

# CHALLENGING PRESIDENTIAL TWEETS

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*Abstract:* Presidents have tried to control agency behavior for decades. The rise of social media gave the President new and innovative tools for controlling agency behavior. As President Obama demonstrated during his time in office, social media became a platform through which the President could communicate to his constituents, align himself with agency actions he supported, and urge agencies to enact policies he favored. After he was elected in November of 2016, President Donald Trump continued his predecessor's use of social media to engage with both agencies and the public. Different from his predecessor, however, President Trump and his presidential orders became the focus of a large number of lawsuits within the first year of his presidency. At the same time, President Trump's use of social media—specifically Twitter—became a vehicle for issuing statements that operate like presidential orders. Tweets, like more traditional forms of presidential orders such as executive orders, may in some instances be challenged in federal court. Because of the likely increase in litigation over presidential orders, and, given the Trump Administration's proliferation of orders triggering legal challenges, courts should recognize litigants' ability to bring legal challenges to presidential orders that are tweets. Furthermore, courts should develop a framework for addressing what kinds of tweets can be challenged, and who can challenge them.

## INTRODUCTION

On March 23, 2018, President Donald Trump tweeted the following statement: “Obama Administration legalized bump stocks. BAD IDEA. As I promised, today the Department of Justice will issue the rule banning BUMP STOCKS with a mandated comment period. We will BAN all devices that turn legal weapons into illegal machine guns.”<sup>1</sup> One week after President Trump issued this tweet, the Department of Justice (DOJ) released its notice of proposed rulemaking. Nine months later, the DOJ promulgated a new rule expanding the list of statutorily banned “machineguns” to include bump-stocks.<sup>2</sup> Through his tweet, President Trump was able to demonstrate to his followers that he and the DOJ worked together to ban bump-stocks.

President Trump is infamous for his use of Twitter. His presence on the

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1. Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 23, 2018, 1:50 PM), <https://twitter.com/realdonaldtrump/status/977286489410240514> [<https://perma.cc/5F9Y-4H5C>].

2. Bump-Stock-Type Devices, 83 Fed. Reg. 66,514, 66,543 (Dec. 26, 2018) (to be codified at 27 C.F.R. §§ 447–479).

popular social media platform has even been the subject of litigation since he assumed office.<sup>3</sup> Trump's tweets cover a wide range of topics, and the functions of those tweets vary as much as their subject matter. Some of his tweets highlight the successes of the Trump Administration. Other tweets express his dissatisfaction with various government actors. Regardless of their message, President Trump's tweets have one thing in common: they all push an agenda. This agenda represents Trump's efforts to exert presidential control over political issues and political actors.

Modern presidential control—beginning under President George W. Bush and continuing into the present administration—has greatly expanded the power a president has over the administrative state.<sup>4</sup> In their efforts to exert presidential control, presidents have used various forms of orders to communicate their goals to their administrations, and to the public. Historically, these orders have taken three forms: executive orders, proclamations, and memoranda. In addition to using presidential orders, however, each presidential administration brings with it a new tool for expanding presidential control. One tool that became especially powerful under President Obama—and now President Trump—is social media.<sup>5</sup> This Comment focuses specifically on President Trump's use of Twitter, in large part because he has been prolific on Twitter and is less active on other social media platforms.

President Trump uses many of the same tactics on Twitter that President Obama used while he was in office.<sup>6</sup> Just as President Obama did, President Trump uses Twitter to connect with his constituents, encourage certain agency actions, take personal credit for agency successes, and further the agendas of his administration. However, President Trump has expanded upon how his predecessor used the social media platform. Trump has expanded what constitutes a “presidential order” by issuing presidential orders to agencies directly on Twitter, in addition to using more traditional means. In light of this new form of presidential order, the courts should recognize litigants' ability to bring legal challenges to presidential tweets in the new era of online presidential communication. They should develop a framework for addressing what kinds of tweets can be challenged, and who can challenge them. This framework should draw heavily from the model Professors Lisa Manheim

3. *See, e.g.*, Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 557–58 (S.D.N.Y. 2018) (holding in part that plaintiffs had standing to sue President Trump to prevent him from blocking individual followers of his Twitter account).

4. Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 692 (2016) [hereinafter Watts, *Controlling Presidential Control*].

5. *Id.* at 685–86.

6. *See id.*

and Kathryn Watts provide in their Article, *Reviewing Presidential Orders*.<sup>7</sup>

This Comment argues that President Trump’s tweets, which effectively operate like other forms of presidential orders, can in some instances be challenged in federal court. Part I provides an overview of modern presidential control so as to contextualize this new form of presidential order.<sup>8</sup> Part II then explores the trend within modern presidential control of using social media to interact with both agencies and constituents.<sup>9</sup> Part II also explains the various forms and functions modern presidential orders can take.<sup>10</sup> Finally, because presidential orders are not legally challengeable in all instances, Part III discusses why and under what circumstances the President’s tweets can be legally challenged as presidential orders. It also applies existing legal frameworks to these types of challenges and discusses how courts should engage in judicial review of presidential orders that are tweets—particularly under the Trump Administration.<sup>11</sup>

## I. MODERN PRESIDENTIAL CONTROL

Presidents have attempted to exert control over agency behavior for decades—since the rise of the administrative state.<sup>12</sup> Over time, this exertion has increased as presidents have developed institutionalized control over agencies’ rulemaking processes.<sup>13</sup> For example, the creation of the Office of Management and Budget drastically increased presidential oversight over agency decisions, requiring heads of executive agencies to submit their agencies’ drafts of proposed rules for executive review.<sup>14</sup> Presidents continued to clarify the rules governing agencies’ communications with the Executive and mandated the submission of

7. Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743 (2019).

8. *See infra* Part I.

9. *See infra* Part II.

10. *See id.*

11. *See infra* Part III.

12. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2272 (2001) (“Since the dawn of the modern administrative state, Presidents have tried to control the bureaucracy. . .”).

13. Watts, *Controlling Presidential Control*, *supra* note 4, at 689–90.

14. *Id.*; *see also* Manheim & Watts, *supra* note 7, at 1766–67 (“Reagan . . . set the stage for greater presidential involvement in the regulatory arena in 1981 when he issued Executive Order No 12291, a nonlegally binding order directed at the heads of executive agencies. It ordered agencies to submit drafts of their proposed rules, along with regulatory impact analyses, to the Office of Management and Budget (OMB), an entity within the Executive Office of the President, for pre-publication review.” (footnotes omitted)).

proposed rules for Executive review.<sup>15</sup> One of the most ardent supporters of presidential control was President Reagan, who issued “comprehensive and far-reaching” executive orders expanding the President’s oversight abilities considerably.<sup>16</sup> This trend continued under President Clinton, and expanded even further under Presidents Bush and Obama.<sup>17</sup>

Modern presidential control, as demonstrated by Presidents Bush and Obama,<sup>18</sup> still relies on some of the traditional methods of controlling agency behavior.<sup>19</sup> These traditional methods include issuing presidential orders and utilizing OMB review.<sup>20</sup> These more traditional tactics include presidential directives and executive orders.<sup>21</sup> Yet new methods also emerged. With the proliferation of technology in the mid-to-late 2000s, one of these new methods was harnessing social media.<sup>22</sup>

The proliferation of social media in the late 2000s allowed the Executive branch to influence agency behaviors in new ways, and to publicly appropriate—assert personal ownership over—agency actions.<sup>23</sup> As the first president in office following the social media boom,<sup>24</sup> President Obama employed social media in two primary ways in the context of administrative law.<sup>25</sup> First, he used visuals to publicly support agencies’ rulemaking activity.<sup>26</sup> Obama did so by attempting to influence how the agency would proceed with the rule, hoping to achieve an outcome collaboratively, in a manner that was advantageous to his

15. *Id.*

16. Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 444 (1987).

17. Watts, *Controlling Presidential Control*, *supra* note 4, at 690, 693–706. When he assumed office in 2001, George W. Bush immediately demonstrated a desire to be involved in agency decisions. Barack Obama continued this trend in 2009, “exert[ing] significant control over the regulatory state” through various mechanisms. *Id.* at 698.

18. *Id.* at 693–706.

19. *Id.*

20. *Id.*

21. Manheim & Watts, *Reviewing Presidential Orders*, *supra* note 7, at 1745.

22. Watts, *Controlling Presidential Control*, *supra* note 4, at 692.

23. *Id.* at 691.

24. Ian Bogost, *Obama Was Too Good at Social Media*, ATLANTIC (Jan. 6, 2017) <https://www.theatlantic.com/technology/archive/2017/01/did-america-need-a-social-media-president/512405/> [<https://perma.cc/WUF6-HKED>] (“On the one hand, the Obama White House was indeed the first presidency to make use of services like Twitter, Facebook, Snapchat, and Instagram. But on the other hand, these services either didn’t exist or weren’t used by a broad public before Barack Obama took office in 2009.”).

25. Elizabeth G. Porter & Kathryn A. Watts, *Visual Rulemaking*, 91 N.Y.U. L. REV. 1183, 1218 (2016) [hereinafter Porter & Watts, *Visual Rulemaking*].

26. *Id.* at 1218.

platform.<sup>27</sup> Second, President Obama used visuals on social media as a way of appropriating credit for agency rulemakings, treating agencies as an arm of his own administration.<sup>28</sup> Public appropriation—publicly claiming credit for an agency action—is a popular tool for modern presidential control that became even more popular under the Obama Administration.<sup>29</sup>

To achieve these two ends, Obama regularly engaged with Twitter, Facebook, Snapchat, and Instagram to communicate his views to agencies, and to the public.<sup>30</sup> He used a variety of platforms to address his constituents on issues ranging from net neutrality to immigration.<sup>31</sup> President Obama turned social media into a tool for presidential control, and President Trump followed suit when he assumed office in 2017.

## II. MODERN PRESIDENTIAL CONTROL UNDER PRESIDENT TRUMP

Since his inauguration in 2017, President Trump has employed many of the same tactics used by Presidents Bush and Obama to influence agencies.<sup>32</sup> In other words, President Trump has continued the presidential trend of exerting control over agency actions. In the first days of his administration, President Trump laboriously enacted new executive actions and withdrew many leftover executive actions from the Obama Administration in order to chart a new course of his own.<sup>33</sup> He did this

27. *See id.* at 1195 n.59.

28. *Id.* at 1218.

29. *See* Watts, *Controlling Presidential Control*, *supra* note 4, at 703.

30. Bogost, *supra* note 24.

31. Watts, *Controlling Presidential Control*, *supra* note 4, at 686 (“From net neutrality to drones to immigration, Obama has openly and aggressively sought to influence or outright control regulatory policy, frequently harnessing social media to maximize the impact of his efforts.”); *see also* Porter & Watts, *Visual Rulemaking*, *supra* note 25, at 1187 (“[I]n August 2015, President Obama issued a YouTube ‘Memo to America’ in which he took political credit for the highly controversial Clean Power Plan, omitting any mention of the fact that the rule was promulgated by the Environmental Protection Agency (EPA). In the same vein, at the outset of its recently finalized overtime pay rulemaking, the Department of Labor (DOL) posted a whiteboard video to its blog featuring a hand-drawn sketch of President Obama directing the agency to ‘update the rules!’” (footnotes omitted)).

32. Daniel A. Farber, *Presidential Administration Under Trump* 3–4 (August 8, 2017) (unpublished manuscript), available at <https://ssrn.com/abstract=3015591>, or <http://dx.doi.org/10.2139/ssrn.3015591> (“Despite the temptation to view the Trump Administration as an outlier, in important respects, it is continuing the trend toward centralizing regulatory authority while echoing or amplifying types of behavior found to a lesser extent in earlier Administrations.”).

33. Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 349 (2017) (“President Trump vigorously issued executive actions of his own in the opening days of his administration— many to counter his predecessor’s policies on immigration.” (footnotes omitted)); Manheim & Watts, *Reviewing Presidential Orders*, *supra* note 7,

largely through traditional forms of presidential orders that took the form of executive orders and presidential memos.<sup>34</sup>

In a manner more blatant than Obama, however, Trump also deployed a less traditional form of issuing orders: Twitter.<sup>35</sup> Trump has used his personal Twitter account for virtually all of his social media communications to agencies and the public.<sup>36</sup> The proliferation of presidential tweets, specifically, is relatively new. President Obama did not have his own “POTUS” Twitter account until six years into his presidency.<sup>37</sup> The relatively novel use of Twitter as a means of Presidential control raises the question: what does President Trump hope to accomplish on Twitter?<sup>38</sup> Adopting the modern presidential control framework helps to answer this question by examining his attempts to influence, and publicly appropriate, agency action in such a modern way.

#### A. *President Trump's Efforts to Influence Agency Action*

Like his predecessor, President Trump has used social media to influence agency action. While in office, President Obama weighed in on several agency issues using social media, claiming credit for actions designed to, for example, boost economic growth or fight climate change.<sup>39</sup> Since entering office, President Trump has attempted to

at 1744 (“In early 2017, a newly inaugurated President Donald J. Trump tried to force policy change through a flurry of written orders.”).

34. See Chen, *supra* note 33; Manheim & Watts, *Reviewing Presidential Orders*, *supra* note 7, at 1744.

35. See *infra* Part II.C.

36. Kevin Breuniger, *Trump's Most Memorable Twitter Bombshells of 2018*, CNBC (Dec. 31, 2018), <https://www.cnbc.com/2018/12/31/trumps-top-10-biggest-twitter-bombshells-made-history-in-2018.html> [<https://perma.cc/Q7JR-ZDF9>] (“President Donald Trump’s Twitter habit grew even more prolific in 2018. Trump sent more than 3,400 tweets this year — an average of nearly 10 tweets a day, and a sizable increase from the president’s first year in office . . . And despite the seemingly constant din of news bombshells breaking around his White House this year, Trump became even more reliant on Twitter as the primary means of communication for both his administration and himself.”).

37. Alex Wall, *Introducing @POTUS: President Obama's Twitter Account*, WHITE HOUSE (May 18, 2015), <https://obamawhitehouse.archives.gov/blog/2015/05/17/introducing-potus-presidents-official-twitter-account> [<https://perma.cc/SW4G-P3X6>].

38. Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515, 562 (2018) (“President Trump operates on the premise that all executive power is vested in him alone, regardless of statutory delegations to the contrary.”).

39. Watts, *Controlling Presidential Control*, *supra* note 4, at 703–704; see also Porter & Watts, *Visual Rulemaking*, *supra* note 25, at 1185–86 (“[A]s the FCC was preparing to finalize its net neutrality rule, President Obama published a video in which he urged the FCC to protect net neutrality. Although critics charged that the President’s video inappropriately interfered with the deliberations of an independent agency, the FCC seemed perfectly willing to listen. After taking both the President’s message and nearly four million public comments into account, the agency ultimately

influence the behavior of agencies through Twitter.<sup>40</sup>

Trump has also advertised his ability to exert control in more nebulous areas of presidential authority, where it is less clear whether the Constitution permits him to take action. For example, on April 18, 2019, a redacted version of Robert Mueller’s report on the Russia investigation became public.<sup>41</sup> Following its release, Trump tweeted, proclaiming himself to be exonerated and pointing out how gracious it was of him not to fire Mueller before the investigation concluded.<sup>42</sup> Whether or not President Trump can actually fire Mueller, however, is still up for debate. Some believe Trump lacks the unilateral authority to fire Mueller.<sup>43</sup> Even if he tried, several checks stand between him and successfully removing Mueller from his position.<sup>44</sup> Still, the tweet represents an attempt to remind the public where he stands relative to an actor inside the DOJ.

In addition to attempting to exert control using constitutionally questionable methods, President Trump has issued blatant, public “directives” to agencies via Twitter. For example, on July 26, 2017, Trump issued a series of three consecutive tweets asserting that transgender individuals would no longer be permitted to serve in the military.<sup>45</sup> The next day, the Chairman of the Joint Chiefs of Staff stated publicly that the existing policy would not be modified until the President

implemented a regulatory scheme that looked very much like the plan Obama had proposed, which favored strong net neutrality rules.” (footnotes omitted).

40. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 22, 2018, 5:13 AM), <https://twitter.com/realdonaldtrump/status/966662241977360384> [<https://perma.cc/BP2H-VRPP>] (describing his intention to push comprehensive background checks and modify regulations on bump-stocks).

41. Washington Post Staff, *Mueller Report Findings: Mueller Rejects Argument that Trump Is Shielded from Obstruction Laws*, WASH. POST (Apr. 18, 2019), [https://www.washingtonpost.com/politics/mueller-report-russia-investigation-findings/2019/04/18/b07f4310-56f9-11e9-814f-e2f46684196e\\_story.html](https://www.washingtonpost.com/politics/mueller-report-russia-investigation-findings/2019/04/18/b07f4310-56f9-11e9-814f-e2f46684196e_story.html) (last visited June 16, 2019).

42. Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 18, 2019, 2:31 PM), <https://twitter.com/realdonaldtrump/status/1118990550235877376> [<https://perma.cc/55CW-JBCH>] (commenting on Executive privilege: “I had the right to end the whole Witch Hunt if I wanted. I could have fired everyone, including Mueller, if I wanted. I chose not to. I had the RIGHT to use Executive Privilege. I didn’t!”).

43. See, e.g., NOAH BOOKBINDER ET AL., WHY TRUMP CAN’T (EASILY) REMOVE MUELLER—AND WHAT HAPPENS IF HE TRIES, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASH. 3–4 (2017) (describing how President Trump does not have unilateral authority to fire Mueller, and how “[s]ignificant [l]egal [o]bstacles” make doing so prohibitive).

44. *Id.* at 3–4.

45. Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 5:55 AM), <https://twitter.com/realdonaldtrump/status/890193981585444864> [<https://perma.cc/M2B5-HW37>]; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM), <https://twitter.com/realdonaldtrump/status/890196164313833472> [<https://perma.cc/SFJ6-EKPU>]; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:08 AM), <https://twitter.com/realdonaldtrump/status/890197095151546369> [<https://perma.cc/C772-U4DB>] [hereinafter Transgender Troop Tweets].

provided further, *formal* guidance on the subject,<sup>46</sup> and the Pentagon said it would not accept a tweet as formal guidance.<sup>47</sup> Here, President Trump's tweets did not directly alter the behavior or policies of the Department of Defense (DOD).<sup>48</sup> He had to send further guidance, in the form of a presidential memorandum, which carried proper legal weight.<sup>49</sup> Even as recently as January 23, 2019, President Trump is still attempting to sway DOD policy in his favor.<sup>50</sup> If Trump's intended effect was to influence the DOD's actions, he was, at least in this instance, unsuccessful.

Trump's other attempts to influence agency behavior have been more successful. For example, Trump saw moderate success in changing the policies of the DOJ during the 2018 Election.<sup>51</sup> On October 20, 2018, President Trump tweeted that government actors and law enforcement were monitoring, and responding to, incidents of voter fraud in early voting.<sup>52</sup> Ten days later, the DOJ's Office of Public Affairs released a statement regarding its efforts "to protect the right to vote and prosecute ballot fraud."<sup>53</sup> Here, President Trump saw the desired results of his social media influence.

President Trump's administration has also helped to facilitate his leadership-by-tweet. The National Security Council (NSC) has taken to distributing copies of President Trump's tweets in meetings—ostensibly for the purpose of "find[ing] ways of justifying, enacting or explaining

46. Rebecca Kheel, *Joint Chiefs: No Change in Transgender Policy Until Trump Sends Pentagon Direction*, HILL (July 27, 2017), <https://thehill.com/policy/defense/344107-joint-chiefs-chairman-no-change-in-transgender-policy-until-trump-sends> [https://perma.cc/6DBL-FZE3].

47. Ryan Browne, *Pentagon Still Awaiting White House Direction on Transgender Policy Change*, CNN POLITICS (July 31, 2017), <https://www.cnn.com/2017/07/31/politics/pentagon-white-house-transgender-policy/index.html> [https://perma.cc/FHX5-CM39].

48. See Comment, *Tweets on Transgender Military Servicemembers: In Tweets, President Purports to Ban Transgender Servicemembers*, 131 HARV. L. REV. 934, 936 (2019) [hereinafter *Tweets on Transgender Military Servicemembers*].

49. *Id.*

50. Matt Thompson, *How to Spark Panic and Confusion in Three Tweets*, ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/donald-trump-tweets-transgender-military-service-ban/579655/> [https://perma.cc/S8WR-K54S] ("The Trump administration has petitioned the Supreme Court to review injunctions from multiple federal-court judges preventing the government from enforcing a modified version of the initial ban.").

51. See U.S. DOJ Press Release No. 18-1413, *Justice Department Continues to Protect the Right to Vote and Prosecute Ballot Fraud* (Oct. 30, 2018), <https://www.justice.gov/opa/pr/justice-department-continues-protect-right-vote-and-prosecute-ballot-fraud> [https://perma.cc/6UDU-Y6ML] [hereinafter DOJ Press Release].

52. Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 20, 2018, 5:36 PM), <https://twitter.com/realDonaldTrump/status/1053807130120200192> [https://perma.cc/A9VD-5LRE] ("All levels of government and Law Enforcement are watching carefully for VOTER FRAUD, including during EARLY VOTING. Cheat at your own peril. Violators will be subject to maximum penalties, both civil and criminal!").

53. DOJ Press Release, *supra* note 51.



Mr. Trump’s policy, not [advising] the president on what it should be.”<sup>54</sup> The NSC’s action means that it views President Trump’s tweets as policy statements, and suggests that those statements are valid presidential orders.<sup>55</sup> Furthermore, its actions demonstrate the uncertainty many members of the Trump Administration feel about what their goals are, and how those goals should be implemented.<sup>56</sup> In other words, when President Trump’s tweets are inconsistent with NSC actions and recommendations, uncertainty ensues, suggesting President Trump’s tweets are viewed by his administration as orders.

### B. *President Trump’s Personal Appropriation of Agency Actions*

Just as President Obama did,<sup>57</sup> President Trump utilizes social media to take credit for—or appropriates<sup>58</sup>—agency actions. Here, again, the transgender military ban provides a helpful illustration. President Trump announced to his 59.8 million followers that transgender individuals would no longer be allowed to serve in the military.<sup>59</sup> Only after he made this announcement did the public learn that the ban was not, in fact, set in stone, and that Trump’s “directives” via Tweet were not legitimate.<sup>60</sup> In tweeting about transgender troops, Trump was able to “project the sense that he owns the regulatory state.”<sup>61</sup> On separate occasions, President Trump boasted about collaborative efforts between the Department of Homeland Security, Immigration and Customs Enforcement, and federal border patrol organizations, posting tweets celebrating their work at the U.S.-Mexico border<sup>62</sup> and sharing videos in support of their efforts.<sup>63</sup>

54. Michael Crowley & David E. Sanger, *Under O’Brien, N.S.C. Carries Out Trump’s Policy, but Doesn’t Develop It*, NY TIMES (Feb. 23, 2020), <https://www.nytimes.com/2020/02/21/us/politics/national-security-council-trump-policy.html?referringSource=articleShare> [<https://perma.cc/69P8-MPLN>].

55. *Id.*

56. *Id.* (“[W]hen Mr. Trump tweeted . . . against heavy restrictions on technology sales to China — days after Mr. Esper gave a fiery speech calling for just that — a White House meeting next week on the subject was abruptly postponed. Not only is the policy in some chaos, it is unclear who is supposed to resolve it.” (citing Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 18, 2020), <https://twitter.com/realDonaldTrump/status/1229790099866603521> [<https://perma.cc/B45H-237G>])).

57. See Watts, *Controlling Presidential Control*, *supra* note 4, at 692.

58. *Id.* at 691.

59. Transgender Troop Tweets, *supra* note 45.

60. Kheel, *supra* note 46.

61. Watts, *Controlling Presidential Control*, *supra* note 4, at 692 (footnotes omitted).

62. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 2, 2018, 2:26 PM), <https://twitter.com/realdonaldtrump/status/959553606134345728> [<https://perma.cc/9737-P8PW>].

63. Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 5, 2019, 6:25 PM), <https://twitter.com/realdonaldtrump/status/1114338251035123715> [<https://perma.cc/5238-PHLL>].

Even his tweets regarding the direction of the FBI or DOJ's action can constitute appropriation, demonstrating successful intervention in agencies' courses of action.<sup>64</sup>

Trump has also influenced, and appropriated, the promulgation of rules by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). On October 1, 2017, a gunman opened fire on thousands of people at the Route 91 Harvest festival in Las Vegas, Nevada.<sup>65</sup> He used a gun equipped with a bump-stock<sup>66</sup> to increase the speed at which he could fire.<sup>67</sup> Months after the shooting, President Trump issued a memorandum directing the DOJ to propose a rule banning all bump-stocks.<sup>68</sup> After the close of the notice and comment period, the DOJ announced a final rule amending the regulatory definition of "machinegun" to include bump-stocks.<sup>69</sup> This change resulted in bump-stocks being unlawful under the National Firearms Act and the Gun Control Act.<sup>70</sup>

Throughout the rulemaking process, President Trump engaged with his Twitter followers on the issue of bump-stocks. Just two days after he issued his February 20, 2018 memorandum, he tweeted that he would be "strongly pushing" the DOJ to increase regulation on the sale of bump-stocks.<sup>71</sup> Two weeks before the notice and comment period opened on

64. See, e.g., Megan Crepeau & Madeline Buckley, *Trump Tweets that FBI and Justice Department Will Look Into Jussie Smollett Case in Chicago*, CHI. TRIBUNE, (Mar. 28, 2019), <https://www.chicagotribune.com/news/local/breaking/ct-trump-jussie-smollett-20190328-story.html> [<https://perma.cc/J3Q2-H5DQ>]; Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 28, 2019, 3:34 AM), <https://twitter.com/realDonaldTrump/status/1111214993293357056> [<https://perma.cc/L7FS-YQ67>] ("FBI & DOJ to review the outrageous Jussie Smollett case in Chicago. It is an embarrassment to our Nation!").

65. Andrew Blankstein et al., *Las Vegas Shooting: 59 Killed and More Than 500 Hurt Near Mandalay Bay*, NBC (Oct. 2, 2017), <https://www.nbcnews.com/storyline/las-vegas-shooting/las-vegas-police-investigating-shooting-mandalay-bay-n806461> [<https://perma.cc/CU4T-ASU9>].

66. A bump-stock is "a device that allows a semiautomatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semiautomatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter." Bump-Stock-Type Devices, 83 Fed. Reg. 66,514, 66,543 (Dec. 26, 2018) (to be codified at 27 C.F.R. §§ 447–479).

67. Larry Buchanan et al., *Nine Rounds a Second: How the Las Vegas Gunman Outfitted a Rifle to Fire Faster*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/interactive/2017/10/02/us/vegas-guns.html> [<https://perma.cc/8M6W-92KX>].

68. Memorandum for the Attorney General, Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices. 83 Fed. Reg. 7,949, 7,949 (Feb. 20, 2018) (proposing "a rule banning all devices that turn legal weapons into machineguns.").

69. Bump-Stock-Type Devices, 83 Fed. Reg. 66,514, 66,514 (Dec. 26, 2018) (to be codified at 27 C.F.R. §§ 447–49).

70. *Id.*

71. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 22, 2018, 5:13 AM), <https://twitter.com/realdonaldtrump/status/966662241977360384> [<https://perma.cc/BP2H-VRPP>] ("I

March 29, 2018, Trump tweeted twice more about his desire to ban bump-stocks, indicating his involvement in changing the ATF regulations.<sup>72</sup> In this way, President Trump was able to fold the work of the agency into his own political agenda, thereby treating the ATF and its work as an extension of his office.<sup>73</sup>

### C. *The Form and Function of President Trump's Orders*

Presidential orders—meaning directives issued by the President—can take many forms. More traditional forms include memorandums, proclamations, and executive orders.<sup>74</sup> Tweets, while a newer and less traditional form of presidential order, can still operate in the same way as more formal forms, and thus, should be challengeable in some instances. To reinforce this point, one way of understanding “presidential orders” is to think of them as directives issued by the President, regardless of their form.<sup>75</sup> It is also possible for presidential orders to go unpublished in the Federal Register, raising additional questions about what qualifies as a “presidential order.”<sup>76</sup>

Assessing what is a presidential order can be quite challenging precisely because presidential orders can take many forms, and their effects differ.<sup>77</sup> That said, the question of whether a tweet is a presidential

will be strongly pushing Comprehensive Background Checks with an emphasis on Mental Health. Raise age to 21 and end sale of Bump Stocks! Congress is in a mood to finally do something on this issue - I hope!”).

72. Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 12, 2018, 6:15 AM), <https://twitter.com/realdonaldtrump/status/973185831547670529> [<https://perma.cc/MFX4-AGAY>] (“Very strong improvement and strengthening of background checks will be fully backed by White House. Legislation moving forward. Bump Stocks will soon be out . . . .”); Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 23, 2018, 1:50 PM), <https://twitter.com/realdonaldtrump/status/977286489410240514> [<https://perma.cc/5F9Y-4H5C>] (“Obama Administration legalized bump stocks. BAD IDEA. As I promised, today the Department of Justice will issue the rule banning BUMP STOCKS with a mandated comment period. We will BAN all devices that turn legal weapons into illegal machine guns.”).

73. See Watts, *Controlling Presidential Control*, *supra* note 4, at 692 (discussing how President Obama “turn[ed] the regulatory state into a very public extension of his own political agenda.”).

74. Manheim & Watts, *Reviewing Presidential Orders*, *supra* note 7, at 1749; see also Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 719 (2007) (discussing presidents’ uses of executive orders and OMB directives instructing agencies how to act).

75. Manheim & Watts, *Reviewing Presidential Orders*, *supra* note 7, at 1749.

76. See *id.* at 1795.

77. *Id.* at 1763 (noting that presidential orders can encompass memoranda, proclamations, and executive orders); Strauss, *supra* note 74, at 719 (“Presidential assertions of controlling authority come in a variety of forms: Executive Orders such as established the Federal Legal Council or the obligation of economic impact analysis under the OMB’s Office of Information and Regulatory

order is increasingly important under President Trump, and will continue to be important under future presidents using social media.<sup>78</sup> Some believe the answer to this question is yes.<sup>79</sup> Legal interest groups recognize that President Trump's Twitter communications constitute official records.<sup>80</sup> Even former White House Press Secretary Sean Spicer confirmed that President Trump's tweets constitute "official communications" when asked about pending litigation over Trump's announcement of the travel ban.<sup>81</sup>

Because presidential orders carry so many different forms and effects of orders, what constitutes a presidential order is ambiguous.<sup>82</sup> Indeed, "objective intent" of the effect of a presidential statement has provided insight in the past.<sup>83</sup> Previous federal guidance has referred to an executive order or proclamation as "a written document issued by the President and titled as such by him or at his direction," providing as little clarity about the form and function of a presidential order then as we have now.<sup>84</sup> Even so, despite a lack of clarity in what can be a presidential order, litigants have challenged presidential orders in the past.

More broadly, the functional ambiguity of a presidential order is concerning for several reasons. First, it can cause confusion about when a president's statement constitutes an order and when it does not.<sup>85</sup> Agencies might be unsure of when and how the President expects them to

Affairs ('OIRA') supervision, OMB circulars requiring preclearance of legislative testimony and recommendations, generalized directives concerning regulatory business (such as moratoria and requirements to reexamine existing regulations imposed by the Presidents Bush), and President Clinton's agency-and-subject-specific directives. . . .").

78. See *Tweets on Transgender Military Servicemembers*, *supra* note 48, at 943 (describing how situations like the one in which Trump tweeted about the transgender military servicemember ban will continue to occur under modern presidents).

79. *Id.*

80. See, e.g., Complaint at ¶¶ 4, 29, *CREW v. Trump*, 924 F.3d 602 (D.D.C. 2017) (No. 18-5150).

81. Russel Spivak, *Trump's Transgender Tweet Isn't in Force Yet, But It's Close*, FOREIGN POLICY (Aug. 2, 2017), <https://foreignpolicy.com/2017/08/02/trumps-transgender-tweet-isnt-in-force-yet-but-its-close/> [<https://perma.cc/D6ZX-L84N>].

82. Manheim & Watts, *Reviewing Presidential Orders*, *supra* note 7, at 1749; see also Strauss, *supra* note 74, at 735 (discussing President Bush's "prompt letters," which were used to "publicly direct[] agency attention to matters that he concluded might warrant litigation." These letters were arguably a form of presidential order).

83. *Tweets on Transgender Military Servicemembers*, *supra* note 48, at 943.

84. H. COMM. ON GOV'T OPERATIONS, 85TH CONG., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF A USE OF PRESIDENTIAL POWERS I (Comm. Print 1957).

85. See Manheim & Watts, *Reviewing Presidential Orders*, *supra* note 7, at 1764 (noting that it can be difficult to know or describe what is a presidential order due to the number of different forms a presidential order can take).

act.<sup>86</sup> Congress might not know whether a presidential statement has been made with clearly delegated authority.<sup>87</sup> The courts might not know which analysis to adopt if the statement gives rise to a legal challenge.<sup>88</sup>

Second, the functional ambiguity can sometimes lead to confusion about when an order is legally challengeable. Presidential orders are not challengeable in all instances, and ambiguity as to an order's intent or effect has the potential to delay or allay lawsuits.<sup>89</sup> Third, ambiguous presidential orders also raise concerns about political access,<sup>90</sup> meaning the President could use the ambiguity of a presidential order to direct agencies while avoiding scrutiny from other branches of the federal government,<sup>91</sup> and from litigants. In other words, he could use the ambiguity to his advantage by influencing agencies through nontraditional channels, and then claiming his influence is not a presidential order.<sup>92</sup> Such a presidential order would be difficult for Congress or a court to review—it would be challenging to claim such an order was a directive, and to take remedial action based on that finding.

President Trump's tweets are not published in the Federal Register. They are not technically executive orders, memoranda, or proclamations, although those labels are not used consistently by presidents.<sup>93</sup> Furthermore, the term “presidential orders” can “cover various forms of unilateral written directives publicly issued by the President, regardless of whether a given directive is formally labeled . . . .”<sup>94</sup> Several of Trump's tweets provide helpful illustrations of their potential to affect agencies as presidential orders.

On July 26, 2017, President Trump issued a series of tweets announcing his administration's decision to ban transgender people from the

86. See, e.g., Jeannie Suk Gersen, *Trump's Tweeted Transgender Ban Is Not A Law*, NEW YORKER (July 27, 2017), <https://www.newyorker.com/news/news-desk/trumps-tweeted-transgender-ban-is-not-a-law> [<https://perma.cc/MA82-WBN5>] (describing how eight DOD officials were unsure of how the President's tweet would affect the DOD's policy on transgender military servicemembers).

87. See Strauss, *supra* note 74, at 745–46 (discussing the potential for the President to take action in an area where he and Congress appear to share concurrent authority, and where the degree of his authority is unclear).

88. See Manheim & Watts, *Reviewing Presidential Orders*, *supra* note 7, at 1802 (describing how, when presented with several possible doctrinal approaches to reviewing presidential orders, “the courts [still] struggle to figure out how to understand these doctrinal rules” in that context).

89. See *infra* Part III.

90. Strauss, *supra* note 74, at 737.

91. See *id.* at 737–38.

92. See *id.* at 738.

93. Manheim & Watts, *Reviewing Presidential Orders*, *supra* note 7, at 1749.

94. *Id.* at 1748–49 (“The labels generally have no bearing on the substance or the legal effect of presidential orders, and presidents tend not to use these labels in a consistent fashion.”).

military.<sup>95</sup> The tweet did not accompany an executive order, proclamation, or memorandum, which suggests that President Trump intended it to be an order. At the time the President tweeted, the DOD did not change its policy on transgender troops.<sup>96</sup> In fact, a Pentagon spokesperson said the DOD would wait for more “formal guidance” from President Trump before changing its policy.<sup>97</sup> It was not until a month later that President Trump issued a memorandum directing the Secretaries of Defense and Homeland Security (with respect to the U.S. Coast Guard) to reinstate the policy of not allowing transgender individuals to serve.<sup>98</sup> Although the Secretaries did not heed the “directive” until it came in the form of a memorandum, when asked how the tweet would be handled and how the ban would take effect, eight DOD officials could not give a definitive answer.<sup>99</sup> Furthermore, despite no official order and no immediate action from the DOD based on President Trump’s tweet, civil rights and transgender advocacy groups vowed to challenge the President’s new policy in court.<sup>100</sup>

Consider another example: President Trump tweeting about voter fraud in the weeks leading up to the 2018 midterm elections.<sup>101</sup> He issued a tweet announcing that voters who committed voter fraud would be “subject to maximum penalties,”<sup>102</sup> and ten days later the DOJ issued a press release affirming the DOJ’s commitment to preventing voter fraud.<sup>103</sup> No executive order, memorandum, or proclamation accompanied the President’s announcement. The absence of any accompanying order, and the short timeframe in which the DOJ issued its press release, suggest that the DOJ affirmatively outlined its policies at the request of President Trump’s tweet.

President Trump’s use of tweets in addition to more formal forms of presidential orders illustrates that presidential orders do not always take a

95. Transgender Troop Tweets, *supra* note 45.

96. *Tweets on Transgender Military Servicemembers*, *supra* note 48, at 936.

97. *Id.*

98. Military Service by Transgender Individuals, 82 Fed. Reg. 41,319, 41,319 (Aug. 30, 2017).

99. Gersen, *supra* note 86.

100. Julie H. Davis & Helene Cooper, *Trump Says Transgender People Will Not Be Allowed in the Military*, N.Y. TIMES (July 26, 2017), <https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html> (last visited Apr. 11, 2020).

101. Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 20, 2018, 5:36 PM), <https://twitter.com/realDonaldTrump/status/1053807130120200192> [<https://perma.cc/A9VD-5LRE>] (“All levels of government and Law Enforcement are watching carefully for VOTER FRAUD, including during EARLY VOTING. Cheat at your own peril. Violators will be subject to maximum penalties, both civil and criminal!”).

102. *Id.*

103. DOJ Press Release, *supra* note 51.

standard written form. Although some scholars remain convinced that President Trump's tweets cannot be presidential orders,<sup>104</sup> others are not as convinced.<sup>105</sup> Despite scholars' hesitation to recognize certain forms of presidential communications as orders, and regardless of whether the DOD responded to President Trump's tweet by enacting the ban, it appears that the tweet was intended by its author to carry legal effect.<sup>106</sup> As President Trump continues to issue tweets that carry legally binding effect, Congress and the courts should equip themselves to handle the potential fallout.<sup>107</sup> When the inevitable legal challenge to a presidential tweet arises, courts should adopt a framework for reviewing tweets that are legally challengeable, and the instances in which those tweets may be challenged.

### III. CHALLENGING PRESIDENTIAL TWEETS

Both Congress and the courts have the potential to function as gatekeepers of the far-reaching effects of Trump's presidential orders. Several members of Congress believe that President Trump's use of Twitter to influence agencies is inappropriate and unprecedented.<sup>108</sup> Despite Congress's authority to amend agencies' organic statutes, checks and balances limit what it can do to remedy the problem of excessive presidential control. Congress may delegate authority to the President either explicitly, implicitly, or in anticipation of presidential action.<sup>109</sup> Congress can also amend agencies' organic statutes to specify where decision-making authority lies within the executive branch. However, if Congress amends agencies' organic statutes to limit President Trump's ability to decide their courses of action, they still require presidential

104. See Gersen, *supra* note 86 (arguing that President Trump's tweets should not be considered orders that agencies should follow, and decriing the fact that we exert so much energy analyzing the President's tweets and their legal significance).

105. *Tweets on Transgender Military Servicemembers*, *supra* note 48, at 939 ("The law-politics divide and the category of military orders can help us make sense of why the PM had legal status, but neither concept can fully explain the conviction that the tweets were not legal.").

106. See *Transgender Troop Tweets*, *supra* note 45.

107. See *Tweets on Transgender Military Servicemembers*, *supra* note 48, at 943.

108. Following several tweets from President Trump regarding two pending DOJ investigations in September 2018, Democrats in Congress expressed their concern that President Trump believes "the entire federal government works for him at his beck and call" and condemning his use of Twitter as inappropriate and "unprecedented in American history." Sophie Tatum, *Democrats Slam Trump's Sessions tweet as 'unprecedented in American history'*, CNN (Sep. 5, 2018) (quoting Sens. Mazie Hirono and Dick Durbin), <https://www.cnn.com/2018/09/04/politics/democrats-senators-donald-trump-jeff-sessions-tweet/index.html> [<https://perma.cc/K8MZ-B52N>]. These sentiments suggest an interest in enacting greater checks on the President's influence over agency action.

109. Erica Newland, Note, *Executive Orders in Court*, 124 YALE L.J. 2026, 2030–31 (2015).

support.<sup>110</sup> The President has veto power.<sup>111</sup> If the president vetoes, they must override the veto with a two-thirds majority vote in *each* Chamber.<sup>112</sup> The uncertainty of whether Congress would be successful in amending agencies' organic statutes means one must look instead to the courts.

Litigants are increasingly challenging presidential orders directly, rather than waiting to challenge subsequent agency action.<sup>113</sup> This is because presidential orders often lead directly to subsequent agency action, thereby reinforcing the argument that orders themselves can cause injury. Courts continue to find that presidential orders are challengeable on various grounds.<sup>114</sup> This reality leads to the conclusion that the courts must recognize litigants' ability to challenge presidential tweets in an era of instantaneous presidential communication leading to certain agency action. It also prompts the following questions: (1) what kinds of tweets are challengeable; (2) who can challenge a tweet; (3) under which circumstances litigants can challenge a tweet; and (4) what remedies are available to those who challenge tweets.

#### A. *What Kinds of Tweets Can Be Challenged?*

First, it is important to discuss what kinds of tweets are challengeable. Generally, not all presidential orders are challengeable.<sup>115</sup> In other words, simply labeling something a “presidential order”—for example, a tweet—does not necessarily mean it is challengeable in court. This is because presidential orders are not always legally binding.<sup>116</sup> Presidential orders are legally binding if they “directly regulate private actors outside of the executive branch and alter legal rights or obligations.”<sup>117</sup> Other types of presidential orders have no legally binding effect, operating instead as “presidential communication tool[s]” that allow the President to direct his administration without “themselves alter[ing] rights or obligations.”<sup>118</sup> Because some presidential orders carry the force and effect of law and

110. U.S. CONST. art. I, § 7.

111. *Id.*

112. *Id.*

113. *See, e.g., Aziz v. Trump*, 234 F. Supp. 3d 724, 739 (E.D. Va. 2017) (enjoining enforcement of the ban against Virginia residents).

114. *See, e.g., id.* (enjoining enforcement of the ban against Virginia residents); *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (finding that plaintiff states had standing to challenge President Trump's Executive Order concerning the travel ban and holding the constitutionality of the order reviewable by the courts).

115. *See Manheim & Watts, Reviewing Presidential Orders, supra* note 7, at 1764.

116. *Id.*

117. *Id.*

118. *Id.* at 1765.



others do not, courts should not treat them the same.<sup>119</sup>

The same principle applies to presidential orders that are tweets. A helpful example of this is President Trump's tweet about banning transgender troops.<sup>120</sup> As a presidential order, the enforceability of the tweet was unclear—in large part because the DOD chose not to follow it.<sup>121</sup> Yet at the same time, it was issued without an accompanying order that took a more formal form, and it immediately triggered a response from both the DOD and the public.<sup>122</sup> Eventually, the President issued a more formal order which directly affected then-current and aspiring transgender military members' right to serve. In the subsequent lawsuit<sup>123</sup> filed by these transgender individuals and advocacy organizations, the court found the plaintiffs' arguments compelling and recognized that the order issued by Trump had directly affected their ability to serve.<sup>124</sup>

Beyond his use of Twitter to issue legally-binding presidential orders, President Trump routinely uses Twitter to communicate with the executive branch, issuing presidential orders that are not legally binding and do not affect actors outside the executive branch. These tweets may be significant to administrative agencies, altering their behaviors or approaches to various agency actions.<sup>125</sup> These tweets also may not be legally challengeable given their form and effect.<sup>126</sup> While the tweets are significant for agencies, they are not necessarily significant for those operating outside the executive branch because they do not alter legal rights or obligations. For example, President Trump has routinely used his Twitter to communicate with agencies in general terms.<sup>127</sup> These tweets do not encourage or demand a change in agency behavior, but rather publicly celebrate agencies' achievements and encourage their continued success.<sup>128</sup>

The effect of a presidential order-by-tweet is sometimes ambiguous, and its ambiguity should be considered in any legal challenge to this type

119. *Id.* at 1796–97.

120. Transgender Troop Tweets, *supra* note 45.

121. *Tweets on Transgender Military Servicemembers*, *supra* note 48, at 936.

122. *See id.*

123. *Doe 2 v. Trump*, 315 F. Supp. 3d 474 (D.D.C. 2018), *rev'd sub nom. Doe 2 v. Shanahan*, 755 F. App'x 19, (D.C. Cir. 2019).

124. *Id.*

125. *See, e.g., Crowley & Sanger*, *supra* note 54.

126. *See Manheim & Watts, Reviewing Presidential Orders*, *supra* note 7, at 1796–97.

127. *See, e.g., Donald J. Trump (@realDonaldTrump)*, TWITTER (Feb. 2, 2018, 2:26 PM), <https://twitter.com/realdonaldtrump/status/959553606134345728> [<https://perma.cc/9737-P8PW>]; *Donald J. Trump (@realDonaldTrump)*, Twitter (Sept. 14, 2018, 6:54 PM), <https://twitter.com/realdonaldtrump/status/1040780813086928897> [<https://perma.cc/4CFL-HVC6>].

128. *See id.*

of presidential order. In some circumstances, it may well be that the tweet is not challengeable and litigants should wait until the subsequent agency action ensues. In other cases, litigants should be able to challenge the Tweet directly, seeking an injunction against imminent agency action. Tweets that have a clear legal effect<sup>129</sup>—or that immediately alter legal rights and obligations<sup>130</sup>—are challengeable.

*B. Who Can Challenge a Tweet?*

Second, different plaintiffs might see varying levels of success (or lack thereof) when challenging tweets. Analogizing to lawsuits in which litigants have challenged other types of presidential orders is helpful in understanding their potential for success. States have been found to have standing to bring legal challenges to presidential orders. Two recent examples of states directly challenging an executive order are *Washington v. Trump*<sup>131</sup> and *Aziz v. Trump*.<sup>132</sup> In these cases, states brought actions seeking to prevent President Trump’s Executive Order concerning the travel ban—a ban on travel between the United States and seven different majority-Muslim countries<sup>133</sup>—from going into effect.<sup>134</sup> The states that brought these suits were ultimately successful.<sup>135</sup> Because courts have recognized states’ ability to bring legal challenges against certain types of presidential orders, courts should also recognize states’ ability to challenge tweets that are presidential orders.

Private citizens and legal nonprofits have also raised challenges involving presidential orders, specifically referencing the President’s tweets.<sup>136</sup> For example, in *Doe 2 v. Trump*,<sup>137</sup> five “current and aspiring” transgender members of the armed services,<sup>138</sup> as well as GLBTQ Legal Advocates & Defenders (GLAD) and the National Center for Lesbian

129. Manheim & Watts, *Reviewing Presidential Orders*, *supra* note 7, at 1764.

130. *Id.*

131. No. C17-0141JLR, 2017 WL 462040, at \*1 (W.D. Wash. Feb. 3, 2017).

132. 234 F. Supp. 3d 724, 739 (E.D. Va. 2017).

133. Michael D. Shear & Helene Cooper, *Trump Bars Refugees and Citizens of 7 Muslim Countries*, N.Y. TIMES (Jan. 27, 2017), <https://www.nytimes.com/2017/01/27/us/politics/trump-syrian-refugees.html> (last visited Apr. 15, 2020).

134. *See generally Washington*, No. C17-0141JLR, 2017 WL 462040; *Aziz*, 234 F. Supp. 3d 724.

135. *Id.*

136. Not everyone agrees that private citizens can raise legal challenges to presidential orders. *See, e.g., Newland, supra* note 109, at 2081 (“[S]ince there is generally no private right of action to enforce an executive order, individual plaintiffs can do little to challenge these practices. . . .”).

137. 315 F. Supp. 3d 474 (D.D.C. 2018), *rev’d sub nom. Doe 2 v. Shanahan*, 755 F. App’x 19 (D.C. Cir. 2019).

138. *Doe 2 v. Trump*, 315 F. Supp. 3d at 480.

Rights (NCLR), brought suit alleging that President Trump’s directive banning transgender troops from military service violated the Fourteenth Amendment.<sup>139</sup> While the lawsuit did not directly challenge the tweet itself, the Complaint included reference to President Trump’s tweets, and described how the White House turned President Trump’s tweets concerning the ban into “official guidance” to the DOD.<sup>140</sup> Because transgender service members were directly harmed by the Trump Administration’s plan to prevent them from serving in the military, the district court held that they had standing to challenge the presidential memorandum that triggered the change in policy.<sup>141</sup>

Based on these examples, one question that remains is whether similarly situated litigants will be successful in direct challenges to tweets that are presidential orders. They likely will, given their varying success in challenging presidential orders that are not tweets. Where litigants have been able to bring legal challenges to other types of presidential orders, the same should be true of their ability to challenge orders that are tweets.

### C. *Under Which Circumstances Can Litigants Sue?*

Third, given the increasing frequency of legal challenges to President Trump’s orders,<sup>142</sup> another question is under which circumstances litigants may challenge the President’s tweets. Before challenging a presidential order, litigants should ensure they satisfy any issues related to standing, ripeness, and cause of action when challenging tweets that are presidential orders.<sup>143</sup> These issues are particularly important in the context of tweets because tweets have an instant impact on the public, but not necessarily an instant impact on agency action. Once litigants have met these threshold requirements, they should consider what kinds of challenges they want to bring.

With respect to standing, “courts apply the same standards to executive orders that they apply to statutes.”<sup>144</sup> Both standing and ripeness are issues of timing prior to litigation, and “loom especially large” in the realm of

139. *Id.*

140. Second Amended Complaint ¶ 5, *Doe 2. v. Trump*, 315 F. Supp. 3d 474 (D.D.C. 2018) (No. 18-5257), *rev’d sub nom.* *Doe 2 v. Shanahan*, 755 F. App’x 19 (D.C. Cir. 2019).

141. *Doe 2 v. Trump*, 315 F. Supp. 3d at 486 (“By singling these Plaintiffs out and stigmatizing them as members of an inherently inferior class of service members, the [ban] causes Plaintiffs grave non-economic injuries that are alone sufficient to confer standing.”).

142. See *Manheim & Watts, Reviewing Presidential Orders*, *supra* note 7, at 1782; *supra* note 113 and accompanying text.

143. See *supra* Part III.

144. Newland, *Executive Orders in Court*, *supra* note 109, at 2099 (citing *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999)).

legal challenges to presidential orders.<sup>145</sup> Both are relevant to legal challenges to presidential orders because it is sometimes unclear whether, at the time a presidential order is issued, an injury in fact has actually occurred.<sup>146</sup> The goal in determining standing and ripeness for the purposes of a challenge to a presidential order is to distinguish between challenges that are premature, and challenges that are ripe for adjudication.<sup>147</sup>

For example, refer again to President Trump’s tweets announcing the transgender servicemember ban. When President Trump tweeted about the ban, millions of people had instant access to those three tweets.<sup>148</sup> Despite stating that they would sue the Trump Administration immediately following President Trump’s tweets,<sup>149</sup> lawyers for transgender plaintiffs did not file suit until after Trump issued a second, more formal, directive to the DOD.<sup>150</sup> The timing of their suit suggests they had concerns about standing and ripeness and did not want to risk their case being dismissed on those grounds. Even so, the injury plaintiffs alleged in their Complaint stemmed in part from the actual tweet itself.<sup>151</sup> By announcing his decision to ban transgender servicemembers from the military, President Trump “upset the reasonable expectations of Plaintiffs and thousands of other transgender servicemembers” as to the stability of their jobs and the disruption of their opportunity to serve their country.<sup>152</sup>

145. Manheim & Watts, *Reviewing Presidential Orders*, *supra* note 7, at 1801. To illustrate this point, Manheim and Watts refer to a series of lawsuits in 2017 challenging the vaguely worded Executive Order No. 13,768, targeting “sanctuary jurisdictions.” *See id.* at 1790–1802. “[A] central point of contention in the litigation over Executive Order No 13768 [] involved the overlapping doctrines of standing and ripeness. The defendants argued that the order’s vagueness precluded the plaintiffs from seeking immediate review. . . .” *Id.* (citing *Cty. of Santa Clara v. Trump*, 272 F. Supp. 3d 1196, 1217 (N.D. Cal. 2017)). Additionally, defendants argued that the lawsuits against the Order were premature. *Id.* The court held that Executive Order No. 13,768 “caused immediate injury that may be considered by a federal court precisely because of the uncertainty the order already had caused.” *Id.* at 1803 (footnote omitted). The Ninth Circuit affirmed the court’s holding. *Id.* (footnote omitted).

146. *See id.* at 1803 (citing *Am. Fed’n of Gov’t Employees, AFL-CIO v. Trump*, 318 F. Supp. 3d 370, 437 (D.D.C. 2018)). Manheim and Watts articulate the need for a distinction between legally binding and non-legally binding orders when considering standing and ripeness. “Legally binding orders carry the force and effect of law and can be legally enforced in court—in a manner analogous to legislative rules promulgated by agencies. By contrast, nonlegally binding orders do not themselves alter legal rights or obligations.” *Id.*

147. *Id.* at 1805.

148. *See* *Transgender Troop Tweets*, *supra* note 45.

149. *See, e.g.,* *Hirschfield Davis & Cooper*, *supra* note 100.

150. *See* *Second Amended Complaint* ¶¶ 2, 74–75, *Doe 2. v. Trump*, 315 F. Supp. 3d 474 (D.D.C. 2018) (describing how the White House turned President Trump’s tweets into “official guidance” to the DOD).

151. *Complaint for Declaratory & Injunctive Relief* ¶ 4, *Doe 2. v. Trump*, 315 F. Supp. 3d 474 (D.D.C. 2018).

152. *Id.*

Although subsequently overturned, the district court held that the plaintiffs suffered “stigmatic” injury from the exclusionary actions taken by the Trump Administration.<sup>153</sup> This injury arguably began when President Trump issued his very public tweets announcing the ban.

In addition to considering issues of standing, ripeness, and cause of action, litigants bringing legal challenges to presidential orders should also carefully consider the kinds of actions they will bring. Case law suggests that the most common circumstances under which plaintiffs challenge presidential orders are those in which agency action is imminent and the proposed policy change is likely to harm plaintiffs. For example, in *Washington v. Trump*,<sup>154</sup> states sued seeking a temporary restraining order (TRO) to prevent the Trump Administration from implementing the travel ban.<sup>155</sup> The states were able to bring a challenge to President Trump’s order because they successfully demonstrated that implementation of the travel ban would “irreparabl[y] harm” the states and their citizens.<sup>156</sup> Similarly, in *Aziz v. Trump*,<sup>157</sup> Virginia sought and obtained a preliminary injunction to enjoin enforcement of the Executive Order against Virginia residents.<sup>158</sup> The state of Virginia was also successful in large part because it was able to demonstrate that it would suffer irreparable harm if the travel ban were enforced against its citizens.<sup>159</sup>

If litigants bring a legal challenge to a presidential order seeking a TRO or to enjoin enforcement, they must be able to demonstrate: “(1) ‘that [they are] likely to succeed on the merits, (2) that [they are] likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in [their] favor, and (4) that an injunction is in the public interest.’”<sup>160</sup> If a litigant is unable to demonstrate even one of these four elements, their legal challenge will be unsuccessful. By this logic, the circumstances under which litigants may sue seeking to enjoin presidential orders depend in large part on the degree of imminent harm they face.

Typically, litigants challenging presidential orders do not bring

153. *Doe 2 v. Trump*, 315 F. Supp. 3d 474, 487 (D.D.C. 2018), *rev’d sub nom.* *Doe 2 v. Shanahan*, 755 F. App’x 19 (D.C. Cir. 2019).

154. No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017).

155. *Id.* at \*1.

156. *Id.* at \*2 (“[T]he States are likely to suffer irreparable harm in the absence of preliminary relief . . .”).

157. 234 F. Supp. 3d 724 (E.D. Va. 2017).

158. *Id.* at 739.

159. *Id.* at 737.

160. *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at \*1 (citing *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009)).

challenges under a statutory framework.<sup>161</sup> Instead, a more fitting source of authority giving rise to a cause of action is the courts' "inherent equitable powers" or "non-statutory review," which has provided the basis for many of the recent legal challenges to President Trump's orders.<sup>162</sup> Non-statutory review is judicially created and "it is universally agreed that nonstatutory review may be used to obtain judicial consideration of presidential actions."<sup>163</sup> Given the benefits of non-statutory review, Manheim and Watts suggest that courts adopt a presumption allowing challenges to presidential orders to go forward under non-statutory review, and that the presumption be especially strong in the context of these challenges.<sup>164</sup> As policymaking continues largely through executive orders, separation-of-powers principles encourage the use of non-statutory review as a way of checking the power of the President—especially when that power appears to be misused.<sup>165</sup>

Because presidential tweets are simply newer forms of presidential orders, the circumstances under which litigants may bring suit to challenge tweets should be similar to those in which litigants are challenging other types of presidential orders. If litigants can challenge more formal presidential orders immediately after they are issued so as to prevent subsequent agency action, they should be able to do the same for tweets. In light of the nuanced issues surrounding the timing of legal challenges to tweets, litigants must ensure that they have satisfied standing, ripeness, and cause of action requirements, and that the types of suits they bring are appropriate under their particular circumstances.

#### D. *What Remedies Are Available?*

Fourth, after litigants bring legal challenges to presidential tweets, several remedies are potentially available to them. Some remedies are better than others and should be sought out when and where possible. Others—such as severability—are less effective in reducing harms triggered by presidential tweets.

To refer again to *Washington v. Trump* and *Aziz v. Trump*, TROs and injunctions are both effective mechanisms by which to limit the effects of

161. See Manheim & Watts, *Reviewing Presidential Orders*, *supra* note 7, at 1805–06.

162. *Id.* at 1806–07.

163. Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1672 (1997).

164. Manheim & Watts, *Reviewing Presidential Orders*, *supra* note 7, at 1810–11.

165. See *id.* at 1810.

presidential orders.<sup>166</sup> When considering the availability of relief in a challenge to one of President Trump's orders—tweets or otherwise—litigants must consider the possibility that President Trump will not accept court rulings as binding, and will not adjust his or his administration's actions accordingly. In other words, President Trump has demonstrated his openness to ignoring the rule of law, creating concerns at various points in recent months that he might trigger a constitutional crisis.<sup>167</sup> Courts must keep this possibility in mind, especially because the President could refuse to comply with a judicial order.<sup>168</sup>

After a court makes a ruling on the merits of a challenge to a presidential order, it considers the availability of relief and severability.<sup>169</sup> Courts have issued relief against government officials under both statutory and non-statutory review.<sup>170</sup> That said, when considering the availability of relief, courts are hesitant to issue relief against the President because they are uncertain of how much control they can exercise over the President's discretionary conduct—which includes issuing presidential orders.<sup>171</sup> In the case that a court can only provide relief if it issues an opinion directly against the President, then the court might, if “necessary to accord relief, compel the President to comply with the law.”<sup>172</sup> This position raises separate concerns about a constitutional crisis—what if the President refuses to comply with the court's findings?<sup>173</sup>

With respect to severability, Professors Manheim and Watts discuss the unique difficulties and opportunities courts face when reviewing presidential orders, as opposed to reviewing statutes or administrative regulations.<sup>174</sup> While severability is relatively common in judicial review of statutes and regulations, it is less common in review of presidential

166. *See generally* *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017); *Aziz v. Trump*, 234 F. Supp. 3d 724 (E.D. Va. 2017).

167. *See, e.g.*, Susan B. Glasser, *Is This the Official Trump Constitutional Crisis?*, *NEW YORKER* (May 9, 2019), <https://www.newyorker.com/news/letter-from-trumps-washington/is-this-the-official-trump-constitutional-crisis> (last visited Apr. 15, 2020) (describing lawmakers' fears that President Trump's actions in the White House might trigger a constitutional crisis for which there is no structural remedy).

168. *See* Manheim & Watts, *Reviewing Presidential Orders*, *supra* note 7, at 1818.

169. *Id.* at 1816, 1819.

170. Siegel, *supra* note 163, at 1705–07. Interestingly, Siegel also discusses how presidential immunity to certain challenges could cause erroneous dismissals—“a danger that the history of nonstatutory review should cause us to take very seriously” and that could potentially deny some plaintiffs *all* forms of relief. *Id.* at 1703.

171. Manheim & Watts, *Reviewing Presidential Orders*, *supra* note 7, at 1816–19.

172. *Id.* at 1818–19.

173. *Id.*

174. *Id.* at 1819–20.

orders.<sup>175</sup> Precisely because a President can issue an order almost instantaneously, without oversight or input from others, “the President can reconsider, rewrite, and reissue partially unlawful orders” far more easily than Congress can amend a statute or an agency can amend a regulation.<sup>176</sup> Thus, courts should avoid severability when reviewing presidential orders, instead invalidating an improper order in its entirety so as to avoid encouraging a President to “reissue the order in a legally valid form.”<sup>177</sup>

Severability will be a difficult issue for the courts to navigate in challenges to presidential tweets. As Manheim and Watts caution,<sup>178</sup> the use of severability when reviewing presidential orders that are tweets will not correct inappropriate presidential activity. If a court chooses to sever a portion of a presidential tweet, President Trump has the option to immediately rewrite a similar message in a form that is constitutionally valid. Courts should instead consider enjoining the President from issuing presidential orders that reflect the challenged issue.

Although it is likely that courts will increasingly review legal challenges to presidential orders that are tweets, it is important to remember that resolution through the courts comes with its own challenges and ambiguity. First, litigation takes time. While a question of statutory interpretation as to a president’s ability to influence agency action is pending, a president has wide latitude to continue to direct agencies.<sup>179</sup> Second, and perhaps more daunting, there is no cogent, well-established legal framework courts can use to review a presidential order.<sup>180</sup> Because of the absence of a robust legal framework within judicial precedent, courts should look to the framework Professors Manheim and Watts propose in their article in order to ensure consistency in the increasingly frequent legal challenges to tweets that are presidential orders.<sup>181</sup> They argue courts should adopt a reflexive model when assessing legal challenges to tweets that are presidential orders.<sup>182</sup>

Unlike agencies promulgating rules, President Trump enjoys

175. *Id.* at 1820. Although it is uncommon, it is not impossible. Manheim and Watts point to the example of *Washington v. Trump*, the first challenge to the travel ban, in which a district court in Seattle prevented the enforcement of two sections of the travel ban but did not address other parts of the ban. *Id.* at 1820–21 (citing *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017)).

176. *Id.* at 1822.

177. *Id.*

178. *Id.*

179. *See* Strauss, *supra* note 74, at 738.

180. Manheim & Watts, *Reviewing Presidential Orders*, *supra* note 7, at 1747.

181. *See generally id.*

182. *Id.*



significant freedom when issuing presidential orders.<sup>183</sup> He is not required to obtain congressional approval before issuing these statements, and some of them carry the force and effect of law.<sup>184</sup> The same is true of his tweets. President Trump has constant access to his Twitter account and can tweet within seconds of deciding he wants to say something. Although the concept of a “POTUS Twitter” didn’t exist before President Obama,<sup>185</sup> presidents will likely continue to utilize social media and expand the ways in which it may be used to influence agencies. Understanding what kinds of tweets can be challenged, which litigants can challenge a tweet, when and under what circumstances they can challenge, and what remedies are available to them will enable litigants and courts to find successful approaches to lawsuits challenging tweets. This is especially important given the probability that President Trump, and presidents after him, are not going to stop using social media anytime soon.

When courts inevitably review tweets that are presidential orders, they should recognize that tweets are challengeable in court. To do otherwise is to ignore the reality that in the twenty-first century, tweets may constitute presidential orders and those presidential orders can cause direct harm. Furthermore, litigants who have standing can have that standing after the issuance of a tweet alone—not just after the agency responds to that tweet or the President releases a subsequent order. Lastly, litigants and courts alike should keep in mind that certain avenues of redressability—such as TROs or other methods of enjoining subsequent action—are more effective than severability and other forms of redress.

## CONCLUSION

Since President Trump assumed office, his presidential orders have been the subject of dozens of different legal actions. Lawsuits against presidential orders—especially his, but likely those of his successors as well—are only going to increase.<sup>186</sup> President Trump will continue to tweet ambiguous presidential orders. Trump can rely on the ambiguity of his orders to continue to act absent oversight from the legislative and judicial branches.<sup>187</sup> And when the President acts outside the clear and well-defined realm of his presidential power, one turns to the interpreters

183. *Id.* at 1795–96.

184. *Id.* at 1763–69.

185. Wall, *supra* note 37.

186. *Id.* at 46.

187. Strauss, *supra* note 74, at 738.

of the Constitution—the courts.<sup>188</sup> Thus, the courts will increasingly become an arena for assessing the legal efficacy of Trump’s tweets.<sup>189</sup> In fact, President Trump’s tweets are already increasingly involved in litigation.<sup>190</sup> If our legal system isn’t prepared to consider tweets a form of presidential order, then President Trump—and his successors—will continue to expand the ways in which they exert presidential control. President Trump will continue to issue tweets that resemble presidential orders. The courts should recognize the President’s tweets as a modern form of presidential order and allow litigants to bring direct legal challenges against tweets that are challengeable presidential orders.

188. *See id.* at 746 (“When the President is allocating responsibilities as between [agencies], in the face of statutes unclear as to their precise reach, he is acting outside this defined realm . . . [W]e anticipate that the courts will resolve such allocational issues for themselves when they are presented to them—perhaps according some deference to an accommodation reached by an actor (the President) better able to understand the full range of considerations entailed, but not imagining this as a matter entrusted to his judgment.” (footnote omitted)).

189. *See generally* Manheim & Watts, *Reviewing Presidential Orders*, *supra* note 7.

190. *See, e.g.*, Editorial Board, *The Constitution and the President’s Tweets*, N.Y. TIMES (Mar. 28, 2019), <https://www.nytimes.com/2019/03/28/opinion/trump-twitter-lawsuit.html> (last visited Apr. 15, 2020).