How Far Can The President Go To Overhaul The U.S. Immigration System Without The Blessing of Congress?

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President Obama reiterated his commitment to immigration reform and reproached the House Republicans for their unwillingness to confront this important issue. Potentially, the combination of four factors ─ Pressure from the immigration advocates that the President has done little on the immigration issue; Speaker John Boehner's statement that the House would not vote on immigration legislation this year; the surge of children crossing the southern border (mostly from Mexico and Central American countries of El Salvador, Guatemala, and Honduras); and strategic positioning for the upcoming midterm elections ─ have all led to this recent announcement.

Acknowledging the demise of his more than yearlong effort to enact compromise legislation, President Obama, in a recent speech, said that he would use his executive powers to make potentially sweeping changes to the nation's immigration system without the blessing of Congress. Political and immigration pundits have begun speculating that the actions could be as far-reaching as: (1) expanding the Parole in Place, (2) not counting family members against per country cap, or (3) giving work permits and protection from deportation to millions of immigrants now in the United States.

Although the President announced that he will make sweeping changes to the nation's immigration system, during the same speech, and before that as well, the President, a former Constitutional Law Professor, made it abundantly clear that that he does not prefer taking administrative actions. Rather, he would prefer permanent fixes through bipartisan legislation to rectify the defects that exists in our broken and "defunct" immigration system.

So the real question are: (1) why the President does not like taking administrative actions, (2) why administrative actions are not permanent fixes to the obsolete immigration system, and (3) why he prefers bipartisan legislation to pass the House. The President is well-aware of his constitutional limits. He does not want to cross the executive territory and disturb the division of powers among three branches of the government. The White House fears that going beyond the confines of executive territory may attract rigorous judicial scrutiny which could nullify the President's potential legacy on the immigration issue.

Before analyzing what the President can and can't do using executive powers to overhaul the immigration system, it is important to understand the constitutional limits within which the President and his Principal Officers can and should operate.

In 1952, the United States Supreme Court, in the landmark case of *Youngstown Sheet & Tube Co. v. Sawyer*, established a framework for analyzing whether the President's issuance of an Executive

Order[1] is a valid Presidential Action.[2] This framework established by Justice Robert H. Jackson (in his concurring opinion) has become more influential than the majority opinion authored by Justice Hugo Black, and has since been employed by the courts to analyze the validity of controversial Presidential Actions.[3]

Justice Black, writing for the majority, stated that under the Constitution, "the President's power to see that laws are faithfully executed refuted the idea that he is to be a lawmaker."[4] Specifically, Justice Black stated that Presidential Authority to issue such an Executive Order, "if any, must stem either from an act of Congress or from the Constitution itself."[5] While Justice Black's opinion indicated that he refuted the idea that the President possesses implied constitutional power, four concurring opinions maintained quite the opposite. Of these concurrences, Justice Jackson's has proven to be the most influential. In his concurring opinion, Justice Jackson established a three-tier scheme for analyzing the validity of Presidential Actions in relation to constitutional and congressional authority. Essentially this proposition leads the inextricable conclusion that guidance and support from Congress is more likely to ward off constitutional challenges.

Under the three-tier scheme, the President's authority to act is considered at its maximum when he acts pursuant to an express or implied authorization of Congress because this includes "all that he possesses in his own right plus all that Congress can delegate."[6] Such action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation."[7]

However, where Congress has neither granted nor denied authority to the President, Justice Jackson maintained that the President could still act upon his own independent powers. For this second category, there is a "zone of twilight in which [the President] and Congress may have concurrent authority, or in which distribution is uncertain."[8] Under these circumstances, Justice Jackson observed that congressional acquiescence or silence "may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility," yet "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[9]

In contrast, the President's authority is considered at its "lowest ebb" when he "takes measures incompatible with the express or implied will of Congress ... for he can only rely upon his own

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[1] Presidents have historically utilized various written instruments to direct the executive branch and implement policy. These include executive orders, presidential memoranda, and presidential proclamations.
[2] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
[3] In 1952, President Harry S. Truman, in an effort to avert the effects of a workers' strike during the Korean War, issued an executive order directing the Secretary of Commerce to take possession of most of the nation's steel mills to ensure continued production. This order, challenged by the steel companies, was declared unconstitutional by the Supreme Court in Youngstown.
[4] *Youngstown*, 343 U.S. at 587.
[5] *Id.* at 585.
[6] *Id.* at 635-37 (Jackson, J., concurring).
[7] *Id.*
[8] *Id.* at 637.
[9] *Id.*

constitutional powers minus any constitutional powers of Congress over the matter."[10] He cautioned that examination of Presidential Action under this third category deserved more scrutiny because for the President to exercise such "conclusive and preclusive" power would endanger "the equilibrium established by our constitutional system."[11]

As *Youngstown* case stands for the preposition that President's authority to act is considered at its maximum when he acts pursuant to express or implied authorization of Congress but is considered at its lowest when the President acts on his own constitutional powers without Congress' power. Thus, any Presidential Action without the express or implied authorization of the Congress may either attract more judicial scrutiny under the third tier or land such actions in the "twilight zone" under the second tier. It is difficult for the Executive Branch to overcome judicial scrutiny if Presidential Action falls within the third tier; however, a compelling argument can be presented if such action can be supported by either Congress's acquiescence or silence under the second tier. All in all, to play it safe, Presidential Actions should be further to the express or implied authorization of Congress.

The express authorization will certainly create no issues. But what about implied Congress's authorization? Does that mean that agencies such as Department of Homeland Security ("DHS") are free to make any regulations pursuant to the President's implied authority to act?

This question can be analyzed pursuant to non delegation doctrine. Under the doctrine, a statutory delegation of authority must contain an "intelligible principle" or standard, to guide and control the agency discretion. When there is a statutory standard to which the agency must conform, implementation of the standard is treated as Executive Action even it might resemble legislative action in some respects because it is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded, it is open to judicial review, as well as power of the Congress to modify or revoke the authority entirely.[12] The central question under the intelligible principle test is whether the standard contained in the statute is sufficiently clear and specific to constitute an "intelligible principle". In practice, it almost always is. The Court has almost never invalidated a statute on non delegation grounds.

Besides the "intelligible principle", the *Chevron*[13] deference also works in favor of the agencies when it comes to interpreting ambiguous or silent issues or making of rules to fill any gap left, implicitly or explicitly, by Congress.

Although *Marbury v. Madison,* 5 U.S. 137 (1803), stated that "it is emphatically the province and of judicial depart to say what law is", Courts often defer to agencies construction of the statute they administer. In *Chevron,* the Court laid down a two-step framework to determine whether or not agency action deserves deference. The first step involves determining whether Congress has directly

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[10] *Id.*
[11] *Id.* at 638.
[12] *See INS v. Chadha*, 462 U.S. 919 (1983).
[13] *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984).

spoken to the precise question at issue? If the intent of Congress is clear, that is the end of the matter. Both the Court and agency must give effect to the unambiguously expressed intent of Congress. Under *Chevron's* second step, 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.

While *Chevron* may initially have been intended or expected to apply broadly to all agency interpretation of their statutes, in practice, the Court has limited its application. As a result the threshold question of whether *Chevron* applies has emerged as "Chevron Step Zero."[14] In a series of recent cases the Court has applied *Skidmore*[15] rather than *Chevron* to informal agency action, generally limiting *Chevron* to delegated lawmaking authority which can proved in a variety of ways such as "agency's power to engage in adjudication, or notice or comment rule-making or by some other indication of comparable congressional intent."[16]

In *Skidmore*, the Court articulated a less deferential test for agency interpretation through informal rulings. Specifically, the Court in *Skidmore* articulated the following test: "The weight of the agency's judgment in a particular case will depend upon the *thoroughness* evident in its consideration, the validity of its *reasoning*, its *consistency* with earlier and later pronouncements, and all those factors which give it *power to persuade*, if lacking power to control."[emphasis supplied]

In 2000, the Court in *Christensen v. Harris County*[17] went on to say that "[i]nterpretations such as those in opinion letters— like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law— do not warrant *Chevron-style* deference. However, the Court in *Barnhart v. Walton*, 535 U.S. 212 (2002), held that it will give *Chevron* deference to agency's long-standing interpretation even though agency previously reached its interpretation through means less formal than "notice and comment" ruling and it recently enacted those regulations.

Based on foregoing legal and complicated background, it is important to analyze what the President can and can't do through administrative actions to change the immigration system. Can the President change the laws already in place and send the Central American kids to their home countries without giving them an opportunity to present an Asylum claim? Can he change the per country Immigrant Visa (commonly referred to "Green Card") limits? Is it alright if the President directs DHS to change its interpretation so as to not count family members towards the per country quota for the Green Card? Can the President unilaterally authorize the continuation of DACA? and Is it alright for him/Executive Branch to craft a blanket Executive Action legalizing all undocumented immigrants?

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[14] *See* Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain,* 89 GEO. L.J. 833, 836 (2001).
[15] *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944).
[16] *See United States v. Mead Corp.*, 533 U.S. 218 (2001).
[17] 529 U.S. 576 (2000).

As stated by Prof. Yale-Loehr[18], and reported by CNN on July 2, 2014, "[t]he President cannot create an immigration policy willy-nilly, whole cloth. He cannot create an immigration law. He has to get Congress." Prof. Yale-Loehr went on to add that "[t]he president can't bar people from applying for political asylum. Those guidelines are set by the United Nations Refugee Convention, which the United States has signed."

Similarly, the President cannot change the per country Green Card quota or implement blanket executive action legalizing all undocumented immigrants on his own because there is already a law in place and taking such action will result in bypassing the Congress and disturbing the constitutional safeguards of bicameralism and presentment. However, he can surely continue DACA or continue to provide more protection to undocumented immigrants using agency's Prosecutorial Discretion within the parameters already established by the Congress.

To the question of whether the DHS can change its long-standing interpretation of counting family members towards the per country Green Card quota. He can certainly do so but, if challenged, the President/DHS may have a tough time sustaining such a battle. A recent article written by seasoned and well-respected immigration attorneys, Gary Endelman and Cyrus D. Mehta, published on ILW.COM, pointed out that there is enough ambiguity in the existing law and the Executive Branch can use that ambiguity to change its interpretation.

While Gary and Cyrus pointed that once the agency, DHS, changes its interpretation, it might be entitled to *Chevron* deference. They are right to a certain extent[19] but that has <u>not</u> always been the case. A study of 1014 Supreme Court cases, between 1984 and 2006 in which an agency's statutory interpretation was at issue, found that the Court applied *Chevron* in only 8.3% of those cases, and it gave the agency no deference in 53.6% of the cases.[20] Further, note that not all agency interpretations are given *Chevron* deference. The United States Supreme Court has held that only interpretations arrived at through certain procedures (such as formal adjudications and notice-and-comment rulemaking or by some other indication of a comparable congressional intent) qualify for *Chevron* deference. Above all, DHS will face an even greater challenge defending the new interpretation when the same agency has been interpreting the law differently for so many years.

Based on the foregoing, it can be plainly concluded that, though the President can certainly use his authority to maneuver within the boundary that has already been set by the Congress through enacted legislation, he definitely needs Congress by his side to achieve Comprehensive Immigration Reform ("CIR"). CIR's success rests alongside the general proposition that the authority to amend or make laws and provide "intelligible principle" rests with the Congress. Thus, unless the President has the support of Congress, his administrative actions could never be more than patches created merely to fix the broken immigration system. Certainly, the President does not want his authority to be at its "lowest ebb" by taking measures incompatible with the express or implied will of Congress

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[18] Prof. Yale-Loehr is one of the nation's preeminent authorities on U.S. immigration and asylum law.

[19] *See Barnhart v. Walton*, 535 U.S. 212 (2002); and *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007).

[20] *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008).

and attract more judicial scrutiny through a microscope as such measures risk disturbing the constitutional safeguards of bicameralism and presentment.