

Perils of the Growth of Executive Power Over Immigration

Author : Ilya Somin

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Adam Cox & Cristina Rodriguez, [The President and Immigration Law](#) (2020).

Over the last few months, President Joe Biden has granted Temporary Protected Status (TPS) to some [300,000 Venezuelans](#) living in the United States and [100,000 Haitians](#). As a result, these people will be able to remain in the U.S. without fear of deportation for another 18 months. Once again, the fate of hundreds of thousands of people fleeing oppression, poverty, and violence turned on the will of a single man. Yet, important as they were, Biden's TPS decisions attracted little public attention beyond the community of experts and others who follow immigration issues closely. That is in large part because we have grown so used to the idea that enormous swathes of immigration law and policy are under the control of the White House. The recent TPS decisions are just the latest manifestation of this trend.

Adam Cox and Cristina Rodríguez's book *The President and Immigration Law* is likely to become the definitive work on the growth of executive power in this field. As they describe, the executive branch has come to wield vast discretionary power over immigration policy, even though nothing in the text or original meaning of the Constitution grants the president that power. At the time of the Founding, the dominant view was that the Constitution [did not give the federal government any general power to exclude and deport immigrants at all](#), much less that such authority would come to rest in the hands of a single person and his subordinates.

When the Alien Acts of 1798 gave the president broad power to deport non-citizens he deemed to be dangerous, such luminaries as Thomas Jefferson and [James Madison](#) argued that it was unconstitutional, and successfully prevented the Alien Friends Act from resulting in any deportations before it was allowed to expire in 1801. For a long time after, the federal government exercised very little power over immigration, though states were more active.

Over time, that changed. As Cox and Rodríguez explain, the executive has gradually acquired "extraordinary power over immigration policy" due to a combination of extensive delegation by Congress, and the enormous size of the undocumented immigrant population subject to deportation (some 11 million people). Since there is no way to deport all of the latter or even come close, presidents end up wielding vast discretion over who to target and why. Cox and Rodríguez's book insightfully analyzes the growth of executive authority, and the ways in which presidents of both parties have used it—sometimes to give a reprieve to favored groups, and other times to engage in brutal enforcement actions that consign large numbers of people to lives of poverty and oppression.

In a series of insightful chapters, the authors explain how the presidency gradually "sidelined" previously dominant state authority over immigration, asserted greater power over the federal enforcement bureaucracy, and—perhaps most of all—increased its power at the expense of Congress. They are careful to explain that Congress' role has not been superseded entirely. However, the White House has, on their account, become a "co-principal" with Congress in the development of immigration law and policy. Crucial to these trends has been the growth of a vast "deportation state," largely under the control of the executive, and what Cox and Rodríguez refer to as the "shadow immigration system." The latter is a combination of congressional delegations and executive power grabs that enable the White House to exercise enormous discretion over who is let into the United States in the first place, and who is subject to deportation afterwards.

This wide-ranging discretion can cause enormous harm, as with Donald Trump's cruel anti-Muslim "[travel ban](#)" and [his child separation policy](#). Even when exercised more humanely, executive control over immigration is an affront to the

rule of law, for reasons well-explained by Daniel Farber, [in his contribution](#) to a *Yale Journal on Regulation* symposium on Cox and Rodriguez's book.

Some of this discretionary power is just one part of a broader problem with our legal system. There are far more laws than any administration can possibly enforce, and far more lawbreakers than can ever be caught and prosecuted. As a result, [a large majority of adult Americans have violated federal criminal law \(to say nothing of state law\) at some point in their lives, and could potentially be prosecuted](#). Undocumented immigrants are far from the only people who live on the sufferance of executive discretion. But the immigration situation is particularly severe, because of the grave consequences of deportation, and [the weakness of due process protections](#) in the immigration enforcement system.

Cox and Rodríguez propose reforms that could help address the problem of excessive executive discretion to deport and exclude migrants. Most of all, they argue that Congress “must drastically decrease the number of people who live under the threat of enforcement” by legalizing the presence of at least a large part of the undocumented population. They also suggest giving the president greater discretion to admit and legalize new immigrants, in order to counterbalance the present wide-ranging discretion to deport and exclude.

If implemented, these ideas would be useful steps in the right direction, especially that of legalizing currently undocumented migrants. But, for reasons I explained in [my contribution](#) to the *Yale Journal on Regulation* symposium, I fear they do not go far enough. In my view, the authors undervalue the need to strengthen judicial review of immigration policy (which [currently tolerates egregiously unconstitutional practices](#) that would be struck down in almost any other field) and especially the necessity of making it easier for migrants to legally enter the United States in the first place. The latter is the only way to truly tame the vast growth of executive power over immigration policy and the threat it poses to the rule of law.

Cox and Rodriguez are also sometimes overly optimistic about the good that can be accomplished through more benevolent exercises of executive authority. Recall the example of Biden's grant of TPS status to Venezuelan and Haitian migrants. As welcome as it is, the beneficiaries still must live with the specter of its possible revocation within 18 months. That makes it extremely difficult for them to plan their lives for the long-term, reduces the contribution they might make to our economy and society, and generally makes their position insecure. What the White House giveth, it can all too often just as easily taketh away.

To their credit, Cox and Rodriguez suggest alleviating this problem by passing legislation giving the president the authority to grant at least some types of otherwise illegal migrants a “legally secure form of residence.” But it may be difficult to create and maintain a system under which the executive can grant security that he cannot readily take away. Such asymmetrical discretion is potentially feasible, and might be a lesser evil relative to the status quo (though still not as desirable as simply giving a much larger class of migrants nondiscretionary legal rights to enter and live in the United States). But it might also turn out to be an unstable equilibrium. Moreover, so long as the power to grant reprieves from entry bans or deportation remains under exclusive presidential control, a president hostile to immigration can simply choose not to exercise it.

Despite these reservations, *The President and Immigration Law* is a major contribution to our understanding of the presidency, immigration law, and separation of powers. It should be of great value to immigration experts and constitutional law scholars alike.

Parts of this piece are adapted from [a symposium piece](#) on *The President and Immigration Law*, written for the *Yale Journal on Regulation*.

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