Apple, Originalism, and the All Writs Act

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Originalism as a method of judicial interpretation is now irrelevant, some claimed after the passing of Justice Antonin Scalia. It never really worked and now it's destined to fade away.

Tell that to federal magistrate judge James Orenstein in New York, who yesterday ruled for Apple in a case in which the feds had invoked the All Writs Act to demand the unlocking of the phone of suspected drug dealer Jun Feng (the case parallels the far higher-profile case of the San Bernardino killer's iPhone).

The Act grants federal courts broad power to issue "necessary or appropriate" writs, which the government would like to interpret to include types of writ Congress has declined to authorize explicitly even after considering doing so. In Judge Orenstein's reasoning, it matters very much what the All Writs Act was understood to mean at the time of its passage in 1789.

The government's position also produces a wholly different kind of absurdity: the idea that the First Congress might so thoroughly undermine fundamental principles of the Constitution that many of its members had personally just helped to write or to ratify. Its preferred reading of the law – which allows a court to confer on the executive branch any investigative authority Congress has decided to withhold, so long as it has not affirmatively outlawed it – would transform the AWA from a limited gap-filing statute that ensures the smooth functioning of the judiciary itself into a mechanism for upending the separation of powers by delegating to the judiciary a legislative power bounded only by Congress's superior ability to prohibit or preempt. I conclude that the constitutionality of such an interpretation is so doubtful as to render it impermissible as a matter of statutory construction.

This isn't my area of law, but here are three observations:

1. That Apple prevailed in this ruling suggests at least that its position on the All Writs Act in its dispute with the government is legally not a frivolous one.

2. If and when the Feng or San Bernardino controversies reach the Supreme Court, it will be very much in order to marshal originalist arguments to reach the Court as a whole, not just Justice Clarence Thomas. To put it differently, originalism is alive and well in federal court in Brooklyn, and likely to be just as much so on First Street.

3. Although there are some constitutional issues lurking about, the All Writs Act is a statute and Congress could enact a different statute tomorrow that it chose to make more protective of law enforcement or homeland security interests. Watch out for elected officials who react to a decision like yesterday's by denouncing Apple, the courts, or both unless they also proceed to set forth a legislative fix that we could debate.

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