party has a claim upon contested assets within the court's exclusive control, or when necessary to give effect to the court's judgment."[132] In delineating the boundaries of ancillary jurisdiction, courts have looked at whether:

> (1) the ancillary matter arises from the same transaction which was the basis of the main proceeding, or arises during the course of the main matter, or is an integral part of the main matter; (2) the ancillary matter can be determined without a substantial new fact-finding proceeding; (3) determination of the ancillary matter through an ancillary order would not deprive a party of a substantial procedural or substantive right; and (4) the ancillary matter must be set-

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District Court believed that it had ancillary jurisdiction over the controversy, or that the failure of the Company to aid the Government posed a federal question under 28 U.S.C. § 1331.").

[128] Federal question jurisdiction under 28 U.S.C. § 1331 likely provides valid ground for jurisdiction where the third-party subject to the All Writs Act order challenges the order. Where the third-party does not challenge the order, and the defendant is the only party challenging the order, however, it is unclear whether federal question jurisdiction should apply.

[129] *See Morrow*, 417 F.2d at 738 n.36 (quoting 1 WILLIAM W. BARRON & ALEXANDER HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 23 (Charles Alan Wright ed. 1960)); *see also* Nat'l City Mortg. Co. v. Stephen, 647 F.3d 78, 85 (3d Cir. 2011) (explaining that ancillary jurisdiction is a "common law doctrine that survived the codification of supplemental jurisdiction in 28 U.S.C. § 1367" since it gives "federal courts the power to enforce their judgments and ensure[s] that they are not dependent on state courts to enforce their decrees"); Robb Evans & Assocs., LLC v. Holibaugh, 609 F.3d 359, 363 (4th Cir. 2010).

[130] Aldinger v. Howard, 427 U.S. 1, 13 (1976).

[131] *Morrow*, 417 F.2d at 739.

[132] Finley v. United States, 490 U.S. 545, 551 (1989) (citation omitted).

> tled to protect the integrity of the main proceeding or to insure that the disposition in the main proceeding will not be frustrated.[133]

Therefore, one should analyze the limits of the court's ancillary jurisdiction based on the "relationship between the original [warrant] and the ancillary order."[134] Under this framework, grounds for ancillary jurisdiction are tenuous because a third-party private entity has no duty or relationship to the underlying crime or warrant. Even if a private third party's assistance may be integral to effectuating the court's enforcement of a prior warrant, it is not the company's action that led to the obstruction. The third-party company was never an accomplice to the defendant in the underlying crime, nor did it place any obstruction to the execution of the warrant. Indeed, the closest analogy would be an order to a lock manufacturing company to open a lock that only the defendant has the keys to. The third-party entity has no legal duty to perform the required act. Nor does the petitioner have a legal right to the third party's performance by virtue of the warrant. The third-party entity is therefore not bound under any legal duty to any of the parties, because it does not owe such a duty to any parties to the litigation. Unlike the Company in *New York Telephone Co.*, which is a public utility company that is both subject to public utility law and has a statutory duty to serve the public, no statutory law imposes any legal duty on the third-party entity in compelled decryption cases. Therefore, a critical piece of the puzzle is missing for the court to establish ancillary jurisdiction.

2. Inherent Jurisdiction Analysis—Is the Order Really Enforcing the Court's Jurisdiction and Duties?

Courts have also based the All Writs Act's jurisdiction on the "inherent powers of a court of equity to prevent the defeat or impairment of its jurisdiction."[135] Indeed, "[t]he power to enter judgment and, when necessary, to enforce it by appropriate process, is inherent in the Court's appellate jurisdiction."[136] Of course, implicit in the courts' exercise of inherent powers is that such power must be used solely to advance the status quo and duties of the court. As the Supreme Court stated in *FTC v. Dean Foods Co*., an injunction under the All Writs Act was upheld because it was necessary to "preserve the *status quo* while administrative proceedings are in progress and prevent

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[133] *Morrow*, 417 F.2d at 740.

[134] *Id.* at 739.

[135] Callaway v. Benton, 336 U.S. 132, 149 (1949); *see also* Nken v. Holder, 556 U.S. 418, 426 (2009) (quoting *In re* McKenzie, 180 U.S. 536, 551 (1901)) (explaining that "[a]n appellate court's power to hold an order in abeyance while it assesses the legality of the order has been described as 'inherent,' preserved in the grant of authority to federal courts" by the All Writs Act).

[136] Fay v. Noia, 372 U.S. 391, 468 n.25 (1963) (Clark, J., dissenting) (citing Stanley v. Schwalby, 162 U.S. 255, 279–82 (1896)).

impairment of the effective exercise of appellate jurisdiction."[137] Maintaining the status quo of the courts means not only preventing the impairment of the court's judgment but also preserving the court's role as a neutral protector of the parties' rights.

Yet orders in aid of a court's own duties and jurisdiction inevitably protects the legal rights of one of the parties. In *New York Telephone Co.*, for example, the requirement that the Company install a pen register enabled the government's right to effectively investigate an alleged crime. Similarly, in *Harris v. Nelson*,[138] the court's ordering of discovery in connection with a habeas corpus proceeding protected the rights of a prisoner.[139] Thus, any time a court issues an order under its inherent jurisdiction, it is also enforcing the rights of a party at the expense of the opposing party.

Such exercise of inherent jurisdiction enforces the warrant at the expense not only of the defendant's privacy rights but also of a third and unrelated party. Supporters of compelled decryption might argue that a third party's encryption enabled the defendant to lock the defendant's device. Thus, the third party has prevented the execution of a search warrant and should be subject to the inherent jurisdiction of the court. However, such a third party did not intentionally impede the warrant's execution; it merely provided the means by which to do so. It is true that Congress imposes criminal penalties on any person who "forcibly assaults, resists, opposes, prevents, impedes, intimidates, or interferes with any person authorized to serve or execute search warrants" in the Omnibus Diplomatic Security and Antiterrorism Act of 1986.[140] But this statutory provision does not impose a positive duty to assist with the execution of a warrant but rather prohibits conduct such as "assaults" and "intimidat[ions]" that would constitute a tort or crime against any individual in the first place. Such criminal acts likely require intent as an element,[141] whereas one cannot impute intent to the simple act of providing an option to encrypt a consumer device. In this sense, companies like Apple are more akin to being a lock manufacturer or a security company. That Congress did not criminalize or prohibit a third party from merely providing the mechanism to lock a consumer device means that courts cannot overstep their jurisdictional boundaries to punish third parties for the same act.

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[137] 384 U.S. 597, 604 (1966) (emphasis added).

[138] 394 U.S. 286 (1969).

[139] *See id.* at 290.

[140] 18 U.S.C. § 2231 (2012); *see also* United States v. N.Y. Tel. Co., 434 U.S. 159, 190 n.21 (Stevens, J., dissenting) (explaining that "[t]his section was originally enacted as part of the Espionage Act of 1917").

[141] *See, e.g.*, United States v. Norton, 808 F.2d 908, 909 (1st Cir. 1987) (interpreting a similar statute that contained the word "intimidate" to suggest "that it was not designed to punish pure 'frightening' without any element of intent to injure . . . .")

V. Access to Court: Practical and Standing Issues Under the *New York Telephone Co.* Framework

Application of the *New York Telephone Co.* framework in the privacy context has focused on a balancing test that weighs the government's need for assistance against the non-party's interest in its own autonomy. However, this application faces several practical hurdles: (1) the test assumes that a non-party will challenge the order when the reality is that most nonparties are unlikely to do so; and (2) standing and other issues can exist where defendants, rather than the non-parties, are the ones challenging the order. These difficulties in turn mean that few such cases will face judicial scrutiny.

A. Practical Issues with Applying the New York Telephone Co. *Test*

The *New York Telephone Co.* test is not ideal for analyzing cases in the privacy context because of three practical issues: (1) private entities tend not to challenge decryption orders for various reasons, so it is often individual defendants who challenge All Writs Act orders; (2) individual defendants who challenge such orders lack access to proprietary information that demonstrates the cost of such orders; and (3) the courts are not well-positioned to evaluate the burden of such orders on technology companies since the cost of compliance will only rise over time as decryption becomes a judicial norm.

Technology companies are not as incentivized as defendants to challenge All Writs Act orders. Thus far, individual defendants—not third-party entities—have brought the majority of challenges to decryption orders under the All Writs Act.[142] In fact, Apple did not object to most of the All Writs Act orders it faced until recently.[143] In the first case where it did object, Apple did so only after the district court ordered it to brief the court on its position.[144] Indeed, third-party entities may be unwilling to incur significant legal costs to object to an All Writs Act order unless the cost of decoding is prohibitive to their business operations. They may not want to jeopardize their relationship with the government by turning down such orders. Furthermore, corporations have little to lose in privacy terms by complying with an All Writs Act order because disclosure of their consumers' data would only implicate the privacy of their users' information. Thus, the unfortunate real-

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[142] *See, e.g.*, United States v. Blake, 868 F.3d 960 (11th Cir. 2017).

[143] *See In re Apple, Inc.*, 149 F. Supp. 3d 341, 346 (E.D.N.Y. 2016) (citation omitted) ("Apple's response, consistent with its past practice in at least 70 instances, was that it could and would unlock [Defendant]'s phone for the agents, but only if a court issued a lawful order requiring it to do so. Also consistent with past practice, Apple provided the agents with the specific technical language it deemed sufficient to make clear its obligation to provide the services that would allow the agents to gain access to the iPhone's passcode-protected data.").

[144] *See id.* at 347; *see also In re Apple Inc.*, No. 1:15–mc–01902–JO, 2015 WL 5920207, at *1 (E.D.N.Y. Oct. 9, 2015).

ity is that most third parties are unlikely to object to an All Writs Act order unless the costs of compliance becomes astronomical in the long run. But by then, a judicial norm may already be so entrenched that it becomes difficult to challenge such orders.

The fact that third-party corporations tend not to challenge All Writs Act orders means that defendants face mounting practical issues that hinder them from effectively challenging such orders. For one, defendants often lack access to proprietary information and insider corporate information such as the administrative costs and technical burdens to decrypt devices.[145] Private corporations control and closely monitor such information, and they have no incentive to share it with criminal defendants. Meanwhile, two prongs of the *New York Telephone Co.* test require that parties demonstrate the burdens of such orders on nonparties.[146] Defendants are therefore rarely equipped to meet this burden given their lack of access to such information. Thus, the practical reality of applying the *New York Telephone Co.* test to All Writs Act orders in forced decryption cases is that defendants face an uphill battle.

Finally, courts are not well-positioned to assess the burdens imposed on nonparties because the *New York Telephone Co.* test only evaluates the cost of decryptions in a single case, whereas the cumulative cost of such orders is much higher. Aside from the logistical problem of estimating the burden of a single decoding procedure, the real question is the cost of complying with such orders in the long-term. Because the request to decode an iPad involves the same procedure in every investigation, a court's decision inevitably impacts future cases. Even though a court decides whether an order is reasonable in a single case, other courts in subsequent cases may lean on the finding that it would not be burdensome to decode an iPad. A single case that seemingly incurs little cost in fact sets important precedent and invites future accumulation of such costs, for which courts cannot account. Furthermore, such analysis cannot take into account the reputational costs[147] of complying with such orders. Thus, the indirect consequences of such orders may also result in costs that are difficult for the court to quantify.

B. Standing of Individual Defendants

Additionally, the government has frequently raised standing issues in cases where individual defendants rather than non-party entities challenge

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[145] *See, e.g.*, *Blake*, 868 F.3d at 972–73 (finding that defendant challenging the All Writs Act order could not demonstrate unreasonable technical burden imposed on Apple).

[146] *See supra* Section III.A.

[147] *See* Apple Inc.'s Response to Court's October 9, 2015 Memorandum and Order at *4, *In re Apple, Inc.*, 149 F. Supp. 3d 341 (E.D.N.Y. Oct. 19, 2015) (No. 15 MISC 1902 (JO)) ("Forcing Apple to extract data in this case, absent clear legal authority to do so, could threaten the trust between Apple and its customers and substantially tarnish the Apple brand. This reputational harm could have a longer term economic impact beyond the mere cost of performing the single extraction at issue.").

All Writs Act orders. For example, in *Blake*, the government argued that defendants challenging the All Writs Act lacked Fourth Amendment standing because the order only implicated the Fourth Amendment rights of Apple, not of individual defendants.[148] It did not implicate the defendants' rights because the order was directed at Apple, not at the defendants. Thus, only Apple had standing to challenge the All Writs Act order. In doing so, the government relied on *United States v. Padilla*,[149] and *In re Order Requiring [XXX], Inc. to Assist in the Execution of a Search Warrant Issued by This Court by Unlocking a Cellphone* ("*In re Cellphone*").[150] Both cases, however, are inapposite in this context. *Padilla* does not address the underlying question of whether the defendants' Fourth Amendment rights were violated.[151] *In re Cellphone* only addresses the question of whether a third party such as a cellphone provider had standing to challenge the search warrant.[152] It did not address whether standing was *limited* to that third party.[153] The court's rationale was that a third party such as a cellphone manufacturer may incur "unduly burdensome" expenses in order to comply with the warrant and did not discuss any limitation of standing as applied to the defendants.[154]

In fact, the defendants likely do have standing because the All Writs Act clearly implicates their Fourth Amendment rights. "Standing to invoke the exclusionary rule . . . exist[s] where the Government attempts to use illegally obtained evidence to incriminate the victim of the illegal search."[155] The Fourth Amendment requires that the party invoking standing "must have objectively reasonable expectation of privacy in the place searched or the item seized."[156] As owners of password-protected devices, defendants have a reasonable expectation of privacy in the contents of those devices. It would be preposterous if a citizen could lose Fourth Amendment standing to protect her right to privacy simply because of a corporation's failure to challenge the order.

The government argues the All Writs Act merely enforces a pre-existing warrant. But this argument ignores the fact that the inquiry is whether the All Writs Act order exceeded the scope of the search warrant and thus

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[148] *See Blake*, 868 F.3d at 969 n.4.

[149] 508 U.S. 77 (1993); *see* Brief for United States at 56, United States v. Blake, 868 F.3d 960 (11th Cir. 2017) (No. 15-13395); *see also Padilla*, 508 U.S. at 81 ("It has long been the rule that a defendant can urge the suppression of evidence obtained in violation of the Fourth Amendment only if that defendant demonstrates that *his* Fourth Amendment rights were violated by the challenged search or seizure.").

[150] In re Order Requiring [XXX], Inc. to Assist in the Execution of a Search Warrant Issued by This Court by Unlocking a Cellphone, No. 14 Mag. 2258, 2014 WL 5510865, at *2 (S.D.N.Y. Oct. 31, 2014) [hereinafter "*In re Cellphone*"]; *see* Brief for United States, *supra* note 149, at 56, 61.

[151] *See* United States v. Padilla, 508 U.S. 77 (1993).

[152] *See In re Cellphone*, 2014 WL 5510865, at *1–2.

[153] *See id*. at *2.

[154] *Id.*

[155] Stone v. Powell, 428 U.S. 465, 488 (1976).

[156] Rehberg v. Pauli, 611 F.3d 828, 842 (11th Cir. 2010).

violated the defendants' Fourth Amendment rights, not whether the pre-existing warrant is valid. Even if the pre-existing warrant is valid, the defendants likely do have a reasonable expectation of privacy in the contents of their iPads that do not fall within the scope of the warrant. Therefore, the All Writs Act order runs the risk of violating the defendants' privacy rights by exceeding the scope of the search warrant. If it exceeded the scope of the search warrant, then the defendants' Fourth Amendment rights would be violated.[157]

VI. All Writs Act and the Separation of Powers: Communications Assistance For Law Enforcement Act

Because the All Writs Act only applies to inadvertent gaps in legislation, its application to privacy raises two issues: first, an exemption under the CALEA arguably addresses this gap; second, application of the Act may undermine separation of powers in light of legislative proposals to address this issue. Here, I argue that a gap indeed exists under the CALEA but that the *New York Telephone Co.* framework fails to take into account the reason for that gap. The framework is insufficient because it does not consider scenarios where the gap is not the result of an unintended oversight but rather the result of legislative failure to reach a consensus. Where it is clear that a gap was the result of legislative gridlock, the use of the All Writs Act as a gap-filler is inappropriate. Such usage undermines separation of powers and judicial independence because it turns courts into an expedient way to circumvent legislative consensus. It undermines both the role of the court as a neutral decision-maker and the functioning of a healthy democracy.

A. CALEA and Device Decryption

The CALEA was designed primarily to preserve the ability of law enforcement agencies to engage in lawful electronic surveillance. However, it "addressed the responsibilities of private companies to preserve and allow access to records relating to wire and electronic communications."[158] The text of the CALEA provides three exemptions that limit its application to specific circumstances.[159] One of these limitations, section 1002(b)(2), exempts equipment manufacturers from providing certain assistance to law enforcement listed in section 1002(a), which requires that telecommunications carriers be capable of "enabling the government, pursuant to a court order or other lawful authorization, to intercept, to the exclusion of any other com-

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[157] *See* Horton v. California, 496 U.S. 128, 140 (1990) ("If the scope of the search exceeds that permitted by the terms of a validly issued warrant . . . the subsequent seizure is unconstitutional without more.").

[158] *In re Apple, Inc.*, 149 F. Supp. 3d 341, 354 n.12 (E.D.N.Y. 2016).

[159] *See* 47 U.S.C. § 1002(b)(1)–(3) (2012).

munications, all wire and electronic communications."[160] However, "information services" and "equipment, facilities, or services that support the transport or switching of communications for private networks or for the sole purpose of interconnecting telecommunications carriers" are exempt from such requirements under section 1002(b)(2).[161] "Information services" is defined as the "offering of a capability for generating, acquitting, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[162] This category includes companies like Apple since products like the iPad and iPhone provide information services.[163]

The fact that Congress exempted information services from the CALEA's obligations is significant—the legislative history of the CALEA explained that one of the considerations of doing so was "to avoid impeding the development of new communications services and technologies."[164] Indeed, given that information services were still in their infant stage in the 1990s, when the CALEA was passed, regulations on how information services companies could design their products would have stunted innovation.

Since its passing, a robust legislative history shows that Congress repeatedly considered amending the CALEA to either require or prohibit compelled decryption by private information services. In 2015, for example, a proposed bill attempted to insulate companies like Apple from decryption orders.[165] Meanwhile, other legislative proposals tried to achieve the opposite outcome. In 1991, then Senator Joe Biden (D-Del.) introduced the Comprehensive Counter-Terrorism Act of 1991 that sought to expand the CALEA to require third-party assistance to decode consumer devices.[166] Additionally, in July 2015, the Senate held hearings in an effort to craft an approach to balance privacy and law enforcement interests with respect to smart phone encryption.[167] Rather than an unintentional "gap" in legislation, the issue of whether private entities can be compelled to decrypt consumer products for law enforcement purposes is in fact a quagmire of frequent legislative debates.

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[160] *Id.* § 1002(a)(1).

[161] *Id.* § 1002(b)(2).

[162] *Id.* § 1001(6)(A).

[163] Moreover, a second exemption broadly frees telecommunication carriers from "decrypting, or ensuring the government's ability to decrypt" communications. *Id.* § 1002(b)(3). This provision specifically contemplates whether a "telecommunications carrier" can be required to decrypt communication encrypted by a customer. It narrowly provides that such decryption is only possible where the (1) encryption was provided by the carrier, and (2) the carrier possess the information necessary to decrypt the communication. *Id.*

[164] H.R. REP. NO. 103-827, pt. 1, at 13 (1994).

[165] *See* Secure Data Act of 2015, S. 135, 114th Cong.; Secure Data Act of 2015, H.R. 726, 114th Cong.

[166] *See* S. 266, 102d Cong. (1991).

[167] *See Going Dark: Encryption, Technology, and the Balance Between Public Safety and Privacy*: *Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (statement of Sen. Chuck Grassley (R-Iowa), Chairman, S. Comm. on Judiciary), https://www.judiciary.senate.gov/meetings/going-dark-encryption-technology-and-the-balance-between-public-safety-and-privacy [http://perma.cc/TQ8C-HYM6].

B. A Modified New York Telephone Co. *Test*

This section proposes that courts should adopt a modified *New York Telephone Co.* test that examines the legislative history of a statutory gap. The Supreme Court has long prescribed the All Writs Act to function as a gap-filler that "renders it unnecessary for Congress to anticipate every circumstance in which a federal court might properly act to vindicate the rights of the parties before it."[168] It has also drawn the boundaries of the Act at two extremes: at one end, the Act cannot be interpreted to empower courts to do something already specifically authorized by another statute.[169] At the other end, it cannot be interpreted to authorize something specifically prohibited by an existing statute. This results in an incredible amount of latitude.

The gulf between these extremes means a variety of gaps exist that the All Writs Act may fill. Therefore, courts should take into account the legislative history of a particular gap so as to understand whether it was the result of intentional deliberation, unintentional inadvertence, or political quagmire. The use of the Act in the third scenario is the most dangerous. Where a gap is the result of a lack of political consensus, the Executive Branch, if successful in seeking the writ, would achieve a legislative goal that Congress has considered but failed to address. Such a result would undermine the separation of powers laid out in our Constitution by transforming the All Writs Act from a jurisdiction-preserving device meant to protect the integrity of the judiciary into an executive tool to circumvent legislative powers that only Congress possesses. It is therefore inconsistent with the "usages and principles" of the Act. Hence, a court applying the All Writs Act should consider whether the use of the Act exceeds its original function by examining the nature of a legislative gap when applying the *New York Telephone Co.* test.

Furthermore, the necessity prong of the All Writs Act also means that the government should exhaust other remedies before seeking a decryption order. However, too often, the government rushes into court without seeking these other remedies first. A grand jury subpoena to the defendant to release the password to a personal device or cloud account is the most direct method possible. In fact, in some cases, defendants have voluntarily surrendered their passwords upon being asked by the police.[170] Where the defendant refuses to cooperate with a subpoena, the district court may place the defendant

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[168] *In re Apple Inc.*, 149 F. Supp. 3d at 353; *see, e.g.*, Pa. Bureau of Corr. v. U.S. Marshals Serv., 474 U.S. 34, 41 (1985) ("[T]he scope of the all writs provision confine[s] it to filling the interstices of federal judicial power when those gaps threaten[ ] to thwart the otherwise proper exercise of federal courts' jurisdiction."); *cf.* Harris v. Nelson, 394 U.S. 286, 300 (1969) ("[T]he purpose and function of the All Writs Act to supply the courts with the instruments needed to perform their duty . . . extend to habeas corpus proceedings.").

[169] *See Pa. Bureau of Corr.*, 474 U.S. at 43.

[170] *See, e.g.*, United States v. Apple Mac Pro Computer, 851 F.3d 238, 248 (3d Cir. 2017) ("Forensic analysts also found an additional 2,015 videos and photographs in an encrypted application on Doe's phone, which Doe had opened for the police by entering a password.").

under contempt. However, these remedies are not without limitations, since for some defendants, the threat of imprisonment for contempt may far outweigh much harsher sentences. Yet the government should be required to show that it has at least attempted these options before seeking an All Writs Act order, especially since the former are much less onerous and implicate fewer constitutional and privacy concerns. Therefore, a minimum requirement in applying the *New York Telephone Co.* test should be for the government to exhaust these options before invoking the All Writs Act.

VII. Conclusion

This Article addresses an emerging issue that will likely become increasingly relevant as long as no legislative solution is provided to address personal device decryption. As the frequency and scope of such decryption orders increase, it is only a matter of time before the issue of whether the All Writs Act is a valid means of forcing decryption by third-party providers must be addressed by either the Supreme Court or Congress. How this issue is resolved will not only affect how criminal investigations proceed in the future but also shape the jurisdictional limits of the judiciary.

The existing framework from *New York Telephone Co.* is no longer sufficient to delineate when the All Writs Act should apply to compel decryption of personal devices. This framework fails to take into account situations where substantial legislative gridlock causes a statutory gap such that the use of the Act would undermine the separation of powers doctrine. The All Writs Act was only meant to preserve the courts' existing jurisdiction, not to fulfill the Executive Branch's wishes where Congress has failed to provide an answer. This improper use of the Act in the decryption context is even more apparent when one examines the jurisdictional basis, or lack thereof, that the courts have over third-party and private entities like Apple.

The use of the All Writs Act as a blunt tool for the Executive Branch is also particularly dangerous when legitimized by the Judiciary. Private entities, whose privacy interests are not at stake, are not as incentivized as individual defendants to challenge such orders. Meanwhile, individual defendants lack the resources and access to proprietary information to adequately challenge such orders in court.

From its early days as a mere mechanism for preserving courts' jurisdiction to its recent role in the privacy context, judicial grant of All Writs Act orders may become dangerously close to judicial activism. Left unaddressed, this trend of using the All Writs Act to order private entities to decrypt private consumer devices for government investigations may become an insidious judicial norm that chips away not only at the rights of defendants and the economic freedom of corporations, but also at the very foundation of our democracy.