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The Antideficiency Act Charade: A Low-Key Separation of Powers Drama

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NOTICE & COMMENT

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As January began, the government was out of money. Therefore its lawyers filed numerous extraneous motions seeking relief they likely did not want and that they knew would be denied.

Wait, what?

Like many tech law junkies, I have been eagerly anticipating the February 1 oral argument in the net neutrality appeal. But as the government shutdown stretched on, the Federal Communications Commission moved to postpone argument in light of the lapse in appropriations. The request itself was unsurprising: many government agencies filed similar motions this month.

As I read the motion, however, I got the distinct impression that the agency neither expected nor really wanted its request to be granted. The Commission "recognize[d] that the Court has indicated that arguments in February will proceed as scheduled." Nonetheless, it explained, the Justice Department instructed government attorneys to request postponement of active cases until funding was available. Helpfully, the agency added that if the Court denies the request, the Justice Department would then allow the agency's attorneys to continue their work. It concluded by asking the court to resolve the motion quickly so it can get back to preparing for argument as scheduled. Unsurprisingly, the D.C. Circuit denied the request.

It turns out this charade, which occurred repeatedly during the shutdown, stems from the Justice Department's interpretation of the Antideficiency Act. Under the Act, "[a]n officer or employee of the United States Government…may not accept voluntary services for…government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." Unlike TSA officers and other essential employees who remained on the job

during the appropriations lapse, civil lawyers do not fit the "emergency" exception, so the Justice Department told them to request that their cases be held until the government reopened.

But there's supposedly a loophole. If the court denied the postponement, then the lawyers could continue working. Why? Because, DOJ explains, the denial operates as a court order to proceed, which "would constitute express legal authorization for the activity to continue" under the Act. What results is a scripted drama that has played out repeatedly over the last month: agencies with pending cases sought postponement, not necessarily because they wanted to avoid argument, but simply as a means to continue ~~getting paid~~ working through the shutdown.

The D.C. Circuit seemed willing to go along with this charade. In *Kornitsky Group v. FAA*, filed on January 9, the court denied an FAA postponement request. Judges Srinivasan and Edwards, concurring in the denial, explained that the DOJ's understanding of the statute "presumably governs the Federal Aviation Administration's participation in this case….Thus there is no dispute that conducting argument as scheduled" is permissible under the Act. The concurrence added a lengthy string cite showing that its decision was consistent with its practice during the 2013 government shutdown. And after *Kornitsky*, the court routinely denied similar requests and ordered cases to proceed as scheduled.

Despite this judicial endorsement, the DOJ's interpretation seems inconsistent with the statute. Absent an emergency, government lawyers could only continue working if "authorized by law" to do so. This means there must be some legal authority for the government to spend public funds. The Constitution's Appropriations Clause vests this power in the political branches: "no money shall be drawn from the treasury, but in consequence of appropriations made by law." With limited exceptions, this happens through an appropriations bill or other statute passed by Congress through bicameralism and presentment. The Court cannot usurp that power to authorize expenditures not otherwise provided for, no matter how much the executive may want it to.

Some judges have similarly criticized the idea that the Act allows the Court itself to fill the appropriations gap. Dissenting in *Kornitsky*, Judge Randolph labeled the scheme "blatant bootstrapping," and argued that the Antideficiency Act "does not confer a license on the Judiciary" to spend public money. In another case, Judge Katsas similarly found the argument "that activity not otherwise 'authorized by law' becomes so when this Court orders it" is "troubling": "a judicial decree resting on that premise —*'la loi, c'est nous'*—seems little better than an executive decree resting on *'l'etat, c'est moi*.'"

Judges Randolph and Katsas are correct. Because government attorneys may not work without appropriations absent emergency circumstances, the court should simply have granted the various postponement requests. (Indeed, many courts routinely stayed civil cases where the United States is a defendant until appropriations were restored.) A court order requiring the government to argue as scheduled may immunize individual attorneys from prosecution for violating the Act. But it cannot by itself authorize payment for their work.

Of course, Friday's continuing resolution drew the curtain on this drama for now. But it is likely to come up again, perhaps as soon as February 15 when the current appropriation runs out. The DOJ's interpretation may be an expedient remedy for agencies and courts affected by a shutdown. But it does an end run around the Antideficiency Act and is inconsistent with constitutional design.

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