

Beyond the Bully Pulpit: Presidential Speech in the Courts

Katherine Shaw*

Abstract

The President's words play a unique role in American public life. No other figure speaks with the reach, range, or authority of the President. The President speaks to the entire population, about the full range of domestic and international issues we collectively confront, and on behalf of the country to the rest of the world. Speech is also a key tool of presidential governance: For at least a century, Presidents have used the bully pulpit to augment their existing constitutional and statutory authorities.

But what sort of impact, if any, should presidential speech have in court, if that speech is plausibly related to the subject matter of a pending case? Curiously, neither judges nor scholars have grappled with that question in any sustained way, though citations to presidential speech appear with some frequency in judicial opinions. Some of the time, these citations are no more than passing references. Other times, presidential statements play a significant role in judicial assessments of the meaning, lawfulness, or constitutionality of either legislation or executive action.

This Article is the first systematic examination of presidential speech in the courts. Drawing on a number of cases in both the Supreme Court and the lower federal courts, I first identify the primary modes of judicial reliance on presidential speech. I next ask what light the law of evidence, principles of deference, and internal executive branch dynamics can shed on judicial treatment of presidential speech. I then turn to the normative, arguing that for a number of institutional reasons, it is for the most part inappropriate for a court

*Associate Professor of Law, Benjamin N. Cardozo School of Law. Note—as an attorney in the White House Counsel's Office from 2009 to 2011, I worked on several of the matters discussed in this Article, but everything here is drawn entirely from the public record. I'm grateful to Kate Andrias, Will Baude, Richard Briffault, Josh Chafetz, Zachary Clopton, Neal Devins, Ryan Doerfler, Bill Eskridge, Barry Friedman, Jonah Gelbach, Bishop Grewell, Michael Herz, Jocelyn Getgen Kestenbaum, Anita Krishnakumar, Rebecca Kysar, Maggie Lemos, Leah Litman, Peter Markowitz, Justin Murray, Luke Norris, Deborah Pearlstein, Michael Pollack, John Rappaport, Alex Stein, Nick Stephanopoulos, Jeffrey Tulis, Steve Vladeck, and Michael Waldman for helpful conversations and comments on earlier drafts, and to participants in workshops at Pace Law School, the University of Chicago Law School, the University of Pennsylvania Law School, Yale Law School, and Cornell Law School. Kate Giessel, Alexander Grass, Sophia Gurulé, Michael Lynch, and Lekha Menon provided excellent research assistance.

to give legal effect to presidential statements whose goals are political storytelling, civic interpretation, persuasion, and mobilization—not the articulation of considered legal positions. That general principle, however, is not absolute. Rather, in a subset of cases, a degree of judicial reliance on presidential speech is entirely appropriate. That subset includes cases in which presidential speech reflects a clear manifestation of intent to enter the legal arena, cases touching on foreign relations or national security, and cases in which government purpose constitutes an element of a legal test. In light of the rhetorical strategies of President Donald Trump, the question of the impact of presidential statements in the courts is quickly becoming a critical one.

INTRODUCTION	73
I. BACKGROUND	79
A. Presidential Speech: A Brief Historical Account	80
B. Presidential Speeches: An Institutional and Procedural Overview	83
II. PRESIDENTIAL ADMINISTRATION, DIRECT PRESIDENTIAL ACTION, AND PRESIDENTIAL SPEECH IN THE LEGISLATIVE PROCESS	89
A. The President in Administrative Law	89
B. Direct Presidential Action	93
C. Presidential Speech and the Legislative Process	97
III. PRESIDENTIAL SPEECH IN THE COURTS	99
A. The Forms of Presidential Speech: A Taxonomy	99
1. <i>Constitutional Power or Authority</i>	99
2. <i>Statutory Meaning or Purpose</i>	103
3. <i>Executive Action</i>	104
4. <i>Statements with Direct Legal Effect</i>	110
5. <i>Statements of Fact</i>	114
B. Presidential Speech and Evidentiary Principles	118
C. Deference and Presidential Speech	121
IV. PRESIDENTIAL SPEECH AND INTRA-EXECUTIVE DYNAMICS	123
V. GUIDING PRINCIPLES	129
A. Manifestation of Intent	129
B. Presidential Speech and Other Executive Branch Statements	131
C. Presidential Speech in the Foreign Affairs and National Security Spheres	134
D. Presidential Speech as Evidence of (Constitutionally Forbidden) Government Purpose	137
CONCLUSION	140

Introduction

Presidential speech, “part theater and part political declaration,”¹ is both a central feature of the contemporary presidency and a key tool of presidential governance. The President’s words are often designed to reach multiple audiences: Congress and the public; members of the federal bureaucracy and regulated industries; allies and adversaries. They may aim to inspire or to mobilize, to comfort or to condemn.²

1. PEGGY NOONAN, *WHAT I SAW AT THE REVOLUTION: A POLITICAL LIFE IN THE REAGAN ERA* 68 (1990).

2. In Mary Stuckey’s words, “The President has become the nation’s chief storyteller, its interpreter-in-chief. He tells us stories about ourselves, and in so doing he tells us what sort of people we are, how we are constituted as a community. We take from him not only our policies but our national self-identity.” MARY E. STUCKEY, *THE PRESIDENT AS INTERPRETER-IN-CHIEF* 1 (1991)

But what sort of impact, if any, should presidential speech have in *court*, if that speech is plausibly related to the subject matter of a pending case? Curiously, neither judges nor scholars have grappled with that question in any sustained way, though citations to presidential speech appear with some frequency in judicial opinions. Some of these citations are no more than passing references; at other times, presidential statements play a significant role in judicial assessments of the meaning, lawfulness, or constitutionality of either legislation or executive action.

Public law scholars *have* considered the role of presidential rhetoric (as well as actual presidential involvement) in the formal legislative process, when it comes to both proposing and shaping legislation;³ such discussions typically approach presidential speech as a subset of legislative history, with its relevance subsumed within larger debates about the propriety of reliance on legislative history.⁴ And a rich body of administrative law literature questions the President's ability to control the actions of executive branch agencies and officials, including through both direction and rhetorical appropriation of agency action.⁵ But, although presidential speech often appears in these debates, no sustained attention has yet been paid to the role of presidential statements, as a distinct category, in judicial fora.

With or without scholarly attention, however, courts do incorporate presidential speech into their decisional processes, in sometimes surprising ways. A number of recent examples from the lower courts, which I'll introduce briefly here and revisit in depth in Part III, help illustrate the scope of the phenomenon. In the first, a challenge to the Obama Administration's

(footnote omitted); *see also* CAROL GELDERMAN, *ALL THE PRESIDENTS' WORDS: THE BULLY PULPIT AND THE CREATION OF THE VIRTUAL PRESIDENCY* 9 (1997) ("Speeches are the core of the modern presidency."); MICHAEL WALDMAN, *MY FELLOW AMERICANS* xi (2003) ("[E]specially in the past century, Presidents have led with their words—using what Theodore Roosevelt called the 'bully pulpit' to inspire, rally, and unite the country.").

3. *E.g.*, Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 *HARV. L. REV.* 2118, 2125 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)). For a social science perspective that also investigates the role of rhetoric, *see* José D. Villalobos et al., *Politics or Policy? How Rhetoric Matters to Presidential Leadership of Congress*, 42 *PRESIDENTIAL STUD. Q.* 549, 550, 554–57 (2012). *See generally* Vasan Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 *WM. & MARY L. REV.* 1 (2002) (analyzing the State of the Union and Recommendation Clauses of Article II and arguing that they envision a significant role for the President within the legislative process).

4. *See* WILLIAM N. ESKRIDGE JR. ET AL., *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 851 (5th ed. 2014) (noting, in the case of presidential signing statements, but with logic that is not by its terms limited to that context, that "for the same reasons that interpreters are usually interested in the views of the congressional sponsors, they might be interested in the views of the President"); *see also* Christopher S. Yoo, *Presidential Signing Statements: A New Perspective*, 164 *U. PA. L. REV.* 1801, 1804 (2016) (proposing an "equal dignity principle" counseling "that both presidential and congressional legislative history be treated the same").

5. *See infra* notes 84–92 and accompanying text.

executive action on immigration, a Texas district court repeatedly invoked presidential statements when reaching the conclusion that the challenged program likely represented a substantive rule change for which notice-and-comment rulemaking had been required.⁶ Presidential statements played a similar role in a constitutional challenge to the military’s “Don’t Ask Don’t Tell” (DADT) policy;⁷ in that case, the district court relied on a single presidential speech as support for the conclusion that, contra the representations made by the Departments of Justice and Defense, DADT did not advance national security interests.⁸ A district court in a third example rebuffed a Guantanamo detainee’s attempts to rely on the contents of a presidential speech to establish changed conditions that rendered his continued detention unlawful.⁹ A fourth case rejected a constitutional challenge to a targeted killing, with the district court pointing to presidential speech as evidence of the continuing threat posed by the target of the strike.¹⁰ Finally, multiple decisions on President Trump’s “travel ban” executive orders have featured extensive reliance on presidential statements (as well as statements by candidate Trump and staffers and associates) as evidence that the orders were motivated by a discriminatory purpose.¹¹

Each of these examples is striking in the impact of presidential speech on a court’s analysis of the legal status of some government conduct. Together, these examples illustrate the range of uses to which presidential

6. *Texas v. United States*, 86 F. Supp. 3d 591, 668 (S.D. Tex. 2015), *aff’d*, 809 F.3d 134 (5th Cir. 2015), *aff’d*, 136 S. Ct. 2271 (2016). For example, the court stated:

What is perhaps most perplexing about the Defendants’ claim that DAPA is merely “guidance” is the President’s own labeling of the program. In formally announcing DAPA to the nation for the first time, President Obama stated, “I just took an action to change the law.” He then made a “deal” with potential candidates of DAPA: “if you have children who are American citizens . . . if you’ve taken responsibility, you’ve registered, undergone a background check, you’re paying taxes, you’ve been here for five years, you’ve got roots in the community—you’re not going to be deported. . . . If you meet the criteria, you can come out of the shadows”

Id.; see *infra* notes 172–77 and accompanying text.

7. 10 U.S.C. § 654, *repealed by* Don’t Ask Don’t Tell Repeal Act of 2010, § 2(f)(1)(A), 124 Stat. 3515.

8. *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 919 (C.D. Cal. 2010), *vacated as moot*, 658 F.3d 1162 (9th Cir. 2011); see *infra* notes 246–50 and accompanying text.

9. *Al Warafi v. Obama*, No. 09-2368 (RCL), 2015 WL 4600420, at *1 (D.D.C. July 30, 2015), *vacated as moot*, No. 15-5266 (D.C. Cir. Mar. 4, 2016).

10. *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 58–59 (D.D.C. 2014). At issue in the case were actually two strikes: the one that killed Al-Aulaqi and also resulted in the death of another American, Samir Khan; and a second strike, which killed Al-Aulaqi’s teenage son Abudlrahman. *Id.* Because the relevant executive branch statements focus on Anwar Al-Aulaqi, that is also my focus in the text. See *infra* notes 235–45 and accompanying text. See generally SCOTT SHANE, OBJECTIVE TROY: A TERRORIST, A PRESIDENT, AND THE RISE OF THE DRONE 299–300 (2015) (describing the lawsuit).

11. See *infra* notes 187–203 and accompanying text.

speech is put in the courts, as well as the magnitude of its potential impact. And in each case in which presidential statements are invoked, their treatment appears largely ad hoc, undertheorized, and badly in need of guiding principles. This Article aims to propose some such principles—both for courts presented with presidential speech, and for executive branch lawyers advising on the potential consequences of presidential statements.

Some presidential speech is legally operative, of course: the granting of a pardon, for example, or the issuance of a veto.¹² And much more is purely expressive.¹³ But there exists a vast expanse between those two poles, and what courts do with presidential utterances in that middle space can shed new light on the relationship between the President and administrative agencies, and on debates in administrative law, the separation of powers, and constitutional law more broadly.

As I argue in what follows, binding Presidents to their claims and representations has an undeniable appeal. But for the most part it is a category error for a court to give legal effect to presidential statements whose goals are political storytelling, civic interpretation, persuasion, and mobilization—not the articulation of considered legal positions. The general principle of non-reliance, however, should give way under several circumstances: first, where the President clearly manifests an intent to enter the legal arena; second, where presidential speech touches on matters of foreign affairs; and third, where presidential speech supplies relevant evidence of government purpose, *and* government purpose is a component of an established legal test.

This Article proceeds as follows. Part I provides background and context: It first walks through the most important work by social scientists—primarily political scientists and communications scholars—on what is known in those fields as “the rhetorical presidency.” It then provides an account, drawn from memoirs as well as scholarship, of the institutional context in which presidential speeches are crafted. Part I therefore remains tightly focused on the *speech* aspect of this project. Part II shifts the focus to the other side of the equation—the type of action on which presidential speech may be deemed to have some bearing. So it first addresses agency action, describing key administrative law debates regarding the relationship between the President and the administrative state. It then discusses direct

12. For discussions of the President’s pardon power, see William F. Duker, *The President’s Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475 (1977); Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802 (2015). Cf. generally J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975) (describing a category of speech which is not merely descriptive or communicative, but operative (i.e., “performative”).

13. See GEORGE C. EDWARDS III, THE PUBLIC PRESIDENCY: THE PURSUIT OF POPULAR SUPPORT 1 (1983) (“[T]he President is rarely in a position to command others to comply with his wishes. Instead, he must rely on persuasion.”).

presidential action in the form of executive orders and other similar tools. Finally, it considers the role of the President in the legislative process.

With the stage thus set, Part III identifies the forms of presidential speech that appear in judicial opinions, across a range of cases and subject matter areas. It also asks what light principles of deference and evidentiary principles can shed on judicial treatment of presidential speech. Part IV then examines the intersection of internal executive branch dynamics and judicial treatment of presidential speech. Finally, Part V turns more fully to the normative, offering a series of recommendations, sensitive to institutional dynamics, to guide judicial use of presidential speech in the courts. In brief, Part V argues that only presidential speech that manifests some intent to enter the legal arena should give rise to judicial reliance, and that under most circumstances, presidential statements should yield to other, more carefully considered and crafted executive branch statements where there is tension between the two. But those general principles are subject to exceptions: where presidential speech touches on matters of foreign affairs, or where government purpose is a component of a legal test and presidential statements may supply relevant evidence of that purpose.

Several caveats are in order before proceeding further. First, this Article does not directly weigh in on judicial treatment of modes of direct presidential action like executive orders, presidential memoranda, presidential proclamations, and the like. Though I do consider such sources both insofar as presidential speech might bear on judicial treatment of them, and to draw out their relationship to presidential speech as a distinct category, my primary interest is in statements that fall short of the degree of formality attached to those categories of statements; accordingly, I focus on speeches alone.¹⁴ One important unifying feature is the *spokenness* of such addresses (though all are subsequently recorded).¹⁵ Some political scientists demarcate

14. This means that my focus is not on Twitter, which as of late 2017 appears to be President Donald Trump's preferred mode of communication. The implications of the Twitter presidency are surely important to scholarship on the presidency, and much of this discussion is applicable to presidential statements made via Twitter. But Twitter is not my primary focus here.

15. Although executive orders and presidential proclamations appear by law in the Federal Register, 44 U.S.C. § 1505(a)(1) (2012), as a general matter presidential speeches do not. Rather, speeches of the President are collected in two places: first, the Daily Compilation of Presidential Documents (which in 2009 replaced the Weekly Compilation of Presidential Documents), a collection consisting of "presidential statements, messages, remarks, and other materials released by the White House Press Secretary," *U.S. Government Documents: The President of the United States*, PRINCETON U. LIBR., <https://libguides.princeton.edu/usgovdocs/president> [<https://perma.cc/7KDG-9PSE>]; see *Daily Compilation of Presidential Documents*, NAT'L ARCHIVES, <https://www.archives.gov/federal-register/publications/presidential-compilation.html> [<https://perma.cc/Y3DX-M2SX>]; and, second, the "Public Papers of the President," a twice-yearly publication dating back to 1957. *Public Papers of the President*, NAT'L ARCHIVES, <http://www.archives.gov/federal-register/publications/presidential-papers.html#about> [<https://perma.cc/L24L-RWHQ>]; see also Samuel McCormick & Mary Stuckey, *Presidential Disfluency*:

this category as spoken popular presidential communication (SPPC).¹⁶ Here, the fact that such rhetoric is spoken provides a way to distinguish it from other rhetorical content that emanates from the White House.¹⁷ The spokenness may also be independently relevant, since speaking often has an improvisational quality that renders it unique among types of presidential discourse.¹⁸

Second, courts often invoke speech not just by Presidents but also by other senior executive branch officials. Although this Article is primarily concerned with speech by the President, from time to time I also refer to statements by officials other than the President, particularly in the handful of Supreme Court cases I discuss.

Third, I do not consider presidential speech as it might bear on a President's personal liability—for example, in a pending case accusing then-candidate Trump of inciting violence at a campaign rally.¹⁹

Literacy, Legibility, and Vocal Political Aesthetics in the Rhetorical Presidency, 13 REV. COMM. 3, 19 n.19 (2013) (noting that speeches and “other kinds of public addresses” are available in the Weekly Compilation and the Public Papers). The Public Papers’ website suggests that the collection reflects remarks as delivered, and where discrepancies appear between written documents and recordings of remarks as delivered, the spoken word controls. *Public Papers of the President*, NAT’L ARCHIVES, <http://www.archives.gov/federal-register/publications/presidential-papers.html#about> [<https://perma.cc/L24L-RWHQ>]. In addition, the Presidency Project at the University of California, Santa Barbara, is in the process of making all presidential speeches free and available to the public. See AM. PRESIDENCY PROJECT, www.presidency.ucsb.edu/index.php [<https://perma.cc/2YBT-NES9>].

16. Anne C. Pluta, *Reassessing the Assumptions Behind the Evolution of Popular Presidential Communication*, 45 PRESIDENTIAL STUD. Q. 70, 70 (2015); cf. Kevin Coe & Rico Neumann, *The Major Addresses of Modern Presidents: Parameters of a Data Set*, 41 PRESIDENTIAL STUD. Q. 727, 728, 731 (2011) (critiquing underdeveloped inclusion criteria in much of the scholarship on presidential communication and offering “a detailed conception of major presidential addresses” as “a president’s spoken communication that is addressed to the American people, broadcast to the nation, and controlled by the president” (emphasis omitted)).

17. Such content includes tweets, blog posts, letters to congressional committees, etc.

18. Cf. Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig’s Theory of Translation*, 65 FORDHAM L. REV. 1435, 1442 (1997) (emphasizing the Constitution’s “writtenness”); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 773 (1988) (“[T]he written Constitution lies at the core of the American ‘civil religion.’” (quoting Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 234 (1980) (quoting Sanford Levinson, *The Constitution in American Civil Religion*, 1979 SUP. CT. REV. 123))).

19. *Nwanguma v. Trump*, No. 3:16-cv-247-DJH, 2017 WL 1234152 (W.D. Ky. Mar. 31, 2017). It does bear noting that in contrast to the explicit constitutional protection legislators enjoy for statements made in their official capacity as legislators, the Constitution confers no such privilege on Presidents. See U.S. CONST. art. I, § 6, cl. 1 (“[F]or any Speech or Debate in either House, they shall not be questioned in any other Place.”). For discussions of the legislative privilege, see generally JOSH CHAFETZ, *DEMOCRACY’S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* 87–110 (2007); Michael L. Shenkman, *Talking About Speech or Debate: Revisiting Legislative Immunity*, 32 YALE L. & POL’Y REV. 351, 352 (2014).

Finally, I have deliberately avoided limiting my consideration of presidential statements to speech that is expressly about law. Presidential speech, perhaps uniquely in our political landscape, can straddle the worlds of law, politics, and policy, and any attempt to limit this project to speech that makes expressly legal claims would both circumscribe the scope of the analysis and present hopeless problems of line drawing. At base, I hope this discussion—of speech that resists easy categorization as law or not-law, treated by courts in ways that are similarly impervious to easy or clear definition—contributes to the body of work on the complex relationship between the worlds of law and politics.²⁰

I. Background

Rhetoric is a central feature of the presidency.²¹ Many of the grants of authority (as well as duties) in Article II's spare provisions have explicitly rhetorical dimensions. The power to request the opinion in writing of any executive officer²² is fundamentally rhetorical in nature, as is the obligation to provide information to Congress, and to recommend to its consideration "such Measures as [the President] shall judge necessary and expedient."²³ The President, alone among constitutional actors, is constitutionally required to recite a *particular* oath before entering into the office;²⁴ by constitutional command, his own words call the office into being. And every presidency begins with an inaugural address. The first time Americans encounter their President *as* President is in the context of speechmaking.²⁵

20. See, e.g., Aziz Z. Huq, *Binding the Executive (By Law or By Politics)*, 79 U. CHI. L. REV. 777 (2012) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010)) (rejecting a sharp distinction between legal and political checks on the Executive); H. Jefferson Powell, *The Province and Duty of the Political Departments*, 65 U. CHI. L. REV. 365, 385 (1998) (reviewing DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801* (1997)) ("[P]olicy and principle, politics and law, are not rigid, mutually exclusive categories.").

21. Indeed, although he focused more on bargaining than direct popular appeals, political scientist Richard Neustadt famously identified rhetoric as a key source of presidential power. RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS 10-11* (1960) ("Presidential power is the power to persuade.").

22. U.S. CONST. art. II, § 2, cl. 1.

23. *Id.* art. II, § 3; cf. Vasan Kesavan & Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1, 17-22 (2002) (discussing a "publicity principle" in some of the provisions relating to the President).

24. U.S. CONST. art. II, § 1, cl. 8. The Constitution provides that other state and federal officials shall "be bound by Oath or Affirmation, to support this Constitution," but only the presidential oath is actually set forth in the Constitution. *Id.* art. VI, cl. 3. See generally Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299 (2016) (discussing the relationship between oaths and constitutional duty).

25. BRADLEY H. PATTERSON, *THE WHITE HOUSE STAFF: INSIDE THE WEST WING AND BEYOND* 162 (2000) ("Every presidency starts with a speech—the inaugural address . . ."); see also Arthur Schlesinger Jr., *Introduction* to *THE CHIEF EXECUTIVE: INAUGURAL ADDRESSES OF*

Although speechmaking has always been an important presidential exercise, both the form and substance of presidential speech have evolved considerably over time. This Part first surveys the key literature on what political scientists describe as the “rhetorical presidency.” It then turns to an institutionally grounded examination of the circumstances in which presidential speeches take shape.

A. *Presidential Speech: A Brief Historical Account*

Much of the literature on the rhetorical dimensions of the presidency begins from the influential account of political scientist Jeffrey Tulis. Tulis traces the emergence of what he terms “the rhetorical [P]residency” to the Administrations of Theodore Roosevelt and Woodrow Wilson,²⁶ both of whom played major roles in reshaping the institution from one that abjured the use of popular rhetoric to one in which popular or mass rhetoric was understood as a “principal tool of presidential governance.”²⁷ On Tulis’s telling, the transformation has been so complete that today it is “taken for granted that Presidents have a *duty* constantly to defend themselves publicly, to promote policy initiatives nationwide, and to inspire the population.”²⁸

According to Tulis, the founding-era vision of presidential rhetoric was characterized by four core themes: concerns about the dangers of demagoguery;²⁹ the founders’ considered choice to create a primarily representative, rather than direct, democracy;³⁰ the paramount importance of an independent Executive, whose authority derives directly from the Constitution;³¹ and a separation-of-powers vision in which the President’s role was both marked by “energy and ‘steady administration of law,’” and in which the need for compromise in light of the overlapping and conflicting authority of Congress and the President served as a disincentive to rhetorical appeals.³² These broad principles resulted in “[t]wo general prescriptions for

THE PRESIDENTS OF THE UNITED STATES iv (1965) (“[E]very President, as he takes the oath, has his opportunity to confide to his countrymen his philosophy of government, his conception of the Presidency, and his vision of the future.”).

26. JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 4 (1987); see also James W. Ceaser, Glen E. Thurow, Jeffrey Tulis & Joseph M. Bessette, *The Rise of the Rhetorical Presidency*, 11 *PRESIDENTIAL STUD. Q.* 158, 159 (1981) (arguing that “mass rhetoric,” once rarely employed by Presidents, has become a principal governing tool).

27. TULIS, *supra* note 26, at 4.

28. *Id.*

29. *Id.* at 27–33; see also Keith E. Whittington, *Bill Clinton Was No Andrew Johnson: Comparing Two Impeachments*, 2 *U. PA. J. CONST. L.* 422, 435 (2000) (“At the time of the founding, demagoguery was seen as a central threat to the stability of democratic regimes, and popular rhetoric was associated with the power to sway the masses behind a charismatic leader who would break the fetters of constitutional office.”).

30. TULIS, *supra* note 26, at 33–39.

31. *Id.* at 39–40.

32. *Id.* at 43.

presidential speech”:³³ first, that “policy rhetoric . . . would be *written*, and addressed principally to *Congress*”;³⁴ and second, that presidential speech that was directed to the people at large, like proclamations and inaugural addresses, would “emphasize[] popular instruction in constitutional principle and the articulation of the general tenor and direction of presidential policy, while tending to avoid discussion of the merits of particular policy proposals.”³⁵

Tulis argues that these general themes informed the rhetorical strategies of every nineteenth-century President but Andrew Johnson, who alone “did not adhere to the forms and doctrine of the nineteenth-century constitutional order.”³⁶ On Tulis’s account, the exception proves the rule, because Johnson was impeached based in part on the style and content of his speeches.³⁷

Although both Abraham Lincoln and Andrew Johnson used speechmaking to advocate policy positions more than their predecessors had, it was not until the presidencies of Theodore Roosevelt, William Howard Taft, and most significantly Woodrow Wilson that presidential speechmaking acquired its modern character. Beginning with Theodore Roosevelt, “twentieth century [P]residents have been increasingly willing to use their office to rally public support behind their policy positions,”³⁸ and Wilson essentially established the practice that has continued to this day.³⁹

Throughout his account, Tulis focuses on two distinct aspects of presidential speech: audience and content. In terms of audience, he traces the transition from Congress to the general public—courts as such do not enter the picture. In terms of content, he describes a shift from general articulations

33. *Id.* at 46.

34. *Id.*

35. *Id.* at 47.

36. *Id.* at 61. Tulis does acknowledge some informal, popular appeals by other nineteenth-century Presidents but finds them “dwarfed” in number and import by the activities of twentieth-century Presidents. *Id.* at 63. He also notes a significant increase in presidential speeches in the period following the Civil War but nonetheless finds the break represented by President Woodrow Wilson far more significant than the Civil War/Reconstruction break. *Id.* at 65.

37. The tenth article of impeachment against Johnson charged that he “did . . . make and deliver . . . certain intemperate, inflammatory, and scandalous harangues . . . [which] are peculiarly indecent and unbecoming in the Chief Magistrate of the United States . . .” *Id.* at 90–91; *see id.* at 61 (noting that Johnson was “formally and constitutionally challenged for his behavior on the stump”); *see also* Whittington, *supra* note 29, at 436–37 (describing Johnson’s “effort to go over the heads of the ‘people’s representatives’ by appeal directly to the people themselves,” which congressional Republicans viewed as “an invitation to anarchy and tyranny”). *See generally* TULIS, *supra* note 26, at 87–90 (describing Johnson’s rhetoric).

38. Keith E. Whittington, *The Rhetorical Presidency, Presidential Authority, and President Clinton*, 26 *PERSP. ON POL. SCI.* 199, 199 (1997).

39. TULIS, *supra* note 26, at 118; *see also* GELDERMAN, *supra* note 2, at 3 (“[O]nly after Woodrow Wilson took office in 1913 did the bully-pulpit presidency take hold.”).

of constitutional principles to persuasive exercises designed to articulate and defend particular policy proposals.⁴⁰

To be sure, others have both built on and challenged Tulis's theory. Samuel Kernell suggests that the change Tulis identifies is mostly traceable to developments in partisanship and the media environment,⁴¹ rather than a particular Wilsonian vision of the presidency that reshaped the office in its image. Doris Kearns Goodwin identifies Teddy Roosevelt, rather than Wilson, as primarily responsible for the transformation.⁴² Keith Whittington cautions that "[t]he rhetorical presidency offers one mechanism for characterizing presidential practice and the sources of presidential authority. . . . [It] is simply one approach to understanding how and why presidents conduct their office and how presidents relate to the larger constitutional structure."⁴³ And a recent literature suggests that increasing polarization has undermined the power of presidential rhetoric, so that Presidents today speak primarily to those whose support they already command.⁴⁴ Still, despite these critics, Tulis's continues to be the definitive

40. See also Vanessa B. Beasley, *The Rhetorical Presidency Meets the Unitary Executive: Implications for Presidential Rhetoric on Public Policy*, 13 RHETORIC & PUB. AFF. 7, 25 (2010) (discussing Tulis's account). There is, however, one subject-matter area in which his historical account does not strictly hold: in the context of war, direct popular appeals were common well before the completion of the transformation Tulis describes. See TULIS, *supra* note 26, at 6 (observing that prior to the twentieth century, "attempts to move the nation by moral suasion in the absence of war were almost unknown"); see also Oren Gross & Fionnuala Ni Aolain, *The Rhetoric of War: Words, Conflict, & Categorization Post-9/11*, 24 CORNELL J.L. & PUB. POL'Y 241, 246 (2014) ("[T]he old rhetorical model itself recognized an important exception to the general antipathy towards presidential public oratory. Even prior to the twentieth century, in matters pertaining to the conduct of war, Presidents have delivered popular speeches aimed directly at the general public.").

41. SAMUEL KERNELL, *GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP* 2, 11–12 (3d ed. 1997) (describing the "strategy whereby a president promotes himself and his policies in Washington by appealing to the American public for support" as traceable to a combination of "advances in transportation and communications" and rises in partisanship and divided government).

42. See DORIS KEARNS GOODWIN, *THE BULLY PULPIT* xi (2013) ("The essence of Roosevelt's leadership . . . lay in his enterprising use of the 'bully pulpit,' a phrase he himself coined to describe the national platform the presidency provides to shape public sentiment and mobilize action.").

43. Whittington, *supra* note 38, at 205. For a related discussion that slightly predates Tulis, see EDWARDS, *supra* note 13. And Tulis has had other detractors. Anne Pluta, for example, has recently cast doubt on some of the foundations of Tulis's empirical claims, particularly on the frequency of spoken speech. See Pluta, *supra* note 16, at 88 ("[T]here was a significant amount of nineteenth-century presidential rhetoric; there was a fundamental relationship between the President and the people from the inception of the institution; there is no significant increase in SPPC coinciding with Wilson's presidency; and no contemporary evidence exists of [a] constitutional norm against presidents addressing the public.").

44. GEORGE C. EDWARDS III, *ON DEAF EARS: THE LIMITS OF THE BULLY PULPIT* 213 (2003); FRANCES E. LEE, *BEYOND IDEOLOGY: POLITICS, PRINCIPLES, AND PARTISANSHIP IN THE U.S. SENATE* 164 (2009); Ezra Klein, *The Unpersuaded*, NEW YORKER (Mar. 9, 2012), <https://www.newyorker.com/magazine/2012/03/19/the-unpersuaded-2> [https://perma.cc/Z3TN-CS67].

political science account of the role of rhetoric in the relationship between the presidency and the public.

B. Presidential Speeches: An Institutional and Procedural Overview

The presidency is an inherently dynamic institution,⁴⁵ and the institutional context out of which presidential speeches emerge is no exception. But all Presidents have given speeches, and most Presidents have relied to some degree on the assistance of others in preparing those speeches.⁴⁶ And, since at least the Administration of FDR, the President has been just one player in a larger White House operation responsible for producing the President's words.⁴⁷

Existing memoirs about presidential speechwriting in the modern White House⁴⁸ make clear how time-pressed and chaotic the process of crafting presidential speeches can be. As Reagan speechwriter Peggy Noonan tells it, much of the time speeches were subject to a thorough process of circulation, input, and clearance, with major speeches “sent out to all of the pertinent federal agencies and all the important members of the White House staff and

45. STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE* 20 (1997) (“[T]he presidency is a governing institution inherently hostile to inherited governing arrangements.” (emphasis omitted)); *see also* STEPHEN HESS, *ORGANIZING THE PRESIDENCY* 3 (1976) (“A president decides . . . to give competing assignments and overlapping jurisdictions or to rely on aides with specific and tightly defined responsibilities. He selects between formal lines of command and informal arrangements. He chooses between the advice of specialists and generalists.”).

46. Alexander Hamilton, for example, famously drafted George Washington's farewell address. RON CHERNOW, *ALEXANDER HAMILTON* 505 (2004); *see also* TED SORENSEN, *COUNSELOR: A LIFE AT THE EDGE OF HISTORY* 130 (2008) (“JFK never pretended . . . that he had time to draft personally every word of every speech he was required to make . . .”); JAMES C. HUMES, *CONFESSIONS OF A WHITE HOUSE GHOSTWRITER* 5 (1997) (observing that presidential speechwriters date back to George Washington).

47. *See* Gelderman, *supra* note 2, at 9 (“Surrogate speechwriting came fully into its own under Franklin Roosevelt.”); *see also* KARLYN KOHRS CAMPBELL & KATHLEEN HALL JAMIESON, *PRESIDENTS CREATING THE PRESIDENCY: DEEDS DONE IN WORDS* 17 (2008) (recounting the speechwriting services of which Lincoln, FDR, Wilson, and JFK took advantage); Kurt Ritter & Martin J. Medhurst, *Introduction* to *PRESIDENTIAL SPEECHWRITING: FROM THE NEW DEAL TO THE REAGAN REVOLUTION AND BEYOND* 5 (2003) (rejecting the “myth” that FDR was the first President to regularly use speechwriters; “Insofar as we know, the first president to hire a full-time speechwriter in the White House was Warren G. Harding.”).

48. The “modern White House” is probably most traceable to the reforms implemented in the wake of the “Brownlow Report.” *See* PRESIDENT'S COMM. ON ADMIN. MGMT., *REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT* iii–iv (1937) (proposing expansion in the size, responsibilities, and authority of the White House staff in response to “the growth of the work of the Government matching the growth of the Nation over more than a generation”); *see also* Matthew J. Dickinson, *The Executive Office of the President: The Paradox of Politicization*, in *THE EXECUTIVE BRANCH* 135, 139–142 (Joel D. Aberbach & Mark A. Peterson eds., 2005) (acknowledging that, despite its later deviation from Roosevelt's apolitical vision of career civil servants, the Executive Office of the President created in response to the Brownlow Report “is justly celebrated as a landmark in the evolution of the modern presidency”).

the pertinent White House offices.”⁴⁹ But even with such processes in place, “the final battle would be fought on the plane, in the limousine, on the couch in the Oval Office. The speech was never really frozen until the President had said it”⁵⁰ And Michael Waldman, former head speechwriter for President Clinton, tells a number of stories of last-minute changes,⁵¹ discarded drafts mistakenly delivered as final speeches,⁵² and a significant improvisational component to presidential speechmaking, at least as practiced by President Bill Clinton.⁵³ Clinton speechwriter David Kesnet echoes this, suggesting that something like 25% of President Clinton’s delivery was extemporaneous.⁵⁴

Notwithstanding the frequent informality and time pressures that attend their crafting, presidential speeches can be an important site of policy development. As one unidentified former White House Chief of Staff explained:

I used to think before I went to the White House, . . . that you made policy decisions and then you wrote a speech to describe the policy. . . . Oftentimes it doesn’t work that way. Oftentimes, the fact of scheduling the speech drives policy It’s the fact of having scheduled a time, a locale where he’s going to talk about a certain issue that forces the policymakers in the [A]dministration, including the President himself, to make decisions.⁵⁵

These drivers and constraints mean that policy announcements can be made, perhaps even inadvertently, in insufficiently considered or cleared speeches.⁵⁶ In addition, time pressure and relatively fluid processes mean that sophisticated bureaucratic players may use presidential speeches to bypass

49. NOONAN, *supra* note 1, at 75; *see also* MATT LATIMER, SPEECHLESS: TALES OF A WHITE HOUSE SURVIVOR 182 (2009) (describing the process of “sen[ding speeches] out for comment throughout the White House staffing system”).

50. NOONAN, *supra* note 1, at 78.

51. *See, e.g.*, MICHAEL WALDMAN, POTUS SPEAKS 139 (2000) (describing changes made to President Clinton’s 1996 nomination acceptance speech while in the presidential motorcade en route to the convention center).

52. *Id.* at 60–62.

53. *Id.* at 44 (describing President Clinton’s improvisation of significant portions of the 1993 State of the Union Address); *see also id.* at 94 (same for the 1995 State of the Union Address); GEORGE STEPHANOPOULOS, ALL TOO HUMAN: A POLITICAL EDUCATION 201–03 (1999) (describing a teleprompter error that left the President improvising the first seven minutes of his 1994 State of the Union address).

54. Patterson, *supra* note 25, at 167.

55. WHITE HOUSE TRANSITION PROJECT, WHITE HOUSE OFFICE OF COMMUNICATIONS 30 (2008) (quoting a background interview), <http://whitehousetransitionproject.org/wp-content/uploads/2016/03/WHTP-2009-33-Communications.pdf> [<https://perma.cc/THH9-MJHP>].

56. *See* LATIMER, *supra* note 49, at 185 (describing once having “created a presidential policy” by proposing an international day of prayer in the President’s National Day of Prayer remarks).

complex policy-development processes and lay down policy markers that the rest of the executive branch is then largely bound to implement.⁵⁷

Internal White House dynamics can have a significant impact on the final output of the speechwriting process. Some social scientists have attempted to measure the impact of such dynamics. A recent contribution uses archival materials to chart the evolution of a 1992 speech by President George H.W. Bush announcing an intent to veto a tax bill.⁵⁸ Reviewing various iterations of the speech and staff memos, the authors conclude that the documents reveal that “two key sources of power within the White House—speechwriters and policy advisors—vie for control over the words of the President.”⁵⁹ Reviewing drafts of both the formal “Statement of Administration Policy” or SAP (about which more below) and President Bush’s speech announcing his intent to veto the bill, the authors tally advisor inputs both qualitatively and quantitatively, ultimately concluding that presidential speechwriters have a significant edge over policy advisors on the final product.⁶⁰

This particular 1992 speech may have involved more rigor and formality than many presidential speeches. That is because where a presidential speech involves pending legislation and will simultaneously serve as a SAP, a formal review process conducted by the Office of Management and Budget (OMB) precedes finalization of the message.⁶¹ This clearance process involves coordination within OMB, as well as “the agency or agencies principally concerned, and other [Executive Office of the President (EOP)] units.”⁶²

57. Noonan tells a story of a Nixon speechwriter who “wrote a speech for Nixon that acknowledged for the first time that the United States would indeed be pulling out of Vietnam eventually.” The speechwriter “managed to keep a copy of the script away from Henry Kissinger. When Kissinger finally saw it he yelled to [the speechwriter], ‘how dare you end a war without staffing it out!’” (i.e., circulating for comments and feedback). NOONAN, *supra* note 1, at 92; *see also* SORENSEN, *supra* note 46, at 133 (describing a dynamic—though not applicable in the Kennedy White House, in Sorensen’s telling—of “fierce turf battles in the White House over phrases intended to commit the president to one or another side of an internal ideological struggle”).

58. Justin S. Vaughn & José D. Villalobos, *Conceptualizing and Measuring White House Staff Influence on Presidential Rhetoric*, 36 PRESIDENTIAL STUD. Q. 681, 682 (2006).

59. *Id.* at 682.

60. *Id.* at 686. Peggy Noonan makes virtually the same point when she tells this story: “[A State Department official] used to come into speechwriting and refer to himself and his colleagues as ‘we substantive types’ and to the speechwriters as ‘you wordsmiths.’ He was saying, We do policy and you dance around with the words. We would smile back. Our smiles said, ‘The dancer is the dance.’” NOONAN, *supra* note 1, at 72.

61. *See, e.g.*, Vaughn & Villalobos, *supra* note 58, at 683 (“The [E]xecutive [B]ranch formally processes veto threats through the Office of Management and Budget (OMB) in the form of Statements of Administration Policy (SAP), which serve as formal notice to appropriate committee and subcommittee chairs that the president intends to veto particular pieces of legislation if Congress passes them.”).

62. According to the description in the OMB archives, “OMB prepares SAPs for major bills scheduled for House or Senate floor action SAPs are prepared in coordination with other parts of OMB, the agency or agencies principally concerned, and other EOP units. Following its

Ordinary speeches may be subject to an analogous process run by the White House Staff Secretary or the speechwriting office, but White House practice on this has varied.⁶³

In addition, State of the Union addresses, which are both constitutionally grounded⁶⁴ and serve as major political events,⁶⁵ often involve more rigorous processes than ordinary presidential speeches.⁶⁶ But even the contents of State of the Union addresses may not always be carefully developed,⁶⁷ or may be subject to last-minute changes, extemporaneous additions or changes, or both.⁶⁸

As a general matter, then—with the potential exception of SAPs and perhaps State of the Union addresses—presidential speechwriting is characterized by a degree of fluidity and informality.

This actually stands in contrast to other White House processes. Although not subject to process requirements comparable to actual

clearance, a SAP is sent to Congress by OMB's Legislative Affairs Office." *The Mission and Structure of the Office of Management and Budget*, OBAMA WHITE HOUSE, https://obamawhitehouse.archives.gov/omb/organization_mission [<https://perma.cc/378K-XBKA>]; see also Bernard H. Martin, *Office of Management and Budget*, in GETTING IT DONE: A GUIDE FOR GOVERNMENT EXECUTIVES 69, 70 (Mark A. Abramson et al. eds., 2013) (referring to OMB as "a central clearance mechanism" within the EOP); SAMUEL KERNELL, PRESIDENTIAL VETO THREATS IN STATEMENTS OF ADMINISTRATION POLICY: 1985–2004, INTRODUCTION 1–2 (CQ Press CD-ROM, rel. Mar. 31, 2005) (explaining that while "Presidents have long communicated their preferences on pending legislation to Congress," the formal SAP sent out by OMB dates to the mid-1970s and also noting that most SAPs actually originate in an agency, rather than the White House, "which explains why a first person statement from the president rarely appears in these memos").

63. Compare BRADLEY H. PATTERSON, TO SERVE THE PRESIDENT: CONTINUITY AND INNOVATION IN THE WHITE HOUSE STAFF 221 (2008) ("All of President Bush's speeches . . . go through the same centralized drafting, staff scrutiny, and editing process as the State of the Union . . ."), with KATHRYN DUNN TENPAS & KAREN HULT, WHITE HOUSE TRANSITION PROJECT, THE OFFICE OF THE STAFF SECRETARY 13 (2017), <http://www.whitehousetransitionproject.org/wp-content/uploads/2016/03/WHTP2017-23-Staff-Secretary.pdf> [<https://perma.cc/MZA4-FGKD>] ("During the Obama [A]dministration, the Office of the Staff Secretary had less contact with speechwriting and did not conduct a . . . clearance process.").

64. U.S. CONST. art. II, § 3 ("He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient . . ."). The in-person delivery, however, is not a constitutional imperative; Presidents Washington and Adams gave their addresses in person, but beginning with Thomas Jefferson, every President until Woodrow Wilson simply delivered the State of the Union in writing. GELDERMAN, *supra* note 2, at 6–8; WALDMAN, *supra* note 51, at 93.

65. WALDMAN, *supra* note 51, at 93 ("Watching [the State of the Union speech] is one of the few remaining civic rituals in America . . ."); see also Keith E. Whittington, *The State of the Union Is a Presidential Pep Rally*, 28 YALE L. & POL'Y REV. INTER ALIA 37, 38 (2010) (discussing the "mass audience and high salience of the event").

66. WALDMAN, *supra* note 51, at 95 (describing a pre-State of the Union meeting with the full Cabinet as "a bit of a ritual").

67. *Id.*

68. *Id.* at 44, 94.

rulemaking,⁶⁹ a degree of rigor attends many White House policy development processes. As discussed, OMB coordinates a clearance process for SAPs; both OMB and its component, the Office of Information and Regulatory Affairs (OIRA), coordinate on other processes as well, including circulating congressional testimony for interagency and White House review.⁷⁰ And an especially regimented system of policy development and approval occurs in the foreign policy and national security spheres, where a statutory scheme set forth in the 1947 National Security Act,⁷¹ together with a number of related presidential directives,⁷² prescribe a high degree of formality and rigor.⁷³ This means that speechwriting on national security and foreign policy topics looks quite different from the picture sketched above.

By presidential directive, the National Security Council (NSC) is the “principal means for coordinating executive departments and agencies in the development and implementation of national security policy.”⁷⁴ The NSC’s decision-making process typically proceeds through three levels.⁷⁵ The first, a staff-level process known as an Inter-Agency Policy Committee or IPC,⁷⁶

69. See Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (2012); Edward Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 100–01 (2003).

70. Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1846–47 (2013).

71. 50 U.S.C. § 401 (2012).

72. Presidential Policy Directive-1, Memorandum from the President on the Organization of the National Security Council System (Feb. 13, 2009) [hereinafter Presidential Policy Directive-1], <https://fas.org/irp/offdocs/ppd/ppd-1.pdf> [<https://perma.cc/C3Z5-H86J>]; National Security Presidential Directive-1, Memorandum from the President on the Organization of the National Security Council System (Feb. 13, 2001), <https://fas.org/irp/offdocs/nspd/nspd-1.pdf> [<https://perma.cc/7M35-HGR4>].

73. Sandra L. Hodgkinson, *Executive Power in a War Without End: Goldsmith, the Erosion of Executive Authority on Detention, and the End of the War on Terror*, 45 CASE W. RES. J. INT’L L. 65, 71–72 (2012) (“The National Security Act was originally designed to improve coordination among the various military services and the other arms of national security, such as the intelligence community, and continues to perform this function today, although it has broadened its scope to a relatively wide array of subjects.”).

74. Presidential Policy Directive-1, *supra* note 72, at 2. Note, though, that there are in some ways two distinct NSCs—the NSC set forth in the National Security Act and further organized in related presidential directives, and the “modern NSC” system, in which “the [P]resident’s own appointed NSC staff—led by the special assistant to the [P]resident for national security affairs”—manages the policy process. See AMY B. ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC* 56 (1999).

75. Hodgkinson, *supra* note 73, at 72. For a thorough overview of the NSC policy-development process, see ALAN G. WHITTAKER ET AL., *THE NATIONAL SECURITY POLICY PROCESS: THE NATIONAL SECURITY COUNCIL AND INTERAGENCY SYSTEM* (2011), <http://issat.dcaf.ch/download/17619/205945/icaf-nsc-policy-process-report-08-2011.pdf> [<https://perma.cc/294B-ATPG>]. The NSC, which was divided into a National Security Staff and Homeland Security Council at the time of this report, is again a single entity. Exec. Order No. 13,657, 79 Fed. Reg. 8823 (Feb. 14, 2014).

76. See Presidential Policy Directive-1, *supra* note 72, at 4–5 (IPCs “shall be the main day-to-day fora for interagency coordination of national security policy”).

is designed to “serve up key issues for resolution or approval at the second level.”⁷⁷ That second level is the “Deputies Committee,” composed of deputy-level officials (Deputy Secretaries, the Deputy Attorney General, etc.).⁷⁸ The third level is the “Principals Committee,” composed of Cabinet or Cabinet-level officials designated by presidential directive.⁷⁹ The Principals Committee works “to ensure that, as much as possible, policy decisions brought to the President reflect a consensus within the departments and agencies.”⁸⁰ Finally, issues are brought to the President for final decision.⁸¹ This means that policy development on national security issues is typically subject to extended, serious, and careful consideration. National security and foreign policy speechmaking is very much a part of this process, so that “[w]hen the President makes foreign policy statements, meets with visiting heads of state, travels abroad, or holds press conferences dealing with national security his words usually have been carefully crafted and are the result of lengthy and detailed deliberations within the [A]dministration.”⁸² All of this means there may be reason to treat speeches that emerge from this process differently from other speeches.⁸³

The discussion here suggests that there may be good reason for caution about excessive reliance on presidential speech—with a slightly different set of standards, for the institutional reasons detailed above, for speech in the national security and foreign affairs context.

77. Hodgkinson, *supra* note 73, at 72.

78. Presidential Policy Directive-1, *supra* note 72, at 3–4.

79. *Id.* at 2–3.

80. WHITTAKER ET AL., *supra* note 75, at 31.

81. Samuel J. Rascoff, *Presidential Intelligence*, 129 HARV. L. REV. 633, 671 (2016). Some scholars have described this final stage of review as something of a rubber stamp, “legitimizing decisions that were debated and decided elsewhere.” ZEGART, *supra* note 74, at 76. A full discussion of the power dynamics of the NSC is far beyond the scope of this discussion, but wherever the true power resides, there is no question that the process is ordinarily a rigorous one.

82. WHITTAKER ET AL., *supra* note 75, at 6.

83. PATTERSON, *supra* note 25, at 164–65 (describing foreign affairs speeches as following a separate path from domestic policy speeches, and attributing the following observation to a Clinton White House staffer: “You say a blooper in a domestic speech . . . and your ratings sink five points, or the stock market goes down fifty. You say a blooper in a foreign affairs speech and you could start a war!”). But even in the more regimented national security sphere, it is possible, as Rebecca Ingber has argued, that speechmaking “can be employed strategically by officials within the government seeking to shape the decisionmaking process.” Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 YALE J. INT’L LAW 359, 397–98 (2013). Note, however, that Ingber’s focus is on speechmaking by officials other than the President. See also Heather A. Larsen-Price, *The Right Tool for the Job: The Canalization of Presidential Policy Attention by Policy Instrument*, 40 POL’Y STUD. J. 147, 153 (2012) (portraying “presidential messages” as the tool for shaping policy in which “presidents have the greatest policy area flexibility”).

II. Presidential Administration, Direct Presidential Action, and Presidential Speech in the Legislative Process

The preceding Part focused on one piece of this puzzle—presidential speeches themselves. But just as important is the *type of action* being tested—that is, the underlying conduct or directive at issue, and on which presidential speech may have some bearing. Accordingly, this Part first sketches the figure of the President in administrative law, focusing on some of the key inflection points in debates about the relationship between the President and the administrative state, and the intersection between those debates and judicial treatment of presidential speech. It next describes the primary modes of direct presidential action, also with an eye toward the role of presidential speech. Finally, it looks to the role of presidential speech in the legislative process.

A. *The President in Administrative Law*

One of the contexts in which presidential speech may be invoked is in the course of judicial review of some agency action.⁸⁴ It is, therefore, impossible to assess judicial treatment of presidential speech without engaging with several aspects of the relationship between the President and the administrative state. More specifically, the question of what effect courts should give presidential speech intersects with two distinct (though related) debates about the President in administrative law: first, the degree to which the President possesses directive authority vis-à-vis administrative agencies; and second, whether and how presidential involvement in agency decision-making should impact judicial deference to agency decisions, and relatedly, whether presidential interpretations are themselves entitled to any sort of deference.

The President, of course, is the head of the executive branch within which administrative agencies sit. But beyond that, the proper relationship between the President and those agencies—in particular, whether the President may *direct* those agencies in the exercise of their delegated authority, either some or all of the time—has long divided scholars. Peter Strauss succinctly describes two key camps in the title of his piece “*Overseer or ‘the Decider’?*”⁸⁵ In brief, partisans of the position that the President is a

84. Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 219 (1993) (arguing that the literature on presidential control has not been sufficiently attentive to “different types of agency decisionmaking” and proposing as a “rough cut” the categories of “adjudication, selection of regulatory strategies, value selection, and statutory interpretation”).

85. Peter L. Strauss, *Overseer or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 696–97 (2007); see also Robert V. Percival, *Who’s in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2487–88 (2011) (describing the debate).

“decider” contend that when a statute delegates authority to an agency official, the President generally retains directive authority—that is, “the power to act directly under the statute or to bind the discretion of lower level officials”⁸⁶—either presumptively or as a categorical matter.⁸⁷ Then-Professor Elena Kagan’s influential *Presidential Administration*, which both identified and celebrated a shift toward presidential control and ownership of regulatory output, is perhaps most closely associated with this view.⁸⁸ (As I will return to later, one important additional aspect of her narrative is presidential appropriation of the output of regulatory processes.⁸⁹) Subscribers to the “overseer” view argue that, absent statutory authority to the contrary, when Congress makes a delegation to an agency official, that delegated authority resides with the agency official alone.⁹⁰ According to these critics, Presidents may attempt to utilize other tools to impact agency output, but may not direct any particular course of action outright.

As a matter of practice, the line between the two may not always be clear, since, as Professor Strauss explains, “[t]he difference between

86. Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006).

87. Here, the strength of this position varies, and even among adherents there are disagreements regarding whether this is the case as a matter of constitutional imperative or simply developed norms and the reality of contemporary governance. Important pieces include Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251 (2001) (arguing, “based in part . . . on policy considerations,” in favor of unitary presidential control in areas delegated by statute to administrative agencies); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2–3 (1994) (rejecting arguments from history in favor of the President’s power to directly control all aspects of the executive branch, but sketching a “plausible structural argument on behalf of the hierarchical conception of the unitary executive” in light of “changed circumstances since the eighteenth century”); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 549–50 (1994) (arguing that the text and history of the Constitution independently establish the President’s role as “a chief administrator constitutionally empowered to administer *all* federal laws”).

88. Kagan, *supra* note 87, at 2320 (arguing that “most statutes granting discretion to [the Executive Branch]—but not independent—agency officials should be read as leaving ultimate decisionmaking authority in the hands of the President”).

89. *See infra* notes 290–94 and accompanying text.

90. *See* Stack, *supra* note 86, at 267 (arguing that a statute “should be read to include the President as an implied recipient of authority” only when that statute “grants power to the President in name”); Strauss, *supra* note 85, at 704–05 (“[M]y own conclusion is that in ordinary administrative law contexts, where Congress has assigned a function to a named agency subject to its oversight and the discipline of judicial review, the President’s role—like that of the Congress and the courts—is that of overseer and not decider.”); *see also* EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957*, at 80–81 (4th ed. 1957) (positing that if the President enjoys unitary control over administrative agencies, Congress cannot “leave anything to the specially trained judgment of a subordinate executive official with any assurance that his discretion would not be perverted to political ends”). For rejections of the idea that a unitary Executive can solve the democratic-legitimacy problems posed by the rise of the administrative state, *see* Cynthia R. Farina, *The “Chief Executive” and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179, 185 (1997); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987–89 (1997).

oversight and decision can be subtle, particularly when the important transactions occur behind closed doors and among political compatriots who value loyalty and understand that the President who selected them is their democratically chosen leader.”⁹¹ But, he continues, “there is a difference between ordinary respect and political deference, on the one hand, and law-compelled obedience, on the other.”⁹²

This debate leads naturally to the second, which involves the impact of presidential involvement on judicial scrutiny of agency action. Kagan’s *Presidential Administration* argues that although “courts . . . have ignored the President’s role in administrative action in defining the scope of the *Chevron* doctrine,”⁹³ in fact “*Chevron*’s primary rationale suggests [an] approach . . . which would link deference in some way to presidential involvement.”⁹⁴ In other words, presidential involvement, under *Chevron* as properly understood, should heighten the degree of deference courts grant to agencies. The piece makes a similar argument with respect to “hard look” review, suggesting that courts should “relax the rigors of hard look review when demonstrable evidence shows that the President has taken an active role in, and by so doing has accepted responsibility for, the administrative decision in question.”⁹⁵

A number of recent pieces grapple with the related issue of how political considerations—not synonymous with, though related to, presidential involvement—should impact judicial review of administrative action.

91. Strauss, *supra* note 85, at 704; see also Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics?*, 12 U. PA. J. CONST. L. 637, 645 (2010) (“[A]ny theoretical difference between influence and control, or between oversight and decision, will not be observed in practice.”).

92. Strauss, *supra* note 85, at 704. A recent piece by Kathryn Watts both continues charting the trajectory identified in Kagan’s *Presidential Administration* and focuses closely on the mechanisms by which outright direction or softer types of influence may be brought to bear. Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 700–04 (2016). And some social science literature examines the connection between presidential speech and administrative activity in particular subject matter areas. See, e.g., Matthew Eshbaugh-Soha, *The Impact of Presidential Speech on the Bureaucracy*, 89 SOC. SCI. Q. 116, 127–28 (2008) (tracing linkage between presidential speeches and criminal complaints brought by DOJ’s Civil Rights Division, and concluding that during the 1958–2002 period, positive “rhetorical attention paid to civil rights policy,” as evidenced by frequency of invocation during presidential speeches, “increased the number of yearly criminal civil rights cases filed in U.S. District Court”); Andrew B. Whitford & Jeff Yates, *Policy Signals and Executive Governance: Presidential Rhetoric in the War on Drugs*, 65 J. POL. 995, 996 (2003) (finding that presidential rhetoric can alter the manner in and extent to which U.S. Attorneys implement drug policy).

93. Kagan, *supra* note 87, at 2375.

94. *Id.* at 2376. But see Peter M. Shane, *Chevron Deference, the Rule of Law, and Presidential Influence in the Administrative State*, 83 FORDHAM L. REV. 679, 701 (2014) (arguing that presidential involvement should not entitle agency interpretations to additional *Chevron* deference, with the possible exception of situations in which the President serves a constitutionally grounded coordinating function).

95. *Id.* at 2380.

Kathryn Watts has offered a proposal under which “what count as ‘valid’ reasons under arbitrary and capricious review” would include under some circumstances “political influences from the President, other executive officials, and members of Congress, so long as the political influences are openly and transparently disclosed.”⁹⁶ A number of scholars have endorsed this or related proposals,⁹⁷ though others have sounded a cautionary note about this “political turn” in administrative law scholarship.⁹⁸

Now for deference to the President himself. Although presidential statements can come in a variety of forms, Peter Strauss argues that, with respect to statutory interpretation, presidential interpretations are *not* entitled to *Chevron* deference, with rare exceptions, because the President is not an agency with the authority to interpret a statute.⁹⁹ Cass Sunstein has suggested that perhaps “the President himself is entitled to deference in his interpretations of law, even if he has not followed formal procedures,”¹⁰⁰ if he is acting pursuant to a delegation. And Kevin Stack argues that “the President’s constructions of delegated authority should be eligible for *Chevron* deference, but only when they follow from statutes that expressly grant power to the President,”¹⁰¹ and perhaps subject to a requirement of reason-giving.¹⁰²

Taken together, these debates may well have implications for presidential speech. That is, if the President is properly understood to be empowered, either as a matter of constitutional imperative or prevailing

96. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 8 (2009). Watts argues that such a move would bring arbitrary and capricious review “into harmony with other major doctrines, such as *Chevron* deference, which seem to embrace the newer political control model.” *Id.* at 13 (footnote omitted).

97. *E.g.*, Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1130 (2010) (proposing a statutory requirement that significant rules “include at least a summary of the substance of executive supervision”).

98. Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1880 (2012) (arguing that there are “real dangers” associated with “a move toward more politicized reason giving”); *see also* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462–63 (2003) (critiquing administrative law scholars’ concern with political accountability considerations).

99. Strauss, *supra* note 85, at 755 (critiquing the position that the President’s views, “as [those of the agency], are entitled to *Chevron* deference”). Here Strauss appears mostly interested in the President’s views as expressed in signing statements and similarly formal declarations—though presumably the concerns would be heightened in the context of potential deference to more informal presidential expressions.

100. Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580, 2603–04 (2006) (“If Congress delegates authority to the President, then Congress presumably also entitles him to construe ambiguities as he sees fit, subject to the general requirement of reasonableness.”).

101. Stack, *supra* note 86, at 267.

102. Kevin M. Stack, *The Constitutional Foundations of Cheney*, 116 YALE L.J. 952, 959, 1013–20 (2007).

norms and practices, to direct agency action—and if the theoretical foundations of *Chevron* actually counsel in favor of deeper deference to agencies when the President is involved in agency decision making—it might seem to follow that presidential interpretations or views themselves would be *a fortiori* entitled to a degree of solicitude, even if not formal deference. On the other hand, if the President lacks the power to direct agency action, presidential remarks that bear on agency action would seem largely irrelevant, or at least lacking in any formal legal effect. And even *if* the President is understood as possessing directive authority, there is an argument that the President should be required to impose his interpretations on agency actors via internal executive branch channels, rather than by announcing his views separately in the hopes that courts will give them legal effect. As the Parts that follow show, presidential speechmaking can clash with agency representations and even actions, as well as representations made by DOJ in litigation, and nothing in the literature provides clear guidance as to how courts should resolve such disagreements when they arise.

B. Direct Presidential Action

Modern Presidents also exercise a degree of power largely independent of the apparatus of the administrative state, and direct presidential action both bears some resemblance to, and also may intersect with, presidential speech. Direct presidential action can take a number of forms: executive orders and presidential memoranda,¹⁰³ proclamations,¹⁰⁴ and executive agreements,¹⁰⁵ to list a few. Although “[t]he U.S. Constitution does not explicitly recognize any of these policy vehicles,”¹⁰⁶ they are now well-established tools within the President’s arsenal. My interest in this category of action is twofold. First, a clear sense of the nature and scope of direct presidential action is necessary before we can assess the implications of any use of presidential speech in evaluating such action. But I am also interested in what these modes of presidential action have in common with presidential speech—since much of the time they take effect through documents that are communicative or expressive, but with more clearly established (though not uncontroversial) legal effect.

103. KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 4–5 (2001).

104. HAROLD C. RELYEA, CONG. RESEARCH SERV., PRESIDENTIAL DIRECTIVES: BACKGROUND AND OVERVIEW 14 (2008), <http://fas.org/sgp/crs/misc/98-611.pdf> [<https://perma.cc/6BJY-F33U>].

105. Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1575 (2007).

106. WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 7 (2003).

The scope of the category of direct presidential action is subject to some debate. In his volume *Power Without Persuasion*, William Howell defines “direct presidential actions” as “the wide array of public policies that Presidents set without Congress.”¹⁰⁷ Although he focuses the bulk of his analysis on executive orders, his definition is quite expansive, including non-public or classified documents like national security directives.¹⁰⁸ Howell argues that over the past half-century, “the trajectory of unilateral policy making has noticeably increased. While it was relatively rare, and for the most part inconsequential, during the eighteenth and nineteenth centuries, unilateral policy making has become an integral feature of the modern Presidency.”¹⁰⁹ The Office of Legal Counsel has advised that executive orders and presidential directives have the same legal effect, and that, in general, there is “no basis for drawing a distinction as to the legal effectiveness of a presidential action based on the form or caption of the written document through which that action is conveyed.”¹¹⁰

Of the existing modes of presidential action, the literature is most developed when it comes to executive orders. Though jurisdictional obstacles often preclude judicial review of executive orders,¹¹¹ and presidential orders are not subject to APA review, some challenges to executive orders do proceed to adjudication. Where they do, existing analyses find that courts are for the most part quite deferential to the Executive. Howell’s analysis of the fate of executive orders in court finds that “[f]ully 83% of the time, the courts affirmed the President’s executive order,”¹¹² and that “[o]nly when Congress explicitly forbids the President from taking certain actions, and public

107. *Id.* at xiv.

108. *Id.* (including within the category directives “that are filed away as confidential”); *see also id.* at 17–18 (discussing national security directives, most of which are classified).

109. *Id.* at 179. For similar observations of the rise of direct presidential actions, see PHILLIP COOPER, *BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION* (2002); Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 34 (2002); Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 550 (2005).

110. Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order, 24 Op. O.L.C. 29, 29 (2000); *see also* VIVIAN S. CHU & TODD GARVEY, CONG. RESEARCH SERV., RS20846, EXECUTIVE ORDERS: ISSUANCE, MODIFICATION, AND REVOCATION 2 (2014) (referring to any distinction between “executive orders, presidential memoranda, and proclamations” as “more a matter of form than of substance”); Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 155 (1999) (“Historically, presidents have had virtually a free hand in deciding what form their orders will take, what the content will be, and how (if at all) they will be entered into the public record.”).

111. *See* Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1841 n.281 (2015) (referring to challenging executive orders in court as “notoriously difficult”); Erica Newland, Note, *Executive Orders in Court*, 124 YALE L.J. 2026, 2098–99 (2015) (summarizing the justiciability difficulties in challenging executive orders).

112. HOWELL, *supra* note 106, at 154.

attention is high, will judges overturn the Chief Executive.”¹¹³ A recent note updates that figure through 2013, finding that of a database of 152 Supreme Court and D.C. Circuit cases involving challenges to executive orders, the federal government prevailed over 70% of the time; when the case featured a “foreign relations component,” the figure rose to over 90%.¹¹⁴

Presidential action can also occur across a range of subject matters, with sometimes significant impact. Executive orders have created the Executive Office of the President,¹¹⁵ desegregated the armed forces,¹¹⁶ attempted to seize private steel mills,¹¹⁷ and authorized broad intelligence collection,¹¹⁸ to name just a few consequential examples.

In addition to their range and generally successful track record in court, presidential orders can have an important communicative or expressive dimension. A recent example comes from the passage of the 2010 Affordable Care Act. After nearly a year of negotiations over the bill, the final obstacle to passage appeared to be concerns raised by a number of House members opposed to abortion—including some Democrats—about the prospect of federal funds being used for abortion services.¹¹⁹ The impasse was eventually broken when President Obama agreed to issue an executive order that reaffirmed the substance of the Hyde Amendment,¹²⁰ which since 1976 has prohibited the use of federal funds for abortion,¹²¹ and directed the Department of Health and Human Services (HHS) to set up a mechanism to ensure compliance with the statutory prohibition. The executive order is widely credited with having removed the final obstacle to passage of the bill,¹²² and it was arguably its expressive content—announcing governmental opposition to federal funding of abortions—rather than its formal legal effect that was ultimately responsible. Another example from the Obama Administration is a 2010 Presidential Memorandum on hospital visitation.

113. *Id.* at 179.

114. Newland, *supra* note 111, at 2091 fig.9, 2094.

115. Exec. Order No. 8,248, 4 Fed. Reg. 3857, 3864–65 (Sept. 8, 1939); MAYER, *supra* note 103, at 5.

116. Exec. Order No. 9,981, 13 Fed. Reg. 4311, 4313 (July 26, 1948).

117. Exec. Order No. 10,340, 17 Fed. Reg. 3139, 3141 (Apr. 10, 1952); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582–83 (1952).

118. Exec. Order No. 12,333, 46 Fed. Reg. 59,441, 59,950 (Dec. 4, 1981).

119. STAFF OF THE WASH. POST, LANDMARK: THE INSIDE STORY OF AMERICA’S NEW HEALTH CARE LAW AND WHAT IT MEANS FOR US ALL 277–81 (2010).

120. Exec. Order No. 13,535, 75 Fed. Reg. 15,599, 15,599 (Mar. 24, 2010).

121. Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976). Since 1976, the Hyde Amendment has been passed annually, typically as an appropriations rider. Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA. L. REV. 1715, 1731 (2016).

122. STAFF OF THE WASH. POST, *supra* note 119, at 281; John C. Duncan, Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 406 (2010) (“The ratification of this order was a political commitment to help the recent enactment of the Patient Protection and Affordable Care Act . . .”).

The Memorandum directed the Secretary of HHS to undertake a rulemaking that would require hospitals to allow patients to designate individuals to participate in their medical decisions.¹²³ Although both the language of the Memorandum and the final rule¹²⁴ swept broadly, the impetus for the undertaking was a widely reported incident in which a Florida hospital denied a woman access to the bedside of her dying partner, a woman with whom she shared four children.¹²⁵ Most striking for these purposes was the tone of the memorandum, which read more like a speech than a legal directive. It began,

There are few moments in our lives that call for greater compassion and companionship than when a loved one is admitted to the hospital. In these hours of need and moments of pain and anxiety, all of us would hope to have a hand to hold, a shoulder on which to lean—a loved one to be there for us, as we would be there for them.¹²⁶

The Memorandum continued in a similar vein for a few paragraphs before the appearance of the operative language directing the rulemaking. As the examples above illustrate, these modes of direct presidential action actually bear some resemblance to presidential speeches.

Of course, there is a degree of fiction in describing any of the foregoing as “direct” presidential action. The President does not, of course, typically draft executive orders or similar documents himself; depending on subject matter, that task may be performed by lawyers in the Office of Management and Budget, the White House Counsel’s Office, or a component of DOJ or another agency.¹²⁷ But the President actually considers such documents and, importantly, affixes a signature.¹²⁸ This is similarly true of the modes of direct presidential action at issue in several of the lower-court cases discussed in

123. Memorandum on Respecting Rights of Hospital Patients to Receive Visitors and to Designate Surrogate Decision Makers for Medical Emergencies, 2010 DAILY COMP. PRES. DOC. 2 (Apr. 15, 2010).

124. 75 Fed. Reg. 70,831 (Nov. 19, 2010) (codified at 42 C.F.R. §§ 482.13(h), 485.635(f) (2016)).

125. Sheryl Gay Stolberg, *Obama Widens Medical Rights for Gay Partners*, N.Y. TIMES (Apr. 15, 2010), http://www.nytimes.com/2010/04/16/us/politics/16webhosp.html?_r=0 [https://perma.cc/J8SV-ZTA6].

126. Memorandum on Respecting the Rights of Hospital Patients to Receive Visitors and to Designate Surrogate Decision Makers for Medical Emergencies, *supra* note 123, at 1.

127. Cf. Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 219 (1993) (“[P]artisans of the unitary executive often discuss presidential control as if *the President* is the one who exercises it. In general, of course, this is simply not true.”). Professor Herz was focused here on agencies, but the point also holds for action that doesn’t visibly emanate from an agency.

128. *But see* Whether Bills May be Presented by Congress and Returned by the President by Electronic Means, 35 Op. O.L.C., at 8–9 (2011), https://www.justice.gov/sites/default/files/olc/opinions/2011/05/31/bills-electronic-means_0.pdf [https://perma.cc/ZP2C-R2QC] (advising that the President must “sign” a bill when he approves its adoption, but that the Constitution permits the President’s staff to affix his signature to legislation via autopen).

the next Part—presidential action in the national security sphere, in particular targeting (like the *Al-Aulaqi* case I discuss at length in the next Part) and detention at Guantanamo Bay. When it comes to both targeting and detention, the President does not, of course, personally take the ultimate actions subject to challenge.¹²⁹ But public reporting suggests, and executive branch statements confirm, that such actions involve actual presidential actions and determinations,¹³⁰ which distinguishes this conduct from most agency action.¹³¹

C. *Presidential Speech and the Legislative Process*

Finally for this Part, I briefly address presidential speech in the context of legislation. When it comes to legislative history—statements that are not themselves law, but are *about* law—the grooves of the debate are well worn. Some scholars advocate, and some judges pledge fealty to, a position of zero tolerance;¹³² some embrace the potential relevance of all such materials;¹³³ and many, perhaps most, take sort of a middle ground, evidencing a willingness to give some weight under some circumstances to certain materials but not others.¹³⁴ Statements by executive branch officials, when

129. See Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES (May 29, 2012), <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?mcubz=0> [<https://perma.cc/NN2T-KM6Q>] (describing DoD as actually “oversee[ing]” the strikes as a general matter); see also *id.* (with respect to targeted killing of Baitullah Mehsud, “Mr. Obama, through Mr. Brennan, told the C.I.A. to take the shot . . .”).

130. *Id.* (describing the President’s practice of “personally overseeing the shadow war with Al Qaeda,” including by personally “approving every new name on an expanding ‘kill list’”); see also Press Release, Office of the Press Sec’y, Press Briefing by Senior Administration Officials on the Killing of Osama Bin Laden (May 2, 2011), <http://www.whitehouse.gov/the-press-office/2011/05/02/press-briefing-senior-administration-officials-killing-osama-bin-laden> [<https://perma.cc/TY82-FSD5>] (“[T]he President gave the final order to pursue the operation that he announced to the nation tonight . . .”); Eric Holder, U.S. Att’y Gen., Speech at Northwestern School of Law (Mar. 5, 2012), <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html> [<https://perma.cc/E7WR-5W4J>] (describing the Administration’s targeting procedures). For an exploration of the legal implications of individually targeted military strikes, including the President’s direct involvement therein, see Samuel Issacharoff & Richard H. Pildes, *Targeted Warfare: Individuating Enemy Responsibility*, 88 N.Y.U. L. REV. 1521 (2013).

131. Authorizations by the executive branch of detention policies are somewhat harder to classify as either agency or direct presidential action. See *infra* notes 212–23 (discussing *Al Warafi v. Obama*, No. 09-2368 (RCL), 2015 WL 4600420 (D.D.C. July 30, 2015), *vacated as moot*, No. 15-5266 (D.C. Cir. Mar. 4, 2016)).

132. See, e.g., ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 376–78 (2012).

133. ROBERT A. KATZMANN, *JUDGING STATUTES* 3–4 (2014).

134. See generally Nicholas Parillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266 (2013) (describing the positions).

they do appear in discussions of the interpretation of statutes, appear as simply a subset of the larger category of legislative history.¹³⁵

Presidential *signing* statements—the “short documents that Presidents often issue when they sign a bill”¹³⁶—have been the subject of extensive scholarly debate.¹³⁷ These instruments in some ways straddle the spheres of substantive law and legislative history. Though there is no question that they play an important part in influencing executive branch actors charged with law implementation,¹³⁸ scholars and judges take a range of positions on the extent to which signing statements should carry force in court.

But it may be worth looking beyond signing statements to consider more broadly presidential statements as a distinct source of authority when it comes to the interpretation of statutes.¹³⁹ The Constitution’s Recommendations Clause imposes on the President the obligation to recommend legislation to Congress.¹⁴⁰ So, where draft legislation originates in the executive branch, there is an argument that statements by the President or other relevant executive branch officials should be deemed especially relevant to the interpretive task. The Supreme Court has recognized that the President “may initiate and influence legislative proposals”¹⁴¹ and has cited

135. See, e.g., OTTO J. HETZEL ET AL., LEGISLATIVE LAW AND STATUTORY INTERPRETATION: CASES AND MATERIALS 589–90 (3d ed. 2001).

136. Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 308 (2006). For a brief historical account of presidential use of signing and veto statements, see WILLIAM ESKRIDGE ET AL., LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 848–52 (5th ed. 2014).

137. A nonexhaustive list includes Bradley & Posner, *supra* note 136; Neal Devins, *Signing Statements and Divided Government*, 16 WM. & MARY BILL RTS. J. 63 (2007); William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699 (1991); Daniel B. Rodriguez et al., *Executive Opportunism, Presidential Signing Statements, and the Separation of Powers*, 8 J. LEGAL ANALYSIS 95 (2016); Christopher S. Yoo, *Presidential Signing Statements: A New Perspective*, 164 U. PA. L. REV. 1801 (2016).

138. Neal Devins, *supra* note 137, at 69; M. Elizabeth Magill, *The First Word*, 16 WM. & MARY BILL RTS. J. 27, 28–30 (2007).

139. See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2125 (2016) (reviewing KATZMANN, *supra* note 133):

Lawyers, academics, and judges too often treat legislation as a one-body process (‘the Congress’) or a two-body process (‘the House and Senate’). But formally and functionally, it is actually a three-body process: the House, the Senate, and the President. Any theory of statutory interpretation that seeks to account for the realities of the legislative process . . . must likewise take full account of the realities of the President’s role in the legislative process.

140. U.S. CONST. art. II, § 3 (“[The President] shall from time to time . . . recommend to [Congress’s] Consideration such Measures as he shall judge necessary and expedient . . .”). For a discussion of the duty imposed by the Recommendations Clause, see Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2081 (1989).

141. *Clinton v. New York*, 524 U.S. 417, 438 (1998); see also Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1819 (1996) (“[T]he President has aptly been termed the ‘legislator-in-chief.’”); Ganesh Sitamaran, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79, 103–04 (2015) (“Despite the conventional understanding of Congress as the primary source of

presidential statements in canonical statutory interpretation cases.¹⁴² But neither courts nor scholars have provided well-developed descriptive or normative accounts of the role of presidential speech when it comes to the judicial task of interpreting statutes.¹⁴³

III. Presidential Speech in the Courts

A. *The Forms of Presidential Speech: A Taxonomy*

This Part turns to presidential speech itself. For purposes of this project, the statements Presidents make¹⁴⁴ can be divided into several distinct categories: views on constitutional power or authority; views on statutory meaning or purpose; statements that might bear on the meaning or purpose of executive action; statements of conclusions with specified legal consequences; and statements of fact, either legislative or adjudicative. The subparts below describe judicial encounters—both in the Supreme Court and lower courts—with presidential speech in each of these categories.¹⁴⁵

1. Constitutional Power or Authority.—First, presidential speech may directly address constitutional power or authority. The Supreme Court’s opinion in the presidential-power case *Myers v. United States*¹⁴⁶ supplies perhaps the best example of judicial reliance on this sort of presidential speech. In its decision striking down a statute that required the President to obtain Senate approval before removing a postmaster, the *Myers* Court cited statements by no fewer than five Presidents; all were made in speeches, and

legislation, often, the [E]xecutive [B]ranch will draft entire pieces of legislation and transmit that legislation to Congress.”); Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1037 & fig.6 (2015) (reporting that nearly 80% of surveyed agency officials regularly participate in “a technical drafting role” for statutes administered by their agencies, and that nearly 60% regularly participate in a “policy or substantive drafting role”).

142. See, e.g., *United Steelworkers v. Weber*, 443 U.S. 193, 203 (1979) (citing remarks of Senator Humphrey and noting that they echoed “President Kennedy’s original message to Congress upon the introduction of the Civil Rights Act in 1963[:] ‘There is little value in a Negro’s obtaining the right to be admitted to hotels and restaurants if he has no cash in his pocket and no job.’”).

143. Kesavan & Sidak, *supra* note 3, at 5 (noting the paucity of literature on the Recommendations and State of the Union Clauses). To be sure, some excellent work describes the President’s role in the legislative process; my point is only that it does not focus on interpretation. See, e.g., Andrew Rudalevige, *The Executive Branch and the Legislative Process*, in INSTITUTIONS OF AMERICAN DEMOCRACY: THE EXECUTIVE BRANCH 419 (Joel D. Aberbach & Mark A. Peterson eds., 2005).

144. With apologies to Stephen Skowronek. See STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE* (1997).

145. This list is not exhaustive, but it does encompass the categories of presidential speech that are most likely to appear in litigation. Other categories—promises, exhortations, and threats, to name a few examples—are simply less likely to end up before courts, so I have not considered them here.

146. 272 U.S. 52 (1926).

all expressed doubts about the constitutionality of laws requiring congressional consultation or approval prior to removal.¹⁴⁷ These included a speech by President Jackson explaining that “[t]he President in cases of this nature possesses the exclusive power of removal from office,”¹⁴⁸ and a similar statement by President Wilson, who contended that “the Congress is without constitutional power to limit the appointing power and its incident, the power of removal, derived from the Constitution.”¹⁴⁹

In contrast to *Myers*, an infrequently cited fragment of Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*¹⁵⁰ strikes a cautionary note about the relevance, in a constitutional case, of executive branch speech delivered both in the spirit of advocacy¹⁵¹ and in a decidedly nonjudicial setting. In the relevant passage, Justice Jackson brushed away the significance of statements made by a previous Attorney General (as it happened, Jackson himself) defending President Roosevelt’s seizure of the Inglewood Plant of North American Aviation.¹⁵² Justice Jackson explained that “a judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself.”¹⁵³

Two of the opinions in *Hamdan v. Rumsfeld*¹⁵⁴ clashed quite explicitly over the significance of executive branch statements to the case before the Court. Dissenting from the majority opinion invalidating the use of military commissions, Justice Thomas criticized the majority’s conclusion that the

147. See *id.* at 152, 167–70 (quoting Presidents Jackson, Grant, Cleveland, Wilson, and Coolidge).

148. *Id.* at 152.

149. *Id.* at 169. The Court cited actions, as well as statements, by previous Presidents, but presidential statements were an important type of evidence on which the Court relied. See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 479 (2012) (describing the *Myers* Court as having “privileg[ed] various expressions of executive disapproval”).

150. 343 U.S. 579 (1952).

151. See Louis Jaffe, *Mr. Justice Jackson*, 68 HARV. L. REV. 940, 989 & n.199 (1955) (citing this language as an example of Jackson’s “acknowledg[ing], sometimes with charming humor, the inconsistencies of his successive avatars”).

152. Of Roosevelt’s seizure, then-Attorney General Jackson stated that “[t]here can be no doubt that the duty constitutionally and inherently rested upon the President to exert his civil and military, as well as his moral, authority to keep the Defense effort of the United States a going concern.” 89 CONG. REC. 3992 (1943) (statement of Sen. Barkely, quoting Jackson); see also Patricia L. Bellia, *The Story of the Steel Seizure Case*, in PRESIDENTIAL POWER STORIES 233, 238–39 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009) (quoting and discussing same). This statement was excerpted in the major newspapers at the time, see, e.g., Louis Stark, *Roosevelt Explains Seizure; Jackson Cites Insurrection*, N.Y. TIMES, June 10, 1941, at 1, 16, and the government seized upon it in its brief in *Youngstown*. See Brief for Petitioner at 109 n.11, *Youngstown*, 343 U.S. 579 (No. 745), at 109 n.11.

153. *Youngstown*, 343 U.S. at 647 (Jackson, J., concurring).

154. 548 U.S. 557 (2006). See generally Dawn E. Johnsen, *The Story of Hamdan v. Rumsfeld*, in PRESIDENTIAL POWER STORIES 447 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

military commissions' failure to comply with the requirements for courts-martial doomed them. According to Justice Thomas, the majority agreed that "the President is entitled to prescribe different rules for military commissions than for courts-martial when he determines that it is not 'practicable' to prescribe uniform rules."¹⁵⁵ And, Justice Thomas explained, the President *had* made such a determination here; as evidence, Justice Thomas offered press statements by the Secretary and Under Secretary of Defense describing the President's conclusion and motivation.¹⁵⁶ Writing for the majority, Justice Stevens responded sharply to Justice Thomas's argument: "We have not heretofore, in evaluating the legality of executive action, deferred to comments made by [executive branch] officials to the media."¹⁵⁷

Many of the invocations of presidential speech in these cases seem to employ such speech as a component of a separation-of-powers "historical gloss" analysis, of the sort Justice Frankfurter urged in *Youngstown*.¹⁵⁸ Together, they suggest that one underappreciated element of gloss analysis may be statements made by Presidents or other executive branch officials. But no clear principles distinguish cases in which such statements will be deemed relevant and those in which they will not.

Indeed, in some constitutional cases, presidential statements appear in briefing or oral argument, but are conspicuously absent from a court's final opinion. *NFIB v. Sebelius*¹⁵⁹ represents the most high-profile example in

155. *Hamdan*, 548 U.S. at 712 (Thomas, J., dissenting).

156. Douglas J. Feith, Under Secretary of Defense for Policy, reiterated statements made by the Secretary of Defense, stating:

[T]he Secretary of Defense explained that "the president decided to establish military commissions because he wanted the option of a process that is different from those processes which we already have, namely, the federal court system . . . and the military court system," Dept. of Defense News Briefing on Military Commissions (Mar. 21, 2002) (remarks of Donald Rumsfeld) The President reached this conclusion because: "we're in the middle of a war, and . . . had to design a procedure that would allow us to pursue justice for these individuals while at the same time prosecuting the war most effectively. And that means setting rules that would allow us to preserve our intelligence secrets, develop more information about terrorist activities that might be planned for the future so that we can take action to prevent terrorist attacks against the United States."

Id. at 712–13 (first and third omissions in original).

157. 548 U.S. at 623 n.52.

158. *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring) ("It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."); see also *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (stating that because the Recess Appointments Clause concerns the separation of elected powers, "in interpreting the Clause, we put significant weight upon historical practice" (emphasis omitted)). For discussions of "gloss" analysis, see generally Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59 (2017); Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097 (2013); Bradley & Morrison, *supra* note 149.

159. 567 U.S. 519 (2012).

recent memory. The presidential remarks of interest in that case appeared in an interview with ABC's George Stephanopoulos. In response to Stephanopoulos's questions, President Obama maintained that the penalty attached to the Affordable Care Act's individual mandate "was absolutely not a tax increase."¹⁶⁰ This comment soon appeared in a number of press accounts and opinion pieces.¹⁶¹ A Virginia district court in *Virginia v. Sebelius*¹⁶² asked a Department of Justice attorney to explain President Obama's statements: "Let's characterize it correctly, . . . [t]hey denied it was a tax. The President denied it. Was he trying to deceive the people?"¹⁶³ Similarly, before the Supreme Court, Justice Scalia pressed Solicitor General Don Verrilli on the President's words, presumably (although not explicitly), in reference to the same interview:

JUSTICE SCALIA: The President said it wasn't a tax, didn't he?

GENERAL VERRILLI: Well, Justice Scalia, what the—two things about that. First is, it seems to me, what matters is what power Congress was exercising. And they were—and I think it's clear that the—they were exercising the tax power as well as the commerce power.

JUSTICE SCALIA: You're making two arguments. Number one, it's a tax. And, number two, even if it isn't a tax, it's within the taxing power. I'm just addressing the first.

160. Stephanopoulos asked, "Under this mandate the government is forcing people to spend money, fining you if you don't[.] How is that not a tax?" After some intervening dialogue, President Obama responded, "[F]or us to say that you've got to take a responsibility to get health insurance is absolutely not a tax increase. . . . [E]verybody in America, just about, has to get auto insurance. Nobody considers that a tax increase. People say to themselves, that is a fair way to make sure that if you hit my car, that I'm not covering all the costs." Interview by George Stephanopoulos with President Barack Obama, on *This Week* (ABC television broadcast Sept. 20, 2009) (transcript available at <http://abcnews.go.com/ThisWeek/Politics/transcript-president-barack-obama/story?id=8618937> [<https://perma.cc/939B-JQKN>]).

161. See, e.g., Chris Frates & Mike Allen, *Bill Says 'Tax' When Obama Said 'Not'*, POLITICO (Sept. 21, 2009), <http://www.politico.com/story/2009/09/bill-says-tax-when-obama-said-not-027384> [<https://perma.cc/NV4M-DTUD>]; *Obamacare: How Many of the President's Promises Have Been Broken?*, HERITAGE FOUND., <http://www.askheritage.org/obamacare-how-many-of-the-presidents-promises-have-been-broken-t3/> [<https://perma.cc/V3DS-9JZH>]; Shikha Dalmia, *Obama's Top Five Health Care Lies*, FORBES (July 1, 2009), <http://www.forbes.com/2009/06/30/obama-health-care-reform-opinions-columnists-public-option-medicare.html> [<https://perma.cc/9MSS-7RLY>]; Avik Roy, *The Individual Mandate is a Tax. Or Isn't. Or Is.*, FORBES (Feb. 1, 2011), <http://www.forbes.com/sites/aroy/2011/02/01/the-individual-mandate-is-a-tax-or-isnt-or-is/#344723552818> [<https://perma.cc/34QS-66SG>]; *Obama's Tax Pledge—Documentation*, AM. FOR TAX REFORM (Aug. 3, 2010), <http://www.atr.org/obamas-tax-pledge-documentation-a5282#ixzz1CHAmKYHg> [<https://perma.cc/N6YY-YWQW>].

162. *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010), *vacated*, 656 F.3d 253 (4th Cir. 2011).

163. Complete Transcript of Motions Before the Honorable Henry E. Hudson, United States District Court Judge at 80, *Cuccinelli*, 728 F. Supp. 2d 768 (No. 3:10 CV 188).

GENERAL VERRILLI: What the President said—

JUSTICE SCALIA: Is it a tax or not a tax? The President didn't think it was.

GENERAL VERRILLI: The President said it wasn't a tax increase because it ought to be understood as an incentive to get people to have insurance. I don't think it's fair to infer from that anything about whether that is an exercise of the tax power or not.¹⁶⁴

It was striking, then, that despite the debates at oral argument about its significance and the extensive media coverage, no genuine reliance on the President's statement appeared in either case—indeed, in *NFIB* it went entirely unmentioned, while the only reference in *Virginia* was oblique and glancing.¹⁶⁵

2. *Statutory Meaning or Purpose.*—Second, presidential speech may speak to the purpose, content, or meaning of a particular legislative enactment. Much of the time, such statements of presidential views are offered in signing statements, which I do not consider here; but they can appear in speeches as well.

I'll mention just a few examples. First, the Court in the 1896 case *Wiborg v. United States*¹⁶⁶ used President Washington's 1793 inaugural address as a guide to interpreting a neutrality statute with founding-era roots.¹⁶⁷ A number of antitrust cases involving the Clayton Act have cited a 1914 speech by President Wilson on the issue of antitrust remedies; his speech specifically addressed the limitations period for private antitrust actions, and the Court has heeded his advice and tolled limitations periods during the pendency of government actions.¹⁶⁸ Majority or dissenting opinions have also cited presidential speech in interpreting Title VII of the

164. Transcript of Oral Argument at 48–49, *Dep't of Health and Human Servs. v. Florida*, 567 U.S. 904 (2012) (No. 11-398).

165. The opinion remarked: “Despite pre-enactment representations to the contrary by the Executive and Legislative branches, the Secretary now argues that the Minimum Essential Coverage Provision is, in essence, a ‘tax penalty.’” *Cuccinelli*, 728 F. Supp. 2d at 782.

166. 163 U.S. 632 (1896).

167. *Id.* at 647.

168. *See, e.g., Minn. Min. & Mfg. Co. v. N.J. Wood Finishing Co.*, 381 U.S. 311, 318 (1965) (citing, in interpreting the tolling provision of the Clayton Act, President Wilson's 1914 speech to Congress calling for strengthened antitrust laws, and specifically pointing to language arguing that for such private actions, “the statute of limitations . . . be suffered to run against such litigants only from the date of the conclusion of the government's action” (quoting 59 CONG. REC. 1964 (1914)); *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 333 (1978) (quoting same).

Civil Rights Act,¹⁶⁹ the Equal Educational Opportunities Act,¹⁷⁰ the Federal Power Act,¹⁷¹ and many others. For the most part, these statements appear to be used in the same way courts use legislative history to construe statutes—as one interpretive aid among many.

3. *Executive Action.*—Presidents may also make statements that go to either the operation and function, or to the purpose, of executive action—whether agency action or direct presidential action. In this subpart, I consider two such examples in some detail: first, the recent litigation over President Obama’s executive action on immigration; second, the litigation regarding President Trump’s successive “travel ban” executive orders, both issued in early 2017.

When the Obama Administration announced a major new immigration initiative in 2014, its rollout happened on two fronts: a televised address by President Obama¹⁷² and a memorandum issued by the Secretary of Homeland Security.¹⁷³ The address explained that a new initiative, which was described in only general terms, would “bring more undocumented immigrants out of the shadows so they can play by the rules, pay their full share of taxes, pass a criminal background check, and get right with the law.”¹⁷⁴

169. *United Steelworkers v. Weber*, 443 U.S. 193, 203 (1979) (citing remarks of Senator Humphrey and noting that they echoed “President Kennedy’s original message to Congress upon the introduction of the Civil Rights Act in 1963[.] ‘There is little value in a Negro’s obtaining the right to be admitted to hotels and restaurants if he has no cash in his pocket and no job.’” (quoting 109 CONG. REC. 11,159 (1963))).

170. *Horne v. Flores*, 557 U.S. 433, 476 (2009) (Breyer, J., dissenting) (“The provision is part of a broader Act that embodies principles that President Nixon set forth in 1972, when he called upon the Nation to provide ‘equal educational opportunity to every person,’ including the many ‘poor’ and minority children long ‘doomed to inferior education’ as well as those ‘*who start their education under language handicaps.*’” (quoting and emphasizing Educational Opportunity and Busing: The President’s Address to the Nation Outlining His Proposals, 8 WEEKLY COMP. PRES. DOC. 590, 591 (Mar. 16, 1972))).

171. *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 139–40 & n.20 (1960) (Black, J., dissenting) (dissenting from the majority opinion allowing the Federal Power Commission to take lands of the Tuscarora Indian Nation in order to complete a hydroelectric power project, and citing statements by Presidents Washington and Jackson).

172. Press Release, Office of the Press Sec’y, Weekly Address: Immigration Accountability Executive Action (Nov. 22, 2014), <http://www.whitehouse.gov/the-press-office/2014/11/22/weekly-address-immigration-accountability-executive-action> [<https://perma.cc/4DFM-RXKJ>].

173. Memorandum from Jeh C. Johnson, Sec’y of Homeland Sec., to Leon Rodriguez, Director, U.S. Citizenship & Immigration Servs. et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_1.pdf [<https://perma.cc/9YPG-J3F2>].

174. Press Release, Office of the Press Sec’y, *supra* note 172.

The Secretary's memorandum actually contained the details of the Administration's "new policies for the use of deferred action."¹⁷⁵ The memorandum announced that it would deprioritize immigration enforcement against two categories of undocumented individuals.¹⁷⁶ (I'll call the new policies "DAPA" for ease of reference.)

Soon after the official announcement, Texas, joined by twenty-five other states, filed suit to enjoin the implementation of the new policies. A Texas district court granted Texas's request for a preliminary injunction on the grounds that the policy should have been adopted pursuant to the notice and comment procedures set forth in the Administrative Procedure Act (APA).¹⁷⁷

One of the most striking features of the district court opinion was its treatment of presidential statements. Throughout the opinion—when discussing justiciability, describing the legal issues in general terms, and ruling on the APA claim—the court repeatedly marshaled speeches and other public statements by President Obama, appearing to accord significant weight to those statements.

First, in a portion of the opinion finding that the state challengers possessed what the court termed "abdication standing," the court wrote:

The Court is not comfortable with the accuracy of any of these statistics [as to the likely number of beneficiaries of the program], but it need not and does not rely on them given the admissions made by the President and the DHS Secretary as to how DAPA will work.¹⁷⁸

Similarly, in rejecting the government's threshold argument that DAPA represented an exercise of enforcement discretion and was therefore unreviewable, the court pointed to a presidential statement to the effect that "it was the failure of Congress to pass such a law that prompted him (through his delegate, Secretary Johnson) to 'change the law.'"¹⁷⁹ This "change the law" statement, the court concluded, represented a concession that nothing in existing law conferred on DHS the sort of discretionary authority that would defeat reviewability.

175. Memorandum from Jeh C. Johnson, *supra* note 173, at 1.

176. The two categories were (1) undocumented immigrants whose children were U.S. citizens or lawful permanent residents and (2) individuals who came to the United States as children and satisfied a number of other eligibility criteria (the second group had been the subject of previous immigration executive action earlier in the Obama Administration). *Id.*

177. *Texas v. United States*, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an evenly divided court*, 136 S. Ct. 2271 (2016).

178. *Id.* at 639 n.46.

179. *Id.* at 657 & n.71 (citing Press Release, Office of the Press Sec'y, Remarks by the President on Immigration—Chicago, IL (Nov. 25, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/25/remarks-president-immigration-chicago-il> [<https://perma.cc/WVY5-L9EN>]).

Later, when considering whether DAPA was policy guidance, and therefore exempt from APA rulemaking procedures, the court wrote:

What is perhaps most perplexing about the Defendants' claim that DAPA is merely "guidance" is the President's own labeling of the program. In formally announcing DAPA to the nation for the first time, President Obama stated, "I just took an action to change the law." He then made a "deal" with potential candidates of DAPA: "if you have children who are American citizens . . . if you've taken responsibility, you've registered, undergone a background check, you're paying taxes, you've been here for five years, you've got roots in the community—you're not going to be deported. . . . If you meet the criteria, you can come out of the shadows. . . ." ¹⁸⁰

This, the court concluded, meant that the DHS Secretary's memo set forth binding rules, rather than a general framework in which individual officials would still enjoy substantial discretion. Based largely on this presidential characterization, the court concluded that DAPA represented a substantive rule change for which notice-and-comment rulemaking had been required, and issued a nationwide injunction.

When the federal government sought to stay the injunction, the Fifth Circuit opinion denying the request cited no statements by the President or other officials.¹⁸¹ But Judge Higginson's dissenting opinion objected strenuously to precisely this aspect of the district court opinion. He wrote:

[T]he district court looked above DHS, the executive agency, to President Obama . . . to find contradiction to [DHS's] stated purpose and emphasis on case-by-case discretion. For good reason, however, the Supreme Court has not relied on press statements to discern government motivation and test the legality of governmental action, much less inaction.¹⁸²

He continued: "Presidents, like governors and legislators, often describe law enthusiastically yet defend the same law narrowly. . . . In addition, our court has noted that 'informal communications often exhibit a lack of 'precision of draftsmanship' and therefore 'are generally entitled to limited weight'" ¹⁸³

180. *Id.* at 668 (quoting and emphasizing Press Release, Office of the Press Sec'y, Remarks by the President on Immigration (Nov. 21, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/21/remarks-president-immigration> [<https://perma.cc/862G-VE7T>]). Interestingly, despite its focus on these presidential statements, the district court only once in passing cited the weekly address in which the President actually announced the policy. *See id.* at 610 n.9.

181. *Texas v. United States*, 787 F.3d 733, 743 (5th Cir. 2015), *aff'd by an evenly divided court*, 536 S. Ct. 2271 (2016).

182. *Id.* at 780 (Higginson, J., dissenting).

183. *Id.* at 780–81 (quoting *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 599 (5th Cir. 1995) (quoting *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987))).

Before the Supreme Court, Texas continued to focus on the same statements that had proven effective before the district court. As its opening brief recounted, “Shortly after DAPA issued, the President admitted, ‘I just took an action to change the law.’ The President later explained that DAPA ‘expanded [his] authorities,’ and conceded that DAPA recipients would get ‘a legal status.’”¹⁸⁴ In addition, there was some indication at oral argument that at least the Chief Justice was struck by the potential relevance of the President’s statements; he pressed Solicitor General Don Verrilli with the following question: “[W]hen he announced—the President announced DACA, the predecessor provision, he said that if you broadened it—this is a quote, ‘Then, essentially, I would be ignoring the law in a way that I think would be very difficult to defend legally.’ What was he talking about?”¹⁸⁵

Because the Supreme Court deadlocked 4–4 on the case, affirming the judgment of the Fifth Circuit, there is no way to know what significance, if any, the Court might have accorded any of President Obama’s statements.¹⁸⁶ But the oral arguments certainly suggested that such statements could have impacted at least some Justices’ views of the case.¹⁸⁷

The second such example involves the litigation around President Trump’s “travel ban” executive orders, in which the weight courts should accord presidential speech has been perhaps *the* central legal question.

The first order, titled “Protecting the Nation from Foreign Terrorist Entry into the United States,” was issued on January 27, 2017.¹⁸⁸ Its main operative provisions temporarily suspended admission to the United States

184. Brief for the State Respondents at 13, *United States v. Texas*, 136 S. Ct. 2271 (No. 15-674) (citations omitted).

185. Transcript of Oral Argument at 33–34, *Texas*, 136 S. Ct. 2271 (No. 15-674) (emphasis added). The Chief Justice’s question seemed almost to suggest an estoppel argument based on the President’s previous statements—an odd suggestion in light of the general rule against nonmutual collateral estoppel in the context of the federal government, particularly in the context of oral statements. See *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 60 (1984) (stating that in light of “the interest of the citizenry as a whole in obedience to the rule of law,” it is “well settled that the Government may not be estopped on the same terms as any other litigant”).

186. *Texas*, 136 S. Ct. at 2272. For a discussion of many of President Obama’s statements on immigration and executive authority, see Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213, 270–80 (2015).

187. See generally Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015) (discussing whether constitutional limitations exist on the President’s power to shape immigration law through administrative channels); Peter M. Markowitz, *The Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489 (2017) (examining the President’s prosecutorial-discretion power in the context of immigration and proposing potential limits).

188. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); see *Washington v. Trump*, 847 F.3d 1151, 1167–68 (9th Cir. 2017) (reserving question of impact of presidential statements on religious discrimination claims).

of individuals from seven majority-Muslim countries;¹⁸⁹ temporarily suspended admission of all refugees; and indefinitely suspended admission of Syrian refugees. It also contained two separate provisions prioritizing the admission of persecuted members of religious minorities.¹⁹⁰ The Order was swiftly challenged by the states of Washington and Minnesota on a number of statutory and constitutional grounds.¹⁹¹ Central to the states' challenge was the argument that "the Executive Order was not truly meant to protect against terror attacks by foreign nationals but rather was intended to enact a 'Muslim ban' as the President had stated during his presidential campaign that he would do."¹⁹² The Washington district court entered a Temporary Restraining Order (TRO),¹⁹³ and the federal government sought review in the Ninth Circuit.

The Ninth Circuit upheld the TRO, primarily on the basis of the strength of the plaintiffs' due process arguments, expressly reserving judgment on the religious discrimination claims. But the court noted that those claims relied heavily on "numerous statements by the President about his intent to implement a 'Muslim ban'"¹⁹⁴ and explained that such evidence *could* properly be considered when evaluating claims brought under the Establishment and Equal Protection Clauses.¹⁹⁵

The federal government then unsuccessfully sought rehearing en banc.¹⁹⁶ The denial of rehearing drew a dissent from Judge Kozinski; though

189. It was initially unclear whether this restriction, contained in Section 3 of the Order, applied to valid green card holders who were temporarily out of the country. *Id.* at 8897–98. The White House initially indicated that it did, and that green card holders would need to seek a waiver to gain reentry. Interview by Chuck Todd with Reince Priebus, White House Chief of Staff, on *Meet the Press* (NBC television broadcast Jan. 29, 2017) (transcript available at <https://www.nbcnews.com/meet-the-press/meet-press-01-29-17-n713751> [<https://perma.cc/QY9X-VMHY>]) (questioning Priebus regarding whether the Order would affect green card holders, to which Priebus responded, "Well, of course it does."). Days after the order was issued, though, the White House Counsel issued a memorandum purporting to clarify that green card holders were *not* subject to the entry ban. Memorandum from Donald F. McGahn II, Counsel to the President, to The Acting Sec'y of State et al., Authoritative Guidance on Executive Order Entitled "Protecting the Nation from Foreign Entry into the United States" (Jan. 27, 2017).

190. Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8979 (Jan. 27, 2017) (notwithstanding the suspension of the refugee program, providing for case-by-case admissions, "including when the person is a religious minority in his country of nationality facing religious persecution," and directing the Secretary of State, upon resumption of the refugee program, to "prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality").

191. Challenges were brought in other districts as well, but I do not address all of those cases here.

192. *Washington v. Trump*, 847 F.3d 1151, 1157 (9th Cir. 2017).

193. *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *1 (W.D. Wash. Feb. 3, 2017).

194. *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017).

195. *Id.* at 1167–68.

196. *Washington v. Trump*, 858 F.3d 1168 (9th Cir. 2017) (mem.).

the panel opinion had expressly disavowed reliance on the President's words, the dissent charged that the opinion nevertheless "sow[ed] chaos by holding 'that evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims.'"¹⁹⁷ Kozinski elaborated: "Candidates say many things on the campaign trail; they are often contradictory or inflammatory. No shortage of dark purpose can be found by sifting through the daily promises of a drowning candidate, when in truth the poor schlub's only intention is to get elected."¹⁹⁸

After the Ninth Circuit opinion upholding the district court's TRO, the Trump Administration opted to withdraw the original executive order in favor of a new one. Issued in March 2017, the second order differed in several ways from the original order with which it shared a name, but imposed the same temporary ban on entry, this time targeting only six countries, rather than seven.¹⁹⁹

This EO, too, was immediately challenged and subsequently enjoined by district courts in Maryland and Hawaii, with a Fourth Circuit opinion forcefully agreeing with the Maryland district court and a Ninth Circuit opinion affirming the bulk of the Hawaii district court's injunction, albeit on statutory rather than constitutional grounds.²⁰⁰ Importantly for this Article's purposes, the Fourth Circuit found that the Order very likely violated the Establishment Clause, placing substantial reliance on statements by both candidate and President Trump, as well as his surrogates and staffers. Among other things, it referenced a March 2016 CNN interview in which then-candidate Trump said, "I think Islam hates us . . . we have to be very careful. And we can't allow people coming into this country who have this hatred of

197. *Id.* at 1172 (Kozinski, J., dissenting).

198. *Id.* at 1173 (footnote omitted).

199. Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,211 (Mar. 6, 2009).

200. *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017), *aff'd in part, vacated in part*, 857 F.3d 554 (4th Cir. 2017), *cert. granted*, 137 S. Ct. 2080 (June 26, 2017) (No. 16-1436); *Hawai'i v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017), *aff'd in part, vacated in part*, 859 F.3d 741 (9th Cir. 2017), *cert. granted sub nom.* 137 S. Ct. 2080 (June 26, 2017) (No. 16-1540). The Supreme Court subsequently granted the government's cert petitions in both cases, staying the injunctions "with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2081 (2017). At the time of this writing, the Supreme Court had removed these cases from its October 2017 calendar after the expiration of the key provisions of the order. *See Trump v. Int'l Refugee Assistance Project*, No. 16-1436 (U.S. Sept. 25, 2017); *Trump v. Hawaii*, No. 16-1540 (Oct. 24, 2017) (vacating judgment in both cases and directing lower courts to dismiss as moot pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). In September 2017 the Trump administration also issued a third order, this one styled as a Presidential Proclamation; this directive, like the first two, is also being challenged in a range of courts and under a variety of theories. *See Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats* (Sept. 24, 2017).

the United States.”²⁰¹ It also cited the pledge on Trump’s campaign website calling “for a total and complete shutdown of Muslims entering the United States until our representatives can figure out what is going on.”²⁰² And it noted the candidate’s admission that he was shifting his rhetoric from advocacy of a “Muslim ban” to a focus on “territories.”²⁰³ Declining the government’s invitation to set aside such evidence, the court wrote, “[w]e cannot shut our eyes to such evidence when it stares us in the face, for ‘there’s none so blind as they that won’t see.’”²⁰⁴

4. *Statements with Direct Legal Effect.*—Presidents may also make statements that have—or where one party argues they should have—direct legal effect. Some such cases present fewer thorny conceptual or institutional questions than cases involving other varieties of presidential speech. In these cases, either statute or judicially crafted doctrine provides for presidential speech to have some specified legal effect; absent any constitutional obstacle, it seems clear that courts should give the speech the prescribed legal effect. Still, these cases are worth considering, in part because parties may disagree about whether particular presidential speech satisfies the requirements of the relevant statute or doctrinal test.

The World War I-era case *Hamilton v. Kentucky Distilleries & Warehouse Co.*²⁰⁵ supplies an example of such a dispute. There the plaintiff whiskey company sought relief from the application of the War-Time Prohibition Act, which by its terms prohibited most selling of spirits “until the conclusion of the present war.”²⁰⁶ Pointing to presidential statements to the effect that “the war has ended and peace has come,”²⁰⁷ that “certain war agencies and activities should be discontinued,”²⁰⁸ and that “our enemies are

201. Interview by Anderson Cooper with Donald Trump, on *Anderson Cooper 360* (CNN television broadcast Mar. 9, 2016) (transcript available at <http://www.cnn.com/TRANSCRIPTS/1603/09/acd.01.html> [<https://perma.cc/XZE8-XFBF>]), *quoted in* Int’l Refugee Assistance Project v. Trump, 857 F.3d 554, 576 (4th Cir. 2017).

202. Int’l Refugee Assistance Project v. Trump, 857 F.3d 554, 594 (4th Cir. 2017), *cert. granted*, 137 S. Ct. 2080 (June 26, 2017).

203. *Id.* at 576 (“When asked whether he had ‘pulled back’ on his ‘Muslim ban,’ Trump replied, . . . ‘I actually don’t think it’s a rollback. In fact, you could say it’s an expansion. I’m looking now at territories. People were so upset when I used the word Muslim. Oh, you can’t use the word Muslim. Remember this. And I’m okay with that, because I’m talking about territory instead of Muslim.’” (quoting Interview by Chuck Todd with Donald Trump, on *Meet the Press* (NBC television broadcast July 24, 2016) (transcript available at <https://www.nbcnews.com/meet-the-press/meet-press-july-24-2016-n615706> [<https://perma.cc/3H26-AZY7>])).

204. *Id.* at 599.

205. 251 U.S. 146 (1919).

206. *Id.* at 153 (quoting War-Time Prohibition Act, ch. 212, 40 Stat. 1045, 1046 (1918)).

207. *Id.* at 159.

208. *Id.*

impotent to renew hostilities,”²⁰⁹ the company contended that the emergency had passed and that “when the emergency ceased the statute became void.”²¹⁰ The Court rejected the company’s argument, citing evidence of action, by both Congress and the President, suggesting that the statute remained in force.²¹¹ Crucially, the Court found that notwithstanding the statements cited above, the President had “refrained from issuing the proclamation declaring the termination of demobilization *for which this act provides*.”²¹² So here the statute actually did identify specific legal effects that would flow from a particular form of presidential speech (here a formal written proclamation), but the speech in question did not satisfy the statute’s requirements.

A much more recent lower-court opinion featured a similar set of arguments about the end of war, this time in the context of detention authority. The case featured a challenge by Guantanamo detainee Al Warafi to the legality of his continued detention.²¹³ The Supreme Court had held in its 2004 *Hamdi*²¹⁴ decision that the 2001 Authorization for the Use of Military Force (AUMF) provided the executive branch with the authority to detain enemy combatants “for the duration of these hostilities.”²¹⁵ And the D.C. Circuit has held that pursuant to the AUMF, “individuals may be detained at Guantanamo so long as they are determined to have been part of Al Qaeda, the Taliban, or associated forces, and so long as hostilities are ongoing.”²¹⁶

In 2015, Al Warafi filed a challenge to his detention, relying for support on a number of presidential statements from 2014 and 2015.²¹⁷ In particular, he pointed to a December 2014 speech at Arlington Cemetery in which the President announced that “[t]his month, after more than 13 years, our combat

209. *Id.*

210. *Id.*

211. *Id.* at 161–62; *see also* Deborah N. Pearlstein, *Law at the End of War*, 99 MINN. L. REV. 143, 159–60 (2014).

212. *Hamilton*, 251 U.S. at 160 (emphasis added). The statute provided that it was to remain in effect “until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States.” War-Time Prohibition Act, ch. 212, 40 Stat. 1045, 1046 (1918); *see also* Pearlstein, *supra* note 208, at 160:

While the President had indeed spoken publicly on many occasions about the end of the war, while the Treaty of Versailles had been concluded, while the President had even mentioned, in a veto message to Congress, the “demobilization of the army and navy,” such popular or passing references could not overcome the reality that the President had yet “refrained from issuing the proclamation declaring the termination of demobilization for which this act provides.”

213. *Al Warafi v. Obama*, No. 09-2368 (RCL), 2015 WL 4600420 (D.D.C. July 30, 2015), *vacated as moot*, No. 15-5266 (D.C. Cir. Mar. 4, 2016).

214. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

215. *Id.* at 521.

216. *Aamer v. Obama*, 742 F.3d 1023, 1041 (D.C. Cir. 2014).

217. Motion to Grant Petition for Writ of Habeas Corpus at 3–4, *Al Warafi*, 2015 WL 4600420 (No. 09-2368).

mission in Afghanistan will be over.”²¹⁸ Al Warafi also cited a portion of the January 2015 State of the Union address in which the President reiterated that “our combat mission in Afghanistan is over,”²¹⁹ as well as remarks at a farewell ceremony for outgoing Defense Secretary Hagel, in which the President lauded the “responsible and honorable end” of “America’s longest war.”²²⁰

The district court made short work of Al Warafi’s argument that these statements rendered his detention unlawful. The court characterized the briefs as taking the position that “the President has a peculiar strain of King Midas’s curse: Everything he says turns to law.”²²¹ The court elaborated:

Petitioner’s argument assumes that the President’s stance on the existence of hostilities is conclusive in this case, and that one discerns that stance from speeches, and speeches alone. . . . But war is not a game of “Simon Says,” and the President’s position, while relevant, is not the only evidence that matters to this issue.²²²

The court proceeded to independently conclude, based on a fairly cursory review of other sources, that “U.S. involvement in the fighting in Afghanistan, against al Qaeda and Taliban forces alike, has not stopped,”²²³ such that the continued detention was lawful.²²⁴

218. *Id.* at 3 (quoting Press Release, Office of the Press Sec’y, Remarks by the President to Military and Civilian Personnel at Joint Base McGuire-Dix-Lakehurst (Dec. 15, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2014/12/15/remarks-president-military-and-civilian-personnel-joint-base-mcguire-dix> [<https://perma.cc/89VM-K24H>]).

219. *Id.* (quoting Press Release, Office of the Press Sec’y, Remarks by the President in State of the Union Address (Jan. 20, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015> [<https://perma.cc/Z2PJ-KAZV>]).

220. *Al Warafi*, 2015 WL 4600420, at *1 (quoting Press Release, Office of the Press Sec’y, Remarks by the President at Farewell Tribute in Honor of Secretary of Defense Chuck Hagel (Jan. 28, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/01/28/remarks-president-farewell-tribute-honor-secretary-defense-chuck-hagel> [<https://perma.cc/NEG4-GREX>]).

221. *Id.* at *5.

222. *Id.* The court continued:

Petitioner’s obsession with Presidential speeches recalls the tale of the man who lost his keys: A police officer sees a man looking for something under a streetlamp and asks the man what it is he’s looking for. The man responds that he’s looking for his keys, so the officer decides to help. After several minutes the officer asks the man if he’s quite sure this is where he lost his keys. The man says no; he lost them over in the park. The officer, befuddled, asks why they’ve been looking under the streetlamp, to which the man replies “the light’s better over here.” A court cannot look to political speeches alone to determine factual and legal realities merely because doing so would be easier than looking at all the relevant evidence. *The government may not always say what it means or mean what it says*

Id. at *6 (emphasis added).

223. *Id.* at *7.

224. The question of when war ends, and in particular how that impacts a President’s legal authorities, is far more complex than I can do justice to here. Excellent discussions of the issue

Yet another example comes from a Freedom of Information Act (FOIA) suit seeking CIA records on the use of drones in targeted killings.²²⁵ The CIA supplied a “*Glomar*” response, in which an agency declines to confirm or deny the existence of any responsive records, on the grounds that even acknowledging the existence of particular materials would compromise national security.²²⁶ The D.C. Circuit ruled against the CIA, noting that public disclosures amounting to an “official acknowledgment” of the subject matter of a FOIA suit will defeat a claim of exemption under *Glomar*.²²⁷ Here, the court found that statements by the President and other executive branch officials sufficiently confirmed the existence of a drone program that the CIA could not invoke *Glomar*. So presidential and other official speech was deemed to have direct legal effect—here in the context of a judicially crafted doctrine that allows the executive branch to operate under conditions of secrecy only under certain circumstances.

The Second Circuit reached a similar conclusion in a FOIA suit seeking access to Office of Legal Counsel (OLC) documents regarding targeted killings. The court cited a number of speeches by executive branch officials—though here none by the President—in concluding that the executive branch had waived its right to claim that the documents were exempt from disclosure.²²⁸

Together, these cases suggest that some presidential or senior executive branch official speech will be deemed to have stand-alone legal significance, at least in instances where a statute or a judicial test so provides.

One additional context in which presidential statements might be deemed to have direct legal effect is within the military justice system. That is, where presidential statements could impact military disciplinary proceedings, military lawyers may argue that such statements constitute

appear in Pearlstein, *supra* note 211, and Stephen I. Vladeck, Ludecke’s *Lengthening Shadow: The Disturbing Prospect of War Without End*, 2 J. NAT’L SEC. L. & POL’Y 53 (2006).

225. *ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013).

226. *Id.* at 425–26; *Phillippi v. CIA*, 546 F.2d 1009, 1010–11 (D.C. Cir. 1976); *see also* David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1118–19 n.120 (2017) (observing courts’ acceptance of “*Glomar* responses”).

227. *ACLU*, 710 F.3d at 428–29 (stating “the President of the United States has himself publicly acknowledged that the United States uses drone strikes against al Qaeda” and quoting a response to a question in a live internet video forum).

228. *N.Y. Times Co. v. U.S. Dep’t of Justice*, 756 F.3d 100, 114, 116 (2d Cir. 2014) (citing “the numerous statements of senior Government officials discussing the lawfulness of targeted killing of suspected terrorists, which the [d]istrict [c]ourt characterized as ‘an extensive public relations campaign to convince the public that [the Administration’s] conclusions . . . are correct’” in concluding that “waiver of secrecy and privilege . . . has occurred”); *see also* Lena Groeger & Cora Currier, *Stacking up the Administration’s Drone Claims*, PROPUBLICA (Sept. 13, 2012), https://projects.propublica.org/graphics/cia-drones-strikes?utm_campaign=sprout&utm_medium=social&utm_source=twitter&utm_content=1430423921 [https://perma.cc/3GDZ-6MWL] (quoting officials discussing the CIA’s drone program on and off the record).

unlawful command influence.²²⁹ One widely cited case describes this doctrine as designed to ensure “that every person tried by court-martial is entitled to have his guilt or innocence, and his sentence, determined solely upon the evidence presented at trial, free from all unlawful influence exerted by military superiors or others.”²³⁰ A number of “unlawful command influence” arguments have relied on presidential statements, including in the high-profile case of *Bowe Bergdahl*.²³¹

5. *Statements of Fact*.—Presidents may also make truth claims, or assertions of fact.²³² When it comes to their appearance in subsequent litigation, these assertions can be further divided between “adjudicative facts” (those facts that “deal with particular circumstances, relating the actions of the parties to the law”²³³), and what are often called, in terminology that appears especially incongruous in this context, “legislative facts.” Despite their name, legislative facts are “[n]ot to be confused with facts found

229. See Uniform Code of Military Justice art. 37, 10 U.S.C. § 837 (forbidding any commanding officer to “censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding”); Monu Bedi, *Unraveling Unlawful Command Influence*, 93 WASH. U. L. REV. 1401, 1421–22 (2016) (describing the Article 37 concerns raised by President Obama’s exhortation to punish those guilty of sexual assault in the military).

230. *United States v. Rodriguez*, 16 M.J. 740, 742 (A.F.C.M.R. 1983).

231. See Motion to Dismiss, *United States v. Bergdahl* (A. Trial Judiciary, 2d Jud. Cir., Ft. Bragg Jan. 20, 2017), <https://bergdahldocket.files.wordpress.com/2016/03/motion-to-dismiss.pdf> [<https://perma.cc/2CQY-GGM6>] (arguing that then-candidate Trump’s numerous critical statements about Bergdahl require the dismissal of the charges against him, based on principles of both due process and unlawful command influence); *Bergdahl v. Nance*, No. 17-0307/AR (C.A.A.F. May 5, 2017), <https://bergdahldocket.files.wordpress.com/2017/02/disposition-may-5-2017.pdf> [<https://perma.cc/U4PG-ELPY>] (denying Bergdahl’s writ-appeal petition). For a discussion of Bergdahl’s unlawful command influence arguments, see Steve Vladeck, *President Trump’s Careless Rhetoric, Unlawful Command Influence, and the Bergdahl Court-Martial*, JUST SECURITY (Apr. 5, 2017), <https://www.justsecurity.org/39541/president-trump-bowe-bergdahl-unlawful-command-influence/> [<https://perma.cc/P3HL-8P3P>]; see also Findings and Conclusions re: Defense Motion to Dismiss for Unlawful Command Influence, *United States v. Johnson*, (N-M. Trial Jud., Haw. Jud. Cir. June 12, 2013), <https://scribd.com/doc/147972097/United-States-v-Ernest-Johnson-Ruling> [<https://perma.cc/G272-GBG8>] (ruling that statements by President Obama on the topic of military sexual assault created a sufficiently serious danger of unlawful command influence that the remedy of discharge should be unavailable).

232. Note that I do not here consider lies or untruthful statements as such. For work that does, see Helen L. Norton, *The Government’s Lies and the Constitution*, 19 IND. L.J. 73 (2015); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 358 (1991).

233. Dean Alfange, Jr., *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637, 640 (1966); see Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 365 (1942) (defining “adjudicative facts” as “facts concerning immediate parties—what the parties did, what the circumstances were, what the background conditions were”).

by a legislature,” but rather “deal with the general, providing descriptive, and sometimes predictive, information about the larger world.”²³⁴

A due process challenge brought by relatives of Anwar Al-Aulaqi, a U.S. citizen who was killed by a U.S. drone strike in 2011, featured judicial invocation of presidential speech, arguably in both categories.

First, the district court largely relied on presidential speech as establishing as a factual matter that Al-Aulaqi had been targeted and killed by the United States, citing for that admission a letter to Congress from Attorney General Holder and a speech by President Obama at the National Defense University.²³⁵ But the court also appeared to accept a core claim made by the President in his National Defense University speech. In that speech, the President announced that he had declassified the operation that resulted in the death and, as summarized by the court, noted specifically that “Anwar Al-Aulaqi posed a continuing threat to the United States.”²³⁶ Though the court explained that it was relying on sources like the speech “only as representations of the Government’s *position* that Anwar Al-Aulaqi . . . posed a continuing threat to the United States,”²³⁷ it is not clear that the court’s use was actually so limited.

The court ruled that the plaintiffs could not pursue a *Bivens* remedy, reasoning that to conclude otherwise would unduly hinder the Executive’s “ability in the future to act decisively and without hesitation in defense of U.S. interests.”²³⁸ In reaching this conclusion, the court noted: “The fact is that Anwar Al-Aulaqi was an active and exceedingly dangerous enemy of the United States”²³⁹ The court pointed to record evidence that included Al-Aulaqi’s own writings and videos in which he praised individuals who had launched or attempted attacks on the United States, and in which he called for “jihad against America.”²⁴⁰ In this portion of the opinion, the court did not explicitly cite the President’s remarks. But an earlier section of the opinion quoted Holder’s letter for the proposition that “Al-Aulaqi was a

234. Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 39 (2011) (footnotes omitted); see Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1759 (2014) (defining legislative facts as “generalized facts about the world that are not limited to any specific case”).

235. *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 59 (D.D.C. 2014).

236. *Id.* at 68; see Press Release, Office of the Press Sec’y, Remarks by the President at the National Defense University (May 23, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> [<https://perma.cc/SR7E-9XYM>].

237. *Al-Aulaqi*, 35 F. Supp. 3d at 68.

238. *Id.* at 79.

239. *Id.*

240. *Id.*

continuing and imminent threat to the United States,”²⁴¹ with a “*see also*” to the President’s speech, including the line that Al-Aulaqi “was continuously trying to kill people.”²⁴² And these sources supplied far more direct evidence of “imminent harm” than did Al-Aulaqi’s videos or writings. So scratching the surface of the opinion suggests that presidential speech may in fact have played a significant role in the court’s conclusion.

Although it granted the government’s motion to dismiss, the court ended its opinion by excoriating the government for its “truculent” opposition to an order requiring declarations that would “provide to the Court information implicated by the allegations in this case.”²⁴³ The government’s conduct, the court explained, had “made this case unnecessarily difficult,” requiring it “to cobble together . . . judicially-noticeable facts from various records” to conclude that the *Bivens* “special factors” applied.²⁴⁴ So it may well have been the government’s failure to supply the court with other sources that caused the court to turn to presidential speech.²⁴⁵ But the fact remains that presidential speech, on factual matters, seems to have played some part in the court’s analysis.

Another instance of judicial reliance on this sort of presidential speech came in a district court case on the constitutionality of the 1996 Don’t Ask Don’t Tell law (DADT),²⁴⁶ which until 2011 prevented gays and lesbians from serving openly in the military.²⁴⁷ While working to repeal DADT during

241. *Id.* at 64 (citing Letter from Eric H. Holder, Jr., Attorney Gen., to Sen. Patrick J. Leahy, Chairman, Judiciary Comm. 3 (May 22, 2013), <https://fas.org/sfp/news/2013/05/ag052213.pdf> [<https://perma.cc/3URT-CMZA>]).

242. *Al-Aulaqi*, 35 F. Supp. 3d at 64 (quoting Press Release, Office of the Press Sec’y, *supra* note 182).

243. *Id.* at 81 & n.32 (quoting Minute Order, *Al-Aulaqi*, 35 F. Supp. 3d 56 (No. 12-1192 (RMC))).

244. *Id.*

245. Defendant’s Response to the Court’s May 22, 2013 Order at 2, *Al-Aulaqi*, 35 F. Supp. 3d 56 (No. 12-1192 (RMC)) (“Defendants’ view is that neither the AG Letter nor President Barack Obama’s May 23, 2013 speech at the National Defense University, during which President Obama discussed the targeting of Anwar Al-Aulaqi and the strike against him, has any effect on the present legal posture of this case.”).

246. 10 U.S.C. § 654, *repealed by* Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515. The statute itself actually had its roots in a 1993 speech by President Clinton, announcing the policy that was later codified. President William J. Clinton, Remarks Announcing the New Policy on Homosexuals in the Military (July 19, 1993) (transcript available at <http://www.presidency.ucsb.edu/ws/index.php?pid=46867> [<https://perma.cc/J4FQ-B5GR>]); *see also* Paul F. Horvitz, ‘Don’t Ask, Don’t Tell, Don’t Pursue’ Is White House’s Compromise Solution: *New U.S. Military Policy Tolerates Homosexuals*, N.Y. TIMES (July 20, 1993), www.nytimes.com/1993/07/20/news/20iht-gay_1.html?mcubz=3 [<https://perma.cc/W9L4-V3CR>].

247. Repeal happened in several steps, beginning with the Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515, and concluding with the July 2011 certification called for in the 2010 Repeal Act. Certification by President Barack Obama, Leon Panetta, Sec’y Def., & Michael Mullen, Chairman of the Joint Chiefs of Staff (July 21, 2011),

the first term of the Obama presidency, the Administration, through the Department of Justice, continued defending the law in several constitutional challenges making their way through the courts.²⁴⁸ While the Administration maintained that there was no inconsistency between these two positions—arguing in court that the law was constitutional while working to effect its repeal—it was not entirely possible to separate the two spheres, and presidential rhetoric deployed in pursuit of repeal quickly became relevant in the constitutional litigation.

The plaintiffs in one case in particular, *Log Cabin Republicans v. Obama*,²⁴⁹ pointed to remarks by the President at a “Pride Month” reception at the White House, in which the President said: “‘Don’t Ask, Don’t Tell’ doesn’t contribute to our national security[;] . . . preventing patriotic Americans from serving their country weakens our national security[.]”²⁵⁰ The plaintiffs offered this statement as highly relevant evidence that DADT could not possibly, as the DOJ argued, “significantly further[] the Government’s interests in military readiness or unit cohesion.”²⁵¹

The district court agreed with the plaintiffs that these statements were relevant, pointing to what it described as “admissions” by the President and other executive branch officials establishing that “far from being necessary to further significantly the Government’s interest in military readiness, the Don’t Ask, Don’t Tell Act actually undermines that interest.”²⁵² To be sure, the court did not place exclusive reliance on presidential statements. But these “admissions” did appear significant to the court’s overall determination.²⁵³

As each of the foregoing examples makes clear, the line between facts and views is far from clear, and perhaps the President’s statements on the

<https://obamawhitehouse.archives.gov/sites/default/files/uploads/dadtcert.pdf>
[<https://perma.cc/7FAG-W34N>].

248. *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (C.D. Cal. 2010), *vacated as moot*, 658 F.3d 1162 (9th Cir. 2011); Brief for the Federal Respondents in Opposition, *Pietrangelo v. Gates*, 556 U.S. 1289 (2009) (No. 08-824).

249. 716 F. Supp. 2d 884 (C.D. Cal. 2010), *vacated as moot*, 658 F.3d 1162 (9th Cir. 2011).

250. *Id.* at 919 (quoting President Barack Obama, Remarks at a Reception Honoring Lesbian, Gay, Bisexual, and Transgender Pride Month, 1 PUB. PAPERS 927, 929 (June 29, 2009)).

251. *Log Cabin Republicans*, 716 F. Supp. 2d at 911. Not only did the plaintiffs point to such statements in their trial briefing, as Daniel Meltzer detailed in a 2012 lecture, the plaintiffs also submitted an interrogatory asking the DOJ defendants to admit the truth of the President’s Pride Month remarks. Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1232–33 (2012). As Professor Meltzer explained, “the Justice Department responded by admitting the request insofar as it sought the executive’s view and denying it insofar as Congress could rationally have had a different view.” *Id.* at 1233.

252. *Log Cabin Republicans*, 716 F. Supp. 2d at 919.

253. The district court’s opinion was subsequently vacated as moot after DADT was repealed while the appeal was pending before the Ninth Circuit. *Log Cabin Republicans v. United States*, 658 F.3d 1162 (9th Cir. 2011).

national security impact of DADT, as well as the continuing dangerousness of Al-Aulaqi, are better described as views than facts. There is additionally a degree of possible overlap with other categories—a presidential claim of fact can be offered as evidence of the purpose of executive action, for example. But there may be some utility in examining these presidential claims as a distinct category.

The next subpart takes up the treatment of such statements from the perspective of some key principles of the law of evidence.

B. Presidential Speech and Evidentiary Principles

At its most basic, presidential speech can serve as evidence of the legal position of the United States. This was true, for example, in the *Myers* Court's treatment of the aggregate effect of consistent statements by multiple Presidents regarding removal restrictions.²⁵⁴ In *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*,²⁵⁵ a case not discussed in the preceding subpart, the Court was faced with a dispute involving an attempt by the U.S. Olympic Committee to prevent a gathering calling itself the "Gay Olympic Games" from using the term "Olympic." In assessing one aspect of the case—whether the U.S. Olympic Committee was a government entity for purposes of the application of the Fifth Amendment—the Court relied heavily on statements by government officials, including a State of the Union address and other statements by the President, all of which the Court believed supported the position that the Olympic Committee was *not* a government entity.²⁵⁶

Justice Souter's opinion for the Court in *American Insurance Association v. Garimendi*²⁵⁷ similarly relied on statements by subordinate executive branch officials as evidence of the position of the federal government. In deciding whether the California Holocaust Victims' Insurance Act was preempted by federal law, the Court first looked to whether the two conflicted. For evidence that "Presidential foreign policy has

254. *See supra* notes 146–49 and accompanying text. Note that in all of the foregoing, the evidence at issue consisted either of statements by a single President or consistent statements by a series of Presidents. Presumably the existence of conflicting views articulated by successive Presidents would serve to cancel out the relevance to the legal question.

255. 483 U.S. 522 (1987).

256. *Id.* at 545 n.27 ("The President thought it would be necessary to take 'legal action [if] necessary' to prevent the USOC from sending a team to Moscow. Previously, the Attorney General had indicated that the President believed that he had the power under the Emergency Powers Act to bar travel to an area that he considered to pose a threat of national emergency. The President's statement indicated a clear recognition that neither he nor Congress could control the USOC's actions directly." (alteration in original) (citations omitted) (quoting President Jimmy Carter, Remarks and a Question-and-Answer Session at the American Society of Newspaper Editors' Annual Convention, 1 PUB. PAPERS 631, 636 (Apr. 10, 1980))).

257. 539 U.S. 396 (2003).

been to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions,” the Court pointed to a number of executive agreements it explained embodied such policy.²⁵⁸ But it also relied heavily on statements by Under Secretary of State Stuart Eizenstat, as well as Secretary of State Madeleine Albright and others,²⁵⁹ including press conference statements and statements made in the course of congressional testimony.²⁶⁰ On the basis of all of this evidence, the Court concluded that a conflict existed and that California law was required to yield to the federal policy.²⁶¹

The dissenting Justices were not convinced that the executive agreements on which the majority relied clearly reflected a policy to displace laws like California’s.²⁶² And they pointedly objected to the use of executive branch statements (appearing troubled in part by the relative lack of seniority of the officials):

To fill the agreements’ silences, the Court points to statements by individual members of the Executive Branch. But we have never premised foreign affairs preemption on statements of that order. We should not do so here lest we place the considerable power of foreign affairs preemption in the hands of individual sub-Cabinet members of the Executive Branch.²⁶³

The *Log Cabin Republicans* court used presidential speech slightly differently, treating the President as a witness of sorts; the court even described his statements as “admissions,” which, under the rules of evidence, can be treated as party admissions²⁶⁴ (though the court did not make this point explicitly). This was an intriguing move: the argument being evaluated was one about the government’s potential national security and overall military-readiness interest in DADT. And the President, of course, is the commander-in-chief of the military. But, as I address in the next subpart, the use of these statements, particularly because the President’s statements were inconsistent with those of other executive branch officials, raised serious questions about internal executive branch dynamics.

258. *Id.* at 421–22.

259. *Id.* at 405 (“From the beginning, the Government’s position, represented principally by Under Secretary of State (later Deputy Treasury Secretary) Stuart Eizenstat, stressed mediated settlement as an alternative to endless litigation promising little relief to aging Holocaust survivors.” (quotation omitted)); *id.* at 411, 422.

260. *Id.* at 421–22.

261. *Id.* at 423–25; see also *In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113, 118 (2d Cir. 2010) (describing the Court’s conclusion in *Garamendi* as based in part on “statements made during negotiations between the United States and Germany, Austria, and France regarding Holocaust-era insurance claims”).

262. *Garamendi*, 539 U.S. at 441 & n.5 (Ginsberg, J., dissenting).

263. *Id.* at 441–42 (citations omitted).

264. FED. R. EVID. 801(d)(2).

Some of the district court invocations of presidential statements in *Texas v. United States*²⁶⁵ were similar to the *Log Cabin Republicans* court's use: essentially as party admissions, here ones that both revealed the true operation of the deferred-action program and conceded that the program wrought a sizable legal change.²⁶⁶

Although both of these cases involve presidential speech with a particular valence—that is, speech that runs *against* the interests of the executive—in several of the cases surveyed above, speech is used to support, rather than to undermine, a President's position. *Garamendi* and *Myers* supply two obvious examples.²⁶⁷ Similarly, in *San Francisco Arts & Athletics, Inc.*, presidential statements were used in support of a position the executive branch appeared to advocate (though it was not a party to the case).²⁶⁸ And the speech Justice Thomas invoked in *Hamdan* would have shored up the President's case, though the majority declined to accord it any weight.²⁶⁹

It is also worth noting, on the question of party admissions, that a number of lower courts have concluded that party admissions under Rule 801(d)(2) are *not* admissible against the government.²⁷⁰ Some of the language in these lower-court opinions may be inapplicable to the President—the rationale in these cases, which involve lower-level officials, is based in part on the principle that “no individual can bind the sovereign”²⁷¹—but the general principle seems to warrant consideration in the context of judicial reliance on presidential speech.²⁷²

265. 86 F. Supp. 3d 591 (S.D. Tex. 2015).

266. *Id.* at 677–78.

267. Note, however, that the speeches in *Garamendi* were of subordinate executive officials, and in *Myers* the speech was of previous Presidents. See *supra* notes 147–49, 258–62 and accompanying text.

268. See *supra* note 255 and accompanying text.

269. See *supra* notes 153–55 and accompanying text.

270. *E.g.*, *United States v. Prevatte*, 16 F.3d 767, 779 n.9 (7th Cir. 1994); *United States v. Santos*, 372 F.2d 177, 180 (2d Cir. 1967); *cf.* *Lippay v. Christos*, 996 F.2d 1490, 1497–99 (3d Cir. 1993) (questioning the principle's applicability in civil proceedings).

271. *Prevatte*, *supra* note 270, at 779 n.9.

272. Another judicial approach to presidential speech that warrants brief mention is the taking of judicial notice of the contents of a presidential speech. This sort of use appeared in a recent challenge to the force-feeding of Guantanamo detainees. Ruling that it was without jurisdiction, the district court added the following:

Even though this Court . . . lacks any authority to rule on Petitioner's request, there is an individual who does have the authority to address the issue. In a speech on May 23, 2013, President Barack Obama stated “Look at the current situation, where we are force-feeding detainees who are holding a hunger strike . . . Is that who we are? Is that something that our founders foresaw? Is that the America we want to leave to our children? Our sense of justice is stronger than that.” . . . [T]he President of the United States, as Commander-in-Chief, has the authority—and power—to directly address the issue of force-feeding of the detainees at Guantanamo Bay.

C. Deference and Presidential Speech

Finally, it is worth considering how judicial treatment of presidential speech interacts with deference principles—that is, whether courts may at times be utilizing some sort of unannounced form of deference in their treatment of presidential speech. Courts, of course, often defer to the President, in particular in the context of national security²⁷³—but to date courts have not explicitly acknowledged deference to the President’s words as such.

As a descriptive matter, there are several leading candidates for the sort of deference that might be at play. First, courts may be using some form of *Chevron* deference—which, as discussed above, has been the subject of some

Dhiab v. Obama, 952 F. Supp. 2d 154, 156 (D.D.C. 2013) (quoting *Text of President Obama’s May 23 Speech on National Security (Full Transcript)*, WASH. POST (May 23, 2013), https://www.washingtonpost.com/politics/president-obamas-may-23-speech-on-national-security-as-prepared-for-delivery/2013/05/23/02c35e30-c3b8-11e2-9fe2-6ee52d0eb7c1_story.html?utm_term=.21bf7ff3019e [<https://perma.cc/V2FF-SS7B>]), *aff’d on other grounds*, Aamer v. Obama, 742 F.3d 1023 (D.C. Cir. 2014). Another invocation that might be viewed as falling into this category came in *Physician Hospitals of Am. v. Sebelius*, a challenge to one of the Affordable Care Act’s Medicare reimbursement provisions. 691 F.3d 649, 651 (5th Cir. 2012). The case was pending in the Fifth Circuit as the Supreme Court considered *NFIB v. Sebelius*, 567 U.S. 519 (2012), and several days before the oral argument in the Fifth Circuit case, President Obama said at a press conference: “I am confident that the Supreme Court will not take what would be an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress.” Chris McGreal, *Obama Warns ‘Unelected’ Supreme Court Not to Strike Down Healthcare Law*, GUARDIAN (Apr. 2, 2012), <https://www.theguardian.com/world/2012/apr/02/barack-obama-unelected-supreme-court> [<https://perma.cc/2GQX-YU88>] (quoting Obama). At oral argument shortly thereafter, the Fifth Circuit panel pressed the Department of Justice to explain the President’s remarks, and subsequently directed DOJ to file a letter “regarding judicial review of the constitutionality of acts of Congress.” Letter Filed by Appellee at 1, *Physician Hosps. of Am.*, 691 F.3d 649 (No. 11-40631), 2012 WL 1130205. The Department did so, explaining that “[t]he power of the courts to review the constitutionality of legislation is beyond dispute,” that deference to the Legislature was appropriate in this case, and that “[t]he President’s remarks were fully consistent with the[se] principles.” *Id.* at 1–3; see JOSH CHAFETZ, CONGRESS’S CONSTITUTION 10–11 (2017) (discussing the episode); see also *Tarros S.P.A. v. United States*, 982 F. Supp. 2d 325, 328–29, 345–46 (S.D.N.Y. 2014) (citing several presidential speeches in a private damages case based on U.S. military involvement in Libya and noting that “[i]n holding that this case presents a nonjusticiable ‘political’ question, the Court merely recognizes that certain questions are not appropriate for judicial review, and are instead left to the electorally accountable branches for resolution. Nothing prevents the President from adhering to this nation’s international obligations . . .”).

273. Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 650 (2000) (“[C]ourts generally . . . giv[e] substantial and sometimes absolute deference to the [E]xecutive [B]ranch in foreign affairs cases.”). *But see* Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 818 (2011) (“[T]here are increasingly strong reasons to doubt both the descriptive and normative validity of [foreign relations] exceptionalism.”). For a comprehensive discussion of the Supreme Court’s post-9/11 treatment of deference to the Executive in the context of national security, see Joseph Landau, *Chevron Meets Youngstown: National Security and the Administrative State*, 92 B.U. L. REV. 1917 (2012); see also *id.* at 1977 (concluding that the Court “insist[s] on meaningful dual-branch solutions to national security”).

scholarly debate in the context of presidential interpretations.²⁷⁴ The second candidate is *Skidmore* deference, a context-dependent mode of deference in which agency interpretations are entitled to weight according to their “power to persuade.”²⁷⁵ And the third is what Bill Eskridge and Lauren Baer term “consultative deference,” in which “the Court, without invoking a named deference regime, relies on some input from the agency (for example, amicus briefs, interpretive rules or guidance, or manuals) and uses that input to guide its reasoning and decisionmaking process.”²⁷⁶

Not all of the cases discussed here involve presidential interpretations, as such—of the Constitution, a statute, or anything else—at least in any direct or straightforward way. So there may be limits to the deference frame. But several of the examples suggest its utility. The Chief Justice’s questions to the government in *Texas v. United States* quoted the President’s statement, with respect to an earlier immigration executive action, that to announce a broader program would entail “*ignoring the law*.”²⁷⁷ There was ultimately no reliance on that statement, because the Court produced no opinion in the case. But the Chief Justice appeared at least to raise the possibility that the President’s remarks—which spoke to the scope of existing statutory authority—might have been entitled to some weight. The district court’s reliance in the same case could perhaps be characterized as representing a form of deference (though not of a sort the Administration would have chosen); the President’s statements were arguably used, among other things, to construe the memorandum creating the program in question, providing the authoritative guidance as to the memorandum’s meaning.²⁷⁸

It appears, then, that at least some courts have accorded some sort of deference to presidential statements. But whether or not reliance is framed as

274. Peter Strauss has argued that presidential interpretations should not be eligible for *Chevron* deference. Strauss, *supra* note 85, at 748. Kevin Stack has taken the position that the President’s interpretations, where they occur pursuant to delegated authority, *should* be eligible for *Chevron* deference. Stack, *supra* note 86, at 267, perhaps subject to a requirement of reason giving. Stack, *supra* note 102, at 1013–20. But neither has considered whether other forms of deference, formal or informal, might be applicable to presidential interpretations—including, as relevant here, interpretations that appear in speeches.

275. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). For thorough discussions of the *Skidmore* standard, see generally Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235 (2007); Peter L. Strauss, Essay, “*Deference*” Is Too Confusing—Let’s Call Them “*Chevron Space*” and “*Skidmore Weight*”, 112 COLUM. L. REV. 1143 (2012); Peter L. Strauss, *In Search of Skidmore*, 83 FORDHAM L. REV. 789 (2014).

276. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1098 (2008).

277. Transcript of Oral Argument at 33, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674) (emphasis added).

278. See *supra* notes 174–79 and accompanying text.

deference, the next Part asks what a focus on internal executive branch dynamics can teach us about the wisdom or propriety of judicial reliance on presidential speech.

IV. Presidential Speech and Intra-Executive Dynamics

Perhaps the most interesting theoretical questions presented by judicial reliance on presidential speech involve intra-Executive or internal separation-of-powers dynamics.²⁷⁹ These dynamics manifest in two distinct ways: First, they may involve tension between representations made in court by the Department of Justice, on the one hand, and statements made by the President in separate venues, on the other, bringing to the fore questions about the relationship between the White House and the Department of Justice. Second, one of the functions of presidential speech may well be both to communicate with agency officials, and to claim credit for agency output. So looking to the consequences of such speech in judicial fora provides new material relevant to debates about the scope, contours, and consequences of presidential administration.

Presidents speak regularly to the press and the public, to Congress and executive branch agencies, but rarely to courts directly. When the executive branch does speak in court, it typically does so in the form of written filings (including amicus briefs) and oral arguments, ordinarily presented by the Department of Justice.²⁸⁰ Occasionally, fissures within the executive branch are made visible through multiple or atypically captioned filings or arguments.²⁸¹ But for the most part, the executive branch speaks in court with one voice, and it is the voice of the Department of Justice.²⁸² This is not just a matter of custom or practice, but of congressional command: a federal statute provides that except where otherwise provided by law, “the conduct

279. For a description of tensions and checks within the Executive, see generally Neal Kumar Katyal, Essay, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

280. Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 560 (2003); Michael Herz & Neal Devins, Recent Developments, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. R. 1345, 1345 (2000).

281. See Richard L. Hasen, *The Nine Lives of Buckley v. Valeo*, in FIRST AMENDMENT STORIES 345, 361 (Richard W. Garnett & Andrew Koppelman eds., 2012) (describing three briefs filed by government actors, each with a different caption and taking a different position, in *Buckley v. Valeo*, 424 U.S. 1 (1976)); Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 232 n.84 (2014) (describing the *Buckley* briefs and the Solicitor General's defending, in the government's briefing in *Oregon v. Mitchell*, 400 U.S. 112 (1970), the constitutionality of a statute reducing the voting age, while acknowledging the President's belief that the change required a constitutional amendment).

282. For a discussion of the instances in which Congress has granted agencies independent litigating authority, see Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 274–87 (1994).

of litigation in which the United States, an agency, or officer thereof is a party . . . and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.”²⁸³

But these representations can clash with presidential statements. Both *Texas v. United States* and *Log Cabin Republicans* involved explicit tension between positions offered by the Department of Justice, on the one hand, and out-of-court statements or representations made by the President, on the other. *Log Cabin Republicans* involved a legal argument, made by DOJ litigators and primarily based on the text of the statute and accompanying legislative findings,²⁸⁴ that it was rational for Congress to have concluded that DADT advanced national security interests. Yet the district court, after complex and contentious discovery requests in which DOJ was pressed to reconcile the President’s statement with its position about the statute’s rationality,²⁸⁵ instead privileged the President’s “admission” as evidence that DADT did not advance national security interests.²⁸⁶ As detailed above, the district court in *Texas v. United States* identified multiple divergences between DOJ representations and public statements by the President, and in each decided that the presidential statement controlled.²⁸⁷ And the litigation over President Trump’s travel ban executive orders involved judicial scrutiny of the disconnect between DOJ arguments that the purpose of the executive order was to advance national security, and presidential statements that suggested, as multiple courts concluded, that the true impetus was anti-Muslim animus.²⁸⁸

The complex relationship between the Department of Justice and the White House in the sphere of litigation, particularly litigation around topics with high political salience, has been well described in the context of the Solicitor General’s office.²⁸⁹ But the dynamics in the lower courts, where the

283. 28 U.S.C. § 516 (2012).

284. Memorandum of Points & Authorities in Support of Defendants’ Motion for Summary Judgment at 4–7, *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (C.D. Cal. 2010) (No. CV 04-08425-VAP (Ex)), 2010 WL 2171537.

285. See Defendants’ Memorandum of Points & Authorities in Support of Defendants’ Motion for Review of Magistrate Judge’s Discovery Ruling at 4, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV 04-08425-VAP (Ex)), 2010 WL 2171536 (“The President’s statements set forth the Executive’s view that the statute does not contribute to national security and, indeed, that it weakens it. But it was the considered judgment of Congress in 1993 that the statute was necessary for military effectiveness, and thus to ensure national security, and that statute remains in force today. Importantly, it is the rationality of Congress’ determination that is relevant and controlling for purposes of litigation in which a statute is called into question.”).

286. See *supra* notes 251–53 and accompanying text.

287. See *supra* notes 177–79 and accompanying text.

288. See *supra* notes 197–203 and accompanying text.

289. See generally LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 33–50 (1987); Drew S. Days, III, *When the President Says “No”: A Few Thoughts on Executive Power and the Tradition of Solicitor General Independence*, 3 J. APP. PRAC.

Solicitor General's office is typically not closely involved in litigation (with the exception of authorizing appeals²⁹⁰), have not been the subject of extensive analysis.²⁹¹ Although the White House may be involved in a consultative capacity in certain civil litigation,²⁹² it is not invariably involved, and the Department of Justice is not routinely consulted on all of the President's speeches or remarks. Despite that context, courts in some of the cases discussed above appear to be sending the message that they will not accept DOJ representations—at least under some circumstances—where the court views those representations as inconsistent with statements made by the President. Anecdotally, this appears especially likely to occur in cases in which the President has had a significant public profile with respect to the action or program in question. But no court has explained when it *will* deem a presidential statement relevant or even controlling when it clashes with DOJ representations.

The second internal-separation-of-powers dynamic implicated in these cases involves the relationship between Presidents and agencies. Such dynamics are present when a court is faced with presidential speech in a case either involving agency action—as in *Texas v. United States*—or even, as in the *Log Cabin Republicans* case, where a statute's meaning or constitutionality is implicated, but an agency (in that case, DoD) has a significant role in the implementation and the litigation. (When more direct presidential action is involved, as in the *Al Warafi* or *Al-Aulaqi* cases, these dynamics do not appear to be implicated in the same way.)

Here it is worth returning to then-Professor Kagan's celebration of presidential administration—a key aspect of which is the President's assumption of credit for regulatory action.²⁹³ On Kagan's account, President Clinton's use of this strategy meant that he “emerged in public, and to the public, as the wielder of ‘executive authority’ and, in that capacity, the source of regulatory action.”²⁹⁴ Kathryn Watts, in a piece that picks up where *Presidential Administration* left off, argues that “presidential control has deepened during the most recent two presidencies,”²⁹⁵ with President Obama in particular “elevat[ing] White House control over agencies' regulatory

& PROCESS 509 (2001); Seth P. Waxman, “Presenting the Case of the United States as It Should Be”: *The Solicitor General in Historical Context*, U.S. DEP'T JUST. (June 1, 1998), <http://www.justice.gov/osg/about-office> [<https://perma.cc/Z5K5-DQM7>].

290. Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1382 (2010) (“The Solicitor General approves only a fraction of agency requests to appeal adverse trial-level decisions.”).

291. *But see* Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1232–33 (2012) (discussing DOJ's response to a request for admission in the DADT litigation).

292. PATTERSON, *supra* note 63, at 67 (describing White House–DOJ interactions).

293. Kagan, *supra* note 87, at 2299.

294. *Id.* at 2300.

295. Watts, *supra* note 92, at 685.

activity to its highest level ever.”²⁹⁶ One natural result of these claims of ownership might be that presidential speech ends up pressed into service in court when regulatory action is challenged. This suggests that some of the use examined here may be a consequence of “presidential administration” that the original article did not anticipate—that is, that the President’s rhetorical appropriation of agency action has the potential to upend or at least impact judicial review of that action.

As a general matter, the public is for the most part unaware of the internal distinctions that exist within the executive branch, and press coverage frequently elides them.²⁹⁷ But courts, of course, should in general be aware of the distinctions between a President and other arms of the executive branch. It is striking, then, that even courts appear, at least at times, to be similarly conflating role or function.

A district court case not discussed above, but featuring a discussion of the same immigration executive action at issue in *Texas v. United States*, may illustrate just this point.²⁹⁸ While deciding an illegal reentry case, a Pennsylvania court *sua sponte* injected into the proceedings the constitutionality of the Deferred Action for Childhood Arrivals (DACA) program. In answering the constitutional question it had posed, the court quoted at length from comments by President Obama in 2010 and 2011, which the court read as establishing that President Obama “viewed an Executive Action, similar to the one issued, as beyond his executive authority.”²⁹⁹ The court explained that “[w]hile President Obama’s historic statements are not dispositive of the constitutionality of *his* Executive Action on immigration, they cause this Court pause.”³⁰⁰ As the foregoing excerpt makes clear, the court appeared to treat the program as the result of *presidential*, rather than secretarial, action.

The court in *Texas v. United States* did not make the error of conflating the President and an agency; rather, it was only because the challenged action

296. *Id.* at 698.

297. See, e.g., Binyamin Appelbaum & Michael D. Shear, *Once Skeptical of Executive Power, Obama Has Come to Embrace It*, N.Y. TIMES (Aug. 13, 2016), https://www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html?mcubz=0&_r=0 [<https://perma.cc/E5U4-MK6P>] (“Once a presidential candidate with deep misgivings about executive power, Mr. Obama will leave the White House as one of the most prolific *authors of major regulations* in presidential history.” (emphasis added)).

298. *United States v. Juarez-Escobar*, 25 F. Supp. 3d 774, 797 (W.D. Pa. 2014) (“The Court holds that the Executive Action is unconstitutional because it violates the separation of powers and the Take Care Clause of the Constitution.”).

299. *Id.* at 784.

300. *Id.* (emphasis added).

was agency action that it was subject to APA challenge.³⁰¹ But the district court's heavy reliance on presidential statements rendered the position of the agency somewhat immaterial to the legal questions in the case. In addition, it was striking that the court repeatedly cited presidential speech, but only once referenced the OLC opinion advising of the lawfulness of the program—and just for one sentence that, out of context, cut against the executive's position.³⁰² To be sure, courts can take different views about the relevance of OLC guidance to a court's interpretive task.³⁰³ But in a case that relied so heavily on one sort of executive branch articulation of views, it was conspicuous not to cite the views of the entity within the executive branch that is customarily charged with advising on the lawfulness of proposed courses of action.

In addition to rhetorical appropriation, Presidents may attempt to use speechmaking to communicate policy desires and preferences, perhaps even instructions, to subordinates within the executive branch. Such a dynamic may well have been at play in the recent litigation around the FCC's "net neutrality" order, one of the centerpieces of Professor Watts's recent *Controlling Presidential Control*.³⁰⁴ The opponents of the order charged that a series of presidential speeches represented a strategy to pressure the FCC and to influence the outcome of its policy process.³⁰⁵ Especially since the FCC is considered an independent agency, the White House would ordinarily have remained formally hands-off in directing any particular result on the politically charged question of an open Internet.³⁰⁶ But the President and

301. See *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992) ("We hold that the final action complained of is that of the President, and the President is not an agency within the meaning of the [APA].").

302. *Texas v. United States*, 86 F. Supp. 3d 591, 663 (S.D. Tex. 2015) ("As the Government's own legal memorandum . . . sets out, 'the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences.'" (quoting Dep't of Homeland Sec.'s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. & to Defer Removal of Others, 38 Op. O.L.C. 1, 6 (2014), <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [<https://perma.cc/A539-JMXZ>])), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016).

303. See Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 868 (2017) ("Is the OLC opinion intended to be a check on the President, or is it a check on *other* law expositors (in particular, Congress and the courts)? OLC's role has always been a mix of both . . ."); cf. Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1451 (2010) (observing that because OLC frequently addresses issues "unlikely ever to come before a court in justifiable form, OLC's opinions often represent the final word in those areas").

304. Watts, *supra* note 92, at 716–20.

305. See Motion for Stay or Expedition of United States Telecom Association et al. at 8 & n.3, *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (No. 15-1063); Reply of United States Telecom Association et al. in Support of Motion for Stay or Expedition at 19, *U.S. Telecom Ass'n*, 825 F.3d 674 (No. 15-1063).

306. *But see* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013) (challenging the distinction between

White House players may have had strong views on the subject, so it is certainly possible that there was some such White House strategy at play. It is notable, then, that despite the dissenting commissioner's repeated invocation of presidential speech in his opinion objecting to the net neutrality order,³⁰⁷ and its prominence in the briefs challenging the order before the D.C. Circuit, that court conspicuously declined to cite the President's speech in its opinion upholding the order.³⁰⁸

Consider again the Presidential Memorandum (PM) on Hospital Visitation discussed above.³⁰⁹ As detailed, the PM had a speech-like quality, but that was simply a matter of style; in substance, it was a directive document, rather than a purely rhetorical one. But what if the President had, in a speech rather than a memorandum, made the same points about the harm that flows from denial of access to loved ones during moments of medical crisis? The rule has not been challenged in litigation, so we don't know whether the Memorandum would have been cited, if it had. But the logic of the *Texas* case would suggest that, if the President had set forth his views in a speech rather than issued a memorandum, the treatment might have been the same—that the President's characterization of the contents of the Memorandum might have controlled over the representations made by HHS and DOJ about the meaning, scope, or purpose of the action (allowing for the possibility that a rule would have been subject to different treatment).

Now imagine that in the case of executive action on immigration, the President had issued a PM, rather than given a weekly address to announce the new program. And imagine that the memorandum had directed the Secretary of Homeland Security to address, through whatever vehicle he deemed appropriate, deportation priorities and eligibility for deferred action. Finally, imagine that the Secretary had issued a memorandum identical to the one he actually issued. Once again, the logic of the *Texas v. United States* decision would seem to suggest that the district court's treatment would be identical. And this does seem like a genuinely noteworthy development: the total collapse of distinctions between informal speech and presidential directives.

executive and independent agencies); *see also* Dan Eggen, *Mukasey Limits Agency's Contacts with White House*, WASH. POST (Dec. 20, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/19/AR2007121902303.html> [<https://perma.cc/VB5S-Z35U>] (reporting Attorney General Mukasey's restriction of contact between DOJ and the White House).

307. *See, e.g.*, Protecting & Promoting the Open Internet, 30 FCC Rcd. 5601, 5921 (2015) (Pai, Comm'r, dissenting) (“[W]hy is the FCC changing course? Why is the FCC turning its back on Internet freedom? . . . We are flip-flopping for one reason and one reason alone. President Obama told us to do so.”).

308. *See* U.S. Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016).

309. *See supra* notes 123–26 and accompanying text.

V. Guiding Principles

In this section, I turn more fully to the normative, offering a series of principles—sensitive to both context and institutional dynamics³¹⁰—that I argue should guide and cabin courts’ use of presidential speech.

There is something undeniably appealing about the idea of courts binding Presidents to their claims and representations, preventing them from speaking in one register at the bully pulpit and another in the courts of law. But I argue here that it is for the most part inappropriate for courts to rely on presidential statements offered in the spirit of advocacy, persuasion, or pure politics, where those statements do not reflect considered legal positions. That general principle, however, should give way in a subset of cases in which a degree of judicial reliance on presidential speech is entirely appropriate.

A. *Manifestation of Intent*

As a general matter, courts should rely on presidential speech only where the President has publicly manifested an intent to enter the legal arena. This manifested intent should make clear that any particular speech is the product of deliberation and that relevant stakeholders have focused significant attention on the issue. So remarks that touch the subject of a case, but are embedded within larger, unrelated, or more general remarks, should presumptively *not* give rise to any sort of judicial reliance. Context and venue are relevant in this regard. A President’s remarks at primarily celebratory, ceremonial, or informal occasions, particularly where they involve unscripted exchanges with members of the public or journalists, are unlikely to reflect such manifestation of intent. This is especially important given the speechwriting dynamics discussed in Part I. On this logic, the Pride Month remarks invoked in the *Log Cabin Republicans* case should not have given rise to judicial reliance. And one of the many presidential statements cited in *Texas v. United States* demonstrated an even more serious flaw: the transcript of the quoted remarks suggests that the statement “I just took action to change the law,” which the district court quoted repeatedly, was made in response to hecklers at a public event³¹¹—clear evidence of the absence of the type of

310. See generally Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 2 (describing a mode of realism in constitutional and public law that “would entail constitutional and public-law doctrines that penetrate the institutional black box and adapt legal doctrine to take account of how these institutions actually function in, and over, time”).

311. The exchange is lengthy, but worth reproducing here:

THE PRESIDENT: . . . I’ve said this before, so I just want to be clear, and I say it in front of immigrant rights groups all the time. Undocumented workers who broke our immigration laws should be held accountable. . . . [W]e’ll keep focusing our limited enforcement resources on those who actually pose a threat to our security. Felons, not

careful deliberation that should be a prerequisite to judicial reliance.³¹² In an unpublished opinion denying the government's motion to stay the preliminary injunction in the same case, the court made repeated reference to a televised "town hall" that postdated the issuance of the injunction.³¹³ The

families. Gangs, not some mom or dad who are working hard just trying to make a better life for their kids. But even —
 AUDIENCE MEMBER: Mr. President, that has been a lie. You have been deporting every —
 AUDIENCE: Booo —
 THE PRESIDENT: All right. Okay. All right. That's fine. All right.
 AUDIENCE MEMBER: Not one more! Stop deportations!
 AUDIENCE MEMBER: Not one more!
 THE PRESIDENT: Here, can I just say this? All right, I've listened to you. I heard you. I heard you. I heard you. All right? Now, I've been respectful. I let you holler. So let me—(applause). All right? Nobody is removing you. I've heard you. . . . Now, you're absolutely right that there have been significant numbers of deportations. That's true. *But what you're not paying attention to is the fact that I just took action to change the law.* (Applause).

Press Release, Office of the Press Sec'y, Remarks by the President on Immigration—Chicago, IL, The White House Office of the Press Secretary (Nov. 25, 2014), <https://www.whitehouse.gov/the-press-office/2014/11/25/remarks-president-immigration-chicago-il> [https://perma.cc/FLR9-ZMQN] (emphasis added). An additional source on which Texas relied in the Supreme Court was an interview in which the President responded to immigration-related questions. See Brief of Governor Abbott et al. as Amici Curiae in Support of Respondents, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674) ("I am president, I am not king. I can't do these things just by myself." (quoting Interview by Eddie "Piolin" Sotelo with President Barack Obama, on *Piolin por la Mañana* (Univision radio broadcast, Oct. 25, 2010) (transcript available at <http://latimesblogs.latimes.com/washington/2010/10/transcript-of-president-barack-obama-with-univision.html?Source=GovD> [https://perma.cc/JU3M-WRVX]))).

312. The guideline outlined above bears certain similarities to the treatment in the Catholic Church's canon law of the speech of the Pope. Not all papal speech carries the full force of the authority of the office. Rather, the Pope's pronouncements are differentially weighted, from pronouncements known as "*ex cathedra*," which are the most authoritative, to those entitled to substantially less weight, depending on manifested intent, content of speech, and circumstances. See Ladislav Orsy, S.J., *Stability and Development in Canon Law and the Case of "Definitive" Teaching*, 76 NOTRE DAME L. REV. 865, 876 n.29 ("The Pope uses his full apostolic authority when he defines, *ex cathedra*, an article of faith; it is a rare event, having happened only twice in recent history. . . . The Pope uses his apostolic authority, but not to its fullness, in all of his other pronouncements. . . . To determine the exact weight of such teachings is always a complex task; much depends on the Pope's intention (often to be reconstructed), on the internal content of the document, and on the document's historical circumstances.").

313. *Texas v. United States*, No. B-14-254, 2015 WL 1540022 (S.D. Tex. Apr. 7, 2015). In that opinion, the court repeatedly cited remarks made during an immigration town hall moderated by José Diaz-Balart. On the issue of standing, the court relied on presidential remarks to the effect that there would be "consequences" in the event that immigration officials failed to adhere to the new guidance, concluding that "[t]he President's message, specifically to those law enforcement officials employed within the Executive Branch, and more generally to the nation, is clear." *Id.* at *3 (quoting Press Release, Office of the Press Sec'y, Remarks by the President in Immigration Town Hall—Miami, FL (Feb. 25, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/02/25/remarks-president-immigration-town-hall-miami-fl> [https://perma.cc/ULF3-EXXY]); see also *id.* at *4 ("The President's statements have obvious significance to this case."). With respect to the APA, the court relied on the same town-hall statements. *Id.* ("Here, too, the President's explanation of the 2014 DHS Directive is important."); see also *id.* at *5 ("If there were

court found that the President's comments there cut against the government's arguments, citing them far more than any other source.

By contrast, the court in the same case made virtually no reference to the televised address at which the President actually announced the new initiative—likely drafted carefully and circulated to relevant stakeholders in advance, with contents that touched questions of legal authority and arguably manifested an intent to enter the legal arena.³¹⁴

B. *Presidential Speech and Other Executive Branch Statements*

Second, under ordinary circumstances, where presidential speech is inconsistent with executive branch positions offered in other, more authoritative sorts of documents or settings—directives, official memoranda, legal briefs—those documents, rather than the contents of presidential speeches, should be deemed to contain the authoritative statements of the position of the executive branch on a legal question. Judicial adherence to this general principle would help to ensure that the careful processes and subject-matter expertise reflected in such documents are not overshadowed by the contents of presidential statements. It would also give Presidents leeway to address topics that either are or could be subject to litigation, without concern about binding themselves to particular positions in court. On this guideline, too, both *Texas v. United States* and *Log Cabin Republicans* fall short. So too may one aspect of the recent district court opinion in *County of Santa Clara v. Trump*,³¹⁵ in which the court enjoined another early executive order issued by President Trump, this one titled “Enhancing Public Safety in the Interior of the United States,”³¹⁶ and widely referred to as the “sanctuary cities” executive order. The City of San Francisco and County of Santa Clara challenged the order as violating separation-of-powers principles, due process, and the Tenth Amendment, and a major question in the case was what the order *did*—whether it imposed new conditions on the receipt of federal funds, or merely required localities to comply with existing federal law. As the court described it, “[t]he Government’s primary defense is that the Order does not change the law, but merely directs the Attorney General and Secretary [of Homeland Security] to enforce existing law.”³¹⁷

any claim that the 2014 DHS Directive does not adopt a new position inconsistent with the INA, the President’s comments also lay that argument to rest.”).

314. See Press Release, Office of the Press Sec’y, *supra* note 172 (“Nothing about this action will benefit anyone who has come to this country recently, or who might try to come to America illegally in the future. It does not grant citizenship, or the right to stay here permanently, or offer the same benefits that citizens receive. And it’s certainly not amnesty, no matter how often the critics say it.”).

315. Nos. 17-cv-00574-WHO, 17-cv-00485-WHO, 2017 WL 1459081 (N.D. Cal. Apr. 25, 2017).

316. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

317. *Cty. of Santa Clara*, 2017 WL 1459081, at *7.

But the court did not credit this representation—it concluded, rather, based on both the text of the Order and a number of statements by both the President and the Attorney General,³¹⁸ that the order *did* impose new conditions, and accordingly that the localities were likely to succeed in their constitutional challenge.

It was surely appropriate for the court to rely on the text of the executive order, which the court maintained swept more broadly than the government argued. But it was arguably improper for the court to so thoroughly disregard DOJ's representations regarding the reach of the Order in favor of statements by the President and other executive branch officials.³¹⁹

This proposed guideline is perhaps a curious one from the perspective of the interests in accessibility, transparency, and accountability. Members of the public are far more likely to encounter a speech by the President than to actually read an agency-guidance memorandum or a brief filed in court. So does a proposal that would privilege those less-accessible sources above presidential speech thwart the public's ability to access and understand government action, properly attribute choices to political actors, and hold the right party or parties accountable?³²⁰

A partial answer may lie in the values of reason giving, procedural regularity, and rigor as administrative law (and core constitutional) values. One of the problems with reliance on presidential utterances is that they are typically not accompanied by the offering of a developed set of reasons, and they are frequently not subject to regular and rigorous processes. When their contents clash with representations that are both subject to a degree of procedural formality and (often) accompanied by reasons, the legal values of process and reason counsel in favor of the more formal and process-laden document—though it may be that the less formal the agency action, the more appropriate it is for courts to put additional stock in a presidential statement that conflicts with that document.³²¹

318. *Id.* at *14–15. In a slightly odd formulation, the court explained that it was taking judicial notice of the presidential statements; in one footnote, for example, the court wrote: “I take judicial notice of President Trump’s interview statements as the veracity of these statements ‘can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.’” *Id.* at *14 n.6 (quoting FED. R. EVID. § 201(b)(2)).

319. *See id.* at *2 (“Section 9(a), by its plain language, attempts to reach all federal grants The rest of the Order is broader still, addressing all federal funding. And if there was doubt about the scope of the Order, the President and Attorney General have erased it with their public comments.”).

320. For an argument that would seem to suggest resolving any such dispute in the direction of presidential speech, see Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836 (2015).

321. On this point, see generally HENRY M. HART JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 4 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (“[D]ecisions which are the duly arrived at result of duly established procedures . . . ought to be accepted as binding upon the whole society unless and until they are duly changed.”); Frederick Schauer, *Giving Reasons*, 47

In addition, judicial reliance on agency representations in these circumstances arguably advances, rather than undermines, democratic values like accountability, even if indirectly. That is, both the President and Congress have determined that the orderly administration of justice requires designated players within the executive branch to perform particular functions, including in litigation. For courts to give effect to this considered allocation of authority, then—including by crediting the position of DOJ in litigation—actually facilitates rather than impedes democratic accountability.³²²

In some ways, courts confronting tension between these two potential sources of authority are faced with a concrete embodiment of one important current in administrative law—the tension between expertise-based and political-accountability-based rationales for deference to agency action. The President’s utterances often represent the purest embodiment of politics. Filings in court and regulatory products—including the full range of formal and informal agency documents—are typically the result of expertise, though they may also reflect significant input from political leadership.³²³ Because the latter may reflect both expertise and politics, the best way to resolve any tension between the two is ordinarily to privilege the agency document.

A related objection may be that this recommendation is inconsistent with the Constitution’s vesting of the executive power in the President—that is, that it elevates subordinate officials above the President by privileging their contributions or views over his. But under this proposed principle, the President remains entirely free to exercise considerable authority over the executive branch, including by directing or at least influencing both agency action and particular representations in litigation. The principle merely works to ensure that courts do not become tools for the *circumvention* of the ordinary processes by which, and avenues through which, presidential power is exercised.

Properly understood, then, this principle is actually consistent with both an “overseer” and a “decider” vision of the President’s relationship to the administrative state. It merely requires that a President who proceeds in directive fashion do so *within* the administrative apparatus, with all of the

STAN. L. REV. 633, 641 (1995) (“[T]o provide a reason for a decision is to include that decision within a principle of greater generality than the decision itself.”).

322. Cf. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside: An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013) (arguing that the reality of congressional drafting should inform both theory and judicial practice).

323. See Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 541–47 (2015) (detailing the role of civil servants in “constraining and guiding administrative action and thus helping to preserve encumbered, heterogeneous government at the subconstitutional level”).

potential consequences—friction, pushback, perhaps even resignations—entailed by the exercise of that authority.

There are two subject-matter exceptions to this general principle, and I take them up in the subparts that follow. But a third exception has to do with reliance. That is, if presidential speech induces a degree of reliance on the part of members of the public, there may be circumstances under which courts *should* give effect to that speech, even where presidential speech conflicts with other executive branch statements.³²⁴ Some courts have essentially recognized such a doctrine, in the form of what is sometimes described as “entrapment by official misleading” or “entrapment by estoppel.”³²⁵

C. *Presidential Speech in the Foreign Affairs and National Security Spheres*

The two preceding principles offer general guidance for judicial treatment of presidential speech. But there may be good reason to vary that guidance in the context of presidential speech that touches matters of foreign affairs and national security.

It is, of course, in the foreign affairs context that presidential power is generally understood to sweep most broadly; the Court in *Curtiss-Wright*³²⁶ wrote of “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.”³²⁷ Although the Court in recent years has backed away from some of the language in *Curtiss-Wright* suggesting unbounded presidential power,³²⁸ the President is still understood to enjoy broad power in this sphere, especially compared to the office’s more limited powers in the domestic domain.³²⁹ So there may be good reason for differential treatment of

324. Cf. Mary D. Fan, *Legalization Conflicts and Reliance Defenses*, 92 WASH. U. L. REV. 907, 913 (2015) (advocating the availability of reliance defenses in the context of competing legalization regimes, so that “[l]aw enforcers cannot lull people or businesses into reasonable reliance only to later attack”); see also Zachary S. Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937 (2017) (arguing against a general due process-based doctrine of “nonenforcement reliance” but identifying several exceptions to this general rule).

325. See, e.g., *United States v. Batterjee*, 361 F.3d 1210, 1216 & n.6 (9th Cir. 2004); *United States v. Stewart*, 185 F.3d 112, 124 (3d Cir. 1999).

326. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

327. *Id.* at 320.

328. See *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2115 (2015) (Roberts, C.J., dissenting) (“[O]ur precedents have never accepted such a sweeping understanding of executive power [as the language in *Curtiss-Wright* would suggest].”).

329. See *id.* at 2097 (majority opinion) (“The President’s longstanding practice of exercising unenumerated foreign affairs powers reflects a constitutional directive that ‘the President ha[s] primary responsibility—along with the necessary power—to protect national security and to conduct the Nation’s foreign relations.’” (alteration in original) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 580 (2004) (Thomas, J., dissenting))).

presidential speech in the realm of foreign affairs, and to include within this category matters of national security, recognizing the significant elision of important distinctions such a move represents.

Kenneth Anderson and Benjamin Wittes recently argued, in a book that both reproduces and analyzes a number of Obama Administration national security speeches, that “[presidential and other senior executive officials’] speeches—at least with respect to international law—represent . . . the *opinio juris* of the United States. The speeches, in other words, are the considered, publicly articulated legal views of the [United States].”³³⁰ And David Pozen suggests, in his review of the same book, that history supports a degree of reliance on executive branch speeches (though he does not directly address courts as such): “[Such] speeches undergo a process of interagency clearance, which makes them a reliable guide to the [E]xecutive [B]ranch’s views. . . . [T]he use of high-level statements to convey the nation’s positions on international law and policy has a long pedigree.”³³¹

The international law concept of *opinio juris*, invoked by Wittes and Anderson to describe the speeches in their collection, is closely related to the idea of a “rule of recognition”—that is, some set of criteria for identifying when rules must be treated *as law*.³³² It is widely accepted that customary international law has two key components: (1) state practice and (2) *opinio juris*.³³³ *Opinio juris* is often defined as a requirement that a practice is “accepted as law”³³⁴—strikingly similar to many definitions of a rule of recognition. As the oft-cited *Continental Shelf* case frames it, “[t]he States concerned must . . . feel that they are conforming to what amounts to a legal obligation.”³³⁵

Most relevant for purposes of this discussion is how the existence of *opinio juris* is ascertained—often through statements of government officials, especially executive branch officials, regarding the binding status of a law or norm. Here an example is illustrative. In 2011, President Obama

330. KENNETH ANDERSON & BENJAMIN WITTES, *SPEAKING THE LAW: THE OBAMA ADMINISTRATION’S ADDRESSES ON NATIONAL SECURITY LAW* 7 (2015).

331. David Pozen, *The Rhetorical Presidency Meets the Drone Presidency*, NEW RAMBLER (2015) (reviewing ANDERSON & WITTES, *supra* note 325), <http://newramblerreview.com/book-reviews/law/the-rhetorical-presidency-meets-the-drone-presidency> [https://perma.cc/Y9VG-5VZD].

332. H.L.A. HART, *THE CONCEPT OF LAW* 94–95 (3d ed. 2012); Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 731 (2006).

333. See, e.g., Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT’L L. 115, 140 (2005).

334. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993.

335. *North Sea Continental Shelf* (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 77 (Feb. 20).

gave a speech regarding Article 75 of the Additional Protocol to the 1949 Geneva Convention.³³⁶ Although the Senate had not ratified the treaty, the President affirmed that “[t]he U.S. Government will . . . choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well.”³³⁷ A statement of this sort may well be sufficient to qualify as *opinio juris*—a statement that a particular source is binding and will be treated as such.³³⁸

The clarity of President Obama’s statement here seems to qualify it, in international law terms, to be treated as something like an authoritative statement of the United States’ position on its legal obligations. So from the perspective of the “intent to enter the legal arena” principle set forth in the preceding subpart, courts would be entitled to rely on it even absent some special rule applicable to speechmaking in the international law domain. But in light of the description in Part I of the processes by which speeches touching international and foreign affairs law and policy are developed, as an institutional matter there is generally reason to believe these speeches do represent the considered legal positions of the United States, rendering judicial reliance appropriate even absent the degree of clarity in the Article 75 example.³³⁹ And the same internal executive branch processes typically precede speechmaking in the national security domain, rendering similar reliance appropriate there.³⁴⁰

336. Protocol Additional to the Geneva Conventions of August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75, June 8, 1977, 1125 U.N.T.S. 3.

337. Press Release, Office of the Press Sec’y, Fact Sheet: New Actions on Guantánamo and Detainee Policy (Mar. 7, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy> [<https://perma.cc/5K99-Y7WD>].

338. See, e.g., Eric Talbot Jensen, *Presidential Pronouncements of Customary International Law as an Alternative to the Senate’s Advice and Consent*, 2015 B.Y.U.L. REV. 1525, 1547 (arguing that President Obama’s 2011 statement “incorporates Article 75 into CIL”).

339. One type of presidential speech that does not appear in any of the examples discussed above is the presidential threat. Matt Waxman has written of “the swelling scope of the President’s practice in wielding threatened force,” which no one today seriously questions the President’s power to do. Matthew C. Waxman, *The Power to Threaten War*, 123 YALE L.J. 1626, 1633 (2014). And of course, threats to use force are often (though not always) communicated in public statements. But threats as such are exceedingly unlikely to end up in judicial fora, so I do not address them here. See also Helen L. Norton, *Government Speech and the War on Terror*, 86 FORDHAM L. REV. (forthcoming Nov. 2017) (manuscript at 2) (discussing “wartime fearmongering”—that is, the “deliberate expressive effort to instill or exacerbate public fear of certain individuals or communities through stereotyping and scapegoating”).

340. See *supra* note 82 and accompanying text. But see Susan B. Glasser, *Trump National Security Team Blindsided by NATO Speech*, POLITICO MAG. (June 5, 2017), <http://www.politico.com/magazine/story/2017/06/05/trump-nato-speech-national-security-team-215227> [<https://perma.cc/2EFQ-36AK>].

A note here seems in order on the applicability of this general principle in the age of President Trump. Nearly a year into the Trump Administration, public reporting suggests that the President has abandoned a number of long-standing practices in foreign affairs and national security policy development,³⁴¹ and contradictions have arisen on a number of occasions between presidential statements and statements by other senior foreign policy officials.³⁴² If sufficient evidence accumulates that the general premises detailed above are no longer operative, the principle offered here may warrant revisiting. But given longstanding practice, across multiple Administrations of both parties, of careful development of such presidential statements, it seems too soon to advocate a major change in course. That said, where credible reporting *does* suggest that particular presidential statements were not carefully considered or did not result from customary executive branch processes, courts are justified in approaching them with care, and perhaps discounting them, especially where they conflict with other statements by executive branch officials.

D. Presidential Speech as Evidence of (Constitutionally Forbidden) Government Purpose

Finally, judicial reliance on presidential speech may be appropriate where such speech supplies relevant evidence of intent or purpose, in particular where an established legal test provides for the invalidity of government conduct when it is animated by a constitutionally impermissible purpose.

Equal protection challenges present the most obvious example. The Court has held that discriminatory intent is a required component of a successful equal protection challenge,³⁴³ and many courts have relied on

341. The short-lived addition of White House strategist Stephen Bannon to the National Security Council was the earliest and perhaps starkest public reflection of this change. *See* Glenn Thrush & Maggie Haberman, *Bannon Is Given Security Role Generally Held for Generals*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/stephen-bannon-donald-trump-national-security-council.html?mcubz=1> [<https://perma.cc/DE45-XQZX>]; *see also* Robert Costa & Abby Phillip, *Stephen Bannon Removed from National Security Council*, WASH. POST (Apr. 5, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/04/05/stephen-bannon-no-longer-a-member-of-national-security-council/> [<https://perma.cc/H5D5-HQ7U>].

342. *See, e.g.*, Michele Kelemen, *In an Afternoon, Trump and Tillerson Appear to Contradict Each Other on Qatar*, NPR (June 19, 2017), <http://www.npr.org/sections/parallels/2017/06/09/532294710/in-an-afternoon-trump-and-tillerson-appear-to-contradict-each-other-on-qatar> [<https://perma.cc/BA7S-KWTM>].

343. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979) (explaining that in the context of sex discrimination claims, “purposeful discrimination is ‘the condition that offends the Constitution.’” (quoting *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971))); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional . . .”).

statements by government officials as potentially relevant evidence of such intent.³⁴⁴ The Supreme Court itself, in the *Village of Arlington Heights*³⁴⁵ case, advised that in looking for evidence of the sort of discriminatory intent that would constitute a denial of equal protection, “[t]he legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body.”³⁴⁶ Nothing in this statement would seem by its logic to restrict consideration to statements by legislators; and where the conduct in question is executive action, statements by executive branch officials supply the most relevant evidence of intent.

The religion clauses of the First Amendment are similar. The Supreme Court has emphasized “the intuitive importance of official purpose to the realization of Establishment Clause values,”³⁴⁷ and courts adjudicating both Free Exercise and Establishment Clause claims have long considered statements by government officials in assessing the existence of an impermissible purpose to discriminate on the basis of religion.³⁴⁸

A number of scholars have expressed doubts about the quest for intent in the law generally (albeit frequently in the context of ordinary statutory interpretation, not necessarily constitutional adjudication), noting in particular the difficulty of attempting to ascertain intent in the context of multimember bodies, like legislatures.³⁴⁹ But whatever the merits of such

344. See, e.g., *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (invalidating a felon-disenfranchisement provision in the Alabama constitution based in part on statements by delegates at the constitutional convention); see also *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 229–30 (4th Cir. 2016) (considering legislative background, including the conduct of legislators, in identifying discriminatory intent).

345. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

346. *Id.* at 268.

347. *McCreary Cty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 861 (2005); see also *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014) (Alito, J., concurring) (noting the absence of evidence of “discriminatory intent” and explaining, “I would view this case very differently if the omission of these synagogues were intentional.”); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (requiring statutes to “have a secular legislative purpose”).

348. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540–41 (1993) (explaining that “[r]elevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body,” and citing numerous statements by “residents, members of the city council, and other city officials” demonstrating “significant hostility . . . toward the Santeria religion and its practice of animal sacrifice”); *Larson v. Valente*, 456 U.S. 228, 254 (1982) (finding in legislative history evidence that a selective registration and reporting requirement “was drafted with the explicit intention of including particular religious denominations and excluding others”).

349. See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* 321–33 (1986); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 430 (2005) (“[T]extualists do not believe that the premises governing an individual’s intended meaning translate well to a complex, multi-member legislative process.”); Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”*: *Legislative*

concerns—which have not, as yet, convinced courts to retreat from a focus on intent—those concerns are arguably misplaced, or at least should have less force, in the context of the Executive, and in particular where executive action is at issue.³⁵⁰ The difficulties of ascertaining intent in the context of legislatures are simply not presented in the case of an executive branch official like the President; indeed, in the context of the executive order, the only intent that *could* matter is the intent of the President.

There may be circumstances in which the recommendations offered in this Part are in some tension. When the President speaks on a matter of foreign affairs, say, but his words conflict with more authoritative representations on the same subject by other executive branch players, courts will have to choose between two of the principles I propose. But there does not seem to be any genuine tension between *this* recommendation—that is, that presidential speech may appropriately be considered when it supplies evidence of purpose—and the principle that in general, more formal documents by other executive branch entities should be entitled to more weight than presidential statements. That is because none of the arguments for privileging the other documents—particularly based in internal executive branch processes—has any force in this context. When it comes to the President’s purpose, other executive branch submissions could not possibly overcome the President’s own words. Accordingly, presidential statements should clearly control in such cases.

The litigation over President Trump’s travel ban executive orders—still ongoing at the time of this writing—presents these questions in a direct and high-stakes context. The recommendation provided above suggests that judicial consideration of President Trump’s statements *is* appropriate where those statements supply evidence of purpose. If, by contrast, the travel-ban cases had featured disputes about the *scope or operation* of the EOs—if, say, rather than a memo from the White House Counsel purporting to clarify that green card holders were exempt from the initial restriction, the President himself had made a statement in an interview to that effect—it would be appropriate for courts to decline to rely on that statement, if it conflicted with

Intent as Oxymoron, 12 INT’L REV. L. & ECON. 239, 244 (1992) (“[T]here is not a single legislative intent, but rather many *legislators’* intents.”); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) (“That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition.”). Professor Richard Fallon’s recent piece, *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523 (2016), urges “reexamination and reform” of conceptions of forbidden legislative intent, *id.* at 527, but expressly brackets the question of executive officials’ intent, acknowledging that “[c]ases involving forbidden motivations by individual officials might . . . call for a different, and more diverse, pattern of doctrinal responses than cases of forbidden legislative intent,” *id.* at 531.

350. It is striking how little scholarship examines intent and the Executive in any systematic fashion. For a more detailed account of this phenomenon, see Katherine Shaw, *Speech, Intent, and the Executive* (unpublished manuscript) (on file with author).

either the text of the executive order or representations and arguments offered by DOJ.

Conclusion

Not just the office of the presidency but the speech of the President is in many ways unique in our constitutional scheme.³⁵¹ As Justice Jackson wrote in his concurring opinion in *Youngstown*:

No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.³⁵²

Despite the mountains of literature on presidential rhetoric, the role of presidential speech in the courts has gone uniquely unexamined. But this particular site of executive–judicial interactions is a potentially significant one, with hugely consequential implications in individual cases, as well as for administrative law practice and doctrine, and both internal and external separation of powers. In light of the stakes, it is striking that our pitched battles about interpretive methodology in statutory interpretation—in particular, courts’ use of legislative history in construing statutes—lack even a rough analogue when it comes to judicial treatment of statements by the President and other executive branch officials.

What this piece has attempted to show is that judicial reliance on presidential speech occurs with surprising frequency; and that, although invocations of speech can impact the results in high-stakes cases, no clear principles guide its use. By cataloging a number of such invocations, and providing an analytical framework, a critique, and a set of guiding principles, this piece aims to provide both courts and the executive branch with a new set of tools.

351. Roderick P. Hart, *Why Do They Talk That Way? A Research Agenda for the Presidency*, 32 PRESIDENTIAL STUD. Q. 693, 707 (2002) (“What a president says today can become law tomorrow. A presidential malapropism can send the stock markets tumbling, and a presidential bon mot can give his people great joy.”).

352. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653–54 (1952) (Jackson, J., concurring).