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#### Selectivity of the doctrine and citing multiple ground zeroes solvency.

Driesen 18 – University Professor, Syracuse U College of Law

David M. Driesen, “Judicial Review of Executive Orders' Rationality,” 98 B.U.L. Rev. 1013 (Sept. 2018), NexisUni

Accordingly, the President's status as an elected official, when considered in light of his responsibility to faithfully execute the law, suggests that judicial review of presidential decisions must check decisions that undermine the law. The need to check decisions undermining the law requires that courts demand an articulation of the reason that the law supports a particular decision and some sort of factual basis - the core of arbitrary and capricious review.

D. Possible Objections This Section considers two possible objections to the argument that courts should review executive orders under an arbitrary and capricious test. One is a broad-based separation of powers concern about an unelected judiciary overseeing an elected President that one may detect in Franklin and other cases loosening judicial oversight of presidential action. This Section rejects this conclusion, at least as a general matter, as contrary to original intent, dangerous to democracy, and overly optimistic about political oversight mechanisms. The other concern comes from critics of arbitrary and capricious review of administrative agency rulemaking. They have argued that arbitrary and capricious review has tended to paralyze administration. Some also object to arbitrary and capricious review as ideological. This Section shows that these problems will not prove as acute in the context of presidential decision-making as in the administrative agency context and also makes some suggestions about how to soften arbitrary and capricious review to ameliorate these concerns. 213 [\*1051] 1. Separation of Powers Concerns The Franklin Court exempted the President from the APA "out of respect for the separation of powers and the unique constitutional position of the President." 214 The analysis provided above considers the constitutional role of the President and separation of powers in addressing the proper standard of review when nonstatutory review takes place. But some concerns articulated in separation of powers cases may cut the other way. 215 While the Franklin Court's statement by itself does not explain why separation of powers or the presidential role counsels no APA review, Franklin cites a case that provides some clues, Nixon v. Fitzgerald, 216 which immunized the President from damage suits not specifically authorized by Congress. 217 Fitzgerald, in turn, relies on concerns that the threat of damage suits would distract or deter the President from "fearlessly and impartially" performing his duties under the law. 218 These concerns might suggest that the Court should avoid arbitrary and capricious review when it reviews an allegation that a President has violated a statute. The analysis presented above reveals the problem with extending this line of reasoning to defeat robust judicial review of executive orders purportedly authorized by statutes. The President's status as an elected official may cause him to "fearlessly" and quite partially ignore his duties under the law while purporting to carry them out. There is a structural tendency of presidents to avoid the Constitution's "finely wrought and exhaustively considered procedure" 219 for legislative change and instead take the short cut of amendment through maladministration. 220 Concerns about suits deterring the President from carrying out his duties properly make more sense in the context of suits for damages than in the context of suits seeking to simply restrain unreasonable executive action. Proper public [\*1052] actions may affect a great number of individuals negatively. 221 The fear that those affected may seek damages could conceivably deter a President from taking legal and appropriate actions to address serious problems. By contrast, a lawsuit seeking to simply deter wrongful presidential actions without seeking damages will only arise when litigants believe that the President has done something improper. 222 Because the Court only allows injured plaintiffs to sue, such lawsuits will come from injured plaintiffs, just as private suits for damages do. 223 But since there is no possibility of damage awards, financial motives will not encourage a proliferation of needless suits. 224 Such suits also do not greatly distract a President from his duties. Government attorneys will defend the lawsuit, just as they defend lawsuits attacking agency action that may be important to the President. 225 While other remedies exist to deter presidential misconduct, they provide weak deterrents to evasion of the law. 226 Presidential elections do not ensure fidelity to law. Voters rarely know a lot about law or policy, and they know even less about whether a President properly implements law. 227 While judicial rulings on the legality of presidential actions have a slight chance of having an impact on elections, presidential policies undermining the law have very little chance of influencing the elections without such signals, except perhaps in the case of very blatant and unpopular decisions. 228 To the extent voters know anything about law and policy, they will evaluate presidential decisions based on [\*1053] the decisions' congruence with the voters' current values, not their conformity to laws enacted in the past. 229 Most voters, however, evaluate presidential candidates by comparing their rhetoric to their own values and making judgments about their character that do not draw heavily on questions of presidential administration. 230 Furthermore, a President in his second term faces no potential electoral deterrent. In short, the notion that elections deter unlawful conduct when courts do not competently settle claims of illegality proves wildly optimistic. Impeachment also provides an inadequate remedy for ensuring fidelity to law. The Senate has never removed a sitting President from office, although an impeachment threat in the House caused President Nixon to resign. 231 The House has only impeached a President when the opposing party controlled it, and then only twice in our nation's history. 232 Members of the President's own political party may overlook blatant legal violations because it likes the policies the President supports. Congressional oversight's value has diminished in recent years to constitutionally inadequate levels. As polarization and special interest influence have increased, members of Congress have become much more interested in advancing their current policy objectives through the oversight process than their prior collective decisions. 233 Kevin Stack has concluded that Congress has not been a [\*1054] "robust monitor of the President's assertions of statutory authority," as it has overturned only four of the more than 3,500 executive orders issued between 1945 and 1998. 234 In any case, the Constitution requires the President to faithfully execute laws enacted prior to his term in office whether or not a subsequent Congress supports it. Leaving enforcement of this duty to Congress alone conflicts with the constitutional principle that law remains in place until Congress musters majorities in both houses to change it and with the requirement that courts generally enforce statutes under Article III. Press scrutiny, while of some value, also has significant limitations as a means of deterring presidential evasion of statutory limits. Most legal violations, even ones that may matter a lot to many people, may not garner significant media attention, as such matters have to compete with spectacular crimes, speeches, provocative tweets, battles over new legislation, celebrities' activities, international events, sports, and other matters for attention. 235 Even for illegal executive actions that attract some attention, media reporting tends to focus on the current policy significance of the executive action, not its legality, at least when the actions evade statutes instead of widely understood constitutional norms. 236 Any coverage of legality will likely report both sides of an argument, leaving the public confused about whether an executive order violates the law absent a judicial ruling. 237 While press scrutiny may nonetheless have some value in discouraging unlawful presidential actions, a President skilled in public relations and sufficiently zealous about policy change may find it a weak deterrent in many cases. 238 [\*1055] The President's concern for his historical legacy may not powerfully influence fidelity to the law absent robust judicial review. Historians and other observers tend to remember Presidents for new laws they enacted, 239 wars they conducted, 240 speeches they made, 241 personal misconduct, 242 and even events that happened to occur on their watch, 243 rather than for faithful (or faithless) [\*1056] execution of the statutes they administer. 244 While a concern with history may occasionally motivate a President to faithfully execute a law he does not like, concern for history does not operate as a strong force for ensuring the rule of law. Judicial review of executive orders for reasonableness under controlling statutes enhances the capacity of electorates, reporters, historians, and Congress to deter legal violations. 245 Judicial rulings on legality perform a political function, by providing information about whether a President obeys the law that most people would find hard to obtain otherwise. Courts have a role to play in preserving a political culture where the rule of law matters, rather than a rule of charismatic decision-making not based on the reflection and consensus building demanded by the procedure of bicameralism and presentment. 246 2. Problems with Arbitrary and Capricious Review While the foregoing establishes that reasonably robust judicial review must check presidential maladministration of statutes, it does not address the most powerful argument against arbitrary and capricious review - that it has tended to frustrate the administrative process. 247 For structural reasons, arbitrary and capricious review will prove much less problematic in the context of executive orders than it has in the context of agency rules. Furthermore, the courts can soften arbitrary and capricious review of presidential actions to minimize problems associated with arbitrary and capricious review of administrative rulemaking. 248 Leading administrative law scholars argue that arbitrary and capricious review of agency action has tended to paralyze administration with unpredictable and onerous demands. 249 The courts have interpreted the arbitrary and capricious [\*1057] standard in ways that force agencies to provide much more than a little evidence and a simply stated rationale as required by the APA. 250 They require a reasoned response to all significant comments and sometimes a very robust explanation. 251 Accordingly, regulated parties can tie the agencies in knots by submitting voluminous comments and lots of data. 252 The agencies must respond to substantially all of these comments and explain why the data provided does not lead them to support the views of the submitters because the agencies cannot predict which information in a voluminous record will prove important to a court. 253 As a result, agencies typically generate an enormous record and explanations for their actions that can run on for hundreds of pages. 254 Hence, the courts' elaboration of the arbitrary and capricious test has converted the potentially simple APA requirement for a statement of basis and purpose into a gauntlet that may frustrate the objectives of the legislation agencies must implement. [\*1058] Because the President need not seek public participation in his decisions or respond to any comments submitted, application of arbitrary and capricious review to executive orders will not reproduce the main pathology associated with arbitrary and capricious review of administrative rulemaking under the APA. Thanks to the Franklin Court's decision to exempt the President from the APA, the President may enact an executive order without responding to the input of every (or any) concerned citizen. 255 Accordingly, arbitrary and capricious review will not force the development of an enormous record and hundreds of pages of justification. 256 Scholars have debated the arbitrary and capricious test's success in countering the ideological reversal of agency action associated with Lochnerism. 257 The Supreme Court has upheld agency actions ninety-two percent of the time, thereby suggesting that the intended deference has taken hold. 258 But the agencies' batting average may be worse in the lower courts. 259 Scholars have found evidence of ideological judging under the arbitrary and capricious test, as in other areas of law. 260 [\*1059] Judges must avoid substituting their views for those of the President, just as they seek to avoid doing so with respect to agencies. Because of the President's stature, judges will prove less likely to engage in ideologically motivated displacement of presidential judgment than they would in the case of administrative agencies. 261 Indeed, as former executive branch lawyers, many Supreme Court Justices may err in the opposite direction, failing to respond vigorously enough to an elected President's evasion of the law. 262 The risk of ideologically motivated reversal should not count as an overwhelming concern not only because it proves less likely in this context, but also because Congress can cure it. We remember the Lochner era primarily for decisions invalidating legislation for a reason. The courts completely thwarted democratic processes when they invalidated statutes in cases like Adkins and Lochner. By contrast, when the courts invalidate an executive order, they do not thwart democracy. Congress can always act to adopt the order if it creates wise (and constitutional) policy. 263 Conversely, a Congressional majority cannot correct an executive order subverting the law, because the President will likely veto the legislation. 264 Still, the cost of invalidating a President's action improperly is high enough that courts should tailor the arbitrary and capricious test to minimize this cost. Too much judicial interference over time, especially judicial interference based on broad principles created by the Court (as in the Lochner-era rate cases) can thwart beneficial presidential action when Congress cannot muster a majority to affirm improperly reversed policies. This Article aims to establish the constitutional theory supporting some arbitrary and capricious review rather than to develop the particulars of how arbitrary and capricious review should apply to the President. For this reason, this Article has treated arbitrary and capricious review as a fairly simple unitary standard (factual support and a reasoned explanation), even though courts vary [\*1060] the intensity of review in particular cases. 265 The State Farm case discussed earlier, for example, exemplifies "hard look review" of administrative rulemaking. 266 Harold Bruff's pre-Franklin article on judicial review of presidential actions under a statute contains a section devoted to the functional considerations unique to presidential decision-making, making full elaboration unnecessary here. 267 But the constitutional theory elaborated above does have a few implications that require addressing. Arbitrary and capricious review of presidential decision-making should aim to detect evasion of the legislative purpose. 268 That is, judicial review should aim to detect faithless execution of the law, not simply errors in judgment from Presidents genuinely seeking to implement a statute's objectives. 269 This usually will require less intensive review than we sometimes find in cases reviewing the reasonableness of agency action. 270 But it does require some factual support for a decision and a rationale that links the decision to statutory policies. 271 [\*1061] E. Implications

The approach outlined above broadly tracks most post-APA cases reviewing executive orders' reasonableness. But some extreme cases may need rethinking.

The courts usually look for a rationale connecting the executive order examined to the authorizing statute and sometimes look at factual support for decisions. Many of the decisions undertaking reasonableness review of executive orders (without calling it that) arise under the Federal Procurement Act ("FPA"). 272 The D.C. Circuit has interpreted the FPA as requiring a rational nexus between executive orders and the statutory purposes of improving the economy and efficiency of government procurement. 273 This test has produced a series of decisions examining the reasonableness of claims that specific executive orders advance these values, i.e. of rationales connecting presidential policymaking decisions to the statutory purposes. 274

Most of these cases tacitly apply an arbitrary and capricious test. For example, in American Federation of Labor & Congress of Industrial Organizations v. Kahn, 275 the entire D.C. Circuit reviewed an executive order requiring federal contractors to adhere to guidelines restraining wages and prices to combat inflation. 276 The district court had invalidated the executive order on the ground that it would give contracts to high bidders in cases where the low bidders did not comply with the wage and price guidelines. 277 The court of appeals reversed, because the policy of restraining prices and wages could reduce procurement cost over time across the federal government, even if it immediately increased the costs of some contracts. 278 The court noted that the government offered some [\*1062] factual support for its conclusion by showing that most large companies seem inclined to adopt the voluntary wage and price restraints. 279 In other words, it examined the President's actual rationale, not an imagined rationale, and asked in effect, whether it was arbitrary given the limited factual support available for future predictions.

The dissent even more clearly applied an arbitrary and capricious standard, finding the factual support for this claim in the record insufficient. 280 It reached this conclusion by engaging in something like hard look review of the record. 281 Both opinions tacitly employ an arbitrary and capricious test.

As in arbitrary and capricious review generally, a lack of factual support rarely proves dispositive in cases involving executive orders. 282 But it has figured in judicial review of applications of an executive order requiring affirmative action. In Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 283 the Third Circuit upheld an executive order requiring affirmative action in federally-funded state construction projects based on record findings that discrimination in employment in the construction industry is especially likely to drive up costs. 284 The Fourth Circuit, however, invalidated the executive order as applied to federal subcontractors underwriting workers compensation insurance in Liberty Mutual Insurance Co. v. Friedman ("Liberty Mutual"). 285 It relied squarely on the lack of factual findings suggesting that affirmative action in the insurance industry has an effect on federal contracting cost. 286 The lack of findings revealed that in the insurance context, the executive order simply advanced a general social policy rather than served the FPA's goal of limiting the cost of government procurement. 287

[\*1063] The approach advocated here, however, brings into question the rationale employed in some of the more extreme cases. For example, in UAW-Labor Employment & Training Corp. v. Chao, 288 the D.C. Circuit tacitly applied rational basis review to allow evasion of the FPA. 289 Chao reviewed an executive order that required federal contractors to notify employees of their rights not to join a union or pay costs unrelated to union representation. 290 The President sought to link his anti-union labor policy to the FPA's goals by claiming that informing workers of their rights to avoid full participation in a union enhances productivity. 291 Because the law already requires unions to inform their members of these rights, the court recognized that this rationale seemed "attenuated," but upheld it anyway. 292 In both Liberty Mutual and Chao, the executive branch sought to evade the statute by implausibly claiming a link between the President's social policies (of affirmative action and weakening unions respectively) and the statutory policy of efficient procurement. The application of an incorrect standard of review in Chao allowed the President to get away with it. 293

The travel ban litigation shows the value of having a constitutional basis for an explicit standard of reasonableness review. The Ninth Circuit's failure to even acknowledge that it was reviewing the order's rationality made the decision's reasoning suspect. The court states that "there is no sufficient finding" that the travel ban serves the "interests of the United States." 294 But the court acknowledges, in the next sentence, that the President found the "unrestricted entry" of aliens from the targeted countries "detrimental to the interests of the United States." 295 Why is that not sufficient? The answer is that this finding and the factual record together provided, in the court's view, an insufficiently robust basis for the decision under the arbitrary and capricious test. 296 A court understanding that the Constitution supports arbitrariness review can better rationalize efforts to detect evasion of the statutory purpose.

Arbitrariness review's structure could have improved the court's reasoning. It demands an adequate rationale linking the Executive Order to the statutory [\*1064] purpose. But Travel Ban 2.0 only finds "unrestricted entry" detrimental to our interests. The nationals of these countries do not benefit from unrestricted entry now. They undergo extensive vetting. So, a question arises about whether a problem with hypothetical but non-existent "unrestricted entry" provides a sufficient rationale for an order that stops all entry, which the Court arguably missed. 297

The Ninth Circuit's insistence on some factual support for the order, however, reinforces factual review's value for detecting evasion of the statutory purpose. The Court noted the lack of evidence of terrorist acts of immigrants from the targeted country. 298 This raises legitimate questions about whether the order rationally serves the national interest as required by the statute, or instead aims to demonize an enemy to enhance the President's standing with a faction of voters.

The Supreme Court's decision to apply a rational basis test to the third travel ban, however, left the Court with no means of detecting whether the third travel ban evaded the statutory requirement to serve the national interest. If the travel ban aimed to serve the interest of Trump's faction or even Russian interests in fostering division in America rather than the national interest, the Court's approach would still allow the judgment to stand. 299 The Court justified disabling itself from detecting evasion of the statutory purpose based on the President's authority to protect national security. 300 This decision, however, does not preclude applying arbitrary and capricious review outside the context of national security determinations. 301

Seeking to answer every possible question scholars might raise about how the courts should apply the arbitrary and capricious test in the many domains outside of national security where it may still apply would make this analysis unduly complex and obscure the fundamental point: presidential policy-making actions implementing statutes generally need some form of arbitrary and capricious review to detect evasion of the law.

Yet, the theory developed to justify this fundamental point has some further implications that merit brief mention. First, the judicial custom of giving the President extreme deference in foreign affairs and national security matters [\*1065] might need some rethinking in light of this analysis. 302 This Article has suggested that the President's status as an elected official and the primary national figurehead makes him uniquely able to undermine the rule of law and that this problem should figure in how courts review presidential actions. 303 The courts often have good reasons to hesitate to question the President's judgment in matters of national security and foreign affairs, because the President has unique and sometimes secret sources of information in these realms. 304 At the same time, manipulation and creation of national security and foreign affairs concerns provide a terrific tool for heads of state to undermine the rule of law. 305 So, the need to ferret out evasion of legal constraints becomes acute in this context. 306 This may suggest that the courts should not hesitate to intensively review rationales purportedly based on national security or foreign affairs when the decision-making process does not appear to rely on expert judgment based on confidential sources. 307 While resolving this tension lies behind the scope of this article, some applications of the arbitrary and capricious test may implicate this concern.

Yet, this Article justifies arbitrary and capricious review as a means of detecting evasion of statutory purpose. 308 This leaves open the question of whether such review has a role to play when the President acts on his own express or implied constitutional authority. 309 That question merits consideration.

[\*1066] Finally, the analysis offered here may have value in reforming administrative law more generally. It suggests that courts should use arbitrary and capricious review of presidential action to detect evasions of legislative purpose, i.e. the pursuit of presidential policy initiatives through evasion of bicameralism and presentment. Arbitrary and capricious review under the APA often serves broader purposes but has endured harsh criticism as overly intrusive. 310 I hope to consider in a subsequent article whether courts should understand arbitrary and capricious review of agency rulemaking only as a means of detecting evasion of statutory policies or, instead, as a broader check on poor decisions.

Conclusion

The demise of Lochnerian due process and the exemption of the President from the APA has opened up a hitherto undetected gap in the law governing presidential policymaking. Courts must fill the gap in a way that affirms the rule of law and ensures that the President faithfully executes the law in accordance with due process of law, Article III, and the judicial promises to review presidential action in the nondelegation doctrine cases.

Courts should accordingly review presidential policymaking actions for rationality under an arbitrary and capricious test that demands some factual support and a rationale connecting the action to the statute purportedly authorizing it. Such an approach supports the rule of law and serves constitutional values.

#### Selectivity makes the doctrine incoherent which in this context zeroes solvency. Empirics.

Manheim & Watts 19 – Professors of Law, U of Washington Law

Lisa Manheim, Charles I. Stone Associate Professor of Law, University of Washington School of Law, and Kathryn A. Watts, Jack R. MacDonald Endowed Chair, University of Washington School of Law, “Reviewing Presidential Orders,” *The University of Chicago Law Review*, Vol. 86, No. 7 (Nov. 2019), JSTOR

In early 2017, a newly inaugurated President Donald J. Trump tried to force policy change through a flurry of written orders. While some opponents took to the streets to protest,1 others identified a different forum for resistance: the federal courts.2 Lawyers, mobilizing at a breakneck pace, sued the President in name to enjoin the implementation of several of his signature orders, including his first travel ban and an executive order involving sanctuary cities.3 Within weeks, plaintiffs succeeded in securing preliminary relief from the courts.4 Resort to the judicial branch thereby allowed litigants, in dramatic fashion, to thwart several of Trump’s earliest policymaking efforts. As Trump’s presidency progressed and additional orders flowed from his desk, more lawsuits arose, including challenges to orders affecting transgender troops, land conservation, tax policy, regulatory rollbacks, and more.5 These separate lines of litigation already have generated extensive commentary. Yet observers generally have overlooked what these lawsuits represent as a whole: a new and particularly forceful form of litigation aimed at the president. Prior to Trump’s entrance into the White House, litigants only occasionally brought lawsuits directly and immediately against the initiatives contained in a president’s written orders.6 Instead, litigants tended to wait for an agency to act in response to a president’s order and then challenged the agency’s action, rather than the president’s order, using now well-established administrative law principles.7 This approach remained constant even as presidents—from Ronald Reagan forward—began to deploy executive orders and other written directives in increasingly heavy-handed ways to control executive-branch policymaking.8 For example, early in his tenure, President Reagan issued a highly controversial order, Executive Order No 12291, that directed agencies to consider costs and benefits when engaging in rulemaking.9 Despite the opposition it garnered, adversaries did not immediately file suit challenging the order’s legality. Instead, they waited for agencies to act in response to Executive Order No 12291 and then filed lawsuits challenging specific agency actions.10 Similarly, when President Barack Obama issued a written directive to the Department of Labor (DOL) ordering it to “modernize and streamline” rules governing overtime pay, litigants did not challenge Obama’s instruction itself.11 Instead, they waited for DOL to issue a final rule on the subject. They then challenged DOL’s rule, not the President’s written directive.12 These two examples illustrate the usual chronology surrounding challenges that implicate written presidential orders: after a president issues an order that provides the bureaucracy with instructions, opponents of the order wait for the order to be implemented by an executive-branch official and then file suit against the executive branch actor, not against the president himself. Not so in the Trump era. Trump’s adversaries have filed a multitude of lawsuits directly against the President, challenging a wide range of presidential orders almost immediately after the orders were made public.13 For example, when Trump issued an order—his so-called “one-in, two-out” order—directing executive agencies to rescind two regulations each time the agency finalizes a new regulation,14 opponents did not wait for agencies to act. Instead, just one week after Trump signed the executive order, opponents filed a lawsuit naming the President himself as one of the defendants.15 Many of the lawsuits filed in opposition to Trump-era policies fit this new model—namely, they involve direct and immediate challenges to the legality of presidential orders, and they name the President himself as a defendant.16 This Article identifies the novelty of this new form of litigation. It also demonstrates just how far these lawsuits fall outside of the well-developed and extensively theorized legal framework that governs challenges to agency action. A partial explanation lies in the Administrative Procedure Act17 (APA), a statute that has provided the scaffolding for more than seventy years’ worth of judicial and scholarly discussion about judicial review of agency action. In 1992, the Supreme Court concluded that the APA reaches only agencies, not the president.18 As a result, the APA simply does not apply to claims brought against the president, including claims that directly challenge the legality of a presidential order.19 Nor do existing judicial precedents provide anything close to a well-developed or coherent legal framework for courts to follow when reviewing presidential orders. In 2018, the Ninth Circuit acknowledged as much when it noted that “[i]n contrast to the many established principles for interpreting legislation, there appear to be few such principles to apply in interpreting executive orders.”20 Indeed, only a smattering of preexisting precedents even speak to judicial review of presidential orders,21 and the few precedents that do exist tend to proceed in a highly case-specific manner that offers little guidance going forward.22 Some of these existing precedents are based on doctrines that predate the APA—doctrines that have been largely ignored since its enactment and that therefore suffer from decades of judicial neglect.23 Meanwhile, presidents over the past several decades have become increasingly bold in their attempts to control agency policymaking.24 The net result is that existing judicial precedents involving presidential orders tend not to reflect the present-day reality of presidential involvement in federal policymaking. Until recently, this absence of a well-developed framework to guide judicial review of presidential orders did not prove particularly problematic. This is because litigants tended to wait to challenge agency action rather than the presidential orders themselves.25 However, the recent flurry of lawsuits aimed at various Trump-era orders has forced courts and litigants to grapple with a host of difficult and unsettled legal issues relating to, among other things, justiciability, deference, remedies, and more. Often, judges have been called upon to resolve these complex issues in an expedited posture and under intense public scrutiny. Although this new burst of litigation began with Trump, it is not likely to recede when he leaves office. Instead, the recent rise in litigation aimed at the President may well suggest an enduring change in the way litigants challenge executive-branch policies— one that reflects not only the controversial nature of Trump’s tenure but also, on a broader level, the increasingly aggressive attempts by presidents, over decades, to control executive-branch regulatory activity.26 The convergence of these trends, and the likely permanence of this new style of litigation, confirms the need for a legal framework to help courts navigate this particularly thorny form of judicial review, both now and in the future. Such a framework cannot easily be developed through case-by-case rulings issued in highly charged and often fast-moving cases. Rather, a cohesive framework to guide judicial review of presidential orders would best be formed through deliberative discussion among scholars, judges, litigants, and members of Congress.

#### The government will lawyer its ass off. The CP’s precedent is a loaded gun that guarantees they’ll win.

Manheim & Watts 19 – Professors of Law, U of Washington Law

Lisa Manheim, Charles I. Stone Associate Professor of Law, University of Washington School of Law, and Kathryn A. Watts, Jack R. MacDonald Endowed Chair, University of Washington School of Law, “Reviewing Presidential Orders,” *The University of Chicago Law Review*, Vol. 86, No. 7 (Nov. 2019), JSTOR

a)Availability of relief. The law surrounding remedies for unlawful agency action is relatively well understood and well settled.375 Under the APA, for example, a plaintiff can sue an agency, agency officials, or the United States, seeking different forms of relief, such as a judicial ruling that sets aside unlawful action agency.376 The rules governing judicial remedies, however, become much less clear once a litigant brings a lawsuit directly against the president. Complications arise, for example, in light of longstanding uncertainty over the degree to which the president is susceptible to legal process, including whether the courts can issue injunctive relief or a declaratory judgment against the president.377

A 2017 lawsuit brought against Trump and two of his subordinates helps to illustrate.378 The plaintiffs sought an injunction requiring that the defendants allow the plaintiffs greater access to the President’s Twitter feed.379 Maintaining that the court lacked jurisdiction to grant the requested relief, the government argued categorically that “the constitutional separation of powers precludes [a federal court] from assuming control over the President’s discretionary official conduct in the form of an equitable injunction.”380 In response to prior decisions—such as United States v Nixon381 and Youngstown, which were arguably in tension with the government’s position—the government argued that those prior precedents were limited to three strict categories:

(1)judicial relief pursued against the president for unofficial conduct; (2) judicial relief pursued against the president himself with respect to a subpoena duces tecum; and (3) judicial relief pursued against the president’s subordinates, rather than against the president himself.382 The plaintiffs, by contrast, interpreted the prior precedents in a more expansive manner—as confirming the ability of federal courts to issue the requested injunction against the president383—with amici arguing broadly that “[f]ederal courts have equitable power to order the President of the United States to comply with the law and the Constitution.”384 Rejecting the categorical arguments advanced by the defendants, the district court nevertheless proceeded cautiously, announcing it would grant only declaratory relief vis-à-vis Trump. It nevertheless suggested that in the future it would address, if necessary to ensure compliance, whether injunctive relief against the president might also be available.385

The district court’s guarded approach helps to confirm the uncertainty that surrounds whether and how courts can exercise direct control over a president’s actions. Given that Trump-era litigants so often bring lawsuits against the President in name, this area of the law likely will require clarification sooner rather than later. Still, in light of the acute separation-of-powers concerns presented when a judge directs a president to comply with a court order, courts should strive to avoid these questions— where they can without prejudice to the plaintiffs’ case—by issuing judicial orders against a president’s subordinates, rather than against the president himself. Given that a president so rarely executes his orders personally, almost any presidential action effectively can be enjoined through injunctions against the president’s subordinates.386 Recognizing this dynamic, courts adjudicating Trump-era lawsuits have repeatedly issued relief against subordinates, rather than the President himself, thereby punting on the thorny questions that arise when courts try to enjoin a president directly.387 This sort of judicial avoidance is prudent both because orders running against the president inevitably require a difficult form of case-by-case analysis that is resistant to bright-line rules,388 and also because a judicial order against a president could give rise to a constitutional crisis if the president refused to comply.

Nevertheless, there eventually will arise a case in which full relief can be granted only if an order runs against the president directly.389 When this occurs, courts will be forced to grapple with competing separation-of-powers concerns. In that case, the better argument—based both on historical precedent and structural constitutional analysis—appears to be that the courts can, when necessary to accord relief, compel the president to comply with the law.390

### Straight turned NB---1AR

### Perm Thru Process---1AR

#### BUT, even if: should is not immediate.

Brown ’8 [Mary Ann Brown; May 14; Judge on the Court of Appeals of Iowa; Westlaw, “In re Est. of Guthrie,” 752 N.W.2d 452]

Brock and Kaitlyn look to the **word** “should” in the phrase “in the event any of my children should predecease me” and claim the district court improperly found the word looked to the **future**. They claim the word should be interpreted as the **past tense** of “shall” to imply a duty or obligation. See Black's Law Dictionary 1379 (6th ed.1990). Looking at **the phrase as a whole, however**, rather than at a **single word**, we determine the phrase is considering **possible future events**. See In re Estate of Grulke, 546 N.W.2d 626, 627 (Iowa Ct.App.1996) (noting we must ascertain a testator's intent from the entire will).

### AT: T Congress---1AR

#### ‘Collective bargaining’ is agent agnostic.

Cornell LII 11. Legal Information Institute. "Collective Bargaining." Cornell Law School. 9/3/11. law.cornell.edu/wex/collective\_bargaining#:~:text=The%20main%20body%20of%20law,the%20%2061%20National%20Labor

The result of collective bargaining procedures is a collective agreement. Collective bargaining is governed by federal and state statutory laws, administrative agency regulations, and judicial decisions.

### CA from MQD---1AR

### AT: Reliance is DA to plan---1AR

## K

### Ontology---1ar

### FW---1AR

### AT: LBL

### Fiat Good---1AR

### Offense---1AR