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INTRODUCTION

Readers of this symposium do not need a long dissertation on the increased visibility of international migration. Evidence that immigration has fully emerged as a core issue is everywhere. It has occupied the attention of Congress, the White House, the rapidly expanding relevant federal agencies, state and local governments, political campaigns, the media, the business world, the practicing Bar, the courts, law schools, scholarly journals across a range of disciplines, and people engaged in plain everyday conversation.

There are many reasons for this recent surge of interest, but one of them, surely, is the growing public recognition that immigration has a major impact on the lives of all who live here. My own view is that on balance that major impact has been overwhelmingly positive, as immigrants continue to contribute to our economy and to enrich us culturally and spiritually.[1] But whether or not one shares that view, all can agree that the impact of immigration policy—both on the prospective immigrants and on the larger society—is immense.

Apart from its massive impact on the life and history of our country, immigration policy has two other characteristics that are pertinent to the themes explored later in this article. One is the role of subjective values in shaping immigration policy. More so than any other area of law, our immigration policies quite literally define who we are as a people and what qualities we admire and disdain in others. Consequently, the formulation of immigration policy requires value judgments about the optimal size of our population, the composition of our society, and our general economic direction. Immigration policy requires us to prioritize

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1. Stephen H. Legomsky, *A Distorted View of Immigrants*, St. Louis Post-Dispatch, Sept. 23, 1993, at 7B.

among reuniting families, addressing our economic needs, fulfilling humanitarian obligations to refugees from persecution, and admitting any other categories of prospective immigrants. It also requires decisions about our law enforcement needs and strategies, about foreign affairs, and about nationalism, community, autonomy, citizenship, and civil liberties.

With so much at stake, it is not surprising that immigration policy has one other feature relevant here: It has attracted a wide variety of interest groups to the debate.[2] They include ethnic and religious organizations, labor unions, industry representatives, civil rights and international human rights organizations, business interests, environmental and population restriction groups, law enforcement agencies, and units of state and local government.

Thus, there are three features of immigration policy to consider in combination: First, its repercussions are powerful and widespread. Second, with so many conflicting priorities to juggle, the decisions depend heavily on personal values and ideologies. Third, with so many different interest groups in the mix, decisions on immigration policy tend to be shamelessly vulnerable to constituent pressures. What all three factors have in common is that they accentuate the importance of choosing the right decisionmaker. The high impact means that much is at stake, and the last two features mean that the results will often turn on who the decisionmakers are.

On that score, recent trends are significant. Over the past fifteen years, for reasons on which I speculate below, Congress has seized the immigration initiative more forcefully than in the past. While large pockets of executive discretion remain, Congress has increasingly been making substantive policy decisions that in former years it had happily delegated to the executive branch.

With all this, however, there has been one gaping exception to the pattern of increased congressional control. In the Refugee Act of 1980[3] Congress virtually wrote the President a blank check to decide how many overseas refugees to admit and which ones. Exercising this power, the various Presidents have collectively authorized almost two million refugee admissions since 1980.[4] Presidents have generously admitted

2. *See generally* Peter H. Schuck, *The Emerging Political Consensus on Immigration Law*, 5 Geo. Immigr. L.J. 1 (1991).

3. Pub. L. No. 96-212, 94 Stat. 102 (1980).

4. Authorizations for fiscal years 1980 through 1994 are listed in Stephen H. Legomsky, *Immigration Law and Policy* 47–48 (Supp. 1994). These add up to 1,812,700. The 1995

those refugees fleeing Communist countries while largely turning a deaf ear to almost all others. I believe that these patterns were inevitable as long as presidents were the decisionmakers and the Cold War was raging.

The demise of Communism will certainly necessitate a fundamental rethinking of the substantive direction of United States refugee policy. The point here, though, is that these same geopolitical changes also require us to rethink the very process by which those substantive refugee selection decisions are made.

This article argues for a new, independent Board whose job it would be to make annual determinations of how many overseas refugees the United States is to admit and which classes of refugees will comprise the pool. To that end, part I surveys recent congressional trends in the allocation of federal power generally and immigration powers particularly. Part II examines some basic theories of separation of powers and compares the suitability of the legislative and executive branches for performing functions analytically classifiable as lawmaking. In part III, I argue that neither Congress nor the President is well situated to make annual refugee allotments, either alone or in combination. Part IV proposes the creation of an Independent Refugee Board to which that responsibility should be substantially transferred.

I. SOME RECENT TRENDS IN CONGRESSIONAL DECISIONMAKING

A. Public Law Generally

In recent years, those who write on separation of powers have described and criticized perceived patterns of congressional decisionmaking. Two broad themes emerge from the literature: that Congress has been going too far and that Congress has not been going far enough. In the eyes of some, Congress has become an overzealous institution, ever ready to micromanage the executive branch. In the eyes of others, Congress has become a sluggish body increasingly happy to delegate broad powers to the executive.

There is truth in both descriptions. Many would trace the roots of modern congressional activism back to Watergate and the constitutional crisis of the early 1970s. In response to broad assertions of presidential

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authorization is 112,000. U.S. Comm. for Refugees, 15 Refugee Reports No. 12, at 20 (1994). Total authorizations through 1995 are therefore 1,924,700.

power, House Speaker Carl Albert and Senate Majority Leader Mike Mansfield opened the 93rd Congress with bold speeches that called for a more assertive congressional role.[5] The resulting congressional resurgence[6] continues today. Through a combination of more detailed legislation, expanded committee oversight of administrative agencies, and, for a while, legislative vetoes,[7] congressional power has become a leading growth industry.[8] That growth has generated criticism, principally from the political right.[9]

Congress has also received flak for delegating too much of its power to the executive.[10] Some such criticisms come, ironically, from the same people who condemn what they see as congressional micromanagement.[11]

In theory, broad delegations of congressional power should not occur. In two leading 1935 cases, the Supreme Court struck down congressional attempts to delegate virtually unlimited regulatory discretion.[12] At the heart of this "nondelegation doctrine" is the conviction that the people's representatives should not escape their duty to make difficult policy

5. James L. Sundquist, *The Decline and Resurgence of Congress* 1 (1981). Speaker Albert listed four examples of President Nixon's expanded claims of authority: his impoundment of funds appropriated by Congress, his escalation of the war in Vietnam, his claims of executive privilege to withhold information from Congress, and his reorganization of executive branch departments along lines previously rejected by Congress. *Id.* at 1–2.

6. *See generally id.* at 199–414; *The Imperial Congress—Crisis in the Separation of Powers* (Gordon S. Jones & John A. Marini eds., 1988) [hereinafter Jones & Marini].

7. *See generally* James Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 Ind. L. Rev. 323 (1977). Legislative vetoes have since been declared unconstitutional. *See* INS v. Chadha, 462 U.S. 919 (1983); Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 Duke L.J. 789.

8. These patterns extend even to such bastions of presidential power as foreign affairs, Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs* 30 (1990), and oversight of the Defense Department, Herman A. Mellor, *Congressional Micromanagement: National Defense*, *in* Jones & Marini, *supra* note 6, at 107–29.

9. *E.g.*, Mellor, *supra* note 8; Newt Gingrich, *Foreword* to Jones & Marini, *supra* note 6, at ix-x; Jones & Marini, *supra* note 6, at 1–13; Charles R. Kesler, *Separation of Powers and the Administrative State*, *in* Jones & Marini, *supra* note 6, at 20–40.

10. *See, e.g.*, Industrial Union Dep't., AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 671–88 (1980) (Rehnquist, J., concurring) [sometimes cited as *the Benzene Case*]; David Schoenbrod, *Power Without Responsibility—How Congress Abuses the People Through Delegation* (1993); Antonin Scalia, *A Note on the Benzene Case*, 4 Reg. 25 (July-Aug. 1980); Note, *Nondelegation After Mistretta: Phoenix or Phaëthon?*, 31 Wm. & Mary L. Rev. 1047 (1990) [hereinafter *Nondelegation*].

11. Jones & Marini, *supra* note 6, at 1.

12. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

choices.[13] John Locke captured that theme with his now famous aphorism, drawn from the social contract theory: The people have given the Legislature the power "only to make Laws, and not to make Legislators."[14] Justice Story felt the same way. Since Congress has only whatever powers the Constitution delegates it, he argued, and since in his view "a delegated authority cannot be delegated," Congress could not subdelegate to the executive branch.[15] Still others have objected that, without intelligible standards, congressional delegations of power invariably require judges to supply the missing content.[16]

In practice, however, no congressional action has been struck down on nondelegation grounds since 1935;[17] the Supreme Court has routinely upheld even those delegations that are clearly devoid of meaningful standards.[18] Today, the major limitation that the courts at least profess to recognize is that, when delegating power, Congress must provide an "intelligible principle" for the delegatee to apply.[19] While some advocate resuscitating the nondelegation doctrine,[20] the complexities and specialization of the modern age and the practical difficulties of articulating meaningful standards make dramatic change of that sort unlikely.[21] At bottom, the debate over the nondelegation doctrine raises broader issues concerning the attributes of Congress and the Executive and their respective roles in a representative democracy. Part II.C below will consider those issues in more detail.

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13. *See Nondelegation, supra* note 10, at 1081–82; Ernest Gellhorn, *Returning to First Principles*, 36 Am. U. L. Rev. 345, 347–48 (1987).

14. *See Nondelegation, supra* note 10, at 1053–54.

15. *See* Shankland v. Washington, 30 U.S. 390, 395 (1831).

16. *E.g.*, Scalia, *supra* note 10, at 28; *cf.* Arizona v. California, 373 U.S. 546, 626 (Harlan, J., dissenting) (standardless delegation makes judicial review problematic). Some of these themes arise in more specific debates about the propriety of independent agencies and will be taken up in part IV.

17. *See* Bernard Schwartz, *Administrative Law* § 2.5 (3d ed. 1991).

18. *See id.* §§ 2.5–2.7. This has been true even when the delegation involves a "core" congressional power, such as the taxing power. Skinner v. Mid-America Pipeline Co., 490 U.S. 212 (1989).

19. Mistretta v. United States, 488 U.S. 361, 372 (1989).

20. *E.g.*, Industrial Union Dept., AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 675 (Rehnquist, J., concurring) (1980); Scalia, *supra* note 10; J. Skelly Wright, *Beyond Discretionary Justice*, 81 Yale L.J. 575, 582–87 (1972).

21. *See, e.g.*, Schwartz, *supra* note 17, § 2.2; Scalia, *supra* note 10, at 27.

B. Congressional Decisionmaking Patterns in Immigration Law

The Supreme Court has consistently recognized a "plenary" congressional power to regulate immigration,[22] and Congress has consistently exercised that plenary power in an expansive way. As in other subject areas, the detail with which the United States Congress has managed immigration policy is especially vivid in comparison with the statutory schemes that are in place in some of the parliamentary democracies.

In the United States, the basic immigration statute is the Immigration and Nationality Act of 1952 (INA), as amended.[23] Depending on the typesize, the statute runs 300–400 pages.[24] In spellbinding detail, it lays out formulas for calculating the maximum number of immigrants who may be admitted in a given year, worldwide and from a single country.[25] It prescribes, too, the substantive credentials those immigrants must possess, the affirmative exclusion grounds they must avoid, and the precise circumstances in which specified exclusion grounds may be waived.[26] It also lays out the basic procedures to be followed in implementing those substantive criteria.[27] That structure is in sharp contrast to immigration statutes in the parliamentary democracies, where, for reasons discussed later, the national legislatures typically expect the executive branch to fill in more of the policy details, both substantive and procedural.[28]

The pattern repeats itself when the subject shifts from admission to deportation. In the United States, there are well over thirty separate

22. I have explored that subject in two previous companion pieces, *see generally* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 Sup. Ct. Rev. 255 (evaluating the substantive soundness of plenary power); Stephen H. Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America* 177–222 (1987) [hereinafter Legomsky, *Immigration and Judiciary*] (examining and critiquing the historical development of plenary power); and in one follow-up piece, Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 Hastings Const. L.Q. (forthcoming 1995). In all those writings the emphasis was on the division of responsibility between Congress and the courts; here the concern is with the relationship between Congress and the executive.

23. Act of June 27, 1952, Pub. L. No. 82-414, 66 Stat. 163.

24. *See, e.g.*, the *edited* version that appears in, *Immigration and Nationality Laws of the United States* 1–343 (T. Alexander Aleinikoff & David A. Martin eds., 1992).

25. INA §§ 201-03, 8 U.S.C. §§ 1151-53 (1994).

26. INA §§ 201–03, 212, 8 U.S.C. §§ 1151–53, 1182.

27. INA §§ 204–05, 211–40, 8 U.S.C. §§ 1154–55, 1181–1230.

28. *See, e.g.*, Immigration Act 1971 (U.K.); Immigration Act 1987 (N.Z.).

grounds on which an alien may be deported.[29] In contrast, the United Kingdom's statute lays out only four specific deportation grounds and additionally empowers the Home Secretary to deport any other non-U.K. citizen whenever the Secretary "deems his deportation to be conducive to the public good."[30] Similarly, while the United States statute enumerates a series of specific fact situations in which the executive officials may waive deportation,[31] the New Zealand statute simply authorizes the Minister of Immigration to cancel a removal order when "exceptional circumstances of a humanitarian nature [would make removal] unjust or unduly harsh" and "it would not in all the circumstances be contrary to the public interest to allow the appellant to remain."[32]

In recent years the trend has been toward yet more detailed congressional management of immigration policy. Many examples could be furnished, and I start with one of the weakest. The Refugee Act of 1980[33] codified and structured key components of United States refugee and asylum policies. Until then, the usual device for admitting overseas refugees had been the parole provision, under which the Attorney General has the discretion to "parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States."[34] Disturbed by the breadth of the resulting executive discretion, Congress in 1980 prohibited the Attorney General from paroling refugees, in the absence of "compelling reasons in the public interest with respect to that particular alien."[35] In place of parole, Congress created a more structured program that requires formal consultations between the President's Cabinet-level designees and congressional committees, public hearings, annual presidential announcements as to the numbers and categories of refugee admissions, and continuing congressional oversight.[36]

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29. The deportation grounds are hard to count. INA § 241(a), 8 U.S.C. § 1251(a) (1994), contain five sets of deportation grounds. Almost every set contains several separate grounds, many of which contain nested sublevels of additional grounds.

30. Immigration Act 1971, §§ 3.5, 3.6 and sched. 2, ¶ 9 (U.K.).

31. These situations are surveyed in Stephen H. Legomsky, *Immigration Law and Policy*, 515–605 (1992).

32. Immigration Act 1987, § 63 (N.Z.).

33. Pub. L. No. 96-212, 94 Stat. 102 (1980).

34. INA § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1994).

35. *Id.* § 212(d)(5)(B), 8 U.S.C. § 1182(d)(5)(B).

36. *Id.* § 207, 8 U.S.C. § 1157. For more detail, *see infra* notes 99–110 and accompanying text.

To be sure, the President's power to decide the size and shape of each year's refugee class is an exceptionally broad delegation of authority. Indeed, I see it as the clearest counterexample to my thesis that Congress generally dominates United States immigration policy, and for that and other reasons I discuss the refugee program separately in parts III and IV below. The point here, however, is that even in this admittedly wide domain of executive power the recent trend has been one of slightly increased congressional control.

The Refugee Act of 1980 restricted executive discretion in other ways as well. Before 1980, the statute had given the Attorney General the discretion not to deport an alien to a country in which he or she would be subject to specified forms of persecution.[37] The Refugee Act removed that discretion, making nonrefoulement mandatory rather than discretionary.[38]

Similarly, before 1980 there had been no statutory authority for granting asylum. The Justice Department in 1974 had issued administrative regulations creating discretionary asylum and spelling out the qualifying criteria.[39] The Refugee Act preserved the discretionary component of asylum but rewrote and codified the eligibility requirements.[40]

Other examples of recent congressional assertiveness can be found in the Immigration Reform and Control Act of 1986 (IRCA), a major legislative attempt to stem illegal migration. Both before and after IRCA, the Immigration and Naturalization Service (INS) has possessed a broad discretion in allocating its enforcement resources and in deciding which deportable aliens to apprehend and to deport.[41] There are specific statutory relief provisions that selected categories of otherwise deportable aliens may invoke, but under almost all of those provisions

37. INA § 243(h), 8 U.S.C. § 1253(h) (1952).

38. At the same time, Congress extended nonrefoulement from the deportation setting to the exclusion setting. Pub. L. No. 96-212, § 203(e), 94 Stat. 102, 107 (1980). Both the change from discretionary to mandatory relief and the extension of section 243(h) to excluded aliens were meant to conform United States statutory law to its treaty obligations. In 1968, the United States had acceded to the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267. By that accession the United States agreed to follow the 1951 U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, article 33.1 of which had mandated "nonrefoulement", the international term for the nonreturn of refugees to countries of persecution.

39. 39 Fed. Reg. 28,439 (1974).

40. *See* INA § 208, 8 U.S.C. § 1158 (1994).

41. *See, e.g.*, Nicholas v. INS, 590 F.2d 802 (9th Cir. 1979).

relief rests ultimately on the favorable exercise of INS discretion.[42] Not so with IRCA. One of its pillars was a series of legalization programs intended to grant permanent resident status to millions of undocumented aliens. Two of those provisions—the general legalization program[43] and a special program for agricultural workers[44]—set specific eligibility requirements and required the INS to legalize the statuses of all aliens who met those requirements. Neither determination permitted the exercise of INS discretion.[45]

IRCA also created a new "H-2A" program specifically for temporary agricultural workers.[46] Temporary workers had already been eligible to enter under the general H-2 category, but the procedures were so cumbersome that by the time the workers arrived perishable crops were often rotting in the fields.[47] Rather than allow the INS to use its discretion in deciding whether to give agricultural workers special priority over other temporary workers, Congress made the decision itself.

The Immigration Marriage Fraud Amendments of 1986 (IMFA)[48] signaled further congressional anxiety about executive policymaking and even executive factfinding. IMFA significantly reduced the INS's freedom to make case-by-case determinations of the genuineness of aliens' marriages. Under IMFA, fixed rules impose a blanket two-year probationary period on almost every immigrant who is admitted on the basis of a marriage that is less than two years old.[49] Moreover, if an alien marries during either exclusion or deportation proceedings, the INS is prohibited from finding the marriage bona fide without "clear and convincing evidence" of genuineness, unless the alien spouse first leaves the United States for at least two years following the wedding.[50] In each case, a statutory presumption has replaced or constrained INS fact-finding.

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42. *See* Legomsky, *supra* note 31.

43. INA § 245A, 8 U.S.C. § 1255a (1994).

44. INA § 210, 8 U.S.C. § 1160.

45. *See* INA § 210(a)(1), 8 U.S.C. § 1160(a)(1) ("The Attorney General *shall* adjust the status of any alien. . . .") (emphasis added); INA § 245A(b)(1), 8 U.S.C. § 1255a(b)(1) (same wording).

46. INA § 101(a)(15)(H)(ii)(A), 8 U.S.C. § 1101(a)(15)(H)(ii)(A).

47. *See generally* Maurice A. Roberts & Stephen Yale-Loehr, *Understanding the 1986 Immigration Law* 4-1 to 4-16 (1987); Stephen Yale-Loehr, *Foreign Farm Workers in the U.S.: The Impact of the Immigration Reform and Control Act of 1986*, 15 N.Y.U. Rev. L. & Soc. Change 333 (1986–87).

48. Act of Nov. 10, 1986, Pub. L. No. 99-639, 100 Stat. 3537.

49. INA § 216, 8 U.S.C. § 1186a (1994).

50. INA § 204(g), 8 U.S.C. § 1154(g).

Numerous recent statutes have also confined the INS's discretion to prioritize the deportation of aliens convicted of crimes. Various crime and drug abuse statutes, for example, have mandated expeditious deportation hearings, detention for certain criminal aliens pending those hearings, speedy removal, and in some cases in absentia deportation hearings.[51]

The Immigration Act of 1990[52] contains a number of provisions that represent similar transfers of policy discretion from the executive to the Congress. Among other things, this Act adds statutory detail to the procedures for obtaining labor certification; to the substantive eligibility requirements for alien managers, business executives, treaty traders, temporary workers, trainees, athletes, entertainers, and others; and to the criteria and procedures for admitting intracompany transferees.[53]

The same Act rendered aggravated felons automatically ineligible for various forms of INS discretion, including both asylum and relief for certain long-term lawful permanent residents.[54] The Act also eliminates the INS discretion to grant certain forms of otherwise available relief in the cases of aliens who fail to show up at designated kinds of immigration proceedings.[55] And the Act replaces "extended voluntary departure," an open-ended vehicle that the Attorney General had used to delay the removal of aliens to war zones and other danger areas, with "temporary protected status" (TPS), a program that codifies and confines the Attorney General's discretion to designate such countries.[56] Congress in fact took an additional step, deciding on its own to designate El Salvador as a TPS country.[57]

There are reasons to find this increased congressional management of immigration policy surprising. As society's problems become more complex, and as solutions to those problems become more technical, one might expect Congress generally to entrust more and more of the decisionmaking to specialized administrative agencies with narrower expertise. Since the complexity of immigration issues has increased in

51. *See, e.g.*, INA §§ 242A, 242B, 8 U.S.C. §§ 1252a, 1252b.

52. Pub. L. No. 101-649, 104 Stat. 4978 (1990).

53. *Id.* §§ 122–23, 204–07.

54. *Id.* §§ 515, 511.

55. *Id.* § 545.

56. *Id.* § 302, creating INA § 244A, 8 U.S.C. § 1254a. See especially INA § 244A(g), 8 U.S.C. § 1254A(g), which makes temporary protected status "the exclusive authority of the Attorney General under law to permit aliens . . . to remain in the United States temporarily because of their particular nationality or region of foreign state of nationality."

57. Pub. L. No. 101-649, § 303, 104 Stat. 4978 (1990).

particularly noticeable ways, one might expect this subject area to be one in which Congress is especially happy to delegate much of the problem-solving to the Justice Department. To many members of Congress, immigration is also a political hot potato for which broad delegation might seem particularly inviting.

Yet, as just shown, precisely the opposite has occurred. The obvious question is why Congress would systematically reclaim this power from the executive at a time when the heightened technical complexity and the political risks associated with immigration might make greater reliance on specialized agencies attractive. On this I can only speculate. Four possible explanations, however, come to mind.

First, throughout almost the entire period described in this section, the Congress and the Presidency have been controlled by two opposing political parties. Under those circumstances, Congress has an added incentive to make more of the decisions itself rather than permit the President or his Administration to do so.

Second, more and more members of Congress have become interested in immigration. As their staffs become ever more conversant with that subject, they develop the confidence to take on issues that they might previously have welcomed the opportunity to slough off. And if they are not immersed in immigration issues already, the proliferation of interest groups might force them to become immersed.

Third, the INS traditionally has not been an agency in which Congress has displayed great confidence. My own view is that the last two Commissioners—Gene McNary and Doris Meissner—have worked hard to restore public faith in the INS. But the problems run deep, and until they are solved Congress might continue to make many of the policy decisions that it would otherwise have been inclined to delegate.

Fourth, and most cynically, the heightened degree of congressional management might reflect the populist sound-bite politics that have increasingly infected immigration and other hot-button issues. As the public more and more associates immigration policy with criminal and national security issues, absolutism in dealing with alien criminal offenders commands ever widening public appeal. Executive officials who administer the immigration laws might very much prefer to retain some measure of discretion for unusually compassionate cases or for prying information from minor players in large conspiracies, but

members of Congress might prefer the political benefits of clarity and perceived "toughness."[58]

I certainly recognize that several major pockets of broad administrative discretion remain in immigration. Some are noted below. I am suggesting only that there seems to be a higher degree of congressional management of immigration policy, and a correspondingly smaller area of administrative discretion, than (a) there used to be and (b) there are, for example, in the parliamentary democracies.

Probably the largest reservoir of executive discretion in immigration today is the overseas refugee program. Each year the President, subject to the constraints discussed above, decides how many refugees will be admitted and from which regions or countries they will be drawn.[59] Within those broad parameters, the Attorney General then decides which subcategories of refugees and which individual applicants to accept.[60]

There are other areas of broad administrative discretion. Even in an era of serious congressional committee oversight, the Attorney General and her delegates retain wide latitude in developing law enforcement priorities and strategies,[61] in implementing temporary protected status,[62] in granting parole in individual cases,[63] and in making discretionary judgments whether to waive deportation in certain statutorily prescribed fact situations.[64]

But the basic pattern remains intact: growing congressional management of United States immigration policy. How does this pattern square with fundamental theories of separation of powers? And what attributes of legislative and executive decisionmaking structures are relevant to the proper allocation of government power?

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58. Credit for this thought goes to my colleague, Ronald Mann.

59. INA § 207, 8 U.S.C. § 1157 (1994).

60. *Id.* § 207(c)(1), 8 U.S.C. § 1157(c)(1); Lawyers Committee for Human Rights, *The Implementation of the Refugee Act of 1980: A Decade of Experience* (Mar. 1990). For that purpose, the State Department and the INS have jointly developed a list of priority categories. *Id.*

61. *See* INA § 103(a), 8 U.S.C. § 1103.

62. INA § 244A, 8 U.S.C. § 1254a.

63. INA § 212(d)(5), 8 U.S.C. § 1182(d)(5).

64. For a description of the various statutory relief provisions, see Legomsky, *supra* note 31.

II. SEPARATION OF POWERS

A. Theories and Strategies for Separating Powers

A strong central government carries obvious potential for abuse of power. Like Montesquieu, James Madison identified separation of powers as one vital antidote to protect individual liberty.[65] The idea was that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny."[66] Unlike Montesquieu,[67] however, Madison was quick to add that separation of powers does not prohibit one branch having partial control over the actions of other branches. The situation that separation of powers is meant to avoid is that in which "the whole power of one department is exercised by the same hands which possess the whole power of another department."[68]

Good government is sometimes said to be another objective of separation of powers. The theory here is that different branches are particularly well situated to perform certain specific functions—a large assembly to deliberate, a hierarchial executive to implement laws, and so on.[69] These and other attributes of legislative and executive bodies will be examined presently in more detail.

As Woodrow Wilson was eager to point out, separation of powers does not have to rest on as strict a system of checks and balances as has been adopted in the United States.[70] He saw our governmental structure as an unconscious replication of Newton's theory of the universe. Just as the heavenly bodies are in equipoise because the opposing physical forces offset and constrain one another, so too the framers set off the three branches against each other to prevent any one force from totally overcoming the others. The problem Wilson perceived in that approach was that government, unlike the heavens, is a living thing. For him,

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65. *The Federalist No. 47* (Madison) (Jacob E. Cooke ed., 1961) [hereinafter Federalist Papers]. *See also* Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988) (portraying separation of powers as device for protecting individual liberty).

66. Federalist Papers, *supra* note 65, No. 47 at 324.

67. Montesquieu advocated a stricter separation than that represented by the United States system of checks and balances. *See* Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 Mich. 592, 597 (1986).

68. Federalist Papers, *supra* note 65, No. 47, at 325–26.

69. *See, e.g.*, Kesler, *supra* note 9, at 27–29.

70. Woodrow Wilson, *Constitutional Government in the United States* 54–57 (1908). Fortunately, he adds, our government is elastic enough to break free of its Newtonian origins, and the Presidency has been shaped by the personalities of its occupants. *Id.* at 57–59.

Darwin's theory of organic life, in which organisms are modified by their environments and in which success requires some community of purpose, would therefore have been a better model to follow. Rather than set the organs of government against one another, Wilson felt, the framers should have relied more heavily on the cooperation of the constituent parts.

For present purposes, the relevant question becomes how best to allocate the federal lawmaking power between the legislative and executive branches.[71] As to that, I consider only the wisdom of different models, not their constitutionality.[72] Nonetheless, considerations that have influenced the constitutional development of the nondelegation doctrine discussed earlier are relevant also at this more general level. They include, on the one hand, the observations that the people intended to delegate broad lawmaking power only to the legislative branch and that broad congressional delegations of authority to the executive branch can lead indirectly to further lawmaking by unelected judges unless Congress provides intelligible standards for courts to apply. On the other hand, as was also discussed in connection with nondelegation, the technical complexity of modern legislative issues and the practical difficulties in fashioning meaningful statutory standards would make strict adherence to nondelegation principles problematic.

Perhaps the best way to place the United States approach for allocating lawmaking functions between Congress and the executive in perspective is to contrast it with the approaches taken in the United Kingdom and many other parliamentary democracies. In the United States at least the major policy decisions are generally the products of legislation. In contrast, in many parliamentary democracies the national legislature often expressly delegates more sweeping powers to the executive branch. It often reinforces that result more subtly by legislating

71. I am taking as a given that Congress does not exercise *all* the lawmaking powers; certainly both rulemaking and the interpretation of law by administrative tribunals located within the executive branch are today important sources of "lawmaking" in every sense of the word. Nor, even though I am confining myself to the allocation of power between the legislative and executive branches, do I dispute that the judiciary also performs critical "lawmaking" functions. As to the latter, see Legomsky, *Immigration and Judiciary*, *supra* note 22, at 235–41.

72. As for constitutionality, see, e.g., Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952) [sometimes cited as the *Steel Seizure Case*]; Michael J. Glennon, *Constitutional Diplomacy* (1990). For a thoughtful discussion of separation of powers in the specific context of foreign affairs, see Henkin, *supra* note 8.

in such broad, general language that as a practical matter the executive branch has to make policy just to apply the statute.[73]

There are substantial reasons for the United States Congress to guard its policymaking power more jealously than do its parliamentary counterparts. Most of those reasons stem from the relatively greater distance between the legislative and executive branches in the United States. As I have discussed elsewhere:

> The monarch in the UK is bound by convention to appoint as Prime Minister the leader of the largest party in the House of Commons. The other Ministers, also appointed by the monarch, will be whomever the Prime Minister recommends. All Ministers must themselves be members of either House of Parliament. Thus, the first point to note is that the selection of all the Ministers rests ultimately on the composition of Parliament. In the United States, by contrast, the President is independently elected by the people. As a result, the probability of a serious ideological rift between the legislative and executive branches is less in the UK than in the US [even during those years in which the same political party controls Congress and the Presidency]. It follows that, with all other factors constant, Parliament would be less hesitant than Congress to delegate broad discretionary powers to the executive branch. . . .
>
> The connection between the legislative and executive branches is closer in the UK than it is in the US for the additional reason that Parliament may oust the government from office by a vote of no confidence. The United States Congress has no such power and, because the President serves a fixed four-year term, the political check on the executive branch is weaker.[74]

That the United States Congress has less legal control over the composition of the executive branch[75] than is the case in some of the

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73. *See, e.g.*, Legomsky, *Immigration and Judiciary*, *supra* note 22, at 260 (comparing United States to United Kingdom); Stephen H. Legomsky, *Specialized Justice—Courts, Administrative Tribunals, and a Cross-National Theory of Specialization* 86 (1990) (comparing United States to New Zealand) [hereinafter Legomsky, *Specialized Justice*].

74. Legomsky, *Immigration and Judiciary*, *supra* note 22, at 259–60. For similar reasons, executive agencies in New Zealand tend to receive broader grants of discretion than do their American counterparts. Legomsky, *Specialized Justice*, *supra* note 73, at 86.

75. The Senate, of course, does have the responsibility for confirming important presidential appointments. U.S. Const. art. II, § 2, cl. 2. But Congress has no role in choosing the President or Vice-President and, except for impeachment, *see id.* art. I, § 3, cl. 6; *id.* art. II, § 4, has no power to replace them.

parliamentary democracies might lead one to assume that Congress is less powerful than its parliamentary analogs. Indeed, that impression might be fortified when one considers that, at least in the United Kingdom[76] and New Zealand,[77] Parliament is the supreme legal authority,[78] the United States Congress, in contrast, is subordinate to the Constitution.[79]

But that theoretical contrast between omnipotent parliaments and a weak United States Congress is highly misleading; in fact, the United States Congress wields far more power vis-a-vis the executive branch than is the case in the parliamentary democracies. The New Zealand example is illustrative:

> [T]he overriding reality of the New Zealand system is that the Cabinet drives Parliament, not vice versa. All major decisions are made by Cabinet, and it is a Cabinet minister who ordinarily introduces bills. All bills must be cleared by caucus, but a united Cabinet ordinarily has little difficulty prevailing in caucus. The members of Parliament are either formally pledged to support the position of their party's caucus or bound in practice to do so; this tight party discipline makes it "very rare indeed for MP's to cross the floor of the House." And once Parliament votes, only the virtually pro forma royal assent is required before the bill becomes law. Consequently, executive proposals are rarely defeated.
>
> The United States system stands in stark contrast. Party discipline is much less stringent, and an independently elected President can in any event be of a different political party from the majority of Congress.[80]

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76. Edinburgh & Dalkeith Ry. v. Wauchope, 8 E.R. 279 (H.L. 1842).

77. *See* Sir Geoffrey Palmer, *Unbridled Power—An Interpretation of New Zealand's Constitution and Government* 186–89 (2d ed. 1987). As in the United Kingdom, Parliament is supreme. *See, e.g.*, Fitzgerald v. Muldoon, 2 N.Z.L.R. 615 (1976) (holding that English Bill of Rights 1688 prohibits executive branch of New Zealand government from interfering with Parliament).

78. Not all parliamentary democracies follow the constitutional models of the United Kingdom and New Zealand. In Canada, India, and Australia, for example, the parliaments are subject to the national constitutions. *See* Constitution Act 1982, Sched. B, § 52(1), *reproduced in* 4 *Constitutions of the World* 118 (Albert P. Blaustein & Gisbert H. Flanz eds.) [hereinafter *Constitutions*] (Canada); Australian Const. arts. 51, 52, *reproduced in* 1 *Constitutions*, *supra* at 39–41; 8 *Constitutions*, *supra* at 23 (observing that Indian Constitution is "fundamental" law and that courts may declare contrary law unconstitutional).

79. Marbury v. Madison, 5 U.S. 137 (1803).

80. Legomsky, *Specialized Justice*, *supra* note 73, at 86.

Thus, one additional reason for members of Parliament to regard broad delegations to the executive branch as appropriate is that in practice the executive holds the cards anyway. For the United States Congress, such delegations entail the surrender of more actual policymaking power.

There is yet another reason for the United States Congress to be less freewheeling in its delegations to the executive. Even though in parliamentary countries the executive branch as a whole has much more power vis-a-vis the legislature than is true in the United States, power within the executive branch seems to be more dispersed in parliamentary countries. When the President of the United States disagrees with the Attorney General or the Secretary of State, there is no question whose view will prevail. The executive branch of the United States, as others have observed, is a hierarchical structure.[81]

In contrast, in most parliamentary systems, the full Cabinet decides on policy and it does so by consensus rather than by majority vote. The principle is called collective accountability, and it tends to decrease the chances of radical change.[82] Perhaps the absence of a collective accountability principle in the United States further diminishes Congress's confidence in the executive branch and its resultant willingness to delegate away broad responsibilities.

B. Congressional and Executive Attributes

The above discussion portrays separation of powers as a vehicle for preserving individual liberty and for promoting good, effective government. The same discussion illustrates some of the separation models that various democracies have chosen. In particular, as the authors of the Federalist Papers and modern writers have recognized, separation of powers does not require that the legislative[83] function be vacuum-sealed within a single branch of government. In the United

81. *See, e.g.*, Glennon, *supra* note 72, at 28 (citing Sundquist, *supra* note 5).

82. Palmer, *supra* note 77, at 40, 45.

83. Both the executive branch, through its network of specialized administrative tribunals, and the judicial branch, through the general courts, adjudicate cases and create additional law in the process. For present purposes, I put case law aside and confine my focus to legislative processes such as enactment of statutes and executive rulemaking. I recognize too that the judiciary also engages in rulemaking, for example by promulgating the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, and local rules of court. The present article, which is concerned only with the allocation of legislative power between Congress and the executive, does not consider the subject of judicial rulemaking.

States today, both Congress and the executive branch are prolific sources of legislation; Congress passes statutes, and the executive branch issues executive orders, regulations, and other subordinate legislation.

Each of these two branches possesses attributes that both positively and negatively affect its fitness to perform legislative functions. For ease of discussion, I shall divide those attributes into two groups: those that flow from the composition of the two branches, and those that derive from the processes they use.

1. Composition

In theory, Congress brings to its work a greater diversity than is possible for the President—a single individual—to bring. Members of Congress affiliate with at least two different political parties. They are of different ethnic heritages and different religions. They are women and men. They are from different geographic regions and from urban, suburban, and rural districts. They are of different ages and ideologies. They bring differing professional backgrounds and life experiences. Whatever homogeneity admittedly exists among those whose financial and political assets permitted them to win election to Congress, surely there is more diversity in a large Congress than in a single President.

Congress is relatively diverse in the additional sense that its members represent diverse constituencies. Congressional districts are in different states, are of different physical sizes, are dominated by different political parties, and have different social, economic, ethnic, and demographic characteristics. The President, of course, represents the entire nation. Because he is only one person, however, the President's political base is likely to be associated, predominantly or at least disproportionately, with one particular political party and other distinct subgroups.

Some would stress, however, that "diverse" does not necessarily translate into "representative." Two politically conservative editors (at a time when the Democrats controlled Congress and the Republicans controlled the White House) argued for a reduced congressional role and a correspondingly more assertive Presidency.[84] They attacked Congress as unrepresentative, stressing that in 1986 Republican congressional candidates had captured 45% of the vote but had received only 41% of the seats.[85] As an argument for transferring power from Congress to the President, that observation accomplishes little if anything, even if one

84. Jones & Marini, *supra* note 6.

85. *Id.* at 8.

attaches great significance to a differential of 4%. The most obvious difficulty with the argument is that one could lodge the same objection even more dramatically in any presidential race, where it is common for the losing candidate to receive nearly half the vote and come away with none of the Presidency.

Admittedly, though, Congress's capacity for broad representation might be more theoretical than real. Factors like gerrymandering, the efforts of special interest groups, the systematic powerlessness of particular minorities within congressional districts, variations in the campaign war chests of opposing candidates, and the unequal impact of the various members all diminish Congress's ability to provide equal representation.

Moreover, one should not understate the diversity or the representative capacity of the Presidency. Even though the President is only one person, the executive lawmaking power is dispersed among Cabinet members (admittedly of the President's choosing) and their subordinates.

A related difference between Congress and the President lies in their formal constituencies. Members of Congress depend on local constituents for re-election; the President (at least once) must look to a more national constituency. That difference gives individual members of Congress an incentive to hone in on local, and more parochial, issues, and to respond to specific grievances brought to them by constituents.[86] Some might view these dynamics as a positive way for Congress to get a better sense of the popular pulse. Others might see them more as a breeding ground for pork barrel projects and other legislation collectively harmful to the nation as a whole.

The congressional structure also generates some pertinent differences in the lawmaking capabilities of Congress and the executive. Congressional bicameralism enables representatives and senators from the same state to monitor the interests of different constituencies. There is no analogous safeguard in the executive branch, although White House approval of contemplated agency regulations arguably serves some of the same functions.

Although some individual members of Congress serve for decades, the composition of the overall Congress changes every two years. The President, in contrast, is normally in office for four years or eight years. These rapid changes in Congress are both good and bad. On the one

86. *See* Sundquist, *supra* note 5, at 441.

hand, they hinder Congress's capacity for long-term planning.[87] On the other hand, at least in the House of Representatives, the relentless proximity of elections might make members more responsive to the people.[88]

The organizational structures of Congress and the Presidency also differ in their degrees of centralization. In contrast to the formal hierarchy of the executive branch is a congressional operation in which all members are at least theoretically equal. Congressional leaders have little influence over members of the opposition, and, even on their own side of the aisle, party discipline cannot provide the same degree of control that the President can exert over his or her subordinates. This difference should not, of course, be exaggerated. The combination of powerful House leadership, the majority caucus, and the committee structure can achieve significant centralization within the majority party.[89]

Finally, Congress and the executive branch might differ with respect to degree of specialized expertise. Here, however, it is not clear which way that difference cuts. First, as a practical matter, both branches today have access to large bodies of expert information. Apart from whatever expertise individual members of Congress happen to bring on their own, Congress benefits from the specialized knowledge of experts on members' staffs, experts who work for the General Accounting Office or the Congressional Research Service, and experts who testify before congressional committees. The President has access to similar experts on the White House staff and in the vast network of administrative agencies. Second, even if one branch is seen as possessing greater specialized expertise than the other, that specialization can be a mixed blessing.[90]

2. *Process*

With both composition and process in mind, it has been common to associate Congress with "deliberation"[91] and the executive with such

87. Douglas A. Jeffrey, *Executive Authority Under the Separation of Powers, in* Jones & Marini, *supra* note 6, at 41, 44.

88. Or, some would say, more subject to shifting political winds.

89. Sundquist, *supra* note 5, at 162–79.

90. The benefits and costs of specialization in the context of adjudication are discussed in detail in Legomsky, *Specialized Justice, supra* note 73, at 7–32. Analogous considerations inform the applicability of these pros and cons to legislation.

91. *See, e.g.*, Jeffrey, *supra* note 87, at 44–45; John A. Marini, *Introduction, in* Jones & Marini, *supra* note 6, at 16.

qualities as "decision", "activity", "secrecy", "dispatch", and "energy".[92] The contrast that these words are usually meant to convey is between a Congress best equipped to debate and then legislate and a President best equipped to command the executive hierarchy and to implement. In constitutional parlance, the President "shall take Care that the Laws be faithfully executed."[93]

The public nature of the congressional process might be seen as enhancing Congress's suitability for legislation. The input of citizens and lobbyists during committee hearings affords at least some of those who might be affected by proposed legislation an opportunity to be heard. The public committee hearings and floor debates, combined with published transcripts of those hearings, committee reports, and the recording of floor debates in the Congressional Record, assure at least some public scrutiny of the legislative process. In contrast, the secrecy for which the executive process is touted makes it a less desirable lawmaking body in a representative democracy.

That distinction, however, should not be overrated. Important negotiations obviously occur behind closed doors in Congress as well. Conversely, within the executive branch, the notice and comment procedures required by the Administrative Procedure Act in formal rulemaking assure some measure of public input.[94] Still, only certain categories of rules are subject to those procedures,[95] and even then, the written documents that the procedures contemplate are not the same as oral testimony or as public debate by the ultimate decisionmakers.

The discussion up to this point might prompt the conclusion that neither an imperial Congress nor an imperial President is either necessary or desirable. Each branch supplies vital nutrients to a constitutional scheme that shares powers rather than separates them. A statute, passed by Congress after substantial public input and in full public view, and then signed by the President, can supply the best of both worlds—a product that bears a joint seal of approval and that embodies a degree of legitimacy less attainable by one branch acting alone.

But certain advantages of the executive process over the legislative process qualify that conclusion. First, the executive structure gives it an advantage in comprehensive planning. Its hierarchial anatomy enables it

92. *See, e.g.*, Glennon, *supra* note 72, at 28–29; Jeffrey, *supra* note 87, at 44; Kesler, *supra* note 9, at 28; Marini, *supra* note 6, at 16.

93. U.S. Const. art. II, § 3.

94. 5 U.S.C. § 553 (1994).

95. *Id.*

to bring together warring factions in a way that Congress's bicameralism and Congress's committee system do not.[96]

The executive also enjoys a speed advantage. The inner workings of the congressional process reflect the framers' conception of Congress as a slow, deliberative body. Committees and subcommittees study issues thoroughly, and floor debate can be lengthy.[97] Consequently, Congress has little choice but to delegate to the executive those policy decisions that require speed—including many in the area of foreign affairs.[98]

Another barrier to exclusive statutory lawmaking is that Congress adjourns from time to time. The President, in contrast, is always "in session."[99]

In the end, there is no perfect lawmaking branch. Both Congress and the executive have shortcomings that inherently affect the timing or quality of the "laws" they produce. In the next two parts, the process for setting United States refugee policy will be assessed in the light of those shortcomings.

III. SEPARATING POWERS AND SELECTING REFUGEES

A. Selection of Overseas Refugees in the United States[100]

The U. S. statutory definition of "refugee" is modeled on that of the 1951 United Nations Convention Relating to the Status of Refugees.[101] The statute requires "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[102]

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96. Sundquist, *supra* note 5, at 158–59.

97. Compare this to New Zealand, where the combination of executive domination and tight party discipline impels Parliament to churn out what its former Prime Minister calls "The Fastest Law in the West." *See* Palmer, *supra* note 77, ch. 9.

98. Sundquist, *supra* note 5, at 156–57; *see also* Henkin, *supra* note 8, at 27 (noting that President can act quickly and informally, unlike Congress).

99. Henkin, *supra* note 8, at 27.

100. The overseas refugee program is to be distinguished from the asylum program, which is for the refugee who is already "physically present in the United States or at a land border or port of entry." INA § 208(a), 8 U.S.C. § 1158(a) (1994).

101. July 28, 1951, art. I.A., 189 U.N.T.S. 137, 152–54. Although article 33 of the Convention prohibits signatories from *deporting or returning* refugees to territories in which their lives or freedom would be threatened on specified grounds, nothing in the Convention affirmatively requires signatories to admit refugees in the first place.

102. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (1994).

Also by statute, the President each year sets the maximum number of refugees who may be admitted during the upcoming fiscal year[103]—112,000 in fiscal year 1995.[104] The President also specifies how that total is to be allocated among the various countries or world regions from which the refugees are fleeing.[105] The President may admit additional refugees in the event of "an unforeseen refugee emergency."[106] The President's discretion is not subject to any statutory maxima or minima. Before making either determination, however, the President must engage in "appropriate consultation,"[107] defined to include personal discussion between Cabinet-level representatives of the President and members of the pertinent congressional committees.[108]

Once the President announces the upper limits, the Attorney General coordinates the selection of individual applicants. Subject to those limits, the Attorney General may admit any refugees who are not "firmly resettled" in a foreign country, are of "special humanitarian concern to the United States," and do not fall within the various immigrant exclusion grounds.[109] In practice, the Immigration and Naturalization Service, with the aid of the State Department and various nongovernmental organizations, adjudicates overseas refugee applications.[110] They employ a list of four "processing priorities" that relate generally to the immediacy of the danger and the applicant's family ties to the United States.[111]

In the public mind, United States refugee policy is often associated with altruism and compassion. The common assumption is that the refugee program is meant to alleviate the suffering of fellow human beings who have been forced from their homelands. Overlaid on this humanitarian depiction of refugee admissions is the related assumption

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103. INA § 207(a)(2), 8 U.S.C. § 1157(a)(2).

104. U.S. Comm. for Refugees, 15 Refugee Reports No. 12 at 20 (1994).

105. The groups of refugees designated are those whom the President finds to be "of special humanitarian concern to the United States." INA § 207(a)(3), 8 U.S.C. § 1157(a)(3).

106. INA § 207(b), 8 U.S.C. § 1157(b).

107. INA § 207(a,b), 8 U.S.C. § 1157(a), (b).

108. INA § 207(e), 8 U.S.C. § 1157(e).

109. INA § 207(c)(1), 8 U.S.C. § 1157(c)(1). The exclusion grounds reflect a variety of national concerns, including public health, crime, welfare use, national security, and the integrity of the immigration process itself. *See* INA § 212(a), 8 U.S.C. § 1182(a). The admissibility requirement is subject to various exemptions. INA § 207(c)(3), 8 U.S.C. § 1157(c)(3).

110. *See generally* Lawyers Committee, *supra* note 60.

111. A detailed description of the priority categories appears in U.S. Comm. for Refugees, 15 Refugee Reports No. 12, at 6–7 (1994).

that the admission of refugees is a response to violations of fundamental human rights.

As others have observed,[112] however, neither a humanitarian model nor a human rights model adequately explains the actual development of refugee law. If humanitarianism were the driving force, some have asked, why is the legal definition of refugee constricted to those who flee persecution? Surely those who flee war, famine, or other threats to life can make equally compelling moral claims to international protection.[113] Similarly, if the overriding goal were promotion of human rights, why would the United States statute admit only those refugees who are of "special humanitarian concern to the United States"?[114]

The clear answer to these and similar questions is that United States refugee law has never been rooted solely, or even primarily, in either humanitarianism or human rights. Rather, as many others have noted with disapproval,[115] the central thrust of United States refugee policy has always been the pursuit of national self-interest—in particular, foreign policy goals, and more particularly the battle against Communism. Provisions that had expressly limited refugee admissions to those who were fleeing either a "Communist-dominated" country or a country within the Middle East[116] disappeared with the enactment of the Refugee Act of 1980,[117] but the actual pattern of refugee selection has remained largely intact. In every year, the President has reserved the overwhelming bulk of the refugee slots for refugees from Communism.[118]

Even in the few years that have followed the collapse of Communism in the former Soviet Union and eastern Europe, refugees from

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112. *See* James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 Harv. Int'l L.J. 129 (1990).

113. *See id.*; *cf.* Deborah Perluss & Joan F. Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 Va. J. Int'l L. 551 (1986) (arguing that customary international law requires protection for those fleeing dangers beyond persecution).

114. INA § 207(a)(3), 8 U.S.C. § 1157(a)(3) (1994).

115. *E.g.*, Elizabeth Hull, *Without Justice for All—The Constitutional Rights of Aliens* 115–46 (1985); Gil Loescher & John A. Scanlan, *Calculated Kindness: Refugees and America's Half-Open Door 1945-Present* (1986); Joan Fitzpatrick & Robert Pauw, *Foreign Policy, Asylum and Discretion*, 28 Willamette L. Rev. 751, 762–65 (1992); Hathaway, *supra* note 112.

116. Pub. L. No. 89-236, § 3, 79 Stat. 911, 913 (1965), amending INA § 203(a)(7), 8 U.S.C. § 1153(a)(7).

117. Pub. L. No. 96-212, 94 Stat. 102 (1980).

118. *See* Legomsky, *supra* note 31, at 835–36 (and 1994 Supplement, *supra* note 4, at 47–49) (vast majority of slots allocated to refugees from former Soviet Union and from Southeast Asia). For fiscal year 1995, these two regions account for 88,000 of the 112,000 authorized refugee admissions. *See* U.S. Comm. for Refugees, 15 Refugee Reports No. 12, at 9 (1994).

Communism have continued to dominate United States refugee admissions.[119] While less clearly connected to foreign policy, the present emphasis on Indochinese and Soviet refugees largely reflects foreign policy-driven commitments that were made in past years. As others have noted,[120] however, constituent pressures and other domestic political forces have also played prominent roles. I believe that these domestic political pressures are themselves a reason to entrust refugee selection decisions to an independent Board relatively insulated from narrowly defined interest groups, but the present discussion will focus on the proper role of foreign affairs in selecting among refugees.

Some might feel there is nothing wrong in linking refugee selection so closely to foreign policy considerations. Certainly a principled defense is possible. There are far more refugees in the world than the United States has the absorptive capacity to admit. Somehow, therefore, we have to select from within the class of people we denominate as refugees. What is the harm, defenders of the present policy might ask, in selecting those refugees who also happen to serve our foreign policy interests?

My own view is that enlisting foreign policy as the principal device for ranking refugees perhaps would be unobjectionable if all who met our refugee definition were otherwise fungible. The problem is that they are not. First, there are degrees of risk. One refugee might face a 40% chance of persecution while another faces a 90% chance. Second, there are degrees of persecution. One refugee might face restrictions on religious freedom while another faces death. With apologies to Learned Hand,[121] one can distinguish within the class of refugees both by the likelihood of persecution and by the harm they will face if the threatened persecution materializes. I would prefer a refugee selection system that rests largely on those kinds of considerations to one that is driven principally by foreign policy.[122]

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119. *See supra* note 118.

120. *E.g.*, T. Alexander Aleinikoff, General Counsel of the United States Immigration and Naturalization Service, Oral Comments at Symposium, University of Washington School of Law (May 6, 1995).

121. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (holding that negligence requires a balancing of the likelihood of harm, the gravity of harm, and the burden of taking adequate precautions).

122. At the risk of stating the obvious, I do not wish to speak of foreign policy as if it were a dirty word. United States foreign policy decisions speak volumes about our nation's values, and in this increasingly shrinking world they have incalculable tangible effects both on the day-to-day lives of Americans and on the populations of other nations. The only issue I am addressing here is the role that foreign affairs should play specifically in shaping United States refugee policy. Moreover, even

How these forces will shape substantive United States refugee policy in the post-Cold War era remains unclear. There are at least four possible scenarios: (1) continued concentration on refugees from Communist countries, either despite the changing political topology or in keeping with any future resurgence of Communism; (2) continued emphasis on foreign policy concerns, and particularly on refugees fleeing governments adversarial to the United States, but with Communist countries constituting progressively lower proportions of these "adversarial nations;" (3) increased emphasis on humanitarianism and human rights as factors in selecting among refugees, and attendant deemphasis on foreign policy; and (4) sizeable reductions in the total numbers of refugees admitted, as the driving force—combatting Communism—gradually peters out.[123]

Those of us who wish to preserve refugee admissions for reasons grounded in humanitarianism and human rights should view some of these possibilities with concern if not alarm. While recognizing that refugee programs in the United States and a small number of other nations cannot ultimately save more than a fraction of the world's refugees,[124] that fraction can translate into millions of people over the course of time.

Naturally, all this raises difficult questions about the direction of substantive refugee policy. In addition, however, it is time to consider the link between the processes for formulating that policy and the ultimate outcomes that those processes can be expected to produce. As long as the major responsibility for making refugee policy resides in the executive branch, is it inevitable that foreign affairs will drive those decisions? Are there alternatives? Finally, apart from issues as to the proper role of foreign affairs in shaping United States refugee policy, are there independent reasons to transfer refugee policy determinations to another place? These and other themes are explored in the subsections that follow.

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in that specific context, I am concerned with its role only relative to the roles of humanitarianism and human rights.

123. The State Department has predicted sharp reductions in total overseas refugee admissions once the current pipeline of Soviet and Indochinese refugees has been cleared. *See* Robert S. Greenberger, *U.S. Faces Pressure to Set New Policy on Refugees Amid Prospects of an Influx*, Wall St. J., Dec. 30, 1991, at A6 (quoting Hon. Princeton Lyman).

124. As of November 1992, there were about 18,000,000 refugees in the world. Statement of Hon. Sadako Ogata, United Nations High Commissioner for Refugees (Nov. 10, 1992) in 4 Int'l J. Refugee L. 541, 542 (1992). In fiscal year 1995, the United States will admit up to 112,000. U.S. Comm. for Refugees, 15 Refugee Reports No. 12, at 9 (1994).

B. The Problem with Presidents

The present system of entrusting refugee policy largely to the President has real advantages over a system of congressional refugee selection. To minimize redundancy, I defer the discussion of those advantages to the next subsection. The present subsection will focus only on the down side of presidential refugee determinations.

The first cost, at least for those who believe that refugee policy should turn more on humanitarian aspirations and human rights protection than on foreign affairs, is the inherent unreality of expecting such an ordering of priorities from a President. In international circles, no individual speaks for the United States with more authority than the President does. Whatever debate there might be about the precise location of the constitutional line that separates congressional and presidential powers in the realm of foreign affairs,[125] few would deny that the presidential responsibility for American foreign policy is substantial. Nor can one discount the influence of the State Department, whose central mission inevitably infuses presidential refugee determinations with a heavy dose of foreign affairs.

A second cost of presidential decisionmaking in this area is a specific application of the general principle, discussed earlier, that major policy decisions should be the province of Congress. As has been noted, Congress enjoys the advantages of greater diversity, closer ties to local constituents, earlier accountability because of more frequent elections (in the House of Representatives only), more opportunity for public input into the process, and more visibly open deliberation.[126] The overall size and shape of our overseas refugee policy are major policy decisions.

Third, the traditional legislative process, with its combination of congressional approval and presidential assent, formally incorporates the representational virtues of both branches. In that way, the procedure enhances the public perception of legitimacy. By vesting a major policy decision exclusively[127] in the President and his delegates, the present refugee selection system cedes some portion of that legitimacy.

Fourth, since Congress decides what funds to appropriate, assigning to the President the ultimate responsibility of setting refugee quotas

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125. On that subject, the classic work is Louis Henkin, *Foreign Affairs and the Constitution* (1972); *see also* Henkin, *supra* note 8.

126. *See supra* part I.B.

127. I acknowledge the *consultation* requirement, but the point here is that the final *decision* rests with the President.

bifurcates the substantive policy decision and the funding decision. That such bifurcation can be problematic became evident in 1992, when the President proposed maintaining approximately the existing level of refugee admissions while Congress drastically cut the funding for resettling them.[128]

Fifth, in the more general context of the United States immigration structure, the refugee process sticks out like a sore thumb. For every other major category of permanent migration—family, employment, and diversity—Congress has prescribed a complex and detailed system of numerical ceilings and priorities.[129] Yet, with respect to refugees, Congress has delegated analogous decisions to the President. The segregation of one central component of immigration policy raises concerns for the overall coherence of that policy. Are there good reasons to employ such fundamentally differing approaches?

Refugees are, of course, different from other immigrants in important ways. By definition, they face higher than usual risks of serious harm. They are unable to turn to their own governments for protection. And they are more likely to have been emotionally traumatized. But none of these factors explains the particular process differences at issue here.

There are, however, at least two possibilities. Refugee flows can be sudden and unpredictable. Consequently, those who make refugee policy must be prepared to respond promptly and flexibly. On that score, as noted earlier, the President is better situated than Congress. Still, the next subsection will explore some ways in which Congress could minimize those difficulties and still assume the major responsibility for refugee selection policy.

The other possible reason for singling out refugee selection as the one major immigration policy that Congress has generally abdicated to the President might be the perceived link between refugee issues and foreign affairs. When the United States declares someone a refugee, it is implicitly concluding that the country of origin is either engaged in persecution or unwilling or unable to protect its own inhabitants from persecution by others. Concededly, such expressions of opinion are potentially damaging to foreign relations.

But even that explanation seems inadequate. For reasons discussed earlier, whether foreign policy should play so prominent a role in refugee selection is debatable in the first place. Moreover, to link refugee policy

128. U.S. Comm. for Refugees, 13 Refugee Reports No. 7 (1992).

129. *See supra* part I.B.

to foreign affairs is hardly a basis for distinguishing refugee policy from all of the other immigration policies of which Congress has taken charge. Indeed, for more than one hundred years, the Supreme Court has affirmatively invoked the link between immigration and foreign affairs as a justification for recognizing a plenary congressional power over immigration.[130] Finally, although United States refugee policy can affect foreign relations, it can have large domestic implications as well. Congress would normally be the logical organ for balancing the various domestic and foreign repercussions.

At bottom, then, ultimate presidential control of refugee selection policy generates some substantial concerns. Would congressional control be better?

C. The Problem with Congress

Previous discussion has illustrated the President's relative strengths and one of Congress's relative drawbacks: the slower and more cumbersome nature of the legislative process.[131] Again, refugee policy must be responsive to rapidly changing world conditions. If Congress had to legislate every year, and especially if it had frequent additional need to legislate ad hoc in response to new emergencies, serious problems could arise.

To be sure, there are ways to surmount, or at least to lower, that barrier. Congress could, for example, enact permanent legislation that either authorizes up to a certain number of annual refugee admissions or mandates that the number admitted fall within a prescribed numerical range. Either way, the statute could confer discretion on the President or other executive officer within those constraints. The statute could also prescribe preference categories analogous to those for family, employment, and diversity immigrants.[132] Congress could create sub-ceilings or sub-ranges for those preference categories and, if it wished, it could exempt certain high-priority refugees from those sub-limits entirely. Because the aim would be to avoid the need for frequent amendments, any such priorities should be personal (e.g., immediate

130. See the sources cited in *supra* note 22.

131. To the extent that slowness adds care and mature reflection, it is also an advantage. *See* Palmer, *supra* note 77, ch. 9. In the refugee field, perhaps it would not be bad for policy decisions to lag some distance behind volatile changes in public sentiment.

132. INA § 203, 8 U.S.C. § 1153 (1994).

danger, close family ties to United States citizens or residents)[133] rather than country-specific. Indeed, if the priorities are designed principally to promote humanitarianism and human rights, the absence of country specifications would be a positive virtue.

To preserve flexibility, Congress could add several features. It could retain the present provision authorizing the President to respond to unforeseen emergencies with additional admissions.[134] The legislation could also require the General Accounting Office or a specified executive branch agency to monitor the world refugee situation continuously and provide regular reports to the appropriate congressional committees.

The above solution would still leave the President with the very broad discretion to choose the number of refugees and their countries of origin. Although narrower than the freedom the President enjoys under present law, such a grant of power would reproduce many of the flaws of the existing process. In particular, Congress would still be abdicating a large chunk of its duty to make major policy decisions. The advantage of this congressional abdication is that the system would retain the flexibility to respond quickly to rapidly changing refugee flows.

An alternative would be for Congress to enact permanent legislation defining the refugee priority categories, but to enact annual legislation setting the number of refugee numbers for the upcoming year for each priority category. Again, there could be provision for presidential authorizations of unforeseen emergency numbers and for continuous executive monitoring and reporting. To assure annual congressional action, the House and Senate rules could build such decisionmaking into the appropriations process. This alternative exacts the opposite kind of tradeoff: it accepts a more cumbersome process in exchange for a greater congressional policymaking role.

An intermediate option would be for Congress to attempt the preceding strategy, but to provide for continuation of the prior year's refugee numbers as the default option. In the event of political stalemate, the continued admission of refugees would be assured.

Inflexible as it might initially sound, that last strategy would have real advantages. Since there is no present danger that the world's refugee supply will suddenly shrink below the level that any Congress is likely to prescribe, future Presidents are not going to find themselves unable to fill

133. These are the current INS and State Department priority categories. *See supra* note 111.

134. INA § 207(b), 8 U.S.C. § 1157(b).

prior years' mandates. Rather, if the statutory numbers are deemed too high for successive years, it will be because of domestic concerns about the nation's absorptive capacity—concerns not likely to fluctuate dramatically from year to year. In any event, the problem would be no greater for refugees than for any other category of immigrants, whose numbers are also set by statute. Moreover, if the situation became sufficiently serious, Congress could enact either permanent or ad hoc corrective legislation. Conversely, if the old statutory numbers became too low, Congress could similarly pass remedial legislation or the President could invoke his or her special authority to admit additional refugees in unforeseen emergencies.

I would prefer any one of these options to the status quo. Admittedly, however, each one is subject either to the criticism that it still leaves too much basic policy discretion with the President or to the criticism that it imposes unrealistically cumbersome burdens on an already overburdened Congress.

A congressional takeover of refugee selection policies would also generate other, smaller concerns. As in any other area, congressional structures do not lend themselves ideally to either long-term or comprehensive planning.[135] Both are crucial in an area like refugee policy, not only because today's admission decisions can affect tomorrow's demography, but also because refugee policy decisions intersect with those in other subject areas.

As in other areas, Congress might be perceived as having local, constituent-based attachments too parochial for national refugee policy determinations. It might also be thought too vulnerable to lobbyists. But these limitations can influence national legislation in practically any subject area; we accept them as the price for both federalism and separation of powers.

The relatively more public congressional process might also be of concern, for openness can bring embarrassment. But the flip side of openness is secrecy, and that too has its dangers. Moreover, some would question whether truly confidential information is any more likely to leak from Congress than it is to leak from the executive branch.[136]

So the only major disadvantages of a meaningful congressional role in the refugee selection process are the slowness and relative rigidity of the congressional structure. These are, however, major costs, and those

135. *See supra* notes 86, 95 and accompanying text.

136. *E.g.*, Glennon, *supra* note 72, at 27-28.

forms of congressional involvement that substantially avoid these costs do so only by granting the President a wide area of unbridled discretion. Given the tendency for Presidents to tie refugee policy so closely to foreign affairs, that large residue of discretion is troublesome.

D. Congressional and Presidential Power-Sharing

If either congressional or presidential control of refugee selection policy poses substantial difficulties, would some sort of power-sharing arrangement solve the problem? One might categorize the existing consultation requirement as a form of power-sharing, but as noted earlier the President alone makes the ultimate decision. Similarly, any of the statutory schemes discussed in the preceding subsection would inherently represent a sharing of power in the sense that the statute itself would require both congressional approval and presidential assent (unless the statute resulted from a veto override). Some of those hypothetical statutes would reflect power-sharing in the additional sense that they call for Congress to make some decisions and the President to make others.

There are, however, many other possibilities. For ease of discussion, I separate them into two groups. Some simply divvy up the various functions between Congress and the President. Others would require the joint approval of all major decisional components by both branches.

In the first group, one possible approach would be for Congress to enact permanent legislation that describes the general goals of the refugee program in broad language. If Congress were so inclined, it could preserve the present system but specify that the President is to base all refugee selections primarily on humanitarian and human rights criteria rather than on foreign affairs criteria. To take that tack would still represent a large delegation of congressional power, however, and in any event a President who wished to select refugees on the basis of foreign policy concerns would have little difficulty in finding humanitarian and human rights rationales that purported to explain the final decision.

Another possibility would be annual congressional passage of bills that prescribe specific numbers of refugees to be admitted from specific countries or regions, but with a line-item veto that would permit the President to delete particular allotments. Constitutional questions aside, such an approach would probably embody the worst of both worlds. Annual congressional action would be cumbersome, Congress would be ceding to the President the authority to block the admission of whichever refugees he or she wished, and the President's decisions could still be made largely on foreign policy grounds.

Other power-sharing approaches might entail consent by both branches to all major components of the refugee selection decision. In theory, one such possibility is for Congress to retain some power to review the President's refugee designations. In the past, Congress freely employed legislative vetoes to constrain the substantive policy discretion of administrative agencies.[137] But that practice ended with *INS v. Chadha*,[138] where the Supreme Court struck down a provision that had authorized a one-House veto of agency action. The Court held the provision amounted to legislation without the constitutionally prescribed legislative procedures. In a later case, the Court summarily affirmed a lower court decision striking down a two-House veto.[139]

Laurence Tribe has suggested that Congress, consistently with *Chadha*, could delegate the authority to issue rules but stipulate that those rules would not take effect unless and until both Houses of Congress affirmatively approve them by joint resolution and present them to the President.[140] Since such a procedure would comprise both bicameral approval and presidential assent, and since those were the two elements of the constitutional process that the Court in *Chadha* believed Congress had circumvented, there should be no constitutional obstacle. In effect, Congress would be treating the President as an advisory, or reporting, agency. Again, though, the problem would be the annual need for both Houses of Congress to reach agreement on the specifics of refugee policy when rapidly changing world conditions might demand prompt action.

A final possibility would be to continue to delegate the broad refugee selection power to the President but to provide that the President's designations do not become effective until some specified time after they have been reported officially to Congress.[141] Time-delay mechanisms would avoid the necessity of affirmative congressional action but would enable Congress to supersede the President's decision legislatively if it wished to do so and if it could either deter or override a presidential veto. Again, however, the potential for long delays would be problematic in a setting that often demands speedy responses to sudden shifts in the world refugee picture. Moreover, congressional consensus within the statutorily prescribed time limits will often be difficult. When such consensus does

137. *See, e.g.*, Abourezk, *supra* note 7; Strauss, *supra* note 7.

138. 462 U.S. 919 (1983).

139. United States Senate v. Federal Trade Comm'n, 463 U.S. 1216 (1983).

140. Tribe, *supra* note 65, at 218 n.27.

141. *Id.* at 217–18.

not materialize, all the problems associated with unilateral presidential control of refugee selection remain.

In the end, none of these solutions is fully satisfying. Some leave the basic policy decision in the hands of the President, to whom foreign relations will continue to loom large. Other solutions would return the major policy responsibility to Congress, but they would necessitate slow and cumbersome procedures in a field that cries out for speed and flexibility. It is time, I believe, for an entirely different approach.

IV. AN INDEPENDENT REFUGEE BOARD[142]

As the discussion to this point has demonstrated, the congressional process is not geared to making annual determinations of how many refugees the United States is to admit and the countries from which they are to come. The partial solutions discussed in the preceding subsection are plausible but insufficient. As a practical matter, Congress must delegate this responsibility to someone.

Under current law, that someone is the President. The chief problem with that arrangement is that the President, by virtue of his or her office and responsibilities, will inevitably give overriding emphasis to the foreign policy ramifications of refugee selection decisions. If Congress believes that refugee policies should turn primarily on humanitarian and human rights considerations, then it needs to find a new delegate. I propose it create an Independent Refugee Board for this purpose.

If Congress were to follow that course, the nondelegation principle discussed earlier would require only that Congress articulate an "intelligible principle" for the Board to follow.[143] To that end, the legislation should first lay out the general goals of the program that the new Board would be shaping. Congress should say explicitly that the principal goals are to ease the suffering of refugees and to promote observance of human rights. Congress should also supply categorical priorities, analogous to those now in use by the INS and the State Department.[144]

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142. For a good discussion of the merits of an analogous independent board, see Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy over Immigration*, 71 N.C. L. Rev. 413, 451–53 (1993). Unlike the Board proposed here, the board that Professor Johnson considers would address a wide range of immigration issues and would perform only adjudicative functions.

143. Mistretta v. United States, 488 U.S. 361, 372 (1989); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

144. *See supra* note 111.

The main job of the new Board would be to announce the total annual refugee admission levels and, within the above statutory constraints, the bases for choosing among competing applicants. Congress here has several sub-options: It could require the Board to specify geographic areas from which the refugees are to be drawn; it could prohibit the use of geographic criteria altogether, opting instead for a system that prioritizes refugees solely on other grounds; or it could entrust to the Board the discretion whether to employ geographic criteria. Congress could also insist that the Board report its designations at least a specified number of months before the start of the fiscal year. Then, if Congress objected strongly to a particular decision, it would have time to pass corrective legislation for that year.

Congress should also prescribe procedural guidelines for the Board to follow. Notice-and-comment rulemaking procedure, with its emphasis on public input, would be worth requiring.[145] The legislation should require the Board to monitor the world refugee situation by communicating regularly with the Office of the United Nations High Commissioner for Refugees, the International Organization for Migration, the United States Department of State, the INS, and relevant nongovernmental organizations (NGOs). Congress should also require the Board to monitor domestic refugee resettlement operations by maintaining close contact with the Department of Health and Human Services, NGOs, and other relevant sources of information.

The statute should preserve the existing presidential power to admit additional refugees in the event of an unforeseen emergency and should require the Board to make recommendations to the President concerning the exercise of that power. In addition, Congress should require the Board to file periodic reports with the appropriate congressional committees and with the President. Congress should also conduct regular and ad hoc oversight hearings to stay abreast of world refugee conditions.

It would be possible for the legislation to delegate additional functions to this new Board. It could, for example, require the Board to provide information and training to the INS and State Department personnel who adjudicate individual refugee applications. It could go a step further,

145. The Administrative Procedure Act (APA) exempts from the formal rulemaking requirements any rule that involves "a foreign affairs function of the United States." 5 U.S.C. § 553(a)(1) (1994). Since some would say refugee determinations fit that description, the statute that creates the refugee agency should specifically require formal rulemaking unless in a given instance it would be "impracticable, unnecessary, or contrary to the public interest" (the current APA language). 5 U.S.C. § 553(b)(B) (1994).

making this Board responsible for the overall administration of the overseas refugee program, including the adjudication component.

Congress would have to make the usual decisions concerning the appointment and removal of Board members. These decisions would need to reflect the appropriate tradeoff between independence and accountability.[146] Congress could opt for presidential appointment and prescribe fixed terms, either with or without the possibility of renewal. One option would be a two-term limit.

In many ways, the proposed Board would resemble the United States Sentencing Commission, an independent body established by Congress to issue binding sentencing ranges for federal crimes.[147] It too operates under very general congressional guidelines that the Supreme Court in *Mistretta v. United States*[148] held compatible with the nondelegation doctrine. Justice Scalia argued in dissent that Congress cannot constitutionally create an agency, like the Sentencing Commission, that has no function other than lawmaking.[149] He believed Congress could constitutionally delegate only those lawmaking functions that were incident to the agency's other executive or judicial responsibilities. Importantly here, the majority rejected that position.

An independent Board charged with pronouncing the number and breakdown of annual refugee admissions would bring several benefits. In many ways, it would combine the deliberative qualities of the legislative branch, the speed and flexibility of the executive branch, and the impartiality and insulation of the judicial branch.

The deliberation that should characterize the operations of this proposed Board would occur for two reasons: First, by monitoring the world refugee situation continuously, the Board's members and staff would have ample opportunity for mature reflection and collegial exchanges that can help their thoughts on long-term refugee problems and solutions to crystallize. Second, the Board's specialized expertise would contribute to comprehensive understanding and sophisticated analysis of what has become highly technical, complex subject matter. While both these qualities are essential, however, I do not view them as

146. For a discussion of some of the subvariables in an analogous immigration context, see Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 Iowa L. Rev. 1297, 1378–80 (1986).

147. *See* Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551 et seq., 28 U.S.C. §§ 991–98 (1988). The Sentencing Commission, however, is within the judicial branch rather than the executive branch. 28 U.S.C. § 991(a).

148. 488 U.S. 361 (1989).

149. *Id.* at 413, 417.

arguments for this proposed refugee Board, since the specialized staffs of congressional committees and executive branch departments have these same traits.

The main advantage of the proposed Board over the existing system of presidential refugee selection is that an independent Board whose members enjoy fixed terms would be at least relatively removed from partisan and pressure group influences.[150] For that reason, even though Presidents have chosen them, Board members should be less likely than Presidents to make foreign affairs the driving force of a refugee selection program. They could focus on finding facts and on making decisions that reflect the needs of the refugees, the promotion of human rights, and all the relevant domestic and international interests of the United States.

The principal advantage of the proposed Board over a system of congressional selection of refugees would be that the Board, like the President, could move quickly when conditions so require. The Board could respond promptly to swiftly changing refugee needs. With specialized expertise, with a steady stream of information from all the major sources, and with constant attention to one specific task, the Board would have the knowledge base to move firmly and aggressively when necessary. With its small size and more flexible procedures, the Board's processes would be similarly conducive to rapid response.

To be sure, independent agencies have their detractors.[151] Perhaps the most forceful criticism has been their lack of political accountability. Their members are not elected by the people and they are not removable except by the President in extreme cases.[152]

That members of independent agencies are not elected by the people is not a fatal characteristic. Neither are the heads or members of any other administrative agencies or, for that matter, federal judges.

The more significant component of the accountability criticism is that Board members are insulated from removal. When an agency makes significant policy decisions, as would be true of the proposed refugee Board, that criticism has teeth.

Still, there are several safeguards. There is some accountability as long as Board members' terms are renewable. The enabling legislation would place significant constraints on the Board's substantive policy

150. Some commentators believe that the actual political insulation of independent agencies is often exaggerated. See the sources collected by Johnson, *supra* note 142, at 452 & n.186.

151. *See, e.g.*, Nolan E. Clark, *The Headless Fourth Branch*, *in* Jones & Marini, *supra* note 6, at 268–92; Jones & Marini, *supra* note 6.

152. *See* Clark, *supra* note 151, at 274–76, 280–81.

discretion. The processes that the proposed statute requires the Board to use would guarantee robust public input into the Board's decisions in all but the most urgent situations. And if the people's representatives in Congress object strongly to a particular decision by the Board, they can supersede it by legislation. While it would be self-defeating to make such legislation routine, the congressional check is there in the event of refugee selections that deviate sharply from public opinion. If the Board's decisions are made subject to statutory time delays, corrective legislation would be plausible. Ultimately, if Congress finds continuing serious problems with the policy decisions of the Board, it could admit defeat, abolish the Board, and return to presidential refugee selection.

Related to the general concerns about political accountability, however, would be concerns about the subject matter of this particular delegation. Congress would be bypassing the President, entrusting to an independent Board a policy decision with international implications. That Congress is bypassing the President is not by itself a concern; but for the logistical difficulties of committing itself to annual legislation, Congress could have chosen to make these decisions on its own. That Congress is delegating a power to an independent Board is also not by itself a problem; Congress delegates powers to independent agencies all the time. The difficulty lies in the combination. The proposed scheme arguably means that neither of the two branches responsible for foreign relations would have primary control over refugee determinations.

One cannot meet this criticism simply by opining that foreign affairs should not control or even influence refugee selection decisions. For one thing, reasonable minds can disagree on that issue. For another, the problem is not just the impact of foreign affairs on refugee selection; it is also the converse impact of refugee selection determinations on foreign affairs. When policies will significantly affect United States foreign relations, critics might say, one should not bypass both Congress and the President.

Again, however, Congress would have the ultimate power to supersede by legislation a Board decision to which it strongly objected. Admittedly, a Congress that has a full menu of other issues competing for its attention will not always find it practical to do so. When decisions repugnant to Congress are left unanswered, and those decisions affect foreign affairs or any other vital area of national policy, harm has occurred.

One must acknowledge that those instances can occur, but congressional acquiescence would be surprising if the Board's deviation

from the congressional will were serious. Moreover, as discussed earlier, Congress would still be able to set the basic parameters in advance, and the proposed Board would then be in continuous permanent contact with both Congress and the President. In any event, neither the status quo nor any alternative proposal of which I am aware would solve the basic problem with less institutional cost.

Apart from the safeguards just described, one can argue credibly that in the refugee context political insulation is not only a positive virtue, but a special necessity. Aliens are, after all, largely excluded from the political process, and thus in particular need of protection by an independent body.[153] Political alignments with individuals or institutions in positions of greater power can occur when particular interests happen to match up,[154] but such fortuities are no substitute for independent lobbying strength.[155]

CONCLUSION

In immigration law, where the impact of policy decisions is both deep and widespread and where those decisions rest heavily on both value judgments and practical politics, the "Who decides?" question is central. For the most part, Congress's answer has been "We decide." In our representative democracy, that is precisely as it should be.

But in one major corner of immigration law Congress has deviated from that philosophy. In our overseas refugee program, Congress has granted the President almost unrestricted authority to decide each year how many people will be admitted and which ones. Every President, without exception, has chosen to allocate the overwhelming majority of the refugee slots to those refugees who are fleeing Communist countries.

Seismic changes to the global political landscape demand reconsideration of these priorities. Resistance to Communism can no longer be the driving force of our overseas refugee program. The larger question, though, is what the driving forces should be. Like many others, I believe that the problem has been the willingness to let foreign relations dominate our refugee policies as much as they have. Foreign affairs considerations have a place in the formulation of refugee policy, but in my view the principal determinants of United States refugee selection

153. Johnson, *supra* note 142, at 444, 456–59; Stephen H. Legomsky, *Political Asylum and the Theory of Judicial Review*, 73 Minn. L. Rev. 1205, 1208 (1989).

154. Schuck, *supra* note 2.

155. Legomsky, *supra* note 153, at 1208.

should be humanitarian relief of suffering and the promotion of human rights.

Reordering our refugee priorities in that way will be highly unlikely as long as the final decisions reside exclusively with presidents. Unfortunately, for reasons discussed at length in this article, Congress is also poorly situated to make the kinds of rapid, periodic determinations that volatile changes in the world refugee situation require.

My proposed solution is to create an Independent Refugee Board whose central function would be to make annual determinations somewhat akin to those now made by the President. Congress, through permanent legislation, would provide more detailed guidance than it now does. To that end, Congress would articulate the broad goals of the overseas refugee program and would enact categorical, nongeographic priorities to structure the exercise of the Board's discretion. Each year, the Board would then translate those criteria into specific refugee authorizations.

United States refugee policy can be as compassionate as we wish it to be. But if we wish it to be more compassionate than it now is, the basic decisionmaking structure will require radical surgery.