Just 1 iPhone? In 1977 it was Just 1 Pen Register

The law develops by the process of incrementalism. That is, it is a slow, gradual development, step by tiny step. In the United States, judicial decisions that fill the gaps in between the constitutional and statutory law and helps those bodies of law evolve. Each case sets a precedent, or foundation, upon which the reasoning for the next case is constructed.

In the USA v. Apple iPhone dispute (#AppleVsFBI), the government seeks to assuage the concerns of those who fear it is seeking a "back door" or "master key" into Apple's iPhones by saying that this case is only about this one phone. The White House has made this claim.

Now James Comey, the Director of the FBI, has made the same argument in a post on the Lawfare blog: "The San Bernardino litigation isn't about trying to set a precedent or send any kind of message. . . . We don't want to break anyone's encryption or set a master key loose on the land."

Of course not. This is not how the law works. It is never about the ultimate goal. It is always about just one phone. In fact, once upon a time back in the 70's, it was about just one pen register. This is how it works:

In the present case, #AppleVsFBI, in the *Government's Ex Parte Application for Order Compelling Apple Inc. to Assist Agents in Search; Memorandum of Points and Authorities* (the "Application & Memorandum"), the government made its argument for why it was entitled to an order compelling Apple to provide the requested relief. At page 11 of the Application & Memorandum, the government relied on the case In re Order Requiring [XXX], Inc. to Assist in the Execution of a Search Warrant Issued by This Court by Unlocking a Cellphone, 2014 WL 5510865, at *2 (S.D.N.Y. Oct. 31, 2014) ("In re XXX, Inc."), as persuasive authority (it was not binding "precedent" in a legal sense, but it has served as precedent, generally speaking) in the form of a similar case in which a court granted at least somewhat similar relief as the government is requesting in #AppleVsUSA.

The court in In re XXX, Inc., relied on an earlier US Supreme Court case for its authority, and because it was the US Supreme Court, it was legal precedent:

"The Supreme Court case that most directly supports the application here is United States v. New York Telephone Co. In that case, the Supreme Court held that a district court had authority under the All Writs Act to issue an order requiring a telephone company to provide technical assistance to the Government in its effort to install a "pen register"—a device for recording the numbers dialed on a telephone. It held that such an order was in aid of the district court's jurisdiction under Fed.R.Crim.P. 41 to issue a search warrant."

So, to support its argument for the Order requiring Apple to comply in #AppleVsUSA, the government is relying on In re XXX, Inc., which in turn relied on the persuasive authority of United States v. New York Telephone Co., in which the government prevailed, which means that it was the government's arguments in that case that have now led to where we are today.

Consider the government's arguments on page 28 of its brief to the United States Supreme Court inNew York Telephone Co., which were made way back in 1977 (emphasis added):

It is no answer to say, as did the court of appeals majority, that sustaining the district court's order could serve as a "dangerous and unwise precedent for the authority of federal courts to impress unwilling aid on private third parties" (Pet. App. 15a). The court of appeals was bound to rule on the case before it, not on some hypothetical future case. It was required to decide only whether the district court could properly order the telephone company, not some other private individual, to provide the assistance necessary for the execution of a valid warrant–a warrant supported by probable cause to believe that the company's facilities were being employed in a criminal venture. Analysis of that issue, we submit, leads to the conclusion that the district court had such power and that it properly exercised it in this case.

In New York Telephone Co., the government made it clear that it was only seeking this one pen register, this one time, in this one case.

It's always just this one. This one pen register. This one iPhone. This one case . . .

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