

Think of an Elephant? Tweeting as "Framing" Executive Power

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THINK OF AN ELEPHANT? TWEETING AS “FRAMING” EXECUTIVE POWER

FERNANDO R. LAGUARDA*

@realDonaldTrump

Sorry Chief Justice John Roberts, but you do indeed have ‘Obama judges,’ and they have a much different point of view than the people who are charged with the safety of our country.¹

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¹ Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 21, 2018, 12:51 PM), <https://twitter.com/realdonaldtrump/status/1065346909362143232>.

INTRODUCTION

The modern American president plays a unique role in public life. No other individuals in the federal government wield as much power by virtue of their office and the accumulated impact of custom and tradition.² Although the framers of the United States Constitution sought to avoid replicating the British monarchy when they vested executive power in a president,³ the modern presidency arguably plays an almost monarchical role.⁴ One of the most significant components of executive power is what President Teddy Roosevelt called the “Bully Pulpit,”⁵ or the ability to speak to a wider audience than any other figure in public life and attract attention for that speech.⁶ With a larger audience comes a greater ability to influence the legal and legislative landscape.

Professor Katherine Shaw has examined the role of presidential speech and introduced a framework for analyzing its appropriate legal effect.⁷ By identifying the modes of judicial reliance on presidential speech, she argues that there is a difference between what Professor Shaw calls presidential “storytelling” and speech that articulates or advances a legal position.⁸ However, the specific impact of presidential speech that is intended to strategically “frame” public discourse—and governmental discourse in particular—is missing from her taxonomy.⁹ The absence is especially striking given the rise of powerful social media platforms and the tweeting proclivities of the current president. In today’s fragmented media environment,¹⁰ the president has a unique ability to speak to both the American people and the federal government, and whatever he says sets the agenda for public discourse.¹¹

² CHARLES EDEL, *TRUMP AND THE US PRESIDENCY: THE PAST, PRESENT AND FUTURE OF AMERICA’S HIGHEST OFFICE* 4 (U.S. Studies Ctr. at the Univ. of Sydney ed., 2018)

³ Steven G. Calabresi et al., *The Rise and Fall of the Separation of Powers*, 106 NW. U. L. REV. 527, 542 (2012).

⁴ The combination of power and ceremony in the presidential system, along with the rise of the modern administrative state and powerful military apparatus both controlled by the presidency, arguably create a modern “monarchy” unlike what the Framers anticipated.

⁵ *Federal Power: Theodore Roosevelt*, BILL OF RTS. INST., <https://billofrightsinstitute.org/educate/educator-resources/lessons-plans/presidents-constitution/federal-power-theodore-roosevelt/> (last visited Jul. 13, 2019) (“[B]ully’ meaning ‘wonderful’ and ‘pulpit’ meaning ‘a preaching position.’”).

⁶ *Id.* “[Theodore Roosevelt’s] use of the bully pulpit contributed to the greatest expansion of federal power in the country’s history to that time.”

⁷ Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 71-140 (2017).

⁸ Professor Shaw argues that it is mostly inappropriate for courts to give legal effect to presidential statements that are not intended to have legal effect (viz., political storytelling, civic interpretation, persuasion and mobilization) as opposed to the articulation of considered legal positions. *Id.* at 76.

⁹ *See id.* at 71-140.

¹⁰ *See, e.g.*, BRUCE M. OWEN & STEVEN S. WILDMAN, *VIDEO ECONOMICS* 64-101 (Harvard Univ. Press ed., 1992) (showing how increased competition in video programming can reduce programming diversity).

¹¹ *See* Bethany A. Conway et al., *The Rise of Twitter in the Political Campaign: Searching for Intermedia Agenda-Setting Effects in the Presidential Primary*, 20 J. COMPUTER-MEDIATED COMM. 363, 366 (2015).

Every generation of new technology imbues informal presidential speech with more power by virtue of the larger audience attracted and greater access to that audience. We have evolved from whistle-stop speeches¹² to radio “fireside chats”¹³ to televised presidential press conferences¹⁴ to modern social media¹⁵ that allows one voice to bypass the media and speak directly and without filter to a mass audience. Donald J. Trump has taken full advantage; in fact, his conduct represents the apotheosis of Twitter as political speech.¹⁶ The “Trump Twitter Archive” categorizes and allows the searching (and exporting) of his tweets since 2009.¹⁷ Beginning with a self-promoting reference to his appearance on *The Late Show* in 2009, he has posted nearly 40,000 Tweets, or about eleven or twelve per day,¹⁸ which is roughly double the rate of the average user.¹⁹ And this activity is strategic. As the *New York Times* has pointed out, Donald Trump “mastered” Twitter as a tool of “political promotion, distraction, score-settling, and attack.”²⁰

This article argues that presidential tweeting not only expresses legal or policy directives and explains legal or policy positions, but it also “frames”²¹ issues for eventual government action—even when contained in the social media wrapper of a 280-character Tweet. It is especially important *not* to discount such communication as mere “storytelling” because, in the same way that tweeting can deflect, divert, and distract the general public and news

¹² Whistle-stop speeches refer to a form of campaigning where politicians travelled from town to town by rail, giving speeches from the rear platform of the train. See, e.g., STEVEN R. GOLDZWIG, TRUMAN’S WHISTLE-STOP CAMPAIGN 21-22, 27-28 (2008) (attributing Truman’s 1948 presidential victory to his whistle-stop speeches).

¹³ Fireside chats refer to a series of thirty radio addresses FDR delivered during his presidency. See Sebastian Mallaby, *The Bullied Pulpit: A Weak Chief Executive Makes Worse Foreign Policy*, 79 FOREIGN AFF. 2 (2000).

¹⁴ See *id.*; Andrew Glass, *JFK holds first televised news conference, Jan. 25, 1961*, POLITICO (Jan. 25, 2018, 2:05 AM), <https://www.politico.com/story/2018/01/25/jfk-holds-first-televised-news-conference-jan-25-1961-355093>.

¹⁵ See Soumitra Dutta & Matthew Fraser, *Barack Obama and the Facebook Election*, U.S. NEWS (Nov. 19, 2008), <https://www.usnews.com/opinion/articles/2008/11/19/barack-obama-and-the-facebook-election>.

¹⁶ Much like his predecessor President Obama’s use of Facebook, President Trump leveraged the social media platform, Twitter, to communicate with the public. Nicol Turner Lee, *How the President’s Twitter Account Affects Civil Society*, THE BROOKINGS INST.: TECHTANK (Feb. 16, 2017), <https://www.brookings.edu/blog/techtank/2017/02/16/how-the-presidents-twitter-account-affects-civil-society/>.

¹⁷ TRUMP TWITTER ARCHIVE, <http://www.trumptwitterarchive.com/archive>. The home page allows users to search for how many tweets mention “loser” (286 as of Jul. 4, 2019) and “dumb” or “dummy” (231 as of Jul. 4, 2019), for example.

¹⁸ Joseph D. Lyons, *How Many Times Does Trump Tweet A Day? The President Basically Lives On Twitter*, BUSTLE (May 21, 2018), <https://www.bustle.com/p/how-many-times-does-trump-tweet-a-day-the-president-basically-lives-on-twitter-8909583>.

¹⁹ *Twitter by the Numbers: Stats, Demographics & Fun Facts*, OMNICORE, <https://www.omnicoreagency.com/twitter-statistics/> (last updated Jan. 6, 2019) (noting Twitter has 100 million daily active users and 500 million tweets are posted per day).

²⁰ Michael Barbaro, *Pithy, Mean and Powerful: How Donald Trump Mastered Twitter for 2016*, N.Y. TIMES (Oct. 5, 2015), <https://www.nytimes.com/2015/10/06/us/politics/donald-trump-twitter-use-campaign-2016.html>.

²¹ Framing theory “suggests that how something is presented to the audience (called “the frame”) influences the choices people make about how to process that information.” *Framing Theory*, MASS COMM’N THEORY, <https://masscommtheory.com/theory-overviews/framing-theory/> (last visited July 2, 2019). By “framing” issues through tweets, the president is deliberately setting a political agenda.

media, presidential tweets can preemptively frame policy issues for action *by the federal government* and serve as an important vehicle for wielding the power of the modern presidency in the hands of its current occupant.

The aim of this article is quite modest. I am not attempting to quantify the impact of presidential tweeting or argue that it deserves unique weight as a form of presidential communication. The goal is rather to situate tweeting by this president within the broader framework within which we understand modern executive power. From there, I seek to argue that tweeting is not merely entertainment or just a distraction but a form of informal power exercised to influence government action by framing policy issues in terms favorable to the president's agenda.

The potential impact of presidential tweeting as framing is especially pronounced with respect to its impact on the agenda-setting activities of the federal government. Presidential tweets matter inside regulatory agencies charged with most of the work of the modern administrative state. Unelected public servants, whether or not they are political appointees,²² have vast discretion to act or not act in the course of everyday governance. The messages coming from the president through all channels of communication, formal and informal, including social media and Twitter, affect their decisions as to how they will discharge their duties. Therefore, the impact of presidential tweets as “framing”—shaping government policy—should not be ignored and, in fact, should be better understood.

The article proceeds in three parts. Part I reviews presidential lawmaking as traditionally understood and the role of the president in driving government action.²³ Presidential lawmaking includes not only the president's traditional areas of authority under Article II of the Constitution and other statutes but also the powers of the president as chief executive of the administrative state, promoting a regulatory agenda. These mechanisms of executive and regulatory power are wielded not only through formal directives but also through informal channels of communication, of which (I argue) Twitter should be considered among the most important.

Part II reviews the legal impact of presidential speech, building upon Professor Katherine Shaw's helpful taxonomy of presidential speech.²⁴ In describing his concept of tweeting as “framing,” linguist George Lakoff explains how language affects an audience by anchoring its understanding of a message in a way the speaker chooses.²⁵ The president conveys a wide range of meaning through “speech” intended to command, explain, or exhort. Specific tweets do not

²² See S. COMM. ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, 114TH CONG., UNITED STATES GOVERNMENTAL POLICY AND SUPPORTING POSITIONS 1-212 (Comm. Print 2016) (noting that out of the nearly two million people employed by the federal government, over 8,000 of those positions are available to political appointees following each presidential election).

²³ See *infra* Part I.

²⁴ See *infra* Part II.

²⁵ GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE—THE ESSENTIAL GUIDE FOR PROGRESSIVES 4 (2004) [hereinafter LAKOFF, DON'T THINK OF AN ELEPHANT!]; George Lakoff, *Trump's Twitter Distraction*, GEORGE LAKOFF, <https://georgelakoff.com/2017/03/07/trumps-twitter-distraction/> (last updated Mar. 7, 2017) [hereinafter Lakoff, *Trump's Twitter Distraction*].

come wrapped with instructions (e.g., “this one is a policy directive,” or “this one is a legal interpretation,” or “this is just me venting”). But the interpretive process itself further “anchors” the frame these powerful tweets convey.

Part III examines the potential impact of presidential tweeting on agenda-setting within the federal government.²⁶ The section begins with an overview of Twitter and its political impact. Next, the section suggests that presidential tweeting as “framing” or “re-framing” policy options for the executive branch needs more attention. Regulatory agencies do not operate in a vacuum: their actions are constrained not only by law but also by the choices made in the process of pursuing a regulatory, or deregulatory, agenda established through legislation and effected by the president. Although such powers are typically left to the appropriate agency, presidents have broad power when it comes to gap filling, interpreting statutes, or even deciding whether or how to regulate (or de-regulate).

Through “framing” language, the president provides a point of reference for policymakers that can anchor or influence their exercise of discretion. It is not so much that “framing” language directs a certain outcome but that it suggests to policymakers a path that may otherwise have been closed (or unavailable) due to past practice or mere convention. The article concludes by observing that tweets as a “framing” device can and do influence administrative agendas, and should not be ignored as simple political rhetoric.

I. PRESIDENTIAL LAWMAKING

This Part reviews presidential lawmaking as traditionally understood and the role of the president in driving government action. Presidential lawmaking includes not only the president’s traditional areas of authority under Article II of the Constitution and other statutes, but the president as chief executive of the administrative state, promoting a regulatory agenda. I am not arguing that the line between “formal” and “informal” power—or even the definiteness of the categories themselves—is precise. The point here is to understand that the mechanisms of executive and regulatory power are wielded *not only* through formal categories of directives but also through informal channels of communication and persuasion over individuals within government agencies, of which (I argue) Twitter should be considered among the most important.

A. FORMAL AUTHORITY

The president’s traditional power to direct the activity of the executive branch stems either from “an Act of Congress or from the Constitution itself.”²⁷ Flowing from this authority, presidents have developed a wide range of tools to command government action. In this manner, the president “takes on aspects of Congress, shaping legislation and sometimes using executive tools to manipulate the congressional process itself” and is “actively involved in rulemaking[,] . . . drafting regulations or using his or her own tools to substitute for them.”²⁸

²⁶ See *infra* Part III.

²⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1951); see also U.S. CONST. art. II §2.

²⁸ Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1818-19 (2015).

Article II grants the president authority to appoint principal officers and heads of departments.²⁹ The Supreme Court has interpreted that grant broadly to include the power to remove those officers.³⁰ Congress may vest the appointment power for minor officers with the president or elsewhere, and it may condition their removal, for example, on cause or some other factor.³¹ The president also has the authority to require appointees to report on the state of affairs of their areas of responsibility, providing a mechanism for accountability.³² And the Supreme Court has broadly interpreted the “take care” clause,³³ giving the president wide authority to ensure the government functions.³⁴

Tools of “unorthodox lawmaking” by the president include signing statements,³⁵ initiating legislation,³⁶ executive orders and memoranda (so-called “quasi-legislation”),³⁷ delegation to policy leaders within the White House,³⁸ rulemaking (e.g., through Office of Information and Regulatory Affairs),³⁹ and the issuance of “quasi-rules such as guidance, bulletins, Frequently

²⁹ U.S. CONST. art. II, § 2.

³⁰ *E.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483-84 (2010).

³¹ U.S. CONST. art. II, § 2; *see, e.g.*, Dodd Frank Act, 12 U.S.C. § 5491(c)(3) (2019) (“The President may remove the [Consumer Financial Protection Bureau] Director for inefficiency, neglect of duty, or malfeasance in office.”)

³² U.S. CONST. art. II, § 2.

³³ U.S. CONST. art. II, § 3 (stating “[the president] shall take care that the laws be faithfully executed”).

³⁴ *E.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 699 (1951).

³⁵ *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 255-56 (1994). *See generally* Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 312–21 (2006) (recounting history of signing statements by American presidents through George W. Bush).

³⁶ *See also* Rajiv Mohan, *Chevron and the President’s Role in the Legislative Process*, 64 ADMIN. L. REV. 794, 797-806, 819-27 (2012); Symposium, *Developments in the Law: Presidential Authority*, 125 HARV. L. REV. 2059, 2068-89, 2113-34 (2012) (describing the president as legislative initiator).

³⁷ Gluck, *supra* note 28, at 1820-21; *see also* Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-day America*, 28 J. LEGIS. 1, 6-10, 21-32, 59-74 (2002); Kenneth R. Mayer, *With the Stroke of A Pen: Executive Orders and Presidential Powers*, 61 J. POL. 445, 445-66 (1999).

³⁸ Peter Ketcham-Colwill, *Presidential Influence over Agency Rulemaking Through Regulatory Review*, 82 GEO. WASH. L. REV. 1622, 1623-53 (2014); Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1128-58 (2010).

³⁹ *See* ROBERT SPITZER, *THE PRESIDENCY AND PUBLIC POLICY: THE FOUR ARENAS OF PRESIDENTIAL POWER* 15-25, 150-57 (1982) (discussing issuance of regulations); Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1054-68, 1107-23 (2013).

Asked Questions, policy statements, memoranda, and letters to state officials.”⁴⁰ Without question, the president “has and uses considerable practical authority to direct agencies.”⁴¹

B. INFORMAL AUTHORITY

In addition to “formal” authority under the Constitution and statutes, presidents also wield significant “informal” authority over the machinery of government. To understand the scope of informal presidential authority over government agencies, it is important first to understand (1) the scope of agency discretion and (2) the role of organizational norms and culture in agency decision-making.

1. AGENCY DISCRETION

To be sure, agencies are creatures of Congress and have “no power to act . . . unless and until Congress confers power” on them.⁴² However, statutory commands are usually too vague to provide clear guidelines to agencies. As a result, the concept of discretion pervades both administrative law and the on-the-ground work of administrative agencies.⁴³ Agencies regularly exercise discretion in implementing delegated statutory authority. Many of their statutory mandates dictated by Congress are broadly worded, requiring regulation in the public interest or for just and reasonable purposes.⁴⁴

Once Congress confers power, courts give considerable deference to the agency’s interpretation of the statutes entrusted to it by Congress.⁴⁵ Part of this level of deference flows from the nature of the modern administrative state. Congress has created hundreds of agencies to

⁴⁰ Gluck, *supra* note 28, at 1822; *see also* HAROLD C. RELYA, CONG. RESEARCH SERV., 98-611., PRESIDENTIAL DIRECTIVES: BACKGROUND AND OVERVIEW 2-16 (2008); Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 269, 273-81, 288-91 (2001); Jessica M. Stricklin, *The Most Dangerous Directive: The Rise of Presidential Memoranda in the Twenty-First Century as a Legislative Shortcut*, 88 TUL. L. REV. 398, 404-10 (2013).

⁴¹ Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1156 (2015). Multiple White House offices are involved in reviewing and overseeing executive agency activities. Lisa Schultz Bressman & Michael P. Vandenburg, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006). Of course, the president’s authority is at its maximum when Congress grants power to the president or concurs in its use. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (Jackson, J., concurring) (1951).

⁴² *New York v. Fed. Energy Regulatory Comm’n*, 535 U.S. 1, 18 (2002).

⁴³ *See* Robert L. Glicksman & Emily Hammond, *Agency Behavior and Discretion on Remand*, 32 J. LAND USE & ENVTL. L. 483, 483 (2017).

⁴⁴ *See* *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 473-76 (2001) (providing further examples); *see also* Jonathan Turley, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013), https://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-of-government/2013/05/24/c7faad0-c2ed-11e2-9fe2-6ee52d0eb7c1_story.html?utm_term=.b946d7157e3c.

⁴⁵ *See* *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (“[T]he power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”).

address countless problems by applying a high level of expertise; thus, the courts place substantial trust in these experts. And part of this deference flows from the evolution of doctrines of judicial review of agency decision-making.⁴⁶ Indeed, the very point of *Chevron* was to give agencies discretion to interpret ambiguous provisions in statutes through agency-administered regulations as an exercise in policymaking.⁴⁷

2. AGENCY DECISION-MAKING STRATEGIES

Ultimately, agency discretion is wielded within a framework of norms and beliefs.⁴⁸ “Norms” are expectations as to what constitutes acceptable behavior.⁴⁹ Whether a particular course of action is “acceptable” or not is premised in part on the strength “of the logical connection between the reasons given for the actions and the principles, values, or guidelines, to which they relate.”⁵⁰ Agency decision-makers who can justify their actions in terms of the purposes for which their agencies exist are more likely to obtain support and buy-in from their colleagues.⁵¹

The work of agencies and their exercise of discretion is an individual project, most importantly undertaken by political appointees:

Political appointees, often not experts, are normally responsible for managing agencies and determining policy. And policy often reflects political, not simply “scientific” considerations. Agency decisions will also occasionally reflect “tunnel vision,” an agency’s supreme confidence in the importance of its own mission to the point where it leaves common sense aside. . . .⁵²

The most important regulatory “decision” any political appointee can make is ultimately that of choosing a “strategy” of regulation: in essence, an “agenda.”⁵³ Regulatory strategy is mostly about

⁴⁶ See, e.g., Peter Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 987-88, 994-95, 1002, 1008-09 (concluding that agency affirmance rates were already on the rise well before the Supreme Court decided *Chevron*).

⁴⁷ RICHARD J. PIERCE, ADMINISTRATIVE LAW 89 (2d ed. 2012); see also Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 18 (2006) (finding judges’ discretion regarding whether to apply *Chevron* is limited).

⁴⁸ JAMES Q. WILSON, BUREAUCRACY (1989), as reprinted in PETER H. SCHUCK, FOUNDATIONS OF ADMINISTRATIVE LAW 318 (2006) (“Every organization has a culture.”). Additionally, judicial review only reaches circumstances where agency conduct is challenged and then only addresses those situations where agencies act without legal justification.

⁴⁹ See RICHARD J. PIERCE, SIDNEY A. SHAPIRO & PAUL VERKUIL, ADMINISTRATIVE LAW AND PROCESS 21 (6th ed. 2014); see also JERRY L. MASHAW, BUREAUCRATIC JUSTICE 15 (1983) (referring to the “internal law of administration that guides the conduct of administrators”).

⁵⁰ PIERCE, SHAPIRO & VERKUIL, *supra* note 49, at 21.

⁵¹ *Id.* at 21.

⁵² Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 CARDOZO L. REV. 2189, 2190–91 (2011).

⁵³ THOMAS MCCRAW, PROPHETS OF REGULATION, 306 (1984).

deciding how to work out the “inevitable tradeoffs between the good of society, on the one hand, and the rights of the individual, on the other.”⁵⁴

In terms of both pressing for discretionary action and working to change agency culture, presidents wield significant “informal” authority over the machinery of government. Thus, the most important guidance on how to make decisions comes through presidential influence over agency action.⁵⁵ And this influence can come from a variety of channels, including presidential speech that re-frames disputes and the role of agencies.

II. PRESIDENTIAL SPEECH

Having examined the ways that presidents obtain and exercise authority, this Part reviews the impact of presidential speech, building upon two helpful frameworks. The goal of this section is to provide context in determining how to categorize speech communicated via Twitter.

Presidents convey a wide range of meaning through “speech” intended to command, explain, or exhort. This speech may have an intended legal effect, or it may simply be intended to frame an issue. Professor Katherine Shaw has introduced a framework for understanding presidential speech with intended legal effect.⁵⁶ Her taxonomy includes categories for (1) speech that “explains” presidential action and (2) speech that directs executive action, but it does not address presidential communication that falls outside these boundaries.⁵⁷ Yet, we know that presidents can and do communicate more broadly. Professor George Lakoff suggests we understand certain presidential speech as “framing.”⁵⁸ Such speech is intended to consciously anchor the manner in which the speaker wants a topic or issue to be understood.⁵⁹ The value of anchoring meaning is to influence norms and expectations for government action under circumstances in which individuals may exercise discretion.⁶⁰

⁵⁴ *Id.* at 302.

⁵⁵ PIERCE, *supra* note 49, at 145 (noting that “investigative journalists discover and report on only a tiny fraction” of instances of presidential intervention in agency decision-making).

⁵⁶ See Shaw, *supra* note 7, 99-117, 129-140.

⁵⁷ *Id.*

⁵⁸ Lakoff, *Trump’s Twitter Distraction*, *supra* note 25; see also Paul D’Angelo, *Studying Framing in Political Communication with an Integrative Approach*, 56 AM. BEHAV. SCIENTIST 353, 353-64 (2011); Gail Fairhurst, *Reframing The Art of Framing: Problems and Prospects for Leadership*, 1 LEADERSHIP 165, 165-185 (2006); Jacob Groshek & Ahmed Al-Rawi, *Public Sentiment and Critical Framing in Social Media Content During the 2012 U.S. Presidential Campaign*, 31 SOC. SCIENCE COMPUT. REV. 563, 563-76 (2013); Regula Hänggli, *Key Factors in Frame Building: How Strategic Political Actors Shape News Media*, 56 AM. BEHAV. SCIENTIST 300, 300-17 (2011); Jörg Matthes, *Framing Politics: An Integrative Approach*, 56 AM. BEHAV. SCIENTIST 247, 247-59 (2011); Nicole D. Mayer & Zakary L. Tormala, *“Think” Versus “Feel” Framing Effects in Persuasion*, 36 PERSONALITY & SOC. PSYCHOL. BULL. 443, 443-54 (2010); Maurice Hall, *He Said What?*, INSIDE HIGHER ED (Oct. 10, 2018), <https://www.insidehighered.com/views/2018/10/10/president-trumps-use-social-media-and-why-we-cant-ignore-it-opinion>.

⁵⁹ See GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT!, *supra* note 25, at 4; Lakoff, *Trump’s Twitter Distraction*, *supra* note 25 (stating framing is about “getting language that fits your worldview”).

⁶⁰ See *supra* Part I.

A. PRESIDENTIAL SPEECH WITH INTENDED LEGAL EFFECT

Professor Shaw identifies five modes of presidential speech and judicial treatment of that speech.⁶¹ First, presidential speech can manifest expressions of constitutional power or authority.⁶² The Supreme Court’s opinion in the presidential power case *Myers v. United States*⁶³ supplies perhaps the best example of judicial reliance on this sort of presidential speech.⁶⁴ There, the Court relied on statements by five presidents expressing doubts about the power of Congress to interfere in the removal of presidential appointees in its decision to overturn an unconstitutional restriction on the president’s power to remove appointed officials.⁶⁵ Second, presidential speech may relate to the purpose, content, or meaning of a particular legislative enactment, such as a presidential signing statement.⁶⁶ Third, presidents may make statements that go to either the operation and function, or to the purpose, of executive action—whether agency action or direct presidential action, which may later be relied upon by courts as interpretive guidance.⁶⁷ Fourth, presidents make statements that arguably have direct legal effect, especially where authorized by statute or precedent.⁶⁸ And fifth, presidents make truth claims or assertions of fact that may later be relevant (e.g., as admissions or statements against interest) in litigation against the government.⁶⁹

By identifying the modes of judicial reliance on presidential speech, Professor Shaw argues that there is a difference between “presidential storytelling” and speech that articulates or advances a legal position.⁷⁰ However, the specific impact of presidential speech that is intended to strategically “frame” public discourse—and agenda setting by the government in particular—is missing from her taxonomy. The absence is especially striking given the rise of powerful social media platforms—and the tweeting proclivities of the current president.

B. PRESIDENTIAL SPEECH AS “FRAMING”

⁶¹ Shaw, *supra* note 7, at 79 (citing RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS* 10-11 (1960)) (“Rhetoric is a central feature of the presidency.”).

⁶² *Id.* at 99-103.

⁶³ 272 U.S. 52 (1926).

⁶⁴ Shaw, *supra* note 7, at 99.

⁶⁵ *Myers*, 272 U.S. at 152, 167-70 (citing presidents Jackson, Grant, Cleveland, Wilson, and Coolidge).

⁶⁶ Shaw, *supra* note 7, at 103. *See supra* notes 7, 8, 56, 61, and accompanying text.

⁶⁷ *Id.* at 104 (citing *Texas v. United States*, 787 F.3d 733, 743 (5th Cir. 2015)).

⁶⁸ *Id.* at 110.

⁶⁹ *Id.* at 114.

⁷⁰ *Id.* at 76.

Professor George Lakoff suggests we understand the impact of presidential speech as “framing.”⁷¹ The concept of framing suggests that how something is presented (the “frame”) influences the choices people make.⁷² Professor Daniel Kahneman and his collaborator Amos Tversky spearheaded research on framing more generally in the 1980s.⁷³ Their research “upended the assumption that humans behave rationally—an assumption that a number of economic models previously rested on.”⁷⁴ Framing implicates heuristics, or “rules of thumb” that we use as mental shortcuts to speed up decision-making.⁷⁵ In other words, the way decisions are presented (or “framed”) affects the choices people make.⁷⁶

Lakoff suggests that the whole point of “framing” is to get listeners, whether they agree or not, to repeat the frame.⁷⁷ Through repetition, framing ultimately affects the way choices are made, including choices about norms.⁷⁸ As Richard Thaler and Cass Sunstein have written, “Decision makers do not make choices in a vacuum. They make them in an environment where many features, noticed and unnoticed, can influence their decisions.”⁷⁹ Most importantly, “metaphor, narrative, and emotion”⁸⁰ can overtake rationality and influence the way we understand and make choices.

Presidential tweets are an important ingredient in such “choice architecture.”⁸¹ More broadly, their framing of current events and issues influences norms. Presidential tweets are a way to extend the president’s influence into the heart of the agenda-setting process. None of these

⁷¹ D’Angelo, *supra* note 58, at 353-64; Fairhurst, *supra* note 58, at 165-85; Hänggli, *supra* note 58, at 300-17; Matthes, *supra* note 58, at 247-59; Mayer & Tormala, *supra* note 58, at 443-54; Groshek & Al-Rawi, *supra* note 58, at 563-76; Hall, *supra* note 58; George Lakoff, *Trump’s Twitter Distraction*, *supra* note 25.

⁷² See Lakoff, *Trump’s Twitter Distraction*, *supra* note 25 (framing is about “getting language that fits your worldview”); see also LAKOFF, DON’T THINK OF AN ELEPHANT!, *supra* note 25, at 4.

⁷³ Steve Rathje, *The Power of Framing: It’s Not What You Say, It’s How You Say It*, THE GUARDIAN (July 20, 2017), <https://www.theguardian.com/science/head-quarters/2017/jul/20/the-power-of-framing-its-not-what-you-say-its-how-you-say-it>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See Lera Boroditsky & Paul H. Thibodeau, *Metaphors We Think With: The Role of Metaphor in Reasoning*, 6 PLOS ONE 1 (2011) (publishing the results of five experiments that demonstrate the influence of framing).

⁷⁷ LAKOFF, DON’T THINK OF AN ELEPHANT!, *supra* note 25, at 33 (“If you keep [his] language and [his] framing and just argue against it, you lose because you are reinforcing [his] frame.”).

⁷⁸ *Id.*

⁷⁹ Richard H. Thaler et al., *Choice Architecture* (Apr. 2, 2010) (manuscript at 1), <https://ssrn.com/abstract=1583509> [hereinafter Thaler et al., *Choice Architecture*] (“The person who creates that environment is, in our terminology, a choice architect.”); see also Richard H. Thaler et al., *Choice Architecture*, in THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY 428, 428-38 (Eldar Shafir ed., 2013) [hereinafter Thaler et al., *Choice Architecture*, in THE BEHAVIORAL FOUNDATIONS].

⁸⁰ See *infra* note 87.

⁸¹ See Thaler et al., *Choice Architecture*, *supra* note 79, at 1.

effects will be evident immediately. As Lakoff himself makes clear, framing works over time.⁸² Additionally, there is, of course, no way to prove causation in any individual case. The impact of a few tweets, no matter how provocative or well-crafted, is not going to upend the rule of law within the federal bureaucracy. But to the extent that Lakoff has a point with respect to the effect of framing on the views of the general public, it is worth noting the potential impact of these messages, when taken in totality, over time if unchecked. They will have a deep impact on the way the government operates through their influence on the discretionary activities of government regulators and enforcers, the setting of regulatory strategy, and the reinforcement of norms and beliefs.

III. The Impact of Twitter

This section begins by exploring Twitter as a medium. Then, it discusses how a president may use Twitter to frame messages and Twitter's potential to effectively frame issues in the hands of a president attuned to Twitter's particular power. Finally, this section addresses President Trump's specific actions and use of Twitter as a reflection of the importance of this medium and to highlight the significance of studying the effects of presidential speech conveyed via Twitter.

A. TWITTER AS A MEDIUM

Twitter has been in business since approximately July 2006.⁸³ Twitter provides its customers ("users") with the ability to publish small amounts of information containing 280 characters or fewer ("tweets"), which are then distributed to other users who have chosen to receive them ("followers"), who are searching for particular tweets or trends, or who are able to access a person's private account and tweets in the case of a private Twitter account. Most public figures will establish public Twitter accounts so that all users can view their tweets. Users can "follow" other individuals, companies, media, government agencies, or nonprofit entities, among others.⁸⁴ Twitter now has more than 320 million active users worldwide, including nearly 70 million in the United States.⁸⁵ Twitter is a source of news, opinion, public safety and emergency updates from

⁸² George Lakoff, *George Lakoff: In Politics, Progressives Need to Frame Their Values*, GEORGE LAKOFF (Nov. 29, 2014), <https://georgelakoff.com/2014/11/29/george-lakoff-in-politics-progressives-need-to-frame-their-values/> [hereinafter Lakoff, *George Lakoff: In Politics*].

⁸³ Complaint at 1, *In re Twitter, Inc.*, No. C-4316 (F.T.C. Mar. 2, 2011), available at <https://www.ftc.gov/sites/default/files/documents/cases/2011/03/110311twittercmpt.pdf>.

⁸⁴ *Id.*

⁸⁵ See *Number of Monthly Active Twitter Users in the United States from 1st Quarter 2010 to 4th Quarter 2018 (in Millions)*, STATISTA, <https://www.statista.com/statistics/274564/monthly-active-twitter-users-in-the-united-states/> (last visited Jul. 2, 2019). Twitter is one of the biggest social networks worldwide. The number of U.S. Twitter users is projected to surpass 70 million in 2020. *Id.* Former United States President Barack Obama was the most-followed world leader as of July 15, 2019. *Id.*; see also Stefan Wojcik, Adam Hughes, and Emma Remy, *About one-in-five adult Twitter users in the U.S. follow Trump*, PEW RESEARCH CTR (Jul. 15, 2019), <https://www.pewresearch.org/fact-tank/2019/07/15/about-one-in-five-adult-twitter-users-in-the-u-s-follow-trump/> ("A new Pew Research Center analysis estimates that around one-in-five adult Twitter users in the U.S. (19%) follow Trump's personal account on the platform, @realDonaldTrump. Trump's immediate predecessor, Barack Obama (@BarackObama), is followed by 26% of U.S. adult Twitter users.").

the government, and commercial and entertainment information. Tweets may include links to other websites as well as photos and short videos.⁸⁶

Twitter has had a profound impact on politics, offering campaigns a direct connection with voters, tailoring messages with more precision than afforded by traditional pay media, and bypassing historic gatekeepers.⁸⁷ Twitter was especially influential with regard to the 2016 presidential election.⁸⁸ Twitter provided a venue for presidential candidates to reach potential voters. And Donald Trump “mastered Twitter” better than any other 2016 presidential candidate, “unleashing and redefining its power as a tool of political promotion, distraction, score-settling and attack.”⁸⁹

B. PRESIDENTIAL FRAMING THROUGH TWITTER

Twitter is a particularly effective tool for framing for several reasons. First, Twitter creates the potential to reach a mass audience, unfiltered and unedited, that can “talk back” to, “echo,” and “promote” speech—not just passively consume it. Presidential “framing” speech amplified through Twitter has the added ability of reaching not only the general public but also the average federal employee, inside the executive branch or elsewhere. Second, Twitter’s unique characteristics, particularly the need to convey messages in 280 characters or less and use poignant hashtags, make it especially suitable for distributing simple storylines and powerful political “memes.”⁹⁰ The medium itself forces its users to creatively use the minimal resources they are afforded in characters per tweet, whether that involves using images, creating a simple frame or slogan, or some other tactic.

Third, the goal of “framing” is to get the listener to repeat the frame, and Twitter provides a powerful forum for mass market repetition.⁹¹ Users may repost tweets (“retweet”) or contribute

⁸⁶ *Id.*

⁸⁷ Tom Murse, *How Social Media Has Changed Politics*, THOUGHTCO. (Jan. 14, 2019), <https://www.thoughtco.com/how-social-media-has-changed-politics-3367534>; see also Tyler Cowan, *The Twitter Takeover or Politics is Just Getting Started*, BLOOMBERG (Feb. 12, 2019), <https://www.bloomberg.com/opinion/articles/2019-02-12/twitter-s-takeover-of-politics-is-just-getting-started> (“[T]he issues that are easier to express on social media will become the more important ones.”).

⁸⁸ See Shontavia Jackson Johnson, *Symposium: Governing in an Age of Partisanship*, 27 WIDENER COMMONWEALTH L. REV. 39 (2018); see also Steve Caton & Galen Stolee, *Twitter, Trump, and the Base: A Shift to a New Form of Presidential Talk?*, 6 SIGNS & SOC’Y 147, 152 (2018) (“When Twitter first emerged in 2006, it wasn’t entirely clear what the value of the platform might be. What had originally been imagined as a system for facilitating group text messaging across one’s social circle evolved quickly (and organically) into a new form of mass communication.”).

⁸⁹ Michael Barbara, *Pithy, Mean and Powerful: How Donald Trump Mastered Twitter for 2016*, N.Y. TIMES (Oct. 5, 2015), <https://www.nytimes.com/2015/10/06/us/politics/donald-trump-twitter-use-campaign-2016.html>.

⁹⁰ A meme is defined as “an amusing or interesting item (such as a captioned picture or video) or genre of items that is spread widely online especially through social media.” *Meme*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/meme> (last visited Jul. 3, 2019).

⁹¹ Sidney L. Barton, Dennis Duchon & Kenneth J. Dunegan, *Framing the Problem and Making Decisions: The Facts are Not Enough*, 36 IEEE TRANSACTIONS ON ENG’G MGMT. 25, 25-27 (1989); Richard Jackson Harris, Jerwen Jou & James Shanteau, *An Information Processing View of Framing Effects: The Role of Causal Schemas in*

to hashtags, or trends, that other users begin, further feeding into a frame or narrative. Presidential speech has to be digested even if only to distinguish mere “storytelling” from speech with intended legal effect. Dismissing a point through reasoning and rational argument takes time, during which the point is repeated over and over. Over time, the impact of constant tweets on the instrumentalities of government might range from mere friction to something more serious.

As President, Donald Trump has unmediated, unfiltered, and pervasive access to communicate directly to the American people—and the American government—through Twitter. While presidents before him had to deal with drafting remarks and having them edited and reviewed by lawyers, dealing with professional journalists who could ask difficult and potentially embarrassing questions, relying on the press to distribute and filter through remarks, and working through the official chain of command to reach officials across the government, President Trump can speak directly to all audiences.⁹² And he does.⁹³

C. PRESIDENT TRUMP’S USE OF TWITTER

Donald Trump established @realDonaldTrump in March of 2009.⁹⁴ He used the account to tweet about a variety of topics, but since his inauguration he has “used the . . . account as a channel for communicating and interacting with the public about his administration.”⁹⁵ This short form of communication “suited to expressing attitudes that reach the electorate virtually in real time, clearly produced significant results in engendering Trump’s political superiority. What Trump lacked in policy, he gained in authenticity with the voters.”⁹⁶ And, as observers noted, “[W]hat is striking about Trump’s campaign, and his eventual win, was his consistent address of his base, often at the expense of a wider reach within the electorate.”⁹⁷

Decision Making, 24 MEMORY & COGNITION 1, 1-15 (1996); Craig R. M. McKenzie & Jonathan D. Nelson, *What A Speaker’s Choice of Frame Reveals: Reference Points, Frame Selection, and Framing Effects*, 10 PSYCHONOMIC BULL. & REV. 596, 596-602 (2003).

⁹² President Barack Obama used Twitter to campaign and throughout his presidency, but not nearly to the same extent as President Trump. See Douglas B. McKechnie, *@POTUS: Rethinking Presidential Immunity in the Time of Twitter*, 72 U. MIAMI L. REV. 1, 7-8 (2017).

⁹³ Jasmine C. Lee & Kevin Quealy, *The 567 People, Places and Things Donald Trump Has Insulted on Twitter: A Complete List*, N.Y. TIMES, <https://www.nytimes.com/interactive/2016/01/28/upshot/donald-trump-twitter-insults.html?module=inline> (last updated May 24, 2019).

⁹⁴ *Knight First Amendment Inst. v. Trump*, 302 F Supp. 3d 541, 552 (S.D.N.Y. 2018).

⁹⁵ *Id.*; Clay Calvert, *Federal Judge Rules Trump’s Twitter Account is a Public Forum*, THE CONVERSATION (May 24, 2018), <http://theconversation.com/federal-judge-rules-trumps-twitter-account-is-a-public-forum-97159>; Shontavia Johnson, *Donald Trump’s tweets are now presidential records*, THE CONVERSATION (Jan. 31, 2017) <https://theconversation.com/donald-trumps-tweets-are-now-presidential-records-71973>.

⁹⁶ Sandra Vlatković, *New Communication Forms and Political Framing: Twitter in Donald Trump’s Presidential Campaign*, 16 AM. J. ART & MEDIA STUD. 123, 126 (2018).

⁹⁷ Steve Caton & Galen Stolee, *Twitter, Trump, and the Base: A Shift to a New Form of Presidential Talk?*, 6 SIGNS & SOC’Y 147, 150 (2018). By “base,” I refer to a figure’s “enthusiastic supporters who resonate with the figure’s Message as built around Issue slogans and Issue shibboleths and other framing semiotic flotsam and jetsam with which a characteristic demographic or cluster of demographics can identify.” *Id.* at 149.

Perhaps because President Trump consistently uses Twitter to address mostly, if not exclusively, his base of supporters, sixty-one percent of voters in an August 2018 poll did not believe President Trump's use of Twitter is appropriate.⁹⁸ Still, President Trump uses Twitter for a broad range of purposes, including (1) announcing, describing, and defending policy;⁹⁹ (2) promoting his agenda;¹⁰⁰ (3) announcing official decisions;¹⁰¹ (4) engaging with foreign leaders;¹⁰² (5) challenging political opponents (including the media);¹⁰³ and (6) other activity unrelated to official government business.¹⁰⁴ And there is a clear connection between the president's use of Twitter and his popularity.¹⁰⁵

1. ATTACKS ON THE RULE OF LAW

When it comes to “framing” language, there are a few key areas in which President Trump's tweets have most directly targeted rule of law values in a manner that implicates “framing theory.” For example, he has tweeted thirty times about judges since being elected president, twice characterizing judges as overtly partisan in a starkly combative tone.¹⁰⁶ In one prominent case, he directly confronted the Supreme Court of the United States' chief justice, John Roberts: “Sorry Chief Justice John Roberts but you do indeed have ‘Obama judges’ and they have a much different point of view than the people who are charged with the safety of our country....”¹⁰⁷ This tweet

⁹⁸ YouGov, *Do you think the way Donald Trump uses Twitter is appropriate or inappropriate for the President of the United States?*, STATISTA, <https://www.statista.com/statistics/900443/adult-opinions-donald-trumps-use-twitter-as-president-usa/> (last visited Jul. 15, 2019).

⁹⁹ Ryan Teague Beckwith & Ashley Hoffman, *Donald Trump's Tweets Really Matter. These 27 Examples Prove It*, TIME (Jan. 18, 2018), <http://time.com/5099544/donald-trump-tweets-first-year/>.

¹⁰⁰ Nicholas Carr, *Why Trump Tweets (And Why We Listen)*, POLITICO MAGAZINE (Jan. 26, 2018), <https://www.politico.com/magazine/story/2018/01/26/donald-trump-twitter-addiction-216530>.

¹⁰¹ Jean Parvin Bordewich, *Q&A with Stuart Butler: What Does It Take to Turn Ideas into Government Action?*, HEWLETT FOUND., <https://hewlett.org/qa-with-stuart-butler-what-does-it-take-to-turn-policy-into-government-action/> (last updated Mar. 1, 2017).

¹⁰² Matthias Lüfkens, *The Delicate Art of Engaging with Trump on Twitter*, WORLD ECON. FORUM, <https://www.weforum.org/agenda/2017/06/twiplomacy-the-delicate-art-of-engaging-with-trump-on-twitter/> (last updated Jun. 06, 2017); *Twiplomacy Study 2018*, TWIPLOMACY, <https://twiplomacy.com/blog/twiplomacy-study-2018/> (last updated July 10, 2018).

¹⁰³ Ezra Klein, *“Enemy of the People”*: How Trump Makes the Media into the Opposition, VOX (Oct. 30, 2018), <https://www.vox.com/policy-and-politics/2018/10/30/18039990/trump-media-sanders-press-fake-news-enemy-people-bombing>.

¹⁰⁴ Natasha Lomas, *The Risky Business of Trump the Twittering President*, WORDPRESS VIP: TECH CRUNCH (Jan. 7, 2018), <https://techcrunch.com/2017/01/25/the-risky-business-of-trump-the-twittering-president/>.

¹⁰⁵ Scott Wallsten, *Do Likes of Trump's Tweet's Predict His Popularity?*, TECH POLICY INST. (Apr. 17, 2018), <https://techpolicyinstitute.org/2018/04/17/do-likes-of-trumps-tweets-predict-his-popularity/>.

¹⁰⁶ See TRUMP TWITTER ARCHIVE, <http://www.trumptwitterarchive.com/archive/judges/ttff/1-1-2017> (last visited Jul. 14, 2019).

¹⁰⁷ Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 21, 2018), <https://twitter.com/realdonaldtrump/status/1065346909362143232?lang=en>.

earned a direct rebuke from the chief justice,¹⁰⁸ to which the president responded, rhetorically “demoting” the Chief to mere “Justice Roberts” in the process.¹⁰⁹

Attacks on an independent judiciary are the quintessential form of undermining the rule of law. The goal of diminishing respect for the judiciary was not accidental, as the president had previously referred to “Democrat judges” gerrymandering districts in Pennsylvania.¹¹⁰ In carrying out that goal, President Trump expertly used all of the tools at his disposal to frame the issue. As set forth above, Lakoff suggests that the whole point of “framing” is to get listeners, whether they agree or not, to repeat the frame.¹¹¹ Through repetition, “framing” ultimately affects the way choices are made, including choices about norms. In this case, the president was successful—because of the outrageous nature of his comments to the media about “Obama judges”—in baiting the Chief Justice of the United States Supreme Court into *repeating the frame*, which the president then *again repeated* in a tweet. The entire exchange was then re-tweeted and reported about widely, *further repeating the frame*. Without Twitter, the widespread re-circulation and re-socialization of this story, and its attendant re-engagement with audiences, would not have been possible.

2. ATTACKS ON THE PRESS

Since announcing his candidacy, Donald Trump has sent 1,339 tweets about the media that were critical, threatening or otherwise hostile.¹¹² The president has tweeted twenty-seven times attacking the media (or so-called “fake news”) as the enemy of the people.¹¹³ “The New York Times reporting is false. They are a true ENEMY OF THE PEOPLE!”¹¹⁴ goes one. “THE RIGGED AND CORRUPT MEDIA IS THE ENEMY OF THE PEOPLE!”¹¹⁵ goes another.

¹⁰⁸ Matthew Borges, *Chief Justice Roberts Responds to Trump’s Criticism of Judges*, JURIST (Nov. 21, 2018), <https://www.jurist.org/news/2018/11/chief-justice-roberts-responds-to-trumps-criticism-of-judges/>.

¹⁰⁹ Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 22, 2018, 4:21 AM), <https://twitter.com/realdonaldtrump/status/1065581119242940416> (“Justice [sic] Roberts can say what he wants, but the 9th Circuit is a complete & total disaster....”).

¹¹⁰ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 24, 2018, 12:16 PM), <https://twitter.com/realdonaldtrump/status/967493467046899712?lang=en>.

¹¹¹ See *supra* notes 58, 59, 72, and accompanying text.

¹¹² Stephanie Sugars, *From Fake News to Enemy of the People: An Anatomy of Trump’s Tweets*, FREEDOM OF THE PRESS FOUND., COMM. TO PROTECT JOURNALISTS (Jan. 30, 2019), <https://pressfreedomtracker.us/blog/fake-news-enemy-people-anatomy-trumps-tweets/>. A real-time database of negative tweets about the press is available here: <https://docs.google.com/spreadsheets/d/1uNA6nsgcRhhQ0b6USsMNzhYLMfuDRSMhbGZLNZ00WkHk/edit#gid=>.

¹¹³ TRUMP TWITTER ARCHIVE, http://www.trumptwitterarchive.com/archive/enemy%20&&%20media/tfff/1-1-2017_ (last visited Jul. 14, 2019).

¹¹⁴ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 20, 2019 5:49 AM), <https://twitter.com/realdonaldtrump/status/1098218016255414272?lang=en>.

¹¹⁵ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 17, 2019 4:56 AM), <https://twitter.com/realdonaldtrump/status/109711749933685553?lang=en>.

“Fake News is truly the ENEMY OF THE PEOPLE!”¹¹⁶ says a third. And the environment for journalists is already dangerous: the U.S. Press Freedom Tracker website documents nineteen journalists physically attacked in 2019 alone.¹¹⁷ Attacking the free press helps undermine confidence in independent institutions *not just among the general public but inside the government as well.*

3. IMMIGRATION POLICY

In terms of policy “framing,” the president has tweeted 128 times about the border and Democrats, forty-three of which mention “Open Borders.”¹¹⁸ “[B]e strong and smart don’t fall into the Democrats ‘trap’ of Open Borders and Crime!,” says one.¹¹⁹ “[O]pen Border Democrats and the Radical Left have filed a lawsuit in of course the 9th Circuit!....,” says another.¹²⁰ “Democrats are becoming the Party of late term abortion high taxes Open Borders and Crime!,” says a third.¹²¹

Attacking political opponents by claiming that they are actively undermining the homeland is another classic threat to rule of law values. As set forth above, framing influences reasoning,¹²² and agency discretion is wielded within a framework of norms and beliefs.¹²³ Presidential speech that re-frames disputes and the work of agencies is a powerful mechanism for altering norms and agency behavior. Here, associating the Democrats with opposing the very concept of a national border, the president is sending a message to the executive branch about how to weigh the opinions, arguments, and even policy mandates emanating from Democratic lawmakers with an otherwise equal claim to respect as those of his own party. Political considerations rightfully always play a role in policymaking, but here, the president is placing them at the absolute front and center in the national security arena.

4. COMMENTS ON CLIMATE CHANGE

¹¹⁶ Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 18, 2019 7:24 PM), <https://twitter.com/realdonaldtrump/status/1086464467481833480?lang=en>.

¹¹⁷ *Physical Attack*, FREEDOM OF THE PRESS FOUND., COMM. TO PROTECT JOURNALISTS, <https://pressfreedomtracker.us/physical-attack/> (last visited Jul. 15, 2019).

¹¹⁸ TRUMP TWITTER ARCHIVE, http://www.trumptwitterarchive.com/archive/open%20border%20&&%20democr/ttff/1-1-2017_ (last visited Apr. 20, 2019).

¹¹⁹ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 25, 2019 4:58 AM), <https://twitter.com/realdonaldtrump/status/1100017237228949506>.

¹²⁰ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 19, 2019 5:52 AM), <https://twitter.com/realdonaldtrump/status/1097856404629700609?lang=en>.

¹²¹ Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 31, 2019 5:36 AM), <https://twitter.com/realdonaldtrump/status/1090967053689937921?lang=en>.

¹²² See Thaler et al., *Choice Architecture*, in THE BEHAVIORAL FOUNDATIONS, *supra* note 79, at 429.

¹²³ See WILSON, *supra* note 48, at 318.

And, finally, the president engages in classic “framing” communication with respect to climate change, with five tweets about global warming that claim cold weather belies scientific evidence.¹²⁴ “In the East it could be the COLDEST New Year’s Eve on record. Perhaps we could use a little bit of that good old Global Warming that our Country but not other countries was going to pay TRILLIONS OF DOLLARS to protect against. Bundle up!”¹²⁵ says one. “Brutal and Extended Cold Blast could shatter ALL RECORDS - Whatever happened to Global Warming?,”¹²⁶ says another. “Be careful and try staying in your house. Large parts of the Country are suffering from tremendous amounts of snow and near record setting cold. Amazing how big this system is. Wouldn’t be bad to have a little of that good old fashioned Global Warming right now!,”¹²⁷ says a third.

Whether a particular course of action pursuant to a statutory directive is “acceptable” or not (for example, at agencies charged with weighing scientific evidence of climate change) is premised in part on the strength “of the logical connection between the reasons given for the actions and the principles, values, or guidelines, to which they relate.”¹²⁸ But the most important guidance on how to actually make decisions probably comes not from the courts or Congress but from presidential influence over agency action.¹²⁹ Because agency personnel exercise so much discretion, prevailing norms and beliefs are deeply important.¹³⁰ Presidential tweets framing climate change in terms of how warm the weather is must be contended with by agency decision-makers *regardless* of whether they are supported by science because they affect norms and values. Where presidential policy can evolve or is evolving, Twitter provides a powerful platform to expand a sort of “informal” presidential lawmaking, especially to “frame” conduct (in the space between directing and explaining). As Lakoff explains, “framing” helps to plant an idea that resonates regardless of whether it immediately results in government action.¹³¹

D. THE POTENTIAL IMPACT OF PRESIDENTIAL TWEETING: QUESTIONS GOING FORWARD

¹²⁴ TRUMP TWITTER ARCHIVE, <http://www.trumptwitterarchive.com/archive/warming%20%7C%7C%20climate/tfff/1-1-2017>.

¹²⁵ Donald J. Trump (@realDonaldTrump), (Dec. 28, 2017, 4:01 PM), <https://twitter.com/realdonaldtrump/status/946531657229701120?lang=en>.

¹²⁶ Donald J. Trump (@realDonaldTrump), (Nov. 21, 2018, 4:23 PM), <https://twitter.com/realdonaldtrump/status/1065400254151954432?lang=en>.

¹²⁷ Donald J. Trump (@realDonaldTrump), (Jan. 20, 2019, 4:59 AM), <https://twitter.com/realdonaldtrump/status/1086971499725160448?lang=en>.

¹²⁸ PIERCE, SHAPIRO & VERKUIL, *supra* note 49, at 21.

¹²⁹ PIERCE, *supra* note 47, at 145.

¹³⁰ WILSON, *supra* note 48, at 321.

¹³¹ Colin Bailey, Emily Fisher & Bill Kennedy, *Framing in Race-Conscious, Antipoverty Advocacy: A Science-Based Guide to Delivering Your Most Persuasive Message*, 43 J. POVERTY L. & POL’Y 408, 412, 418-21 (2010).

Working out the balance between economic efficiency and legal due process is complicated.¹³² Regulators need not just guidance but also reliable norms of behavior and decision-making. Framing policy actions through tweets is not just a tactic for influencing media coverage and public opinion; it also puts a hammer to the scale balancing these two important considerations.

One important question is whether the channel through which the president chooses to influence government decision-making is appropriate. Twitter is clearly “efficient” in reaching an audience, but there is no “due process” when it comes to tweets. Even if the president should be understood to act within his scope of authority to direct government action (formally or informally), “there is an argument that the President should be required to impose his interpretations . . . via internal executive branch channels, rather than by announcing his views separately”¹³³

Another important question is how the government (courts, the administration, and Congress) or the public tell the difference between presidential speech intended to direct or explain conduct, and if it does neither how it might affect government action if it “frames” ideas. A government employee, tasked with determining the impact of a new presidential tweet, has to decide whether or not it has legal effect. But the president need not announce that in advance. To the recipient, the message could represent mere personal opinion, a policy announcement, a legal command, or something entirely different. In other words, how can a listener in a government department or agency tell whether the president (on his personal Twitter handle) is “disseminat[ing] his own views” as DOJ might claim,¹³⁴ announcing policy; or “framing” policy decisions for discretionary agency action (e.g., claiming cold weather excuses scientific evidence of human contributions to climate change)? While a lay audience can effectively decide to “tune out” these messages, the government is essentially a “captive audience.”¹³⁵

As Professor Lakoff suggests, the problem with being told *not* to think of an elephant is that the listener ends up more likely than not *thinking of the elephant*.¹³⁶ Presidential tweets that can be explained as personal opinion or “storytelling” speech outside traditional legal rubrics can still leave federal government employees “thinking” of an elephant.¹³⁷ When those employees are

¹³² See MCCRAW, *supra* note 53, at 306 (discussing the determination of regulatory “strategy”).

¹³³ Shaw, *supra* note 7, at 90 (citing Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006)).

¹³⁴ Brief of Appellants at 12, *Knight First Amendment Inst. v. Trump*, No. 18-1691 (2d Cir. Aug. 7, 2018).

¹³⁵ Alissa Ardito, *Social Media, Administrative Agencies, And the First Amendment*, 65 ADMIN. L. REV. 301, 368 (2013); John Herrman & Charlie Savage, *Trump’s Blocking of Twitter Users Is Unconstitutional, Judge Says*, N.Y. TIMES (May 23, 2018), <https://www.nytimes.com/2018/05/23/business/media/trump-twitter-block.html>; Kevin McCoy & Adam Shell, *Trump Tweet on Jobs Report May Have Breached a 1985 Federal Directive*, USA TODAY (June 1, 2018), <https://www.usatoday.com/story/money/2018/06/01/trump-jobs-report-tweet/663233002/>. Another question is the extent to which digesting presidential tweets conditions the recipients not to take seriously presidential speech with intended legal effect.

¹³⁶ See LAKOFF, DON’T THINK OF AN ELEPHANT!, *supra* note 25, at 33.

¹³⁷ *Id.*

regulators who have to make judgments about how to interpret and apply the law to complicated factual circumstances, or judges who have to do the same with far less oversight, who can say what the impact of repeating presidentially tweeted “frames” might be? Ultimately, presidents “can and do easily find ways to direct agency heads, even while respecting a purported decisional limit on presidential involvement in the administrative state.”¹³⁸

CONCLUSION

Presidential tweeting “frames” issues for eventual government action. More than mere “storytelling,” presidential tweets can preemptively frame policy issues for action *by federal agency decision-makers*—and serve as an important vehicle for wielding the power of the modern presidency in the hands of its current occupant. The impact of presidential tweeting as framing is especially pronounced with respect to its impact on the rule of law and the agenda-setting activities of federal government employees. Unelected public servants have vast discretion to act, or not act, in the course of everyday governance. In making their decisions as to how they will discharge their duties, they are affected by the messages coming from the president through all channels of communication, formal and informal, including social media outlets such as Twitter. The impact of presidential tweets as “framing”—and therefore shaping government policy—must be studied further and understood within the landscape of literature relating to public administration and regulatory policymaking.

¹³⁸ Cary Coglianese, *The Emptiness of Decisional Limits: Reconceiving Presidential Control of the Administrative State*, 69 ADMIN. L. REV. 43, 80 (2017).