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July 8, 2016

Hon. Kevin McNulty BY OVERNIGHT UPS AND US MAIL
US District Judge
U.S. District Court for the District of New Jersey
Martin Luther King Building & U.S. Courthouse
50 Walnut Street
Newark, NJ 07101
Chambers: 973-645-3493

Re: US v Ravelo, 15-cr-576[KM]

Dear Judge McNulty:

I enclose a short essay entitled "Apple and the American Revolution: Remembering Why We Have the Fourth Amendment" that was published today on the website of the Yale Law Journal: http://www.yalelawjournal.org/forum. The motion to suppress in US v Ravelo currently pending before you is discussed on pages 6-7 and also on a webpage cited in the footnotes: http://www.clarkcunningham.org/Apple/Cases/USvRavelo.html

As indicated on the attached letter, I sent this essay yesterday to the prosecutors and defense counsel in this case and invited them to send me comments and suggested factual corrections by 2pm today. (Although my letter to the US Attorney indicates delivery by fax, due to technical difficulties the letter was actually sent to the prosecutors by email to the addresses indicated below.) I have not received a response from either the government or defendant.

Respectfully yours,

Clark D. Cunningham
W. Lee Burge Chair in Law & Ethics

cc: By US mail and email
Paul J. Fishman
Andrew Kogan
Brian Urbano
Jose R. Almonte
United States Attorney
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Re: US v Ravelo

Dear Mr. Fishman, Mr. Lustberg and Mr. Sadow:

I attach an 8 page typescript version of an essay to appear in the on-line Yale Law Journal Forum, entitled "Apple and the American Revolution: Remembering Why We Have the Fourth Amendment." US v Ravelo is discussed on page 7 and also on a linked website: http://www.clarkcunningham.org/Apple/Cases/USvRavelo.html

I plan to send the attached to Judge McNulty but will wait to do so until 2pm this Friday to provide time to receive and review any comments and suggested factual corrections you may send before that time.

I also plan to send the attached on Friday afternoon to leading 4th Amendment scholars for comments, as well as to Congressional committees working on this issue, and reporters covering the FBI v Apple controversy.

Sincerely yours,

Clark D. Cunningham

Clark D. Cunningham
W. Lee Burge Chair in Law & Ethics

cc:
Andrew Kogan BY FAX
Jose R. Almonte BY FAX

The Burge Chair of Law & Ethics was established by an endowment from the U.S. District Court for the Middle District of Georgia to promote ethics, professionalism, and access to justice.

Apple and the American Revolution:
Remembering Why We Have the Fourth Amendment

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126 YALE LAW JOURNAL FORUM (forthcoming 2016)
www.yalelawjournal.org/forum/apple-and-the-american-revolution-remembering-why-we-have-the-fourth-amendment [1]

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On Thursday, February 18, 2016 the New York Times reported on its front page that an order issued by a federal court in California had "set off a furious public battle" between the Federal Bureau of Investigation and the Apple corporation "in a dispute with far-reaching legal implications."[2] The order would have forced Apple to create and give to the FBI new software capable of defeating the basic security features of Apple's most famous product, the iPhone. Over the next two months the story that came be to be known as "FBI v Apple" probably received more national media coverage than any topic other than the 2016 presidential primaries; the New York Times alone published more than 30 additional articles on the subject, including three more on the front page,[3] and the story made the cover of Time magazine.[4] In explaining his company's strenuous opposition, Apple CEO Tim Cook said: "[W]e fear that this demand would undermine the very freedoms and liberty our government is meant to protect."[5]

By taking steps that could lead to greater protection for every owner of an iPhone from the power of government surveillance, Apple has been enacting a 21st century version of the struggles out of which America was born and which resulted in the Fourth Amendment's guarantee of the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures".

The FBI v Apple controversy brings into new focus what Akhil Reed Amar described more than 20 years ago as "First Principles" of the Fourth Amendment,[6] which include:

- The search warrant is "an enemy not a friend" and has the potential to be "an engine of great oppression"

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[1] This is an unedited and unformatted draft version of the Essay. The final edited and formatted version of the Essay will replace this version in the coming weeks, and this version will be no longer be available online. When citing this preliminary version, please refer to it as Clark D. Cunningham, *Apple and the American Revolution: Remembering Why We Have the Fourth Amendment*, 126 YALE L.J. F. (forthcoming 2016). Invaluable research assistance was provided by Ryan Bozarth, Tosha Dunn, and reference librarians Pamela C. Brannon, Margaret Elizabeth Butler, and Jonathan Edward Germann. The brevity of this format does not allow sufficient acknowledgement of the monumental work that has been done in the past 25 years on the historical background of the Fourth Amendment by Akhil Reed Amar, Thomas K. Clancy, Morgan Cloud, William J. Cuddihy, Thomas Y. Davies, Tracey Maclin, and others.

[2] Eric Lichtblau & Katie Benner, *As Apple Resists, Encryption Fray Erupts in Battle*, N.Y. TIMES, Feb. 18, 2016, at A1; internet version, *Apple Fights Order to Unlock San Bernardino Gunman's Phone*, N.Y. TIMES, Feb. 17, 2016, at http://www.nytimes.com/2016/02/18/technology/apple-timothy-cook-fbi-san-bernardino.html

[3] *See* http://www.nytimes.com/news-event/apple-fbi-case (New York Times index of articles from Feb. 17, 2016 through Apr. 21, 2016) (last visited July 2, 2016); *see also* index of more than 50 National Public Radio stories from Feb. 17, 2016 through April 21, 2016, http://www.npr.org/series/469827708/the-apple-fbi-debate-over-encryption (last visited July 2, 2016).

[4] Lev Grossman, *Apple CEO Tim Cook on his fight with the FBI and why he won't back down*, TIME, March 28, 2016, http://time.com/magazine/us/4262476/march-28th-2016-vol-187-no-11-u-s/ ; *see also* http://time.com/topic/apple-v-fbi/ and http://time.com/4261796/tim-cook-transcript/.

[5] Tim Cook, *A Message to Our Customers*, Feb. 16, 2016, http://www.apple.com/customer-letter/

[6] Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

- The Amendment is not uniquely bound up in criminal law yet the almost exclusive focus on whether incriminating evidence should be excluded in criminal trials diminishes and distorts its core values and has made it "contemptible in the eyes of citizens"
- The Amendment singles out "papers" for explicit protection
- Legislatures are obliged to fashion rules delineating the search powers of government officials[7]

In speaking out against the California order, Cook correctly invoked this country's foundational values of freedom and liberty. The California court's order against Apple was remarkably like two abuses of powers that prompted the American Revolution: "writs of assistance" and "general warrants."

America's second President, John Adams, said "the child Independence was born" in 1761 when James Otis appeared like a "flame of fire" in a packed Boston courtroom arguing against "writs of assistance,"[8] which ordered "all Subjects" of the King to assist customs officials so they could enter private homes and "in Case of Resistance break open" any locked door or chest in search of goods imported without payment of custom duties.[9] Otis argued that the writ of assistance, by violating the citizen's fundamental right of security, was "the worst instrument of arbitrary power, the most destructive of English liberty".[10] Although Otis lost the case, his arguments became widely known in the colonies, where a "widespread revolt" against writs of assistance took hold and became a significant factor in events leading to the Revolution.[11] Adams himself was deeply moved and influenced by Otis' argument, which he recorded as an eyewitness. Adams later wrote the provision of the 1780 Massachusetts Constitution that became the model for the Fourth Amendment.[12]

The special protection for "papers" in the Fourth Amendment has its origin in the royal persecution of political pamphleteers, in particular an opposition member of Parliament, John Wilkes.[13] In 1763, the British Secretary of State, Lord Halifax, issued a general warrant "to make strict and diligent search for the … authors, printers and publishers of a seditious and treasonable paper, entitled the North Briton, Number 45 … any of them having found, to apprehend and seize, together with their papers".[14] (North Briton Number 45 accused Halifax of "corruption and despotism";[15] it was published anonymously but authored by Wilkes.) Over the next week forty-nine different persons were arrested and their papers seized; many had nothing to do with North Briton Number 45.[16] Wilkes was arrested at his London home. When the royal officers searched the house and encountered a table with a locked drawer, they sent to Halifax for directions, who replied that the drawer must be opened and all manuscripts seized.[17] The general warrant ordered all the King's "loving subjects" to "be aiding and assisting,"[18] and so a locksmith was summoned to break open the locked drawer.[19] The officers took "all the papers in those

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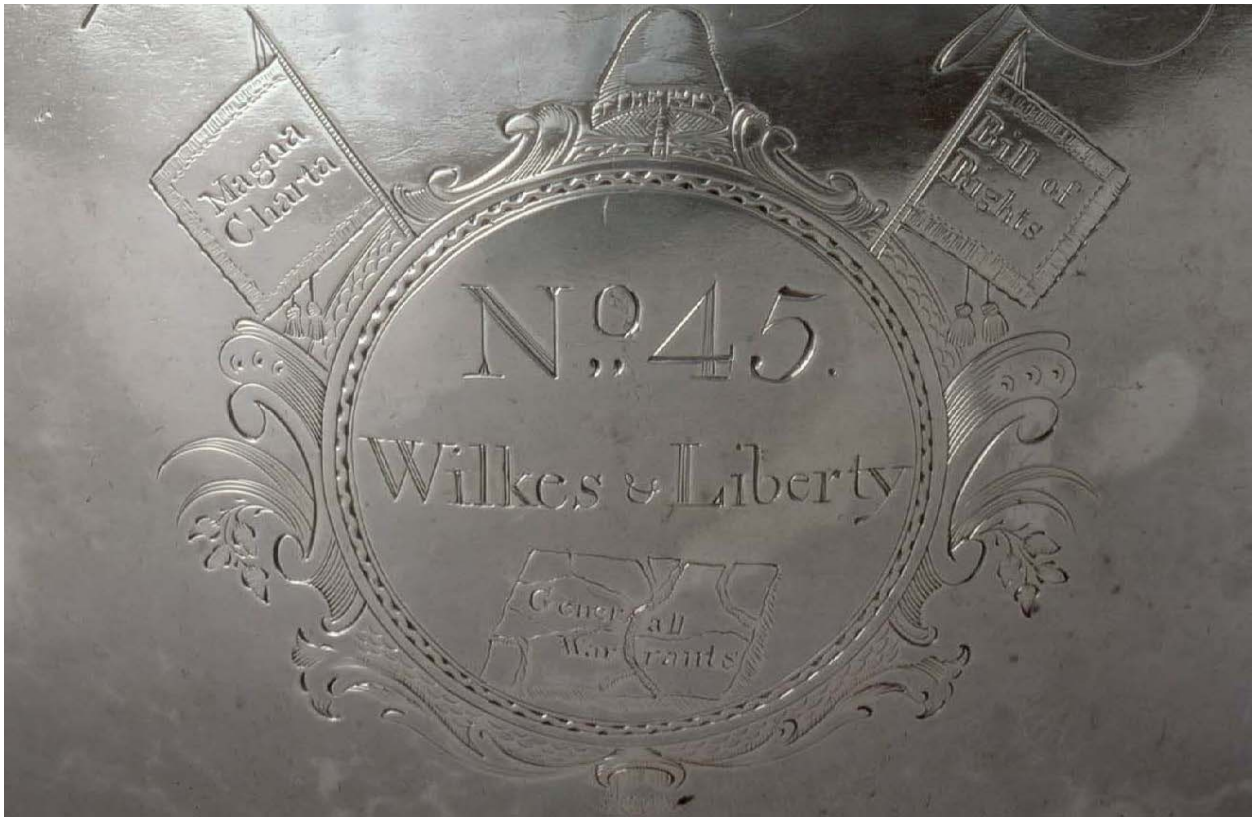
[7] Detailed citations are available at: http://clarkcunningham.org/Apple/History/Amar.html
[8] 1 LEGAL PAPERS OF JOHN ADAMS 107 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) (letter to William Tudor, March 29, 1817).
[9] John Adams, *Writ of Assistance*, Province of Massachusetts Bay, Dec. 1761, 1 LEGAL PAPERS OF JOHN ADAMS 144-47.
[10] John Adams, *Petition of Lechmere* (Argument on Writs of Assistance) 1761, 1 LEGAL PAPERS OF JOHN ADAMS 125-27, 141-42.
[11] Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S.CAL.L.REV. 1, 13-25 (1994).
[12] Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 INDIANA L.J. 979, 1027-29 (2011).
[13] 18th Century English cases cited in this paragraph and additional information are available at: http://clarkcunningham.org/Apple/History/English.html
[14] Money v. Leach, 97 Eng. Rep. 1075, 1076 (1765).
[15] Peter D.G. Thomas, JOHN WILKES: A FRIEND TO LIBERTY 28 (1996).
[16] *Id*. at 28-30.
[17] Wilkes v. Wood, 98 Eng. Rep. 489, 491, 496 (1763).
[18] Money, 97 Eng. Rep. at 1076.
[19] Wilkes, 98 Eng. Rep. at 491, 496

drawers and a pocket-book of Mr. Wilkes's," put them in a sack, and carried them away.[20]

The parallels are striking between the current iPhone controversy and both the Boston writs of assistance case and the search in London of Wilkes' private papers. In both cases government authorities obtained orders compelling private parties – "subjects of the King" – to assist officials in destroying safeguards which created safe spaces for the exercise of liberty.

In Boston, writs of assistance were used to force open the locked doors of private homes. In London, general warrants threatened both civil and political liberty when used to seize and examine all of Wilkes' private papers in search of evidence to prosecute him. When Wilkes later won a substantial damage award against the officials, the judge said the use of the general warrant was "totally subversive of the liberty of the subject."[21]

When Wilkes was released from the Tower of London a few days after his arrest, a crowd of more than 10,000 accompanied Wilkes back to his home, shouting: "Wilkes and Liberty."[22] The Wilkes case has been described as "*the* paradigm search and seizure case" for Americans in the period leading up to the Revolution.[23] The famous silver bowl designed in 1768 by Paul Revere for the Sons of Liberty says it all: the image of a general warrant torn in half is paired with the words "No. 45" and "Wilkes & Liberty" and topped by flags labeled "Magna Carta" and "Bill of Rights."[24]



I have explained elsewhere that the explicit mention of "papers" in the Fourth Amendment provides an

[20] *Id.*
[21] Wilkes v. Wood, 98 Eng. Rep. 489, 498 (1763).
[22] Thomas, JOHN WILKES at 30-31.
[23] Amar, *First Principles*, 107 HARV. L. REV. at 772.
[24] *The Sons of Liberty Bowl*, Museum of Fine Arts, Boston, http://www.mfa.org/collections/object/sons-of-liberty-bowl-39072

interpretive clue to a textually coherent application of Fourth Amendment protections to technologies like wiretapping and electronic surveillance, by interpreting "search" to encompass both "search of" and "search out."[25] Thus it is not only the physical handling, "the search of," private papers that can be an unreasonable search but also the "searching out" of information contained therein. Today's cell phones are at least the equivalent of a locked drawer of private papers. As the Supreme Court recently observed: "A [cell] phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form – unless the phone is."[26]

After Independence, many revolutionaries raised the concern that a federal government would, like the vanquished British, use writs of assistance and general warrants. At the Virginia ratifying convention for the proposed Constitution Patrick Henry declared: "unless the general government be restrained by a bill of rights [it may] go into your cellars and rooms and search, ransack and measure every thing you eat, drink and wear. Everything the most sacred may be searched and ransacked by the strong hand of power."[27]

Henry's speech pointed out another reason writs of assistance and general warrants were viewed as inimical to liberty: both were unlimited in scope. Thus, when the First Congress fulfilled the promise made to the ratifying conventions by approving a Bill of Rights to submit to the states as amendments to the Constitution, what became the Fourth Amendment not only protected the "right of the people to be secure" but also went on to say "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Yet as a leading scholar recently concluded, current practices for searching computers, including cell phones, seem "perilously like the regime of general warrants that the Fourth Amendment was enacted to stop. Everything can be seized. Everything can be searched."[28]

Within a two-day period the First Congress both enacted the All Writs Act and approved the language that became the Fourth Amendment. It thus seems highly unlikely the First Congress imagined that the very general language of the All Writs Act was authority for issuing an order that was in effect a writ to assist in executing a general warrant for an unlimited search through a person's private papers.

The evolution of the FBI v Apple controversy, as well other recent cases involving cell phone searches, demonstrates (1) how search warrants can be "engines of oppression," (2) the danger of focusing only on narrow issues of criminal procedure, (3) the need to remember the special importance of "papers," and (4) the imperative for legislatures, especially Congress, to take responsibility for regulating cell phone searches so as to protect everyone's liberty.

The origins of the California litigation were in a mass shooting at the San Bernardino County Health Department on December 2, 2015.[29] The crimes were committed by Syed Farook, and his wife, Tafsheen

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[25] Clark D. Cunningham, *A Linguistic Analysis of the Meanings of "Search" in the Fourth Amendment: A Search for Common Sense*, 73 IOWA L. REV. 541 (1988).

[26] Riley v. California and U.S. v Wurie, 132 S.Ct. 2473, 2491 (2014).

[27] Cunningham, *Meanings of "Search"* at 554-55.

[28] Orrin S. Kerr, *Executing Warrants for Digital Evidence: The Case for Use Restrictions on Nonresponsive Data*, 48 TEX. TECH L. REV. 1, 10-11 (2015). Professor Kerr, who wrote the first edition of the Department of Justice manual on searching computers, earlier reported that the FBI trains its analysts to conduct highly comprehensive examinations and "to leave no digital stone unturned." Orrin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARVARD L.REV. 531, 574 n. 189, 579 (2005).

[29] Case materials cited below and other information are available at: http://clarkcunningham.org/Apple/Cases/SanBernardino.html

Malik, who both died later that day in a police shoot-out.[30] Acting on a warrant authorizing the seizure and search of any "digital device" that might have been used to facilitate the crime, the FBI seized an iPhone used by Farook; however, it was locked with a standard user-selected four-digit passcode.

More than two months passed with no access to the contents of Farook's iPhone. Then on February 16, 2016 the government approached a federal magistrate without notice to Apple and obtained an *ex parte* order compelling Apple to design and deliver "signed iPhone software" [31] that that would make the device vulnerable to a "brute force" attack by the FBI likely to crack the passcode in a day.[32]

Congress has carefully regulated many forms of electronic data gathering by the government that may require the co-operation of private companies, such as telephone wiretapping, "pen registers" that monitor the numbers dialed from a telephone, interception of computer data transmissions, disclosure of email records, access to remotely stored data, and monitoring of communications sent via the internet.[33] However, though the kinds of information obtainable through these regulated methods (and indeed much more information) can often now be simply captured by accessing a person's cell phone, Congress has not enacted procedures to regulate the search of electronic data stored on a cell phone. Therefore, the only statutory authority the FBI could cite in asking for the order against Apple was a law passed by the First Congress in 1789, the All Writs Act, which gave federal courts power to issue "writs of *scire facia*, *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."[34]

Apple CEO Tim Cook immediately announced his company would challenge the order. "Rather than asking for legislative action through Congress, the FBI is proposing an unprecedented use of the All Writs Act of 1789 … If the government can use the All Writs Act to make it easier to unlock your iPhone, it would have the power to reach into anyone's device to capture their data."[35]

The day before a highly anticipated hearing on Apple's opposition to the order the government unexpectedly asked for an adjournment, telling the court "an outside party" had contacted the FBI offering a possible method for unlocking the iPhone without Apple's assistance.[36] A week later, on March 28, the FBI announced that it had been able to access Farook's iPhone and the order against Apple was vacated at the government's request.[37] Suspicions that particular technique was ineffective against iPhones using different operating systems were born out when the federal government moved forward a week later to obtain a similar order against Apple in the context of a New York drug trafficking case.[38]

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[30] In the Matter of the Search of an Apple iPhone (C.D. Cal. Feb. 16, 2016), *Government's Ex Parte Application for Order Compelling Apple Inc. to Assist Agents in Search* (No. CM-16-10).

[31] In the Matter of the Search of an Apple iPhone (C.D. Cal. Feb. 16, 2016), *Order Compelling Apple Inc. to Assist Agents in Search* (No. CM-16-10). The order did provide if "Apple believes that compliance with this Order would be unreasonably burdensome, it may make an application to this Court for relief within five business days of receipt of the Order."

[32] Grossman, *Apple CEO* 44.

[33] Citations to these provisions are available at http://clarkcunningham.org/Apple/CongressionalAction.html *See generally* Orin S. Kerr, *The Next Generation Communications Privacy Act*, 17 U. PENN. L. REV. 373 (2014); *2015 Criminal Law Symposium: The Fourth Amendment in the 21st Century*, 48 Tex. Tech. L. Rev. 1-244 (Fall 2015).

[34] Judiciary Act of 1789, Sec. 14, 1 Stat. 81-82.

[35] Tim Cook, *A Message to Our Customers*, Feb. 16, 2016, http://www.apple.com/customer-letter/

[36] In the Matter of the Search of an Apple iPhone (C.D. Cal. March 21, 2016), *Government's Ex Parte Application for a Continuance* (No. CM-16-10).

[37] In the Matter of the Search of an Apple iPhone (C.D. Cal. March 28, 2016), *Government's Status Report* (No. CM-16-10).

[38] Eric Lichtblau & Katie Benner, *New Push to Unlock an iPhone in Brooklyn*, N.Y. TIMES, Apr. 9, 2016, at B1. The government was appealing a decision by Magistrate Judge James Orenstein, who had issued a carefully reasoned 50-page

Then lightning struck twice. On April 22, the day its reply to Apple's brief was due,[39] the government once again withdrew its application for an order against Apple. This time the government said an unnamed individual had "provided the passcode" the previous evening.[40]

The day after the case was dismissed, it was reported that six former government officials with impeccable law enforcement, security and intelligence credentials were in agreement with Apple.[41] By that time opinion polls had shifted to more persons supporting Apple's position, as the New York Times discussed in a story with the headline, "In the Apple Case, a Debate Over Data Hits Home."[42]

Meanwhile it appeared as if FBI v Apple was moving from the courts to Congress.[43] On April 13 the discussion draft of a bi-partisan bill was released by the Chair and Co-Chair of the Senate Select Committee on Intelligence that seemed to recognize the need for modern legislation to take the place of reliance on the All Writs Act; the proposed "Compliance with Court Orders Act of 2016" would have required companies like Apple that received a warrant for electronic information "to provide such technical assistance as necessary" to produce the data "in an intelligible format." However, undermining the fundamental premise of this bill, as well as the government's applications for orders against Apple in California and New York, are problems with the constitutionality of what seem to be standard government procedures for obtaining cell phone search warrants.[44]

On March 30, 2016 it was reported that the American Civil Liberties Union had uncovered[45] sixty-three other cases where the government had actually succeeded in getting orders similar to the San Bernardino order; however, all this had taken place in secret because the government had routinely asked that the court files be sealed. One of the unsealed cases, U.S. v. Crawford, perfectly illustrated how typical cell phone warrants were in fact "general warrants" and were being obtained without any due process for the owner of the phone.[46]

Perhaps the clearest example of how the federal government's current approach to cell phone searches is re-enacting pre-Revolutionary War abuses of power is the case of United States v. Ravelo, now pending in the U.S. District Court for New Jersey.[47] On Christmas Eve 2014 a federal magistrate signed an ex parte warrant to search a cell phone seized during the arrest a few days earlier of a lawyer on

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opinion holding that the All Writs Act was not applicable, for reasons different than stated in this essay. In re Order Requiring Apple Inc. to Assist in the Execution of a Search Warrant (E.D.N.Y. Feb. 29, 2016), *Memorandum and Order* (No. 15-MC-1902). Cited material and other information about this case available at: http://clarkcunningham.org/Apple/Cases/EDNY.html

[39] In re Order Requiring Apple Inc. to Assist in the Execution of a Search Warrant (E.D.N.Y. March 29, 2016), *Order Granting Apple Inc.'s Letter Motion for an Extension of Time* (No. 15-M-1902).

[40] In re Order Requiring Apple Inc. to Assist in the Execution of a Search Warrant (E.D.N.Y. April 22, 2016), *Letter from US Attorney* (No. 15-M-1901).

[41] Eric Lichtblau, *Security Czars on Apple's Side in Privacy War*, NY TIMES, April 23, 2016, at A1.

[42] Michael D. Shear, David E. Sanger & Katie Benner, NY TIMES, March 13, 2016, at http://www.nytimes.com/2016/03/14/technology/in-the-apple-case-a-debate-over-data-hits-home.html .

[43] For details: http://clarkcunningham.org/Apple/CongressionalAction.html

[44] Because federal search warrants are issued by magistrate judges before the initiation of formal criminal proceedings, there are rarely any records of this process readily available to the public. However, in 2014 two distinguished federal magistrates – deeply troubled by the way the government was insisting on warrants that would give unbridled authority to obtain and review the complete contents of a cell phone – began denying such warrant applications and publishing their reasons. For details: http://clarkcunningham.org/Apple/Cases/MagistratesRevolt.html

[45] Matt Drange, *Here are 63 Other Cases Where the Government Asked for Help to Unlock a Smart Phone*, FORBES, March 30, 2016; *see also* Matthew Segal, *Lesson From the Government's 63 Prior Attempts to Make Tech Companies Unlock Device*s, Slate.com, March 31, 2016.

[46] For details: http://clarkcunningham.org/Apple/Cases/USvCrawford.html

[47] Cited material and other information about this case available at: http://www.clarkcunningham.org/Apple/Cases/USvRavelo.html

charges of wire fraud. Apparently both the warrant application and the warrant itself were filed under seal; neither the warrant nor its return was served on Ravelo; and the government subsequently refused requests from her lawyers for a copy. Fourteen months later the government disclosed that it had copied all "the user-generated content retrieved from the cellular phone" including "emails, text messages, contact list, and user-generated photographs."[48] According to Ravelo's counsel, over 90,000 separate items had been downloaded from the iPhone onto this hard drive.[49]

The Ravelo case illustrates Amar's point about the limitations of viewing the Fourth Amendment through the blinders of criminal procedure. The government has responded to Ravelo's motion to suppress[50] by saying such a motion is premature until after it has reviewed *all* the content of the phone (except for communications covered by attorney-client privilege) and then decided what information it might use at trial.[51]

A famous pamphlet published in 1765 about the Wilkes case by the anonymous "Father of Candor" reproduces a letter from Lord Halifax in response to Wilkes' request for the return of his papers.[52] It is remarkably like the prosecutor's response to Ravelo:

May 7, 1763 Mr. Wilkes Sir, In answer to your letter of yesterday, we acquaint you, that your papers were seized in consequence of the heavy charge brought against you, for being the author of an infamous and seditious libel, for which, notwithstanding your discharge from your commitment to the Tower, his Majesty has ordered you to be prosecuted by his Attorney-general. Such of your papers as do not lead to a proof of your guilt, shall be restored to you. Such as are necessary for that purpose, it was our duty to turn over to those, whose office it is to collect the evidence, and manage the prosecution against you. We are Your humble Servants Egremont Dunk Halifax	May 23, 2016 Dear Judge McNulty, …[T]he Government is in the process of determining whether it intends to introduce any of the contents of the Phone in its case-in-chief at trial. … Once it is determined what, if any, evidence on the Phone is privileged, the trial team will receive the contents of the Phone minus the privileged items. The trial team will then conduct its review and determine if it intends to use any of the contents of the Phone in its case-in-chief at trial. If the trial team determines that it will indeed use any of the contents of the Phone in its case-in-chief at trial, it will provide the [Search Warrant] Affidavit to defense counsel and will address any motion to suppress at that time. … Respectfully submitted, Paul J. Fishman, United States Attorney By: Andrew Kogan, Assistant U.S. Attorney

There are now very encouraging signs that Congress will provide leadership on resolving both the FBI v Apple controversy as well as generally moving toward greater safeguards of liberty threatened by overreaching surveillance of electronic information. At the end of May, Reuters reported that support

[48] U.S. v Ravelo (D.N.J. Feb 19, 2016), *Letter from "Filter" Assistant United States Attorney* (15-CR-576).
[49] U.S. v Ravelo (D.N.J. Apr. 29, 2016), *Letter in Support of Motion to Suppress* (15-CR-576).
[50] A better method of remedying unconstitutional cell phone searches might be a motion to return the phone and all data copied from it pursuant to Fed. R. Crim. P. 41(g). *See* U.S. v Ganias, 2016 WL 3031285 (2d Cir. May 27, 2016); U.S. v Comprehensive Drug Testing Inc., 621 F.3d 1162 (en banc) (9th Cir. 2010).
[51] U.S. v Ravelo (D.N.J. May 23, 2016), *Letter in Opposition to Motion to Suppress* (15-CR-576).
[52] The full pamphlet and the letter from Lord Halifax are available at:
http://clarkcunningham.org/Apple/History/English.html

had faltered for the "Compliance with Court Orders Act," which had still not been introduced. Instead momentum was shifting to several bipartisan initiatives that promised to take a balanced and nuanced approach to these issues, in particular a proposal by House Homeland Security Committee Chairman Michael McCaul and Senator Mark Warner to create an expert commission.[53]

Perhaps remembering why the Americans who won freedom from Britain refused to adopt a constitution unless it guaranteed the right of the people to be secure in their papers from the unchecked power of the search warrant will inspire Congress to be bold in protecting the security of cell phones and produce legislation that is a model for the rest of the world as well. The United Nations Special Rapporteur on freedom of expression submitted a letter opposing the California court's order against Apple saying that the ability to use encrypted devices like the iPhone creates a zone that protects opinion and belief and can "empower individuals to circumvent barriers and access information and ideas without the intrusion of authorities."[54] His was not a hypothetical warning. At the same time the US government was seeking court orders to break the security of the iPhone, an almost exact replay of the Wilkes persecution was taking place in China, where an anonymous email letter criticizing President Xi Jingping had led to "a far-reaching inquisition to root out the culprits behind the letter" in which at least eleven people were detained.[55]

Legislation might, for example, include requirements that the phone be examined by someone other than government investigators and that information found on the phone not be used by the government against the phone user or otherwise disclosed if it was not particularly described in the search warrant.[56] Or perhaps Congress might decide, very much in the spirit of the American Revolution, to prohibit government from forcing open a passcode protected cell phone, giving Americans at least one place – albeit only 14 square inches -- where they can be completely free from surveillance.

[53] For details see: http://clarkcunningham.org/Apple/CongressionalAction.html
[54] This letter is available at: http://clarkcunningham.org/Apple/Cases/SanBernardino.html
[55] Chris Buckley, *Call for Xi to Resign Rattles Party Leaders in China*, NY TIMES, March 30, 2016 at A5.
[56] For an example of just such protections, see a search warrant approved by the Vermont Supreme Court in 2012: http://clarkcunningham.org/Apple/Cases/VT.html