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## Unitary Theory, Consolidation of Presidential Authority, and the Breakdown of Constitutional Principles in Immigration Law

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COMMENT

UNITARY THEORY, CONSOLIDATION OF PRESIDENTIAL AUTHORITY,  
AND THE BREAKDOWN OF CONSTITUTIONAL PRINCIPLES IN  
IMMIGRATION LAW

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*We are a nation that has a government—not the other way around. And this makes us special among the nations of the Earth. Our government has no power except that granted it by the people. It is time to check and reverse the growth of government, which shows signs of having grown beyond the consent of the governed. It is my intention to curb the size and influence of the Federal establishment and to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the States or to the people.*<sup>2</sup>

## INTRODUCTION

### A. Statement of Purpose

This paper will argue that beginning with President Reagan the adoption of unitary theory as a central tenet in presidential administrations created a now ongoing consolidation of executive regulatory authority. This consolidation of power has considerably accelerated over the course of the last four decades. As Courts continue to defer to the executive in decisions made within the broad grants of power delegated by Congress, the relevance of the legislative body dwindles. The checks on executive assumption of power have largely been removed. The wall between the executive and the administrative have crumbled, and what were once considered unofficially separate branches are merging. This convergence of both the power to enforce and create the laws has no other outcome but to create significant questions of power allocation and constitutionality in immigration law and beyond. This idea will be explored through the historical evolution of United States

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<sup>2</sup> Ronald Reagan, Inaugural Address, The American Presidency Project, 3/11/2019, <https://www.presidency.ucsb.edu/node/246336>.

immigration law, the executive's expansions of power, and the gradual rise of the modern American administrative state.

## B. Brief Discussion of Modern Expansions of Presidential Power

When first elected, President Reagan minced no words regarding his intent during the first of his inaugural speeches in January of 1980. He intended to reduce the scope of the federal government and remit powers he saw as usurped by it to the states. This position could be described as reactionary and a culmination of the events of the previous three decades. The Presidency had been aggressively expanding its powers since President Truman sought to contain Communism in the Korean peninsula.<sup>3</sup> Truman, though, pushed the boundaries of presidential authority enough to have the Supreme Court draw a line still applicable to evaluations of presidential authority today.<sup>4</sup> President Kennedy further consolidated foreign policy decisions in the presidency with unilateral decisions on major events of the early 1960's, including the Bay of Pigs invasion and Cuban Missile Crisis.<sup>5</sup> President Johnson continued to consolidate foreign policy into the hands of the presidency, but he also looked inward with his "Great Society" programs.<sup>6</sup> President Johnson had sought, and largely succeeded, in legislating this expansion of civil rights and government services

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<sup>3</sup> See, e.g. Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 Indiana Law Journal 1199 (2006).

<sup>4</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>5</sup> See, e.g. David Luban, *On the Commander in Chief Power*, 81 Southern California Law Review 477, 538 (2008)

John F. Kennedy, he reports, cut the National Security Council and Joint Chiefs out of the advising loop, preferring to confer only with his "inner club." Kennedy blamed the Bay of Pigs fiasco on bad advice from the Joint Chiefs; and, after their advice on the Cuban missile crisis proved inferior to Defense Secretary Robert S. McNamara's strategy, McNamara increasingly came to believe that he and his systems analysts could plan a war better than the military.

<sup>6</sup> See, e.g., Peter Feuerherd, *How Great Was the Great Society?*, JSTOR, January 4, 2017, last accessed 03/07/2019, <https://daily.jstor.org/how-great-was-the-great-society/>

from the White House.<sup>7</sup> All of these presidents pursued unpopular wars which were entered into and expanded on the back of a Congressional resolution instead of a Congressional declaration of war.<sup>8</sup>

With Nixon's resignation, the revolt against the expansion of presidential power began in earnest. The Supreme Court denied President Nixon Executive Privilege in forcing him to hand over the Watergate tapes.<sup>9</sup> This was a major rebuke of unlimited Presidential powers and Nixon's "Imperialist Presidency."<sup>10</sup> In addition, Congress bristled at the thought of a Presidency left unchecked and enacted legislation, such as the War Powers Act and National Emergency Act, meant to curb Executive power through Congressional oversight.<sup>11</sup> Presidents Ford and Carter fought

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<sup>7</sup> See, e.g. Bruce Miroff, *Presidential Leverage over Social Movements: the Johnson White House and Civil Rights*, 43 JOURNAL OF POLITICS 2 (1981).

<sup>8</sup> See, e.g., *Unchecked Presidential Wars*, 148 University of Pennsylvania Law Review 1637, 1656 (2000) Explaining that every military engagement since World War II had been authorized by presidential action, not by a Congressional declaration of war; Stephen I. Vladeck, *Congress, The Commander-in-Chief, and the Separation of Powers After Hamdan*, 16 Transnational Law & Contemporary Problems 933, University of Iowa College of Law (2007) Discussing the history of presidential authorization through the George W. Bush administration and the effect of *Hamdan v. Rumsfeld*, 548 U.S. 667 (2006) on executive authorization authority.

<sup>9</sup> *United States v. Nixon*, 418 U.S. 683, 706 (1974)

However, neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.

<sup>10</sup> See, e.g. Thomas E. Cronin, *A Resurgent Congress and the Imperial Presidency*, 95 Political Science Quarterly 209, 209(1980).

The "imperial presidency" meant many things to many people. But it especially suggested the abuse and misuses of presidential powers. By 1973 it became an accepted term to describe presidential deceptions, lying, and transgressions against cherished notions of separation of powers. A deep-seated skepticism set in as an increasing number of Americans lost confidence in President Nixon.

<sup>11</sup> See, e.g., David S. Friedman, *Waging War Against Checks and Balance—The Claim of an Unlimited Presidential War Power*, 57 ST. JOHN'S LAW REVIEW

contractions of Presidential authority throughout their terms.<sup>12</sup> With the election of President Reagan, a new approach to consolidation of power in the Presidency arose. For President Reagan to unilaterally reduce the size of government, he had to simultaneously assert his power over all administrative offices created through the power of the executive. The Reagan administration justified this through the idea that the power of administrative agencies created under the banner of the Presidency sprang from the power of the Executive alone.<sup>13</sup> In claiming this, President Reagan could issue directives to those agencies directing how they operated.<sup>14</sup> This was President Reagan's implementation of the unitary theory of the presidency.<sup>15</sup>

This places the discussion firmly on the path to the Presidency of Donald Trump and the continued efforts by his predecessors to consolidate power into the hands of the Executive. Since the resignation of President Nixon and the contraction of Presidential powers under Presidents Ford & Carter, Presidential powers have been steadily expanding.<sup>16</sup> As the first President to

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214 (1983); L. Elaine Halchin, *National Emergency Powers*, CONGRESSIONAL RESEARCH SERVICE, Last Accessed 03/07/2019, <https://fas.org/sgp/crs/natsec/98-505.pdf>

<sup>12</sup> See, e.g. Phillip Shabecoff, *Presidency is Found Weaker Under Ford*, THE NEW YORK TIMES, March 26, 1976; Ann Mari May, *Fiscal Policy, Monetary Policy, and the Carter Presidency*, 23 PRESIDENTIAL STUDIES QUARTERLY 699 (1993).

<sup>13</sup> See, e.g. Morton Rosenberg, *Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEORGE WASHINGTON LAW REVIEW 627 (1989).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See, e.g. Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 NEW YORK UNIVERSITY LAW REVIEW 227 (2016); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUMBIA LAW REVIEW 515 (2015); Jon D. Michaels, *Privatization's Progeny*, 101 GEORGETOWN LAW JOURNAL 1023 (2013).

make unitary theory a centerpiece of their administrative philosophy, President Reagan resumed what Nixon had been forced to stop via Watergate and his resignation.<sup>17</sup> Over the next four decades, Presidents would continuously usurp Congressional power to control and shape policy.<sup>18</sup>

The longstanding deference of Congressional and Executive control of immigration policy are starting to be supplanted by issues concerning separation of powers.<sup>19</sup> As the Presidency assumes ever increasing authority over the federal bureaucracy—what many had termed the “fourth branch of government”—the checks and balances envisioned by the founders have been rendered ineffective.<sup>20</sup> This is particularly true in today’s hyper-partisan political climate. In immigration law, these issues were most recently exposed as *Trump v. Hawaii* made its way through the judicial process where it was ultimately decided by the Supreme Court.<sup>21</sup> The decision itself should not have been surprising to students of history.

To understand why the Supreme Court’s decision in *Trump v. Hawaii* should have been unsurprising to informed observers, it

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<sup>17</sup> See, e.g., Michael Fix & George C. Eads, *The Prospects for Regulatory Reform: The Legacy of Reagan’s First Term*, 2 YALE JOURNAL ON REGULATION, 293 (1985).

<sup>18</sup> See, e.g., Elena Kagan, *Presidential Administration*, 114 HARVARD LAW REVIEW, 2245 (2001) Illustrating the consolidation of administrative authority through the Reagan, George H.W. Bush, and Clinton presidencies; William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 BOSTON UNIVERSITY LAW REVIEW, 505 (2008) Providing a brief overview of the history of presidential power expansion.

<sup>19</sup> For additional reading on court deference in the immigration sphere, see, e.g., Adam B. Cox, *Deference, Delegation, and Immigration Law*, THE UNIVERSITY OF CHICAGO LAW REVIEW, vol. 74, 1671 (2007).

<sup>20</sup> See, e.g., Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984) (describing agencies as the fourth branch of government).

<sup>21</sup> *Trump v. Hawaii*, 138 S.Ct. 2392, 2409 (2018). “Moreover, plaintiffs’ request for a searching inquiry into the persuasiveness of the President’s justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere.”

is necessary to examine the Supreme Court decisions that initially asserted federal control over immigration vis-a-vis the states. Only then does it become practical to examine how that control gradually flowed into the office of the Executive.

## IMMIGRATION AUTHORITY

### A. Federalism and the Beginnings of Congressional Control

Outside of Article 1, Section 8 the Constitution was silent on immigration.<sup>22</sup> Immigration policy was largely left unregulated for the first hundred years of American existence. That changed when the Supreme Court issued one of its first major immigration ruling in 1875.<sup>23</sup> *The Passenger Cases* of 1849 would provide the vehicle for that decision and laid important groundwork for the Supreme Court to justify federal regulation of immigration policy. *The Passenger Cases* were a series of consolidated cases arising from an import tax disguised as an immigrant quarantine fund. These cases would be the first to establish Congressional authority over immigration policy while substantially limiting the state's ability to regulate. In order to do so the Taney court looked to the Commerce Clause. After much discussion of the Commerce Clause's history and the dangers of allowing the states to regulate foreign commerce individually, the court concluded that "the Constitution has conferred on Congress the power to regulate commerce with foreign nations, and among the States."<sup>24 25</sup> The state law "must oppose what has been actually done or prescribed by Congress, and in a case

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<sup>22</sup> Article 1, Section 8 of the Constitution gives Congress the power to make laws regarding naturalization. The document makes no mention of immigration otherwise.

<sup>23</sup> *Chy Lung v. Freeman*, 92 U.S. 275, 277 (1875). This case would establish the federal government's right, and only the federal government's right, to exclude. The only exception was an interest of vital necessity to the state and the means to which the interest was protected were only wide enough to achieve it.

<sup>24</sup> *Smith v. Turner*, 48 U.S. 283, 562 (1849).

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

where it has no reserved power to act differently from Congress.<sup>26</sup>”  
The Court goes on to cite the decision in *Ogden v. Gibbons*<sup>27</sup>

But in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. “The deep streams which penetrate our country in every direction pass through the interior of almost every State in the Union, and furnish the means for exercising this right. If Congress has the power to regulate it, that power must be exercised wherever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State.”<sup>28</sup>”

From here, the majority reasoned that the power of regulating foreign commerce had been undertaken by Congress, stating Congress had created “treaties, and ha[d] regulated [the United States’] intercourse with foreign nations by prescribing [those treaties’] conditions.”<sup>29</sup>” The Court would also address arguments made that the quarantine of undesirable immigrants was an exercise of the police powers granted to the state. The Court disagreed, describing the taxes imposed by the state as a “transit duty.”<sup>30</sup>” The Court strikes down the state’s ability to “pervert[] into weapons of

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<sup>26</sup> *Id.*

<sup>27</sup> In *Ogden*, the state of New York had tried to grant a single company monopoly over steamboat navigation in state waters. The Supreme Court ruled that the establishment of such monopolies interfered with Congressional power to regulate interstate & foreign commerce. Established the maxim that states could not interfere with Congressional authority to regulate commerce via legislative enactment.

<sup>28</sup> *The Passenger Cases*, 48 U.S. 283, 462 (1849) quoting *Gibbons v. Ogden*, 22 U.S. 1, 74 (1824).

<sup>29</sup> *Supra*, Note 23 at 462.

<sup>30</sup> *Id.* at 463.

offence and aggression upon the rights of others” state police powers which should be reserved for “self-defence and protection against harm”.<sup>31</sup> Finally, the Court addresses the argument that states had ultimate authority to act upon any person within their jurisdiction, regardless of their status as a citizen of that state. The Court dispatches this argument by pointing to the decision in *Gibbons* reasoning that a state may attempt to “exclude all vessels but her own from entering her ports, and may grant monopolies of the navigation of her bays and rivers. This the State of New York at one time attempted, but was restrained by the decision of this court”.<sup>32</sup>

The Court would strike down these types of duty impositions made by the states but would leave the door open to exercise state police power “for the preservation of the health, the morals, or the domestic peace of the States”.<sup>33</sup> Later decisions would look to close that door completely.

#### B. Eliminating State’s Police Power Immigration Authority

The Supreme Court would revisit this issue nearly three decades later in its 1875 decision in *Chy Lung v. Freeman*. In *Chy Lung*, California had enacted a statute allowing the state Commissioner of Immigration to inspect passengers seeking to immigrate into the United States via California ports prior to anyone disembarking from the ship. The commissioner was enabled to charge fees based on snap judgments made in his own discretion. California argued that the law was meant to exercise its police power to protect the state from acquiring the burden of care for

[the] lunatic, [the] idiot, [the] deaf, dumb, blind, crippled, or infirm, [who] is not accompanied by relatives who are able and willing to support him, or is likely to become a public charge, or has been a pauper in any other country, or is from sickness or disease (existing either at the time of sailing from the port of

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

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 464.

departure or at the time of his arrival in the State) a public charge, or likely soon to become so, or is a convicted criminal, or a lewd or debauched woman.<sup>34</sup>

The Supreme Court disagreed, viewing the law as too wide in scope, and stated

We are not called upon by this statute to decide for or against the right of a State, in the absence of legislation by Congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad; nor to lay down the definite limit of such right, if it exist. Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity. When a State statute, limited to provisions necessary and appropriate to that object alone, shall, in a proper controversy, come before us, it will be time enough to decide that question. The statute of California goes so far beyond what is necessary, or even appropriate, for this purpose, as to be wholly without any sound definition of the right under which it is supposed to be justified. Its manifest purpose, as we have already said, is, not to obtain indemnity, but money.<sup>35</sup>

The Supreme Court avoided ruling directly on the scope of a state's ability to defensively use its police powers but did indicate its willingness to do so in a later case. Regarding the right of the states to regulate immigration through its police power, the Supreme Court states, "Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity."<sup>36</sup> They continue by asserting their willingness to define the boundaries of that scope in the next sentence, "When a State statute, limited to provisions necessary and appropriate to that object alone, shall, in a proper controversy, come before us, it will be time enough to decide that question."<sup>37</sup> Throughout the decision the

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<sup>34</sup> *Supra*, Note 22 at 277.

<sup>35</sup> *Id* at 280.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

Court is hesitant to grant that the state's right to regulate immigration through police power exists at all. In terms of the California Statute, they strike it down stating the statute, "invades the right of Congress to regulate commerce with foreign nations, and is therefore void."<sup>38</sup> With this sentence, the Supreme Court expressed its opinion that immigration authority was governed by the Commerce Clause and it was questionable whether states had any right to regulate immigration at all.

New York would again attempt to justify an import duty on immigrants by amending the statute struck down in the *Passenger Cases* to reflect an inspection law. In *People of State of New York v. Compagnie Générale Transatlantique* the Court rejected that people were property and could be imported. The Court stated

We know of nothing which can be exported from one country or imported into another that is not in some sense property-property in regard to which some one is owner, and is either the importer or the exporter. This cannot apply to a free man. Of him it is never said he imports himself or his wife or his children.<sup>39</sup>

While the Court took time to explain why New York could not justify taxation of immigrants based on an inspection theory, the argument had become moot during the appeal process. Congress had fully asserted their power over immigration under the Commerce Clause in August of 1882 with the passage of 'An act to regulate immigration.' This act decreed "a duty of 50 cents is to be collected for every passenger not a citizen of the United States who shall come to any port within the United States by steam or sail vessel from a foreign country".<sup>40</sup> The state's ability to levy any type of import

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<sup>38</sup> *Id.*

<sup>39</sup> *People of State of New York v. Compagnie Generale Transatlantique*, 107 U.S. 59, 62 (1883)

<sup>40</sup> *Id* at 63.

charge against an immigrant arriving in a port which fell under their jurisdiction was effectively dead.

### C. Constitutional Challenges to the Act to Regulate Immigration of 1882

Constitutional challenges would come quickly after the Congressional regulation of immigration duties began. These challenges would be consolidated in what would become known as the *Head-Money Cases*. The constitutional argument for these cases was presented as follows

[A]ssuming that congress, in the enactment of this law, is exercising the taxing power conferred by the first clause of section 8, art. 1, Const., and can derive no aid in support of its action from any other grant of power in that instrument, [petitioner] argues that all the restraints and qualifications found there in regard to any form of taxation are limitations upon the exercise of the power in this case. The clause is in the following language: The congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and the general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.<sup>41</sup>

The petitioners argue that the duty imposed on immigrants entering the country was not established for the defense or general welfare of the United States and it does not affect the states evenly, and therefore is not uniform. The Court responds by arguing differences in revenues raised or distributed do not determine whether a statute has been uniformly applied. The Court defines uniformity as the law appl[ying] to all ports alike, and evidently giv[ing] no preference to one over another, but is uniform in its operation in all ports of the United States... [p]erfect

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<sup>41</sup> Edye v. Robertson, 112 U.S. 580, 594 (1884) (Internal quotes & citations omitted)

uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream.<sup>42</sup>

Additional arguments were levied against the act under the auspices of violating treaties between sovereign nations. The Court argues that a treaty is on equal footing with a statute created by the federal government. They are both regarded as a “law of the land.”<sup>43</sup> Vis a vis one another, since a treaty only takes the Senate and Executive to and statutory authority is derived from both houses of Congress and the Executive and superiority “would seem to be in favor of an act in which all three of the bodies participate.”<sup>44</sup> The Court would rule that “nothing in the statute by which it has here exercised that power forbidden by any other part of the constitution.”<sup>45</sup> In effect, Congressional authority to regulate immigration had been firmly established by the Supreme Court.

#### D. Immigration Act of 1891 & Its Constitutional Challenges

The Immigration Act of 1891 “establishe[d] the office of superintendent of immigration<sup>46</sup>” and placed it under the control of the Department of the Treasury.<sup>47</sup> In *Nishimura Eiku v. United States*, the Court considered whether Congress had the power to appoint inferior officers in departments of the Executive. Petitioner in *Nishimura* asserted that the inspector of immigration was illegally appointed by the Secretary of the Treasury. Petitioner argued that the Superintendent of Immigration should have made the appointment of the inspector. The Court rejected this argument stating “the constitution does not allow congress to vest the appointment of inferior officers elsewhere than in the president alone, in the courts of law, or in the heads of departments.”<sup>48</sup>

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<sup>42</sup> *Id* at 595.

<sup>43</sup> *Id* at 598.

<sup>44</sup> *Id* at 599.

<sup>45</sup> *Id* at 600.

<sup>46</sup> *Nishimura Ekiu v. U.S.*, 142 U.S. 651, 662 (1892)

<sup>47</sup> See § 7, Immigration Act of 1891.

<sup>48</sup> *Supra*, *Nishimura* at 663. (Internal quotations omitted).

*Nishimura* also established the idea that the judiciary could not overrule decisions rightfully made by the legislative and executive branches or their rightfully designated actors in regards to immigration on due process grounds. The Court states,

It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law.<sup>49</sup>

This decision marked the beginnings of the Executive branch's influence over immigration policy. It furthered the idea that the federal government was able to bar who it wanted so long as they were doing so under the legitimate authority of Congressional action. Additionally, those actors Congress had vested decision-making authority within issued final verdicts that were not appealable to the judiciary.

[T]he final determination of those facts may be in trusted by congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted.<sup>50</sup>

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<sup>49</sup> *Id* at 660.

<sup>50</sup> *Id.*

The proper offices to make those decisions fell “either to the department of state, having the general management of foreign relations, or to the department of the treasury, charged with the enforcement of the laws regulating foreign commerce.<sup>51</sup>” The President, as the Chief Executive, names the Secretary of the Treasury and the Secretary of State—both departments formed under executive authority.<sup>52</sup> As unitary theory became a more prominent idea, executive control of all subordinate offices of the Executive and their employees/appointees would lead to the President having great latitude in shaping immigration policy through Executive directive.

The *Nishimura* case helped establish the right of the federal government to do three things in the field of immigration law, (1) deny entry to noncitizens, (2) allowed Congress to vest decision making authority regarding entry in offices other than itself and outside the legislative branch, and (3) labeled decisions made by those agents as final decisions excluded from review by the judiciary. Shortly after this decision, the Court would again weigh in on the rights of the sovereign in regard to immigration, this time as it related to the deportation of noncitizens.

In *Fong Yue Ting v. U.S.* the Supreme Court examined the right of the federal government to expel noncitizens and whether this expulsion violated the Fourteenth Amendment. The Court discusses the right of the sovereign to choose who may remain in its lands at length. They ultimately arrive at the following conclusion

The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of congress, and to be executed by the executive authority according to the regulations so established, except so far the judicial department has been

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<sup>51</sup> *Id* at 559

<sup>52</sup> See Article II, § 2, Const.

authorized by treaty or by statute, or is required by the paramount law of the constitution, to intervene.<sup>53</sup>

Here the Court grants Congress, and to a lesser extent the President, authority to control who may remain in the country. The Court also defers to the Constitution's ultimate authority while excluding their right to become involved unless authorized by statute or treaty language to do so. Once they conclude that a sovereign does have the authority to expel noncitizens, the Court expands on Congress's power to expel nonresident aliens at its whim stating

Chinese laborers, therefore, like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility. But they continue to be aliens, having taken no steps towards becoming citizens, and incapable of becoming such under the naturalization laws; and therefore remain subject to the power of congress to expel them, or to order them to be removed and deported from the country, whenever, in its judgment, their removal is necessary or expedient for the public interest.<sup>54</sup>

In this part of the ruling the Court granted ultimate authority over immigration to Congress. They provide Congress the vehicle by which to expel and admit nonresidents. This combined with the authority to regulate naturalization laws as delegated under the Constitution gave Congress control over all the major processes involved in immigration.<sup>55</sup> The last major hurdle to Congressional dominion over immigration would be brought under the Due Process Clause of the Fourteenth Amendment.

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<sup>53</sup> *Fong Yue Ting v. U.S.*, 149 U.S. 698, 713 (1893)

<sup>54</sup> *Id* at 724.

<sup>55</sup> *See* Art. I, Sec. 8, Const.

The Court had largely laid the foundation of its reasoning on the question of Due Process violations in earlier decisions. The Court revisited this reasoning again near the beginning of *Fong Yue Ting*, foreshadowing their ultimate decision. The Court ruled immigration status and its adjudication did not constitute a trial and sentencing for, but merely an ascertainment of, an alien's right to remain in country. The Court avoided a Due Process conflict by defining immigration outside the bounds of a normal judicial proceeding. Deportation was not a punishment per se, only a way for the sovereign to enforce "the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend."<sup>56</sup> As a political question, the Court declined to express an opinion upon "the wisdom, the policy, or the justice of the measures enacted by [C]ongress in the exercise of the powers confided to it by the [C]onstitution".<sup>57</sup>

By the end of the nineteenth century, Congressional power to control policies regarding immigration had been firmly established. The Executive's role was also somewhat defined as Congress could delegate responsibilities in enforcement to certain executive departments, specifically the state & treasury departments' head. The judiciary gave substantial deference to the interplay between Congress's delegation of authority to executive agencies and how those agencies chose to wield it.

The Court subjected these delegations of power to what amounted to a rational basis review, a relatively low hurdle to clear.<sup>58</sup> The Court would also categorically abstain from weighing

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<sup>56</sup> *Supra*, Note 52 at 730.

<sup>57</sup> *Id* at 731.

<sup>58</sup> *See e.g. Wayman v. Southard*, 23 U.S. 1 (1825). "The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary

in on implications of policy decisions, labelling such matters political questions.<sup>59</sup> This would come to be known as the plenary power doctrine. This scenario would set the stage for continued expansion of Presidential authority and influence in the sphere of immigration policy and enforcement. Having a judiciary reticent to rule on policy matters that was willing to allow Congress to delegate its authority to another branch would lead to an opportunity for executive usurpation of immigration control. While the bureaucracy created by executive agencies had historically been viewed as an unspoken fourth branch of government operating autonomously, the advancement of the unitary theory of the executive would see its autonomy weakened and then fully usurped by presidential control. As the executive and the administrative wings of the federal government became exceedingly beholden to the person holding executive office, the Congressional and Executive offices were placed squarely on a collision course with the Constitution and its own delegation of authority.

#### E. The Shifting Sands of Federal Authority

Prior to 1875's *Chy Lung* decision, regulation of immigration was largely done on the local and state level. *Chy Lung* moved authority into the hands of Congress as a function of foreign commerce regulation. At the turn of the twentieth century, the judiciary was in the process of moving federal justification of immigration control from a theory of foreign commerce regulation to a theory of national sovereignty. The Immigration Act of 1891 and the Court's opinion in *Fong Yue Ting* cemented the sovereign theory of immigration as the Court's new view. More importantly, though, the Court circumvented due process considerations by

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of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily."

<sup>59</sup> *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889). This case established the "plenary power" doctrine and highlighted an approach of deference to the legislative and executive branches in immigration matters. The court ruled that those decisions were "conclusive upon the judiciary."

placing foreign nationals outside the purview of Constitutional protections and all but the barest of judicial consideration.

The Court's reticence to intervene remains relevant throughout this discussion and will likely need to be discarded in order to avoid Constitutional crisis. *Pearson v. Williams*<sup>60</sup> shows the Court's hesitation to overrule both Congressional and executive agency decision making authority at the turn of the twentieth century. Congress had entirely removed the subject of immigration from the purview of the courts, and the courts repeatedly endorsed Congress' ability to do so.<sup>61</sup> If Congress, the Constitution, or a foreign treaty did not demand judicial review of an agency action, those decisions were final upon appeal to the treasury secretary and subject to only an *abuse of discretion* review by the court. This is a plain error standard and quite a high bar given the deference courts give to agency decision making.<sup>62</sup>

Congress would pass several immigration acts over the course of the next fifty years. The first of those acts was aimed at restricting the inflow of immigrants from Asian countries and introduced a

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<sup>60</sup> *Pearson v. Williams*, 202 U.S. 281 (1906). Court holds that it is without doubt that Congress has the authority to expel noncitizens. The Court examines whether the commissioner of immigration can hold a second deportation hearing after adjudication in favor of the nonresident in the first. They rule that as a function of the executive and not the judicial power, immigration hearings do not fall under the idea *res judicata*. As such, it is permissible for immigrants to be placed under scrutiny a second time.

<sup>61</sup> *Fok Young Yo v. U.S.*, 185 U.S. 296, (1902). ("By the act of August 18, 1894 (28 Stat. at L. 390, chap. 301), the decision of the proper executive officer, if adverse to an alien's admission, was made final unless reversed on appeal to the Secretary of the Treasury"); *See Also Lee Moon Sing v. United States*, 158 U.S. 538 (1895).

<sup>62</sup> *Fok Young Yo v. U.S.*, 185 U.S. 296. "we think that, upon the admitted facts, the orders of the collector cannot be held to have been invalid"; *See Also Tulsidas v. Insular Collector of Customs*, 262, 266 U.S. 258 (1923)

It was for them to establish their exemption from the prohibition of the law; for them to satisfy the insular officials charged with the administration of the law. If they left their exemption in doubt and dispute, they cannot complain of a decision against it.

reading requirement to enter the country.<sup>63</sup> The Immigration Act of 1917 greatly expanded the types of immigrants excluded from immigration, discussion of which is beyond the scope of this argument.<sup>64</sup> The important takeaway is that the courts continued to defer to the executive administrative agency's decision-making without offering anything other than *abuse of discretion* review. There were several cases the Court did take up after the act became law. These mostly had to do with defining who would qualify as a white person under section 2169 of the Immigration Act of 1917.<sup>65</sup> Being a free white person had become requisite after the passage of the act to become naturalized as a United States citizen.<sup>66</sup> In addition to race, this act also imposed a literacy test on new immigrants, increased the taxes paid by new immigrants, and defined an entire region, known as the Asiatic Barred Zone, ineligible to immigrate to the United States.<sup>67</sup> Again, the courts would avoid ruling on the merits of such policy and only interpret the intent of Congress when judging who met the legislative criteria

Following a long line of decisions of the lower Federal courts, we held that the words imported a racial and not an individual test and were meant to indicate only persons of what is *popularly* known as the Caucasian race. But, as there pointed out, the conclusion that the phrase 'white persons' and the word 'Caucasian' are synonymous does not end the matter. It enabled us to dispose of the problem as it was there presented, since the applicant for citizenship clearly fell outside the zone of debatable ground on the negative side; but the decision still left the question to be dealt with, in

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<sup>63</sup> See Immigration Act of 1917, Sec. 2

<http://library.uwb.edu/Static/USimmigration/39%20stat%20874.pdf> Sec. 2

<sup>64</sup> *Id.*

<sup>65</sup> See, e.g., *United States v. Bhagat Singh Thind*, 43 S.Ct. 338 (1923); *Ozawa v. United States*, 260 U.S. 178 (1922).

<sup>66</sup> Immigration Act of 1917, Section 2.

<sup>67</sup> Immigration Act of 1917 Sec. 2-4.

doubtful and different cases, by the process of judicial inclusion and exclusion.<sup>68</sup>

The process of judicial inclusion and exclusion, or who does and does not meet the definition of a statute, continued the tradition of judicial deference on questions of immigration policy.

Congress would amend the 1917 act in 1924 creating nation-based limitations on the number of immigrants able to enter the United States each year.<sup>69</sup> While a quota system had been in place for over three years, this act would further reduce the number of immigrant visas available.<sup>70</sup> Additionally, Congress would retool the formula on which immigration quotas were set.<sup>71</sup> This change gave preference to immigrants from the British Isles and Western Europe while reducing the number available for Eastern and Southern Europeans.<sup>72</sup> Unsurprisingly, Congress also barred completely those that would not be able to naturalize. This included the majority of Asia.<sup>73</sup>

The Court would break no new ground while the Immigration Act of 1924 remained good law. They remained an assessor of applicability, deferring to the powers of Congress to create law and those tasked through the office of the executive to enforce it. The majority of cases for this time period, though, revolved less around the immigrants than in times past. These cases largely ruled on applicability of fines to those ships carrying immigrants into the country that did not have authorization to enter.<sup>74</sup> The Act itself had

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<sup>68</sup> *U.S. v. Bhagat Singh Thind*, 261 U.S. 204, 208 (1923) (Internal quotations omitted).

<sup>69</sup> *Immigration Act of 1924 (The Reed-Johnson Act)*, Office of the Historian, Last Accessed 03/07/2019, <https://history.state.gov/milestones/1921-1936/immigration-act>

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> See, e.g., *U.S. v. Cosulich Line*, 76.F2d 128 (2<sup>nd</sup> Cir. 1935); *International Mercantile Marine Co. v. Elting*, 67 F.2d 886 (2<sup>nd</sup> Circuit 1933).

supplied straightforward restrictions on entry and was difficult to challenge on discriminatory grounds.<sup>75</sup> For example, citizens that had married abroad after the act's passage were unable to bring their spouse into the country if they were a banned nationality.<sup>76</sup> Even if they were half white.<sup>77</sup> Immigrants were barred from reentry even if they had lived in the United States for nearly fifteen years.<sup>78</sup>

Each of these examples share the fact that the courts only sought to define the law's application, and not what the law was. The United States would operate under the framework of the Immigration Act of 1924 for nearly thirty years. The Second World War would force American legislators to reexamine their stance on immigration as labor shortages during the war and the need to provide relief to decimated European villages and populations after the war put pressure on the United States to ease its immigration requirements.

#### F. World War II & The Need For Change

As World War II took much of the United States' workforce to Europe and the Pacific, the country was left scrambling to find a source of replacement labor that could meet the substantial need of American farms and industry. Starting in 1942, the United States government entered into an agreement with Mexico to solve the

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<sup>75</sup> See Immigration Act of 1924. For example, nation quotas were created based on a percentage of immigrants coming from those countries in 1890. Most of Asia was barred from entry either through the "Asiatic Barred Zone" of the Act or earlier Chinese Exclusion legislation. If you were barred or immigrated from a country whose quota had exhausted you would not be allowed into the country.

<sup>76</sup> See *Haff v. Tom Tang Shee*, 63 F.2d 191 (9<sup>th</sup> Cir. 1933).

<sup>77</sup> See *Bonham v. Bouiss*, 161 F.2d 678 (9<sup>th</sup> Cir. 1947).

<sup>78</sup> *U.S. ex rel. Polymeris v. Trudell*, 284 U.S. 279 (1932). Holding that there is no right to enter the United States unless that right has been granted by the United States. In not being able to produce a return permit or immigration visa due to leaving prior to the effective date of the act, Plaintiffs were unable to show they had secured that right and were deported back to Greece.

labor issues caused by the war.<sup>79</sup> Known as Braceros, hundreds of thousands of these agricultural workers entered the United States through 1964 when the United States completely overhauled its immigration policies.<sup>80</sup> While a continuing need for labor was one of the motivating factors for reevaluating United States immigration policy in the early 1950's, the affect of World War II on Europe and the Far East was likely a larger impetus for change.<sup>81</sup> Legislation passed in the in the 1940's had such an intent and that was carried forward in the Congressional intent of the 1952 act. As Representative Joseph Farrington stated during floor debate while discussing the lifting of nationality restrictions as contained in the INA of 1952

[T]he enactment of this law will bring great change in the attitude of those people...[the act's] passage is vitally important from the standpoint of our future in the Pacific because it will remove what has always been a serious source of irritation in our relationship...[t]he value of such a step is indisputable.

In 1943...to get the support of the Chinese in the fight against the totalitarian powers, the House repealed the racial restrictions in our immigration and naturalization law...followed in 1946 by similar action in regard to the Filipinos and the people of India.

It provides in addition the solution of several difficult problems. One of these has been created by the marriage of...American citizens serving in the Armed Forces in the

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<sup>79</sup> *Overview of INS History*, USCIS HISTORY OFFICE AND LIBRARY, U.S. Citizenship and Immigration Services, 9, last accessed 3/11/2019, <https://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf>

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

Pacific and Far East to girls of races now ineligible for citizenship.<sup>82</sup>

It is also important to note that within the same debate, Representatives of the House comment on the dangers of granting the executive the power to halt immigration. This provision was included in the Immigration and Nationality Act of 1952. Its inclusion gave some Representatives pause. Emmanuel Celler, a Representative from New York, comments that, “[t]he President has that right in times of peace, in times of war, in times of emergency, and in time of nonemergency, to shut off immigration...we should very carefully scrutinize that provision”.<sup>83</sup> Upon another Representative pointing out that the provision requires immigration to be “detrimental” to the United States, Representative Celler responds, “But what is meant by ‘detrimental’ is left entirely to the judgment, or shall I say the possible imagination of the chief executive officer”.<sup>84, 85</sup>

The Immigration and Nationalization Act of 1952 would be voted, adopted, and signed into law toward the end of the year. It contained the provision to grant the President authority to halt immigration when it is detrimental to the interests of the United States. It also maintained the National Origins quota system began in the 1920’s, though over the objection of many members of Congress. Congressman Peter Rodino from New Jersey closed his comments on the House floor by stating “immigration is so basic to our welfare...international relations and...growth and development of the country that we must make every effort to place the national need above personal prejudices in considering this legislation.”<sup>86</sup> Perhaps the most important result of the 1952 act was the

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<sup>82</sup> P 4304 Congressional Record <https://www.govinfo.gov/content/pkg/GPO-CRECB-1952-pt4/pdf/GPO-CRECB-1952-pt4-1.pdf>

<sup>83</sup> *Id* at 4305

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id* at 4311.

codification of the nation's immigration laws in a single section of the United States Code.<sup>87</sup>

### G. Immigration in The Era of Civil Rights

As Representative Rodino alluded, Congress would need to return to the immigration policy debate only thirteen years later. New questions arose due mainly to the perception of racial bias within the immigration system. The National Origins Formula had been used to derive immigration quotas since the passage of the Emergency Quota Act of 1921.<sup>88</sup> This would be addressed in 1965 through amendments to the 1952 act introduced by Emanuel Celler.<sup>89</sup> These amendments would do several important things for immigration law. First, they abolished the National Origins Formula in favor of a numerical cap for all immigrants. They also provided for seven classifications to prioritize entry while allowing immediate family members of United States citizens and special immigrants to avoid being subject to cap restrictions. These amendments had the de facto effect of limiting immigration from the western hemisphere for the first time, as immigrants from Latin America were subject to a cap on immigrant entry for the first time.<sup>90</sup> Additionally, the amendments would consolidate more power over immigration in the executive branch. The Department of Labor would be required to certify a labor shortage in order for visas to be granted to noncitizens looking for labor in the United States. This was required whether the labor was skilled or unskilled.<sup>91</sup>

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<sup>87</sup> See H.R. 5678 Sec. 403 (82<sup>nd</sup>). Prior to the 1952 Immigration and Nationality Act, immigration legislation was found in different sections throughout the code. This legislation organized those regulations into Title 8 of the United States Code while repealing them from the sections they had previously been found in.

<sup>88</sup>Emergency Quota Act of 1921 Sec. 2(a).

<sup>89</sup> The Immigration act was alternatively known as the Hart-Celler act. Emmanuel Celler (NY) and Philip Hart (MI) were its two main sponsors in the House of Representatives and the namesakes of the bill.

<sup>90</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3407978/>

<sup>91</sup> § 212(a)(14) of P.L. 414.

Despite the changes to the 1952 version of the act, challenges still came before the courts. Often these actions involved plaintiffs requesting the courts overrule the administrative orders issued in their cases. In a continuation of previous policy, the courts would refuse. The plenary powers granted to the executive agencies regarding their immigration decisions were absolute and not subject to judicial review. The courts would reaffirm this idea in several cases of the era stating

It has long been held that the Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.<sup>92</sup> [O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.<sup>93</sup> [I]t is important to underscore the limited scope of judicial inquiry into immigration legislation.<sup>94</sup>

The Supreme Court's continued refusal to interject itself into the discussion of Congress's power to regulate immigration has become a major factor in the executive's ability to direct policy through the exercising of administrative control. While issues were slow to build in the first hundred years of immigration control, the Berlin Wall would not be the only barrier of note Ronald Reagan would have a hand in bringing down.<sup>95</sup> The breakdown of the wall between the administrative wing of government and the chief executive has significantly increased the control the chief executive has over immigration policy over the last forty years.

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<sup>92</sup> *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339, 29 S.Ct. 671, 676, 53 L.Ed. 1013 (1909).

<sup>93</sup> *Boutilier v. Immig. and Naturalization Serv.*, 387 U.S. 118, 123 (1967).

<sup>94</sup> *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

<sup>95</sup> Ronald Reagan would be the first president to insist on the unitary theory of the executive being the correct view of the executive's relationship to the administrative wing of government, breaking down the wall between the executive and the administrative agencies of the executive.

#### H. Immigration Act Of 1990 and Policy Toward the Present

Immigration would continue to be a point of discussion and policy over the next twenty-five years.<sup>96</sup> The Vietnam War created its own unique considerations dealing with immigrants & refugees from Southeast Asia.<sup>97</sup> The Haitian “Freedom Flotilla” or Mariel boatlift of 1980 would combine with the ongoing issues of undocumented immigration across the Southern border to compel Congressional action on naturalization and immigration in 1986.<sup>98</sup> It would ultimately be the economy’s need for skilled workers that would drive amendments to immigration policy in 1990.<sup>99</sup>

As President George H.W. Bush stated during his speech before signing the bill, "Immigration isn't just a link to America's past, it's also a bridge to America's future. This bill provides for vital increases for entry on the basis of skills, infusing the ranks of our scientists and engineers and educators with new blood, and new ideas.<sup>100</sup>" The Immigration and Nationality Act of 1990 would create several new employment-based nonimmigrant visa categories while nearly tripling the number of those visas available.<sup>101</sup> The act also revised the admission preferences by splitting them into three different categories: family-sponsored, employment-based, and diversity immigrants determined by a lottery. The family-sponsored

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<sup>96</sup> See e.g., Armed Forces Naturalization Act (1968); Indochina Migration and Refugee Assistance Act (1975); Amerasian Immigration Act (1982); Immigration Reform and Control Act (1986).

<sup>97</sup> See Indochina Migration and Refugee Assistance (1975); Amerasian Immigration Act (1982).

<sup>98</sup> See Immigration Reform and Control Act of 1986.

<sup>99</sup> George Bush, *Statement on Signing the Immigration Act of 1990*, The American Presidency Project, last accessed 3/11/2019, <https://www.presidency.ucsb.edu/node/265173>. “This legislation meets several objectives of this Administration’s domestic agenda – [including] cultivation of a more competitive economy....This legislation will encourage the immigration of exceptionally talented people, such as scientists, engineers, and educators.”

<sup>100</sup> George H.W. Bush, Immigration Act of 1990 Signing Ceremony Speech, November 29, 1990, last accessed 3/11/2019, <https://www.c-span.org/video/?c4737330/george-hw-bush-immigration>

<sup>101</sup> § 201-223 of P.L. 101-649.

and employment-based immigrants were each assigned 4 subcategories that were subsequently ranked in preference for their corresponding visas.<sup>102</sup>

More importantly, Congress granted the executive the ability to grant temporary, protected, or deferred enforced departure status to any group of immigrants that met certain criteria. These designations allowed those that received it certain benefits, such as work authorization and protection from deportation.<sup>103</sup> In doing so, this act ceded more Congressional authority to make immigration decisions to the executive branch.

While there have been other legislative actions aimed at immigration since 1990, the examples provided sufficiently illustrate the court system's reticence to interject itself in immigration policy decisions and the allocation of authority by Congressional action to executive actors. Having established these practices, the idea that unitary theory has accelerated an inevitable collision between the Constitution and the executive as chief administrator may be explored.

## **THE RISE OF THE ADMINISTRATIVE STATE**

### **A. The Supreme Court Hands Control to the Executive**

The scope of managing a country which stretched from the Atlantic to the Pacific coasts and covered an area of nearly four million square miles could not have its laws effectively enforced by the office of the executive as a singular entity. Since the Presidency of George Washington, it has been customary for the executive to select advisors as members of his cabinet.<sup>104</sup> These advisors would serve as the secretary in charge of their department.<sup>105</sup> Washington

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<sup>102</sup> *Id.*

<sup>103</sup> §601-603 of P.L. 101-649.

<sup>104</sup> Art. II, Sec. 2, Clause 2 of the Constitution of the United States.

<sup>105</sup> *Id.*

began this tradition by naming four members to his cabinet.<sup>106</sup> Executive agencies have been considerably expanded since the country's founding and are comprised of at least fifteen major departments with several smaller additional agencies.<sup>107</sup> There are also legislative agencies, which are created by Congress, that the executive may have some control over.<sup>108</sup> While it is important to know they exist to avoid confusion, they are not particularly relevant to the present discussion. The major distinction between the executive and legislative agencies is that the executive agency secretaries serve at the pleasure of the executive as the Supreme Court ruled in 1926.<sup>109</sup> The 1935 case *Humphrey's Executor v. United States* put a limit on the executive's ability to remove the heads of agencies, and allowed for Congress to prescribe the circumstances under which the heads may be dismissed.<sup>110</sup> The Court summarizes the executive's power of dismissal thusly

“To the extent that, between the decision in the Myers Case, which sustains the unrestricted power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall

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<sup>106</sup> See George Washington's Mount Vernon, *Cabinet Members*, last accessed 3/11/2019, <https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/cabinet-members/>

<sup>107</sup> See *United States Government Organizational Chart*, last accessed 3/11/2019, <https://www.usgovernmentmanual.gov/ReadLibraryItem.ashx?SFN=Myz95sTyO4rJRM/nhIRwSw==&SF=VHhnJrOeEAnGaa/rtk/JOg==&AspxAutoDetectCookieSupport=1>

<sup>108</sup> *Id.*

<sup>109</sup> *Myers v. United States*, 272 U.S. 52 (1926).

[W]e have no hesitation in holding that conclusion to be correct; and it therefore follows that the Tenure of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so.

*Myers v. U.S.*, 272 U.S. 52, 176 (1926).

<sup>110</sup> *Humphreys Executor v. United States*, 295 U.S. 602 (1935).

remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise.”<sup>111</sup>

As discussed above, the earliest immigration policies were enforced by the Secretary of the Treasury.<sup>112</sup> Congress gave the executive branch wide latitude to create rules and policies within the scope of the power they granted.<sup>113</sup> Congress also allowed for the creation of an administrative judiciary, which adjudicated decisions based on administrative policy.<sup>114</sup> The federal judiciary’s decision not to interject itself into this process effectively gave administrative policy the power of law.<sup>115</sup> As a matter of course, the administrative arm of the executive branch would serve as its own legislator, enforcer, and adjudicator.<sup>116</sup> Once Congress ceded authority to the executive via legislation, it became very difficult to reclaim. Any legislation attempting to limit the executive’s power would need to be signed into law by the executive. This creates a significant conflict of interest.<sup>117</sup>

Congress attempted to assert itself as a check against unfettered executive policy making authority. For several decades, Congress inserted legislative vetoes into proposals passing through both houses. These vetoes allowed Congress to overrule administrative decision making without executive oversight.<sup>118</sup> Incidentally, a challenge to one of these vetoes would be brought under the 1952 Immigration and Naturalization Act decades after its passing.

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<sup>111</sup> *Id* at 632.

<sup>112</sup> *Supra*, Note 47

<sup>113</sup> *See A Guide to the Rulemaking Process*, Office of the Federal Register, 3/11/2019,

[https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf)

<sup>114</sup> 5 U.S.C.A. Sec. 556.

<sup>115</sup> 5 U.S.C.A. Sec. 551 et seq.

<sup>116</sup> 5 U.S.C.A. Sec 551 et seq.; 5 U.S.C.A 771 et seq.

<sup>117</sup> Article I, Section 7, Clauses 2 and 3 of the United States Constitution.

<sup>118</sup> *Legislative Veto*, LEGAL INFORMATION INSTITUTE, Cornell Law School, 3/11/2019, [https://www.law.cornell.edu/wex/legislative\\_veto](https://www.law.cornell.edu/wex/legislative_veto)

*INS v. Chadha* would be granted certiorari by the Supreme Court and a decision would be issued in 1983. Congress had inserted a legislative veto within the 1952 act. Upon the suspension of the respondent's deportation order, Congress sought to exercise its authority to review based on the language of the legislative veto provision.<sup>119</sup> Respondent was ordered deported after a single house of Congress voted to lift the suspension of his deportation. Respondent sued questioning the constitutionality of the legislative veto provision and argued that the decision to lift the suspension of his deportation amounted to a legislative action. As a legislative action it would constitutionally require passage by a majority of both houses and presented to the executive.<sup>120</sup> The Burger Court agreed with Respondent. The Court found the legislative veto provision in the language of the Immigration and Nationality Act unconstitutional. The Court did not relegate their decision simply to the case before them. Instead, it issued a broad ruling striking down Congress's ability to invoke legislative veto provisions as unconstitutional.<sup>121</sup> This ruling would have a profound effect on Congressional ability to check executive agency decision-making. A great number of the legislative actions ceding power to the executive branch had included veto provisions since the 1930's. These provisions had been a major Congressional check on unfettered executive administrative authority.<sup>122</sup>

The judiciary would also continue its practice of deferring to the decisions of the administrative bodies acting under the authority of Congress. In *Chevron v. Natural Resources Defense Council, Inc.*, the Court would set a standard of review in questions of administrative decision validity.<sup>123</sup> This 1984 case developed a two-part test for judicial intervention in administrative decision-making.

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<sup>119</sup> *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>120</sup> *Supra*, Note 117 at 949.

<sup>121</sup> *Id* at 951-959.

<sup>122</sup> *Supra*, Note 118.

<sup>123</sup> *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, (1984).

The first prong evaluated whether Congress had granted the authority to decide in direct language. If this test was met, no further investigation was warranted. The courts would defer. If not, the second prong would evaluate whether the decision fell under the authority granted by Congress. If it did, the courts would defer to the administrative body's reasonable interpretation of Congressional language.<sup>124</sup> This is essentially the intelligible principle standard created by the 1928 decision in *J.W. Hampton v. United States*.<sup>125</sup> The *Chevron* test, as it became known, established very narrow grounds on which the courts would intercede. Particularly, if the decisions made by an administrative body exceeded the scope of authority granted by Congress.<sup>126</sup>

*Chadha* in conjunction with *Chevron* significantly weakened Congressional ability to retake authority it had previously delegated. Under this new standard, the executive had to be willing to relinquish authority already granted. The Presentment Clause along with Bicameralism would make clawing back delegated authority a very steep hill to climb. Additionally, legislation granting the authority was often created in broad terms to give the administrative wing of the executive branch wide latitude to perform their assigned

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<sup>124</sup> *Id* at 842-843.

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

<sup>125</sup> *J.W. Hampton v. United States*, 276 U.S. 394 (1928). Congress must give administrative agencies an intelligible principle on which to base their regulations when granting them the ability to regulate.

<sup>126</sup> See *supra*, Note 121.

duties. There were often few statutory checks on the actions the executive could take. The Court could have been a major obstacle for the executive, but the *Chevron* decision established there were very limited circumstances in which the courts would frustrate administrative decision-making. By 1986, the executive appeared to be in control of the federal bureaucracy and there appeared to be little recourse the other branches could or would take to wrest away control.

While Congress has passed legislation to force administrative authorities to report actions directly to Congress, Congressional influence was otherwise limited.<sup>127</sup> The Administrative Procedure Act was passed in 1946 to standardize the way in which administrative regulations were created and give more transparency to the process.<sup>128</sup> The public notice and comment requirements located in § 553 and the adjudication limitations located in § 554 of the Administrative Procedure Act serve to put restraints on the actions administrative agencies may effectuate, but still provide little recourse for Congressional influence.<sup>129</sup>

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<sup>127</sup> See Todd Garvey & Daniel Sheffner, *Congress's Authority to Influence and Control Executive Branch Agencies*, p.15-16, CONGRESSIONAL RESEARCH SERVICE, 2018, last accessed 3/23/2019, <https://fas.org/sgp/crs/misc/R45442.pdf>.

The Constitution's required lawmaking procedures impose significant limitations on how Congress and its component parts may wield power over agencies. The Supreme Court has made clear that Congress must exercise its legislative power in compliance with the finely wrought and exhaustively considered procedure set forth in Article I, Section 7, which provides that every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States.

<sup>128</sup> 5 U.S.C.A.Chapter 5 §§ 500 – 596.

<sup>129</sup> *Id* at §§ 553 – 554. Requires agencies to submit proposed rules for publication in the federal register and allow for a period of public comment. Additionally, section 554 defines the rights of a party facing adjudication by an administrative court. Provides for such rights as notice of time and place of a hearing and the right to present a defense and evidence to support it.

With Congress having few remaining options to check the authority of executive branch administrative rule-making and the courts granting wide deference for agencies to act within the bounds of their statutorily granted authority, the executive office could potentially assert itself over that process and guide policy decisions that carry the force of law. While previous executives had done so to a limited extent, President Ronald Reagan's adamant assertion that administrative agencies were governed by the Unitary Theory of the Executive would aggressively seek to consolidate power into the chief executive's hands.<sup>130</sup>

### B. The Unitary Theory of the Executive

Ronald Reagan was not the first president to invoke inherent authority over agencies under the banner of the executive. There are examples throughout the history of the presidency of chief executives justifying their actions by claiming authority over the agencies operating under the executive wing of government.<sup>131</sup> The difference with President Reagan was that he asserted unitary theory as a central piece of his presidential power and sought to exercise it to direct governmental policy from the White House. Reagan attempted to do so significantly more often than any other modern executive before him.<sup>132</sup>

Current Supreme Court Justice Samuel Alito was Deputy Assistant Attorney General in the Reagan administration. During his confirmation hearing to become a member of the nation's highest court, he was asked about unitary theory by the late Senator Ted Kennedy. Justice Alito's response is a clear and succinct summary of the administration's justification of the idea that all power of the executive flows first through the President.

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<sup>130</sup> Harold J. Krent, *From a Unitary to a Unilateral Presidency*, 88 BOSTON UNIV. L. REV. 523, 525-534, 3/11/2019, <http://www.bu.edu/law/journals-archive/bulr/documents/krent.pdf>

<sup>131</sup> *Id.* at 523-524.

<sup>132</sup> *Id.* at 525-527.

I think it's important to draw a distinction between two very different ideas. One is the scope of Executive power . . . [W]e might think of that as how big is this table, the extent of the Executive power. [W]hen you have a power that is within the prerogative of the Executive, who controls [it]? [T]he concept of [the] unitary Executive doesn't have to do with the scope of Executive power...It has to do with who within the Executive branch controls the exercise of Executive power, and the theory is the Constitution says the Executive power is conferred on the President.<sup>133</sup>

The central idea of the unitary theory is that the exercise of executive authority must first be authorized by the President based upon the constitutional delegation of powers. It follows, then, that in order for an agency under the banner of the executive to act, it must do so only once it has authorization to do so.

Arguments against this theory include the President's duty to faithfully execute federal law. It is true that the executive branch may not enforce a law in a way which directly contradicts the statutory language.<sup>134</sup> Additionally, the Written Opinions Clause suggests that the executive may seek the opinions of his department heads in order to make an informed decision.<sup>135</sup> When these two clauses are read together, they would seem to suggest that the Framers anticipated that the executive would be making decisions in regard to enforcement of laws absent an explicit directive from the legislative branch.<sup>136</sup> Absent an explicit directive the executive would be free to execute the laws—and direct agencies operating

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<sup>133</sup> John Harrison, *The Unitary Executive and the Scope of Executive Power*, 126 YALE UNIV. L. REV., 3/11/2019, <https://www.yalelawjournal.org/forum/the-unitary-executive-and-the-scope-of-executive-power>.

<sup>134</sup> See U.S. CONST. art. II, § 3 (empowering the President to "take Care that the Laws be faithfully executed").

<sup>135</sup> Article II of the United States Constitution.

<sup>136</sup> This note will not seek to address whether unitary theory is reflective of the Framers' intent. For those interested in pursuing additional information, the following resources are available: Calabresi & Woo

under his authority—as he or she may so choose within the bounds prescribed by legislative authority.

### C. The Unitary Executive and the Convergence of the Administrative Branch and the Presidency.

The Constitution’s framers were wary of any branch of government having unchecked power, particularly Congress.<sup>137</sup> The framer’s split Congress into two houses in order to strike compromise between states wanting population based representation and states wanting equal representation, but also to bifurcate Congressional power and provide the legislature an internal check against itself.<sup>138</sup> The framers were most concerned that Congress would grow too powerful and consume the other branches.<sup>139</sup> Perhaps in weakening Congressional authority by strictly outlining the powers granted, the framers may have left too much uncertainty in the authority delegated to the Executive. As demonstrated above, those powers relating to immigration have been checked by the courts even less frequently—whether undertaken by Congressional or Executive actors.

The Framers’ assumption that a strong Congress would check the executive’s power, the Constitution’s silence on immigration authority outside of naturalization, and the court’s policy of deference on immigration policy questions has created a perfect

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<sup>137</sup> See, e.g., James Madison and Alexander Hamilton, *The Federalist Papers* #51, 1788, 3/11/2019, [http://avalon.law.yale.edu/18th\\_century/fed51.asp](http://avalon.law.yale.edu/18th_century/fed51.asp).” As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified.”

<sup>138</sup> See, e.g., Jeremy C. Pope and Shawn Treier, *Reconsidering the Great Compromise at the Federal Convention of 1787: Deliberation and Agenda Effects on the Senate and Slavery*, 55 *American Journal of Political Science* 2, 289-306, 291, 3/11/2019, <https://www.jstor.org/stable/23025052>. “portrayed the convention as consciously choosing a bicameralism to restrain the large state from taking control of the government, [b]y this mixture of states and people.”

<sup>139</sup> *Id.*

storm of sorts for present day practice.<sup>140, 141, 142</sup> In *Chadha*, the Supreme Court struck down longstanding Congressional checks on the powers delegated to the executive known as legislative vetoes. This decision revoked Congressional authority to execute any meaningful unilateral action to overrule post-delegation decisions made by the Executive.<sup>143</sup> Congress had been placing these vetoes in legislation since the 1930's. They served as a Congressional check on Executive overreach. Once they were ruled unenforceable, though, consequences only marginally considered when making such delegations were unleashed. Prior to *Chadha*, Congress relied on the legislative veto as their main source of unilateral control over the powers they delegated to the Executive. Faced with the vetoes' unenforceability, Congress was now tasked with the proposition of creating legislation granting Congressional oversight and then either convince the Executive to sign that legislation or muster enough support to overcome its veto. Congress no longer had a recourse where it was the sole actor.<sup>144</sup>

Future Supreme Court Justice Stephen Breyer defined the problems created by the historical unraveling of these events during a 1990 panel on Agency Autonomy and the Unitary Executive.<sup>145</sup> In discussing the test used to justify Congressional power delegations to administrative agencies, Breyer reaffirms that the courts have

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<sup>140</sup> See, e.g., Robert J. Reinstein, *The Limits of Executive Power*, 59 AMERICAN UNIV. L. REV. 2, 260-304, 3/11/2019, <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1005&context=aulr>.

<sup>141</sup> See, e.g., David Martin, *Why Immigration's Plenary Power Doctrine Endures*,

<sup>142</sup> *Id.*

<sup>143</sup> See, e.g., Girardeua A. Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473, 3/11/2019, <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2947&context=facpub>.

<sup>144</sup> *Id.*

<sup>145</sup> Stephen Breyer, Laurence Silberman, E. Donald Elliot, and Terry Eastland, *Panel I: Agency Autonomy and the Unitary Executive*, 68 WASHINGTON UNIVERSITY L. Q. 495 (1990).

historically been unwilling to strike down legislation delegating authority to the executive provided

1) the power is at least arguably related to the basic function of that branch;<sup>146</sup> 2) the specific text of the Constitution does not specifically forbid the delegation;<sup>147</sup> and 3) the delegation of the power to one branch does not unreasonably interfere with the ability of a different branch to carry out its constitutionally mandated duties.<sup>148, 149</sup>

A year prior to this panel, the Supreme Court ruled on issues regarding delegation of powers to the other branches in *United States v. Mistretta*.<sup>150</sup> *Mistretta* involved a challenge to Congressional delegation of power to the executive for determining mandatory minimum sentencing guidelines. In cases involving delegation of power, the Court developed a test for gauging the constitutionality of such legislation. This test is referenced above as the intelligible principle doctrine. *J.W. Hampton Jr. & Company v. United States* developed this doctrine and allowed for circumvention of the nondelegation doctrine so long as Congress "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform."<sup>151, 152</sup> It is important to note that a delegation of authority has not been struck down since 1935 under the nondelegation doctrine and the principle of

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<sup>146</sup> See *Federal Radio Comm'n v. General Elec.*, 281 U.S. 464 (1930).

<sup>147</sup> *Myers v. United States*, 272 U.S. 52 (1926). Striking down the portions of the Tenure of Office Act that attempted to limit the President's ability to remove heads of executive agencies at his pleasure.

<sup>148</sup> *Supra*, Note 140.

<sup>149</sup> *Supra*, Note 142 at 496.

<sup>150</sup> *United States v. Mistretta*, 488 U.S. 361 (1989).

<sup>151</sup> *J.W. Hampton, Jr., & Co. v. U.S.*, 276 U.S. 394 (1928).

<sup>152</sup> *Id* at 409.

nondelegation has long been considered dormant.<sup>153, 154</sup> There have been repeated opportunities for the Supreme Court to revive the doctrine as lower federal courts have ruled against the constitutionality of a Congressional delegation by invoking the nondelegation doctrine, but the Supreme Court has consistently overruled attempts to breathe life back into the standard.<sup>155</sup>

Thus far this note has established four irrefutable truths in the present relationship among the three branches of government.: 1) Congress has ultimate authority over immigration; 2) Congress may delegate their authority to executive agencies; 3) the Court is reluctant to interject itself into immigration policy or check Congressional power to delegate their rule-making authority; and 4) Congress may not attempt to circumvent bicameralism or the Presentment Clause in attempts to retake its already delegated authority. These four points of fact established the criteria needed for a strong-willed executive to steer policy making in areas under executive agency control. In 1980, Ronald Reagan would defeat Jimmy Carter in a landslide victory. Reagan had run on a platform of a reduction in government interference. In a climate of high unemployment and double-digit inflation Regan asserted, “In this present crisis, government is not the solution to our problem;

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<sup>153</sup> *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Striking down a delegation of Congressional authority to the executive as too broad.

<sup>154</sup> See, e.g., Whittington & Iuliano, *The Myth of the Nondelegation Doctrine*, 165 *University of Pennsylvania Law Review* 379 (2017). Arguing that the Supreme Court has rendered the nondelegation doctrine inoperable by repeatedly overturning lower court decisions finding delegations of authority by Congress unconstitutional.

<sup>155</sup> See, e.g., *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1233-34 (2015) (overturning the D.C. Circuit's decision regarding the unconstitutionality of the Passenger Railroad Investment and Improvement Act of 2008's delegation of authority); *Whitman v. Am. Trucking Assn's*, 531 U.S. 457, 474 (2001) (finding that “[t]he scope of discretion [the Clean Air Act provision in question] allows is in fact well within the outer limits of our nondelegation precedents”).

government is the problem.<sup>156</sup> After his election, Reagan would look to unitary theory to justify his unilateral actions attempting to reduce the size of the federal bureaucracy.

#### D. Reagan Sets the Standard

At the outset of this note, several instances of policy directives were given starting with President Truman.<sup>157</sup> While it is true that President Reagan was not the first to utilize the executive's authority over the executive branch's sub-agencies to drive rule making and enforcement choices parallel to their own agenda, he was the first to assert his absolute authority to do so.

In 1974, President Ford initially tasked the Office of Management and Budget (OMB) with considering the financial implications of regulatory measures. While placing aspects of regulatory financial review under an executively controlled agency, this requirement did not insert the Executive into the decision-making process.<sup>158</sup> President Carter would expand on this in 1978.<sup>159</sup> In addition to requiring financial evaluation prior to adoption, Carter's 1978 order required a secondary evaluation after implementation, which became known as retrospective regulatory review.<sup>160</sup> Again, retroactively assessing whether a policy had met its goals was not attempting to create executive authorization for administrative rules, but Carter's executive order set the precedent for Reagan to further involve the OMB in regulatory decisions<sup>161</sup>

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<sup>156</sup> *Supra*, Note 1.

<sup>157</sup> *Supra*, Notes 2-8.

<sup>158</sup> E.O. 11821 Sec. 1-2, Nov. 27, 1974; E.O. 11949, Dec. 31, 1976.

<sup>159</sup> Jimmy Carter, *Improving Government Relations*, E.O. 12044, March 23, 1978, 3/11/2019, <https://www.presidency.ucsb.edu/documents/executive-order-12044-improving-government-regulations>.

<sup>160</sup> *Id* at Sec. 4.

<sup>161</sup> *Supra*, Note 159. The roles given to executive agencies in determining the effectiveness of their regulatory efforts by both Presidents Ford and Carter placed executive directives on a path toward Presidential control. In 1981, Reagan only had to assert control over the agencies to gain control of their quasi-legislative authority.

In 1981, President Reagan would assign the OMB additional responsibilities, causing it to serve as a clearinghouse for regulatory rule creation.<sup>162</sup> This order was the most successful and long-lasting of Reagan's unilateral policy initiatives to reduce the size and spending of the federal government. Reagan's redefining of the responsibilities of the OMB and its sub-agency the Office of Information and Regulatory Affairs (OIRA) placed the executive as the de facto decision-maker on regulatory policy. Both these offices fell directly under presidential control as members of the Executive Office of the President.<sup>163</sup> As part of the order, Reagan tasked the OIRA with finding wasteful regulations and eliminating them. In addition, proposed regulations were required to be both in line with the executive agenda and cost-effective for the OIRA to grant approval for adoption.<sup>164</sup> In 1984, Reagan would issue his second Executive Order aimed at executive administrative review.<sup>165</sup> Reagan sought to create a master regulatory plan, compiled by the OIRA, which required agencies to submit any anticipated regulatory actions for the upcoming year.<sup>166</sup> At the time, Reagan's assertion of his control over the unnamed fourth branch of government was viewed as a radical departure from historical practice. Such choices would place Ronald Reagan among those presidents that sought to substantially expand the powers of the presidency, or "the Imperial Presidents."<sup>167</sup>

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<sup>162</sup> Ronald Reagan, *Federal Regulation*, E.O. 12291 Sec. 6, February 17, 1981, 3/11/2019, <https://www.presidency.ucsb.edu/documents/executive-order-12291-federal-regulation>

<sup>163</sup> See Executive Branch Organizational Chart, 3/11/2019, <https://www.usgovernmentmanual.gov/ReadLibraryItem.ashx?SFN=Myz95sTyO4rJRM/nhIRwSw==&SF=VHhnJrOeEAnGaa/rtk/JOG==>

<sup>164</sup> *Supra*, Note 162.

<sup>165</sup> E.O 12498, 1984

<sup>166</sup> *Id.*

<sup>167</sup> See, e.g., Julian E. Zelizer, *The Conservative Embrace of Presidential Power*, 88 Boston University L. Rev. 499, 500, 3/11/2019, <http://www.bu.edu/law/journals-archive/bulr/documents/zelizer.pdf>.

Through executive order, President Reagan bestowed his office with the ability to centrally review regulatory proposals made by executive agencies and force those proposals to be in line with the goals and policies of the current administration.<sup>168</sup> Additionally, while the ultimate rule making authority likely remained in the hands of the agencies, the Office of Information and Regulatory Affairs has actually reported great success in convincing agencies to adopt their favored regulations.

While Reagan largely failed to reduce the size of the federal government, his policies did slow its expansion—while turning the country into a debtor nation.<sup>169</sup> Reagan’s attempts to reign in the federal government through executive order and control of the federal bureaucracy’s rule-making apparatus opened a Pandora’s box of sorts. While it was expected that George H.W. Bush, Reagan’s vice president, would continue down a similar path, what surprised many was the continued expansion of these practices under subsequent Democratic executives.

#### E. Expansion After Reagan

Bill Clinton defeated George H.W. Bush in the Presidential election of 1992. President Clinton would address the administrative rule-making process in September of 1993 with his own Executive Order.<sup>170</sup> Surprisingly, President Clinton would revise and expand the orders issued by President Reagan.<sup>171</sup> The first order would further define how agencies should expect to establish their regulatory prerogatives. Early in the year’s planning cycle, federal agencies, aside from independent agencies, were to meet with the

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<sup>168</sup>*Supra*, Note 162.

<sup>169</sup> Hugh Helco, *The Mixed Legacies of Ronald Reagan*, 38 PRESIDENTIAL STUDIES QUARTERLY VOL. 4, December 2008, 3/21/19, <https://www-jstor-org.proxy.libraries.uc.edu/stable/41219701>.23

<sup>170</sup> See E.O. 12866, September 30, 1993.

<sup>171</sup> Compare *Id.*, with *Supra*, Note 162. Executive order 12866 would keep many of the same requirements as Reagan’s 1981 order. It would also explicitly direct agencies to ensure regulations being considered were in line with the President’s goals.

Vice President to establish regulatory priority. All regulations—whether the agency was independent or not—under development or review were to be compiled and submitted to OIRA and include basic information. Additionally, all agencies were expected to prepare a plan of the most significant regulatory actions expected to be issued in either proposed or final form in the present year.<sup>172</sup>

President Clinton also sought to make sure all executive agencies were moving toward the same goals. Clinton tasked the OIRA with ensuring that proposed and preexisting significant regulations were within the bounds of the law, the President's priorities, and did not conflict with other agencies' proposed rules.<sup>173</sup> Proposed rules could not be published in the Federal Register until the OIRA had made sure they met these criteria, and agencies had to reconsider any rule returned to them by the OIRA.<sup>174</sup>

Clinton would issue another order directed toward agency rulemaking near the end of his presidency. This order was geared toward eliminating regulations that would preempt state law or circumvent other principles of federalism.<sup>175</sup> Agencies would be required to consider regulations based on the principles of federalism laid out within the order.<sup>176</sup> Agencies were to avoid making national policy unless Congress expressly allowed for national preemption authority or that Congress alluded that was their intent.<sup>177</sup> The language of Clinton's second order was largely borrowed from a similar order on federalism issued toward the end of Reagan's second term, though it did insert additional language enabling preemption.<sup>178</sup>

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<sup>172</sup> *Supra*, Note 170.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> E.O. 13132, August 4, 1999.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Compare Id.*, with *Supra*, Note 165.

President Clinton began his Presidency by expanding on Reagan's attempts to assert executive control over the rule-making process. Clinton inserted the Vice President into the conversation while making sure the OIRA had the authority to reject proposed rules and force agencies to revise them. Despite Clinton's second order appearing to limit the scope of agency rule making, in reality it was expanded. The previous order issued by Reagan remained in effect. President Clinton incorporated a significant amount of that order's language, but also inserted the ability for agencies to issue orders that could affect principles of federalism, something not previously available.<sup>179</sup> Clinton left office having granted more authority to the executive to control regulatory action.

George W. Bush would win the Presidency in 2000 and a year after taking office would issue his first order regarding regulatory action.<sup>180</sup> President Bush sought to consolidate executive control over regulatory direction even more extensively than Clinton had in 1993. Instead of placing the Vice President into the discussion, Bush sought to have the executive's Chief of Staff or director of the OMB mandatorily present.<sup>181</sup> Each of these positions fell directly under the authority of the President and would thus be able to influence the process in line with the executive agenda more reliably. The Chief of Staff and director of the OMB would always have the threat of being replaced hanging over them. This was something the Vice President would not have had to consider.

In 2007, George W. Bush would once again address regulatory review through the executive office. Curtis Copeland, a researcher for the Congressional Research Service, referred to the changes made under this executive order as "the most significant changes to the presidential regulatory review process since 1993."<sup>182</sup> Several

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<sup>179</sup> Compare *Supra* Note 175, with *Supra*, Note 162.

<sup>180</sup> E.O. 13258, February 26, 2002

<sup>181</sup> *Id.*

<sup>182</sup> Curtis W. Copeland, *The Law: Executive Order 13422: An Expansion of Presidential Influence in the Rulemaking Process*, 37 PRESIDENTIAL STUDIES QUARTERLY 3, last accessed 4/3/2019,

requirements were added to the regulatory review process at the issuance of this order.

First, all proposed rules had to state an explicit market failure which created the regulations need.<sup>183</sup> While agencies could identify potential causes that created a need for a regulation previously, identifying an actual market failure established a higher bar for regulatory adoption.<sup>184</sup>

The order also required agencies to provide a cost-benefit analysis for their regulatory plan in its totality. While Executive Order 12866 created the requirement that agencies submit a cost-benefit analysis for individual regulations, this expanded those requirements significantly and represented a much larger undertaking than analyzing a few proposed regulations.<sup>185</sup>

Additionally, the order placed a presidentially appointed regulatory policy officer that had to approve an agency's agenda of regulatory action. While rules specifically authorized through the agency head were outside this requirement, this represented a significant increase in the executive's influence over policy adoption.<sup>186</sup>

The order also required the OIRA to review any agency guidance documents with significant economic impact.<sup>187</sup> This complemented the OIRA's responsibility to review economically significant regulations.

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<sup>183</sup> *Supra*, Note 180.

<sup>184</sup> *Compare Supra*, Note 180, *with Supra*, Note 162.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

Finally, the last major piece of the order required agencies, in conjunction with the OIRA, to pursue the formal rulemaking process for the resolution of complex determinations.<sup>188</sup>

While these new requirements significantly tightened the executive's grip over the administrative role of that branch, it would be short lived. Barack Obama would repeal both of George W. Bush's orders within the first year of his presidency, returning the language to that of Executive Order 12866. Additionally, this executive order directed all agencies to discard all policies and practices developed to implement those directives created by Executive Order 13422.<sup>189</sup>

President Obama would issue two additional orders relating to executive regulatory review. The first would create the policy of retrospective regulatory review.<sup>190</sup> This was largely an attempt to reduce costs and eliminate redundant or obsolete policy from agency regulations. It required agencies to periodically review regulations and determine those that could be eliminated.<sup>191</sup> Additionally, agencies had to be able to make a reasonable determination that the results would justify the cost of implementation before adoption. In this cost-benefit analysis, the agencies were directed to consider hard to quantify ideas such as human dignity and fairness.<sup>192</sup> The order encouraged integrative and innovative approaches to problem solving while stressing flexibility and the objectivity of scientific or technological information used to make support regulatory action.<sup>193</sup> Finally, the order established a floor of 60 days for public comment period, stressed how important public participation was in the rule-

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<sup>188</sup> In application, this did not change the status quo much, if at all. Agencies had always had the power to enter into the formal rulemaking procedure, but this had fallen out of favor in the 1970's.

<sup>189</sup> E.O. 13497, January 30, 2009.

<sup>190</sup> E.O. 13563, January 18, 2011

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

making process, and required agencies to make commenting as well as proposed rules and their backing materials available online.<sup>194</sup>

President Obama's final order regarding regulatory review would come in 2012. This order expanded on Executive Order 13563's retrospective review requirements. It expanded on the administration's idea of the process of retrospective review in greater detail.<sup>195</sup> This included how agencies should interpret policy, include the public in the review process, prioritize policies needing review, and keep agencies accountability by requiring retrospective review reports be submitted to the OIRA twice a year.<sup>196</sup>

Before discussing the Trump administration, it is important to note the ongoing cycle over the last forty years and five presidents; since President Reagan first asserted the idea that the executive had singular authority over all executive agencies. Republicans have tended to significantly expand the power of the executive to control rule-making. Democrats have sought to reverse those policies that consolidated rule-making authority in the hands of the executive to the largest degree, but then issued their own order expanding executive control in a more limited way. This cycle has born out each time control of the executive has changed parties since 1980. Practically speaking, this means that executive control has been continuously expanding and never regressing below the control President Reagan initially asserted in his first order.

The Trump administration, in less than two years, issued more Executive Orders relating to executive regulatory review than all of his predecessors combined.<sup>197</sup> Some of these were concerned with dismantling the Affordable Care Act ("ACA") as the Trump

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<sup>194</sup> *Id.*

<sup>195</sup> E.O. 13610, May 10, 2012.

<sup>196</sup> *Id.*

<sup>197</sup> Since taking office in 2017 Donald Trump has issued 11 executive orders relating to the regulatory review. His predecessors starting with President Carter issued 10.

administration fought to have it repealed.<sup>198</sup> One of President Trump’s first actions upon taking office was to sign an order requiring agencies to grant waivers, deferrals, and exemptions to the maximum extent of their ability under law.<sup>199</sup> This requirement was established in very broad terms, requiring the governing agency to provide for exemptions, deferrals, or waivers any time a policy regarding the ACA created a financial burden. The actual language guided agencies to act when the ACA imposed a “fiscal burden on any State or a cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications.”<sup>200</sup>

President Trump’s second order would require the elimination of two existing regulations for any new regulatory actions to be considered.<sup>201</sup> It also required the cost of the discontinued regulations to offset the cost of any regulations adopted.<sup>202</sup> This order was targeted toward economically significant rules, and required non-compliant agencies to submit a yearly report outlining their plan to become compliant.<sup>203</sup> All guidance on implementation of this policy was to come directly from the OMB.<sup>204</sup>

In his third order, President Trump would look to create policy regarding the United States financial system.<sup>205</sup> Though not directly naming it, this order would specifically address regulations created as required by the Dodd-Frank Act.<sup>206</sup> It created principles by which the Treasury Department could revise existing rules and ensure

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<sup>198</sup> See E.O. 13765, January 20, 2017.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> E.O. 13771, January 30, 2017

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> E.O. 13772, February 3, 2017.

<sup>206</sup> The Dodd-Frank Act was a response to the 2008 financial crisis, which created tighter regulation of the financial industry.

policy was in line with administration goals.<sup>207</sup> Additionally, there was a reporting requirement requiring the secretary of the U.S. Department of the Treasury, in consultation with the heads Financial Stability Oversight Council, to provide regular updates to the president on "the extent to which existing laws, treaties, regulations, guidance, reporting and recordkeeping requirements, and other Government policies promote the Core Principles and what actions have been taken, and are currently being taken, to promote and support the Core Principles."<sup>208</sup>

The administration's fourth order would create additional positions within agencies. This new position of Regulatory Reform Officer was tasked with ensuring Executive Order 13771 was implemented, agencies were conducting cost-benefit analyses in accordance with Executive Order 12866, effectively reviewing enacted policies through the retrospective review requirements of Executive Order of 13563, and eliminate programs and activities derived from rescinded policy.<sup>209</sup> The order would also create Regulatory Reform Task Forces, which were concerned with identifying regulations that should be eliminated.<sup>210</sup> This essentially created a mechanism to enforce the requirements of order 13771.

Executive Order 13781 would continue to attempt to dismantle the executive agency regulatory framework. It tasked the OMB with developing a comprehensive plan to reorganize the executive branch agencies.<sup>211</sup> The order provided guidance on how to approach such a proposal and provided for public comment.<sup>212</sup>

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<sup>207</sup> *Supra*, Note 205.

<sup>208</sup> *Id.*

<sup>209</sup> E.O 13777, February 24, 2017.

<sup>210</sup> *Id.*

<sup>211</sup> E.O. 13781, March 13, 2017.

<sup>212</sup> *Id.*

Subsequent orders carried on in much the same vein. Executive Orders relating to environmental regulation,<sup>213</sup> tax regulation,<sup>214</sup> regulations regarding the federal collective bargaining process and public sector federal unions,<sup>215, 216, 217</sup> and the appointment of administrative law judges.<sup>218</sup> The most recent of those orders is perhaps the most consequential as it gave agency heads the capacity to appoint judges outside of the merit-based selection process typical of most civil service positions.<sup>219</sup>

## CONCLUSION

The takeaway from the last forty years of regulatory review directives is that each, in its own way, has sought to consolidate decision making authority within the Presidency. It has not mattered which party was in the White House, if Congress was in opposition to the sitting President, or if both houses and the Presidency were controlled by the same party. The Chief Executive has acted unilaterally to increase his authority over the regulatory framework with an increasing frequency and scope. A continuation down this path may have no outcome other than a Constitutional showdown.

The willingness of the Supreme Court to interject itself into attempted usurpations of regulatory immigration authority must increase. Since *Chadha*, the ability of the legislative branch has been hamstrung, giving legislators few choices other than to maintain an approach to governing that had become far too important to abandon. By 1984, the administrative state was far too ingrained into American society to discard. Even if the legislative branch chose to pursue an alternative path, the Presentment Clause required

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<sup>213</sup> See E.O. 13783, March 28, 2017.

<sup>214</sup> See E.O. 13789, April 21, 2017.

<sup>215</sup> See E.O. 13836, May 25, 2018.

<sup>216</sup> See E.O. 13837, May 25, 2018.

<sup>217</sup> See E.O. 13839, May 25, 2018.

<sup>218</sup> E.O. 13843, July 10, 2018.

<sup>219</sup> *Id.*

executive acquiescence to a Congressional retaking of authority. A requirement unlikely to be met.

Historically, the Supreme Court has refused to hear cases dealing with any issues other than clear error or actions that occur outside of the authority delegated by Congress in the immigration realm. Most statutes were written with broad terms which gave agencies great latitude to act. As the primary administrators and regulators of federal law, agencies wield great amounts of power. This power had once existed largely extra-executively. Time has chipped away at this dichotomy. The executive and the administrative are becoming one; their convergence hastened by the adoption of unitary theory by President Reagan in the early 1980's.

Exacerbating the issue, Congress currently has little authority and limited appetite to check the executive's continued assumption of regulatory control. The checks relied upon since the 1930's to retain control over the authority Congress delegated were deemed unconstitutional. The delegations remained, however, absent a control mechanism for Congress. The *Chadha* decision created the requirement of an unrealistic outcome to rebalance the scales. The executive must willingly give away his authority.

It is more likely that the Supreme Court will need to discard the approach that has placed us here, particularly in regard to immigration. As an area with no Constitutional guidance, the Court is only bound by its prior decisions. With the climate presently surrounding immigration, a great opportunity is afforded the Court to correct the path the country has been placed upon. Absent such a change in direction, Congressional relevance will continue to dwindle. The executive will wield increasingly more legislative power across an ever-expanding scope of regulatory bodies and Congress will have little choice but to continue to create them. This continued syphoning of power has created a collision course between the executive branch and the Supreme Court. Steps should be taken to avert a Constitutional showdown by allowing Congress

to reassert some form of control over those powers delegated to regulatory bodies.