Presidential Administration and Judicial Review

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Lisa Manheim and Kathryn A. Watts, *Reviewing Presidential Orders*, 86 **U. Chi. L. Rev.** 1743 (2019).

What then-Professor Elena Kagan said in 2001 continues to hold true today: ours is an "era of presidential administration." Modern-day presidents do not merely stand on the sidelines while agency officials run their agencies. Rather, from the Reagan Administration onward, presidents have wielded an increasingly heavy hand in dictating the course of their appointees' day-to-day actions—monitoring, supervising, coordinating, and directing agency activities in accordance with their political and policymaking priorities. Agencies may remain the primary repositories of the powers that Congress has delegated away, but the agencies themselves have become subject to powerful forms of White House control.

As Lisa Marshall Manheim and Kathryn Watts note in this excellent new article, one of the ways in which presidents influence agency policymaking is through the issuance of orders, memoranda, proclamations, and other written directives. These documents communicate instructions from the president to a target agency, making clear to that agency's officials that the President expects them to exercise their delegated powers in an often quite specifically defined way. More often than not, such instructions do not formally bind anyone to do anything. But when directed at officials who serve at the pleasure of the President, the demands of such "presidential orders" are seldom disregarded.

The increased use of presidential orders as a means of controlling agency action raises important questions regarding both the intrabranch allocation of power between agencies and the President and the interbranch division of powers across the federal government. But, as Manheim and Watts's analysis makes clear, the rise of presidential administration also has raised the salience of several important *procedural* questions concerning the federal courts' role in reviewing the legality of the Chief Executive's directives. We are all familiar with the standard set of rules, doctrines, and principles that apply when *agency action* gets challenged in court. Ample case law guides courts' application of, among other things, the APA's reviewability provisions, the standing and ripeness requirements of Article III, Chevron and its associated deference doctrines, and the equitable principles governing the scope and availability of injunctive relief. But when courts confront *presidential* action, these principles—to the extent they apply at all—operate against a legal backdrop marked by a greater degree of precedential scarcity and obliqueness.

For most of U.S. history, this relative dearth of legal guidance has not posed much of a problem, as direct challenges to presidential orders have only sporadically arisen. This is not because presidential action is categorically or even largely immune from legal attack. Rather, it's because past litigants seeking to challenge presidential action have tended to do so only indirectly, training their focus on the subsequent agency action that a presidential order provokes. And with the agency's action on the books, a more traditional administrative law-based challenge can proceed. Would-be challengers to presidentially initiated action thus have tended to avoid the uncertainties and potential pitfalls of direct review by instead waiting to sue the agencies that act on the President's behalf.

This "wait for the agency" approach, Manheim and Watts contend, has diminished in popularity during the course of Donald Trump's presidency. President Trump's orders concerning the so-called "travel

ban," sanctuary jurisdictions, the military's treatment of transgender servicemembers, IRS enforcement priorities, and several other subject matters have found themselves subject to immediate and direct challenge in federal court. There has thus been what the authors call an "explosion" of litigation targeting direct presidential action, with public-law litigants increasingly "elect[ing] to challenge the legality of the President's orders, rather than (or along with) the legality of subsequent agency action." The heightened presence of this practice has put new pressure on the courts to develop a more structured set of doctrines to guide their adjudication of these cases.

Manheim and Watts's descriptive thesis raises two sets of questions. The first has to do with underlying causes. Specifically, if the descriptive observation is correct, what accounts for the change in litigation practice? Why, that is, have public-law litigants suddenly shown an increased willingness to go after the President directly rather than wait for the relevant agencies to act? Part of the answer, Manheim and Watts suggest, has to do with Trump himself. While Trump by no means initiated the era of presidential administration, he has certainly embraced it with special enthusiasm, "act[ing] aggressively throughout his presidency to blur the lines between the President and the agency he oversees." What is more, Trump has been "willing to use presidential orders to advance politically and legally controversial policies," many of which have provoked intense public opposition while opening up opportunities for legal attack. These two Trumpian tendencies—his rhetorical tendency to "collaps[e] the distinction between presidential and agency action" and his political tendency to take the lead in pursuing divisive, controversial, and legally-suspect executive-branch policies—may be working to "invite[] litigants to direct their legal challenges not at subsequent agency action, but rather at the predicate presidential decisions."

But that's not the entirety of Manheim and Watts's causal explanation. There is a second and somewhat complementary element that connects with two relatively high-profile and largely successful litigation campaigns: the 2014 attack on the Obama Administration's Deferred Action for Parent Arrivals (DAPA) policy and the 2017 challenge to the initial iteration of Donald Trump's "travel ban." To be sure, only the latter of these two cases amounted to a formal attack on presidential action itself—the DAPA order took the form of a DHS memorandum that qualified as a "rule" under the APA—but both cases bore important similarities to the numerous challenges to presidential action that followed in their wake: Among other things, the DAPA challenge and the "travel ban" challenge concerned "politically salient executive actions;" they targeted policies at the core of each president's political agenda, and they occurred "quite early in the administrative process." And in both cases, the challengers achieved quick and high-profile successes. The DAPA plaintiffs not only won on the merits, but also managed to vindicate "a controversial theory of standing…that the government warned would open the floodgates for future challenges to federal policies." And while a subsequent iteration of the travel ban would survive Supreme Court review, the initial travel-ban challenge yielded important victories for the plaintiffs on both procedural and merits-based issues. Manheim and Watts surmise that these two litigation campaigns operated as something of a proof-of-concept for the strategy of seeking immediate and direct review of presidential orders.

The second question raised by Manheim and Watts's descriptive thesis can be simply stated: What should courts do now? Manheim and Watts do not take a strong normative position on whether the rise of challenges to presidential orders represents a good or bad thing. But they do suggest that the trend is likely to remain with us for the foreseeable future, and they urge the development of a more structured judicial approach to reviewing presidential orders.

In service of that goal, the authors conclude their article by developing a coherent but context-sensitive procedural framework for adjudicating challenges to presidential orders. This framework both derives and deviates from traditional administrative-law principles in instructive and revealing ways. In particular, the discussion considers: (1) the extent to which various timing-related limits on premature

suits (e.g., ripeness, standing, finality, exhaustion, etc.) might embrace a working distinction between presidential orders that formally bind other actors and those that do not; (2) the circumstances in which courts should rely on their equitable powers as a basis for finding an implied cause of action to challenge presidential action; (3) the appropriate level of deference with which courts should review both the underlying rationality of a presidential order and any statutory constructions on which the order is based; (4) the proper crafting of injunctive relief in response to successful challenges on the merits (including the extent to which courts should address their injunctions to the President's subordinates so as to avoid "the thorny questions that arise when courts try to enjoin a President directly"); and (5) the question whether severability analysis is ever appropriate in the context of reviewing presidential orders, given the procedural ease with which an invalidated order could be revised and reissued. On these and other issues, Manheim and Watts offer penetrating insights and persuasive conclusions, and their discussion is likely to be of great value to future scholars, litigants, and judges confronting the procedural complexities of future presidential-action cases.

Notably, Manheim and Watts are not the only public-law scholars who have grappled with the review-related problems raised by challenges to presidential orders. Several components of their analysis build on insights from an important article that Kevin Stack authored well before the recent spate of Trump-era challenges took center-stage. Their descriptive thesis is informed by Erica Newland's impressive historical survey of the federal courts' consideration of executive orders over the past two centuries. And their prescriptive suggestions nicely complement two other treatments of specific review-related problems to which presidential orders give rise: David Driesen's article advocating for "arbitrary and capricious" review of statutorily-based presidential orders, and Tara Grove's article (also recently JOTWELL-reviewed) endorsing a relatively strict-form of textualism as the appropriate method of interpreting presidential orders. Manheim and Watts's article provides a helpful, unifying frame for this burgeoning line of inquiry, and it moves the discussion forward in numerous useful ways.

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