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## RECENT SOCIAL MEDIA POSTS

EXECUTIVE POWER — PRESIDENTIAL DIRECTIVES — IN TWEETS, PRESIDENT PURPORTS TO BAN TRANSGENDER SERVICEMEMBERS. — Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 5:55–6:08 AM), <https://perma.cc/X7J4-CUL3>.

As the sun was rising on July 26, 2017, President Donald Trump tweeted, “the United States Government will not accept or allow”<sup>1</sup> “Transgender individuals to serve in any capacity in the U.S. Military.”<sup>2</sup> Commentators concluded that the three-tweet statement lacked “legal efficacy,”<sup>3</sup> and the Chairman of the Joint Chiefs of Staff told military leadership that existing policy — which allowed transgender service-members to serve openly — would remain in place “until the President’s direction has been received by the Secretary of Defense.”<sup>4</sup> When further guidance came, in the form of a presidential memorandum,<sup>5</sup> the Secretary of Defense committed to “carry out the president’s policy direction.”<sup>6</sup> These responses indicated that the memorandum achieved legal status that the tweets did not. Underlying this conclusion are expectations about the nature and form of law and the process of making it. Exploring those expectations can sharpen our descriptive and normative understandings of presidential instruments and directives.

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<sup>1</sup> Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 5:55 AM) [hereinafter Tweet 1], <https://twitter.com/realDonaldTrump/status/890193981585444864> [<https://perma.cc/R7DP-DXVN>].

<sup>2</sup> Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM) [hereinafter Tweet 2], <https://twitter.com/realDonaldTrump/status/890196164313833472> [<https://perma.cc/HB8H-XDZ6>]; see also Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:08 AM) [hereinafter Tweet 3], <https://twitter.com/realDonaldTrump/status/890197095151546369> [<https://perma.cc/52YQ-DDN5>].

<sup>3</sup> Jeannie Suk Gersen, *Trump’s Tweeted Transgender Ban Is Not a Law*, NEW YORKER (July 27, 2017), <http://www.newyorker.com/news/news-desk/trumps-tweeted-transgender-ban-is-not-a-law> [<https://perma.cc/TSM8-5CZ9>]; see also Russell Spivak, *Trump’s Transgender Tweet Isn’t in Force Yet, but It’s Close*, FOREIGN POL’Y: LAWFARE @ FP (Aug. 2, 2017, 12:52 PM), <http://foreignpolicy.com/2017/08/02/trumps-transgender-tweet-isnt-in-force-yet-but-its-close/> [<https://perma.cc/X9L4-BWCQ>].

<sup>4</sup> Letter from Gen. Joseph Dunford, Chairman of the Joint Chiefs of Staff, to Serv. Chiefs, Commanders & Senior Enlisted Leaders (July 27, 2017) [hereinafter Dunford Letter], <http://thehill.com/policy/defense/344107-joint-chiefs-chairman-no-change-in-transgender-policy-until-trump-sends> [<https://perma.cc/K8VE-JGE2>].

<sup>5</sup> Memorandum on Military Service by Transgender Individuals, 82 Fed. Reg. 41,319 (Aug. 25, 2017) [hereinafter Presidential Memorandum].

<sup>6</sup> News Release, Dep’t of Def., Statement by Secretary of Defense Jim Mattis on Military Service by Transgender Individuals (Aug. 29, 2017), <https://www.defense.gov/News/News-Releases/News-Release-View/Article/1294351/statement-by-secretary-of-defense-jim-mattis-on-military-service-by-transgender/> [<https://perma.cc/6FHT-JTCE>].

Openly transgender individuals were long disqualified from military service,<sup>7</sup> and servicemembers could be discharged for reasons related to their gender identities.<sup>8</sup> In 2015, Secretary of Defense Ashton Carter began to revisit these policies by elevating to an Under Secretary any separations “on the basis of . . . gender identity” and by commissioning a working group to “formulate policy options.”<sup>9</sup> On June 30, 2016, Secretary Carter issued Directive-Type Memorandum (DTM) 16-005, which allowed current transgender servicemembers to serve openly, beginning “immediately.”<sup>10</sup> In a statement explaining the change,<sup>11</sup> Secretary Carter cited a RAND Corporation study commissioned by the working group<sup>12</sup> concluding that allowing transgender servicemembers to serve openly would “have minimal impact on readiness and health care costs.”<sup>13</sup> The DTM also gave the service branches several months to develop guidelines related to “necessary medical care and treatment”<sup>14</sup> and one year to begin accepting transgender recruits.<sup>15</sup>

In June 2017, on the day the military was set to begin accepting these recruits, Secretary of Defense James Mattis delayed accessions until

<sup>7</sup> Various standards could have been applied to exclude transgender individuals. See DEP’T OF DEF., INSTRUCTION NO. 6130.03, MEDICAL STANDARDS FOR APPOINTMENT, ENLISTMENT, OR INDUCTION IN THE MILITARY SERVICES 25, 48 (2011) (barring individuals who have experienced “change of sex,” *id.* at 25, and those with “transsexualism,” *id.* at 48); JOYCELYN ELDERS ET AL., PALM CTR., REPORT OF THE TRANSGENDER MILITARY SERVICE COMMISSION 7–9 (2014) (describing these policies); see also *id.* at 9–21 (criticizing these policies as medically incorrect and urging the military to abandon them).

<sup>8</sup> See DEP’T OF DEF., INSTRUCTION NO. 1332.38, PHYSICAL DISABILITY EVALUATION enclosure 5 E5.1.2.9.7 (1996) (giving discretion to discharge those with “Sexual Gender and Identity Disorders”).

<sup>9</sup> Memorandum from Ashton Carter, Sec’y of Def., to the Sec’ys of the Military Dep’ts (July 28, 2015), [https://www.defense.gov/Portals/1/features/2016/0616\\_policy/memo-transgender-service-directive-28-July-2015.pdf](https://www.defense.gov/Portals/1/features/2016/0616_policy/memo-transgender-service-directive-28-July-2015.pdf) [<https://perma.cc/5ZTN-JLAX>] (regarding “Transgender Service Members”). The military’s process for studying policies related to transgender servicemembers was similar to its process for studying “Don’t Ask, Don’t Tell” before recommending that law’s repeal. See Jeh C. Johnson, Introduction, *Implementation of “Don’t Ask, Don’t Tell” Repeal*, 5 ALB. GOV’T L. REV. 407 (2012).

<sup>10</sup> Memorandum from Ashton Carter, Sec’y of Def., to the Sec’ys of the Military Dep’ts et al. 1 (June 30, 2016) [hereinafter DTM 16-005], [https://www.defense.gov/Portals/1/features/2016/0616\\_policy/DTM-16-005.pdf](https://www.defense.gov/Portals/1/features/2016/0616_policy/DTM-16-005.pdf) [<https://perma.cc/ND4A-K32M>] (regarding “Directive-Type Memorandum (DTM) 16-005, ‘Military Service of Transgender Service Members’”).

<sup>11</sup> Secretary of Defense, *DoD Transgender Policy Changes*, MEDIUM (June 30, 2016), <https://medium.com/@SecDef/dod-transgender-policy-changes-4f473b21b416> [<https://perma.cc/Z9CW-CHMK>].

<sup>12</sup> AGNES GEREKEN SCHAEFER ET AL., RAND CORP., ASSESSING THE IMPLICATIONS OF ALLOWING TRANSGENDER PERSONNEL TO SERVE OPENLY iii (2016).

<sup>13</sup> News Release, RAND Corp., Impact of Transgender Personnel on Readiness and Health Care Costs in the U.S. Military Likely to Be Small (June 30, 2016), <https://www.rand.org/news/press/2016/06/30.html> [<https://perma.cc/DMZ8-EXT5>].

<sup>14</sup> DTM 16-005, *supra* note 10, attachment at 2. This medical care could include hormone therapy or gender-affirming surgery. See *id.* attachment at 1–2.

<sup>15</sup> *Id.* attachment at 1.

January 2018. The services had requested additional time to study the impact of transgender troops on “readiness and lethality.”<sup>16</sup>

The acceptance and accession of transgender servicemembers next came under fire on July 26. Between 5:55 and 6:08 AM, President Trump issued three tweets from his @realDonaldTrump handle. The tweets stated, “please be advised that the United States Government will not accept or allow”<sup>17</sup> “Transgender individuals to serve in any capacity in the U.S. Military,”<sup>18</sup> and asserted that “[o]ur military”<sup>19</sup> “cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you.”<sup>20</sup> According to the opening tweet, the new policy had been devised “[a]fter consultation with my Generals and military experts.”<sup>21</sup>

In an internal memo circulated the next day, the Chairman of the Joint Chiefs of Staff told military leadership that “[t]here [would] be no modifications to the current policy” without further “direction” from the President, adding, “[i]n the meantime, we will continue to treat all of our personnel with respect.”<sup>22</sup> A Pentagon spokesperson reiterated that the Department of Defense (DoD) was “awaiting formal guidance . . . as a follow-up to the commander-in-chief’s announcement.”<sup>23</sup>

Five transgender servicemembers quickly sued, alleging that the policy violated their equal protection and due process rights under the Fifth Amendment.<sup>24</sup> They argued that the suit was immediately justiciable because the tweets “upset the reasonable expectations” of servicemembers.<sup>25</sup> Additional lawsuits were filed after the White House had issued formal guidance.<sup>26</sup>

That guidance came on August 25, as a presidential memorandum (PM). The PM remarked that “[s]hortly before President Obama left

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<sup>16</sup> News Release, Dep’t of Def., Statement by Chief Pentagon Spokesperson Dana W. White on Transgender Accessions (June 30, 2017), <https://www.defense.gov/News/News-Releases/News-Release-View/Article/1236145/statement-by-chief-pentagon-spokesperson-dana-w-white-on-transgender-accessions/> [https://perma.cc/59UF-8CFL].

<sup>17</sup> Tweet 1, *supra* note 1.

<sup>18</sup> Tweet 2, *supra* note 2.

<sup>19</sup> *Id.*

<sup>20</sup> Tweet 3, *supra* note 2.

<sup>21</sup> Tweet 1, *supra* note 1.

<sup>22</sup> Dunford Letter, *supra* note 4.

<sup>23</sup> News Release, Dep’t of Def., Statement by Chief Pentagon Spokesperson Dana W. White on Transgender Policy (July 27, 2017), <https://www.defense.gov/News/News-Releases/News-Release-View/Article/1260064/statement-by-chief-pentagon-spokesperson-dana-w-white-on-transgender-policy/> [https://perma.cc/23SN-HRLL].

<sup>24</sup> Complaint for Declaratory & Injunctive Relief at 2, *Doe v. Trump*, No. 17-1597, 2017 WL 4873042 (D.D.C. Oct. 30, 2017).

<sup>25</sup> *Id.*

<sup>26</sup> Complaint for Declaratory & Injunctive Relief, *Karnoski v. Trump*, No. 2:17-cv-1297 (W.D. Wash. Aug. 28, 2017); Complaint for Declaratory & Injunctive Relief, *Stone v. Trump*, No. 17-2459, 2017 WL 5589122 (D. Md. Nov. 21, 2017).

office . . . his Administration dismantled the [military's] established framework by permitting transgender individuals to serve openly."<sup>27</sup> Next, President Trump's PM announced: "I am directing [the Secretaries] to return to the longstanding policy and practice"<sup>28</sup> because of "my judgment" that the Obama Administration lacked "a sufficient basis to conclude that terminating the Departments' longstanding policy" would not negatively affect "military effectiveness and lethality," "unit cohesion," and "military resources."<sup>29</sup> Before translating the announcement into a set of commands, the PM mentioned that the directives were "by the authority vested in [President Trump] as President and as Commander in Chief of the Armed Forces of the United States under the Constitution and the laws of the United States . . . , including Article II of the Constitution."<sup>30</sup> It next directed the Secretaries to "return" to the pre-June 2016 policies prohibiting transgender accessions and authorizing discharges related to gender identity.<sup>31</sup> Secretary Mattis was to "maintain" the prohibition on accessions past January 1, 2018.<sup>32</sup> The new discharge policy, along with a ban on funding "sex-reassignment surgical procedures,"<sup>33</sup> would go into effect on March 23, 2018,<sup>34</sup> remaining "until . . . a sufficient basis exists upon which to conclude that terminating that policy and practice would not have . . . negative effects."<sup>35</sup>

Secretary Mattis promised to "carry out the president's policy direction" four days later.<sup>36</sup> Soon after, a federal court preliminarily enjoined on constitutional grounds the memorandum's directives related to accession and retention.<sup>37</sup>

DoD's night-and-day reactions to the tweets and the memorandum evinced a conclusion that the memorandum was legally binding but the tweets were not. This conclusion cannot be explained by the basic principles governing presidential instruments, which tell us that authoritative presidential directives, whatever their form, are legally binding on

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<sup>27</sup> Presidential Memorandum, *supra* note 5, § 1(a).

<sup>28</sup> *Id.* § 1(b).

<sup>29</sup> *Id.* § 1(a).

<sup>30</sup> *Id.* § 1(b).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* § 2(a).

<sup>33</sup> *Id.* § 2(b).

<sup>34</sup> *Id.* § 3. By February 21, 2018, the Secretary of Defense was to develop an implementation plan. *Id.*

<sup>35</sup> *Id.* § 1(b).

<sup>36</sup> News Release, Dep't of Def., *supra* note 6; *see also* Memorandum from James Mattis, Sec'y of Def., to the Sec'ys of the Military Dep'ts et al. 1 (Sept. 14, 2017), <https://www.defense.gov/Portals/1/Documents/PDFs/Military-Service-By-Transgender-Individuals-Interim-Guidance.pdf> [<https://perma.cc/HT6H-Q4SD>] (regarding "Military Service by Transgender Individuals — Interim Guidance").

<sup>37</sup> *Doe v. Trump*, No. 17-1597, 2017 WL 4873042 (D.D.C. Oct. 30, 2017).

subordinates. The traditional line between legal and political speech and the threat of judicial enforceability partially explain the difference between the tweets and the memorandum. Further explanation can be found in fundamental expectations about the nature and form of law and the process of making it.<sup>38</sup> A complete account of why the memorandum was legally effective but the tweets were not requires grappling with our commitments to values like accountability and to ideals like the rule of law.<sup>39</sup>

To direct executive officials and agencies and shape policy, Presidents have at their disposal various tools that can bind subordinates.<sup>40</sup> Executive orders are the best known and most formal of these; other examples include various national security directives and presidential memoranda.<sup>41</sup> The legal validity of these instruments does not depend on their form.<sup>42</sup> Rather, validity requires public issuance and promulgation under legitimate statutory or constitutional authority.<sup>43</sup> Both the tweets and the memorandum satisfy these bare requirements. The memorandum was public — posted on the White House website<sup>44</sup>

<sup>38</sup> This comment defines the term “law” loosely and expansively to mean rules, conventions, and so forth that relevant actors and cultures perceive as binding, *see generally* H.L.A. HART, *THE CONCEPT OF LAW* (3d ed. 2012), and that fit into a larger, coherent system, *see, e.g.*, Jeremy Waldron, Essay, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 5 & n.8 (2008).

<sup>39</sup> On the rule of law’s particular “demands” in the administrative context, *see* Kevin M. Stack, Essay, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985 (2015). Professor Kevin Stack adopts Professor Lon Fuller’s principles of legality, LON L. FULLER, *THE MORALITY OF LAW* 46–90 (rev. ed. 1969), and draws on Professor Jeremy Waldron’s procedural account of the rule of law, *see* Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, in *NOMOS L: GETTING TO THE RULE OF LAW* 3 (James E. Fleming ed., 2011). Stack, *supra*, at 1990–92.

<sup>40</sup> Broad directive power is indispensable to, even emblematic of, the modern presidency. *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2290–303 (2001); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 729 (2016) (recapping scholarly debate and noting that the “on-the-ground winner” is broad directive power). These instruments can also affect third parties. *See, e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654, 686–88 (1981) (applying executive orders to parties outside the government).

<sup>41</sup> For an accounting, *see* HAROLD C. RELYEA, CONG. RESEARCH SERV., 08-611, *PRESIDENTIAL DIRECTIVES: BACKGROUND AND OVERVIEW* (2008).

<sup>42</sup> As the Office of Legal Counsel has advised, there is “no basis for drawing a distinction as to the legal effectiveness of a presidential action based on the form or caption of the written document.” *Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order*, 24 Op. O.L.C. 29, 29 (2000) [hereinafter OLC Opinion]; *see also, e.g.*, *Meyer v. Bush*, 981 F.2d 1288, 1296 (D.C. Cir. 1993).

<sup>43</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (“The President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.”); VIVIAN S. CHU & TODD GARVEY, CONG. RESEARCH SERV., RS20846, *EXECUTIVE ORDERS: ISSUANCE, MODIFICATION, AND REVOCATION* 2 (2014). Public issuance need not take a particular form. *See id.* That said, executive orders must be published in the *Federal Register*; other instruments “that the President may determine . . . have general applicability and legal effect” must also be published there. 44 U.S.C. § 1505(a) (2012).

<sup>44</sup> *Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security*, WHITE HOUSE (Aug. 25, 2017), <https://www.whitehouse.gov/the-press-office/2017/08/25/>

and published in the *Federal Register* — and so were the tweets — posted on Twitter. As Commander in Chief, the President has constitutional authority to direct military policy in this area.<sup>45</sup>

Nevertheless, legal commentators concluded that the tweets were “neither a law nor an executive order.”<sup>46</sup> If not the basic principles governing the legal validity of presidential instruments, then what underlies this belief? Some highlighted the tweets’ political valence,<sup>47</sup> suggesting that legal status depends on context. Others concluded that the tweets were “not an order . . . as would be required to compel” Secretary Mattis.<sup>48</sup> 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.

We might think that presidential directives represent their legality through tone and language. We might expect a President’s political statements to be “expressive”<sup>49</sup> and his legal ones to feel like speech acts (in that speaking makes it legally so).<sup>50</sup> But Presidents often blend political talk and legal illocution.<sup>51</sup> For example, section 1(a) of the PM, which painted the Obama Administration policy as a dangerous midnight change, is political storytelling, legally dressed.<sup>52</sup> This blending can complicate efforts to separate legally operative directives from expressions of prospective plans. Of course, some presidential remarks will be obviously too inchoate to confuse with legally binding directives.<sup>53</sup> But these tweets were not so unambiguously aspirational. For

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presidential-memorandum-secretary-defense-and-secretary-homeland [https://perma.cc/C8YM-24XE].

<sup>45</sup> See U.S. CONST. art. II, § 2. The President’s authority to direct policy is separate from the constitutionality of the policy itself, which has been challenged. See sources cited *supra* notes 24–26.

<sup>46</sup> Suk Gersen, *supra* note 3; see also, e.g., Jacqueline Klimas, *For Transgender Troops, a Tweet Is Not Policy — Yet*, POLITICO (July 26, 2017, 5:24 PM), <http://www.politico.com/story/2017/07/26/trump-transgender-troops-ban-240998> [https://perma.cc/95F6-S64Z].

<sup>47</sup> Suk Gersen, *supra* note 3 (“[The tweets] ha[ve] the same legal efficacy as his myriad other tweets expressing desires, promises, and intentions . . . from building a wall on the Mexican border to changing the libel laws.”).

<sup>48</sup> Spivak, *supra* note 3.

<sup>49</sup> See Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 76 (2017) (describing a spectrum).

<sup>50</sup> “[S]peech acts are those acts that can . . . be performed by saying that one is doing so.” Mitchell Green, *Speech Acts*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2015), <https://plato.stanford.edu/archives/sum2015/entries/speech-acts/> [https://perma.cc/5T65-BSXH].

<sup>51</sup> Illocution is the “performance of an act *in* saying something as opposed to performance of an act *of* saying something.” J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 99–100 (1975).

<sup>52</sup> See Presidential Memorandum, *supra* note 5, § 1(a).

<sup>53</sup> See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 13, 2017, 6:17 PM), <https://twitter.com/realDonaldTrump/status/919009334016856065> [https://perma.cc/8AV8-EM3H] (“ObamaCare is causing such grief and tragedy for so many. It is being dismantled but in the meantime, premiums & deductibles are way up!”).

example, the tweets deployed legalisms — “after consultation,” “please be advised,” “accept or allow.”<sup>54</sup> Indeed, the media and the military jumped to clarify for the public that the tweets were not binding.

Alternatively, maybe some statements are political because they are delivered in political channels. But Professor Katherine Shaw has documented recent instances of courts giving legal consequences to statements delivered in political contexts.<sup>55</sup> To Shaw, that the district court in *Texas v. United States*<sup>56</sup> treated President Barack Obama’s media town halls and responses to hecklers<sup>57</sup> as it would have treated a presidential memorandum demonstrates “the total collapse of distinctions between informal speech and presidential directives,” at least during judicial review.<sup>58</sup> Unmediated by courts, statements in the political arena have legal consequences within agencies. President Bill Clinton famously publicly announced policies in White House ceremonies before he had formally directed agencies to adopt those policies; agencies treated the announcements as binding.<sup>59</sup> In part because modern administration is so wrapped up in presidential politics,<sup>60</sup> the line between political expression and legally binding direction is more muddled and more contingent. Here, the possibility that the military would comply with an announcement on Twitter, a political medium, was real enough that servicemembers claimed a right to sue based on the tweets alone.

Analyses also suggested that the tweets lacked legal force because they were not military orders. Members of the armed forces can face criminal court martial for disobeying superiors’ orders.<sup>61</sup> The PM might be some form of law because it is enforceable, while the tweets might lack legal status because they lack characteristics of enforceable orders.<sup>62</sup> This distinction’s usefulness is limited to the military context.

<sup>54</sup> Tweet 1, *supra* note 1.

<sup>55</sup> Shaw focuses on presidential speeches. Shaw, *supra* note 49, at 77–78. On tweets, see Amber Phillips, *Trump’s Tweets Keep Being Used Against Him in a Court of Law*, WASH. POST (Aug. 2, 2017), <http://wapo.st/2vtopDw> [<https://perma.cc/C52Q-NBNQ>].

<sup>56</sup> 86 F. Supp. 3d 591 (S.D. Tex.), *aff’d*, 809 F.3d 134 (5th Cir. 2015), *aff’d by an equally divided Court*, 136 S. Ct. 2271 (2016) (mem.).

<sup>57</sup> See *id.* at 610 n.9, 613, 668.

<sup>58</sup> Shaw, *supra* note 49, at 128.

<sup>59</sup> Kagan, *supra* note 40, at 2300–03 (arguing that the announcements often had the same effects as formal directives).

<sup>60</sup> *Id.* at 2300 (“[T]he ‘public Presidency’ became . . . tethered to the ‘administrative Presidency’ . . .”).

<sup>61</sup> Article 92 of the Uniform Code of Military Justice, which applies to orders by noncommissioned officers like the President, allows court martial for “fail[ure] to obey any lawful general order or regulation.” 10 U.S.C. § 892(1) (2012). Article 90, the general disobedience provision inapplicable here, subjects to court martial anyone who “willfully disobeys a lawful command of his superior commissioned officer.” *Id.* § 890(2) (2012).

<sup>62</sup> The *Manual for Courts-Martial* does not include criteria for the enforceability of Article 92 orders, but in the Article 90 context, orders must be specific as to the act and directed at the proper person. JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL

In the civil context, because the PM disclaims the “creat[ion of] any right or benefit, substantive or procedural,”<sup>63</sup> it does not create a private right of action enforceable under the Administrative Procedure Act<sup>64</sup> (APA) or by mandamus. So, if Secretary Mattis fails to implement the PM, no one will be able to sue in civil court to force implementation. This language is boilerplate in presidential instruments, including executive orders, rendering many directives unenforceable against officials in court.<sup>65</sup> But this decoupling from judicial sanction does not destroy the normative force of these instruments. Less formal presidential actions illustrate the same point: a cabinet member is bound to obey a presidential command delivered verbally in the Oval Office, though a court would not entertain enforcing such commands.

This episode shows how the legality of presidential instruments is shaped and sustained not by judicial enforceability but by the executive branch’s legal culture.<sup>66</sup> This culture is dynamic, and Presidents can reshape it to novel uses of their directive power. But evolution is not unilateral; it is negotiated through interactions between the President and subordinates, often mediated by the media.<sup>67</sup> Understood through this lens, the conviction that the tweets were not law is rooted in beliefs about what law does and should look like and how it is and should be made.

For one, the tweets evaded typical processes of accountable, reasoned decisionmaking. Extensive dialogue with agencies and stakeholders usually precedes a final directive, and memoranda are often accompanied by detailed guidance and initial agency plans.<sup>68</sup> As the PM’s quick

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UNITED STATES ¶ 14.c(2)(a)–(d) (2016 ed.). For an argument that the tweets were not enforceable, see Eugene R. Fidell, *Your Tweet Is My Command*, JUST SECURITY (July 31, 2017, 8:01 AM), <https://www.justsecurity.org/43714/tweet-command-military-trump-transgender/> [https://perma.cc/WYA6-LKX9]. But see Phillip Carter, *A Tweet Is a Direct Order*, SLATE (July 28, 2017, 2:48 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/07/it\\_s\\_very\\_dangerous\\_for\\_military\\_leaders\\_to\\_say\\_trump\\_s\\_tweets\\_aren\\_t\\_policy.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/07/it_s_very_dangerous_for_military_leaders_to_say_trump_s_tweets_aren_t_policy.html) [https://perma.cc/B5BC-APZT].

<sup>63</sup> Presidential Memorandum, *supra* note 5, § 5.

<sup>64</sup> Ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551, 553–559, 701–706 (2012)); see also 5 U.S.C. § 706.

<sup>65</sup> Some directives would be nonjusticiable even without the disclaimer. When the legal basis for the instrument is statutory, the statute may supply a right of action, but courts have rarely found Article II–based instruments justiciable, in part on separation of powers concerns. See Erica Newland, Note, *Executive Orders in Court*, 124 YALE L.J. 2026, 2076–80 (2015); see also *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, 457 (D.C. Cir. 1965).

<sup>66</sup> See, e.g., Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 986 (1997) (discussing this legal culture as the “psychology of government”).

<sup>67</sup> See Kagan, *supra* note 40, at 2299–303. President Clinton’s interactions with agencies redefined not just the legality of directives but the entire “relationship between the agencies and President.” *Id.* at 2303.

<sup>68</sup> See, e.g., Klimas, *supra* note 46 (describing the expected process in the military context). On deliberative decisionmaking in the presidency generally, see Cass R. Sunstein, *Deliberative Democracy in the Trenches*, DAEDALUS, Summer 2017, at 129.



appearance signals, these processes are often not formalized and, where they are, can be skirted.<sup>69</sup> The loosening of administrative law's typical procedural and reason-giving requirements in the presidential context is often justified by the presidency's political features — its public orientation and national electoral connection breed “responsiveness and transparency.”<sup>70</sup> On the same theory, tweeting directives might be justified — as substituting publicity and presidential ownership for bureaucratic deliberation and explanation — or even preferred — because it brings policymaking into the open. But the military did not see it that way, expecting a policy of this magnitude to be formulated and rolled out in a traditional process, a process in tension with Twitter's character limit and thirst for hot takes.<sup>71</sup> The request for formal guidance forced the President to slow down, consult, and justify his decision.<sup>72</sup>

Relatedly, the military evinced reluctance to abandon, at the sudden direction of a new President, a policy that had been carefully designed and implemented. Complying with the tweets, then, would have been inconsistent with expectations about stability.<sup>73</sup> The tweets also subverted legal stability in how they were issued. Consider that President Trump tweets from a personal account, @realDonaldTrump. Communicating binding directives through a personal account on a nongovernmental platform is inconsistent with the principle that executive directives maintain across administrations because they “issue[] from the Office of the Chief Executive.”<sup>74</sup> The President could alter or delete a tweet in seconds;<sup>75</sup> instruments from official channels tend to be stickier.

The belief that the tweets lacked legal status could also be grounded in expectations related to notice. Documents published in the *Federal Register* are easy for the public to find<sup>76</sup> and appear legal. Even the

<sup>69</sup> The President is not subject to the APA. See *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992). Presidents have prescribed a formal procedure for the issuance of executive orders, see, e.g., Exec. Order No. 11,030, 27 Fed. Reg. 5847 (June 19, 1962), but it can be bypassed, see Newland, *supra* note 65, at 2080–81.

<sup>70</sup> Kagan, *supra* note 40, at 2332; see also *id.* at 2331–39.

<sup>71</sup> In granting the preliminary injunction, the district court in *Doe v. Trump*, No. 17-1597, 2017 WL 4873042 (D.D.C. Oct. 30, 2017), gave this procedural irregularity constitutional significance. The court cited “the unusual circumstances surrounding the President's announcement,” *id.* at \*2 — namely, the “abrupt[]” statement “via Twitter” lacking the “formality or deliberative processes that generally accompany . . . major policy changes” — as “additional support for Plaintiffs' claim that the decision to exclude transgender individuals was not driven by genuine concerns regarding military efficacy,” *id.* at \*30.

<sup>72</sup> On the role of process and justification in promoting dignity and protecting against arbitrariness, see Stack, *supra* note 39, at 1992–93; and Waldron, *supra* note 39.

<sup>73</sup> “Constancy” is one of Fuller's principles of legality. FULLER, *supra* note 39, at 79–81.

<sup>74</sup> OLC Opinion, *supra* note 42, at 29.

<sup>75</sup> See Russell Goldman, *Trump Deletes Tweets Supporting Luther Strange*, N.Y. TIMES (Sept. 27, 2017), <https://nyti.ms/2k4M8YO> [<https://perma.cc/8SDZ-EEJL>].

<sup>76</sup> In contrast, there are concerns about the public accessibility of President Trump's tweets. See Complaint for Declaratory & Injunctive Relief at 1, Knight First Amendment Inst. at Columbia

White House's website version of the PM is formatted to *feel* legal in a way the tweets do not.<sup>77</sup> That said, the proliferation of legal instruments less formal than executive orders, as well as the adoption of new platforms for government communication, suggests that expectations about what law looks like and where to find it are fluid. In substance too, the tweets defied our legal system's commitment to notice. The tweets gave the military little to go on — no particular actions or deadlines. Demanding further guidance promoted public promulgation; it also furthered clarity and a desirable link between the policies announced and those implemented.<sup>78</sup>

A President's adherence to expectations about process, form, and issuance could signal that an instrument is legally operative, rather than expressive. Indeed, past attempts to get to a core definition of presidential instruments have centered on objective intent. One "widely accepted" description<sup>79</sup> offers: "Essentially an Executive order . . . is a written document issued by the President and titled as such by him or at his direction."<sup>80</sup> It might seem tautological, even antithetical to the rule of law, to suggest that the President's intent to create something legal could be determinative. But conceptualizing the legality of presidential instruments through a thicker conception of intent — marked by indicators like process, form, and promulgation — could further commitments like accountability, notice, and stability.<sup>81</sup>

As long as modern Presidents' means for shaping policy continue to evolve, situations like this one will continue to arise. The public's interest in these controversies extends beyond a need to know what the policy is; the public should be equipped to participate in conversations about how presidential statements — from memoranda to speeches to tweets — fit into our legal system. Giving content to our convictions about these tweets brings to light beliefs about what presidential directives are and should be that are key to this discussion.

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Univ. v. Trump, No. 1:17-cv-05205 (S.D.N.Y. July 11, 2017) (alleging that @realDonaldTrump blocks users).

<sup>77</sup> Cf. Jaclyn Peiser, *A Bot That Makes Trump's Tweets Presidential*, N.Y. TIMES (Oct. 15, 2017), <https://nyti.ms/2kTJjdW> [<https://perma.cc/ZSM2-RDSX>] (describing a Twitter account that morphs President Trump's tweets into documents that convey the tweets' "impact").

<sup>78</sup> Public promulgation, clarity, and "congruence" between action and law are among Fuller's principles. See FULLER, *supra* note 39, at 49–51, 63–65, 81–91; see also Stack, *supra* note 39, at 1991 ("[L]aw must be accessible, consistent, reasonably clear and stable . . .").

<sup>79</sup> CHU & GARVEY, *supra* note 43, at 1.

<sup>80</sup> H. COMM. ON GOV'T OPERATIONS, 85TH CONG., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF A USE OF PRESIDENTIAL POWERS 1 (Comm. Print 1957).

<sup>81</sup> Cf. Shaw, *supra* note 49, at 129–31 (arguing that courts should use presidential speeches only where "the President has publicly manifested an intent to enter the legal arena" through "deliberation" and extensive "attention" from "relevant stakeholders," *id.* at 129).