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LEGAL ANALYSIS AND COMMENTARY FROM JUSTIA

Why Coordinated Resistance by Law Firms to The Trump Administration's Targeted Executive Orders Against BigLaw Would Not Run Afoul of Antitrust Restrictions

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Legal professions and indeed the nation as a whole have been engaged over the past few weeks in a heated conversation about how best to respond to a series of executive orders from the White House targeting law firms whose past clients and legal work have annoyed the President and members of his team. The roster of targeted firms includes Covington & Burling, Paul/Weiss, Perkins Coie, Jenner & Block, Skadden, WilmerHale, Milbank, and Wilkie Farr. The executive orders, if allowed to stand, would (among other things) impede the targeted firms from doing business with the federal government, and would also strip the lawyers of these firms of the ability to obtain security clearances or even enter federal buildings. Some of the orders also go so far as to seek to disfavor *clients* of the affected firms in the competition for government contracts.

There doesn't seem to be much doubt that the executive orders are blatant violations of the First and Sixth Amendments to the Constitution. All the courts to have considered the matter have enjoined at least some key parts of the orders; indeed, while not every provision in each order may be equally problematic, we know of no remotely credible constitutional scholar—occupying any point on the ideological spectrum—who thinks the orders are completely valid. (Many of the contentious provisions of the orders are themselves self-consciously limited to executive actions that are "permitted by law," but this kind of purported savings clause, which could be said to be implicit in any order, certainly cannot insulate the orders from facial constitutional attack in federal court, especially insofar as the orders create problematic chilling effects under the First and Sixth Amendments.)

And yet many law firms (most notably Paul/Weiss, Skadden, Wilkie, and Milbank), have, instead of pushing back against the orders, negotiated deals with the administration so as to be removed from its blacklist. Reports are that the deals have included promises by the law firms to change some of their DEI policies (policies that may or may not be illegal under Supreme Court case law), and commitments to do *pro bono* work for causes the administration favors. These settlements are seen by many in the legal community as capitulation and cowardice, and have generated a rift within BigLaw and the profession more generally. That only 10 or so of the largest 100 American law firms signed on to an amicus brief supporting Perkins Coie in its efforts to fight the Executive Order against it in court has generated criticism by many legal analysts, law firm associates, and even the former Second Gentleman (and lawyer) Doug Emhoff. (In this column our goal is to analyze rather than to judge, although we do note that there are many legitimate reasons for not joining an amicus brief, including the fact that many amicus briefs today do not add any additional information and arguments not already provided by the parties, and instead are "me-too" political statements that some folks reasonably think clutter litigation and make it harder for courts to identify and consider the few amicus briefs that actually do add helpful new arguments or information.)

All of this raises the question: why would law firms—themselves dedicated to protecting the legal rights of individuals and entities around the world—not stand up for their own rights? The answer seems to be quite practical. In addition to the cost of litigating (and remember many defendants in all manner of cases settle disputes for “nuisance value” rather than litigate, and doing some additional *pro bono* work may not be a huge deal for a gigantic law firm), the firms that have settled have apparently been worried about losing clients and revenue the longer their pissing matches with the administration go on. After all, it would be natural for a client—especially, perhaps, a corporate client with regulatory matters such as merger approvals or tax disputes that are likely to arise in front of the federal government—to want to have a lawyer who is in the federal government’s good graces. While regulatory decisions government makes ought not to be influenced by politics or personal vendettas, establishing impermissible government motive in the context of future regulatory decisions may be very hard to do (indeed one of the striking aspects of the executive orders against law firms is that they seem transparently retaliatory rather than grounded on any plausible concerns about the legal incompetence or disloyalty of the affected firms). Thus, risk-averse clients might simply abandon the targeted firms and instead throw their business to other firms whose lawyers are similarly skilled. Or so the targeted law firms might understandably think.

Indeed, when the Paul, Weiss, settlement was announced (and generated much criticism within the legal community, including this forceful op-ed in the *New York Times* authored by the named partners of Keker, Van Nest & Peters and urging law firms to "stand together and fight"), there were press reports that Paul, Weiss clients were being actively poached by rival firms on account of the Executive Order, and that such market pressure figured prominently in the firm's decision to settle.

This, in turn, suggests a collective-action problem. While each law firm may have an incentive to settle right away (for fear of losing business to other firms who have already settled or who haven't yet been targeted), the law firms collectively would be better off (in terms of being able to govern themselves the way they want, and to choose their paying and *pro bono* clients and cases without government pressure) if none of them settled and the administration's executive orders were forcefully and repeatedly rebuffed by courts all the way to the Supreme Court.

Is there a way to solve this collective-action hurdle? Certainly, many commentators think so. On CNN last week, our friend and law-professor colleague Erwin Chemerinsky argued forcefully and cogently that if the BigLaw firms simply stuck together and agreed (either explicitly or implicitly) that none of them would cave, they would win this war initiated by the administration. And if Professor Chemerinsky is right about this (and we think he is), then no firm would have to be worried about poaching; no other firm could hold itself out as being different from any other firm in this regard; all firms would be protected from improper government discrimination.

But even if this cartel-like action by law firms could, by peer pressure or otherwise, surmount the problems that cartels always confront (including the risk of individual defectors) would such coordinated action by law firms be permissible under antitrust laws? While we are not antitrust scholars, we do teach and write in the area of the First Amendment, and in our view, under current Supreme Court doctrine, law firms that stood together to resist the administration would be insulated from antitrust liability.

At the outset, we concede a few points that might otherwise create the worrisome prospect of an antitrust violation. As one of us wrote (in a co-authored column a few months ago), under current antitrust doctrine, the key to establishing a violation of Section 1 of the Sherman Act, the law probably most relevant here, is to prove the existence of an agreement (typically among competitors) that has an anticompetitive purpose and effect—the language of Section 1 prohibits "every contract, combination . . . or conspiracy, in restraint of trade or commerce." The archetypal example of such an agreement is for competitors within an industry to agree (effectively as a cartel) on a price they will charge for a particular good or service.

We acknowledge that the law firms in question are direct competitors (indeed that is what creates the poaching problem.) We also acknowledge that coordination by competing law firms to address outside threats to the profitability of the profession could in some circumstances reflect impermissible anticompetitive intent and generate problematic anticompetitive effect. For example, imagine an AI tool had the potential to greatly reduce the number of lawyer-hours (and thus billings) required for certain legal tasks. If the maker of such an AI tool came to an individual law firm and offered the product, that firm might be tempted to use it, even if it reduced the firm's overall profits (since more associate hours means more partner profits), out of fear that competing law firms would use the tool, lower their costs, and poach clients. If the firms all decided that they would be collectively better off (and make more profits) by maintaining the old-fashioned time-intensive way of doing legal work, and collectively agreed that none of them should use the new AI tool as a result, that kind of collusion, from what we understand, could be problematic.

Why, then, are we confident that even explicit coordination and agreement by law firms in the context of the Trump administration's executive orders would be permissible? Because, (as explained in the earlier column) in at least two separate lines of cases, the Supreme Court has recognized that coordinated business activity that might result in reduced marketplace competition is nonetheless insulated from government regulation under First Amendment principles. In the first of these lines, the so-called *Noerr-Pennington* line of cases

> the Court has held that coordinated lobbying

activities by businesses lie outside the scope of the federal antitrust laws, even if the object of the lobbying is the enactment of policies and regulations that would have anti-competitive consequences. So, for example, in the 1961 *Noerr* case (*Eastern R. Conference v. Noerr Motors*), the Court held that a public relations campaign orchestrated by railroad companies, who were in competition with each other and also with the trucking industry, could not give rise to antitrust liability even if the goal of the PR campaign was the enactment of regulations that would burden the trucking industry so as to hinder competition between it and railway transportation. As the Court has described the essential teaching of *Noerr*, "at least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had."

We think the *Noerr* doctrine relating to lobbying and petitioning government for redress does have direct application to the present situation, insofar as the collective action by law firms would be explicitly and narrowly "directed toward obtaining government action," namely the judicial invalidation and/or political retreat by the administration of the executive orders in question. We also think it of no importance that the present situation involves litigation efforts rather than political lobbying efforts. In this regard, recall that in the 1963 case of *NAACP v. Button* involving access to counsel for impact litigation, the Court characterized lawsuits as a traditionally important form of seeking redress from government:

> litigation is not [just] a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, ... and is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. . . . And under the conditions of modern government, litigation may well be the sole practicable avenue open . . . [for certain disfavored groups] to petition

> for redress of grievances.

If that weren't enough, another line of cases, represented by the 1982 Supreme Court decision in *NAACP v. Claiborne Hardware* also discussed in the earlier column, seems on point as well:

> The *Claiborne Hardware* case "arose after black citizens boycotted white merchants in Claiborne County, Miss [and some] white merchants sued under state law to recover losses from the boycott." The Court concluded that the "right of the States to regulate economic activity could not justify a . . . prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." Thus, even though the boycotting customers in *Claiborne Hardware* were engaged in concerted economic activity that could affect the competitive conditions in the Claiborne County business community—as opposed to simply lobbying, as in *Noerr*, for governmental policies that might change those