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MAKING APPLESAUCE: REFLECTIONS ON APPLEôS IPHONE CASE

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Editor's Note: *L , A F 26, 2016, P D L . I . A FBI P .*[1] *, .*

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1. Ellen Nakashima,

I. INTRODUCTION

Good morning. Thank you, Curtis, for that very kind introduction. It is a pleasure to be a small part of this very interesting Symposium. Like you, I am very interested in what our expert speakers have to tell us today. And thanks to all of you for taking time from your busy schedules to attend todayôs Symposium. However, before we get to the meat and potatoes, so to speak, from our privacy law experts today, I have been given the privilege of making some brief remark m A o φ ϰ þ Ɨ =

massacre ð become subject to a federal court order? To answer that question, weôve got to go back past the iPhone, Apple, and Steve Jobs; weôve got to go back 227 years to the All Writs Act of 1789.

III. OLD LAW WITH A NEW APP(LICATION)

The All Writs Act of 1789 is refreshingly brief but broad, providing that:

> (a) The Supreme Court and all courts established by Act of Congress

The telephone company moved to vacate the courtôs order, but the court answered that it had authority to issue the order under the All Writs Act.[19]

The Supreme Court agreed with the district court.[20] The Supreme Court observed that the All Writs Act permits a court to use its judgment to ñachieve the rational ends of the law.ò[21] The Court held in that case that:

> the power conferred by the [All Writs] Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice.[22]

So, the Actôs power extends to ñpersons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice.ò[23]

Now, two things are clear: (1) the All Writs Act encompasses those who havenôt taken any affirmative action yet, and (2) the Act applies to nonparties. Here, that means Apple.

IV. RESIDUAL AUTHORITY

The All Writs Act is a residual source of authority for courts. For example, the Supreme Court explained that under the Act courts can issue orders that are not covered by a regular statute.[24]

In *P . B C i . . . M* , an inmate sued state prison officials under 42 U.S.C. Ä 1983.[25] The district court transferred the case to a federal magistrate judge, and the magistrate issued writs of habeas corpus *i . i* [26] to produce

19. *I* . at 163.
20. *I* . at 172.
21. *I* . (citing Harris v. Nelson, 394 U.S. 286 (1969)).
22. *I* . at 174 (internal quotations omitted).
23. *I* .
24. Pa. Bureau of Corr. v. U.S. Marshals Serv., 474 U.S. 34, 43 (1985).
25. *I* .
26. *i . i* , BALLENTINEôS LAW DICTIONARY (3d ed. 1969) (an order to appear and testify).

five witnesses. Since the witnesses were scattered in different

overselling the negative marketing concerns. The order actually lets Apple run the passcode-breaking operation itself at its own facilities ð the FBI would remotely send in passcodes and Apple

us ð lawyers and nonlawyers alike. The outcome of what happens to the San Bernardino shooterôs locked iPhone will likely affect a large number of ñregularò people.

While the battle over precedents, orders, and appeals will happen in courtrooms, the debate over privacy and the debate over encrypted technology will most surely rage on in the public ñtown square.ò Already, weôve seen an enormous amount of media coverage on this issue. Tim Cook, Appleôs Chief Executive Officer, released a public letter.[36] The appeal to the public doesnôt stop there. Jim Comey, the seventh director of the FBI and a former Deputy Attorney General in the George W. Bush administration, wrote a ay M