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## The Administrative State: Congress's Role in Perpetuating It

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# The Administrative State: Congress's Role in Perpetuating it

## ABSTRACT

*"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."*<sup>1</sup>

*For many Americans, the rise of the administrative state signaled the deterioration of the framers' vision for American government. Gone are the days where the Legislative Branch primarily enacted laws, the Executive Branch enforced laws, and the Judicial Branch interpreted laws and adjudicated disputes. Today, the American form of government is an administrative state. Agencies possess legislative, executive, and judicial powers and wield those powers to administer critical government programs—often at the directive of the Executive Branch.*<sup>2</sup>

*Scholars have repeatedly criticized the evolution of the administrative state as unlawful, unconstitutional, and have even gone so far as to call it a "bloodless constitutional revolution."<sup>3</sup> But who is to blame for the creation of the administrative state? Does the blame fall on Franklin Roosevelt's New Deal? There is no doubt that the "growth of the administrative state can be traced, for the most part, to the New Deal," but perhaps the New Deal "merely served as the occasion for implementing the ideas of America's Progressives."<sup>4</sup>*

*This Comment argues that Congress has primarily contributed to the growth and empowerment of the administrative state. Not merely through the traditional process of creating administrative agencies, but through Congress's abdication of its legislative power to the President, who in turn*

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1. THE FEDERALIST NO. 51 (James Madison).

2. JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC 8 (2017).

3. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994).

4. Ronald Pestritto, *The Birth of the Administrative State: Where It Came From and What It Means for Limited Government*, HERITAGE FOUND. 1 (Nov. 20, 2007), <https://perma.cc/VRG4-TFFP>.

*utilizes the administrative agencies as tools to do his bidding. This Comment further argues that once Congress has delegated its legislative power to the President, and the President has empowered the administrative state, the Judicial Branch generally defers to both the President and the administrative state. This has emboldened the administrative state and enabled it to flourish.*

*This Comment begins with a brief introduction of the historical principles underlying the American form of government and how, against the backdrop of the framers' intent, the administrative state undermines these principles. Part I discusses a broad overview of the current administrative state. It specifically considers what roles Congress and the President have traditionally played in the administrative state. Part II discusses *Trump v. Hawaii* and the Trade Expansion Act. Both illustrate Congress's abdication of its legislative power and the President's use of that authority to empower the administrative state to act. Part III of the Comment discusses the two ways in which the judiciary branch acquiesces to actions taken by both the President and administrative agencies.*

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## INTRODUCTION

Scholars have long critiqued the administrative state for its smudging—or eviscerating—of the lines delineated by the separation of powers

doctrine.<sup>5</sup> “The framers of the Constitution aimed to create a national government that was energetic, but limited, effective, yet safe . . . . Their goal, in short, was to produce balanced government.”<sup>6</sup> This balanced approach was fueled by the framers’ fear of tyrannical power, as seen in the English government and fought against during the American Revolution.<sup>7</sup> To achieve a balanced government and prevent tyranny, the framers separated government power between three federal branches of government with the intent that no one branch could accumulate vast power.<sup>8</sup> James Madison made it clear in Federalist No. 47:

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system.<sup>9</sup>

James Madison elaborated in Federalist No. 51:

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others . . . . Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government.<sup>10</sup>

By design, each branch was vested with specific powers that the other branches were not. Congress, “the most representative, and thus the most democratic of the three branches,” received lawmaking power.<sup>11</sup> The Executive Branch, headed by the President, was vested with executive power that required the President to “take Care that the Laws be faithfully executed.”<sup>12</sup> The Judicial Branch was vested with judicial power to adjudicate cases and controversies.<sup>13</sup>

The Framers did not merely divide power among the three federal branches. “The president, [Congress], and federal judges were each made

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5. *Id.* at 3–5.

6. KEITH WERHAN, *PRINCIPLES OF ADMINISTRATIVE LAW* 11 (3d ed. 2019).

7. *Id.*

8. Pestritto, *supra* note 4, at 3–4.

9. THE FEDERALIST NO. 47 (James Madison).

10. THE FEDERALIST NO. 51 (James Madison).

11. WERHAN, *supra* note 6, at 41.

12. U.S. CONST. art. II, § 3.

13. U.S. CONST. art. III, § 2.

answerable to different constituencies and subject to different temporal and occupational demands. These differences ensured that the branches would regularly clash. And such clashing was good . . . for the prevention of tyranny and for the . . . promotion of liberty.”<sup>14</sup>

In contrast to the framers’ design, the current administrative state grants all three powers—legislative, executive, and judicial—to administrative agencies and makes those agencies answerable to only the President. “Agencies typically have authority to make legally binding rules (which resembles the legislative power of Congress), to enforce statutes and administer programs (which is executive in nature), and to adjudicate disputes (which resembles the judicial power of the federal courts).”<sup>15</sup> This conglomeration of powers and lack of accountability is at odds with the framers’ carefully crafted branches of government. Many complain that administrative agencies “embody the evil of tyranny that separation of powers was designed to avoid.”<sup>16</sup> The framers’ intended clashing does not occur when all three powers accumulate in one agency.

Thus, the question remains, who or what can be blamed for the deviation from the framers’ intent to create a balanced government to the current administrative state? This Comment seeks to answer that question. It proposes that Congress is mainly responsible for the creation, growth, and continued empowerment of the administrative state.

## I. THE UNACCOUNTABLE “FOURTH BRANCH” OF GOVERNMENT

The American administrative state is made up of hundreds of agencies.<sup>17</sup> The term administrative agency is often broadly defined as “any government entity with the authority to take actions that alter the legal rights and obligations of individuals.”<sup>18</sup> This definition does little for the average American citizen, who is more likely to recognize the names of specific agencies such as the Securities and Exchange Commission (SEC), Fair Housing Administration (FHA), or the Federal Deposit Insurance Corporation (FDIC).

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14. MICHAELS, *supra* note 2, at 7.

15. WERHAN, *supra* note 6, at 48.

16. *Id.*

17. There is a good deal of confusion on the exact number of federal administrative agencies and there appears to be no authoritative list of all government agencies. See Clyde Wayne Crews, *Nobody Knows How Many Federal Agencies Exist*, COMPETITIVE ENTERPRISE INST. (Aug. 26, 2015), <https://perma.cc/WE6L-WJS3>; see also Clyde Wayne Crews, Jr., *How Many Federal Agencies Exist? We Can’t Drain the Swamp Until We Know*, FORBES (July 5, 2017, 4:03 PM), <https://perma.cc/Q5C3-K35T>.

18. WERHAN, *supra* note 6, at 3.

Congress is responsible for the creation and initial empowerment of administrative agencies.<sup>19</sup> Congress creates an agency through the passage of legislation termed an “enabling act.”<sup>20</sup> This act specifies the provisions that empower, as well as limit, the agency’s power.<sup>21</sup> “[E]nabling acts . . . operate as a kind of corporate charter for the agency.”<sup>22</sup> The provisions in the enabling acts are binding on the agency.<sup>23</sup> “Any agency action that exceeds the authority that Congress has provided it, or that is inconsistent with any provision in the enabling act, is *ultra vires* . . . and thus invalid.”<sup>24</sup>

When creating an agency, Congress “possesses broad authority” to design it in a manner that is conducive to fulfilling a prescribed mission.<sup>25</sup> While an agency’s mission can vary significantly depending on Congress’s intent, agencies generally address pragmatic issues such as managing crises, redressing serious social problems, or overseeing complex matters of governmental concern that are beyond the expertise of legislators.<sup>26</sup> Administrative agencies are responsible for administering numerous government programs dealing with countless matters, including healthcare, tax credits, housing loans, education loans, clean air, and safe food.

Given Congress’s expansive authority to create agencies in the way it pleases, agencies come in all shapes and sizes. “While all administrative agencies share in common the power to take legally binding actions, they otherwise exhibit a wide variety of form and function.”<sup>27</sup> Congress designs

19. *Id.* at 10.

20. *Id.*

21. *Id.* “Administrative lawyers refer to these statutes as ‘organic’ or ‘enabling’ acts, sometimes interchangeably.” *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 5.

26. *Administrative Agency: History of Administrative Agency, Federal Administrative Agencies, State and Local Administrative Agencies, Further Readings*, JRANK, <https://perma.cc/J286-VQMP> (last visited Feb. 10, 2019). There are three primary theories concerning what motivates agency action. WERHAN, *supra* note 6, at 6. First, the public interest theory which “posits that agencies act in order to further public values and the general good, as either the legislature or agency officials have defined them. According to this view, Congress creates agencies as a means of addressing public problems that existing institutions . . . have been unable to resolve.” *Id.* Second, the interest group theory views agency decisions as a trade-off for preferential treatment pressed on the agency by interest groups. *Id.* at 7. “According to interest group theory, the decision-making process of agency does not provide a forum for public deliberation, but rather a field of competition among interested parties.” *Id.* Third, the public choice theory uses an “economic model to explain public policymaking. According to public choice theory, agency action is a ‘good’ that is distributed in a regulatory ‘market’ according to the laws of supply and demand.” *Id.*

27. *Id.* at 5.

agencies in two basic forms. First, Congress can create executive agencies which “are designed to be responsive to the political and policy direction of the president.”<sup>28</sup> Second, Congress can create independent agencies which “are somewhat insulated from presidential control.”<sup>29</sup> “Independent agencies generally are led by a collegial group of individuals . . . whose membership is closely balanced between the two major political parties.”<sup>30</sup>

Depending on the authority given to the agency by Congress, a single agency may possess power comparable to that of all three traditional branches of government.<sup>31</sup> It is common for a single agency to have the power to create a rule through rulemaking, a process akin to legislative lawmaking, as well as the power to issue an order through adjudication, a process akin to a judicial trial.<sup>32</sup> This consolidation of legislative, judicial, and executive power in a single agency is often at the forefront of criticisms of the administrative state.<sup>33</sup>

Traditionally, the President’s primary domestic function is to enforce acts of Congress as evidenced by the “take Care that the Laws be faithfully executed”<sup>34</sup> clause in Article II of the Constitution.<sup>35</sup> Due to the endless number of laws, it is impossible for the President to personally oversee their execution. To remedy this, Congress vests “authority to administer statutory programs in a federal agency . . . rather than in the president. In the administrative state, agency officials, not the [P]resident, primarily exercise the executive power.”<sup>36</sup> By and large, the President fulfills his constitutional duty to “take Care that the Laws be faithfully executed”<sup>37</sup> in a managerial sense “by overseeing how administrative agencies carry out their statutory authority.”<sup>38</sup>

Clearly, Congress plays a vital role in the creation of administrative agencies. However, creating agencies is not the only role Congress plays in perpetuating the growth of the administrative state. Congress also bolsters the administrative state through abdication of its legislative power to the President who uses the administrative agencies to do his bidding. This

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28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 48.

32. *Id.*

33. *Id.*

34. U.S. CONST. art. II, § 3.

35. WERHAN, *supra* note 6, at 81.

36. *Id.*

37. U.S. CONST. art. II, § 3.

38. WERHAN, *supra* note 6, at 81.

exchange can be seen through an examination of *Trump v. Hawaii* and the Trade Expansion Act.

## II. *TRUMP V. HAWAII* AND THE TRADE EXPANSION ACT'S ROLE IN FORTIFYING THE ADMINISTRATIVE STATE

This part will discuss two illustrations where Congress abdicated its legislative power to the President, who in turn empowered the administrative state to act on the President's behalf. First, in *Trump v. Hawaii*, President Trump utilized power delegated to him by Congress under the Immigration and Nationality Act to empower administrative agencies to make findings of facts regarding entry of foreign nationals into the United States.<sup>39</sup> Second, under the Trade Expansion Act of 1962, President Trump directed administrative agencies to investigate and report on the effects of imports of steel mill articles on national security.<sup>40</sup>

### A. *Trump v. Hawaii*

In *Trump v. Hawaii*, the Supreme Court held that a presidential proclamation placing entry restrictions on foreign nations from eight countries was a valid exercise of presidential authority under the Immigration and Nationality Act.<sup>41</sup> *Trump v. Hawaii* is an ideal illustration of the main principal of this Comment. It shows Congress's explicit delegation of legislative authority to the President via statute and the President's use of that authority to empower the administrative state to act under his direction.

#### 1. President Trump's Use of Congress's Authority

Congress passed the Immigration and Nationality Act on June 27, 1952.<sup>42</sup> Under the Act, "foreign nationals seeking entry into the United States undergo a vetting process to ensure that they satisfy the numerous requirements for admission [to the United States]."<sup>43</sup> The Act "establishes numerous grounds on which an alien abroad may be inadmissible to the

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39. *Trump v. Hawaii*, 138 S. Ct. 2392, 2403, 2407–09 (2018).

40. Proclamation No. 9704, 83 Fed. Reg. 11619 (Mar. 8, 2018); Proclamation No. 9705, 83 Fed. Reg. 11625 (Mar. 8, 2018); *Presidential Proclamation on Adjusting Imports of Steel into the United States*, WHITE HOUSE (Mar. 8, 2018), <https://perma.cc/V6VL-XD2K>.

41. *Trump*, 138 S. Ct. at 2399–416.

42. 8 U.S.C §§ 1101–1537 (2012).

43. *Trump*, 138 S. Ct. at 2403.



United States and ineligible for a visa.”<sup>44</sup> The President was vested with authority to restrict the entry of aliens when he finds that their entry “would be detrimental to the interests of the United States.”<sup>45</sup>

Relying on Congress’s delegation of power, President Trump signed Executive Order No. 13769 (EO-1) on January 27, 2017.<sup>46</sup> “EO-1 directed the Secretary of Homeland Security to conduct a review to examine the adequacy of information provided by foreign governments about their nationals seeking to enter the United States.”<sup>47</sup> While that review occurred, the order suspended the entry of foreign nationals from “Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen” for ninety days.<sup>48</sup> These seven countries had previously been “identified by Congress or prior administrations as posing heightened terrorism risks.”<sup>49</sup> EO-1 was immediately challenged, and the United States “District Court for the Western District of Washington entered a temporary restraining order blocking the entry restrictions.”<sup>50</sup> On appeal, the United States “Court of Appeals for the Ninth Circuit denied the Government’s request to stay that order.”<sup>51</sup>

In response to the litigation, President Trump revoked EO-1 and replaced it with Executive Order No. 13780 (EO-2).<sup>52</sup> EO-2 still directed a worldwide review but cited “investigative burdens on agencies and the need to diminish the risk that dangerous individuals would enter [the United States] without adequate vetting.”<sup>53</sup> Likewise, EO-2 restricted the entry of foreign nationals for ninety days, but limited its reach to six of the seven countries listed in EO-1, excluding Iraq.<sup>54</sup> Those six countries had been chosen because each “is a state sponsor of terrorism, has been significantly

44. *Id.* at 2407 (citing 8 U.S.C. § 1182(a)(1)–(3)(C) (2012)).

45. *Id.* (citing 8 U.S.C. § 1182(f) (2012)) (internal quotations omitted).

46. *Id.* at 2403; *see also* Exec. Order No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017).

47. *Trump*, 138 S. Ct. at 2403 (discussing Exec. Order No. 13769, 82 Fed. Reg. at 8977). The Department of Homeland Security is a relatively new Cabinet-level department. It was created as a response to the September 11, 2001, terrorist attacks as a means to safeguard the United States against terrorism and respond to any further attacks. The Department began its efforts to minimize threat even days after the terrorist attacks; however, Congress did not actually pass the Homeland Security Act until November 2002. *Creation of the Department of Homeland Security*, DEP’T OF HOMELAND SECURITY (Sept. 24, 2015), <https://perma.cc/3HL2-5RAZ>.

48. *Trump*, 138 S. Ct. at 2403.

49. *Id.* (discussing Exec. Order No. 13769, 82 Fed. Reg. at 8978).

50. *Id.*

51. *Id.*

52. *Id.* at 2403–04 (discussing Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 9, 2017)).

53. *Id.* at 2404 (discussing Exec. Order No. 13780, 82 Fed. Reg. at 13213).

54. *Id.*

compromised by terrorist organizations, or contains active conflict zones.”<sup>55</sup> However, EO-2 allowed for case-by-case-waivers of foreign nationals from the listed countries, whereas EO-1 did not.<sup>56</sup> Unsurprisingly, EO-2 was promptly challenged in federal district court.<sup>57</sup> Soon after, the “District Courts for the Districts of Maryland and Hawaii entered nationwide preliminary injunctions barring enforcement of [EO-2], and the respective Courts of Appeals upheld those injunctions.”<sup>58</sup>

Then, after the worldwide review, President Trump issued Proclamation No. 9645 on September 24, 2017.<sup>59</sup> “The Proclamation . . . sought to improve vetting procedures by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present ‘public safety threats.’”<sup>60</sup> To support this stated purpose, the Proclamation restricted entry of nationals from eight countries—Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen—“whose systems for managing and sharing information about their nationals [President Trump] deemed inadequate.”<sup>61</sup>

55. *Id.* (quoting Exec. Order No. 13780, 82 Fed. Reg. at 13210).

56. *Id.*

57. *Id.*

58. *Id.* The Supreme Court “granted certiorari and stayed the injunctions—allowing the entry suspension to go into effect—with respect to foreign nationals who lacked a ‘credible claim of a bona fide relationship’ with a person or entity in the United States. The temporary restrictions in EO-2 expired before [the Supreme Court] took any action, and [the Court] vacated the lower court decisions as moot.” *Id.* (citations omitted).

59. *Id.* (citing Proclamation No. 9645, 82 Fed. Reg. 45161, 45162 (Sept. 24, 2017)).

60. *Id.* (citations omitted).

61. *Id.*; Proclamation No. 9645, 82 Fed. Reg. at 45162. The Supreme Court described the Proclamation as follows:

The Proclamation described how foreign states were selected for inclusion based on the review undertaken pursuant to EO-2. As part of that review, the Department of Homeland Security (DHS), in consultation with the State Department and several intelligence agencies, developed a ‘baseline’ for the information required from foreign governments to confirm the identity of individuals seeking entry into the United States, and to determine whether those individuals pose a security threat. The baseline included three components. The first, ‘identity-management information,’ focused on whether a foreign government ensures the integrity of travel documents by issuing electronic passports, reporting lost or stolen passports, and making available additional identity-related information. Second, the agencies considered the extent to which the country discloses information on criminal history and suspected terrorist links, provides travel document exemplars, and facilitates the U. S. Government’s receipt of information about airline passengers and crews traveling to the United States. Finally, the agencies weighed various indicators of national security risk, including whether the foreign state is a known or potential terrorist safe haven and whether it regularly declines to receive returning nationals following final orders of removal from the United States.

The State of Hawaii, Dr. Ismail Elshikh, John Doe #1, John Doe #2, and the Muslim Association of Hawaii sued President Trump challenging the Proclamation in the United States District Court for the District of Hawaii.<sup>62</sup> Plaintiffs argued that the Proclamation was not a valid exercise of President Trump's authority under the Immigration and Nationality Act (INA).<sup>63</sup> Specifically, Plaintiffs asserted that the INA confers "only a residual power to temporarily halt the entry of a discrete group of aliens engaged in harmful conduct."<sup>64</sup> Plaintiffs further contended that the Proclamation was in conflict with another provision in the INA<sup>65</sup> because the Proclamation discriminated against an individual based on an individual's nationality.<sup>66</sup> "Under the [INA], foreign nationals seeking entry into the United States undergo a vetting process to ensure that they satisfy the numerous requirements for admission."<sup>67</sup> The Act "establishes numerous grounds on which an alien abroad may be inadmissible to the United States and ineligible for a visa."<sup>68</sup>

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DHS collected and evaluated data regarding all foreign governments. It identified 16 countries as having deficient information-sharing practices and presenting national security concerns, and another 31 countries as 'at risk' of similarly failing to meet the baseline. The State Department then undertook diplomatic efforts over a 50-day period to encourage all foreign governments to improve their practices. As a result of that effort, numerous countries provided DHS with travel document exemplars and agreed to share information on known or suspected terrorists.

Following the 50-day period, the Acting Secretary of Homeland Security concluded that eight countries—Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen—remained deficient in terms of their risk profile and willingness to provide requested information. The Acting Secretary recommended that the President impose entry restrictions on certain nationals from all of those countries except Iraq.

*Trump*, 138 S. Ct. at 2404–05 (internal citations omitted).

62. *Trump*, 138 S. Ct. at 2406. The Court also noted:

The State [of Hawaii] operates the University of Hawaii system, which recruits students and faculty from the designated countries. The three individual plaintiffs are U.S. citizens or lawful permanent residents who have relatives from Iran, Syria, and Yemen applying for immigrant or nonimmigrant visas. The Association is a nonprofit organization that operates a mosque in Hawaii. Plaintiffs challenged the Proclamation—except as applied to North Korea and Venezuela . . . .

*Id.*

63. *Id.*

64. *Id.* at 2408.

65. 8 U.S.C. § 1152(a)(1)(A) (2012).

66. *Trump*, 138 S. Ct. at 2408.

67. *Id.* at 2403.

68. *Id.* at 2407.

“The District Court granted a nationwide preliminary injunction barring enforcement of the entry restrictions.”<sup>69</sup> The Court of Appeals for the Ninth Circuit affirmed and held that the Proclamation exceeded the President’s authority under the INA.<sup>70</sup> The Supreme Court’s analysis centered on the text of the INA and the expansive power Congress granted the President through the statute.<sup>71</sup> Through the INA, Congress gave the President expansive discretion regarding immigration policy and enforcement. The Court stated that the plain language of the INA “grants the President broad discretion to suspend the entry of aliens into the United States.”<sup>72</sup> The text of the INA emanates “deference to the President in every clause” of the statute.<sup>73</sup> Congress, through the INA, “entrust[ed] to the President the decisions whether and when to suspend entry . . . for how long [to suspend entry] . . . and on what conditions [to suspend entry into the United States].”<sup>74</sup>

The Court explained that the Proclamation landed well within Congress’s comprehensive delegation to the President.<sup>75</sup> The sole prerequisite in the text of the INA is that the President make a finding of fact “that the entry of the covered aliens ‘would be detrimental to the interests of the United States.’”<sup>76</sup> President Trump satisfied Congress’s lone prerequisite by empowering and utilizing the administrative state through administrative agencies. He utilized administrative agencies, such as the Department of Homeland Security, to conduct a comprehensive evaluation of all countries’ compliance with the information and risk assessment baseline.<sup>77</sup>

The Court went on to say that “[t]he President lawfully exercised that discretion based on [the President’s] findings—following a worldwide, multi-agency review—that entry of the covered aliens would be detrimental to the national interest.”<sup>78</sup> It explained that “plaintiffs’ attempts to identify a conflict with other provisions in the INA, and their appeal to the statute’s

69. *Id.* at 2406.

70. *Id.* The Court of Appeals for the Ninth Circuit concluded that the provision of the INA in question only “authorize[d] only a ‘temporary’ suspension of entry in response to ‘exigencies’ that ‘Congress would be ill-equipped to address.’” *Id.* (quoting *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017)).

71. *See id.* at 2407–08.

72. *Id.* at 2408.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* (quoting 8 U.S.C. § 1182(f) (2012)).

77. *See id.*

78. *Id.*

purposes and legislative history, fail to overcome the clear statutory language.”<sup>79</sup>

The Court ultimately determined that the “Proclamation [was] squarely within the scope of Presidential authority under the INA.”<sup>80</sup> The Court’s lengthy discussion and narrow analysis of the text of the INA make it apparent that the sole reason the President had the power to make the Proclamation was because in passing the INA, Congress granted expansive discretion to the President to make findings of fact.

## *2. President Trump’s Empowerment of Administrative Agencies*

To exercise the authority Congress granted to the President under the INA, and thus restrict the entry of aliens, President Trump had to make findings of fact as to what would be detrimental to the interests of the United States.<sup>81</sup> To make the findings of fact, President Trump used the administrative state by empowering various administrative agencies to make his findings of fact for him.<sup>82</sup> To do so, the President directed the agencies to conduct “a worldwide review of whether, and if so what, additional information would be needed from each foreign country to assess adequately whether their nationals seeking to enter the United States pose a security or safety threat.”<sup>83</sup>

Specifically, in EO-1, President Trump directed the Secretary of Homeland Security to submit to him a list of countries recommended for inclusion in the Proclamation.<sup>84</sup> The list “would prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested until they do so or until the Secretary of Homeland Security certifies that the country has an adequate plan to do so, or has adequately shared information through other means.”<sup>85</sup> “As part of the review, the Secretary of Homeland Security established global requirements for information sharing in support of immigration screening and vetting. The Secretary of Homeland Security developed a comprehensive set of criteria and applied it to the information-sharing practices, policies, and capabilities of foreign governments.”<sup>86</sup> Thereafter,

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79. *Id.*

80. *Id.* at 2415.

81. *Id.*

82. Both the President and administrative agencies are within the Executive Branch.

83. Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017).

84. *Id.* at 45163.

85. *Id.* (quoting Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 9, 2017)).

86. *Id.* at 45161.

the Secretary of State engaged with the countries in an effort to address deficiencies and achieve improvements.<sup>87</sup>

The President further delegated the power given to him from Congress under the INA to the Secretary of Homeland Security.<sup>88</sup> The Secretary was tasked with determining what countries remained deficient with respect to their identity-management and information-sharing capabilities.<sup>89</sup> Some of these countries also had a “significant terrorist presence within their territory.”<sup>90</sup> President Trump then adopted that determination, which ultimately resulted in his finding that “absent the measures set forth in this proclamation, the immigrant and nonimmigrant entry into the United States of persons described in section 2 of this proclamation would be detrimental to the interests of the United States, and that their entry should be subject to certain restrictions, limitations, and exceptions.”<sup>91</sup> President Trump wholly relied on Homeland Security’s determination that Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen continued to have inadequate identity-management protocols to the extent that entry restrictions and limitations were set in place.<sup>92</sup>

*Trump v. Hawaii* illustrates the crux of the argument of this Comment. Congress creates and empowers administrative agencies through enabling statutes, and feeds administrative agencies by deferring to the President. Congress bolsters and grows the administrative state through its abdication of legislative power to the President who, in turn, utilizes the administrative agencies as tools to accomplish his mission. One need look no further than Congress’s passage of the INA, which delegated the President the authority to make a finding of fact on immigration. The President used that authority to empower administrative agencies to investigate and act, which lead to the administrative agencies making findings of fact for the President.

Congress’s deference to the President has led to further destruction of the separation of powers doctrine. Instead of the branches of government clashing as the framers’ intended, Congress’s willingness to relinquish its legislative power to the President has created a monopoly of federal power in the administrative state. This “gradual concentration of the several powers in the same department” is exactly what James Madison, the Constitution’s leading architect, warned about in Federalist No. 51.<sup>93</sup> “The accumulation

87. *Id.*

88. The Secretary of Homeland Security consulted with the Secretary of State and the Attorney General. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 45161–62.

92. *Id.* at 45164.

93. *See supra* note 10 and accompanying text.

of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”<sup>94</sup> *Trump v. Hawaii* is not the only recent example of this. The Trade Expansion Act is yet another example of Congress’s delegation of power to the President which results in the manipulation of the administrative state.

### B. *The Trade Expansion Act*

Despite Article I of the United States Constitution vesting Congress with the power to regulate international trade,<sup>95</sup> Congress explicitly delegated trade policy authority to the President in the Trade Expansion Act of 1962.<sup>96</sup> The stated purposes of this Act were threefold. First, the Act was passed “to stimulate the economic growth of the United States and maintain and enlarge foreign markets for the products of United States agriculture, industry, mining, and commerce.”<sup>97</sup> Second, the Act was supposed to “strengthen economic relations with foreign countries through the development of open and nondiscriminatory trading.”<sup>98</sup> Third, the Act was supposed “to prevent Communist economic penetration.”<sup>99</sup>

In its unamended form, the Act gave the President broad discretion to make a finding of fact—to determine whether any existing duties or import restrictions were unduly burdensome on foreign trade.<sup>100</sup> Once the President made that finding, Congress gave him the authority to enter into trade

94. THE FEDERALIST NO. 47 (James Madison).

95. U.S. CONST. art. I, §8, cl. 3. “Article I of the Constitution gives Congress the ‘Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States,’ and ‘To regulate Commerce with foreign Nations, and among the several States.’” Caitlain Devereaux Lewis, *Presidential Authority over Trade: Imposing Tariffs and Duties*, CONG. RES. SERV. (Dec. 9, 2016), <https://perma.cc/DGB2-8BQ3> (last visited Feb. 9, 2019).

96. Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872 (codified as amended at 19 U.S.C. § 1801 (2012)) [hereinafter Trade Expansion Act].

97. *Id.* § 102.

98. *Id.* “The Trade Expansion Act of 1962 was widely regarded as the most important legislation passed by the 87th Congress. It was also President Kennedy’s largest and most satisfying legislative victory in his first two years in office. The new Act gave the President more tariff-cutting authority than had ever been granted by Congress to a President. It embodied new trade policy concepts and was designed to match the architecture of new world trade patterns.” *The Trade Expansion Act*, CQ ALMANAC (1962) <https://perma.cc/D2UT-N2PQ>.

99. Trade Expansion Act § 102.

100. Trade Expansion Act § 201(a).

agreements, adopt import restrictions, proclaim modifications of any existing duty, and a number of other options.<sup>101</sup>

The Act has been amended various times since 1962. In its current state, the Act relies on administrative agencies to work in conjunction with, and for, the President.<sup>102</sup> The Act states that if the Secretary of Commerce “finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security,” then the President is authorized by Congress to take such other acts as the President deems necessary to adjust the imports of such article so that such imports “will not threaten to impair the national security.”<sup>103</sup> This is quintessentially Congress delegating broad authority to the President.

On March 8, 2018, President Trump issued a Proclamation entitled “Adjusting Imports of Steel into the United States.”<sup>104</sup> This Proclamation stated that the Secretary of Commerce investigated and submitted a report to President Trump on the “effect of imports of steel mill articles . . . on the national security of the United States under section 232 of the Trade Expansion Act of 1962.”<sup>105</sup> The Proclamation detailed the Commerce Secretary’s findings including the Secretary’s opinion that steel articles were “being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States.”<sup>106</sup> The Proclamation stated that the Secretary determined that the “present quantities of steel articles imports and the circumstances of global excess capacity for producing steel are ‘weakening our internal economy,’ resulting in the persistent threat of further closures of domestic steel production facilities and the ‘shrinking ability to meet national security production requirements in a national emergency.’”<sup>107</sup>

Based on the Secretary’s recommendations, and in accordance with Congress’s explicit delegation of power under the Trade Expansion Act, President Trump “decided to adjust the imports of steel articles by imposing a 25 percent ad valorem tariff on steel articles . . . .”<sup>108</sup> President Trump’s

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101. *Id.* The Act also gave the President authority to continue existing duty-free or excise treatment. § 201(a)(2).

102. § 222.

103. 19 U.S.C. § 1862(b)(3)(A), (c)(1)(A)(ii).

104. Proclamation No. 9705, 83 Fed. Reg. 11625 (Mar. 8, 2018).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 11626. The proclamation also cited Section 604 of the Trade Act of 1974, as amended (19 U.S.C. § 2483) which “authorize[d] the President to embody in the Harmonized Tariff Schedule of the United States (HTSUS) the substance of acts affecting import



Proclamation thereafter explicitly empowered various administrative agencies to execute duties in relation to the Proclamation.<sup>109</sup> The President specifically empowered the Secretary of Commerce, in consultation with the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the United States Trade Representative, and a number of other agencies, to “provide relief from the additional duties set forth . . . in this proclamation for any steel article determined not to be produced in the United States.”<sup>110</sup>

The power to make the finding of fact regarding whether a steel article should be excluded from the duties in the Proclamation was delegated to the Secretary of Commerce.<sup>111</sup> The President also empowered the agencies listed above to “continue to monitor imports of steel articles” and “review the status of such imports with respect to the national security.”<sup>112</sup>

The Trade Expansion Act is yet another example of Congress explicitly delegating its authority to the President. The President used this delegation to impose a twenty-five percent ad valorem tax and empower the administrative state to investigate and monitor the situation as well as make additional findings of fact regarding whether a steel article should be excluded from the proclamation.<sup>113</sup> Congress’s abdication of its legislative power to the President undermines the separation of powers doctrine that our nation was founded upon. That issue is compounded by deference given to the President and administrative agencies by the Judicial Branch.

### III. JUDICIAL REVIEW: UNDERSTANDING *TRUMP V. HAWAII* AGAINST THE BACKDROP OF *YOUNGSTOWN* AND *CHEVRON*

As is apparent from *Trump v. Hawaii*, the Court relied on Congress’s explicit grant of power to the President to make findings of fact.<sup>114</sup> This led the Court to the determination that the “Proclamation [was] squarely within the scope of Presidential authority under the INA.”<sup>115</sup> Such an outcome is not surprising when viewed against the backdrop of *Youngstown Sheet & Tube Co.*, arguably the most influential opinion regarding presidential power.

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treatment, and actions thereunder, including the removal, modification, continuance, or imposition of any rate of duty or other import restriction.” *Id.*

109. *Id.* at 11627.

110. *Id.*

111. *Id.*

112. *Id.* at 11628.

113. *Id.* at 11626.

114. *See generally* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

115. *Id.* at 2415.

*A. Youngstown Sheet & Tube Co.*

In 1951, during the height of the Korean War, a dispute arose between various steel companies, including Youngstown Sheet & Tube Company, and their employees surrounding the possible terms of new collective bargaining agreements.<sup>116</sup> After failed resolutions, the United Steelworkers of America notified the steel companies of its intention to strike as soon as the bargaining agreement expired.<sup>117</sup> In an attempt to avoid the strike, President Truman “referred the dispute to the Federal Wage Stabilization Board to investigate and make recommendations for fair and equitable terms of settlement.”<sup>118</sup> When no settlement was reached, “the Union gave notice of a nation-wide strike” set to begin on April 9, 1952.<sup>119</sup> “The indispensability of steel as a component of substantially all weapons and other war materials led [ ] President [Truman] to believe that the proposed work stoppage would immediately jeopardize our national defense . . . .”<sup>120</sup> With these considerations in mind, President Truman issued Executive Order 10340.<sup>121</sup> Pursuant to this order, Secretary of Commerce, Charles Sawyer, took possession of the steel mills to ensure their continued operation.<sup>122</sup> Even though President Truman sent two messages to Congress shortly after issuing the executive order, Congress took no action in response to the seizure.<sup>123</sup>

The steel companies sued the Secretary arguing that the seizures were “not authorized by an act of Congress or by any constitutional provisions.”<sup>124</sup> The companies asked the district court to “declare the orders of the President and the Secretary invalid and to issue preliminary and permanent injunctions restraining their enforcement.”<sup>125</sup> The United States argued that “a strike disrupting steel production for even a brief period would so endanger the well-being and safety of the Nation that the President had ‘inherent power’ . . . ‘supported by the Constitution, by historical precedent, and by

116. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952).

117. *Id.* The existing bargaining agreement was set to expire on December 31, 1951. *Id.*

118. *Id.* at 582–83 (footnote omitted).

119. *Id.* at 583.

120. *Id.*

121. *Id.*

122. *Id.* To do so, the Secretary of Commerce issued his own orders requiring the presidents of seized steel companies to serve as operating managers. *Id.* The presidents “were directed to carry on their activities in accordance with regulations and directions of the Secretary.” *Id.*

123. *Id.* The Solicitor General acknowledged that Congress never authorized the seizure. *Id.* at 648.

124. *Id.* at 583.

125. *Id.*

court decisions.”<sup>126</sup> A preliminary injunction issued by the trial court temporarily precluded the Secretary from seizing the steel plants and from acting under the executive order’s “purported authority”.<sup>127</sup>

The Supreme Court granted certiorari in the interest of having these issues promptly decided.<sup>128</sup> The Court defined the key issue as whether the seizure was within the “constitutional power of the President.”<sup>129</sup> In a six-to-three decision the majority declared the seizure of the steel mills unconstitutional.<sup>130</sup> The Court started its analysis by stating that the President’s power “must stem either from an act of Congress or from the Constitution itself.”<sup>131</sup> It then summarily determined that there was no act from Congress.<sup>132</sup> The Court further held that the President’s military power as Commander in Chief of the Armed Forces did not extend to the taking of private property “in order to keep labor disputes from stopping production.”<sup>133</sup>

*Youngstown Sheet & Tube Co.* has become “[t]he leading case addressing the scope of inherent presidential power—the ability of the president to act without express constitutional or statutory authority.”<sup>134</sup> Although Justice Black wrote the majority opinion, seven different opinions were written because the Justices in the majority disagreed on when the President may act without express constitutional or statutory authority.<sup>135</sup>

Justice Robert Jackson’s concurring opinion is arguably the most influential opinion regarding presidential power because he identified three zones of presidential authority.<sup>136</sup> First, he identified zone one: “When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”<sup>137</sup> Justice Jackson emphasized that the level of power the President would have if acting in zone

126. *Id.* at 584.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 588.

131. *Id.* at 585.

132. *Id.* Although there were two statutes that authorized the President to take both personal property and real property, the Government admitted that the conditions of these statutes were not met and the executive order was not rooted in either statute. *Id.* at 585–86.

133. *Id.* at 587.

134. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 352 (5th ed. 2011).

135. *Id.* at 353.

136. *Id.* at 355.

137. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

one by stating, “In these circumstances, and in these only, may he be said . . . to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power.”<sup>138</sup>

The second zone is “[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”<sup>139</sup> Finally, the third zone is “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”<sup>140</sup> Zone three’s “presidential actions will be allowed only if the law enacted by Congress is unconstitutional.”<sup>141</sup> Justice Jackson determined that President Truman’s seizure of the steel mills fit into zone three because “Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure.”<sup>142</sup>

When viewing *Trump v. Hawaii* against the backdrop of Justice Jackson’s zone one, it reinforces the Court’s conclusion that President Trump was within the scope of his presidential authority because he was acting pursuant to an express authorization of Congress. The passage of the INA resulted in the President’s power being enhanced to its maximum strength—the President possessed all of his authority as president, in addition to all the power Congress delegated him.

After Congress passed the INA, it was within President Trump’s power to use the discretion Congress delegated to him to make findings of fact related to immigration. President Trump empowered the administrative state by using agencies as tools to accomplish his goal to suspend entry of foreign nationals from certain countries. *Youngstown Sheet & Tube Co.* and *Trump v. Hawaii* serve as reminders that once Congress has explicitly delegated power to the President, courts have very little power in reviewing presidential acts that are in accord with Congress’s delegation of power. Without meaningful judicial review, the Executive Branch is relatively unchecked and free to use the administrative state as the President sees fit. This, however, is not the only way in which the Judicial Branch defers to

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138. *Id.* at 635–37.

139. *Id.* at 637.

140. *Id.*

141. CHEMERINSKY, *supra* note 134, at 355.

142. *Youngstown*, 343 U.S. at 639 (Jackson, J., concurring).

Congress's delegation of its powers. The Judicial Branch also uses *Chevron* deference to defer to administrative agencies' determinations.

*B. Judiciary's Deference to Administrative Agencies: Chevron*

Although the plaintiffs in *Trump v. Hawaii* attacked the President's actions not the agencies', courts reviewing agency determinations have little power in overturning agency decisions due to the landmark decision of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>143</sup> After *Chevron*, the Judicial Branch defers to an agency's decision so long as that agency decision is merely rational.<sup>144</sup>

In *Chevron*, the Court created a new standard of judicial deference to administrative agency decisions. In 1977, Congress amended the Clean Air Act because certain states failed to satisfy the national air-quality standards established by the EPA in the Clean Air Act.<sup>145</sup> The amended Clean Air Act "imposed strict permitting requirements on those who desired to build or to modify a major stationary source of air pollution" in the noncompliant states.<sup>146</sup> The EPA adopted a rule that allowed "a State to adopt a plantwide definition of the term stationary source."<sup>147</sup> The EPA's adoption of this rule allowed "an existing plant that contain[ed] several pollution-emitting devices [to] install or modify one piece of equipment without meeting the permit conditions if the alteration [did] not increase the total emissions from the plant."<sup>148</sup> Essentially, the EPA's rule allowed plants to circumvent the permit process by allowing states "to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble.'"<sup>149</sup>

The United States Court of Appeals for the District of Columbia admitted that Congress had not explicitly defined what it intended "stationary source" to mean.<sup>150</sup> However, the court determined that the purpose of the program was to improve air quality and that the EPA's bubble concept was contrary to that purpose.<sup>151</sup> Therefore, the court set aside the

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143. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

144. *Id.* at 844.

145. *Id.* at 839–40.

146. WERHAN, *supra* note 6, at 374.

147. *Chevron*, 467 U.S. at 840 (internal quotations omitted).

148. *Id.*

149. *Id.*

150. *Id.* at 841.

151. *Id.* at 841–42.

EPA regulations and refused to defer to the agency's definition of a stationary source.<sup>152</sup>

The Supreme Court reversed the D.C. Circuit "chastising the lower court . . . for over-reaching its review powers."<sup>153</sup> The Court stated that "[t]he basic legal error of the Court of Appeals was to adopt a static judicial definition of the term 'stationary source' when it had decided that Congress itself had not commanded that definition."<sup>154</sup> The Court went on to create the test that would become known as *Chevron* deference:

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.

"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." If 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>155</sup>

The Court ultimately redefined judicial review by creating a two-step analysis.<sup>156</sup> First, a court must determine "whether Congress has directly spoken to the precise question at issue."<sup>157</sup> If so, the court must give effect to Congress's expressed intent.<sup>158</sup> Second, if Congress is silent or ambiguous on the issue, the court will determine whether the agency's interpretation "is based on a permissible construction of the statute."<sup>159</sup> The agency's interpretation must merely be reasonable.<sup>160</sup>

152. *Id.* at 842.

153. WERHAN, *supra* note 6, at 375.

154. *Chevron*, 467 U.S. at 842.

155. *Id.* at 842–44 (footnotes omitted) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

156. *See id.*

157. *Id.* at 842.

158. *See id.*

159. *Id.* at 843.

160. *Id.* at 845.

*Chevron* deference has ultimately given broad power to an agency's interpretation of legislation. At the same time, it has minimized courts' ability to impose its own judgment in face of an agency's reasonable interpretation.<sup>161</sup> *Chevron* has been criticized as reversing the traditional scope of review doctrine and making agencies, rather than courts, the authoritative interpreter of ambiguous provisions in the statutes they administer.<sup>162</sup> It is apparent through both *Youngstown* and *Chevron* that courts have very little power to interject once Congress has delegated its power to the President who then relies on that power to act.

This process culminates into a vicious cycle of Congress delegating its power to the President, the President using that authority to empower the administrative state, and the Judicial Branch deferring to both the acts of the President and the decisions made by administrative agencies. This collusive system is the opposite of the framers' intent. The national government designed by the framers "ensured that the branches would regularly clash."<sup>163</sup> This clashing was orchestrated to prevent tyranny and promote liberty.<sup>164</sup>

#### CONCLUSION

Considering *Trump v. Hawaii* and the Trade Expansion Act, Congress continues to contribute to the growth and empowerment of the administrative state. Congress does this by abdicating its legislative power to the President, who then utilizes the administrative agencies as tools to do his bidding. The discussion of *Youngstown* and *Chevron* illustrated the typical response the Judicial Branch has to both acts of the President and the decisions made by administrative agencies—deference. Unfortunately, the culmination of these actions has emboldened the administrative state and enabled it to flourish.

This is contrary to the framers' design for our national government. "The framers of the Constitution aimed to create a national government that was energetic, but limited, effective, yet safe. Their goal, in short, was to produce a balanced government."<sup>165</sup> This balanced approach was fueled by the framers' fear of tyrannical power, as seen in the English government and fought against during the American Revolution.<sup>166</sup> However, the administrative state has disintegrated the lines delineating America's

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161. *See id.*

162. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005).

163. MICHAELS, *supra* note 2, at 7.

164. *Id.*

165. WERHAN, *supra* note 6.

166. *Id.*

balanced government, and Congress has been at the front of the pack. By vesting its power to enact rules into administrative agencies Congress has caused the administrative state to grow.

The “vice of the modern administrative state is that Congress often ‘punts’ on the policy direction—proclaiming amorphous goals, such as achieving ‘clean air’ or ‘clean water’—and then gives administrative agencies virtually unchecked authority to ‘fix’ the problem.”<sup>167</sup> As a consequence, “[a]gencies [have] become de facto lawmakers, determining policy matters of national consequence.”<sup>168</sup>

Evidence of Congress’s “punting” is found in statistics comparing the relatively small number of laws Congress passed to the extraordinary number of regulations administrative agencies promulgated. At the end of 2016, “Federal departments, agencies, and commissions issued 3,853 rules . . . while Congress passed and the president signed 214 bills into law—a ratio of 18 rules for every law.”<sup>169</sup> If the framers were to see the American government as it is now, overrun by the administrative state, it is no doubt that their minds would turn to Federalist No. 47: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”<sup>170</sup>

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167. Mark Pulliam, *Dismantling the Administrative State*, LAW & LIBERTY (Sept. 12, 2018), <https://perma.cc/2UFQ-E95F>.

168. *Id.*

169. Clyde Wayne Crews Jr., *How Many Rules and Regulations Do Federal Agencies Issue?*, FORBES (Aug. 15, 2017, 12:48 PM), <https://perma.cc/6Y9J-QJ7T>.

170. THE FEDERALIST NO. 47 (James Madison).

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