

# CONSTRAINT THROUGH DELEGATION: THE CASE OF EXECUTIVE CONTROL OVER IMMIGRATION POLICY

CRISTINA M. RODRÍGUEZ†

## ABSTRACT

*This Article proposes recalibrating the separation of powers between the political branches in the context of their regulation of immigration law's core questions: how many and what types of immigrants to admit to the United States. Whereas Congress holds a virtual monopoly over formal decisionmaking, the executive branch makes de facto admissions decisions using its discretionary enforcement power. As a result of this structure, stasis and excessive prosecutorial discretion characterize the regime, particularly with respect to labor migration. Both of these features exacerbate pathologies associated with illegal immigration and call for a structural response. This Article contends that Congress should create an executive branch agency, marked by indicia of independence, to set visa policy—an avenue increasingly contemplated by reformers. Though it may seem counterintuitive, delegation of greater authority can help constrain executive power by substituting a transparent process, subject to monitoring, for decisionmaking that occurs hidden from view. Delegation can also help overcome limitations in the*

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† Professor of Law, NYU School of Law, Henry E. Stimson Visiting Professor of Law, Harvard Law School. I am a non-resident fellow at the Migration Policy Institute in Washington, D.C., which has advocated the creation of a Standing Commission on Labor Markets, Economic Competitiveness, and Immigration. The views expressed in this Article, however, are my own. This Article draws from my coauthored work with Adam B. Cox, *The President and Immigration Law*, and is informed by numerous conversations we have had, as well as his insightful comments on the Article itself. Any misguided suggestions or observations in this piece are my own. I also have benefitted greatly from comments from and conversations with Bruce Ackerman, Rachel Barkow, Stephen Legomsky, Jerry Mashaw, Hiroshi Motomura, Nicholas Parrillo, Matthew Stephenson, Susan Rose-Ackerman, and participants in the *Duke Law Journal's* Administrative Law Symposium and the Boston University School of Law Faculty Workshop. I am extremely grateful for the excellent research assistance of Rebecca Krauss, Philip Mayor, Alexander Parachini, and Kevin Zhao.

*legislative process that contribute to the current regime's dysfunction, making immigration policy more efficient and effective. The Refugee Act of 1980 provides a parallel that is helpful in thinking through what it would mean to delegate ex ante admissions power to the executive.*

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## INTRODUCTION

In *The President and Immigration Law*,<sup>1</sup> Adam Cox and I explore the relationship between executive and legislative decisionmaking in the immigration context, with a view to understanding how constitutional responsibility has been allocated between the political branches for answering “immigration policy’s core questions: what types of noncitizens, and how many, should be admitted to and permitted to reside in the United States.”<sup>2</sup> Though statements of congressional primacy in relation to core policy matters

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1. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009).

2. *Id.* at 462.

exist in Supreme Court dicta<sup>3</sup> and have been repeated during legislative debates,<sup>4</sup> the actual allocation of powers between the two branches, as a matter of practice, has been considerably more complex.<sup>5</sup> *The President and Immigration Law* demonstrates through analysis of historical and contemporary instances of interaction between the branches that joint and sometimes competitive resolution of specific immigration problems, including refugee crises<sup>6</sup> and domestic labor shortages,<sup>7</sup> has determined the contours of the separation of powers dynamically.

More specifically, *The President and Immigration Law* elucidates two important features of the separation of powers in immigration law. First, as a formal matter, the power to make decisions regarding the core questions of immigration law has indeed come to reside with Congress,<sup>8</sup> which maintains a monopoly on setting the numbers and types of visas issued each year. Second, however, the president exercises similar power over core immigration policy as a de facto matter, albeit indirectly and in a manner obscured from scrutiny, primarily through prosecutorial discretion or the use of discretionary enforcement power.<sup>9</sup> The article concludes with an analysis of the

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3. See, e.g., *Galvan v. Press*, 347 U.S. 522, 531 (1954) (“[T]hat the formulation of [immigration] policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.”).

4. See, e.g., *Immigration: Hearings on H.R. 7700 and 55 Identical Bills to Amend the Immigration and Nationality Act, and for Other Purposes Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 88th Cong. 392 (1964) (statement of Rep. Feighan, Chairman, Subcomm. No. 1, H. Comm. on the Judiciary) (“Mr. Secretary, does your proposal [to create an Immigration Board to allocate visas] suggest that Congress is inadequate for the task of establishing a clear and all-inclusive immigration policy?”); *id.* (testimony of Dean Rusk, Secretary of State of the United States) (“No, Mr. Chairman. Both under the Constitution and under the practices of our system of government, it is for the Congress to establish the basic policy and the basic legislation.”); *id.* at 423 (statement of Rep. Feighan) (“Mr. Attorney General, to what extent does the administration proposal call upon Congress to divest itself of its traditional authority under decisions of the Supreme Court for regulating immigration into the United States?”).

5. For a detailed discussion of the dynamics of cooperation and competition that have unfolded between Congress and the executive, specifically in relation to the operation of the Bracero guest worker program, the management of Haitian and Cuban refugee crises, and the formulation of contemporary enforcement policy, see Cox & Rodríguez, *supra* note 1, at 483–528.

6. *Id.* at 492–509.

7. *Id.* at 485–91.

8. See *id.* at 483–84, 519–28; see also *id.* at 465–83 (discussing the extent to which congressional monopoly appears in court doctrine).

9. *Id.* at 510–30.

dysfunctions created by this de facto power, which include not only nontransparent decisionmaking, but also the perpetuation of illegal immigration. The article proposes that Congress address these dysfunctions through new approaches to institutional design, calling for “vertical integration”<sup>10</sup> within the executive of authority over admissions and deportation policy.<sup>11</sup> This integration would require Congress to delegate authority to the president to make core immigration determinations formally through ex ante procedures—that is, to set visa numbers and types—rather than informally through back-end enforcement decisions. This change would thus shift certain decisions from the exclusive control of the legislative process to the realm of administrative law and process.<sup>12</sup>

This Article considers in greater detail what that shift might look like and argues that delegation would advance two important objectives. First, the delegation of ex ante authority to the president promises to advance the objective outlined in *The President and Immigration Law*—the constraint of prosecutorial discretion. Second, the delegation would improve the accuracy and quality of the decisionmaking process surrounding labor immigration by breaking through the stasis that currently bedevils the system.<sup>13</sup> This analysis is salient for the field of administrative law generally, because it demonstrates that delegating more power to the executive can in some cases constrain executive discretion, counterintuitive as this proposition might seem. Second, for the immigration field, this exploration underscores that departing from the conventional wisdom of congressional primacy through institutional reform could introduce much-needed flexibility and responsiveness into the system of immigrant screening.

Part I advances the justification for delegation by considering what an ideal immigrant-admissions process would look like and why the ideal framework requires departure from the status quo. Part II

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10. *Id.* at 537.

11. This focus on labor migration is warranted by the nature of the problems being addressed, but this shift in policy could affect the other streams of immigration into the United States: family-based immigration—the largest component of the system—and refugee admissions. Effects on the former are far more likely than on the latter, however, because refugee selection has operated in an independent sphere since at least 1980, after Congress passed the Refugee Act. For further discussion of these interrelationships, see *infra* notes 79–95 and accompanying text.

12. Cox & Rodríguez, *supra* note 1, at 537–46.

13. For a discussion of the problem of stasis, see *infra* notes 26–35 and accompanying text.

addresses the design question. Given the objectives outlined in Part I, what should be the role for each of the three key actors in the administrative drama: the president, Congress, and the bureaucracy? Second, what should the agency or commission decisionmaking structure look like? In answering these questions, Part II draws parallels to other instances of delegation, primarily the refugee-selection system created by the Refugee Act of 1980, which provides a rich example of how the executive can participate in setting core immigration policy. As the experience with the Refugee Act reveals, a crucial design question involves determining the optimal degree of insulation from politics that a new agency should have in order to ensure efficiency and effectiveness. Given that this insulation must be balanced against the need for accountability to the public, Part II also explores how much political control over the agency ought to exist and whether Congress or the president should be the primary political actor in control. Part III focuses on the feasibility of the proposal. As a threshold matter, the question of whether Congress will be willing to give up its formal monopoly must be addressed, but the more important feasibility question ultimately will be whether a new agency or commission is likely to succeed in addressing the dysfunctions that *The President and Immigration Law* and other commentators have identified.

Because of the number of design questions involved, and given that each design choice depends on how the other choices are made, providing a comprehensive blueprint for the new agency is beyond the scope of this Article. But the preferred strategy should be for Congress to create an independent agency or commission subject to the requirements of the Administrative Procedure Act and additional congressional controls, including report-and-wait requirements and deadlines. To maintain independence, the commission should be located outside existing immigration agencies, but the commission's decisionmaking process should include consultation with the Departments of Labor, State, and Homeland Security. The framework statute for the agency ought to include requirements that the agency set the number of visas for labor immigration by a certain date in the fiscal year and that the agency base its visa-limit judgments on collection and evaluation of particular types of data, along with the public comments submitted during notice-and-comment procedures. This combination of features should help ensure that the agency sets visa limits that correspond with the evolving empirical reality but remains attentive to public opinion and

interest group preferences in a highly charged regulatory and political context. By calling for delegation, this Article ultimately advances the idea, often obscured in political debates, that immigration policy requires technical and data-driven determinations, along with moral and value judgments.

## I. JUSTIFICATION

For the sake of simplicity, and because the impetus for this proposal arises from dynamics related to labor migration and the attendant problem of illegal immigration, this Article focuses on how an agency or commission might channel labor migration, especially migration by low-skilled workers. To understand why the current separation of powers dynamic in immigration law calls for a delegation experiment, it is important to first conceptualize an optimal decisionmaking process. An ideal structure to govern labor migration would balance two basic objectives—flexibility and stability—while remaining attentive to the need for accountability.<sup>14</sup>

### A. *The Systemic Ideal*

The regime governing labor migration should be flexible and capable of evolving along with the country's economic and demographic needs. At the same time, the regime must be relatively stable and predictable, both to allow employers and other economic actors to plan and manage their expectations, and to build public confidence in and acceptance of the system as a whole. These objectives of responsiveness and stability may be in tension with one another, but this tension can be softened. Responsiveness to facts on the ground can help ensure predictability, and stability does not necessarily require that admissions numbers remain constant, only that they reflect evolving needs in a nonarbitrary manner. The salient point for the purposes of this Article is that the decisionmaking

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14. The reformulation of the system that governs labor migration will likely have an impact on the family regime and other dimensions of immigration policy. Assuming that the number of immigrants the United States can realistically admit (for political or other reasons) is within a fixed range between five hundred thousand and one million entrants per year, the creation of a new decisionmaking structure with the potential to increase the number of economic migrants will put pressure on the family and refugee regimes. The reformulation of labor policy might thus prompt a debate about whether some of the family categories, such as brothers and sisters and adult children, ought to be eliminated. But to address the limitations of the current decisionmaking structure for channeling labor migration cleanly, I leave aside consideration of how to manage these tradeoffs.

structure for immigration policymaking ought to be capable of balancing these objectives.

Creating a flexible system equipped to respond to changing circumstances will help promote efficiency and economic growth and create capacity for preventing illegal immigration through non-enforcement-oriented means, thereby helping to mitigate the negative effects of such immigration on U.S. workers and secure ongoing public confidence in the regime.<sup>15</sup> To be flexible, the system must be capable of responding to facts on the ground. The system should be able to adapt to fluctuations in the U.S. labor market,<sup>16</sup> as well as to changes in the economic and demographic circumstances outside the United States that help shape migratory flows, particularly in the American hemisphere.<sup>17</sup> Determining the number and types of immigrants to admit does depend upon value judgments concerning who should become part of the polity, on what terms, and with what effects on existing residents—the so-called “membership decision.”<sup>18</sup> But the process also has a technical dimension that requires data-based projections about market dynamics and future economic and social needs. Regulating immigration effectively, therefore, demands a system equipped to evolve in response to the sociology and economy of migration.

Predictability, on the other hand, requires avoiding dramatic fluctuations in rules. A predictable system will be somewhat insulated from day-to-day political pressures, whether in the form of interest group lobbying or the anti-immigrant, restrictionist shocks that occasionally arise from the electorate. Predictability not only allows employers and workers to manage their expectations, but also helps

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15. Cf. Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 73 LAW & CONTEMP. PROBS. (forthcoming 2010) (noting that one of the reasons a sizeable population of unauthorized immigrants exists is that the immigration laws are out of step with the demand for labor). For a discussion of the problem of illegal immigration as a function of the distribution of decisionmaking power between Congress and the executive, see *infra* Part II.A.

16. For literature discussing the importance of this objective, see, for example, Susan Martin & B. Lindsay Lowell, *Competing for Skills: U.S. Immigration Policy Since 1990*, 11 LAW. & BUS. REV. AM. 387, 390–95 (2005); Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148, 183–87 (2006).

17. For a discussion of the cross-border integrated nature of labor migration to the United States, see generally DOUGLAS S. MASSEY, JORGE DURAND & NORMAN J. MALONE, *BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION* (2003).

18. For a classic analysis of immigration policy as distributing the good of membership, see MICHAEL WALZER, *SPHERES OF JUSTICE* 61–63 (1983).

facilitate a stable and orderly flow of migration, which in turn helps secure public acceptance of immigration.<sup>19</sup>

Predictability and responsiveness need not be mutually exclusive. A regime that adjusts in response to changed circumstances can also be predictable, if interested parties understand how the government anticipates and then adjusts to fluctuating conditions, or if clear standards, set out in advance of the actual decisionmaking, guide changes to the numbers of visas available from year to year. A goal of the decisionmaking structure, therefore, should be to determine how much predictability affected parties require to make decisions about their futures, and to be transparent about the mechanisms used to identify changed circumstances.<sup>20</sup>

This process of balancing flexibility and predictability implicates yet another concern: the democracy question. A principle of accountability is implicit in the idea of predictability, which revolves around the importance of notice. In addition, even if effective policymaking requires some insulation from political pressures, the regime ultimately must respond to public views concerning acceptable levels of immigration, for reasons of democratic legitimacy in and of itself, as well as to nurture public confidence in government and acceptance of immigration over time. In other words, accountability must extend beyond the predictability that enables affected parties to plan, to include respect for the interests of the broader public. Securing public acceptance requires, at the very least, developing mechanisms for taking proper account of the interests of U.S. workers,<sup>21</sup> as well as the interests of immigrants themselves, who may

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19. I have written extensively elsewhere about the importance of managing the change produced by migration. *See, e.g.*, Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008).

20. Adam Cox has suggested to me that this goal might require segregating decisions about low-wage and high-skilled migrants, because the latter demand more predictability in light of their educational investment, and perhaps also in light of the more specialized nature of the labor they provide to employers.

21. I leave aside the question of the weight policymakers should give to this interest—that is, whether the interests of U.S. workers ought always to take priority over other goals, such as promoting growth, preventing illegal immigration, or even expanding opportunities for less-well-off noncitizens. A policy that keeps immigration levels low by requiring punctilious certification that no U.S. workers are available for a job before a visa is issued may seem to promote the interests of U.S. workers by protecting their wages, but not if the result is high levels of illegal immigration or diminished job creation as the result of inadequate economic dynamism. Resolving this debate is well beyond the scope of this Article, but the important institutional point is that the designers should equip the decisionmaking regime to take account of these interests in relation to the other factors that shape a well-rounded immigration policy.



not be a formal part of the public but who nonetheless represent a key constituency of this particular policy process. Balancing insulation from short-term political pressures that might sidetrack efforts to ensure that visa policy tracks demographic and economic trends with long-term respect for popular opinion may be impossible to accomplish with precision. But the decisionmaking regime for channeling labor migration should be designed to be maximally capable of calibrating this balance.

Though the case for delegation in the immigration context is made in the next Section, it is useful at this stage to reflect on general trends in administrative law scholarship that address some of the values just articulated. Many scholars increasingly emphasize the importance of ensuring agency accountability to the public, and this emphasis has produced a particularly vital literature advocating presidential control.<sup>22</sup> At the same time, other scholars have argued that prioritization of accountability has obscured other important objectives, such as prevention of arbitrary decisionmaking—objectives that agency design and judicial review might address.<sup>23</sup> And still other scholars emphasize that accountability to the public can itself arise from bureaucratic insulation.<sup>24</sup> Each of these positions has its virtues, but an appropriate synthesis of these concerns must include recognition that democratically legitimate decisionmaking demands more than direct political control. Indeed, democracy and rule-of-law values can be served by placing limits on

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22. *E.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2363–83 (2001) (arguing that courts should “attempt . . . to recognize and promote [presidential] control over agency policymaking”).

23. *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 475–78 (2003) (noting that excessive attention to political accountability has obscured other values, such as preventing arbitrary agency decisionmaking). For other critiques of the emphasis on majoritarian responsiveness, see Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 988, 1004–07 (1997); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1824–25 (1996).

24. *See* Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 55 (2008) (arguing that “[f]orcing the politically responsive president to share power with a partially insulated, politically unresponsive bureaucracy tends to reduce the variance in policy outcomes, because bureaucratic insulation creates a kind of compensatory inertia that mutes the significance of variation in the president’s policy preferences” and noting that “[t]his result contrasts sharply with the received wisdom that majoritarian values are best served by maximizing the degree to which politically responsive elected officials can control unaccountable bureaucrats”).

majoritarianism<sup>25</sup>—a possibility that must be continually taken into account when considering the allocation of decisionmaking authority among the branches. Several systemic values are thus in play and must be reconciled continually.

*B. Limitations of the Status Quo*

The current system does not come close to meeting the conditions described above. Two primary defects characterize it: stasis and excessive prosecutorial discretion. On the first score, the factors that influence migration fluctuate, as economic and demographic conditions change in the United States and Mexico, as well as other sending countries. But Congress, which maintains a monopoly on the system of legal labor migration that presumably exists to channel these pressures, infrequently adjusts the ceilings and categories that define the regime. Stasis defines the system.

The last significant overhaul of the permanent labor migration categories occurred in 1990.<sup>26</sup> A system of temporary visas has emerged to complement the permanent preferences, and the number of temporary immigrants admitted annually now dwarfs permanent migration.<sup>27</sup> Though Congress has adjusted the number of temporary

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25. The relevant question is not whether congressional control is preferable to presidential control, but whether maintaining attachment to formal congressional control offers a more democratically legitimate alternative to a system with high levels of both ex post executive screening and illegal immigration. For discussion of this point, see *infra* notes 72–75, 170–73 and accompanying text.

26. In 1997, Congress passed the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, 111 Stat. 2160 (1997) (codified as amended in scattered sections of 8 U.S.C.), allocating five thousand visas from the unskilled-labor category to persons from Nicaragua and Cuba, and permitting nationals of Guatemala, El Salvador, the former Soviet Union, and most Eastern European nations to apply for cancellation of removal under more generous pre-1996 standards, *id.* § 203, 111 Stat. at 2199–201 (codified as amended at 8 U.S.C. § 1101 (2006)). This shift, however, did not change the overall number of available visas; instead, it represented a reaction to a discrete problem and responded in part to pressure from the executive.

27. The fact that a system of temporary labor immigration has grown up around the permanent regime suggests that Congress has responded to labor-market demands by admitting workers with temporary status to simultaneously respond to the need for labor, as well as and the public's reluctance to admit greater numbers of immigrants for permanent membership. In 2004, for example, approximately 1.5 million immigrants were admitted on a temporary basis, in contrast to the 155,000 permanent labor-based visas issued. See DEBORAH WALLER MEYERS, MIGRATION POLICY INST., TEMPORARY WORKER PROGRAMS: A PATCHWORK POLICY RESPONSE 3 (2006), available at [http://www.migrationpolicy.org/ITFIAF/TFI\\_12\\_Meyers.pdf](http://www.migrationpolicy.org/ITFIAF/TFI_12_Meyers.pdf). Only five thousand lawful permanent resident (LPR) visas are available per year in the employment categories for unskilled workers and workers with the equivalent of a Bachelor of Arts degree. See 8 U.S.C. § 1153(b)(3)(B) (establishing that no more than ten thousand visas

visas with more frequency than the permanent categories, employers consistently importune Congress to raise the ceilings. What is more, the number of visas for low-skilled migrants has remained consistently low and inadequate over time, if the rates of illegal immigration are at least partial evidence of demand.<sup>28</sup> The current decisionmaking structure governing legal labor migration—particularly the permanent regime—is neither flexible nor responsive.<sup>29</sup>

Perhaps as a response to this rigidity, and with respect to low-skilled labor in particular, a regime of illegal immigration has come to dominate the field. This regime is actually highly flexible and dynamic, because it is largely informal, but it is neither predictable nor democratic, and it runs counter to rule-of-law values. Before exploring these conclusions, it is important to see that the existence of the illegal regime is partially attributable to the current structure of regulation and the stasis that defines legal admissions. Though numerous factors likely motivate illegal entrants, at least three dynamics related to the existing allocation of decisionmaking authority could theoretically be at work. First, the system Congress has created and maintained contributes to illegal immigration: either illegal entrants have been waiting too long in backlogged immigration queues, or no queues exist for them to join in the first place because they lack the requisite labor profiles or family connections.<sup>30</sup> Whereas the number of low-skilled immigrants Congress has authorized for

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can be made available to unskilled workers per year); *id.* § 1101 (allocating five thousand LPR visas from the ten thousand available to unskilled workers to beneficiaries of NACARA).

28. Such demand cannot be isolated from other factors, such as the desire for low-cost labor and failure to enforce labor laws. Holding these preferences constant, however, it seems that the demand for visas has outpaced supply. For a discussion of the motivations behind underenforcement of immigration policy, see *infra* notes 32–37 and accompanying text.

29. This distinction raises the related question of whether the turn to temporary labor visas is itself misguided policy—a question well beyond the scope of this Article. Commentators consistently underscore that temporary regimes, even among educated H1-B workers, give rise to exploitative employer-employee relationships. For an argument that this regime, particularly the H1-B category, depresses the wages of U.S. workers and that employers respond to this charge by claiming skilled workers fill genuine labor shortages, see Susan Martin, B. Lindsay Lowell & Philip Martin, *U.S. Immigration Policy: Admission of High Skilled Workers*, 16 *GEO. IMMIGR. L.J.* 619, 631 (2002).

30. For a description of the permanent admissions categories, see STEVEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 304–10 (5th ed. 2009). Congress also has erected a system that dramatically prefers family-based immigration to labor-based immigration. See Peter H. Schuck, *The Morality of Immigration Policy*, 45 *SAN DIEGO L. REV.* 865, 872 (2008) (discussing the strong bias toward family migration).

admission has remained constant for decades, the demand for entry has consistently and dramatically exceeded the supply of visas.<sup>31</sup>

Second, the enforcement challenge may well be overwhelming the executive branch, despite consistent and dramatic increases in enforcement budgets since the Clinton administration. The executive may be unable to fully control labor migration through construction of barriers at the border or deterrence and apprehension policies in the interior—the primary methods of *ex ante* control the executive possesses under the current regime.<sup>32</sup> Finally, it may be that the executive has adopted a less-than-total enforcement policy,<sup>33</sup> out of an interest in perpetuating low-cost labor,<sup>34</sup> or perhaps because of a

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31. See *supra* note 28 and accompanying text.

32. Some commentators have suggested that the desire for complete control is unrealistic. See, e.g., John A. Scanlan, *Immigration Law and the Illusion of Numerical Control*, 36 U. MIAMI L. REV. 819, 819–20 (1982) (“United States immigration law is rooted in the fundamental premise that the law can and should control the numbers and the characteristics of individuals entering the United States to live, work, and bear children; . . . although this premise fosters a degree of regulation, it runs counter to both past experience and our reasonable expectations for the future . . .”).

33. See Cox & Rodríguez, *supra* note 1, at 534–45 (discussing this possibility); see also Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 LAW & SOC’Y REV. 1041, 1061 (1990) (observing that early implementation efforts involved a “spirit of cooperation . . . devoted to establishing rapport with employers and encouraging voluntary compliance with employer sanctions”); Jason Juffras, *IRCA and the Enforcement Mission of the Immigration and Naturalization Service*, in THE PAPER CURTAIN: EMPLOYER SANCTIONS’ IMPLEMENTATION, IMPACT, AND REFORM 33, 41 (Michael Fix ed., 1991) (noting that INS guidelines adopted in the wake of IRCA “stressed cooperation with business” and sought to avoid “harassment and heavy-handed enforcement”); Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1126–29 (2009) (discussing literature exploring underenforcement of IRCA as policy). Others have discussed underenforcement as a more general problem. See RANDALL KENNEDY, RACE, CRIME AND THE LAW 19 (1997) (noting that a major problem facing African Americans is not overenforcement but underenforcement of the law); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1716–17 (2006) (arguing that underenforcement occurs when the group in need of enforcement is a politically unpopular group, such as poor residents of crime-ridden neighborhoods); Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1201, 1204–06 (1996) (discussing reasons why zones in which law is not enforced as a matter of explicit policy arise, and noting that enforcement is sometimes politically unpalatable); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 116–17 (2005) (noting that underenforcement is sometimes part of a larger regulatory scheme); Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 707, 720–21 (2005) (arguing that the state’s failure to prevent crime should be treated as public policy).

34. See, e.g., David A. Martin, *Eight Myths About Immigration Enforcement*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 525, 545 (2007) (noting that border crackdowns are a more politically palatable but less effective means of enforcement than crackdowns on employers, but that enforcement against employers generates “determined resistance among a highly influential

humanitarian desire to enable the entry of immigrants with no legal options for admission.<sup>35</sup>

These policy outcomes are not necessarily irrational. Congress may have very good reasons for leaving admissions ceilings in place for decades. Public opinion has not supported upward adjustments in visa numbers,<sup>36</sup> suggesting that keeping admissions ceilings constant fulfills the accountability principle. At the same time, however, Congress's failure to adjust these numbers may not reflect the average or median voter's views on the subject as much as the lack of salience of the issue to most people most of the time, or the difficulty of surmounting interest group pressures to change the numbers,

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interest group," suggesting obstacles to complete enforcement); *see also* INDEP. TASK FORCE ON IMMIGRATION & AM.'S FUTURE, MIGRATION POLICY INST., IMMIGRATION FACTS NO. 10, IMMIGRATION ENFORCEMENT SPENDING SINCE IRCA 4-5 (2005), *available at* [http://www.migrationpolicy.org/ITFIAF/FactSheet\\_Spending.pdf](http://www.migrationpolicy.org/ITFIAF/FactSheet_Spending.pdf) (showing that interior investigations have remained at only 10 percent of the enforcement budget over the past decade and that from 1991 to 2003 interior enforcement shifted toward criminal enforcement and away from employer investigations).

35. In addition to being shaped by the executive's own views about the number and types of immigrants who should be admitted, enforcement policy will also be affected by the due process constraints courts have placed on removal, by the humanitarian and social-policy concerns that militate against aggressive enforcement and complete deportation, and by the political pressures felt by the executive that may come from the business lobby, pro-immigrant members of Congress, or constituents in immigration-friendly or dependent states. *See* Cox & Rodríguez, *supra* note 1, at 537-40, 545-46.

36. Given that public opinion polls have suggested the public would prefer to admit fewer immigrants, congressional failure to alter visa numbers appears partially responsive to this set of public concerns. *See, e.g.,* Peter Schuck, *The Disconnect Between Public Attitudes and Policy Outcomes in Immigration*, in *DEBATING IMMIGRATION* 17, 20 (Carol Swain, ed. 2003) ("81 percent of Americans oppose higher immigration—a level of opposition that contradicts the thrust of immigration's political economy, which is decidedly expansionist . . ."). It is not possible with the data the government publishes to determine what percentage of temporary workers become permanent. JEANNE BATALOVA, MIGRATION POLICY INST., INSIGHT NO. 14, *THE GROWING CONNECTION BETWEEN TEMPORARY AND PERMANENT IMMIGRATION SYSTEMS*, 7-8 (2006), *available at* [http://www.migrationpolicy.org/ITFIAF/TFI\\_Batalova.pdf](http://www.migrationpolicy.org/ITFIAF/TFI_Batalova.pdf). But particularly for skilled-employment-based immigration, temporary visas and subsequent status adjustment have become "the route into permanent residence for the overwhelming majority of employment-based green card recipients for the past decade." DEMETRIOS G. PAPADEMETRIOU ET AL., MIGRATION POLICY INST., *ALIGNING TEMPORARY IMMIGRATION VISAS WITH U.S. LABOR MARKET NEEDS: THE CASE FOR A NEW SYSTEM OF PROVISIONAL VISAS* 7 (2009), *available at* [http://www.migrationpolicy.org/pubs/Provisional\\_visas.pdf](http://www.migrationpolicy.org/pubs/Provisional_visas.pdf). In 2008, for example, nearly 90 percent of employment-based permanent immigrants had previously held temporary visas. *See* OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2008 YEARBOOK OF IMMIGRATION STATISTICS 21 tbl.7 (2009), *available at* [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/ois\\_yb\\_2008.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/ois_yb_2008.pdf) (showing that 149,542 of 166,511 employment-based permanent immigrants experienced an adjustment of status). Certain categories of temporary visa holders, such as the H-2 categories of low- and midskilled workers, are not eligible for adjustment. PAPADEMETRIOU ET AL., *supra*, at 20.

either up or down. Regardless of whether the system perfectly captures public preferences, a system that relies on underenforcement by the executive may not always be a negative, particularly given that the alternative could be the adoption of more police-like measures against employers and immigrants.<sup>37</sup>

But the explicability of this regime does not justify it, and the system does a poor job of advancing the objectives outlined in Part I.A. Again, the formal regime is marked by stasis, even if it can be described as accountable in some sense. The informal regime is neither truly democratic nor consistent with the interest in predictability. On the democracy question, the very existence of illegal immigration directly contravenes the public's preferences as formally expressed in statute, if not the public's or the government's de facto preferences. A regime that produces a level of immigration that exceeds the popularly determined optimal level embodied in the INA is difficult to characterize as true to principles of accountability. More important, illegal immigration produces undemocratic social conditions, primarily by generating a population of people substantially disabled as social actors.<sup>38</sup>

With respect to predictability, the regime of illegal immigration clashes with the objective of having a transparent immigration policy. Indeed, the regime facilitates the broad exercise of nontransparent prosecutorial discretion and therefore generates uncertainty among immigrants and their employers. A key insight of *The President and Immigration Law* is that the executive possesses enormous control over the number (and to a lesser extent, the types) of immigrants in the United States through its power to determine whether and against whom to prosecute removal, even though the president has not been delegated formal authority to determine core immigration questions.<sup>39</sup> The most obvious example of this power exists as the result of illegal

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37. For an argument that underenforcement can be a rational law enforcement strategy when the goal is to deter marginal offenders but not expend enormous resources on people who will violate the law anyway, see Jonathan M. Barnett, *The Rational Underenforcement of Vice Laws*, 54 RUTGERS L. REV. 423, 429–31 (2002).

38. For an elaboration of why illegal immigration produces undemocratic social conditions, see, for example, Cox & Rodríguez, *supra* note 1, at 536–37; Cristina M. Rodríguez & Ruth Rubio-Marín, *The Constitutional Status of Irregular Migrants: Testing the Boundaries of Human Rights Protection in the United States and Spain*, in WHO BELIEVES IN THE HUMAN RIGHTS OF MIGRANTS (Marie Dembour & Tobias Kelley eds., forthcoming 2010).

39. Cox & Rodríguez, *supra* note 1, at 510–19.

immigration:<sup>40</sup> nearly twelve million unauthorized immigrants are present in the United States,<sup>41</sup> each of whom is removable at the discretion of prosecutors in Immigration and Customs Enforcement (ICE). Because ICE cannot possibly effectuate removal of even a majority of this population due to resource and political constraints, it must exercise discretion regarding whom to remove. ICE might choose to focus on aliens convicted of particularly serious crimes, on noncitizens who have filed complaints regarding labor violations or have demanded humane treatment too vociferously, or simply on immigrant workers (as opposed to unauthorized immigrants generally).<sup>42</sup>

Little information ultimately exists, however, about how ICE exercises its discretion—whether it is making substantive decisions based on the criteria described above or acting randomly or episodically in response to political pressure—and that is precisely the problem. Though prosecutorial discretion is perfectly consistent with the rule of law, the scope of the executive’s discretion in this context is vast. The executive’s discretion is not subject to scrutiny to determine if the standards on which the executive relies comport with the priorities Congress has defined, align with priorities the public might have, or reflect the appropriate level of equanimity to unauthorized immigrants who have developed ties to the U.S. or who have done nothing wrong beyond violating the prohibition on their entrance.<sup>43</sup>

Given how poorly the current system approximates the ideal decisionmaking structure outlined above, there is cause for an institutional redesign that would better promote the constellation of

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40. In *The President and Immigration Law*, Professor Cox and I identify two other contexts in which this dynamic obtains. First, Congress has enumerated an increasingly long list of crimes and other acts that warrant removal of lawful immigrants, and ICE exercises prosecutorial discretion in determining when and whether to proceed against immigrants who have committed these violations. And, second, the law permits the executive (namely immigration judges) to exercise discretion in certain contexts to provide relief from removal—to exercise a kind of clemency in light of certain equitable factors such as family ties or exceptional hardships that might arise as the result of the alien’s removal. Cox & Rodríguez, *supra* note 1, at 514–18.

41. JEFFREY S. PASSELL & D’VERA COHN, PEW HISPANIC CTR., *A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES*, at i–v (2009).

42. For an extended discussion of this dynamic, see Cox & Rodríguez, *supra* note 1, at 510–14.

43. I recognize that this fact alone may well justify their removal. The point is not that it is never appropriate to remove noncitizens who are present unlawfully, but that the executive has the power to pick and choose among those noncitizens—a power whose exercise should be rendered transparent.

values that mark a sound regulatory regime. For reasons explored in detail in Part II, a redesign that gives the executive the power to set *ex ante* admissions standards, to channel the streams of migration it either desires or cannot stop, would be an improvement over the status quo along each of the dimensions of flexibility, predictability, and democracy.<sup>44</sup> Importantly, this delegation solution must be seen in relation to the status quo of congressional inaction and high levels of illegal immigration, not in comparison to a world in which executive enforcement can and does match quotas set by Congress. In other words, even if Congress is in the best position theoretically to set the ideal number of immigrants to be admitted in a given year,<sup>45</sup> this call for a rethinking of the current allocation of powers between the political branches responds to the realities generated in practice by the current allocation of decisionmaking authority.<sup>46</sup>

But before proceeding to Part II and the discussion of institutional-design possibilities, it is crucial to underscore that the problem of prosecutorial discretion, in particular, requires more than a delegation solution. For reasons discussed in Part III, delegation may be inadequate to constrain prosecutorial discretion, because the executive may still have incentives to make core policy

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44. For a leading policy proposal advocating delegation of new authority to an executive entity, see DEMETRIOS G. PAPADEMETRIOU ET AL., *MIGRATION POLICY INST., HARNESSING THE ADVANTAGES OF IMMIGRATION FOR A 21ST-CENTURY ECONOMY: A STANDING COMMISSION ON LABOR MARKETS, ECONOMIC COMPETITIVENESS AND IMMIGRATION* (2009), available at [http://www.migrationpolicy.org/pubs/StandingCommission\\_May09.pdf](http://www.migrationpolicy.org/pubs/StandingCommission_May09.pdf).

45. I doubt very much that any such number exists, primarily because the “ideal” number of immigrants to admit will be a function of what immigration is supposed to accomplish (family reunification, reducing global poverty, enhancing economic competitiveness, or meeting humanitarian obligations to victims of natural or man-made disasters). In addition, a large number of different interests are at stake, such that multiple combinations of those interests could produce various sorts of second-best compromises that would be ideal in the sense of being politically achievable. The more important point is that the number of immigrants admitted ought to be allowed to fluctuate in response to changing labor-market needs, political pressures, and conditions outside the United States. The inability of the current allocation of powers to promote this sort of flexibility and regular resetting of priorities thus warrants a structural reorientation of decisionmaking power.

46. Importantly, this delegation is warranted whether the executive has deliberately enabled or simply cannot prevent illegal immigration. In addition, though the preceding discussion foregrounds reduction of illegal immigration and restraint of prosecutorial discretion as reasons for dissatisfaction with the current regime, the stasis problem can also be reframed as a rigidity that undermines competitiveness and economic dynamism. One leading proposal for a Standing Commission on Immigration that would involve the executive much more directly in setting visa policy highlights as a justification for the commission promoting U.S. competitiveness through the creation of a more nimble immigration bureaucracy as a justification for delegation. *Id.* at 2–4.



determinations through back-end, nonreviewable forms of screening. Any redesign should therefore incorporate other tools of the administrative state as potential mechanisms of restraint. The systematic and open use of cost-benefit analysis, for example, is well worth considering as a means of checking both enforcement discretion and the buildup of enforcement capacity. Whether the directive comes from Congress or the president, systematically and publicly accounting for and weighing the costs of enforcement plans and technology against the gains achieved (in terms of numbers of arrests and the economic and social value of arrests) can introduce the elements of rationality and transparency into the enforcement regime as a whole.<sup>47</sup> The design solution I explore in Part II offers but one means, albeit a significant one, of addressing the limitations of the current decisionmaking regime.

## II. DESIGN

Advancing the objectives outlined in Part I—ensuring responsiveness to changing circumstances while creating a predictable and accountable regime—requires awareness of the pathologies that characterize the current allocation of authority between the branches. Those problems include stasis, illegal immigration, and back-end executive screening hidden from view. This Part considers how delegation of ex ante, standard-setting power to the executive might help ameliorate these problems. Section A considers the three decisionmakers in play—Congress, the president, and the bureaucracy—and their relative capabilities, virtues, and vices. Section B turns to an existing scheme of delegation in the immigration context—the refugee selection system—for evidence of how such delegation might work in practice. Section C lays out how delegation in the labor context might be structured, in light of the features of each of the relevant decisionmakers.

### A. *The Decisionmakers*

Congress, the president, and the bureaucracy each have a role to play in the policymaking process. The allocation of power among

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47. The budget devoted to enforcement measures has increased from \$326.2 million in 1992 to \$2.7 billion in 2009, prompting the simple question of whether ratcheting up enforcement is worth its price. *Building a Wall*, *ECONOMIST*, Jan. 20, 2010, [http://www.economist.com/daily/chartgallery/displaystory.cfm?story\\_id=15326722](http://www.economist.com/daily/chartgallery/displaystory.cfm?story_id=15326722).

them depends in large part on how their characteristics align with the objectives of a particular regulatory regime.

1. *Institutional Characteristics.* Congress, which consists of hundreds of members standing in for hundreds of overlapping constituencies, represents the most broadly and deeply representative institution of government. Its consequent closeness to the people, understood as a disaggregated and diverse entity, gives Congress the strongest democratic pedigree of the institutional actors in play. Even if the president represents a national constituency by virtue of being popularly elected,<sup>48</sup> the multimember nature of Congress provides broader and deeper representation of the diverse electorate's interests. In addition, in Congress, deliberation over matters of public concern, though increasingly conducted in committees and subcommittees, is at its most transparent.

But Congress's failure to adjust admissions numbers with any regularity also suggests that the structure of congressional decisionmaking tends to give rise to stasis. Though Congress responds to public pressures, it is often slow to do so in an affirmative way by passing legislation (as opposed to by avoiding legislation and thus controversy). The political complications of representing many different constituencies likely contribute to the difficulty of legislating, but so does the cumbersome nature of the legislative process itself, which requires passing through numerous veto gates<sup>49</sup> and achieving consensus among a large number of actors with widely divergent preferences. The congressional decisionmaking process is thus ill suited to respond to regular fluctuations in social and economic conditions.

Congress arguably has the capacity to gather and analyze the sort of data that would allow it to track such changes—it can order research studies and has the staff to consume them.<sup>50</sup> But such fact-

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48. Cf. Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 LAW & CONTEMP. PROBS. 1, 24–25 (1994) (arguing that the president lacks the regional bias of Congress and therefore will be more likely to represent the median voter).

49. Cf. McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3, 11, 16–21 (1994) (“[A]ttempts to pass new legislation typically must navigate through numerous veto gates before even reaching the presidential approval/veto stage . . .”).

50. As one scholar has emphasized, “Congress has chosen to legislate any number of seemingly complex issues. Where the incentive exists, legislators find the time and resources to deal with complexity.” Morris P. Fiorina, *Group Concentration and the Delegation of Legislative Authority*, in REGULATORY POLICY AND THE SOCIAL SCIENCES 175, 184–86 (Roger G. Noll

finding is arduous,<sup>51</sup> and the incentives to displace casework or other more politically salient activity are likely limited. The sheer number of participants and multiple layers of negotiation and debate that the modern committee process has engendered make legislative reform protracted and difficult to see through to completion, though the American Immigration Lawyers Association has highlighted at least one example to the contrary in the labor immigration context.<sup>52</sup>

In addition, when it comes to immigration issues, Congress may be particularly sensitive to what could be called identitarian concerns,<sup>53</sup> which manifest themselves as a strong bias in public

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ed., 1985); see also Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 23–24 (1982) (noting that agency heads do not necessarily have greater expertise than committee and subcommittee chairs, suggesting that Congress can take on technical issues when it has reason to do so).

51. The difficulty of legislating is highlighted by the scholarly literature that contends that Congress's motivation for delegating lawmaking authority to a bureaucracy is to reduce "legislative decision-making costs." MURRAY J. HORN, *THE POLITICAL ECONOMY OF PUBLIC ADMINISTRATION: INSTITUTIONAL CHOICE IN THE PUBLIC SECTOR* 44–45 (1995); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 131 (1980) (arguing that delegation arises from legislators' lack of time and ability to express substantive disagreement by second-guessing administrative officials in hearings, because "it is simply easier, and it pays more visible political dividends, to play errand boy-cum-ombudsman than to play one's part in a genuinely legislative process"); Jonathan Bendor & Adam Meirowitz, *Spatial Models of Delegation*, 98 AM. POL. SCI. REV. 293, 300–01 (2004) (arguing that delegation is driven by high information-gathering costs); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 98 (1985) (noting, in defense of delegation, that truly specific legislation is not achievable and that delegation permits the government to be responsive to diversity in voter preferences over time, as well as across the country—something nondelegating legislation cannot achieve, suggesting limitations to Congress's ability to engage in fine-tuned regulation).

52. The American Immigration Lawyers Association has emphasized that American employers have been successful at convincing Congress on several occasions to increase total H1-B visa limits. The group feels that Congress is more responsive to the interests of its members than an independent commission might be. See AM. COUNCIL ON INT'L PERS., *EXAMINING PROPOSALS TO CREATE A NEW COMMISSION ON EMPLOYMENT-BASED IMMIGRATION* 12 (2009), available at <http://www.immigrationworksusa.org/uploaded/file/ACIP%20Commission%20Paper%20Final.pdf>. It is possible that the legislative dynamic differs when it comes to temporary visa numbers, though temporary visas increasingly lead to permanent residence over time. More to the point, that Congress responds to particular constituencies is not surprising, but this fact does not change the antiquated nature of the employment-immigration regime, nor does it address the rule-of-law problems with which I began. And a commission should in theory be responsive to the need for more H1-B workers, particularly if they present potential for long-term economic contributions. In truth, employers are loath to lose control over the admissions process. For other opposition to a commission proposal, see Immigration Works USA, *An Immigration Commission?*, <http://www.immigrationworksusa.org/index.php?p=193> (last visited Mar. 21, 2010).

53. For discussion of why the executive is more likely than Congress to be open to immigration, see Cox & Rodríguez, *supra* note 1, at 543 n.271.

opinion against increasing migration levels.<sup>54</sup> A number of factors shape these concerns, including popular resistance to economic competition from migrants and the admission of people from distinct societies who might challenge the cultural cohesion of the country. Such worries may well be legitimate, and lawmakers should take them into account. But they nonetheless contribute to the congressional stasis that defines core immigration policy. Though these populist pressures do not often result in affirmative legislation restricting migration,<sup>55</sup> they likely contribute significantly to legislative inaction. The political costs of engaging the immigration question can be high, but the benefits tend to be low, especially given that a major set of potential beneficiaries are noncitizens and therefore nonvoters. Even if some legislators anticipate political gain from pushing either expansionist or restrictionist sentiments, immigration debates historically have been protracted and not conducive to the formation of consensus.

Conventional conceptions of the executive emphasize that the president moves with far more alacrity than Congress. He is better able to advance affirmative policy measures—through executive order or by directing agency policy—than his multimember counterpart in the legislative branch.<sup>56</sup> As a result, the executive branch has greater structural capacity to be responsive to changing circumstances than does Congress.<sup>57</sup> This responsiveness can cut two

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54. See, e.g., Schuck, *supra* note 36, at 20 (“81 percent of Americans oppose higher immigration—a level of opposition that contradicts the thrust of immigration political economy, which is decidedly expansionist.” (footnote omitted)). History suggests an upper limit exists on the number of immigrants the public is willing to admit—perhaps somewhere close to one million per year, including close family of U.S. citizens. When Congress enacted the immigration reforms of 1965, for example, the primary purpose of the reforms was to eliminate the national-origins quotas and permit the admission of immigrants from all countries on equal terms. But in selling this measure to Congress and skeptical Republicans, President Johnson, as well as the reform’s advocates in Congress, repeatedly emphasized that the reform would not increase the total number of immigrants, even as it dramatically changed the types of immigrants admitted.

55. *Cf. id.* (discussing the expansionist nature of immigration policy).

56. For a discussion of how the president directs agency policy, see generally Kagan, *supra* note 22.

57. See Mashaw, *supra* note 51, at 95 (“Strangely enough it may make sense to imagine the delegation of political authority to administrators as a device for improving the responsiveness of government to the desires of the electorate. . . . [Whereas constituents vote for congressmen to deliver goods and services to their districts, t]he president has no particular constituency to which he or she has special responsibility to deliver benefits. Presidents are hardly cut off from pork-barrel politics. Yet issues of national scope and the candidates’ positions on those issues are the essence of presidential politics. Citizens vote for a president based almost wholly on a

ways, however. Congress may be more populist, but its cumbersome decisionmaking mechanisms make it difficult for Congress to respond to populist pressures through affirmative lawmaking. The president, however, who is not immune to public pressure, particularly if he is in his first term, is much better situated to change policies in response to such pressure. A regime controlled by the president might therefore be highly flexible but also unpredictable.

The increase in immigration enforcement activity during the late Bush and early Obama administrations reflects how the president's sensitivity to public pressure can lead to dramatic swings in enforcement policy. In the case of the late Bush administration, the rise in enforcement activity may have been a response to the restrictionist public preferences that helped cause the demise of an immigration-reform package that included a legalization program. The early Obama administration's emphasis on enforcement strategies could represent an effort to clear political space for immigration reform down the road by indicating to the public that the administration is tough on illegal immigration.<sup>58</sup>

That said, the president is still more likely than Congress to adopt strategies that hew closely to facts on the ground because of the administrative apparatus at his disposal. Even if the president himself will be attentive to or controlled by identitarian interests because of his status as an elected official,<sup>59</sup> the bureaucracy will not be nearly as susceptible to such pressures, because agency officials are not themselves subject to election (though political appointees present a different story). The bureaucracy is comparatively unaccountable,<sup>60</sup> though this insulation does not necessarily mean reliance on the bureaucracy is undemocratic.<sup>61</sup>

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perception of the difference that one or another candidate might make to general governmental policies.”). For further discussion of presidential control, see generally Kagan, *supra* note 22.

58. For a discussion of the shift in enforcement policy during the first year of the Obama administration, see Cox & Rodríguez, *supra* note 1, at 521.

59. For a discussion problematizing this point, see *infra* note 71 and accompanying text.

60. See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2317 (2006) (“Much maligned by both the political left and right, bureaucracy creates a civil service not beholden to any particular administration and a cadre of experts with a long-term institutional worldview. These benefits have been obscured by the now-dominant, caricatured view of agencies as simple anti-change agents.”).

61. See Stephenson, *supra* note 24, at 55 (“Forcing the politically responsive president to share power with a partially insulated, politically unresponsive bureaucracy tends to reduce the variance in policy outcomes, because bureaucratic insulation creates a kind of compensatory inertia that mutes the significance of variation in the president's policy preferences. Up to a

The extent of the bureaucracy's insulation likely depends on whether and how political appointees positioned at its helm control it.<sup>62</sup> But it is not necessary to portray the bureaucracy in the New Deal spirit famously articulated by James Landis—as made up of disinterested technocrats applying scientific expertise to regulatory problems<sup>63</sup>—to establish that, relative to Congress and the president, the bureaucracy is less responsive to political pressure and more likely to incorporate technocratic modes of thought into its decisionmaking.<sup>64</sup> To some degree, cultures of expertise-based problem solving exist within bureaucratic agencies. The bureaucracy is therefore the most likely of the actors involved to respond to changing circumstances with apolitical, data-based policies, with time horizons that extend beyond the next election or the state of the here-and-now.<sup>65</sup> Indeed, an agency can be expected to gather and analyze

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point, the benefit to a majority of voters from a reduction in outcome variance outweighs the cost associated with biasing the expected outcome away from the median voter's ideal outcome.”).

62. See James P. Pfiffner, *Political Appointees and Career Executives: The Democracy-Bureaucracy Nexus in the Third Century*, 47 PUB. ADMIN. REV. 57, 57 (1987) (arguing that distrust and hostility toward career bureaucrats are misplaced and that the high numbers of political appointees undermine the effectiveness of government); cf. David Fontana, *Government in Opposition*, 119 YALE L.J. 548, 610–11 (2009) (noting that “American bureaucrats understand their role as much more political and much less technical than their counterparts in nonpresidential systems,” and that because of the rapid turnover among political appointees within the bureaucracy, “bureaucratic officials cannot form working relationships with their colleagues, and do not learn the idiosyncrasies of their policy portfolios”); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 54–55 (noting that though “[e]very administration exerts some degree of political influence over agency decision making,” the Bush administration’s interference with the EPA, which included “altering scientific reports, silencing its own experts, and suppressing scientific information that was politically inconvenient,” were of a “different scope and scale than in the past”).

63. See JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* 154–55 (1938) (describing administrative bureaucrats as “men of professional attainment . . . bred to the facts”).

64. Cf. Fontana, *supra* note 62, at 611 (“But no one believes that bureaucrats, even in a perfectly designed system, either can or should be purely technical creatures implementing objectively neutral commands with the best available evidence. . . . Creating a European-style civil service for the entire federal bureaucracy is not a choice for a country that recognizes the need for political accountability over bureaucrats.” (footnote omitted)).

65. Katyal, *supra* note 60, at 2345 (“A chief advantage of bureaucracy is to maintain the long-term view. By articulating the prospective costs, an effective bureaucrat is able to refocus government questions away from the crisis du jour. . . . Wisdom requires tradition-bound professionalism and the realization that future generations will feel the effects of earlier politicians’ decisions.”); Pfiffner, *supra* note 62, at 60 (arguing that whereas political appointees rarely stay longer than the president who appointed them, career bureaucrats do stay longer, which “causes them to pay attention to the health of institutions and to the integrity of the processes that assure nonpartisan implementation of the laws”).

complex data from multiple sources and then assess the data through social-scientific mechanisms, rather than through the primarily political and outcome-driven lenses that filter legislative fact-finding.<sup>66</sup> Admittedly, the familiar problem of ossification caused by procedural requirements and layers of judicial review can beset the bureaucracy, thus undermining its supposed policymaking advantages,<sup>67</sup> but scholars have challenged both the extent to which ossification occurs and the assumption that it has negative consequences for policymaking.<sup>68</sup> Further, through design, institutional features that may threaten ossification, such as excessive court review and procedural requirements that lead to protracted or failed rulemaking, can be controlled.

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66. See PAPADEMETRIOU ET AL., *supra* note 44, at 9 (discussing the lack of “systematic, wide-ranging, and ‘just-in-time’ research results the government often requires” and explaining how a “properly staffed body” would coordinate existing research and generate its own policy-relevant research); *see also id.* at 13 (emphasizing the limitations of shortage analyses that focus only on labor market shortages, which are hard to predict and invariably change as administrative processes for admission run their course, such that admissions always lag behind labor market needs). One important question in the data-gathering process is the extent to which employers ought to have input into setting visa levels. The current system, which relies on employers to petition for workers based on employer needs, embodies the assumption that private actors are more likely to screen effectively than the government, which is removed a step from the labor market. *See Lee, supra* note 33, at 1115–16 (arguing that employers are better suited than the government to conduct thorough ex ante screening of high-skilled workers).

67. *See, e.g.,* JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 225–54 (1990) (discussing judicial review issues in the context of auto safety regulation); Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 726–30 (2007) (summarizing the ossification debate and suggesting that adding layers of procedure and judicial review on to the production of guidance documents will eliminate the utility of such documents to an agency seeking to escape ossification); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 549–50 (1997) (arguing that hard look review ultimately encourages judges to replace agencies’ judgments with untechnocratic policy judgments); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60–62, 71–93 (1995) (analyzing the problem of ossification and suggesting solutions).

68. *See, e.g.,* William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 396–97 (2000) (arguing based on an empirical survey of D.C. Circuit decisions over ten years that losing judicial challenges did not seriously impede agencies’ abilities to pursue their policy goals); Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251, 253–54, 265–67, 286, 301–02 (2009) (arguing that hard look judicial review does not necessarily impose extra costs upon society because a number of features of administrative bodies also function to discourage aggressive rulemaking, and that the hard look doctrine may actually increase wise rulemaking).

2. *The Argument for Delegation.* Given these basic features of the three actors in the decisionmaking triad, the question becomes: who should be given what power? At the very least, any redesign should end the congressional monopoly on core immigration policy, addressing stasis by introducing greater flexibility into the decisionmaking process. An administrative agency, as a structural matter, is better equipped than Congress to take into account factors that require expertise and speed to discern. And, crucially for the immigration context, an executive decisionmaker—particularly the president, but also the agencies within the executive branch—is more likely to include the issue’s international dimension in its analysis than Congress, whose debates routinely focus on the domestic context.<sup>69</sup>

Delegation would also make possible a greater degree of regularized, data-driven analysis. A system redesign should give the bureaucracy, in particular, a much more significant role in the visa-policy-making process than it has under the status quo, in part by expanding the capacities of the existing bureaucracy to generate policy-relevant analysis. Delegation in a manner that promotes such data-gathering would leverage the advantages of the administrative state to improve the quality of immigration policy. The move toward delegation, thus, should not be seen as an aggrandizement of executive power over matters related to foreign affairs, but rather as an extension of the basic principles of administrative law and design to a new context in which the advantages of an administrative process could be significant. The congressional model embodies the presumption that core immigration policy should reflect the preferences of the domestic political process. Though this presumption is not inappropriate, it should not determine the design

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69. For a discussion of this conceptual problem and citation of literature discussing the importance of taking into account the nondomestic factors that produce migration, see generally Cristina M. Rodríguez, *Building Capacity for the Transnational Regulation of Migration*, 110 COLUM. L. REV. SIDEBAR 1 (2010), available at [http://www.columbialawreview.org/assets/sidebar/volume/110/1\\_Rodriguez.pdf](http://www.columbialawreview.org/assets/sidebar/volume/110/1_Rodriguez.pdf). This tendency of the executive can be explained not just by the fact that economic migration has foreign policy consequences, but also by the likelihood that the executive will be more aware of and attuned to conditions beyond the United States’ borders, and able and willing to address transnational issues through state-to-state dialogue, bilateral accords, and executive agreements. Historical examples abound of the executive engaging the foreign dimension of migration directly, through diplomatic and other channels. For a discussion of the Bracero Accords, perhaps the best twentieth-century example of this phenomenon, see Cox & Rodríguez, *supra* note 1, at 485–92.



of the regime, because immigration policy should also be responsive to the factors that produce migration.<sup>70</sup>

Ending the congressional monopoly on core immigration policy would help address the problem of excessive prosecutorial discretion by achieving vertical integration within the executive branch. By giving the executive power to set *ex ante* visa standards, delegation would make it possible for the executive to shift resources from enforcement actions to admissions determinations, which in turn would make the executive's immigration decisions subject to scrutiny. As Part III discusses in more detail, the power of vertical integration to address the discretion problem depends in large part on whether the executive would actually engage in a shift, which in turn depends on whether the executive would prefer to channel migration *ex ante* or *ex post*. Ensuring that vertical integration functions to improve transparency will also require congressional and other forms of monitoring. But even if the shift to *ex ante* decisionmaking does not entirely eliminate *ex post* screening, the substantial benefits of such a shift and the pathologies of the status quo support experimenting with new approaches to institutional design.

Another advantage to be gleaned from making the admissions process more flexible and responsive to migration realities through delegation would be the introduction of periodicity into the system, or the creation of the structural capacity for periodic updating of quota numbers. As a value, periodicity guards against a law's obsolescence or increasing mismatch with the world it regulates—a key problem with today's admissions processes, as discussed in Part I. At the same time, emphasizing periodicity would require trading off constancy, as well as some predictability and clear notice to employers, workers, and others about what to expect from the regulatory regime.

The fact that an executive agency charged with setting visa numbers might change those numbers on an annual basis could

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70. See COLTON C. CAMPBELL, *DISCHARGING CONGRESS: GOVERNMENT BY COMMISSION* 113–28 (2002) (discussing the creation of the Base Closure and Realignment Commission to overcome the political impossibility of closing military bases). The Base Closure and Realignment Commission may not be exactly on point, because most members of Congress apparently agreed that a certain number of bases needed to be closed but that Congress could not accomplish the task because legislators would be unable to support the closure of bases in their jurisdictions. With respect to immigration, on the other hand, such consensus is largely absent. That said, the example does underscore the value of delegation as a means of breaking through legislative impasse, and most members of Congress probably do consider the immigration regime in need of reform.

account for the strong opposition to delegation from employer lobbies, who probably fear that visa streams will be cut off or diminished in an unpredictable fashion. These interests might prefer to lock a secure number of visas into a legislative bargain.<sup>71</sup> One of the key challenges, then, in designing a labor visa agency or commission will be to ensure that employers and other important interests have the incentive and ability to predict changes in policy in a manner that allows them to go about their business. For the reasons discussed in Part I, flexibility and predictability need not be completely at odds. But even when they are, the virtue of the administrative process relative to the legislative process is that the former can continuously balance these competing objectives, recalibrating the balance in response to policy outcomes.

But even if delegation successfully introduces greater flexibility into the system, policymakers must still weigh that flexibility against the potential loss of accountability or responsiveness to public opinion (as opposed to responsiveness to changing empirical circumstances). As discussed in more detail in Section C below, this concern for accountability justifies building congressional controls into the model, and may also determine the choice between creating an executive agency or an independent commission. But the more important points at this stage are not only that the administrative process has its democratic side,<sup>72</sup> but also that a key question

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71. The American Council on International Personnel, for example, has emphasized that a commission would make unpredictable annual adjustments to employment-based immigration levels without necessarily taking employers' workforce needs into account—a situation of particular concern to employers accustomed to Congress's slower-moving, employer-responsive processes. AM. COUNCIL ON INT'L PERS., *supra* note 52, at 13. A similar dynamic appeared during debates over the 1980 Refugee Act. One central issue was whether to set numerical limits on refugee admissions in the statute, or to delegate authority to the executive to determine those numbers on an annual basis—the form the law ultimately took. Leading supporters in Congress of creating a stable refugee regime, as well as refugee advocacy groups, advocated inclusion of a fixed number of annual refugee admissions in the statute to ensure that the president did not have the power to reduce refugee admissions below an acceptable threshold, or eliminate them altogether. See Deborah E. Anker & Michael H. Posner, *The Forty-Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 25 (1981).

72. The literature on presidential control emphasizes the president's national constituency and democratic bona fides. See Cox & Rodríguez, *supra* note 1, at 545 (“Whereas the intensity of regional preferences can allow a minority coalition to block reform in Congress, the President through the administrative process is arguably better positioned to effectively balance competing interests, such as the interests of employers, labor, and immigrants themselves. Of course, whether we can conclude that the President is more accountable to the people than Congress depends on to whom accountability should run . . .”); Kagan, *supra* note 22, at 2334;

implicated in the design of regulatory structures is how to identify the optimal balance between insulation and political control, given that the structures should also promote efficiency and effectiveness.<sup>73</sup> In other words, as advanced in Part I, accountability is important, but policymakers must balance that value not only with the need for a more data-driven policy, but also with rule-of-law values that require more than appealing to the public's immediate preferences.

Delegation in the immigration context advances this balancing effort, largely because of the nature of the problem identified in Part I. Even if Congress is in the best position to determine the ideal number of immigrants to admit, or its decisions are the most legitimate from a democratic perspective, history suggests, at least with respect to low-skilled labor, that the choice is not between keeping immigration numbers low through congressionally imposed limitations and pushing them ever-higher through an executive-driven process. Rather, the question is whether the United States would prefer a mostly legal system or a hybrid legal-illegal system. Will the executive be willing or able to exercise its discretion to enforce the law in a way that keeps illegal immigration to negligible numbers? If history suggests that this enforcement level can be difficult to achieve, are democracy and rule-of-law values better served by keeping in place the institutional arrangements that have allowed the illegal immigration regime to arise, or should policymakers develop structural alternatives to ensure that as much immigration as possible is legal?

Section C addresses the question of how much insulation from the political process is desirable in immigration policy and how Congress can introduce mechanisms of accountability to the public into the design of an agency. But even in the face of strong accountability claims, the existing dynamics of the immigration regime underscore that *some* insulation from politics is necessary. Delegation of some sort will contribute to the production of an admissions policy more attuned to changing conditions and therefore more likely to strike at the pathologies referred to in Part I.

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Moe & Wilson, *supra* note 48, at 11. For a challenge to the view that the president represents a more national constituency, see Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1231–42 (2006).

73. See Jacob E. Gersen, *Designing Agencies: Public Choice in Public Law*, in RESEARCH HANDBOOK ON PUBLIC LAW AND PUBLIC CHOICE 7 (Daniel A. Farber & Anne Joseph O'Connell eds., forthcoming 2010).

The move toward delegation in a politically charged context has an analogue in the criminal justice arena, in which scholars and reformers in the 1980s advocated the creation of a judicial agency—the Sentencing Commission, eventually established in 1984 by the Comprehensive Crime Control Act<sup>74</sup>—because they “did not trust the political process on its own to produce rational sentencing policy in a tough-on-crime culture.”<sup>75</sup> The structure of an immigration agency would differ substantially from the Sentencing Commission, in large part because the separation of powers dynamic would be distinct, given that an immigration agency would involve power sharing between the legislative and executive branches, whereas the Sentencing Commission affects judges.<sup>76</sup> But the reasons underlying the Commission’s creation are instructive in the immigration context nonetheless, because the Guidelines represent a turn to delegation as a means of addressing certain perverse effects of the political process.<sup>77</sup>

### B. *The Refugee Act as Parallel*

Before answering the design question in more detail, it bears emphasizing that the delegation of ex ante standard-setting authority to the executive is not unprecedented. In 1980, Congress passed the Refugee Act,<sup>78</sup> which delegated to the president the power to

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74. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, § 217(a), 98 Stat. 1976, 2017–26 (codified as amended at 28 U.S.C. §§ 991–98 (2006)).

75. Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 715 (2005). For a brief history of the Sentencing Guidelines, emphasizing their role in providing certainty and fairness in sentencing by reducing disparity, see U.S. SENTENCING COMM’N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1–3 (2009), available at [http://www.ussc.gov/general/USSC\\_Overview\\_200906.pdf](http://www.ussc.gov/general/USSC_Overview_200906.pdf).

76. It is also important to note that judges famously have bristled at the constraints the Guidelines placed on their discretion, and the Supreme Court recently declared the Guidelines advisory in a highly contested decision. See *United States v. Booker*, 543 U.S. 220, 246 (2005). The Court has nevertheless continued to stress that judges must consult the Guidelines in sentencing. See *Kimbrough v. United States*, 552 U.S. 85, 108–09 (2007); *Gall v. United States*, 552 U.S. 38, 51–55 (2007). The constitutional reasons for the Court’s decision—the fact that the Sixth Amendment requires juries, not judges, to find facts that increase a defendant’s sentence above the statutory maximum—simply do not obtain in the immigration context. *The President and Immigration Law*, Cox & Rodríguez, *supra* note 1, is devoted to demonstrating that no formal constitutional restraints exist on the executive’s authority to set core immigration policy.

77. See Barkow, *supra* note 75, at 715 (arguing that the agency model can succeed in the sentencing context but that it will be “more efficacious” if it is “politically enmeshed” and operates largely like an interest group).

78. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

determine the number of refugees to be admitted each year and gave the president the authority to delegate substantive screening decisions to lower-level executive officials.<sup>79</sup> Existing law thus contemplates executive-driven screening; the agency or commission proposed in this Article could be understood, in fact, as a labor-based complement to a regime that already exists. When considering the design of a new labor regime, then, the details of the refugee system offer useful points of comparison, as well as cautionary tales.

In the Refugee Act of 1980 (the Act), Congress replaced an ad hoc regime of refugee admissions, determined largely through presidential exercise of the parole power<sup>80</sup> without congressional consultation, with a clear procedure for the annual admission of overseas refugees that explicitly incorporated congressional participation.<sup>81</sup> The Act delegates to the president the authority to determine the number of refugees to be admitted each year.<sup>82</sup> In the years 1980, 1981, and 1982, the ceilings could not exceed fifty thousand, unless the president determined humanitarian concerns required otherwise.<sup>83</sup> But in the years since, no numerical restrictions have applied, and the Act gives the president the power to adjust numbers set at the start of the fiscal year in response to unforeseen refugee situations.<sup>84</sup> The statute also requires that the president, before setting the annual numbers, engage in “appropriate consultation” with the judiciary committees of both houses of Congress, through in-person communication initiated by cabinet-level officials.<sup>85</sup> The transcripts of these consultations are published in the

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79. 8 U.S.C. §§ 1157–59 (2006).

80. For a discussion of the president’s historical use of the parole power and the way in which the Refugee Act responded to what Congress deemed to be the president’s misuse of power, see Cox & Rodríguez, *supra* note 1, at 501–05.

81. For a contemporaneous, comprehensive account of the legislative history of the Refugee Act of 1980, including a discussion of efforts to create statutory mechanisms that would address conflict between Congress and the executive over refugee-admissions standards, see Anker & Posner, *supra* note 71, at 30, which also notes that balancing calls for broad executive authority against demands for congressional control and statutory consultation was a “pervasive theme throughout [the] six-year debate” on the Act.

82. 8 U.S.C. § 1157.

83. *Id.* § 1157(a)(1).

84. *Id.* § 1157(a)(2).

85. *Id.* § 1157(d). The executive branch must provide Congress with a description of the nature of the refugee situation, a description of the number and allocation of the refugees to be admitted, and an analysis of conditions within the countries from which they came, as well as an analysis of the anticipated social, economic, and demographic impacts of their admission to the United States. *Id.* § 1157(e). The cabinet-level officials typically involved in the consultation

Congressional Record, and the State Department also must submit a report to Congress on the proposed numbers.<sup>86</sup> Finally, once the president has set the maximum number of refugees and allocated that number among countries or regions of the world, the attorney general coordinates the selection of individual applicants.<sup>87</sup>

Though the Act was passed before the Supreme Court struck down the legislative veto in *INS v. Chadha*,<sup>88</sup> the Act never contained a provision for congressional veto of the president's determinations. That said, during the drafting process, the question of whether to include the veto proved to be a significant source of contention.<sup>89</sup> The House and Senate disagreed considerably over how much congressional control to relinquish, with the House advocating returning to Congress the power to admit refugees, and leaders in the Senate seeking "to maintain the flexibility of the admission procedures and not compromise that flexibility by imposing rigid congressional control mechanisms."<sup>90</sup>

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included the attorney general, the secretary of state, the U.S. coordinator for refugees—a position the statute created, requiring confirmation by the Senate—an HHS representative, and, before its dismantling, the commissioner of the old INS.

86. See, e.g., U.S. DEP'T OF STATE ET AL., PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2009: REPORT TO THE CONGRESS, at ii (2008), available at <http://www.state.gov/documents/organization/113507.pdf> (noting that President Bush signed into law a provision that broadens the discretionary authority of the executive branch to exempt aliens from terrorism bars related to admission); *id.* at iii–iv (creating new access categories for Iraqi refugees and citing increased attention to the plight of Iraqi refugees); *id.* at 19 tbl.II (listing recommended ceilings, including 37,000 from Near East and South Asia, 4,500 from Latin America, 19,000 from East Asia, 2,500 from Europe and Central Asia, and 12,000 from Africa); *id.* at 20–48 (listing reasons for allocation, with an emphasis on religious freedom); U.S. DEP'T OF STATE ET AL., PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2007: REPORT TO THE CONGRESS 9 (2006), available at <http://www.state.gov/documents/organization/74762.pdf> (listing three priority levels, with first priority being individual referrals with compelling protection needs for whom no other durable solution exists, second priority being groups of special humanitarian concern for the United States, and third priority involving family reunification).

87. 8 U.S.C. § 1157(c).

88. *INS v. Chadha*, 462 U.S. 919, 959 (1983).

89. See Anker & Posner, *supra* note 71, at 58 (recounting congressional testimony in favor of the legislative veto amendment suggesting that it would return "control over admission of aliens to the Congress, the branch of government that is given sole control over immigration by the Constitution" (quoting 125 CONG. REC. 12,374–75 (1979) (statement of Rep. Fish)); *id.* at 59 (recounting the argument that the legislative veto would establish the principle that "Congress, as a whole, will establish immigration policy for the country in an informed and open manner" (quoting 125 CONG. REC. 12,020 (1979) (statement of Sen. Huddleston)); *id.* at 63 (noting that the major issue during House debates on the Conference Bill was the failure to include a legislative veto provision).

90. *Id.* at 50.

Congress ultimately chose to delegate authority in the Refugee Act for at least two reasons that resonate in the labor context. First, the international refugee situation fluctuates dramatically in response to natural disasters and political developments abroad, thus warranting delegation to take advantage of the executive's alacrity and foreign affairs expertise relative to Congress.<sup>91</sup> Though the economic factors that contribute to the fluctuation of migration flows may not change as rapidly as the conditions that give rise to refugees or require as much foreign affairs expertise to discern, economic factors fluctuate more regularly than Congress appears willing or able to account for. And though the president might have greater relative expertise in foreign affairs than in judging the interaction of international economic conditions and domestic labor interests—an area in which Congress could have the upper hand—the need to look abroad to regulate economic migration, and the executive's greater capacity for responsiveness to changing conditions, cut in favor of executive involvement.

Second, the Refugee Act represented an effort to control the discretion the president had exerted historically over the admission of refugees.<sup>92</sup> As explained in *The President and Immigration Law*, presidents since at least Eisenhower had been using the parole authority to admit thousands of immigrants without congressional pre-approval.<sup>93</sup> With the Refugee Act, Congress sought to systematize that practice and bring it under congressional scrutiny by requiring the president to submit his annual determinations to Congress. On

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91. See *id.* at 35–37 (discussing State Department opposition to numerical limits to preserve the capacity to respond flexibly to crises and the eventual compromise with Congress—some of whose members favored numerical restrictions—to balance flexibility with congressional controls); David A. Martin, *The Refugee Act of 1980: Its Past and Future*, 3 MICH. Y.B. INT'L LEGAL STUD. 91, 99 (1982) (“Members of Congress . . . wanted refugee programs to be flexible, so as to meet new crises effectively.”).

92. See H.R. REP. NO. 96-781, at 19–20 (1980) (Conf. Rep.), as reprinted in 1980 U.S.C.C.A.N. 160, 161–62 (explaining Congress's checks on the president's discretion); S. REP. NO. 96-256, at 1–2 (1980), reprinted in 1980 U.S.C.C.A.N. 141, 141–42; see also Anker & Posner, *supra* note 71, at 27–31 (discussing congressional discomfort with the use of the parole power); Edward M. Kennedy, *Refugee Act of 1980*, 15 INT'L MIGRATION REV. 141, 146 (1981) (“Another concern in Congress was the use of the Attorney General's ‘parole authority’. I felt that Congress had provided ample approval and constitutional justification for the authority. Many disagreed, however, and the issue was of deep concern to many in Congress, especially in the House of Representatives. One of the principal arguments for the Act was that it would bring the admission of refugees under greater Congressional authority and statutory control and eliminate the need to use the parole authority.”).

93. Cox & Rodríguez, *supra* note 1, at 501–05.

the surface, then, because Congress designed the new regime to constrain the president, the direction of congressional control suggested by the Refugee Act may seem to run in the opposite direction of the position advocated in this Article, because the Act sought to constrain the president. But the delegation of ex ante screening authority in the Act offered a means of addressing overly broad prosecutorial discretion through the creation of a transparent regime—one of the dynamics the delegation proposed in this Article would promote.

A wholesale adoption of the refugee selection model in the labor context would be inappropriate, given the differences in regulatory context—primarily that effective regulation of labor migration requires more data-driven analysis and less foreign affairs judgment than refugee admissions, two factors that warrant less presidential control in the labor context. Even in the refugee context, scholars such as Professor Stephen Legomsky have criticized the system for giving the president too much control, which has resulted in refugee admissions that reflect the president's foreign policy agenda at the expense of humanitarian concerns, reflected in the long-standing preference for refugees from communist regimes over other deserving refugee populations.<sup>94</sup>

Such influence is not necessarily illegitimate, if the president's agenda reflects what he was elected to accomplish or the president's actions are viewed as democratic because of his election. But the more important point is that the structure of the refugee regime prioritizes direct presidential control, and overweening control by the president would undermine the objective of introducing technocratic-

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94. Stephen H. Legomsky, *The Making of United States Refugee Policy: Separation of Powers in the Post-Cold War Era*, 70 WASH. L. REV. 675, 701, 708–13 (1995); see also LAWYERS COMM. FOR HUMAN RIGHTS, *THE IMPLEMENTATION OF THE REFUGEE ACT OF 1980: A DECADE OF EXPERIENCE 2* (1990) available at <http://attorneynelson.com/sitebuildercontent/sitebuilderfiles/LCHRRefugeeDecadeReport.pdf> (noting that the humanitarian purpose has been “subverted by political considerations,” with foreign policy dominating refugee admissions such that the vast majority of those admitted were “from the Soviet Union, Eastern Europe and Indochina”); *id.* at 10–11 (noting that ideological and geographical bias in asylum adjudications stems from flaws in the implementation of the Refugee Act, including DOJ's failure to promulgate comprehensive administrative criteria to interpret the standards in the Act, leaving too much discretion to immigration judges); Anker & Posner, *supra* note 71, at 69–70 (documenting that in the early years of the regime, the Carter administration allocated very few visas to refugees from Africa or Latin America, outside Cuba); cf. Matthew E. Price, *Persecution Complex: Justifying Asylum Law's Preference for Persecuted People*, 47 HARV. INT'L. L.J. 413, 418 (2006) (identifying humanitarian and political conceptions of asylum and advocating a focus on political conception).



style decisionmaking into core immigration policy determinations to complement (but not offset) the political framework that dominates the current structure. Indeed, Congress's role in the refugee system, though designed to check unfettered executive discretion, arguably has amounted to nominal participation involving little direct control over the policy decision of whom to admit.<sup>95</sup> The politics of the labor-migration issue may ultimately demand more congressional control, again because labor migration does not sit as close to the heart of the president's traditional foreign affairs powers. But despite the flaws in the refugee model, the regime's existence does underscore that executive involvement in setting admissions numbers fits within existing conceptions of the separation of powers, suggesting room for reforms along similar lines in other parts of the immigration regime.

### C. Agency Structure

Whether an agency or commission offers a politically attractive reform option or dramatically improves the process of immigrant screening without inappropriately displacing popular control over admissions decisions depends in large part on how the agency is designed.<sup>96</sup> This Section surveys the key design questions that must be addressed, providing some preliminary answers. The key task of the agency will be to set the number of labor immigration visas to be issued each year.<sup>97</sup> The two most important design questions will be:

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95. Arnold Liebowitz, a former special counsel to the Selection Commission on Immigration and Refugee Policy and special counsel to the Senate Subcommittee on Immigration and Refugee Policy, has offered this view of how congressional consultation works: "The way this works is that the Executive Branch puts forth a number. The Congress then has consultations in relevant committees, both in the House and Senate, and then the Executive Branch goes and does what it wants. At least, that is the congressional view of the system." Symposium, *Challenges in Immigration Law and Policy: An Agenda for the Twenty-First Century*, 11 N.Y.L. SCH. J. HUM. RTS. 467, 473 (1994) (comments of Arnold Liebowitz) (citations omitted). Even if Congress were able to influence the ceiling numbers, the number of refugees the attorney general actually admits often falls well below the allocated numbers. See DAVID A. MARTIN, U.S. DEP'T OF STATE, THE UNITED STATES REFUGEE ADMISSIONS PROGRAM: REFORMS FOR A NEW ERA OF REFUGEE RESETTLEMENT 36 (2004), available at <http://www.state.gov/documents/organization/36495.pdf>.

96. For an excellent and comprehensive synthesis of the public choice literature exploring agency-design questions, see Gersen, *supra* note 73.

97. Other topics for consideration are implicit in this very general mandate, such as whether the president or the agency should set ceilings and delegate power to other executive branch actors to screen among applicants in a pool for actual admission, as is the case with the refugee regime, or whether the agency should set the numbers and conduct the allocations itself on a rolling basis. Should the agency supplant the entire employment-based system with respect to both permanent and temporary workers? The justifications for delegation explored in Part I

(1) whether the agency should be an independent agency or commission, or an executive agency—a question that involves determining the optimal level of insulation from politics that would ensure the agency’s effective performance and legitimacy, and (2) how Congress should oversee the agency’s work.<sup>98</sup> Other important questions, such as whether forms of public or White House oversight should be built into the regime, should also be taken into consideration. Each of the existing mechanisms of control has its virtues as a means of ensuring accountability, transparency, and effectiveness, so this Section discusses many design possibilities. But lawmakers designing the agency must be careful not to weigh it down with so many different forms of oversight that it becomes difficult for the agency to do its job. The following analysis, therefore, represents a menu of options, rather than a fixed list of features.

Though this Section focuses on the procedural and structural aspects of the agency’s design, the substance of the agency’s statutory mandate will also affect the balance of insulation and accountability and will determine the scope of the agency’s authority, requiring a preliminary consideration of what, precisely, Congress should direct the agency to do. The framework statute for the agency could place significant substantive constraint on the agency’s activity by setting ceilings on the number of immigrants admitted in a given year. But such *ex ante* constraint would run counter to the reasons for

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do not suggest any reason to delegate in one area and not the other, which then raises the question of how many and what types of visas the agency would issue—lawful permanent resident visas versus temporary visas. Should the statute specify a proportion in which the agency should allocate those categories? Should the agency apply a ceiling to one stream but not the other?

Another way to enhance congressional involvement would be for the executive to serve primarily in an advisory role, recommending labor visa numbers annually that Congress could choose to adopt to replace the status quo or a number fixed in the statute. Even a purely advisory committee might act as a prompt to congressional action by doing some of Congress’s work for it. By gathering data and issuing regular recommendations, even an advisory agency would produce empirically informed contributions to what should be an ongoing debate and give Congress a leg up on the fact-finding process. If the obstacles to congressional action are primarily political and structural, however, a board or commission that lacks decisionmaking power will just produce make-work. Ultimately, the refugee-selection system offers one model for executive decisionmaking complemented by congressional oversight, and its key feature is the opportunity it creates for adjustment of numbers on an annual basis by an actor within the executive branch well placed to identify and respond to changed conditions in a comparatively swift manner.

98. For a discussion of how to negotiate this divide through institutional design in the criminal justice context, see Barkow, *supra* note 75, at 798–812.

delegation,<sup>99</sup> because it would functionally replicate the status quo. Another option would entail having Congress set a statutory minimum or target, rather than authorizing the president to act unilaterally. Congress could then delegate power to the president or the agency to determine whether to depart upward from this number. This default approach could guard against agency failure to regulate by ensuring that a minimum number of labor entrants are permitted each year. But such statutory defaults could quickly become de facto ceilings and could reduce the agency's incentives to conduct the sort of data-gathering and analysis needed to ensure that annual visa allocations respond to changing circumstances.

A meaningful departure from the status quo in service of the objectives outlined in Part I would require Congress to authorize the agency to set actual visa numbers. In delegating this standard-setting authority, Congress must lay out “intelligible principle[s]”<sup>100</sup> to guide the rulemaking process—principles that provide a framework for agency decisionmaking but are sufficiently open-ended to permit the agency's determinations to change in response to evolving circumstances. The statute should require that the agency set admissions standards requisite to meet the country's labor market needs, promote the public interest, and ensure the orderly flow of labor migration. This latter requirement, in particular, would task the agency with the responsibility of taking a holistic approach to setting standards by focusing not simply on short-term labor shortages, but also on the multiple and long-term factors that contribute to labor migration. The statute could give greater content to these principles by directing the agency to reasonably balance a nonexclusive list of factors, including current labor shortages and predicted future labor market needs, potential for economic growth and job creation, the impact of immigration on the wages of U.S. workers, and the likelihood of future illegal immigration in the absence of legal avenues for entry. By creating a nonexclusive list, Congress would ensure that other relevant but perhaps more controversial factors, such as the interests of intending migrants and the economic and

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99. See Gersen, *supra* note 73, at 11 (citing literature suggesting that ex ante mechanisms of control will be suboptimal when cheap ex post mechanisms of control exist as substitutes).

100. *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 472 (2001) (“[W]e repeatedly have said that when Congress confers decisionmaking authority upon agencies *Congress* must ‘lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.’” (alteration in original) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928))).

social factors that motivate migration from other countries, namely Mexico, could be taken into account.<sup>101</sup>

1. *Independent Versus Executive Agency.* The threshold structural question to be answered is to what extent the president himself should be involved in agency decisionmaking. In an early assessment of the refugee selection system, David Martin emphasized that the refugee admission scheme had not gotten off the ground because it was subject to incompatible demands. Members of Congress and the public demanded that programs be flexible “to meet new crises effectively” but insisted at the same time on avoiding surprises, thus expressing preferences for “planning and control.”<sup>102</sup>

One way to break through these incompatible demands might be to establish an independent agency, which would be capable of acting with speed in response to changed circumstances, but which also might be sufficiently insulated from direct presidential involvement to prevent politically motivated decisionmaking by the president or his political appointees from producing surprises. Though no single definition of an independent agency exists,<sup>103</sup> such agencies tend to be defined by restraints on the president’s authority to hire and fire their members, primarily through requirements that the agencies be structured as multimember commissions whose members may only be dismissed for cause, serve staggered terms, and include representatives from both political parties. In theory, an agency insulated from presidential control through one or more of these features would be more likely than an agency controlled directly by the president to make objectively informed determinations that affected parties can easily anticipate and scrutinize. Though the above factors represent the most commonly recognized indicia of independence, other considerations, such as whether Congress establishes the agency or commission as free-standing or within an already existing executive entity, and more ephemeral factors, such as personal ties to the president,<sup>104</sup> affect independence, as well.

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101. For a discussion of the forms of data that the agency ought to gather, see PAPADEMETRIOU ET AL., *supra* note 44, at 13.

102. Martin, *supra* note 91, at 99.

103. See Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1135 (2000) (“There is no general, all-purpose statutory or judicial definition of ‘independent agency.’”).

104. See Kagan, *supra* note 22, at 2376.

Scholars have advocated a move toward independence in the refugee context to preserve the advantages of flexibility while reducing the role of presidentially driven politics, primarily to ensure that the refugee system does not sacrifice humanitarian goals to foreign policy objectives.<sup>105</sup> Similarly, a leading proposal to create a standing commission on labor migration emphasizes independent, data-based judgment and expertise as the animating criteria for a new system of labor migration and calls for the creation of an independent agency whose members, removable only for cause, would serve staggered terms and be balanced between the political parties.<sup>106</sup> A turn to an independent agency would thus place the expertise justification at the center of the design, on the theory that independence would make it difficult for political actors of any kind to control the numbers that the agency ultimately sets.<sup>107</sup>

Commentators have vigorously challenged this conception of the independent agency as insulated from political control in at least two ways. First, numerous scholars have emphasized that the “independence” of independent agencies has been overstated.<sup>108</sup> The president’s power to appoint members, even in the face of

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105. See Legomsky, *supra* note 94, at 708–13 (advocating the creation of an independent commission to allocate refugee visas, thereby addressing the problem of politically motivated decisionmaking).

106. See PAPADEMETRIOU ET AL., *supra* note 44, at 15 (noting that “[t]he Attorney General and Secretaries of Homeland Security, Labor, State, Commerce, Health and Human Services, and Agriculture should be *ex officio* members”).

107. Other factors in the agency structure that would be particularly pertinent to the objectives outlined here include determining who will be regarded as an expert for staffing purposes and whether this agency will compete with the Department of Labor or other agencies for jurisdiction, which may lead its members to align themselves with interest groups, thus politicizing the process. See Jonathan R. Macey, *Organizational Design and the Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 104 (1992) (discussing these structural questions in the context of arguing that dictating agency structure is one of the most effective ways of controlling policy drift).

108. See Breger & Edles, *supra* note 103, at 1162 (arguing that although independent agencies have “several tools” to resist executive will, “[a] vigilant President will make it more difficult for an agency to effectuate its own policies”); Alan B. Morrison, *How Independent Are Independent Regulatory Agencies?*, 1988 DUKE L.J. 252, 252 (“The basic question . . . is, how independent are independent agencies? The answer, it seems to me, is ‘not very.’”); see also Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255, 256 (1994) (noting that the fact that the solicitor general defends the positions of independent agencies before the Supreme Court gives the executive significant control over the development of law in independent agencies); cf. Aranson, *supra* note 50, at 26 (arguing that regulatory issues cannot be depoliticized and “[i]f transfers involve political questions about public policy, then there is no reason to expect that politics will disappear”).

bipartisanship requirements, coupled with the president's ability to apply informal pressures to the agency, result in considerable executive control.<sup>109</sup> The combination of these powers suggests that the choice of whether to create an independent or executive agency to channel labor migration may be less consequential than it seems at first glance. If policymakers seek insulation from executive whim, then the question becomes how to build in congressional and other controls to promote decisionmaking that, even if not apolitical, at least takes into account more than the president's preferences.

Another line of thought holds that independent agencies accomplish precisely this goal of disabling the president through the maintenance of congressional control. By creating an independent agency, Congress actually protects its own territory. On this theory, independent agencies do not introduce Congress directly into the decisionmaking picture, but they constrain the president to the benefit of Congress by preventing the president from interpreting and shaping the agency's statutory mandate.<sup>110</sup> One version of this theory suggests that independent agencies actually aggrandize Congress and its committees, thus undermining the unitary executive. In his opinion in *FCC v. Fox*,<sup>111</sup> for example, Justice Scalia emphasizes that "independent agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction,"<sup>112</sup> citing considerable scholarly commentary to this effect.<sup>113</sup> In addition, interest groups are also capable of exerting pressure over independent agencies in a way that undermines the claims that the

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109. See, e.g., Angel Manuel Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 ADMIN. L.J. AM. U. 461, 499-504 (1994) (summarizing seven powers the executive exercises to varying degrees over independent agencies, including clearance of legislative recommendations, controls over personnel and facilities, the power of appointment, litigation and representation in court, and powers related to the budgetary process).

110. Since 2000, for example, five independent agencies have sent their legislative proposals directly to Congress, rather than to the Office of Management and Budget in the White House, as required by executive order, to assert their independence. See Breger & Edles, *supra* note 103, at 1152 (noting also that though the executive can exert control over independent agencies, those agencies can turn to Congress as a means of fighting executive control).

111. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009).

112. *Id.* at 1815 (plurality opinion).

113. *Id.* (citing, *inter alia*, Steven Calabresi & Sai Prakash, *The President's Power to Execute the Laws*, 104 YALE L. J. 541, 583 (1994); Frank Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1341 (1994); Kagan, *supra* note 22, at 2271 n.93).

agencies' decisions are expertise-based. This dynamic thus introduces the possibility that an independent agency will be subject to political influences, but not to direct mechanisms of accountability, such as presidential removal.<sup>114</sup> And thus, one might characterize the choice of independent agency versus executive agency as a choice between indirect congressional control and direct presidential control, rather than one about relative insulation from politics.<sup>115</sup>

If independent agencies are subject to significant external control, then insulation may be an insufficient justification for creating such an agency. In other words, if insulation is truly difficult to achieve, the loss of greater accountability that comes from direct and transparent control by a political actor—an accountability that arguably characterizes executive agencies—may be too significant a tradeoff. In some contexts, the value of insulation may be ephemeral in any case because of the nature of the domain being regulated. Professor Rachel Barkow has made this point in the sentencing context, noting that “political pressures in criminal justice are strong enough to overcome any institutional design of insulation, thus making criminal justice a unique subject of agency regulation.”<sup>116</sup> The same may be true for immigration. The political economies of immigration law and criminal law resemble one another a great deal. Professor Cox and I have explored one way in which this is true with respect to prosecutorial discretion.<sup>117</sup> In addition, the “tough-on-crime” and “no-more-immigrants” lines of argument mirror one another as zero-tolerance policies, abetted in large part by the fact that neither criminal defendants nor noncitizens have much political clout—the former because they are an unsympathetic and unorganized constituency and the latter because, by definition, they lack the right to vote (as is true for some criminal defendants, as well).

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114. Cf. Stephenson, *supra* note 24, at 61 (noting that some presidentialists acknowledge the value of entities other than the president playing a role, including interest groups and congressional committees, but not for majoritarian reasons).

115. Cf. Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 896 (2008) (demonstrating empirically that agencies are responsive to political transitions in Congress, not just to presidential transitions, and that “[l]egal scholars likely have focused too heavily on the President in examining the operation and legitimacy of the administrative state”).

116. See Barkow, *supra* note 75, at 798.

117. See Cox & Rodríguez, *supra* note 1, at 513–16.

If insulation is truly unachievable, then perhaps policymakers should create an executive agency, making the political controls exercised more transparent and therefore subject to more effective critique and greater accountability. That said, the critiques outlined above arguably cancel each other out, suggesting that neither the president nor Congress has complete control over independent agencies,<sup>118</sup> which means the branches can play off of each other to some extent. In other words, though complete insulation from political control may be unattainable (and probably also undesirable because it would eliminate accountability), the structure of an independent agency at least enables tensions between political actors to keep politically motivated decisionmaking at bay. In addition, scholars have emphasized that, for cultural and political reasons, the president shows greater caution when attempting to control an independent agency's agenda than an executive agency's.<sup>119</sup> And, as a matter of practice, the Office of Information and Regulatory Affairs (OIRA) in the White House has subjected independent agencies to less centralized review.<sup>120</sup> At the same time, the extent of an independent agency's insulation from politics also will depend on the internal culture and operations of the agency<sup>121</sup> and the president's particular orientation toward the agency, which in turn depends on the agency's substantive mandate and the quality of staffing and prestige of the agency.

The hope of independence, ultimately, need not be abandoned, particularly because the objectives outlined in Part I—broad responsiveness to popular will but insulation from incremental

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118. Cf. Breger & Edles, *supra* note 103, at 1234 (“The administrative state is too protean for the executive to always desire, or indeed always to be able, to patrol all its far reaches. And, Congress is too balkanized to effectively control at all times through oversight and legislation.”).

119. See, e.g., Nicholas Bagley & Richard C. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1308 (2006) (describing how most executive orders regulating modes of policy analysis do not extend to independent agencies); Breger & Edles, *supra* note 103, at 1200 (noting that much of agencies' independence is determined by culture and a belief that the president is not supposed to reach out to independent agencies); Kagan, *supra* note 22, at 2376–77 (noting that removal power does not precisely track the strength of a president's policy influence and emphasizing lesser sanctions, institutional incentives, personal ties, as well as long-standing and “psychological” norms of independence).

120. Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 135 (2003) (discussing the limited requirements OIRA executive orders place on independent agencies).

121. See Breger & Edles, *supra* note 103, at 1234 (noting that administrative process owed more to experience than doctrine, which is especially true for the internal operations of agencies).



populist shocks, as well as responsiveness to changing circumstances—still militate in favor of independence. Because the cultural norms of independence take shape over time, for a new immigration commission, it will be important for Congress to create structures that encourage norms of independence to emerge. Independence and insulation from politics are ultimately matters of degree,<sup>122</sup> and Congress can design an agency or commission to sit at various points on an independence-to-accountability spectrum by varying the indicia of independence built into the agency's framework.

The institutional features of a new immigration commission should include a multimember, bipartisan decisionmaking structure located outside existing agencies, both to avoid direct presidential control<sup>123</sup> and to circumvent the inertia of the existing immigration bureaucracy. Above all, securing insulation may be less about eliminating political controls than about opening up space for apolitical, data-based regulatory analysis to play a significant role in the policy process. As the discussion of the relative nonresponsiveness of the bureaucracy in Part I suggests, even if politics cannot be removed from regulation altogether, drawing agents with nonpolitical incentives into a central position in the decisionmaking structure can heighten attention to technocratic concerns. Even under this framework, the president's concerns, particularly with respect to foreign policy, could play a role in policy formation by using his power of appointment to require the agency to consult with the Departments of Labor, Homeland Security, State, and others.

## 2. *Congressional Monitoring of Executive Policymaking.*

Whether the agency takes the form of an independent commission, or an agency directly controlled by the president, policymakers should give additional thought to the shape congressional oversight might take. Two possibilities for this oversight include the introduction of reporting requirements similar to those established in the Refugee Act and formal report-and-wait requirements. Such oversight will

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122. Cf. Kagan, *supra* note 22, at 2376–77 (noting that when insulation from removal is combined with a multimember, bipartisan commission structure, and long-standing norms of independence held widely within the bureaucracy and Congress, “the gap between the agency and the President almost inexorably widens”).

123. See Gersen, *supra* note 73, at 28 (noting that the location of new agencies outside existing bureaucratic structures can heighten insulation).

help to promote legitimacy, particularly given that the creation of an agency to make core immigration policy would represent a significant reallocation of power. And, particularly in the creation of an independent agency, accountability concerns make congressional controls even more important. Even assuming critics are correct that congressional committees exert considerable influence over independent agencies by definition, Congress can build additional and more formalized mechanisms of congressional consultation or control into the agency's decisionmaking processes to ensure transparent oversight. Similarly, if Congress chooses to create an executive agency and believes either that the president's position at the top of the scheme is not sufficient to ensure accountability to the people, or that the president's influence should be limited in some way short of denying him removal power, congressional monitoring mechanisms of some kind will be useful.<sup>124</sup>

As suggested at the outset of this Part, Congress could add *ex ante* mechanisms into the agency's framework statute to limit executive discretion. Congress could list particular employment categories to which the agency must give priority, determine annual ceilings, dictate the proportion of visas to be allocated between certain industries or between high- and low-skilled workers, or declare certain factors, such as the interests of U.S. workers, to be more important than other factors, such as economic growth. Most constraints of this sort, however, would undermine core purposes of creating the commission—flexibility and responsiveness—in favor of predictability, stability, and constraint, thus approximating the status quo. A new system that substantially maintains the status quo would

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124. Ample literature exists on congressional control. See, e.g., Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 433–40 (1989) (observing that Congress prefers structures and processes that insulate agencies from congressional influence, because the enacting coalition wants to “lock in” policy gains by making it harder for future Congresses to undo its work); see also J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1456–59 (2003) (describing Congress's use of “*ex ante* limits on agency decisionmaking and *ex post* oversight by congressional committees” to control its “delegated power[s]”); Macey, *supra* note 107, at 99–101 (discussing how Congress can use the design structure of agencies to maximize its control over them); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 243–45 (1987) [hereinafter McCubbins et al., *Administrative Procedures*] (summarizing the ways in which Congress can enhance its control through procedural changes); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984) (defining two types of congressional oversight).

not justify wholesale institutional reform. As a result, instead of imposing *ex ante* statutory constraints, policymakers should consider congressional monitoring mechanisms that take procedural form and include formal consultation, report-and-wait requirements, and deadlines that require the agency to set annual numbers by a certain point in the fiscal year.

The inclusion of some of the so-called “police patrol”<sup>125</sup> measures should be a threshold expectation. These measures could include regular reporting requirements to congressional committees and perhaps also to the Government Accountability Office (GAO), which could independently assess the agency’s interpretation of and response to the data it collects. Formal consultation requirements could promote good-faith engagement with congressional committees at a relatively low cost.<sup>126</sup> Recent refugee consultation hearings reflect congressional awareness of and concern for the executive branch’s recent failures to reach the ceilings set by the president, as well as implementation challenges faced by the executive and caused by Congress’s own alterations to the statutory scheme, such as its enactment of the bar to refugee status for those who have provided “material support” to terrorists. As noted in Part II.B, scholars have criticized the congressional oversight process in the refugee system as being little more than ceremonial,<sup>127</sup> or even as make-work. But even if these critiques are accurate, the formal consultation requirement at least has the virtue of bringing together multiple actors serving different constituencies to assess the executive branch’s recommendations. The consultation also creates a public record identifying issues of concern and limitations in the workings of the bureaucracy.<sup>128</sup>

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125. See McCubbins & Schwartz, *supra* note 124, at 166.

126. See Anker & Posner, *supra* note 71, at 49 (noting the concern in the House that formal methods of consultation would discourage good-faith efforts to solicit congressional input into presidential decisions to raise the numerical limit over fifty thousand, in response to which the attorney general defended the consultation process as a “report-and-wait” provision).

127. For additional discussion of congressional oversight in the refugee context, see *supra* notes 94–95 and accompanying text.

128. In the wake of *INS v. Chadha*, Congress continued to enact statutes that required specific committee approval for agency action. Despite resistance from presidents regarding the constitutionality of these requirements, agencies apparently have tended to respect Congress’s wishes, displaying a deference born out of the agencies’ status as repeat players before the committees. See Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 273 (1993). Though because of *Chadha*, I would favor report-and-wait requirements; Congress could write strong committee oversight into the agency’s statute to encourage substantive dialogue with Congress that renders it more of a player than it has

So-called report-and-wait requirements similarly could provide Congress with a window into and an incentive to evaluate the executive's determinations.<sup>129</sup> These statutory provisions would build in time between the agency's articulation of annual limits and their taking effect, giving Congress or the relevant committees the opportunity to review the standards and to act legislatively if objections arise.<sup>130</sup> In a sense, such provisions only replicate the normal state of affairs, given that Congress always has the power to overturn agency action by passing legislation. But a report-and-wait provision can at least send a signal that a particular agency action deserves attention or scrutiny by expanding the ordinary thirty-day period before agency rules go into effect and providing Congress with more time to engage in review, before reliance interests set in.

The Sentencing Commission is set up along such lines. Its rules take effect 180 days after their announcement, unless Congress passes legislation to stop them.<sup>131</sup> Congress most famously exercised this power when it blocked the Commission's proposal to address the sentencing disparity between crack and powder cocaine—an action ultimately supported by the president, who signed the rejection into law.<sup>132</sup> Because the Commission is a judicial agency, it is quite

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become in the refugee selection process. *See id.* at 288 (discussing how *Chadha* has driven committee vetoes underground, “where they operate on the basis of informal and non-statutory understandings”).

129. For a discussion of report-and-wait systems, see L. Harold Levinson, *Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives*, 24 WM. & MARY L. REV. 79, 93–94 (1982).

130. The Migration Policy Institute proposal follows such an approach.

The Standing Commission would be required by statute to submit an annual report and recommendations simultaneously to the president and Congress. After a specified period of congressional consultation, unless Congress acted to maintain existing statutory baseline labor market immigration levels, the president would issue a formal Determination of New Levels, adjusting employment-based green-card quotas and preferences and temporary worker visa limits for the coming fiscal year.

PAPADEMETRIOU ET AL., *supra* note 44, at 16. A Brookings Institution-Duke University Policy Roundtable has proposed an independent standing commission that would publish reports and studies on many aspects of immigration policy and biennially recommend overall visa category ceilings for congressional review and action. *See* Executive Summary, Brookings-Duke Immigration Policy Roundtable, *Breaking the Immigration Stalemate: From Deep Disagreements to Constructive Proposals* (Oct. 6, 2009), *available at* [http://www.brookings.edu/reports/2009/1006\\_immigration\\_roundtable.aspx](http://www.brookings.edu/reports/2009/1006_immigration_roundtable.aspx).

131. 28 U.S.C. § 994(p) (2006) (requiring the Commission to submit guidelines to Congress by May 1 of a given year and providing that proposed amendments take effect within 180 days of announcement unless Congress passes legislation rejecting the amendments).

132. *See* Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1332 n.75 (2005).

independent from the president. As a result, the presidential veto represents much less of a threat to the congressional control mechanism than it does in relation to executive agencies.<sup>133</sup> Because the president's views are not necessarily in line with the views of the Commission, the report-and-wait provision offers a potentially robust tool for Congress in the sentencing context. Indeed, in the case of the crack/powder cocaine controversy, the president was susceptible to the very same law-and-order political dynamics as Congress and therefore had preferences in line with Congress's.<sup>134</sup> However, the possibility of a presidential veto in response to congressional efforts to overturn agency action suggests that report-and-wait requirements have far less utility in the context of an executive agency, because the agency's outputs are more likely to be in line with the president's preferences, and the president will be more likely to back an agency up with a veto of congressional rejection of the agency's rules.

Despite the theoretical utility of report-and-wait provisions in independent settings, however, Congress has rejected Sentencing Commission amendments only twice,<sup>135</sup> highlighting that the value of report-and-wait provisions may come less from their actual use than from the incentives their existence gives to agencies to anticipate Congress's concerns.<sup>136</sup> As a general matter, report-and-wait provisions require significant congressional effort to overturn an executive determination, including overcoming a presidential veto, and may therefore lead to little more than delay.<sup>137</sup> Over time,

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133. If the president controls an agency, the agency's rules are likely to be in line with the president's preferences, such that even if Congress objects to the agency's rules and attempts to pass legislation overturning them, the chances of a presidential veto are high, unless there is a transition in administration. In the context of an independent agency or commission, where the president's views are less likely to be in line with the agency's views, a congressional move to overturn agency regulations is less likely to be met with a presidential veto.

134. See Statement on Signing Legislation Rejecting U.S. Sentencing Commission Recommendations, 2 PUB. PAPERS 1700 (Oct. 30, 1995).

135. See Bowman, *supra* note 132, at 1341 n.119.

136. One potential problem with report-and-wait requirements suggested by the experience of the Sentencing Commission is congressional micromanagement—a problem that dovetails with the literature discussed in Part II.C.1 concerning congressional control of agencies. Some scholars have suggested that federal sentencing reform has led Congress to attempt to influence the Commission through statutory directives that the Commission “consider” or adopt a new guidelines provision, usually one that involves sentencing enhancements in a manner that reflects the political “cause du jour.” See Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Criminal Sentencing Policy; or Confessions of Two Reformers*, 9 GEO. MASON L. REV. 1001, 1123–24 (2001).

137. In 1996, Congress passed the Congressional Review Act (CRA), Pub. L. No. 104-121, 110 Stat. 868 (codified at 5 U.S.C. §§ 801–08 (2006)), which essentially imposes report-and-wait

Congress may simply come to rubber-stamp the agency's determinations through inaction, suggesting that the provisions might amplify the costs of rulemaking without providing true accountability benefits.<sup>138</sup> In addition, a congressional "no" is a blunt instrument and provides the agency with little guidance concerning how to reformulate its regulatory agenda.<sup>139</sup> If, therefore, the goal of congressional review is to provide agencies with guidance, report-and-wait provisions may have limited value.

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requirements for a wide swath of executive regulations. The sorts of determinations that the agency under consideration would make might qualify as "major rules" under the Congressional Review Act, which would mean that the agency would be required to submit a concise general statement regarding the new rules to Congress, as well as to provide the GAO with a cost-benefit analysis of the rules, among other things. A major rule is defined as one that OIRA has found has resulted in or is likely to result in a one-hundred-million-dollar effect on the economy; a major increase in costs or prices; or significant adverse effects on competition, jobs, investments, and productivity. 5 U.S.C. § 804(2). Presumably the standards the agency sets would be an economic plus and a boost to competition, but particularly with respect to low-skilled immigration, the costs to U.S. workers in the form of depressed wages could qualify the agency's work for the statute's requirements. For further discussion on the requirements of the CRA, see Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 96–102 (1997). The use of the CRA has been sporadic, however, suggesting either that overcoming a presidential veto can be difficult; that once a problem is delegated to an agency, inertia keeps it largely in the control of the executive; or that performing oversight functions, although important to committees, may not be of great import to Congress as a whole. See MORTON ROSENBERG, CONG. RESEARCH SERV., CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN UPDATE AND ASSESSMENT OF THE CONGRESSIONAL REVIEW ACT AFTER A DECADE 6 (2008), available at <http://www.fas.org/sgp/crs/misc/RL30116.pdf> (summarizing critiques, including that the CRA provides no expedited consideration procedure in the House, no screening mechanism to identify rules that may require special congressional attention, and the fact that disapproval of a significant or politically sensitive rule is likely to need a supermajority to be successful if Congress and the White House are under the control of different parties); *id.* (noting that as of March 31, 2008, GAO had cataloged submissions of over 47,000 rules, and Congress had introduced only forty-seven joint resolutions of disapproval relating to thirty-five rules); *id.* at 15 (noting that the Occupational Safety and Health Administration (OSHA) ergonomics rules were disapproved in 2001 but that this disapproval has been attributed to circumstances of the rules' passage, including control of both houses of Congress and the presidency by the same party, long-standing opposition to the standards, and the willingness of the president to undo the contentious rule of the previous administration); *id.* at 44 ("[T]he limited utilization of the formal disapproval process in the ten years since enactment has arguably reduced the threat of possible congressional scrutiny and disapproval as a factor in agency rule development."). For an excellent review of the history of the CRA, see generally Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162 (2009).

138. See Cohen & Strauss, *supra* note 137, at 104 (discussing the CRA and its failure to "secure the enhanced congressional responsibility for the outcomes of rulemaking that seems to be among its principal justifications").

139. *Id.* at 104–05 ("Rather than take political responsibility for defining the agency's authority, Congress leaves to the courts the task of working out the meaning of its Delphic 'No!' This is an evasion, not an assumption, of political control.").

But report-and-wait provisions at least provide a means of promoting transparency, a moderate incentive for the executive to consider potential legislative preferences, a prod to future Congresses to evaluate the agency's outputs, and an added veneer of democratic legitimacy. The delay of implementation gives powerful opposition forces a chance to mobilize to stop rules before they go into effect and create reliance interests. The agency, aware of this possibility, may be less likely to set limits that will upset Congress or the interest groups most affected by its rules.

Finally, the newly created agency must be required to set visa numbers by a certain date each fiscal year to avoid delay and to ensure predictability for employers and those who intend to immigrate. As a recent empirical study of the use of deadlines in administrative law reveals, deadlines provide Congress with an easy mechanism to ensure compliance, but deadlines might also result in "reductions in quality along the substantive dimension."<sup>140</sup> To be sure, the creation of a deadline would reduce the rigor of the consultation processes discussed above, but over time the agency and relevant committees will become more efficient at the process of review (admittedly raising the possibility that it will become pro forma). In addition, because visas must issue every year, regardless of which branch is responsible for setting the visa numbers, the responsible branch must make decisions quickly, which calls for mechanisms that minimize delay, and the ongoing nature of the visa-setting process provides the agency with opportunity for correction each year if its decisionmaking turns out to be faulty. Alternatives include the statutory default rules discussed at the outset of this Part, or a default rule that the previous year's numbers set by the agency will control, if the agency fails to act by its deadline. But whereas the former diminishes the agency's incentives to act, the latter might serve as a useful safeguard to ensure that agency inaction does not bring the labor immigration system to a halt.

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140. Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 932 (2008) ("It is easier to specify and monitor compliance for the temporal preference (say with a quick deadline), but doing so may produce shirking or reductions in quality along the substantive dimension. Congressional choice about whether to regulate substance, timing, or procedure depends in part on the costs of specifying the rule ex ante and monitoring agency compliance along each dimension ex post."); *id.* at 952 ("Deadlines stand out as one of few areas where courts will compel agencies to act despite multiple demands on their resources.").

### 3. *Public Participation, Judicial Review, and Other Controls.*

Other process and structure tools exist to constrain agency decisionmaking, and the Administrative Procedure Act (APA) should apply to the new agency. Most importantly, the tools that promote public participation, such as notice-and-comment rulemaking, can ensure that the views of the multiple interest groups affected by the formation of labor policy inform the agency's actions, and these groups, through their participation, can serve to monitor the agency's activity.<sup>141</sup> The interest groups in this context are relatively well developed and organized, in the form of lobbies representing business, labor, and immigrants' rights, though they by no means have equal money and influence at their disposal, with the latter likely at a relative disadvantage.

The possibility of interest group participation inevitably raises the familiar problem of capture.<sup>142</sup> Interests such as labor unions may

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141. For a discussion of this sort of monitoring, see McCubbins & Schwartz, *supra* note 124, at 166. For a discussion that distinguishes between ex ante and ex post mechanisms of monitoring, when the latter involve congressional oversight to ensure agency compliance with legislative goals, and the former refer to the terms of the statute that limit agency authority, see Kathleen Bawn, *Choosing Strategies to Control the Bureaucracy: Statutory Constraints, Oversight, and the Committee System*, 13 J.L. ECON. & ORG. 101, 105–09, 119–20 (1997). Commentators have discussed the ways in which the APA operates as a mechanism through which Congress controls administrative agencies. See McCubbins et al., *Administrative Procedures*, *supra* note 124, at 244 (“By controlling processes, political leaders assign relative degrees of importance to the constituents whose interests are at stake in an administrative proceeding and thereby channel an agency’s decisions toward the substantive outcomes that are most favored by those who are intended to be benefited by the policy.”). For an excellent review of the positive political theory literature on administrative design, see Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1767–76 (2007). To be sure, it may be more difficult than in the average regulatory case to determine who is supposed to benefit from the agency’s policies in this instance. The “American economy” is not exactly an interest, and the interests of employers, U.S. workers, the consuming public, and the potential immigrant do not necessarily align. In addition, among the objectives this idea of delegation ought to serve are the general values of democracy and transparency, which high levels of prosecutorial discretion undermine in the immigration enforcement context. It is not clear how administrative procedures would channel interest-group pressures to advance these objectives, though the notice-and-comment procedure itself would render executive decisionmaking more transparent and susceptible to public influence than the status quo. This exposure, in turn, could simply replicate the status quo if transparency and participation result in pressure to keep the number of immigrants admitted formally and legally low.

142. For a discussion of theories of agency capture and the difficulties of organizing groups to promote the public good for a large and diffuse group of people, and the overwhelming influence of industry in the rulemaking process in the environmental context, see Bagley & Revesz, *supra* note 119, at 1284–90. Opponents of delegation in the immigration context have emphasized that government commissions are almost never immune from politicization and have raised the specter of capture as a reason to maintain the status quo. Press Release, Am. Immigration Lawyers Ass’n, AILA Position Statement on Business Immigration Reform



wind up exerting considerable influence over the selection process, resulting in visa allocations that prioritize U.S. worker interests at the expense of economic growth, the reduction of illegality,<sup>143</sup> or the very flexibility that should be the hallmark of the new regime. The same could hold true for employers, whose influence could result in an underprioritization of the interests of U.S. workers or the reduction of incentives to build up domestic capacity to address the needs of particular industries. The interests of future or potential migrants (as opposed to immigrants already present) and the general public's interests are also easily obscured. Future migrants are neither territorially present nor sociologically part of the polity, and the general public is an incredibly diffuse entity, making it difficult for either interest to make an impact on the policymaking process.

The need to take into account these interests, particularly the broader public interest, and to avoid interest group dominance of the agency make some direct reporting to Congress important, though such reporting admittedly may not promise much, given that Congress and congressional committees will be influenced by interest groups as well. It is not obvious that the intrusion of politics and interest groups is wholly undesirable, however. In reformulating the existing allocation of power toward the executive and thus toward insulation, legitimacy concerns ultimately demand some connection to public and political interests. Whether delegation functions as a constraint on the executive's discretion and as a means of promoting greater dynamism in the immigration-selection system will depend on the ability of interested parties to hold the executive to account for its failure to act, and so imperfect public participation is preferable to a regime hidden from view.

The procedural requirements of the APA can also help ensure reasoned decisionmaking, and judicial doctrines designed to ensure that agencies take account of the evidence before them and provide reasons for their actions have a role to play in this context. Importantly, however, the role of the judiciary should be limited to ensuring that the agency addresses public comments and follows APA procedures. Courts should avoid hard look review of the

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Principles 2 (July 20, 2009), *available at* <http://www.immigrationworksusa.org/uploaded/file/AILA%20Position%20Statement%20on%20Business%20Immigration%20Reform%20Principles.pdf>.

143. This trade-off would be self-defeating for labor interests, because unauthorized workers present more of a threat to wages and working conditions than legal workers who have bargaining power.

agency's processes, and Congress should preclude review of the substantive limits the agency sets, because such review would give rise to unnecessary and inappropriate complications.<sup>144</sup> In addition, piling notice-and-comment rulemaking on top of report-and-wait provisions may make it difficult for the agency to complete its business each year. Ultimately, the value of each set of requirements provides further justification for creating a new agency, rather than relying on existing agencies, to balance speed with the need for oversight.

Finally, the agency's regime should include two other control mechanisms developed in the last few decades. First, and more importantly, Congress should require a cost-benefit analysis,<sup>145</sup> as well as a distributional analysis,<sup>146</sup> of visa levels, with the relevant factors to be considered to include impacts on the wages of U.S. workers, measures of growth and job creation (or loss), and the enforcement costs incurred to prevent circumvention of the regime. Requiring this analysis on a biennial basis only could reduce the agency's workload, if workload develops as a concern. Though the outcomes of the cost-benefit analysis need not, and probably should not, be explicitly

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144. For a recent discussion of the need for a "new metaphor" to describe judicial review of agency action, and a proposed amendment to the APA that would require courts to be deferential to agencies' analytical methodologies and choice of inferences, relaxing the need for factual support in areas of scientific uncertainty, see McGarity, *supra* note 67, at 557–58. For a discussion of the debate over whether strong judicial review and procedural requirements give rise to ossification, see *supra* notes 68–69 and accompanying text. It is also possible that courts would decline to engage in hard look review of immigration-related decisions because of traditional notions of deference to the political branches in these matters. See Cox & Rodríguez, *supra* note 1, at 465–82 (discussing the complex history of judicial deference to the immigration policies of the political branches); cf. Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1149 (2009) (arguing that in certain areas courts have not taken the hard look approach because of political constraints or because rules emerge during times of emergency).

145. For a recent and robust defense of cost-benefit analysis as "inevitable" as well as desirable as a "requirement of basic rationality" that "makes decisionmakers more accountable by making their decisions more transparent" and "imposes structure" on the vast discretion of agencies, see RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* 12 (2008); see also *id.* at 13–16 (addressing critiques of cost-benefit analysis, including that it leads to commodification, unfairly distributes regulatory benefits, and delivers the impression but not the reality of scientific certainty).

146. See *id.* at 180–83 (discussing the use of cost-benefit analysis to serve progressive ends); see also RICHARD L. REVESZ & MICHAEL A. LIVERMORE, INST. FOR POLICY INTEGRITY, N.Y.U. SCHOOL OF LAW, *FIXING REGULATORY REVIEW: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION* 14–15 (2008), available at <http://www.policyintegrity.org/publications/documents/FixingRegulatoryReview.pdf> ("Cost-benefit analysis should be augmented with distributional analysis, conducted on a central and holistic level, to account for disadvantaged groups, including those that face disproportional environmental, health, and safety risks.").

binding on the agency<sup>147</sup> because of the fundamental distributional concerns implicated by labor migration, the process of conducting the analysis will help ensure informed congressional oversight, good-faith agency efforts to compile the appropriate data,<sup>148</sup> and transparent agency decisionmaking.

Second, policymakers—both in Congress and the White House—should consider whether OIRA should review the agency’s visa limits. If the agency is established as independent, requiring such review would undermine the virtues of independence and add unnecessary delay, creating tension with the deadline requirement articulated above.<sup>149</sup> In addition, if Congress requires consultation with the Departments of State, Labor, and Homeland Security, then OIRA review may be superfluous. But even given these two conditions, some White House scrutiny and coordination may well be warranted, given both the political nature of the agency’s mandate and the sprawl of the immigration bureaucracy across the executive branch.

### III. FEASIBILITY

Whether the creation of an agency or commission amounts to a good idea depends in part on its feasibility, in two senses. First, is it realistic to think that Congress will delegate to the president authority that has become, over time, the province of Congress? As noted at the outset of this Article, the Supreme Court has repeated on numerous occasions that “the [notion that the] formulation of [immigration] policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.”<sup>150</sup> Given that this concept of congressional primacy over core immigration decisions has evolved principally through interaction between the

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147. The agency’s framework statute can specify that cost-benefit analysis must be conducted, but that it need not be binding on the agency. It may be that the requirement of analysis will lead the agency to rely on it more often than not, but at least this structure would give the agency room to exercise its discretion.

148. See REVESZ & LIVERMORE, *supra* note 146, at 21 (emphasizing that OIRA should make sure that agencies gather necessary background data and build an adequate knowledge base to regulate).

149. For a discussion of the OIRA process and its limitations, including that there is little reason to think that agency capture cannot happen to OIRA or the president, see Bagley & Revesz, *supra* note 119, at 1304–12, and see also Rubin, *supra* note 120, at 135–37.

150. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 766–67 (1972); *Galvan v. Press*, 347 U.S. 522, 531 (1954).

political branches themselves and not through judicial imposition (the oft-repeated quotation above represents a bit of observational dicta), Congress may well regard the delegation of core immigration power as anathema, or as a threat to the powers it has claimed over time, as immigrant admissions has evolved from a treaty-based endeavor to a legislative one.<sup>151</sup>

Second and more important is the question of whether an agency will be able to meet the objectives Congress sets for it. This evaluation will be predictive in nature, and given how poorly the current system channels labor migration, taking a structural redesign approach that differs radically from the status quo has its virtues as an experiment. But it nonetheless remains important to confront the possibility that the executive will not exercise the power delegated to it in a way that addresses the rule-of-law or stasis problems that present the primary motivations for institutional redesign, or that the same factors that constrain Congress from acting will not also distort the executive's decisionmaking.

On the first question of political feasibility, I leave aside whether the current mix of Democrats and Republicans in Congress, the legislative priorities of the current president, and the legislative agenda as it is now unfolding would be conducive to the creation of an agency, largely because such details are ephemeral. Instead, the important question is whether Congress, as a general structural matter, will be willing to delegate its power. Historically, Congress has been resistant to executive meddling in the allocation of visas. During the 1965 immigration reforms, for example, a proposal to create a commission charged with allocating visas proved to be a sticking point. The 1965 Hart-Celler Act<sup>152</sup> eliminated the national-origins quotas but phased in the new regime over a period of years. Members of the Johnson State Department were nonetheless concerned about the foreign policy implications of reducing the number of visas available to Northern European immigrants, even though the visas were underutilized.<sup>153</sup> The bill would have put into place a procedure for executive reallocation of visas to provide "the flexibility needed to deal with unforeseeable problems of fairness and

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151. See Cox & Rodríguez, *supra* note 1, at 483.

152. Hart-Celler Act, Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended in scattered sections of 8 U.S.C.).

153. Edward M. Kennedy, *The Immigration Act of 1965*, 367 ANNALS AM. ACAD. POL. & SOC. SCI. 137, 145-46 (1966).

foreign policy.”<sup>154</sup> It would have required the president to consult with a new Immigration Board, whose task would have been conducting continuous study of migration conditions and advising the president on criteria for admission.<sup>155</sup>

Key players in the House—primarily Representative Michael Feighan, Chairman of the Immigration Subcommittee of the House Committee on the Judiciary—resisted.<sup>156</sup> Feighan argued that the Board would “usurp [Congress’s] statutory duty and functions” of regulating immigration,<sup>157</sup> transforming the president’s limited power to keep immigrants out in emergencies into a power to let them in.<sup>158</sup> The administration ultimately bowed to the pressure engendered by the specter of executive micromanagement and dropped the Commission from the bill.<sup>159</sup>

154. See *Immigration*, *supra* note 4, at 414 (statement of Robert F. Kennedy, Att’y Gen. of the United States).

155. *Id.* at 392 (statement of Dean Rusk, Secretary of State of the United States) (suggesting in writing that “it would be orderly for the executive branch to have the benefit of the study, advice, and guidance of a board”).

156. Chairman Feighan questioned Secretary Rusk: “[D]oes your proposal suggest that Congress is inadequate for the task of establishing a clear and all-inclusive immigration policy?” *Id.* (statement of Rep. Feighan, Chairman, Subcomm. No. 1, H. Comm. on the Judiciary). Secretary Rusk responded: “No, Mr. Chairman. Both under the Constitution and under the practices of our system of government, it is for the Congress to establish the basic policy and the basic legislation.” *Id.* (testimony of Dean Rusk).

Chairman Feighan also questioned Attorney General Kennedy: “[T]o what extent does the administration proposal call upon Congress to divest itself of its traditional authority under decisions of the Supreme Court for regulating immigration in the United States?” *Id.* (statement of Rep. Feighan). Attorney General Kennedy dismissed the chairman’s concerns, stating,

I do not think it really does[,] . . . no. I think it sets up certain standards which must be followed by the executive branch of the Government, by the President of the United States . . . I think that this is one tight control over the situation by the legislative branch of Government. The authority that the President has is only to soften somewhat the impact of a change from one system to another. But the President, Mr. Chairman, does not have the authority under this legislation to permit a greater number of immigrants to come into the United States from any country than are permitted to come under the present system.

*Id.* at 423–24 (testimony of Robert F. Kennedy).

Members of the administration sought to reassure Congress that the Board would not be overly responsive to political pressure. See *id.* at 474 (testimony of Norbert A. Schlei, Assistant Att’y Gen. of the United States) (“The Immigration Board would be a very high-level policy board that would not be getting any supervision at all from the executive branch. It would be the highest policy source in the Government, and would give advice to the President, to the Attorney General, the Secretary of Labor, and the Secretary of State, the people who are involved in the various aspects of immigration policy.”).

157. *Id.* at 393, 423 (statement of Rep. Feighan).

158. *Id.* at 424.

159. For a discussion of the debate over the Commission, see Kennedy, *supra* note 153, at 140, and see also Cox & Rodríguez, *supra* note 1, at 541 n.266.

The Hart-Celler experience raises the classic administrative law question of why Congress does or does not delegate.<sup>160</sup> As noted above, in the case of immigration, Congress may be reluctant to delegate because of a general desire to protect its territory, as core immigration policy over time has become entrenched in Congress's bailiwick. Perhaps Congress regards immigrant admissions decisions as value judgments that do not require the expertise of agencies or bureaucrats—a key factor in the decision to delegate. To put the proposition in lofty terms, immigrant admissions constitute membership decisions, which belong to the legislative body standing in for the people.

But the notion that setting immigration levels is different in kind from other policy decisions made by administrative agencies seems grandiose and blinkered. Other regulatory matters handled by agencies, such as the setting of environmental or occupational health and safety standards, have serious economic and distributional implications and involve moral and policy judgments concerning the value of human life, both present and future, and the need to protect industry and promote innovation. And as with other regulatory matters, the tradeoffs made in the immigration context are influenced by typical political and interest group pressures from unions, ethnic lobbies, business groups, and the foreign policy establishment, among others. More to the point, the central conclusion drawn in *The President and Immigration Law* is that the executive *does* make “membership” decisions as a de facto matter, though in a fashion that is generally nontransparent and parasitic on the existence of high levels of socially dysfunctional illegal immigration.<sup>161</sup>

Of course, the fact that the claim of congressional monopoly over membership decisions does not ring true does not make it any less a part of Congress's self-conception, so the claim remains a potential obstacle to delegation. What is more, Congress and the executive have not historically shared preferences concerning how many

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160. See DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATED POWERS* 29–35, 151–54, 196–231 (1999) (observing that delegation tends to occur when there is unified government or with respect to matters involving technical expertise or detail).

161. See Cox & Rodríguez, *supra* note 1, at 510–19 (describing how “the modern structure of immigration law that gives the President little standard-setting authority as a formal matter actually has given rise to a system of de facto delegation of power that serves as the functional equivalent to standard-setting authority,” in light of the executive's power to enforce legal rules that make significant populations of immigrants removable).

immigrants to admit, irrespective of the parties in power, thus making Congress more reluctant to delegate. Presidents have tended to be more expansionist than Congress. Multiple presidents vetoed the literacy-test requirement that Congress sought to impose in the early twentieth century;<sup>162</sup> four presidents, beginning with Roosevelt and including Eisenhower, sought to remove the national-origins quotas from the law before President Johnson finally signed the legislation that did so in 1965;<sup>163</sup> and Roosevelt, Truman, and George W. Bush all advocated temporary worker programs in the face of strong resistance by Congress.<sup>164</sup>

Finally, Congress may desire to maintain low limits or consistent ceilings on immigration—even as it reshuffles priorities within the system—to be seen as responsive to public preferences. Even if low limits result in the production of illegal immigration (or pressure from certain high-tech industries to admit more high-skilled immigrants), these costs are likely limited ones worth bearing, because Congress never faces direct or exclusive blame for the rise of illegal immigration. Instead, it can easily deflect that blame to the president and the failure of his dysfunctional agencies to enforce the law,<sup>165</sup> or to the illegal immigrant lawbreaker himself.<sup>166</sup> Congress can

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162. *Id.* at 483 n.83.

163. *See supra* note 152 and accompanying text.

164. Cox & Rodríguez, *supra* note 1, at 482 n.78, 535.

165. Other scholars have offered a different perspective on blame avoidance. *See* Jide O. Nzelibe & Matthew C. Stephenson, *Complementary Constraints: Separation of Powers, Rational Voting, and Constitutional Design*, 123 HARV. L. REV. 617, 625, 640 (2010) (arguing that blame avoidance represents a rational response to voter preferences that the president share power or seek assent from other agents before engaging in policymaking).

166. Some scholars of delegation emphasize that Congress delegates as a means of shifting blame and political costs to agencies and that Congress has the capacity to produce detailed, complex legislation through time-consuming processes when it will benefit from doing so. *See* MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 48–49 (2d ed. 1989); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 10, 55 (1993) (underscoring Congress's capacity to legislate on complex matters and arguing that Congress shirks its duties in unconstitutional ways when it delegates to unelected bureaucrats, noting that “broad delegation helps to insulate Congress and the White House from political accountability for supporting laws that are harmful to the broad public interest”); *see also* Aranson et al., *supra* note 50, at 33 (“The delegate with broad discretion offers the legislator a substitute for taking direct action that different constituents might find objectionable.”). This dynamic suggests that a major incentive for delegation may not exist in the immigration context, because the political costs already have been diffused. Others have been critical of the blame shifting literature. *See* HORN, *supra* note 51, at 44–46 (expressing skepticism that legislators can shift blame to agencies, as this move would require apathetic, uninformed voters, and noting that delegations still occur in parliamentary systems, in which “responsibility is perfectly clear,” because it belongs to the

simultaneously garner ever-greater public support for its policies of shoveling more money into new enforcement initiatives such as the border fence—a crowd-pleasing way of addressing the pressures of economic migration—and then blame the executive for failing to spend that money effectively.<sup>167</sup>

These obstacles to delegation loom large, but whether Congress could be persuaded to delegate ultimately depends on what, exactly, Congress would be delegating. Substantively, Congress might be more willing to draft a statute that sets visa ceilings but permits the agency to allocate visas among types of labor migrants according to its data-based judgments than to give an agency complete power over the process. But, as emphasized throughout this Article, such an agency would be of limited benefit and probably not worth the time and resources that would be allocated to its creation and maintenance.

Structurally, the creation of an independent agency that limits the president's powers may be more appealing to Congress than an agency that gives the president new powers, especially if Justice Scalia's claim in *FCC v. Fox* that congressional committees exert tremendous control over independent agencies turns out to be true,<sup>168</sup> or if Congress is uncertain about the trajectory of political preferences.<sup>169</sup> That said, the creation of an independent agency raises the accountability flag, and in some regulatory arenas, including immigration, members of Congress might desire broad political control by the political branches, particularly in a moment of unified government, but also if Congress can carve out a role for itself to monitor, through oversight mechanisms, a presidentially controlled agency. In the end, given that lawmakers often delegate to reduce

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governing party responsible for all measures “taken or not taken”); Mashaw, *supra* note 51, at 86 (noting that none of these theories are supported by more than anecdotal evidence).

167. Professor Cox and I make a similar point in *The President and Immigration Law*, emphasizing that Congress derives political benefits of the law-and-order variety from making the immigration laws ever harsher by expanding the grounds for removal, while relying on the executive to ameliorate the harsh consequences of such laws through prosecutorial discretion and other means. Cox & Rodríguez, *supra* note 1, at 529.

168. For further discussion on congressional control over independent agencies, see *supra* notes 108–20 and accompanying text.

169. See Gersen, *supra* note 73, at 12 (citing literature suggesting that legislators are more likely to turn to insulated boards as design tools when uncertainty increases, which suggests that Congress will be more likely to create an independent agency when it is uncertain about the future political preferences of Congress or the executive).



decisionmaking costs in complex regulatory arenas,<sup>170</sup> a key factor in securing delegation will be persuading lawmakers that immigration is an issue that demands expertise and data-driven (not just value-driven) judgments, and that better policy would result from incorporating the value added by the bureaucracy into the decisionmaking process.

The second feasibility question requires determining whether it would be worth conducting the delegation experiment in the first place—to determine if the executive is likely to use its new powers in a manner that addresses the pathologies of the status quo. The risk of agency inaction or underregulation in this context might be high. First, the president might actually prefer an illegal immigration system over one in which the executive admits greater numbers of workers *ex ante*. Unauthorized workers are easier to remove than their authorized counterparts—fewer due process constraints limit the executive’s ability to remove—and their wages are necessarily lower, making them a better option for employers looking for low-cost labor. As with Congress, this scenario allows the president to diffuse the blame for illegal immigration. Though the executive can be criticized for failing to enforce Congress’s laws, easy scapegoats for executive fecklessness exist in the lawbreaker himself and the unscrupulous employer who attracted him to the United States in the first place. But if a president were to expand the numbers of visible, legal immigrants, the public could hold him more directly accountable for circumventing the public preference for lower immigration levels and blame him for deliberately (rather than haplessly) taking jobs from Americans.

In the context of the refugee-selection system, the numbers of refugees the president has authorized for admission have remained relatively constant over the last decade, fluctuating between 70,000 and 90,000—though, if the sample is expanded to include the years since 1980, the number has gone as high as 231,700 and as low as 67,000.<sup>171</sup> Perhaps it turns out that the average number of refugees in

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170. For additional discussion of this dynamic, see *supra* note 51 and accompanying text.

171. LEGOMSKY & RODRÍGUEZ, *supra* note 30, at 885 (compiling statistics from Yearbooks of Immigration Statistics); see also KELLY J. JEFFERYS & DANIEL C. MARTIN, U.S. DEP’T OF HOMELAND SEC., ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2007, at 3 (2008), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_rfa\\_fr\\_2007.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_rfa_fr_2007.pdf) (noting that the number of refugees admitted declined from approximately one hundred thousand during the 1990s to fifty thousand in the period from 2000 to 2007 and that “decline is partly due to changes in security procedures after 9/11 and admission requirements resulting from the USA

the world remains relatively constant and their origins simply shift around the globe. More likely, presidents may have hit upon a number that has not met with resistance but is sufficient to make the foreign policy gains and accrue the international humanitarian credibility they desire from refugee admissions.

If the goal of delegation is to ensure responsiveness to changed conditions, and the result is a stable equilibrium, then the primary benefit of delegation might be nothing more than the *possibility* of adjustment without protracted legislative debate. The difficulties of dealing with agency inaction and inertia have been the subject of inconclusive consternation among scholars.<sup>172</sup> The concern in the immigration context is less that the president will not regulate at all—by statute he would be required to set visa numbers annually—and more that he will not use the power in a way that offsets the extent of back-end screening that occurs, or that accounts in a meaningful way for what the collected data suggest is needed in a particular sector of the economy. This issue arises primarily because the same political pressures that operate on Congress to keep immigration low will operate on a politically accountable president (in part *through* Congress and its appropriations decisions and committee oversight).<sup>173</sup>

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PATRIOT Act of 2001 and the REAL ID Act of 2005”); MARTIN, *supra* note 95, at vii (noting that officials historically have treated the president’s number as a ceiling, not a target, and advocating the treatment of numbers as targets to better ensure admissions and “provide a benchmark for accountability of the various actors in the system”). During a congressional consultation in 2006, Senator Edward Kennedy highlighted a structural problem that has contributed to the failure to reach the ceilings set by the president. See *Oversight Hearing: U.S. Refugee Admissions and Policy: Hearing Before the Subcomm. on Immigration, Border Security and Citizenship, S. Comm. on the Judiciary*, 109th Cong. 29 (2006) (testimony of Father Kenneth Gavin, S.J., National Director, Jesuit Refugee Service/USA) (responding to the questions of Sen. Kennedy, Member, Subcomm. on Immigration, S. Comm. on the Judiciary, that “doubling of the unallocated reserve represents a serious problem in that it indicates a lack of sufficient commitment, planning and resource allocation by the Department of State to reach the full authorized admissions figure”); see also *id.* at 1 (statement of Sen. Cornyn, Chairman, Subcomm. on Immigration, S. Comm. on the Judiciary) (noting that “while refugee ceiling remains at 70,000, the Government has not consistently been able to meet this threshold” because “legitimate refugees are barred because the definition of ‘terrorist activity’ is too broad”).

172. See, e.g., Bagley & Revesz, *supra* note 119, at 1277–80.

173. Standard administrative law doctrines would require that the agency take into account all of the relevant data presented to it, but this requirement imposes only a reasonable explanation expectation and would not speak to the way the agency uses the data it has assembled itself. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))).

But even if the potential for adjustment represents the best possible outcome of delegation, the creation of a new decisionmaking structure could still have benefits by making more regular adjustment institutionally possible should political dynamics allow it, as well as by heightening the executive's accountability for core policymaking. In addition, reasons enough exist to believe that the executive will exercise the authority Congress delegates to it and will be at least somewhat responsive to changing conditions. As noted above, presidents historically have been more willing to admit immigrants than Congress.<sup>174</sup> A culture of professionalism may motivate commissioners and bureaucrats within an agency to fulfill its statutory mandate, particularly if the agency is set up as independent.<sup>175</sup> It also seems quite possible that the executive would prefer to shift its law enforcement resources away from apprehending immigration-status violators and toward larger public-order problems, such as drug trafficking and its associated violence, and human smuggling. This desire for resource allocation represents an incentive for the executive to channel more labor migration through ex ante legal channels rather than to rely on ex post prosecutorial discretion and enforcement.<sup>176</sup>

## CONCLUSION

Through dynamic interaction, the political branches have settled on a scheme of separated powers in the immigration context that leaves the formal authority to make core immigration policy decisions in the hands of Congress. As a practical matter, however, the executive exercises considerable authority of the same kind, but largely through nontransparent discretionary acts. In addition, the congressional monopoly on formal admissions decisions has produced an immigration regime slow to respond to changes in demography, economy, and social structure, particularly across borders, in large part because of the difficulty of achieving legislative consensus in this

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174. See *supra* notes 92–93, 161–64 and accompanying text.

175. For a discussion of the insulation and technocratic nature of the executive, see *supra* Part II.C.1.

176. Presumably, the executive could curtail its enforcement actions against unauthorized immigrants, thus retaining the power to shift enforcement resources regardless of whether Congress delegates the sort of power I envision in this Article. But the political costs of failure to enforce remain significant enough for the president that it seems reasonable to assume that the executive would use its ex ante authority to diminish the political *need* to use enforcement authority against status violators.

arena. It is therefore time to rethink the allocation of power and to follow the lead of the Refugee Act of 1980 in delegating standard-setting power to the executive.

Delegating power to the executive to manage the situation at hand through ex ante rule-like procedures would bring the lines of accountability into better view, regardless of the exact contours of that delegation. Delegation would thus help ensure that the exertion of executive power in the immigration arena serves defined purposes through transparent policymaking processes that produce measurable outcomes. In addition, delegation could well make the admissions process more responsive to regulatory reality. Determining how to balance insulation of admissions decisions from the costs of the legislative process to promote data-based decisionmaking, with promotion of accountability on the subject of whom to admit to the United States, will be a challenge. But the need for an institutional solution to the limitations of the current regime is clear, and scholars and lawmakers should take up the challenge of reimagining the allocation of decisionmaking authority to produce a more effective and transparent immigration policy.