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Can the President of the United States Order the Attorney General to Drop a Case?

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I. INTRODUCTION

Last month, 15 Democrats and 100 Republicans signed separate letters endorsing the proposed AT&T-T-Mobile merger and urging the Obama administration to drop the lawsuit brought by the Department of Justice's Antitrust Division to block it. The fact that nearly all of the signatories turned out to have received thousands of dollars in campaign contributions from AT&T recently was no surprise; at its most benign, there is nothing untoward about the private sector supporting politicians who are naturally inclined towards their point of view.

What was surprising was that the letters were directed not to Attorney General Eric Holder, but to President Obama himself. Lost in the debate over the propriety of members of Congress weighing in on a merger was a different, far more interesting question: Can the president of the United States order the attorney general to drop a lawsuit?

In short, yes. But that doesn't make it a good idea.

The attorney general is a member of the executive branch, appointed by the president, and tasked with assisting the president in his/her responsibility to execute the laws of the United States. There is, in fact, a long tradition of presidents directing their attorney generals to drop lawsuits, stretching back to the earliest days of the Republic. But the president has sworn to "faithfully" execute the laws of the United States. Electing to discontinue lawsuits for political purposes is not only wrong; it could also constitute grounds for impeachment, as it did with President Nixon.

Even if the president had a valid reason, such actions would undermine a basic pillar of American society. The country was founded on the idea of leveling the playing field for all persons,² inherent in which is the notion that every person has the same chance to succeed as any other through sheer hard work and innovation. Not only are these fundamental American ideals; these are the philosophical underpinnings of antitrust law as well. Antitrust assumes a steady state for the American economy in which the most successful companies are the ones that provide the greatest value for consumers. Shielding select modern-day oligarchs from the antitrust laws places a well-greased palm on the scales of justice, creating market imbalances that harm the companies that play by the rules, while eroding basic principles of equality and upward mobility.

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² It is not without irony that I note that not all people were considered "persons" at the nation's founding, and acknowledge the inherent, unresolvable contradiction between the principle that "All men are created equal" and the institution of slavery.

II. TO SUPPORT A PHONE COMPANY MERGER, CONGRESS STARTS A LETTER-WRITING CAMPAIGN

Public relations cognoscenti may one day speak of the AT&T-T-Mobile merger messaging campaign in the same breath as New Coke, Kentucky Grilled Chicken, and Daisuke Matsuzaka.³ The campaign has featured old-school message bombardment oblivious to concerns that are actually being raised. From the time the merger was announced on March 20, 2011, endorsements came in with the mechanical regularity of British redcoat infantry, stilted (and, in the case of the Gay & Lesbian Alliance Against Defamation, incongruous) testimonials to the pro-competitive benefits of the transaction.

On September 15, 2011, 15 House Democrats co-signed a letter addressed to President Obama, urging the administration to settle the lawsuit brought by the Department of Justice's Antitrust Division to block the merger. Five days later, 100 House Republicans sent a similarly themed letter to the White House. Government watchdog organizations would later reveal that nearly all of the signatories to the letters had received donations from AT&T over the past few years. All but one of the Republican signatories received political donations from AT&T, totaling \$963,275; the Democrat signatories received cumulative donations of nearly \$570,000.

To be clear, there is nothing to suggest that these donations were illicit; companies obviously want to support politicians who share their goals and interests, and nothing about the timing of these donations suggests that there was any sort of quid pro quo. What was odd, however, was that the letters were directed to President Obama.

Congressional letters regarding a merger are not an uncommon thing, but they tend to follow the genteel steps of courtiers. Members of Congress are regularly urged to weigh in on (in support of or opposition to) a merger at the behest of a local employer or a campaign donor with a particular interest in the outcome. Congress has no authority to approve or block mergers. Instead, some members choose to send deferential letters to the attorney general, containing expressions of hope and interest on the outcome of a merger;⁴ signed, the people who confirm you and approve the budget for your department. For high-profile mergers, members may hold an "oversight" hearing in which the CEOs of the merging companies are trotted up to Capitol

³ Both New Coke and Kentucky Grilled Chicken were product makeovers shoved onto the American public in tone-deaf, overbearing marketing campaigns that landed with a resounding thud. Matsuzaka was a star baseball pitcher for the Seibu Lions of Japan, and was brought into Major League Baseball amid great fanfare and a colossal bidding war culminating in a \$103 million contract with the Boston Red Sox. He turned out to be a bust, marking one of the few times in modern baseball history that the New York Yankees could point their fingers at another team and exclaim gleefully, "Ha ha, you overpaid!"

⁴ With exceptions; take Rep. Pete Olson's impassioned press release from September 1, 2011. "With this latest move, it's hard to figure out who this Justice Department is working for. If they are not trying to stop the closure (sic) of the terrorist prisons at Guantanamo Bay, then they are helping Mexican gangsters acquire weapons through their imbecilic 'Fast and Furious' program. Congress has found no reason why this merger should not go through. Blocking an American company from acquiring a foreign-owned company, which will bring back thousands of American jobs as well as pump many billions into the economy doesn't make sense." Noteworthy here is that the U.S. Congress was apparently able to race through its thorough antitrust analysis while teams of professional antitrust attorneys and economists on staff at the Department of Justice continue to slog through calculations of market shares and competitive impact at a lame-stream pace.

Hill to assure Congress that tens of thousands of jobs will be created, while the ones to be “efficiency-ied” out are back-office functions.⁵

Few seriously expect President Obama to be influenced by these letters; such entreaties from members of Congress are a regular occurrence and are, in many instances, a box to be checked for a member on behalf of a constituent or donor. But the forthrightness of the letters raises an intriguing question: Can the president of the United States order the attorney general to drop a case?

III. NIXON AND THE GOLDEN AGE OF ANTITRUST EXTORTION

The letters are reminiscent of a politicization of antitrust not seen since the Nixon administration. Given President Nixon’s fluid understanding of which laws applied to whom, this should come as little surprise. For President Nixon, antitrust enforcement was yet another tool toward political ends.

Transcripts of White House tapes published in *The Washington Post* revealed that Nixon used the threat of an antitrust lawsuit against the three major television networks as a means of extracting more favorable coverage (including, bizarrely, a prime time rebroadcast of his daughter’s wedding ceremony).⁶ Although his Attorney General favored bringing an actual antitrust suit against the networks for monopoly ownership of prime-time programs, Nixon reportedly told him to “hold it for a while, because I’m trying to get something out of the networks.”⁷

Arguably even less beneficial to consumer welfare than watching Tricia Nixon’s nuptials was the President’s interference in an Antitrust Division case after receiving campaign commitments of \$400,000 from the acquirer. In 1971, telecommunications conglomerate International Telephone and Telegraph (ITT) was facing a dogged legal challenge to its acquisitions of Hartford Fire Insurance Corp. from the Antitrust Division. Internal ITT memoranda would later reveal that in return for the President pushing the Antitrust Division into a settlement favorable to ITT, ITT would make a substantial contribution to Nixon’s reelection campaign. At one point, Deputy Attorney General Richard Kleindienst, who was leading the case, received a call from Presidential Advisor John Ehrlichman ordering him not to file a critical brief due the following day. When he refused, the next call he received was from the President himself, reiterating what Ehrlichman had demanded, albeit more colorfully.^{8,9} Ultimately, Nixon

⁵ It always struck me as strange how reassuring people found it that the only jobs that would be eliminated were back-office ones, as though the back office was populated by some sort of cave-dwelling troglodytes not worthy of the company of respectable society.

⁶ Walter Pincus & George Lardner, Jr., *Nixon Hoped Antitrust Threat Would Sway Network Coverage*, WASHINGTON POST, (Dec. 1, 1997), at A1, available at <http://www.washingtonpost.com/wp-srv/national/longterm/nixon/120197tapes.htm>. Illustrative is the following exchange between aide Charles Colson and the President. Colson: “...[K]eeping this [antitrust case against ABC, NBC, and CBS] in pending status gives us one hell of a club of an economic issue...” Nixon: “We don’t give a goddamn about the economic gain. Our game here is solely political...” To this author’s knowledge, this balancing test was never subsequently adopted by staff economists at either federal antitrust agency.

⁷ *Id.*

⁸ Nixon is reported to have responded to Kleindienst’s persistence with, “You son of a bitch, don’t you understand the English language?”

⁹ Kleindienst hardly acquits himself as a white hat figure in this drama. President Nixon would reward him for playing along by appointing him Attorney General in 1972. Less than a year later, he resigned as the Watergate

ordered the DOJ to drop the suit after receiving commitments of \$400,000 from ITT in campaign contributions.¹⁰

Nixon is more famously known among legal circles for the “Saturday Night Massacre,” in which, seeking an attorney general who would call off the independent prosecutor’s investigation of the Watergate break-in, he sacked two attorneys general until he found a willing participant in Robert Bork.¹¹

Nixon’s Nero-like proclivities would lead to the passage of a number of laws by a Congress seeking to head off future abuses of power. The ITT scandal would lead to the passage of the Tunney Act, which requires all DOJ antitrust consent decrees to be left open for a comment period and to be approved by a federal judge. The Saturday Night Massacre led to the passage of the Ethics in Government Act of 1978, which created the framework for an independent counsel to investigate violations of the law by high-level government officials; subject to removal only by the attorney general, not the president. Senator Sam Ervin went as far as to push (ultimately, unsuccessfully) for a Department of Justice completely independent of the president, a notion controversial to many, notably Archibald Cox, one of the attorneys general fired by President Nixon during the Saturday Night Massacre. Although the Act was ultimately upheld by the Supreme Court,¹² the idea that the Congress could create a prosecutor who existed outside of the control of the executive was one that many found unconstitutional.

IV. IS THE ATTORNEY GENERAL AUTONOMOUS FROM THE PRESIDENT OF THE UNITED STATES?

The position of attorney general of the United States was created in section 35 of the Judiciary Act of 1789.¹³ The Judiciary Act was silent as to who controlled the attorney general. From a functional perspective, the role of the attorney general fits best within the executive branch. In Montesquieu’s tripartite system of governance, no one branch of government contains any two powers. Congress is charged with creating the laws, the judiciary is charged with interpreting them, and the executive is charged with their faithful execution. The Constitution entrusts the president with the responsibility of the faithful execution of laws, and the attorney general, a presidential appointee, acts as his/her agent in bringing those cases and controversies before the courts.

scandal was breaking. (There was a period under Nixon when Attorneys General had the lifespan of WWII RAF pilots.) He would later be convicted of perjury for statements made regarding the ITT matter during his Senate confirmation hearing.

¹⁰ Thomas Catan, *Echoes of Nixon’s Order on ITT Deal in Democrats’ Letter to Obama on AT&T*, WALL ST. J., (Sep. 15, 2011), available at <http://blogs.wsj.com/washwire/2011/09/15/echoes-of-nixons-order-on-itt-deal-in-democrats-letter-to-obama-on-att/>. From transcribed White House tapes, Nixon is heard ordering Deputy Attorney General Kleindienst: “My order is to drop the goddamn thing – is that clear?”

¹¹ Bork’s succession to the position in the dead of night is reminiscent of the “Admiral Piett” sequence from “Empire Strikes Back”. See http://www.youtube.com/watch?v=7O1Qd_FNgfM.

¹² *Morrison v. Olson*, 487 U.S. 654 (1988).

¹³ “And there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments, and shall receive such compensation for his services as shall by law be provided.” Judiciary Act of 1789, I Stat. 73.

Constitutional scholars have debated the degree to which prosecution is an executive function. In the early days of the republic, presidents actively directed (and stopped) prosecutions.¹⁴ A *nolle prosequi* is a declaration formally entered into a case that the prosecutor (or plaintiff) does not wish to further pursue the case. Presidents Washington and Adams both issued *nolle prosequis*. President Washington, having directed Attorney General Edmund Randolph to prosecute participants in the Whiskey Rebellion, later instructed the district attorney of Pennsylvania to enter a *nolle prosequi* in the case of two “respectable persons” who had been indicted. President Adams directed a district attorney to enter a *nolle* in the case of a newspaper editor charged under the Sedition Act. President Jefferson also ordered a number of prosecutions to be halted. In the same era, the Supreme Court made clear what it saw as limitations on the office of the attorney general. In *Hayburn’s Case*,¹⁵ the Court would not permit Attorney General Randolph to argue a matter without first ascertaining whether his actions had been authorized by President Washington.

Proponents of the theory of the unitary executive argue that the attorney general was never intended to be independent of the president of the United States. In fact, under pure unitary executive theory, such a thing would be impossible; as then-Solicitor General Ted Olson argued in *Morrison v. Olson*, Congress cannot carve a position for the enforcement of laws outside of the execution authority of the chief executive of the United States.

Yet pure unitary executive theory has been proven wrong. Olson lost his argument. To the chagrin of proponents, the validity of the independence of a special prosecutor from the executive branch has been upheld by the Supreme Court.¹⁶ In addition, Congress has recognized an ability to create administrative agencies that operate independently from the executive branch.¹⁷

That said, nothing in the creation of the role of the attorney general by the first Congress, nor its operation by the presidents contemporaneous with the office’s creation, suggests that the office of the attorney general was intended to or interpreted to exist independently of the president. Then, as now, the president is charged with faithful execution of the laws of the land, and the attorney general is obliged to follow his/her direction. So, as to whether the president has the ability to order the attorney general to discontinue a lawsuit, I argue: Yes.

But that power is not unchecked.

V. CAN v. SHOULD

As discussed above, the president is charged with “faithful” execution of the laws of the land. There is no reasonable definition of the word under which dropping cases in return for financial or political gain constitute could possibly be “faithful” to the spirit of the laws.

Nor would such mercenary behavior be without consequence. The Constitution permits impeachment of the president for “treason, bribery, and other high crimes and misdemeanors.” The terms are not defined, and subject to interpretation, but dropping a case in exchange for a

¹⁴ This section draws heavily upon the research of Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH L. REV. 521 (2005).

¹⁵ 2 U.S. 409 (1792).

¹⁶ It would be practically Heller-ian to argue for the Executive Branch’s control over independent prosecutors by essentially refusing to acknowledge the autonomy of the Judiciary Branch in interpreting that law.

¹⁷ *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935).

campaign contribution, for example, would readily meet the definition of bribery. Indeed, the ITT scandal was one of the articles of impeachment against President Nixon.

More likely than not, a president who instructs his attorney general to drop an antitrust investigation for political reasons will be smart enough to couch his/her rationale in constitutionally palatable terms. But the table having been set, there is yet reason not to eat the meal. A fundamental component of the American psyche is the idea of equality, that to each comes the fruit of his merits. It's the basis for a culture of entrepreneurialism that makes upward mobility practically a birthright. Indeed, the antitrust laws exist only as a corrective measure on what is assumed to be a naturally well-working economy, to ensure that market power doesn't collect in the hands of a few. A country in which the chief executive protects one company from the antitrust laws but not others undercuts the inherent trust and transparency that makes a market welcoming for investors.

Indeed, politicians who ask the president to suspend an attorney general's investigation should carefully consider the precedent they've set. The role of the antitrust enforcement agencies would rapidly dwindle, as companies would make a beeline for the president's PAC and reelection campaign rather than go through the more tedious and time-consuming Hart-Scott-Rodino filing process.

VI. CONCLUSION

The President is to have the laws executed. He may order an offence then to be prosecuted. If he sees a prosecution put into a train which is not lawful, he may order it to be discontinued and put into a legal train....There appears to be no weak part in any of these positions or inferences.

Thomas Jefferson (1801)

I want something clearly understood, and if it's not understood, [Department of Justice Assistant Attorney General Richard] McLaren's ass is to be out of there within one hour. The ITT thing – stay the hell out of it. Is that clear? That's an order....I do not want McLaren to run around prosecuting people, raising hell about conglomerates, stirring things up....I don't like the son of a bitch.

Richard Nixon (1971)

Putting aside the coarseness of the second of the two quotes above, there is very little that separates the sentiments expressed. And that's the scary part about the president's authority to order an attorney general to discontinue a case.

There is a reason why the president should refrain from becoming involved in individual cases. To ensure the greatest compliance with the laws, there must at least be an *appearance* of an independent justice system. The free-wheeling, pay-for-play days of the Nixon Administration tarnished the institutions of power in this country and created a general malaise towards government in this country.

“Hand of God” actions have a disruptive effect on free markets. They reward proverbial squeaky wheels while indirectly penalizing the market actors playing by the rules.

For these reasons, the presidential power of intervention on DOJ antitrust prosecutions, while unquestioned, should be used sparingly, if ever. Else, we risk permanently enervating the antitrust laws, and undermining basic principles of equality and justice enshrined within the Constitution.