

## ***Perkins Coie v. DOJ* Oral Argument: "There Are Certain Things Even the Unitary Executive Cannot Do."**

by

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This morning, a three-judge panel of the D.C. Circuit heard argument in *Perkins Coie v. DOJ*. That case involves challenges to executive orders that, as WLF's amicus brief in the case put it, "singled out four private law firms [Perkins Coie, Susman Godfrey, WilmerHale, and Jenner & Block] for punishment" because the President "doesn't support the firms' prior legal representations and pro bono work." The orders directed that "attorneys at those firms [be] stripped of security clearances, debarred from government contracting and government employment, and excluded from federal buildings."

That outcome was avoided because the government lost below, and four district courts issued injunctions against the administration. Rather than concede error, the administration opted to appeal. The four cases were consolidated, and the D.C. Circuit paired hearing *Perkins* with another challenge involving a security clearance determination (*Zaid v. Executive Office of the President*). Perhaps because of that, Much of the approximately two-hour oral argument (which was scheduled for a mere 40 minutes) focused on the security clearance aspect of the case.

The lower courts didn't simply enjoin the orders but also restored yanked clearances. All three judges on the panel (Chief Judge Srinivasan and Judges Pillard and Rao) asked questions about that remedy. Under tough questioning from the panel, the government held to a strict Article II defense and never wavered from its position that there's no judicial authority to review security-clearance determinations at all, let alone restore them—even if the President acted for plainly improper motives (religious or racial bigotry) or for partisan purposes. That position encountered far more hostility.

Indeed, the fact that there was so much emphasis on the scope of the remedy would seem to suggest that the panel agrees the order itself is unlawful. And, indeed, questioning by the panel about the propriety of severability of an executive order (the security-clearance provision is section 2 of each order) also suggests a panel that's inclined to affirm the injunctions as unconstitutional in every other respect.

As WLF’s brief explains, the orders should fall wholesale and the injunctions should be affirmed because they violate the First Amendment. The government tried to downplay the First Amendment, claiming that this case merely involved an interference with freedom of “commercial association.” But as Paul Clement (arguing for the law firms) explained in a colloquy with Judge Pillard, whatever the merits of a distinction between commercial and noncommercial activity, the President can’t impose punishments against commercial concerns for their expressive speech—here, the advocacy for clients and causes the White House opposes.

As Mr. Clement said (per my notes), “There are certain things that even the unitary executive cannot do.” WLF—staunch defenders of the unitary executive—concur. The vesting of executive power in the President is merely the power to faithfully execute those laws.