

## THE RISE OF THE ADMINISTRATIVE STATE: A PRESCRIPTION FOR LAWLESSNESS

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### INTRODUCTION

The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart. . . . They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.<sup>1</sup>

This essay examines the confluence of events and factors, crystallizing primarily in the 1970's, 1980's, and 1990's, which have culminated in the creation of an unchecked, arbitrary, abusive, and unconstitutional fourth branch of government, hereinafter referred to as the "Administrative State."<sup>2</sup> The article attempts to analyze the Administrative State beginning with Part I, describing the context in which the Administrative State was created and defined. Part II describes and examines the rise of presidential administration and executive power, the lack of congressional oversight of agency rules and regulations, and judicial review and the disappearing federal courts. Part III presents a case study applying these factors to one federal agency, United

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1. *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952).
2. J. FREEDMAN, *CRISIS AND LEGITIMACY* 6 (1978).

States Citizenship and Immigration Services (USCIS, formerly the INS), in order to illustrate the current state of administrative lawlessness. Part IV discusses the failures that are an inherent part of the current Administrative State. Finally, Part V offers some prescriptions for remedying the current state of affairs.

### PART I – THE CONTEXT

Most of the real lawmaking in modern-day America occurs in bureaucracies. The Federal Register alone comprises some 70,000 pages annually. Any attempt at congressional oversight of these bureaucracies is impossible; the sheer size of Administrative State is as incomprehensible as it is unconstitutional. Scholars will tell you that we no longer live under the Constitution and its three branches of government. Rather, we live under the administrative law of an Administrative State, a de facto fourth branch of government. This fourth branch of government is one that James Madison in *The Federalist* would have deemed “the very essence of tyranny.”<sup>3</sup>

The general public has not paid much attention to the rise of the administrative state because “the connection between politics and administration arouses remarkably little interest in the United States. The presidency is considered more glamorous, Congress more intriguing, elections more exciting, and interest groups more troublesome.”<sup>4</sup>

The genesis of the problem rests with the U.S. Constitution itself, which provides little guidance regarding the line between making laws and executing them:

When the Constitution assigned the legislative power to the Congress and the executive power to the president, it offered no abstract definition of either and demarked no precise boundary between them. Authorizing the government to do things is clearly legislative; doing them is plainly executive, but in between is a vast borderland: how the executive shall go about executing the law.<sup>5</sup>

The Constitution does not mention agencies at all. Professor Erwin Chemerinsky has noted that “in fact, in many ways [agencies] are in tension with basic constitutional principles.”<sup>6</sup> Agencies can make rules that have the force of law and many scholars argue that this conflicts with the basic separation-of-powers notion “that Congress alone possesses the federal

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3. A. M. Gulas, *The American Administrative State: The New Leviathan*, 28 DUQ. L. REV. 489, 490 (1990).

4. Hugh Hecl, *Issue Networks and the Executive Establishment*, in THE NEW AMERICAN POLITICAL SYSTEM, (Anthony King, ed., Amer. Enterprise Institute) (1978).

5. JAMES SUNDQUIST, THE DECLINE AND RESURGENCE OF CONGRESS 37 (1981).

6. ERWIN CHEMEKINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 319 (2d ed. 2002).

legislative power.”<sup>7</sup>

With no clear definition or direction from the Constitution as to the propriety of this transfer of power from Congress to the administrative branch, scholars have produced mountains of literature debating the constitutionality of this delegation.<sup>8</sup> This argument is premised upon the non-delegation doctrine, enunciating “the principle that Congress may not delegate its legislative power to administrative agencies.”<sup>9</sup> Professor Kagan explains the argument in a nutshell as follows:

Basic separation of powers doctrine maintains that Congress must authorize presidential exercises of essentially lawmaking functions. In directing agency officials as to the use of their delegated discretion, the President engages in such functions, but without the requisite congressional authority. Congress indeed has delegated discretionary power, but only to specified executive branch officials; by assuming responsibility for this power, the President thus exceeds the appropriate bounds of his office. This argument underlies the conventional, though never adjudicated, view that the President lacks directive authority over administrative officials.<sup>10</sup>

Professor Kagan’s explanation can be reduced to a more basic form: Only Congress can enact a law. However, the responsibility for interpretation and implementation of that law is vested in the executive branch. Because of the president’s increasing influence over the direction and control of agency actions, agencies often promulgate regulations and policies to be consistent with the president’s agenda, which may not be consistent with the legislation enacted by Congress.

Individuals unhappy with an agency’s rules and regulations may in some instances have the right to challenge the agency in federal court. However, because of judicial deference to administrative agency action, courts often decline to intervene and overrule the agency.<sup>11</sup> Thus, despite sound constitutional principles for maintaining Congress’s legislative function, it often appears futile to challenge administrative actions for alleged violations of the non-delegation doctrine. At one time, the Supreme Court showed a willingness to strike down federal laws as invalid delegations of legislative power; however, the last time it did so was in 1935.<sup>12</sup> The inevitable result of

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7. *Id.*

8. LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT (4th ed. 1997).

9. Chemerinsky, *supra* note 6, at 319-20.

10. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2319-20 (2001).

11. Donald S. Dobkin, "The Diminishing Prospects for Legal Immigration: Clinton through Bush," 19 St. Thomas L. Rev. 329 (2006).

12. See Chemerinsky *supra* note 6, at 320 (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)). The non-delegation doctrine was almost revived in recent years when the U.S. Court of Appeals for the D.C. Circuit found an impermissible delegation of legislative powers in the Clean Air Act’s delegation to the EPA to promulgate certain air quality regulations. *Amer. Trucking Ass’ns, Inc. v. EPA*, 195 F.3d

the current state of affairs is that Congressionally-enacted laws are either ignored or so modified by the executive's stranglehold on administrative agencies that they often are implemented and enforced in ways that are contrary to the will of the Congress.<sup>13</sup> This administrative domination is only exacerbated when courts then abdicate their responsibility to provide effective judicial review to reinforce constitutional principles.

#### **PART II(A) – THE RISE OF PRESIDENTIAL ADMINISTRATION AND EXECUTIVE POWER**

Professor Kagan has described the evolution of the administrative process as follows:

At the dawn of the regulatory state, Congress controlled administrative action by legislating precisely and clearly; agencies, far from exercising any worrisome discretion, functioned as mere “transmission belts[s]” to carry out legislative directives. But as the Administrative State grew and then the New Deal emerged, Congress routinely resorted to broad delegations, giving substantial, unfettered discretion to agency officials. With this change came a justifying theory, which stressed the need for professional administrators, applying a neutral and impartial expertise, to set themselves the direction and terms of regulation. As the years passed, however, faith in the objectivity of these administrators eroded, and in consequence, an array of interest groups received enhanced opportunities to influence agency conduct.<sup>14</sup>

For many years, political scientists and other observers of government generally agreed that once Congress made these delegations, it had affirmatively chosen not to exercise any effective control over administrative policymaking. Adherents to this view pointed to the rarity of any visible use by Congress of its remaining levers of control—its ability to block statutory mandates, reverse administrative decisions, cut agency budgets, block presidential nominees, or even conduct serious oversight hearings.<sup>15</sup>

Presidential control over administrative agencies took a giant step forward in the Reagan administration through the expanded use of executive orders. Exec. Order No. 12,291, 46 Fed. Reg. 13193 (Feb. 17, 1981), issued during Reagan's first month in office, required executive agencies to submit to the Office of Management and Budget (OMB) for pre-publication any proposed

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4, 7-8 (D.C. Cir. 1999). The Supreme Court granted certiorari and unanimously reversed on this point, holding that the Clean Air Act did not violate the non-delegation doctrine. *Whitman v. Amer. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474 (2001). Because the Clean Air Act contained “intelligible principles” to guide the agency, nothing more was needed to avoid violating the non-delegation doctrine. *Id.*

13. *Id.*

14. Kagan, *supra* note 10, at 2253.

15. LAWRENCE C. DODD & RICHARD L. SCHOTT, CONGRESS AND THE ADMINISTRATIVE STATE (1979); *see also infra* Part II(b).

major rule, accompanied by a “regulatory impact analysis” of the rule, including a cost-benefit comparison. This Order effectively transferred substantive control over rule making to the OMB and by extension, to the executive branch.<sup>16</sup>

Furthermore, the executive branch no longer even needs to wait for Congress to authorize the creation of an agency: “Using executive orders, department orders, and reorganization plans, presidents have unilaterally created a majority of the administrative agencies listed in the *United States Government Manual*.”<sup>17</sup> This is a large aberration from the traditional view whereby Congress vests discretion for agency decisions in an agency head, rather than in the President. As Professor Thomas Sargentich has noted, “[i]f Congress had wanted the President to have controlling authority, it could have so provided.”<sup>18</sup> When the executive branch actively creates its own agencies, the President is all the more likely to have the ability to exercise controlling authority.

New initiatives introduced in the Clinton administration raised the ante substantially. Faced with a distinctly hostile and partisan Republican Congress, Clinton seized the opportunity to tighten his control over the agencies in order to accomplish by executive order what he could not achieve legislatively. The Administrative State expanded significantly during Clinton’s eight years in office, forcing him the center of the regulatory landscape.<sup>19</sup> Professor Sargentich has summarized Clinton’s actions during these years as giving regulatory oversight “a new substantive turn.”<sup>20</sup> The changes included “formal directives to executive branch officials regarding the exercise of their statutory discretion.”<sup>21</sup>

In this way, Clinton was able to perfect the art of “go-alone governing.”<sup>22</sup> For instance, when his 1993 health care initiative went nowhere, Clinton subsequently managed to “issue directives that established a patient’s bill of rights for federal employees, reformed health care programs’ appeals processes, and set new penalties for companies that denied health coverage to the poor, and people with pre-existing medical conditions.”<sup>23</sup> With the expanded use of executive orders, Clinton was able to achieve with a pen what

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16. KENNETH MAYER, *WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER* (2001).

17. WILLIAM J. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* (2003).

18. Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 ADMIN. L. REV. 1, 10 (2007); see also *id.* at 24 (“On its face, a statutory delegation to an agency head indicates that the agency head is to be the decisionmaker.”).

19. Kagan, *supra* note 10, at 2281.

20. Sargentich, *supra* note 16, at 14.

21. Kagan, *supra* note 10, at 2293.

22. William J. Howell, *Unilateral Powers: A Brief Overview*, 35 PRESIDENTIAL STUD. Q. 417, 418 (2005) (citations omitted).

23. *Id.*

he could not achieve on the Hill. Clinton's use of directives "effectively placed him in the position of a department head."<sup>24</sup> In this position, the President was able to pass wide-sweeping reforms.

Because an agency's actions often receive far less media attention than the actions of the President, the general public is often unaware of political decisions being made at the agency level. This lack of accountability in general makes it easier to pursue a political agenda at the agency level.<sup>25</sup> President George W. Bush has also used the inattention to agency action to pursue some of the more unpopular aspects of his political agenda to avoid direct accountability. For example, rather than openly challenging environmental protections, President Bush has used agencies to help him pursue his anti-environmental agenda to ensure the "systematic dismantling of various environmental regulations."<sup>26</sup>

The White House's tightening of control via executive orders had its origins in the alteration of the context of presidential leadership during the 1960's and 1970's:

In an era of growing budget deficits, divided government, a more open political process, and a general loss of public faith in "big government," presidents beginning with Richard Nixon no longer saw unalloyed benefits in relying on "neutral" staff agencies. Instead, they sought greater political responsiveness. This meant relying more heavily on aides within the White House Office, and appointing political loyalists to exercise top-down control of the other Executive Office of the President (EOP) agencies.<sup>27</sup>

The attached Table 1 illustrates the magnitude of the EOP, which by 2004 had reached 1,731 staffers ranging from everything to Homeland Security Staff, OMB, CEA, and other agencies:

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24. Thomas O. Sargentich, *supra* note 16 at 13 (citing Kagan, *supra* note 10, at 2306).

25. Cf. Robert R.M. Verchick, *Toward Normative Rules for Agency Interpretation: Defining Jurisdiction Under the Clean Water Act*, 55 ALA. L. REV. 845, 858 (2004) ("[Professor] Kagan acknowledges the possibility that a President might use his or her power to inappropriately cloud issues and avoid accountability, but she grossly underestimates the danger.").

26. Sargentich, *supra* note 16, at 34 n.147 (2007) (citing CHARLES TIEFER, *VEERING RIGHT: HOW THE BUSH ADMINISTRATION SUBVERTS THE LAW FOR CONSERVATIVE CAUSES* 121-23 (2004)); *see also* TIEFER, *supra*, at 104 ("After he rolled back President Clinton's popular legacy initiatives, [President Bush] mounted from November 2002 through 2004 an anti-environmental campaign, including secrecy aspects . . .").

27. Matthew Dickinson, *The Executive Office of the President: The Paradox of Politicization*, in *THE EXECUTIVE BRANCH* 135,137 (Joel D. Aberbach & Mark A. Peterson eds., 2005).

**TABLE 1: The Executive Office of the President**

Agency	Employees	Year Est.
White House Office (Includes Homeland Security Staff)	406	1939 (2001)
Office of the Vice President	24	1972
Office of Management and Budget	521	1921
Office of Administration	212	1977
Council of Economic Advisers	28	1946
Council on Environmental Quality	22	1969
Office of Policy Development (Includes National Economic Council) (Includes Domestic Council)	32	1970 (1993) (1993)
Executive Residence at the White House	90	
National Security Council	54	1947
Office of National Drug Control Policy	102	1988
Office of Science and Technology Policy	28	1976
Office of the U.S. Trade Representative	212	1963
<b>Total EOP Employment (as of May 2004)</b>		<b>1,731</b>
<i>SOURCE: Office of Personnel Management<sup>28</sup></i>		

During this same time period, “presidents have increased the number of political appointees at the upper levels of the non-White House EOP agencies, and brought the agencies more tightly under White House staff control.”<sup>29</sup> The appointment process has allowed presidents to use agencies as a means for major—and often unpopular—policy changes. For instance, President Reagan made “a series of fox-in-the-chicken-coop appointments to undermine public

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28. *Id.*

29. *Id.*

interest regulation,” notably of his infamous anti-environment interior secretary, James Watt.<sup>30</sup> Many commentators have noted that the current Bush Administration has made similar appointments.<sup>31</sup> These types of appointments make it difficult for agencies to exhibit expertise and to execute the law in an impartial manner. As a result, we are left with “a more thoroughly politicized, White House-dominated EOP, but one that is short on institutional memory, administrative expertise, and organizational continuity.”<sup>32</sup>

The rise in the presidentially-led Administrative States merely reflects the growing use—and creation—of unilateral powers by the President:

To pursue a unilateral strategy, of course, presidents must be able to justify their actions on some blend of statutory, treaty or constitutional powers; and when they cannot, their only recourse is legislation. But given the ambiguity of Article II powers and the massive corpus of law that presidents can draw upon . . . the appeal of unilateral powers is readily apparent.<sup>33</sup>

Although some would argue that a unilateral executive branch is justified based on the majoritarian “mandate” produced by a presidential election, it is difficult to take this notion very seriously when “a President can be elected without obtaining a majority of the popular vote—as in the cases of President Clinton in 1992 and 1996 and President George W. Bush in 2000.”<sup>34</sup> Indeed, in the 2000 election, the winning candidate did not even garner a plurality of the popular vote.<sup>35</sup> Furthermore, presidential elections often center on issues like national security, which are far removed from the everyday decisions of administrative agencies.<sup>36</sup>

The situation is only likely to worsen. In the early days of President George W. Bush’s administration, Professor Kagan predicted that President Bush would continue Clinton’s “expansion of presidential administration.”<sup>37</sup> Professor Sargentich has noted that this prediction has undoubtedly “come to pass,” as exemplified by recent executive branch acts such as the OMB’s far-reaching and controversial Peer Review Bulletin, which guides agency decisions.<sup>38</sup>

## PART II (B) – THE LACK OF CONGRESSIONAL OVERSIGHT

Congress has vast powers to oversee the actions of federal agencies and the policies they implement:

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30. Tiefer, *supra* note 24, at 106.

31. E.g., James Gerstenzang, *Bush’s Choice for Consumer Post Criticized*, L.A. TIMES, Mar. 2, 2007, at 21.

32. Tiefer, *supra* note 24, at 106 .

33. Howell, *supra* note 20, at 28.

34. Sargentich, *supra* note 16, at 28.

35. See Kagan, *supra* note 10, at 2334.

36. Sargentich, *supra* note 16, at 28.

37. Kagan, *supra* note 10, at 2319.

38. Sargentich, *supra* note 16, at 13 n. 48.

Although the Constitution grants no formal, express authority to oversee or investigate the executive or program administration, oversight is implied in Congress's impressive array of enumerated powers. (Article 1, Sec. 8 and Article II, Secs. 2 and 4). . . . Reinforcing these powers is Congress' broad authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof."<sup>39</sup>

The standing committee system provides the most obvious means for exercising congressional oversight.<sup>40</sup> However, historically, oversight has occurred in many other contexts, including "authorization, appropriations, and legislative hearings by standing committees; specialized investigations by select committees; and reviews and studies by congressional support agencies and staff."<sup>41</sup>

The Necessary and Proper Clause has been interpreted to allow Congress "to enact laws that mandate oversight by its committees, grant relevant authority to itself and its support agencies, and impose specific obligations on the executive to report to or consult with Congress, and even seek its approval for specific actions."<sup>42</sup> Several significant statutes also grant broad oversight mandates to Congress:

The Legislative Reorganization Act of 1946 (P.L. 79-601), for the first time, explicitly called for "legislative oversight" in public law. It directed House and Senate standing committees "to exercise continuous watchfulness" over programs and agencies under their jurisdiction; authorized professional staff for them; and enhanced the powers of the Comptroller General, the head of Congress's investigative and audit arm, the General Accounting Office (GAO). The Legislative Reorganization Act of 1970 (P.L. 91-510) authorized each standing committee to "review and study, on a continuing basis, the application, administration and execution of laws" under its jurisdiction.<sup>43</sup>

Political science literature analyzing Congressional oversight takes a normative approach and largely concludes that effective congressional oversight is sorely lacking.<sup>44</sup> However, recent literature contrarily argues that Congress does effectively influence agency decision making within a system of "congressional dominance." These studies have shown large statistical increases in formal methods of legislative oversight.<sup>45</sup> The power over

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39. FREDERICK M. KAISER, CONGRESSIONAL OVERSIGHT 3 (Cong. Research Serv., CRS Report for Congress No. 97-936 GOV, Oct. 10, 1997), available at <http://countingcalifornia.cdlib.org/crs/ascii/97-936>.

40. *Id.* at 1.

41. *Id.*

42. *Id.* at 3.

43. *Id.*

44. *E.g.*, MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? (1988).

45. Kagan, *supra* note 10, at 2257 (citing JOEL D. ABERBACH, KEEPING A WATCHFUL EYE

appropriations is of particular importance because it theoretically allows Congress to punish agencies by constraining their funding.<sup>46</sup> The idea is that “an annual appropriations process puts a premium on agencies demonstrating that Congress gets what it pays for.”<sup>47</sup> If Congress is upset with an agency’s actions, it has the power to bring enormous pressure to bear on that agency: “Potential sanctions for an agency’s failure to fulfill statutory mandates include political embarrassment at congressional hearings, vulnerability to auditing and investigation, the threat of losing appropriations, and even elimination of the agency.”<sup>48</sup> Nevertheless, as a practical matter, these apparently vast powers are rarely ever used. Even the authors of the studies that claimed to find “congressional dominance” concede that they were unable to effectively assess the quality of such review.<sup>49</sup>

Literature analyzing congressional oversight utilizes a broad definition of oversight and includes budgetary, fiscal, regulatory review, and other powers. Too little, if any, attention has been focused on oversight of agency rules and regulations—an area where Congress seems to be unwilling to play any sort of significant role.

After the 1983 Supreme Court decision, *INS v. Chadha*,<sup>50</sup> it took Congress a decade or more to realize that something had to be done to check the unfettered power of administrative agencies over rulemaking and regulations. In *Chadha*, the Supreme Court’s invalidation of the legislative veto technique seemed to provide the knockout blow to congressional clout over agency abuse. Prior to this ruling, “Congress placed legislative veto provisions in nearly 300 statutes, allowing one or both houses . . . to overturn, without the President’s approval, an agency’s exercise of delegated authority.”<sup>51</sup> This legislative veto had been successfully used to nullify many orders, including wrongfully-issued USCIS deportation orders.

In 1996, the Congressional Review Act (CRA)<sup>52</sup> was enacted with a purpose “to set in place a mechanism to keep Congress informed about the rule making activities of federal agencies and to allow for expeditious

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14, 34-37 (1990)).

46. E.g., Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 354 (2006) (noting that Congress’ control over appropriations is one of several methods Congress can use “to punish agencies that interpret laws in a manner that diverges too far from Congress’s intention”).

47. Joan H. Krause, *A Patient-Centered Approach to Health Care Fraud Recovery*, 96 J. CRIM. L. & CRIMINOLOGY 579, 597 (2006).

48. J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2235-36 (2005).

49. Joel Aberbach, *What’s Happened to the Watchful Eye*, 29 CONGRESS & PRESIDENCY 3, 14 (2002).

50. 462 U.S. 919 (1983).

51. Kagan, *supra* note 10, at 2257.

52. Contract with America Advancement Act of 1996, Pub. L. No. 104-121, §251, 110 Stat. 847, 868-74 (1996).

congressional review, and possible nullification of particular rules.”<sup>53</sup> It soon became apparent that there were two major flaws in the CRA. First, there was no Congressional screening device capable of identifying particular rules in need of Congressional examination. Second, there was no expedited joint resolution procedure in the House to run concurrently and complimentary with Senate procedures.<sup>54</sup>

In the decade following the enactment of the CRA, “[a]most 42,000 rules were reported to Congress over that period, including 610 major rules, and only one, the Labor Department’s ergonomics standard, was disapproved in March 2001.”<sup>55</sup> Moreover, “[t]hirty-seven disapproval resolutions, directed at 28 rules, [were] introduced during that period, and only three, including the ergonomics rule, passed the Senate.”<sup>56</sup>

## PART II (C) – JUDICIAL REVIEW AND THE DISAPPEARING FEDERAL COURTS

With the effectiveness of the CRA in serious question, we turn our attention to the courts and their intervention, or lack thereof, in the conduct and rule-making power of the agencies. In the decade after enactment of the CRA, federal appellate courts negated all or parts of sixty rules: a number, while significant in some respects is comparatively miniscule in relation to the number of rules (42,000) issued in the period.

Why have courts been so reluctant to intervene to check agency power? The modern cornerstone of the legal doctrine of judicial deference to administrative agencies was laid out in the 1984 Supreme Court decision of *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*.<sup>57</sup> *Chevron* involved the interpretation of the words “stationary source” in the 1977 Amendments to the Clean Air Act.<sup>58</sup> Justice Stevens, delivering the opinion of the court, developed a two-step process for reviewing an agency’s construction of a statute. The first step determines whether a statutory provision is ambiguous, and, if it is, the second step determines whether the agency’s interpretation is reasonable and therefore deserving of what is now called “*Chevron* deference” by the courts:

First, as always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of the 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

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53. *Congressional Review Act: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. On the Judiciary*, 109<sup>th</sup> Cong. (2006) (Statement of Morton Rosenberg, Specialist in American Public Law, Cong. Research Serv.), 2006 WL 833617.

54. *Id.*

55. *Id.*

56. *Id.*

57. 467 U.S. 837 (1984).

58. *Id.*

Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of 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 on the statute.<sup>59</sup>

The court further clarified the scope of administrative agency power:

The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. . . . Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.<sup>60</sup>

In establishing the two-part *Chevron* doctrine, the Court revolutionized administrative law. Although the first step of the *Chevron* analysis allows courts to retain their full powers to interpret the clear language of statutory directives, the second step defers to a reasonable agency interpretation. Some authors have suggested that if *Chevron's* basic holding is: 'ambiguous statutory provisions should be interpreted by agencies rather than the courts,' then *Chevron* may be seen as a "kind of counter-*Marbury* for the Administrative State."<sup>61</sup> To be sure, the principles of judicial deference to agency interpretations laid out by the Supreme Court in *Chevron* caused profound disruption balance among Congress's law-making powers, an executive agency's rule-making powers, and the judicial branch's interpretive powers.<sup>62</sup> The importance of *Chevron* in judicial review of administrative agencies cannot be understated:

In a remarkably short period, *Chevron* has become one of the most cited cases on all of American law. As of December 2001, *Chevron* has been cited in federal courts over 7000 times—far more than *Brown v. Board of Education*, *Roe v. Wade*, and *Marbury v. Madison*. In terms of sheer citations, *Chevron* may well qualify as the most influential case in the history of American public law.<sup>63</sup>

To date, an agency's decision has not been invalidated by the Supreme Court under step two of *Chevron* (though several Courts of Appeal have done

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59. *Id.* 842-44.

60. *Id.* (citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

61. STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 290 (5th ed. 2002).

62. See generally Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 4 (2007) ("[A]dministrative law at its core is concerned with the tension between judicial power and democracy.")

63. BREYER ET AL., *supra* note 59 at 289-90.

so).<sup>64</sup> As a result, agencies are left with enormous latitude in how they interpret ambiguous statutory provisions. It is an understatement to say that the courts have not been proactive in reviewing and negating agency regulations and rule-making authority.<sup>65</sup> *Chevron* simply demonstrates the federal judiciary's indifference to filling their docket with review of agency rules and regulations. What is worse, the Supreme Court's record in this regard has been characterized by some as an abdication of judicial responsibility.<sup>66</sup>

Without a doubt, under the Court's guidance, agencies like USCIS have little fear in construing statutes and issuing regulations. Generally, agencies can establish binding rules through adjudication, rather than through a formal notice-and-comments or informal rulemaking processes.<sup>67</sup> In the first case following the enactment of the Administrative Procedures Act (APA), the Supreme Court in *NLRB v. Wyman-Gordon Co.*<sup>68</sup> held that agencies could formulate rules either through adjudication or formal rule-making channels and that the ultimate choice between the two lies in the agency's discretion.<sup>69</sup> Despite the agency's choice between adjudication and formal rule-making, the Supreme Court has generally stressed the importance of consistency in administrative agency adjudications. In *Allentown v. Mack Sales & Service, Inc. v. NLRB*, the Court held that an agency must utilize "reasoned decision-making and consistency in adjudication."<sup>70</sup>

Within the immigration arena, the Supreme Court most recently addressed the scope of agency rule-making power in *INS v. Yang*.<sup>71</sup> The central issue in *Yang* was whether a sudden change in USCIS (INS) policy of disregarding entry fraud in determining eligibility for waivers of deportation was permissible. The Court stated:

Though the agency's discretion is unfettered at the outset, if it announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of

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64. *Id.* Although the Supreme Court has so far been unwilling to hold that an agency's interpretation is unreasonable (a holding that would likely upset the executive branch and lead to charges of judicial activism), the Court sometimes finds a way to reach the same result under a more aggressive application of step one of the *Chevron* analysis. See Molot, *supra* note 60 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 227-29 (1994)) ("[C]ourts sometimes have applied *Chevron* quite aggressively. . . . Where a court works hard to find statutory clarity at *Chevron* Step I, it ends up not only substituting its judgment for that of the relevant agency, but also fixing statutory meaning for all time and enhancing its power vis-à-vis future courts and future political administrations.").

65. Donald S. Dobkin, *The Diminishing Prospects for Legal Immigration: Clinton through Bush*, 19 ST. THOMAS L. REV. 329, 340 (2007).

66. *Id.*

67. 394 U.S. 759, 781 (1969).

68. 5 U.S.C. 554, (2000).

69. See *NLRB*, 394 U.S. at 781.

70. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359,374 (1998).

71. *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 30 (1997).

discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as “arbitrary, capricious, [or] an abuse of discretion” within the meaning of the Administrative Procedure Act, 5 U.S.C. S. 706(2)(A).<sup>72</sup>

Despite paying considerable lip service to the principle that a sudden change in agency practice could be arbitrary if not properly explained or justified, Justice Scalia, noted that “the INS has not, however, disregarded its general policy here; it has merely taken a narrow view of what constitutes ‘entry fraud’ under that policy”<sup>73</sup> and the net result was the reversal of the Ninth Circuit’s decision that held in favor of Yang.<sup>74</sup>

In the 2001 decision, *United States v. Mead Corp.*,<sup>75</sup> the Supreme Court issued its first major decision since *Chevron* that pertained to judicial deference and administrative agencies. *Mead* appeared to alter *Chevron* by imposing a threshold barrier to agencies seeking a *Chevron* defense. Rather than automatically deferring to the agency when statutory ambiguities exist, agencies seeking to implement a particular statutory provision now qualify for *Chevron* deference only “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and [where] the agency interpretation claiming deference was promulgated in the exercise of that authority.”<sup>76</sup>

While some authors have heralded *Mead* as a major development in administrative law jurisprudence and a setback to unbridled agency power (even proclaiming it as a reversal of the global presumption of judicial deference established by *Chevron*)<sup>77</sup> its impact has yet to be felt in the immigration arena. Federal courts have largely ignored *Mead* in their review of immigration cases, maintaining their “business as usual” posture.<sup>78</sup> Of the few

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72. *Id.*, at 32.

73. *Id.*

74. *Id.*

75. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

76. *Id.* at 226-27.

77. Adrian Vermeule, *Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 352 (2003).

78. See, e.g., David S. Rubenstein, *Putting the Immigration Rule of Lenity in Its Proper Place: A Tool of Last Resort After Chevron*, 59 ADMIN. L. REV. 479, 480 (2007) (“The Supreme Court has historically deferred to the political branches’ policy decisions in immigration matters.”). But see Brian G. Slocum, *Courts vs. the Political Branches: Immigration “Reform” and the Battle for the Future of Immigration Law*, 5 GEORGETOWN J.L. & PUB. POL’Y 509, 511-12 (2007) (“While it is partially accurate, the standard theory of extreme judicial deference to the political branches in immigration matters is typically overstated. The standard account fails to recognize the judiciary’s increasing inclination to promote its own version of desirable public values in limited, but extremely important, areas of immigration law. In contrast to the values promoted by Congress and the executive branch through their reforms, the judiciary has, through various methods, pursued a more pro-immigrant set of values. The judiciary’s decisions have, for the most part, been made through the (often aggressive) application of mainstream principles of law and statutory interpretation . . .”). Although Professor Slocum makes a forceful argument that the judicial branch has played a surprisingly active role in immigration cases, he still recognizes that “there is no right to judicial review in many important immigration cases.” *Id.* at

circuits that have cited *Mead* while reviewing immigration cases, only one court has decided to withhold deference based in part on *Mead*.<sup>79</sup>

### PART III – A CASE STUDY: USCIS

The Immigration Act of 1990 (INA)<sup>80</sup> contained a novel and breakthrough provision, which allowed aliens of exceptional ability to receive immigrant visas if doing so would serve the United States' national interest. Specifically, the law provided that persons holding advanced degrees (or those possessing exceptional ability in the arts, sciences or business) whose work would benefit the national economy, cultural or educational interests of the United States would be *exempted* from the legal requirement that they obtain a job offer from a U.S. employer. Hence, those persons would avoid the long and arduous labor certification process if such application would be in the national interest of the United States.<sup>81</sup>

A major sponsor of this provision was Senator Jesse Helms of North Carolina. In the Senate debate, Helms described the transformation of his State from the time he first took office to the present as “truly remarkable.” He reminisced that North Carolina had moved from a dying and stagnant tobacco economy to one led and transformed by the foreign Ph.D.'s and M.D.'s who had come to live and work in the Research Triangle area of North Carolina and advocated that America needs a policy that encourages skilled workers and people with exceptional abilities to come to our country. Unfortunately, our current system discourages them from immigrating . . . .<sup>82</sup>

The enactment of the exceptional ability/national interest waiver provision opened a new path for applicants to obtain immigrant visas. In the early 1990's, the INS (USCIS) was deluged with applications in this category, and approvals of petitions were plentiful. This apparently did not sit well with the INS and the Clinton administration. In August of 1998, the Wall Street Journal ran a front-page article mocking the INS for approving anyone with a “pulse” under this category.<sup>83</sup> Citing an “acrobat from Russia who plays a horn while flying through the air, Korean golf-course designers, Russian ballroom dancers and Ghanaian drum makers”<sup>84</sup> as examples of the types of

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522. In particular, “[c]onsidering the lack of independence in the administrative adjudication process, the vesting of complete and unreviewable discretion in the Attorney General regarding whether an alien should be allowed to reside in this country has understandably troubled immigration scholars.” *Id.* at 523.

79. *Flores v. Ashcroft*, 350 F.3d. 666 (7th Cir. 2003).

80. Immigration Act of 1990, PUB. L. 101-649, §121, 104 Stat. 4978, 4987-88 (codified as amended at 8 U.S.C. § 1153 (1990)).

81. *Id.*

82. 135 CONG. REC. 758–02 (daily ed. July 12, 1989) (statement of Sen. Jesse Helms).

83. Barry Newman, *Alien Notions: The 'National Interest' Causes INS to Wander Down Peculiar Paths—Or How a Roving Acrobat Got a Visa While Doctor Probing Cancer Didn't—Is the Curio Cabinet Closed?*, WALL ST. J., Aug. 20, 1998, at A1.

84. *Id.*

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applicants being approved under this category. From there, the INS had enough.

In the same month (August 1998), the INS issued an administrative decision confronting these ambiguities. In *Matter of N.Y. State Department of Transportation* (“*NYS DOT*”),<sup>85</sup> the Board of Immigration Appeals finally transformed the ambiguous concept of ‘national interest’ into a defined set of conceptual guidelines, delineated below:

1. The alien applicant must be seeking employment in an area of “substantial intrinsic merit;”
2. The proposed benefit must be national in scope; and
3. The alien applicant seeking exemption from the labor certification process must present a national benefit so great as to outweigh the “national interest inherent in the labor certification process.”<sup>86</sup>

The impact of the third prong of the *NYS DOT* prong was the most significant. It allowed the INS to engage in the subjective process of assessing and evaluating any applicant and determining by its own standards which achievements by aliens would “greatly exceed the achievements and significant contributions” of U.S. workers and “exhibit some degree of influence on the field as a whole.”<sup>87</sup>

The *NYS DOT* standard was implemented without any statutory or regulatory changes to the existing exceptional ability provisions, in contravention with the USCIS’s own regulation, which explicitly provide requirements for the national interest waiver.<sup>88</sup> USCIS regulations require a showing that to “the alien is an alien of exceptional ability in the sciences, arts or business, the petition must be accompanied by at least *three* of the following” six criteria:

1. An official academic record showing that the alien has a degree, diploma, certificate or similar award from a college, university, school or other institution of learning related to the area of exceptional ability;
2. Evidence in the form of letter(s) from current or former employer(s) showing that he has at least ten years of full-time experience in the occupation for which he or she was sought;
3. A license to practice the profession or certification for a particular profession or occupation;
4. Evidence that the alien has commanded a salary, or other remuneration for services demonstrates exceptional ability;
5. Evidence of membership in professional associations; or
6. Evidence of recognition for achievements and significant contributions to the field by peers, governmental entities, or

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85. 22 I. & N. Dec. 215, Interim decision (B.I.A.) 3363 (1998).

86. *Id.*

87. *Id.*

88. See *Immigrant Visa Petitions*, 8 C.F.R. § 204.5(k)(3)(ii) (2007).

professional or business organizations.<sup>89</sup>

Despite these INS criteria, Congress's failure to define "national interest" in its legislation left the door open for the INS to step in and provide a definition. The INS did just that, with the *NYS DOT* decision. Quite remarkably, *NYS DOT* has no basis in the statute Congress passed in 1990, nor is it consistent with that statute. What is worse, the INS's own regulations direct conflict with the statutory provision.

#### PART IV – FAILURES INHERENT TO THE CURRENT SYSTEM

Although USCIS presents a particularly compelling case study of the failures inherent in the current system of administrative law, these failures are by no means exclusive to the immigration law context. Practitioners in many areas of administrative law routinely run up against a system that elevates executive power above congressional intent and the fair adjudication of administrative hearings.<sup>90</sup>

Across the board, congressional oversight has been a failure, as the record would certainly seem to indicate, particularly when looking at agency rules and regulations. Congress has shown little interest and demonstrated little effectiveness in curbing agency abuse and disregard for legislative enactments. It is indeed difficult to place faith in an institution with such a disappointing record and whose members rarely read the text of legislation prior to voting on whether to enact a particular bill.

Presidential administration and the growth of executive power have reached unprecedented levels in the last decade. One author has described it as "the shift from congressional preeminence . . . to presidential preeminence."<sup>91</sup> Whether it is the use or abuse (depending on one's viewpoint) of executive orders or direct White House control over specific agencies through the EOP, executive power is on the rise. With all due respect to Professor Kagan's argument that more power must, by necessity, be placed in the executive branch, it is difficult to see the benefits of more executive control when recent executive branch policies have included incarceration without due process, agency rulemaking without effective review, and stripping courts of powers of

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89. *Id.*

90. See, e.g., Jason D. Vendel, Note, *General Bias and Administrative Law Judges: Is There a Remedy for Social Security Disability Claimants?*, 90 CORNELL L. REV. 769, 770-75 (2005) (finding bias in social security claims administrative hearings); Clean Water Action et al., *Continuing Dereliction of Duty: How Michigan's Environmental Agency Defies the Law and the Public* 7 (Feb. 8, 2001), available at <http://www.mecprotects.org/deqreport2.pdf> (finding bias in environmental hearings before administrative law judges); cf. also Cynthia M. Ohlenforst et al., *Annual Survey of Texas Law: Taxation*, 59 SMU L. REV. 1565, 1570 (2006) (stating that one recent survey found that in general "[t]axpayers had few successes before administrative law judges").

91. Joseph Cooper, *From Congressional to Presidential Preeminence: Power and Politics in Late Nineteenth-Century America and Today*, in CONGRESS RECONSIDERED (Dodd & Oppenheimer, eds., 2005).

judicial review.<sup>92</sup> All of these policies have been made possible by the seemingly limitless power of the unitary presidency.<sup>93</sup>

Since most agencies already have some form of internal administrative review, either by administrative judges or agency officials, an increase in internal review is not likely a viable solution. The problem with internal administrative review is that it is often a mere technicality because the decision-maker does not have the true independence and impartiality that is needed to reach fair resolutions.<sup>94</sup> Some commentators have stated that this lack of independence and impartiality allows administrative law judges to engage in “lawless decision-making.”<sup>95</sup> For instance, a large coalition of environmental groups in Michigan has noted that “EPA staff have confirmed they identified . . . administrative law judge rulings that are inconsistent with state and federal law.”<sup>96</sup>

For the most part, administrative judges have not demonstrated sufficient independence from the agency over which they review. Because they remain employees of the executive branch and can be removed at any time for virtually any reason, the visible lack of any semblance of judicial independence substantially undercuts their credibility. Indeed, according to ethicist Professor James Moliterno, our current system requires administrative judges to “recognize that their role demands adherence to agency policy and goals.”<sup>97</sup> In other words, administrative judges cannot even pretend to be

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92. Donald S. Dobkin, *Court Stripping: Limitations on Judicial Review of Immigration Cases*, 28 JUST. SYS. J. 104 (2007).

93. Indeed, the current administration has shown a willingness to find ways to expand executive power even in those rare instances where Congress attempts to exercise oversight. See CHARLES TIEFER, *supra* note 24, at 238 (“Among more exotic tactics, the administration has sabotaged congressional overseers by accusing them of unpatriotically violating intelligence rules . . . .”) (emphasis added).

94. See, e.g., Vendel, Note, *supra* note 88, at 770 (“[F]ew will deny that bias inevitably seeps into their decisionmaking process. . . . With some ALJs, however, bias more than seeps. It gushes.”). But see Harold J. Krent & Lindsay DuVall, *Accommodating ALJ Decision Making Independence with Institutional Interests of the Administrative Judiciary*, 25 J. NAT’L ASS’N ADMIN. L. JUDGES 1, 26-27 (2005) (citing Administrative Procedure Act (APA), 5 U.S.C. §§ 554(d), 557(d)(1) (2000)) (“[T]he APA largely protects ALJs at the federal level from external influence. Agencies that employ ALJs cannot hire or fire them, except for cause. Nor do the agencies set their pay. In addition, ex parte discussions are limited in order to prevent even the appearance of impropriety. Although Congress can reduce pay for ALJs as a group or eliminate their jobs altogether, Congress cannot readily pressure any individual ALJ to reach a particular decision.”).

95. Vendel, *supra* note 88, at 770.

96. Clean Water Action, *supra* note 88, at 7, available at <http://www.mecprotects.org/deqreport2.pdf>.

97. James Moliterno, *The Administrative Judiciary’s Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1192 (2006); see also Patricia E. Salkin, *Judging Ethics for Administrative Law Judges: Adoption of a Uniform Code of Conduct for the Administrative Judiciary*, 11 WIDENER J. PUB. L. 7, 22 (citations omitted) (“Whether it is appropriate to apply the same code of judicial conduct to constitutional court judges, ALJs, and hearing officers is a matter of considerable debate. One argument advanced against the application of the code of judicial conduct considers that, since ALJs may be viewed as nothing more than employees whose job it is to help the agency

independent because they are, in fact, *legally* bound to adhere to agency policies:

Clearly, administrative judges must follow the agency's legislative rules, but, perhaps more controversially with some administrative judges, they must also follow other statements or indicators of agency policy. They are, after all, agents of the agency and have no independent authority to divine policy. The only true source of their authority is the agency itself, and their judgment must be informed by the agency's and not their own sense of good policy. This aspect is an important distinction between administrative judges and Article III judges and their state court counterparts.<sup>98</sup>

Further, "as a matter of practice, Presidents commonly tell agencies what they want them to do,"<sup>99</sup> and those priorities are likely to carry weight with administrative judges. Although administrative judges are also bound by legal requirements that they act "in an impartial manner" when presiding over hearings,<sup>100</sup> it is difficult to see how employees can truly be impartial to decisions made by their employers.

Generally, administrative law judges lack proper insulation and independence from administrative agencies. This is especially true for Immigration Judges, who lack even the theoretical "statutory independence" that Congress has granted to other administrative law judges.<sup>101</sup> An example is the recent removal of more than a dozen Immigration Judges by the executive branch for an alleged failure to deport aliens at a fast enough pace.<sup>102</sup> Indeed, a recent analysis revealed that "[t]he Bush administration [has] increasingly

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make decisions with respect to individual cases arising under statutes and regulations over which the agency has charge, either by *making decisions on the agency's behalf* or by gathering and reporting facts and recommending a result to those who make the agency's decisions. . . . [Their] function is not much, if any, more judicial than state employees who administer driving tests.") (emphasis added).

98. Moliterno, *supra* note 95, at 1199.

99. Sargentich, *supra* note 16 at 7.

100. Administrative Procedure Act, 5 U.S.C. § 556(b) (2000).

101. Jeffrey S. Lubbers, *Closing Remarks, Holes in the Fence: Immigration Reform and Border Security in the United States*, 59 ADMIN. L. REV. 621, 627 (2007). *But see* Nina Bernstein, *Immigration Judges Facing Performance Reviews*, N.Y. TIMES, Aug. 10, 2006, available at <http://www.nytimes.com/2006/08/10/washington/10immig.html> (quoting an immigration law judge who claims that judges like herself "by statute are supposed to be neutral, independent decision makers").

102. *See, e.g.*, Carol Marin, *Patronage "Crime" Does Pay – for Justice Dept.*, CHI. SUN-TIMES, Mar. 25, 2007, at B6, available at [http://findarticles.com/p/articles/mi\\_qn4155/is\\_20070325/ai\\_n18757004](http://findarticles.com/p/articles/mi_qn4155/is_20070325/ai_n18757004) ("Just as we like to think our U.S. attorneys function with a high degree of independence despite being political appointees, we like to think that our judges do, too. But immigration judges work for the Justice Department, not the federal courts. Their boss is also Alberto Gonzales. And just as Gonzales and the Bush administration are being accused of pursuing a blatantly political agenda with regard to the fired U.S. attorneys, they have been accused of doing the same thing with regard to immigration judges, who basically do what the administration wants them to do."); *see also* Bernstein, *supra* note 98 (noting that a new policy of requiring "performance evaluations raised serious concerns for the independence of judges").

emphasized partisan political ties over expertise . . . in selecting the judges who decide the fate of hundreds of thousands of immigrants,” despite laws that preclude such considerations.<sup>103</sup> Professor Brian Slocum has noted that since 2002, the Attorney General has taken numerous actions “that reinforced the notion that Immigration Judges and BIA members are *employees* of the Department of Justice *rather than independent adjudicators*.”<sup>104</sup> To make matters worse, “[a]ll the judges appointed during this period who arrived with experience in immigration law were prosecutors or held other immigration enforcement jobs.”<sup>105</sup> Hiring practices such as these make it difficult to believe that immigration judges are truly neutral and independent.

Because agencies sometimes base hiring—and firing—practices on the outcomes they expect to receive from administrative judges, these judges are under enormous pressure to keep their employers happy. In general, the administrative judges themselves have never been comfortable being in this position, and they have for many years “sought to ensure their independence in resolving cases brought under myriad administrative schemes at both the federal and state levels.”<sup>106</sup>

This lack of independence becomes all the more problematic because the employers of administrative judges are the very agencies that are most likely to appear as parties (usually defendants) before the judge: “Often, one of the litigants before the administrative judge is the judge’s employer.”<sup>107</sup> The administrative judge is then asked to pass judgment on the very same agency that has the power to terminate the judge’s employment.

It is no wonder that when litigants brings lawsuits against agencies, the litigants often take it as a given that they will lose before the administrative judge.<sup>108</sup> These litigants thus focus much of their attention on the first appeal to a federal district court. This process might be acceptable if they were guaranteed to get a fair hearing at the district court level. The problem is that losing at the administrative level can poison later proceedings. For instance, on appeal, later courts will defer to an administrative judge’s findings of fact

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103. Amy Goldstein & Dan Eggan, *Immigration Judges Often Picked Based on GOP Ties*, WASH. POST, June 11, 2007, at A1.

104. Brian G. Slocum, *Courts vs. the Political Branches: Immigration “Reform” and the Battle for the Future of Immigration Law*, 5 GEORGETOWN J.L. & PUB. POL. 509, 515 (2007) (emphasis added).

105. Goldstein & Eggan, *supra* note 101.

106. Harold J. Krent & Lindsay DuVall, *Accommodating ALJ Decision Making Independence with Institutional Interests of the Administrative Judiciary*, 25 J. NAT’L ASS’N ADMIN. L. JUDGES 1, 1 (2005).

107. Moliterno, *supra* note 95, at 1195.

108. See, e.g., Andrew W. Barnes, Comment, *Building on Michigan Wetlands After In re Ocedek: Analyzing On-site and Off-site Alternatives Under the “Feasible and Prudent Alternative” Test of Part 303 of the NREPA*, 2006 MICH. ST. L. REV. 511, 514 n.12 (noting that environmental groups blame some of their losses at the administrative level on administrative law judges being “pro-development”).

“unless they are unsupported by substantial evidence on the record.”<sup>109</sup> Cases are often won or lost based on how the initial decision-maker views the facts, which are often open to various interpretations. All of this makes it crucial that the initial judicial decision-maker be truly independent and impartial. Administrative judges under the current system cannot fulfill this role.

If administrative judges are not fit to hear these cases, should we instead go straight to the federal district courts? The problem here is that the current federal court system is already too overburdened to hear the large volume of administrative agency matters.<sup>110</sup> And federal judges, in many instances, have shown a lack of interest in hearing such cases.<sup>111</sup>

### PART V – PRESCRIPTIONS FOR LAWFULNESS

This then leaves the creation of new Article III courts with the power of judicial review as the only sensible solution to the current state of affairs, if only by default. We need to create a new corps of federal judges who only hear cases involving agency rules and regulations. Congress could easily create such a corps.<sup>112</sup> Indeed, in 1983, the Judicial Administration Division of the American Bar Association passed a resolution “favoring the passage of legislation to establish federal administrative law judges *as an independent corps*.”<sup>113</sup> More recently, Congress has considered legislation to bring independence to Immigration Judges.<sup>114</sup> Thus, it is not unreasonable to suggest that Congress should go further and actually take the steps necessary to create a new corps of federal judges.

Creating a new corps of federal judges to hear administrative matters is the only way to reinstate proper checks and balances and to ensure what scholars deem to be a central constitutional principle—namely, that “no

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109. *E.g.*, O’Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 508 (1951).

110. *See, e.g.*, Carden v. Arkoma Assoc., 494 U.S. 185, 207 (O’Connor, J., dissenting) (“[O]ur federal courts are already seriously overburdened.”); Jeff Jones, *Court Overload*, ALBUQUERQUE J., Nov. 5, 2005, at A1 (“Illegal immigrants are . . . pushing the entire New Mexico federal court system near a breaking point. The sheer volume of immigration cases filed in federal courts is crushing.”). *But see* Robert L. Ostertag, *New York and the Law*, 10 EXPERIENCE 6, 7 (2000) (“[I]n 1998, . . . New York’s statewide judicial system absorbed more than 3.4 million new cases. During that same time the entire federal district court system throughout America took in fewer than 300,000 just the year before, a more than 11-to-1 ratio. One wonders sometimes why federal judges feel overburdened.”).

111. Donald S. Dobkin, “The Diminishing Prospects for Legal Immigration: Clinton through Bush,” 19 St. Thomas L. Rev. 329 (2006).

112. Article III of the Constitution expressly permits Congress to create lower federal courts. U.S. Const. art. III, § 1 (“Congress may from time to time ordain and establish [lower federal courts.]”).

113. Moliterno, *supra* note 95, at 1228 (2006) (citing Victor W. Palmer, *The Administrative Procedure Act: After 40 Years, Still Searching for Independence*, JUDGES’ J. 34, 39 (Winter 1987)).

114. *See* Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 229 (2006).

particular actor should be dominant.”<sup>115</sup> When a unitary executive branch has the power to influence all levels of agency decisions, including those made by administrative judges, the executive branch has become dominant in a way that violates basic principles of the separation of powers. A new corps of federal judges would help reinstate constitutional principles regarding the separation of powers. Professor Robin Arzt has argued forcefully for the need to create an independent body to adjudicate social security claims:

When an agency . . . exclusively uses rulemaking proceedings to set policy, rather than also using adjudications to set policy, there no longer is any rationale for keeping the adjudicatory function within the agency. The Congressional interest in providing a check on . . . enforcement powers . . . is best served by having benefits entitlement determinations decided by an independent adjudicatory agency.<sup>116</sup>

The same rationale supports moving other agency decisions away from administrative judges and toward a new corps of independent federal judges.

In addition to establishing necessary checks and balances, the creation of a new corps of federal judges would have at least three additional major (and related) practical advantages over the current system. First, the new corps of federal judges would have the requisite independence needed to insulate their decisions from political influence. Second, these judges would also have an opportunity to develop expertise in adjudicating administrative matters. Third, as a result of greater independence and expertise, this new corps of judges would be more likely to decide cases correctly at the outset and thereby help relieve the federal docket by decreasing the amount of work that must be done on appeal.

Judicial independence is foundational to any effort to adjudicate matters fairly and without bias. The drafters of the U.S. Constitution required that all federal judges be insulated from political pressures by life tenure and salary protection.<sup>117</sup> Similarly, the first Canon of the Code of Conduct for United States Judges, entitled *A Judge Should Uphold the Integrity and Independence of the Judiciary*, requires the following of all federal judges:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to

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115. Sargentich, *supra* note 16, at 6.

116. Robin J. Arzt, *Recommendations for a New Independent Adjudication Agency to Make the Final Administrative Adjudications of Social Security Act Benefits Claims*, 23 J. NAT'L ASS'N ADMIN. L. JUDGES 267, 271 (2003).

117. U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

further that objective.<sup>118</sup>

The importance of judicial independence is in fact so ingrained in the minds of most Americans that most of us simply take it for granted that an independent judiciary is crucial to the fair resolution of disputes. We should not deprive litigants in administrative disputes from the benefits of an independent judiciary.

Critics of this approach could argue that a new corps of federal judges would not actually create a truly independent judiciary. After all, the new federal judges would presumably be appointed by the President and would therefore be likely to share many of the political viewpoints of the executive branch. Nevertheless, the appointment process for Article III judges is far less likely to produce a partisan judiciary than the current process for appointing administrative judges. After all, Article III judges must be confirmed by the Senate, which theoretically acts as a check to prevent the President from appointing partisan candidates, especially when the Senate is controlled by a different political party. Also, we know from experience that the constitutional protections afforded to Article III judges—life tenure and salary protection—really do allow judges to act independently without fear of political recourse. For instance, U.S. Supreme Court Justice David Souter was appointed by a politically conservative president (George H.W. Bush), and Justice Souter is now considered to be one of the most liberal judges on the bench.

A new corps of federal judges to hear administrative matters would also allow these judges to become experts in adjudicating administrative matters. The benefit of expertise is related to judicial independence. Although some would argue that administrative judges are already experts in adjudicating the matters that come before them, a more realistic (if somewhat cynical) view is that a lack of judicial independence prevents administrative judges from developing this expertise. Rather than searching for the correct legal answer, an administrative judge might be more concerned with finding ways to interpret the law in a way that justifies whatever actions were taken by the agency that employs the judge.

Creating a new corps of federal judges would also help relieve the current burden on federal courts. Although an overburdened federal judiciary is not an excuse for failing to ensure the proper administration of justice,<sup>119</sup> it is all the better if we can find a way to ensure fair adjudication of administrative matters without overburdening the federal court system. The creation of a new corps of federal judges to hear administrative matters does precisely that. In fact, because the new corps of federal judges would be truly independent and impartial, these judges would be more likely to reach the proper outcome at the

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118. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 1 (2000) (emphasis added).

119. See, e.g., Danné L. Johnson, *SEC Settlement: Agency Self-Interest of Public Interest*, 12 *FORD. J. CORP. & FIN. L.* 627, 678 n.233 (2007) (noting that in general even when federal courts are overburdened, “public interest in adjudication should not give way to an overburdened system”).

outset. This would be a major improvement, given that immigration judges, for instance, are currently reversed more than twice as often as other civil trial court judges.<sup>120</sup> The improper initial adjudication of these cases “has placed a greater burden on federal courts.”<sup>121</sup> If immigration cases and other administrative cases were tried initially by truly independent judges, we could expect to see far fewer appeals—and less work to do on those appeals—than under the current system of agency-employed administrative judges. As a result, this new corps of federal judges goes a long way toward helping relieve the federal docket.

### CONCLUSION

The administrative state has spiraled out of control. Over the last several decades, the executive branch has used agencies to expand its own powers, and Congress and the courts have done little to provide any sort of meaningful checks on this process. The result has been a current state of lawlessness, as exemplified by USCIS. This lawlessness is inherent in the current system, which relies in large part on administrative judges, who do not have proper insulation from political pressures and are therefore unable to exercise the independence that is so crucial to adjudicating matters. The best way to remedy the situation is to establish a new corps of independent and impartial federal judges to adjudicate administrative matters. Although this would not address the fundamental unfairness of many of the statutes that govern an area such as immigration law, creating a new corps of federal judges would go a long ways to ensuring that even unjust laws are adjudicated in the fairest manner possible. We should strive toward judicial independence wherever it is possible, and it is time for Congress to take steps to ensure that this independence exists in the adjudication of administrative matters.

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120. See Slocum, *supra* note 102, at 518, n.48 (citing Judge Posner in *Benslimane v. Gonzalez*, 430 F.3d 828, 829 (7th Cir. 2005), as “comparing the reversal rate in immigration cases of 40% to the 18% reversal rate in other civil cases”).

121. *Id.* at 525.