

COMMENT

IMMIGRANTS MAKE AMERICA GREAT: CONTEMPORARY OVERVIEW OF THE EXECUTIVE AUTHORITY FOR REGULATION OF U.S. IMMIGRATION POLICY

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INTRODUCTION

The celebrated Broadway musical *Hamilton* makes it clear that immigrants make America great.¹ European settlers created the thirteen colonies on the east coast of the United States by leaving their home country in search of a better life across the Atlantic.² Additionally, all of the Founding Fathers themselves were technically immigrants—they were not officially Americans until they won the fight for independence from Britain.³ Further, early Americans brought unwilling immigrants to the nation's shores for purposes of slave labor.⁴ Even after the United States was well on its way to becoming a model of liberal democracy, immigration was encouraged for a variety of reasons from the intellectual to the mundane.⁵ Immigration is also important to the U.S. because it stimulates economic growth, increases innovation, and positively contributes to government finances, among other constructive impacts.⁶

However, immigration policy has changed drastically over the past several years due to President Donald Trump's stark change of course. These policies

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1. See *Did You Know That Our Founding Fathers Were All Immigrants?*, NEW AM. ECON. (Feb. 15, 2016), <https://www.newamericaneconomy.org/feature/did-you-know-that-our-founding-fathers-were-all-immigrants/> [<https://perma.cc/B6LE-FKXJ>] [hereinafter Founding Fathers].

2. *American colonies: British and United States History*, ENCYCLOPEDIA BRITANNICA (Nov. 5, 2019), <https://www.britannica.com/topic/American-colonies> [<https://perma.cc/QV6J-6LBF>].

3. Founding Fathers, *supra* note 1.

4. Howard S. Myers, *America's Immigration Policy - Where We Are and How We Arrived: An Immigration Lawyer's Perspective*, 44 MITCHELL HAMLINE L. REV. 743, 745 (2018).

5. See David Bier, *The Founding Fathers Favored a Liberal Immigration System*, CATO INST. (May 27, 2018), <https://www.cato.org/blog/founding-fathers-favored-liberal-immigration-system> [<https://perma.cc/HM5N-EWN3>]; Myers, *supra* note 4.

6. Ryan Nunn et al., *A dozen facts about immigration*, THE BROOKINGS INST. (Oct. 9, 2018), <https://www.brookings.edu/research/a-dozen-facts-about-immigration/> [<https://perma.cc/5LNG-RJTS>].

include the potential completion of a border wall between the U.S. and Mexico, the intended deportation of immigrants who came to the U.S. under the protection of the Deferred Action for Childhood Arrivals Act (DACA), restriction of travel (and work visas) for primarily Muslim countries, increased refugee screening, increased review of other visa programs, and increased limits to legal immigration.⁷ While President Trump is not entirely responsible for all recent changes to immigration, his more aggressive tactics have had a profound impact on many overarching U.S. policies, from foreign relations to our economy.

This Comment will provide a general overview of contemporary U.S. immigration policy, especially President Trump's implemented restrictions, and the power of the executive branch to regulate immigration. It will also address the various interpretations of authority for regulation including limits within the context of national security, judicial limits/expansion of executive authority, and a strict interpretation of regulatory authority per the U.S. Constitution. Finally, this Comment will assess which, if any, of these interpretations is correct, as well as potential implications on further developments for immigration policy as a whole.

PART I—IMMIGRATION POLICY IN THE UNITED STATES AND EXECUTIVE AUTHORITY TO REGULATE CONTEMPORARY BACKGROUND

As stated in the introduction, immigration has been indispensable to the development of the United States as a nation. Americans have also developed a very high opinion of themselves as members of an exclusive club where outsiders are not welcome.⁸ By the time candidate Trump began his presidential campaign, it appears that tensions regarding immigration had reached a veritable boiling point. In fact, during both of his election campaigns, Trump has made a variety of claims regarding immigration from building a border wall that Mexico would fund to demonizing immigrants as ruthless invaders intent on destroying American ideals.⁹ His divisive rhetoric has fueled feelings of hatred toward immigrants, with many Americans claiming that immigrants are receiving government welfare assistance for free or are otherwise taking advantage of benefits that should be reserved for “true” citizens, not to mention claiming that

7. Kimberly Amadeo, *Donald Trump on Immigration*, THE BALANCE (Dec. 16, 2019), <https://www.thebalance.com/donald-trump-immigration-impact-on-economy-4151107> [<https://perma.cc/S7UX-BHWH>].

8. Bill Ong Hing, *Entering the Trump ICE Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253 (2018).

9. *Promises about Immigration on Trump-o-meter*, POLITIFACT, <https://www.politifact.com/truth-o-meter/promises/trumpometer/subjects/immigration/>, (last visited May 7, 2020) [<https://perma.cc/VZG8-LJWL>]; John Fritze, *Trump used words like 'invasion' and 'killer' to discuss immigrants at rallies 500 times: USA Today analysis*, USA TODAY (Aug. 8, 2019 10:18 AM), <https://www.usatoday.com/story/news/politics/elections/2019/08/08/trump-immigrants-rhetoric-criticized-el-paso-dayton-shootings/1936742001/> [<https://perma.cc/8P4B-9XPB>].

such persons are criminals or even terrorists.¹⁰ Trump thus based many of his purported immigration policies on addressing these factually inaccurate sentiments.

In reality, most immigrants, especially from Mexico or South America, likely come to the U.S. seeking better job opportunities, to be with already established family members, to go to school, or to escape persecution, among other reasons.¹¹ Other immigrants may have first come to the U.S. with authorization (such as through work visas) that simply expired; this also means that such persons are generally still paying taxes while they are unable to use the same benefits as legal residents.¹² Further, the criminal statistics offered in support of deportations/the curbing of immigration overall have been largely disproven by executive agencies themselves.¹³ Legal immigration is not a quick process, so many immigrants enter the country in search of a better life illegally because it is simply easier to do.¹⁴ Illegal immigrants also pick up work in the U.S. in jobs that Americans tend to avoid, such as bussing tables at restaurants, construction, or working in a slaughterhouse.¹⁵ The next section will review contemporary immigration policy as implemented between the most recent two Presidents as well as some of the reasons for specific changes where applicable.

10. *Mainstreaming the Hate: the Anti-Immigrant Movement in the U.S.: An Overview of the Anti-Immigrant Movement in the U.S.*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/the-anti-immigrant-movement-in-the-us#an-overview-of-the-anti-immigrant-movement-in-the-us>, (last visited May 7, 2020) [<https://perma.cc/6NJB-DFFH>].

11. *Why Do People Migrate to the US?*, USAFACTS, <https://usafacts.org/articles/why-do-people-immigrate-us/>, (last visited May 7, 2020) [<https://perma.cc/FV6X-N6NN>].

12. *H-2B – Seasonal Workers*, ELKIND, ALTERMAN, HARSTON PC, <https://www.eahimmigration.com/practice-areas/for-employers/h-2b-seasonal-workers> [<https://perma.cc/JBW4-N87Z>]; *Immigration and Taxes: Who has to Pay U.S. Taxes?*, FINDLAW, <https://immigration.findlaw.com/visas/immigration-and-taxes-who-has-to-pay-u-s-taxes.html> [<https://perma.cc/WRZ8-7YMM>]; Vivian Yee, Kenan Davis and Jugal K. Patel, *Here's the Reality About Illegal Immigrants in the United States*, NY TIMES (Mar. 6, 2017), <https://www.nytimes.com/interactive/2017/03/06/us/politics/undocumented-illegal-immigrants.html> [<https://perma.cc/LC5K-5LR3>].

13. *See Fiscal Year 2018 ICE Enforcement and Removal Operations Report*, U.S. IMMIGRATION AND CUSTOMS ENF'T, <https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf> [<https://perma.cc/6A83-2698>].

14. *Why Don't Immigrants Apply for Citizenship?*, AM. IMMIGRATION COUNCIL (Nov. 25, 2019), <https://www.americanimmigrationcouncil.org/research/why-don%E2%80%99t-they-just-get-line> [<https://perma.cc/6FRS-BQPT>].

15. John Burnett, *Employers Struggle With Hiring Undocumented Workers: 'You Cannot Hire American Here'*, NATIONAL PUBLIC RADIO (Aug. 21, 2019 5:00 AM), <https://www.npr.org/2019/08/21/752336132/employers-struggle-with-hiring-undocumented-workers-you-cannot-hire-american-her> [<https://perma.cc/QFM4-SG9S>].

Contemporary Immigration Policy: 2001-2019
Immigration Under President Barack Obama

Generally speaking, crackdowns on illegal immigration began well before President Barack Obama took office.¹⁶ In 2003, the U.S. Customs and Border Protection (CBP) agency was introduced as a component of the Department of Homeland Security (DHS), which was created as a response to the 9/11 attacks.¹⁷ The U.S. Immigration and Customs Enforcement (ICE) agency was also formed to address additional concerns related to immigration within U.S. borders.¹⁸ It appears that, at least before 2001, illegal entrants to the U.S. from Mexico were generally allowed to return voluntarily without punishment.¹⁹

Of course, the entire atmosphere of security and law enforcement changed across the country following 9/11 and has not been the same since. Thus, increased criminal deportations appeared to rise around the same time.²⁰ However, the majority of these “criminal” deportations were a result of entrants being in the U.S. illegally—not because they had committed other crimes on U.S. soil.²¹ When President Obama took office, he inherited robust new legal mechanisms for curbing illegal immigration and related concerns.²²

In 2008, the Obama administration (re)implemented the Secure Communities Program which seeks to identify immigrants who are deportable for violations of U.S. immigration law.²³ Jails that participate in the program must submit fingerprint data of arrestees to both criminal and immigration databases to determine if an arrestee has violated immigration policy.²⁴ ICE can then decide whether to take the arrestee into federal custody.²⁵ This program thus empowers

16. Muzaffar Chishti et al., *The Obama Record on Deportations: Deporter in Chief or Not?*, MIGRATION POL. INST. (Jan. 26, 2017), <https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not> [<https://perma.cc/QKW9-CFLT>].

17. *Id.*

18. *Id.*

19. *Id.*; Ted Hesson, *Five Ways Immigration System Changed After 9/11*, ABC NEWS (Sept. 13, 2012), https://abcnews.go.com/ABC_Univision/News/ways-immigration-system-changed-911/story?id=17231590 [<https://perma.cc/6FNV-5ZYA>].

20. Chisti et al., *supra* note 16.

21. *Id.*

22. *Id.*

23. *Id.*; *Secure Communities: A Fact Sheet*, Am. Immigration Council (Nov. 29, 2011), <https://www.americanimmigrationcouncil.org/research/secure-communities-fact-sheet> [<https://perma.cc/NG22-DJRE>]. Note: the Trump administration also restarted the program on January 25, 2017 via executive order (Executive Order: Enhancing Public Safety in the Interior of the United States, THE WHITE HOUSE (Jan. 25, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/>; Julie Rheinstrom, *Current Developments: One Hundred Days of President Trump’s Executive Orders*, 31 GEO. IMMIGR. L.J. 433 (2017).

24. Chishti et al., *supra* note 16.

25. *Id.*

local law enforcement agencies to also become part of ICE's mission of enforcing federal immigration policy.²⁶ Since 2005, privatization of federal detention centers increased under the new immigration policies which has led to longer detentions over time.²⁷

The Obama administration focused immigration policy on the removal of recent southern border crossers and individuals who were convicted of (serious) crimes instead of those who had simply violated immigration policy.²⁸ Obama also used executive action to give protected status to immigrants who came to the U.S. as children and reduced deportations of people living inside the U.S. interior.²⁹ While approximately five million people were deported during Obama's presidency, these removals included primarily those individuals who did not have strong ties in the U.S. or those who committed serious criminal offenses.³⁰

Immigration Under President Donald Trump

A 2019 CNN article suggests President Trump has completely rejected Obama's focused policy on removals and simply wants to deport as many people as possible.³¹ Under the Trump administration, ICE detentions have risen to a daily average of over 45,000 and initial bookings have exceeded 274,798 at ICE facilities as of 2019 (if persons seeking to enter the U.S. have not already been forced to wait in Mexico as opposed to being held at a U.S. facility).³² Although these facilities were in use by the Obama administration, the conditions inside have grown increasingly worse, likely due to the increased length of detentions.³³ Additionally, Trump has pushed for a one-hundred percent prosecution rate for all cases of illegal entry or re-entry.³⁴ Trump immigration policy has also increased separation of children from their parents when the parents are taken into criminal custody, whether or not they have committed serious crimes aside from being in the U.S. illegally.³⁵

Trump's policies on immigration can generally be defined by the three executive orders he implemented shortly after taking office. These executive

26. Hesson, *supra* note 19.

27. *Id.*

28. Chishti et al., *supra* note 16. Zachary B. Wolf, *Yes, Obama deported more people than Trump but context is everything*, CNN (July 13, 2019), [<https://perma.cc/8MC6-BYEC>].

29. Wolf, *supra* note 28.

30. *Id.*

31. *Id.*

32. Bea Bischoff, *Immigrant Detention Conditions Were Atrocious Under Obama. Here's Why They're So Much Worse Under Trump*, SLATE (June 25, 2019, 4:08 PM), [<https://perma.cc/R5DK-MK4Y>]; Priscilla Alvarez, *US is sending migrants back to Mexico. Thousands have missed a court date*, CNN (Dec. 20, 2019, 11:58 AM), [<https://perma.cc/7HUN-3S3K>].

33. *Id.*

34. *Id.*

35. *Id.*

orders include (1) Border Security and Immigration Enforcement Improvements; (2) Enhancing Public Safety in the Interior of the United States; and (3) Protecting the Nation from Terrorist Attacks by Foreign Nationals.³⁶ The first order essentially seeks to provide DHS with the authority to build a border wall, increases deportation resources, authorizes longer/continued detentions of immigrants prior to court proceedings, and authorizes expedited deportations for certain individuals without a hearing before a judge.³⁷ The second order is more expansive and includes policies such as prioritizing specific categories of individuals for removal from the U.S., restricting funding for “sanctuary cities,” and reimplementation of the Secure Communities Program.³⁸ Finally, the third order constitutes a “travel ban” by suspending the visas for individuals from a number primarily Muslim nations, severely limits or halts specific aspects of the U.S. refugee program, and authorizes DHS to implement an exit-entry tracking system.³⁹

Additional policies that Trump has at least suggested include an expansion of his travel ban to six new countries, a “public charge” rule to limit legal immigration for those who use government resources, and the rescission of the DACA/DAPA programs implemented by President Obama, among others.⁴⁰ However, several of these policies have been challenged in the courts or are in the process of judicial review thus leading to actual or potential limits on their scope.⁴¹ While the ultimate implementation of Trump’s immigration policies remains to be seen, it is clear that they will continue to have onerous effects on due process, human rights, and sociopolitical considerations for years to come.

36. *President Trump’s Executive Orders on Immigration and Refugees*, CTR. FOR MIGRATION STUDIES, <https://cmsny.org/trumps-executive-orders-immigration-refugees/> (last visited May 2, 2020) [<https://perma.cc/H4TC-HT2Y>][hereinafter *Executive Orders*].

37. Rheinstrom, *supra* note 23.

38. *Id.*

39. *Executive Orders*, *supra* note 36.

40. Daniel Denvir, *The Deep Roots of Trump’s Anti-Immigrant Policies*, JACOBIN (Feb. 2, 2020), <https://jacobinmag.com/2020/02/donald-trump-anti-immigration-policies-history-muslim-ban-racism> [<https://perma.cc/PKU8-LDM6>]; Monsy Alvarado and Alan Gomez, *New Donald Trump immigration policy could ban thousands of African immigrants from US*, USA TODAY (Feb. 24, 2020, 5:07 PM), <https://www.usatoday.com/story/news/politics/elections/2020/02/24/new-trump-travel-ban-could-keep-african-immigrants-out-us/4861122002/> [<https://perma.cc/RX53-ZSMU>]; Camilo Montoya-Galvez, *Trump’s controversial “public charge” rule takes effect, reshaping legal immigration*, CBS NEWS (Feb. 24, 2020, 7:33 PM), <https://www.cbsnews.com/news/trump-public-charge-rule-immigration-green-card-public-assistance/> [<https://perma.cc/64KX-QN46>]; Nicole Narea, *The battle over DACA comes to the Supreme Court*, VOX (Nov. 11, 2019, 7:20 AM), <https://www.vox.com/policy-and-politics/2019/11/11/20943523/daca-supreme-court-trump-dreamers-immigration> [<https://perma.cc/D3JC-3QED>].

41. NAREA, *supra* note 40.

*The Power of the Executive Branch on Immigration
and the Executive Order Dilemma*

The U.S. Constitution itself does not speak specifically on immigration—that is to say there are no provisions within the text that pertain directly to what is or is not considered lawful immigration or what power exists to regulate it.⁴² However, this does not mean that the government is powerless when it comes to immigration regulation. For instance, if Congress passes laws regulating immigration on the grounds of national security (within reason) one would have a difficult time rebutting the authority to do so, at least based on existing precedent.⁴³

To that end, there is also no specific enumerated power given to the executive regarding the restriction of immigration.⁴⁴ However, the Immigration Act of 1990 provides some regulatory authority to the Department of Homeland Security (DHS)—an executive branch agency—and then arguably, by extension, to the president.⁴⁵ Then, through executive order, Trump has further expanded that authority to achieve political aims that he otherwise might not have had if he attempted to push them through Congress.⁴⁶

The use of executive orders by U.S. presidents is by no means a new strategy. The President has broad authority to issue executive directives, including executive orders, despite the fact that there is no specific constitutional provision authorizing this power.⁴⁷ Executive orders are derived from implied executive power and have been used by almost all U.S. presidents.⁴⁸ According to the National Constitution Center, executive orders have the same general power as federal law; they tell government agencies how to act and therefore set policy.⁴⁹ Congress or the Supreme Court could thus modify or strike down an executive order if either branch feels that it exceeds the scope of presidential authority.⁵⁰

42. Ilya Somin, *Does the Constitution Give the Federal Government Power Over Immigration?*, CATO UNBOUND (Sept. 12, 2018), [<https://perma.cc/XC72-7L5T>].

43. Congress has the authority to provide for the common defense as written in the Preamble of the U.S. Constitution. However, one could make the argument here that this means protecting the country against foreign enemies—not foreign immigrants.

44. *Id.*

45. Matt Ford, *The President's Extreme Immigration Powers*, THE NEW REPUBLIC (Jan. 9, 2018), [<https://perma.cc/57SS-BZD5>].

46. *Id.*

47. *Executive Orders 101: What are they and how do Presidents use them?*, NAT'L CONST. CTR. (Jan. 23, 2017), <https://constitutioncenter.org/blog/executive-orders-101-what-are-they-and-how-do-presidents-use-them/> [<https://perma.cc/XX26-YA57>].

48. *Id.*

49. Kevin Liptak, *Executive orders: What Trump can and can't do*, CNN (Jan. 23, 2017, 9:09 PM), <https://www.cnn.com/2017/01/23/politics/donald-trump-executive-orders-executive-actions/index.html> [<https://perma.cc/A7D5-N94H>]; *Executive Orders 101*, *supra* note 47.

50. *Executive Orders 101*, *supra* note 47; *Executive Orders*, THE HERITAGE FOUND., <https://www.heritage.org/political-process/heritage-explains/executive-orders> (last visited May 7,

Another limitation is that executive orders cannot reverse existing legislation and could be withdrawn by the next president.⁵¹ Additionally, Trump may have attempted to use an executive order to end birthright citizenship, which is a constitutional provision.⁵² As with most constitutions, changes of such provisions are most likely only permissible through a predetermined amendment process.⁵³ Thus, executive orders are a means of setting executive policy in the now, even if they might be limited in scope as well as duration.

PART II – ANALYSIS OF THE SOURCES OF AUTHORITY TO REGULATE IMMIGRATION THE NATIONAL SECURITY ARGUMENT

One of the strongest arguments for broad presidential authority to regulate immigration directly comes from the context of national security. This argument derives from the President's sole power to determine foreign policy⁵⁴ as well as statutory authority to control immigration. When it comes to immigration, “. . . the executive branch is tasked with ensuring that U.S. enforcement policies are consistent with the Nation's broader foreign policy.”⁵⁵ Therefore, many presidents, including President Trump, have used national security as the vehicle by which they create and enforce certain policies on immigration.⁵⁶

Since the president is considered to have broad foreign policy as well as national security powers, this context has often been used as the reason for many contemporary law enforcement policies since at least the 1980s.⁵⁷ For one, the president is well within her rights to consider the implications of immigration on national security, especially the security of national borders. Immigration also presents other valid concerns overall—it is important for government officials to know generally who is entering the U.S., when they are entering, when or if they are supposed to leave, and why. The U.S. should also generally have procedures in place to vet foreigners to screen them for potential security concerns. All of

2020) [<https://perma.cc/9TWJ-MQF6>].

51. Liptak, *supra* note 49.

52. Danny Cevallos, *No, Mr. President, an executive order can't change the Constitution. Here's why*, NBC NEWS (Nov. 1, 2018, 4:26 PM), <https://www.nbcnews.com/politics/donald-trump/no-mr-president-executive-order-can-t-change-constitution-here-n929806> [<https://perma.cc/BP28-CNVM>].

53. *See generally* RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS (2019).

54. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

55. Lucy Chauvin, Note, *Evading Constitutional Challenge: DAPA's Implications for Future Exercises of Executive Enforcement Discretion*, 93 IND. L.J. SUPPLEMENT 139, 151 (2018).

56. *See* Chishti et al., *supra* note 16.

57. D'Vera Cohn, *How U.S. immigration laws and rules have changed through history*, PEW RES. CTR. (Sept. 30, 2015), <https://www.pewresearch.org/fact-tank/2015/09/30/how-u-s-immigration-laws-and-rules-have-changed-through-history/> [<https://perma.cc/FV3Z-C8HF>]; note: this source refers to changes to policy related to concerns surrounding illegal immigration and terrorism.

these sorts of considerations are valid, and all countries are empowered to enforce their own national security.

Of course, the prevention of terrorism is the oft used rationale for any national security policy, and that is still true when it comes to immigration. Trump's travel bans tout a national security reasoning for their implementation because the administration believes that stopping the travel of some foreign nationals to the U.S. will protect the country from foreign terrorism.⁵⁸ Unfortunately, there are several problems with this argument in particular: there is no evidence or guarantee that the travel bans will serve their intended purpose; the travel bans have an inherent discriminatory purpose that stereotypes persons of the Muslim faith and could make it more difficult for the U.S. to conduct diplomacy with the countries included in the bans; the travel bans do not address acts of domestic terrorism that are far more likely to occur than foreign-purported terrorism.⁵⁹ However, the U.S. Supreme Court has typically upheld executive policies on national security grounds without evidence that they further those aims.

Judicial Limits/Expansions on Immigration Policy

Generally speaking, the judicial interpretation of executive authority to regulate immigration is confusing at best. The judicial branch has used varying rationales for both reviewing and ruling on the President's enforcement authority over immigration. For instance, at least on the subject of the travel bans, the lower federal courts have generally held that such directives are too broad or unconstitutional on discriminatory or anti-Establishment Clause grounds. However, the Supreme Court has generally upheld the bans on national security as well as rational basis grounds. Thus, a review of judicial policy is necessary to understand why the courts differ so widely on this issue.

First, the Supreme Court often cites *Arizona v. U.S.*, where government purportedly has "broad, undoubted power" to control immigration per Article I of the U.S. Constitution.⁶⁰ However, this case could be interpreted to say that the power to control immigration vests in the legislature or Congress, not the President directly.⁶¹ That is not to say, however, that Congress cannot delegate power to the President—which it has done in the context of immigration through the Immigration and Nationality Act of 1965, as well as through its subsequent

58. *Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States*, THE WHITE HOUSE (Jan. 27, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states-2/> [perma.cc/A8PV-KCPJ].

59. David Chipman, *The Enemy Within: Why Domestic Terrorism Poses a Greater Threat than Foreign Terrorism*, GIFFORDS (Nov. 14, 2019), <https://giffords.org/blog/2019/11/the-enemy-within-why-domestic-terrorism-poses-a-greater-threat-than-foreign-terrorism-blog/> [https://perma.cc/CFV2-T47Y].

60. *Arizona v. United States*, 567 U.S. 387, 394 (2012).

61. *Id.*

amendment, the Immigration Act of 1990.⁶² Currently, the authority of the executive to set immigration policy is somewhat settled. Further, the Supreme Court often turns to *Heckler v. Chaney* in noting that certain enforcement or administrative actions are exempt from judicial review.⁶³ In regard to deportations under Trump specifically, one could argue that the prioritization of persons for removal still brings executive action in line with Congressional intent, thus suggesting that there is no separation of powers issue.⁶⁴

Second, while the lower federal courts generally struck down Trump's travel bands (and their revisions), the Supreme Court reversed these decisions. Citing *Kleindienst v. Mandel*, the Court upheld Trump's authority over immigration stating that if there is a "facially legitimate and bona fide" reason for the action, then that is enough under rational basis review.⁶⁵ In the context of Trump immigration policy, the national security basis for the travel ban was enough for the Court and the government need not provide additional rationale for this determination.⁶⁶ However, this determination in the modern day is in effect a reversal of the precedent set by the *Youngstown Sheet & Tube Co. v. Sawyer* case, where the Court struck down an executive order based arguably on national security grounds.⁶⁷ In any case, it appears that the Supreme Court's decision to uphold certain immigration policies on the grounds of national security creates an expansion of executive authority that may not exist statutorily or constitutionally.

Strict Interpretation of the U.S. Constitution on Immigration

Another interpretation of the executive authority to regulate immigration is that the U.S. Constitution provides no implicit or enumerated power to do so. Generally, the executive cannot assume power that is not expressly provided to it. As stated previously, Congress also possesses the power to delegate statutory authority to the executive, but this power is not absolute. This is where things get tricky. Although Congress has passed legislation pertaining to immigration, there remains a question as to whether the delegation of authority to the executive is permissible and whether the most recent presidential administrations have exceeded the scope of that authority.

For one, some scholars have argued that no one has the power to enforce Trump's executive orders because they could be considered violations of federal law.⁶⁸ Another point is that executive directives themselves arguably circumvent Congress and violate the separation of powers doctrine because they create rules

62. Immigration and Nationality Act of 1990, 8 U.S.C. Ch. 12. (1990).

63. *Heckler v. Chaney*, 470 U.S. 821, 848 (1985); Chauvin, *supra* note 55, at 154.

64. Chauvin, *supra* note 55, at 154.

65. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972); Fatma E. Marouf, *Executive Overreaching In Immigration Adjudication*, 93 TUL. L. REV. 707, 718 (2019).

66. Marouf, *supra* note 65.

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

68. Rheinstrom, *supra* note 23.

or policy that are specifically within the province of Congress.⁶⁹ Additionally, there are Congressional statutes in place regarding immigration but neither those statutes nor the Constitution itself have ever been amended to provide the additional authority that recent administrations have taken in regard to immigration policy.

Even if the executive has the authority to regulate immigration in the manner in which it is currently doing so, there are other alarming considerations that must be addressed. First, assuming that the president has derived legitimate authority from an existing statute or court decision by stating so does not automatically validate that authority. Further, it is clear that the authority to regulate immigration has been ultimately derived from extra-constitutional sources. This creates additional problems when the Supreme Court essentially certifies the executive's power through case law and thus affirms that power each time it is challenged.⁷⁰ While a strict interpretation of the Constitution would implicate concerns across the board for executive policy, it is at least worth noting that the current authority to regulate immigration cannot be found in the text of the supreme law of the land.

PART III – CONCLUSION

As one can see, the executive authority to regulate immigration is not clear. There are multiple interpretations of the source and scope of this authority, and none is without its own concerns. Most importantly, the national security argument that is often made by the Trump administration is not backed by good evidence and has been overused. There are other policies that would best further national security aims that do not involve the increased restriction of travel visas that already have stringent procedures in place to acquire them.⁷¹ There are more pressing concerns regarding national security, such as the prevalence of domestic terrorism or related acts of violence within the U.S., that could be addressed first. Arguably, the travel bans also have a discriminatory intent and will make global diplomacy more difficult if this is not already the case.

Next, while the lower federal courts have often been reluctant to enforce most of Trump's immigration policies, the Supreme Court has not been cautious in applying the purported national security rationale to such policies 'without more.' This has created conflict among the courts overall as to what executive actions are reviewable in the first place, as well as whether the context for specific actions is important. The Supreme Court has arguably moved away from precedent and in effect certified the executive's broad power to regulate immigration regardless of whether the Constitution itself or congressional statutes have properly delegated this authority.

69. Chauvin, *supra* note 55.

70. See generally Shawn E. Fields, *The Unreviewable Executive? National Security and the Limits of Plenary Power*, 84 TENN. L. REV., 731 (2017).

71. *Visitor Visa*, U.S. DEPT. OF ST., <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visitor.html> [<https://perma.cc/AMH4-L4D2>].

Further, the Constitution has not provided the executive with explicit power to regulate immigration. Nor has it implicitly provided the administration with such authority. Therefore, the regulation authority over immigration has been derived from extra-constitutional sources and has been expanded over time, especially in the context of national security. Although there are congressional statutes that provide the executive with some enforcement authority over immigration and the Court has determined that the president has complete authority to shape foreign policy, these rationales should not automatically validate all executive action over immigration.

By its very nature, immigration makes America great. Admittedly, immigrants make America great. Throughout our history, they have made invaluable contributions to our economy, our intellectual pursuits, and our social progress. We must resist the urge to create policies based on divisive rhetoric that neither address the cause of illegal immigration, nor recognizes the inherent human rights of the people affected by such policies. While there is likely no correct approach to applying executive authority to regulate immigration policy, we must at least work to shift its focus to directives that will address the administration's concerns in a workable and impartial manner.