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The Justices Don't Have Much Guidance for Handling Trump's Tweets

Q&A: Cardozo's Kate Shaw on her new article "Beyond the Bully Pulpit: Presidential Speech in the Courts."

Marcia Coyle, The National Law Journal

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President Donald Trump's [tweets and remarks about his travel-ban executive order](#) could mean very little—or a whole lot—if the U.S. Supreme Court agrees to decide challenges to the controversial immigration policy, [according to a new study](#) that looked at how courts have grappled with statements from presidents.

[Kate-Shaw-Vert-201706140955.jpg]

Lower courts don't offer much guidance on how to resolve any clashes between presidential speech and the U.S. Justice Department's litigation positions, Kate Shaw of the Benjamin N. Cardozo School of Law found in her review.

In "Beyond the Bully Pulpit: Presidential Speech in the Courts," Shaw undertook what she called "the first systematic examination of presidential speech in the courts." Shaw, who joined the law school in 2013, [previously worked in the](#) Obama White House Counsel's Office as a special assistant and associate counsel to the president. She is a former clerk to Justice John Paul Stevens.

In her article, to be published in the Texas Law Review, Shaw said judges and scholars have not grappled with how to weigh presidential speech in any sustained fashion even though presidential speech is cited 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," she wrote.

The National Law Journal recently caught up with Shaw about her timely study. Highlights from our conversation, below, were edited for length and clarity.

NLJ: Why did you begin this research project?

Shaw: I initially came to this project because I was closely following the litigation around President Barack Obama's immigration executive action in *Texas v. United States*. One of the things I found most striking in the district court opinion enjoining the policy was the court's repeated invocation of presidential speech, including speech that seemed to conflict, in important ways, with representations made by DOJ or DHS.

So I started to wonder: Was this opinion an outlier? Or is this sort of judicial reliance on presidential speech actually a broader phenomenon? And I realized I'd never read any treatment of the question.

I cast a pretty broad net, looking across federal court decisions for reliance on presidential speech. I wanted to focus on speeches—not executive orders; not signing statements. Those are important subjects, but there's a very developed literature on both, and speech felt like something that hadn't really been addressed. I started the project in the waning days of the Obama administration, when presidential Twitter was still in its early stages, and there still isn't much case law involving Twitter, so my project is mostly focused on the presidential spoken word. But much of what it says is, I think, broadly applicable to presidential statements made via Twitter.

Which president or presidents gets credit for being the first to use rhetoric to shape the presidency?

Political scientist Jeffrey Tulis' seminal "The Rhetorical Presidency" traces this change in presidential leadership primarily to Woodrow Wilson. Others credit the shift to Teddy Roosevelt, who coined the term "the bully pulpit." But there's pretty broad agreement that there's a real change, in terms of an increase in direct popular presidential appeals, around the time of the presidencies of Woodrow Wilson and Teddy Roosevelt. So a bit over a century ago.

Was any president comparable in his time to President Trump and his use of rhetoric, particularly social media, to shape his presidency?

Well, most obvious is FDR's use of the "fireside chat" to directly reach a large percentage of American households—this was a hugely significant innovation.

Second, I really don't want to overstate the parallels here, but I will point to President Andrew Johnson as one president whose use of rhetoric really departed from the norms—and who was impeached for it, among other things. (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.") Now, much of this was about his criticism of Congress. But it's definitely a significant moment in the history of presidential rhetoric.

Can you generalize about how courts or the Supreme Court have used presidential statements in their decisions?

Not really—for the most part it appears largely ad hoc. Part of my project is to respond to this—to propose some generally applicable guidelines for courts to use in these cases.

Should courts weigh Trump's statements about his immigration executive orders in determining their constitutionality or legality?

Though I'm generally dubious about judicial reliance on presidential speech, I think such reliance may be appropriate where the speech supplies 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. And here, I do think the speech goes to intent in a way that makes its consideration appropriate.

When should courts give weight to presidential statements?

Here's my general view: It's for the most part improper for a court to give legal effect to presidential statements, especially where those statements conflict with representations made by DOJ. That general principle, however, is subject to a number of exceptions: 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.

Should the Supreme Court establish guidelines for the use of presidential statements if it takes up the litigation over the immigration executive order, or do you think it is likely to be a case-by-case issue going forward?

I think it would be very helpful for the court to offer general guidelines. But if it takes the case and reaches the merits of the constitutional question, I suspect it will limit itself to the facts of this case, so lower courts are going to have to find their way in a case-by-case fashion. But I do think guidance would be helpful—not just to courts, but to lawyers within the executive branch advising on the potential consequences of these statements.

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