

Donald Trump and the Weight of Presidential Speech A talk with Kate Shaw

I. Presidential Speech and Manifested Intent

- A. Should presidential speech be legally operative?
 - 1. The courts have not yet created a framework for determining what type of presidential speech is legally operative.
 - 2. Whether or not it is may depend on the type of executive speech and the action.
- B. Professor Kate Shaw's proposed general framework:
 - 1. Generally, the president's spoken remarks should not be accorded the same legal weight was official statements and more authoritative documents. When there are inconsistencies between the two, the latter should control.
 - 2. Presidential speech may be legally operative when:
 - a. The president has publicly manifested an intent to enter the legal arena;
 - b. In limited circumstances, presidential speech induces a degree of public reliance;
 - c. Presidential speech touches on foreign affairs or national security; or
 - d. Presidential speech is evidence of constitutionally impermissible government purpose.
- C. Manifested intent
 - 1. Where the president has publicly manifested an intent to enter the legal arena and that it is clear that the speech is the product of deliberation on which relevant stakeholders have contributed, the speech should be legally operative.
 - 2. Context and venue of the speech must be examined.
 - 3. Celebratory, ceremonial, or informal occasions particularly where they involve unscripted exchanges with members of the public or journalists are unlikely to reflect such manifestation of intent.
- D. Speech relating to executive orders
 - 1. Though executive orders are not enumerated in the Constitution, there is a long established tradition of the use of executive orders. Courts are generally deferential to executive orders, though there are several notorious exceptions.
 - a. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)¹
 - i. During the Korean War, when steel workers strike threatened to slow down war efforts, President Truman issued an executive order directing the Secretary of Commerce to seize and operate

¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952):
https://scholar.google.com/scholar_case?case=14460863599772421355&hl=en&as_sdt=6&as

- the steel mills. The steel mills sued the Secretary for issuing an order seizing the steel mills.
- ii. The Court found that the president had no constitutional or statutory authority to issue the executive order in which he took possession of property to prevent strikes, and that his powers as Commander in Chief of Armed Forces do not extend to labor disputes.
2. Inconsistent presidential speech and executive branch statements
 - a. Ascertaining intent: in context of executive order, the only intent that should matter is the intent of the president.
 - b. Generally, even when presidential speech is inconsistent with executive branch positions or policies offered in a more authoritative manner, those documents should be considered controlling as evidence of executive intent.
 3. E.g. *US v. Texas*
 - a. In a memorandum issued by the Secretary of Homeland Security, the government outlined a new initiative for “deferred action” that would deprioritize immigration enforcement for undocumented immigrants with US citizen or permanent resident children, and individuals who entered the U.S. as children and met certain eligibility criteria. Texas and 25 other states filed suit to enjoin the new policies.
 - b. The Texas district court cited Obama’s public statements that he “took action to change the law” as relevant to the determination that the DHS memorandum as binding rules rather than guidance.
 - c. The Fifth Circuit’s decision denying the government’s request to stay the injunction made no mention of the President’s public statements.
- E. Speech relating to legislative actions
1. E.g. *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012)
 - a. During a televised interview with George Stephanopoulos on ABC, President Obama stated that the Affordable Care Act “was definitely not a tax increase.” This statement was brought up during oral arguments repeatedly in subsequent litigations. For example, Justice Scalia asked the Solicitor General Don Verrilli to confirm that the President had said “it wasn’t a tax.” The Solicitor justified Obama’s statement, explaining that the individual mandate should be understood as an incentive to obtain insurance and that the statement should not be a basis for determining whether Congress exercised its taxing power. Though these statements were debated during oral arguments, the opinion did not rely on these statements.

II. Speech on Foreign Affairs, National Security, or a Constitutionally Impermissible Purpose

- A. National security
 - 1. The President has broad powers on matters touching on national security. Typically, presidential speech regarding foreign affairs undergoes process of interagency clearance, which may make them more reliable guidance to executive branch views.
- B. E.g. Trump's campaign rhetoric and subsequent travel bans
 - 1. First order "Protecting the Nation from Foreign Terrorist Entry into the United States" 1/27/17 main objectives:
 - a. Temporarily suspend admission to the US of individuals from 7 majority Muslim countries;
 - b. Temporarily suspended admission of all refugees;
 - c. Indefinitely suspended admission of Syrian refugees.
 - d. Also contained 2 separate provisions prioritizing the admission of persecuted members of religious minorities.
 - 2. The Washington district court entered a TRO.
 - a. 9th Circuit review – upheld the TRO primarily on the basis of π due process arguments, reserving judgment on religious discrimination claims. Court noted claims relied heavily on numerous statements by the President about his intent to implement a Muslim ban and that such evidence could properly be considered when evaluating claims brought under the Establishment and Equal Protection Clauses.²
 - 3. The federal government unsuccessfully sought hearing en banc.
 - a. Denial of rehearing drew dissent from Judge Kozinski:
 - i. In his view, *"candidates say many things on the campaign trail; they are often contradictory or inflammatory. No shortage of dark purpose can be found sifting through the daily promises of a drowning candidate, when in truth the poor schlub's only intention is to get elected."*³
- C. Constitutionally impermissible purpose
 - 1. Presidential speech as evidence of constitutionally forbidden government purpose, e.g. equal protection challenges.
 - a. Where discriminatory intent is a required component of a successful equal protection challenge, some courts have relied on public officials' statements as potentially relevant evidence of such intent.
 - 2. Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993)⁴

² Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017):

cdn.ca9.uscourts.gov/datastore/opinions/2017/03/15/17-35105.pdf

³ Slip op. at 12 (Kozinski, dissenting from the denial of rehearing en banc).

⁴ Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993):

<https://www.law.cornell.edu/supremecourt/text/508/520>

- a. A part of the religious practices of Santeria, an Afro-American religion, is animal sacrifice. The Church of Lukumi Bablu Aye, a Santeria church based in Florida, leased property in Miami-Dade County. The Hialeah City Council held an emergency public session and passed a resolution noting the city's commitment to prohibiting religious practices inconsistent with public morals, peace, or safety and subsequently adopted a resolution incorporating Florida's animal cruelty laws and ritual sacrifice or slaughter of an animal, the primary purpose of which is not for food consumption.
- b. The Supreme Court found that the ordinances were not facially neutral - their main purpose was to suppress an essential element of Santeria's religious practices - and not narrowly tailored to accomplish the government's asserted interests of preventing public health risks and animal cruelty.

Additional Resource

Shaw, Katherine, Beyond the Bully Pulpit: Presidential Speech in the Courts (June 5, 2017). Texas Law Review, Vol. 96, 2017; Cardozo Legal Studies Research Paper No. 520. Available at SSRN: <https://ssrn.com/abstract=2981475>