Did He Really Just Say That?

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Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 **Tex. L. Rev.** 71 (2017), available at SSRN.

President Donald Trump is a loquacious man. He speaks at rallies, he speaks at interviews, he speaks at press conferences, he speaks in addresses to Congress, and—nearly every day—he speaks on Twitter. Sometimes, he speaks about his own speech, as when, at a recent rally in Phoenix, Arizona, he quoted at length, though with notable omissions, from his own earlier statements concerning the recent events in Charlottesville, Virginia, where a woman was killed at a protest by neo-Nazis and white nationalists.

In her recently published article, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, Professor Kate Shaw examines the phenomenon of presidential speech and explains how the courts should treat presidential statements in the course of deciding cases that challenge executive-branch action. Her article has already (and rightly) enjoyed a fair share of the limelight; Professor Shaw's work on presidential speech was featured in the *New Yorker* and in the *National Law Journal*. She also wrote an op-ed on presidential speech in the *New York Times* earlier this summer. So, while this Jot comes late to the party, I hope it will persuade administrative law scholars who haven't yet encountered this article that it is still well worth a read. Public presidential statements aimed at influencing agency behavior are an increasingly important facet of "presidential administration," in the phrase coined by then-Professor Elena Kagan in her famous article. And while Professor Shaw's discussion ranges far beyond the words of the sitting President, this article is especially salient nowadays, when the headlines are often consumed with reporting and dissecting President Trump's every utterance.

Professor Shaw's article rests upon the observation that the President is both a person and an office, and that conflating the two is an error. Although the President may sit atop of the executive branch, all of the President's personal pronouncements cannot be attributed to the executive branch as if they were the official positions of that branch. At times—like the Pope—the President speaks "ex cathedra," with the "full force of the authority of the office"; at other times, however, the President speaks more in the capacity of a private citizen. (P. 130, N.312.) When statements by the President contradict official pronouncements by agencies or undercut the executive branch's litigating positions, how should courts respond?

This is one of the key questions addressed by this article. To tackle it, Professor Shaw begins by describing the process of writing presidential speeches (Pp. 79-83) and sketching the institutions and procedures that structure presidential speech (Pp. 83-88). She then examines how presidential speech relates to ongoing scholarly debates in administrative law and in statutory interpretation. (Pp. 89-99.) After offering a helpful taxonomy of the types of statements that Presidents make ("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"), she next explores how the courts have treated statements from each category. (Pp. 99-123.) There appears to be a remarkable degree of variation in the degree to which courts have relied on presidential statements, a disarray that makes clear that some guiding principles need to be articulated.

In the final part of the article, Professor Shaw offers this guidance. (Pp. 129-140.) She proposes that courts eschew reliance on presidential statements "offered in the spirit of advocacy, persuasion, or pure politics, where those statements do not reflect considered legal positions" or a "manifest[] … intent to enter the legal arena," but with one important exception: in situations where those statements are offered as evidence of the President's purpose or intent. (P. 129). That is because, when the President's own purpose or intent is at issue in a case, the executive branch is best viewed as an "it, not a they." Or, as she puts it, "[w]hen 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." (P. 139.) As Professor Shaw notes, this carve-out has relevance to the ongoing litigation challenging the "travel ban" executive orders on the basis that the bans flow from religious animus by the President against Muslims; the courts, she argues, can properly rely on presidential statements if they go to show illegitimate animus, while they should not rely on presidential statements concerning the "scope or operation" of the executive orders if they were to conflict with the orders' language or DOJ's litigating positions. (P. 139.)

It is important to stress that much of Professor Shaw's paper focuses on *actual presidential speeches*—i.e., on statements that are normally preceded by some degree of advance planning and discussion. (See Pp. 78-79 and N.14.) But what of presidential utterances in informal formats—for example, on Twitter or on Facebook—and what of extemporaneous or unscripted remarks made by the President—such as in response to journalists' questions, or at campaign rallies or other events? President Trump has already made an enormous number of such informal statements, and plenty of them have already prompted litigation. And what should courts do in the event that the President disowns the authorship of speech (such as tweets) that he appears—online, anyway—to have written? It would be interesting to see Professor Shaw revisit this topic to provide a sustained examination of how courts should address these more informal varietals of presidential speech.

Expanding the inquiry beyond courts to agencies would also be valuable. A long-running debate in administrative law has focused on whether the President should act as an "overseer" or a "decider" of executive-branch action. (Pp. 89-91.) Professor Shaw's article highlights an important aspect of that question: how the President uses public statements to attempt to "decide" or "oversee" executive-branch action. Sometimes, the President's words alone may not produce policy change within the executive branch, unless those words assume a particular form and are communicated through the proper channels. For example, a tweet from the President was evidently not enough to end the policy of accepting transgender recruits and soldiers; instead, the Pentagon announced that it would await formal guidance to that effect, which subsequently arrived.[1] At other times, however, it may be that executive-branch officials will take their cue to act from the President's public statements alone, and take consequential administrative actions *without* first waiting for all the paperwork to be completed. When do executive-branch officials do the first thing, and when do they do the second? When *ought* they do the first thing, and when *ought* they do the second? As the growing literature on internal separation-of-powers suggests, examining how presidential speech is received and weighed by subordinates *within* the executive branch may matter quite as much as how it is received and weighed by Article III courts. The response by executive-branch subordinates to informal presidential speech may determine the future evolution of "presidential administration"—and may prompt some to reappraise then-Professor Kagan's largely positive assessment of its legitimacy and desirability.

In the years to come, there will be ample time and occasion to consider these and other questions that may be raised by "all the president's words." I will look forward to reading what Professor Shaw has to say about what the President has to say.

1. In a poignant sign of the times, in January 2018 the *Harvard Law Review* inaugurated—alongside

> the venerable categories of Recent Legislation, Recent Publications, and Recent Cases—a new genre of "Recent" thing: "Recent Social Media Posts." See "Recent Social Media Posts: *Donald J. Trump (@realDonaldTrump)", Twitter (July 26, 2017, 5:55–6:08 AM), https://perma.cc/X7J4-CUL3* ", 131 **Harv. L. Rev.** 934 (2018).

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