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IMMIGRATION FEDERALISM IN THE 2020 PRESIDENTIAL ELECTION

by TARA MEHRA '23

Immigration is a cornerstone issue in the federalism debate and a key issue in the 2020 presidential race. According to the Bipartisan Policy Center, more than four out of five registered voters report that a candidate’s immigration plan is influential in their decision of who to vote for in the 2020 election.¹ The BPC report also found that Republicans tend to give more consideration to a candidate’s immigration policy. While 63% of Republican voters would call a candidate’s immigration plan “very important,” only 40% of Democrats would.² Article I, Section 8 of the U.S. Constitution permits Congress to “establish a uniform Rule of Naturalization.” The Supreme Court has limited the scope of state power through consistently ruling in favor of the federal government when immigration federalism conflicts arise.³ At its core, the federalism conflict lies between both the state and federal governments and the state and city governments. Specifically, the conflict involves the extent to which city governments and state governments must enforce state and federal policies, respectively.

Recent decisions from the Supreme Court have spurred tension in the immigration federalism debate. *Kansas v. Garcia* (2020) ruled that federal immigration law does not preempt states from prosecuting undocumented immigrants under their identity theft and fraud statutes.⁴ Federalism scholars believe that *Kansas v. Garcia* points to the growing tension regarding a state’s role in enforcing federal immigration policy, with some states instituting increasingly rigorous measures to enforce federal law, and others avoiding cooperation with federal authorities.⁵ Also, *Department of Homeland Security v. Regents of the University of California* (2020) held that the Department of Homeland Security’s intent to limit or end DACA protections was judicially reviewable, and in violation of the Administrative Procedure Act.⁶ Many other Trump Administration immigration policies are percolating in lower courts, including the administration’s widened definition of who can be deemed a “public charge” as well as tightening restrictions to obtain asylum.⁷

Throughout the four years, the Trump Administration

1 <https://bipartisanpolicy.org/wp-content/uploads/2019/09/BPC-Immigration-memo.pdf>
2 <https://bipartisanpolicy.org/wp-content/uploads/2019/09/BPC-Immigration-memo.pdf>
3 <https://www.boundless.com/blog/u-s-constitution-immigration/>

4 <https://www.oyez.org/cases/2019/17-834>
5 <https://academic.oup.com/publius/article/50/3/311/5870265>
6 <https://www.oyez.org/cases/2019/18-587>
7 <https://www.oyez.org/cases/2019/18-587>



heavily restricted asylum eligibility and entry for asylum-seekers from the southern border. Allegations of border patrol agents physically blocking asylum seekers at ports of entry and turning asylum seekers away surfaced.⁸ Questions have arisen regarding the cooperation of border states and their state patrol officers with these restrictive policies. President Trump also declared a “national emergency” to transfer funds for building the southern border wall after a government shutdown failed to produce a congressional agreement for the funding. President Trump’s and Vice President Biden’s stances on continuing to build the wall will influence the role of states along the southern border in the coming years.⁹

A prominent topic in immigration federalism is the implementation and legality of the sanctuary jurisdiction. Sanctuary jurisdictions limit the enforcement of federal or state immigration policies in that particular area. For example, when the Trump administration implemented restrictive ICE policies regarding the reporting of undocumented immigrants, many cities became sanctuary jurisdictions, barring their agencies from cooperating with ICE regulations and agents. Consequently, both federal and state governments threatened to withhold funding from the sanctuary jurisdictions. Cities within states can also reject state sanctuary policies, becoming anti-sanctuary cities. In April 2018, the California city of Los Alamitos passed an ordinance that attempted to absolve the city from the state’s sanctuary policies.¹⁰ By May 2020, Los Alamitos repealed the ordinance after charter cities with similar tactics lost their respective legal battles.¹¹

Thus, the position of the presidential candidates on sanctuary jurisdictions and their visions for ICE are relevant to the federalism debate. The candidate’s

8 <https://academic.oup.com/publius/article-abstract/49/3/379/5530676?redirectedFrom=fulltext>

9 <https://academic.oup.com/publius/article-abstract/49/3/379/5530676?redirectedFrom=fulltext>

10 <https://voiceofoc.org/2020/05/los-alamitos-anti-sanctuary-city-fight-fizzles-out/>

11 <https://voiceofoc.org/2020/05/los-alamitos-anti-sanctuary-city-fight-fizzles-out/>

position communicates the extent to which he believes that a state or city can constitutionally reject a federal policy, perhaps speaking to his perspective on federalism more broadly.

The past actions of the Trump Administration offer a perspective into President Trump’s federalism theory on immigration, and Vice President Biden’s comments on these actions give insight into his plan for immigration.

THE CANDIDATES

Looking Forward: President Trump

Throughout his tenure, President Trump aimed to withhold funding from sanctuary jurisdictions in an effort to encourage them to enforce federal law. The president’s approach has an especially contentious history with California. When Trump signed an executive order to make sanctuary jurisdictions ineligible for federal grants in 2017, the state of California challenged the action. Later that year, California filed a lawsuit against the new Department of Justice (DOJ) requirements for justice grant eligibility. In 2018, the Trump Administration also filed a lawsuit against California when the state passed three laws that would prevent enforcement of federal immigration policy.¹²

President Trump intends to continue his efforts to encourage enforcement of federal immigration policy at a state level. In a rally in Pittsburgh on September 22, 2020, President Trump said “we will ban deadly sanctuary cities. We’d ban them.”¹³ A few days prior, he called sanctuary cities “a disaster” during a rally in Minnesota.¹⁴ If President Trump

12 https://ballotpedia.org/Federal_policy_on_sanctuary_jurisdictions,_2017-2020

13 <https://www.rev.com/blog/transcripts/donald-trump-pittsburgh-campaign-rally-transcript-september-22>

14 <https://www.rev.com/blog/transcripts/donald->

is re-elected, his limitation of funding to states with sanctuary jurisdictions will continue, and legal action from cities and states, like that from California, will again ensue. However, appeals courts have ruled in favor of the Trump Administration, a decision which supports a centralized immigration policy.¹⁵ And as with the ruling in *Kansas v. Garcia*, some states may attempt to supplement the enforcement of more restrictive federal immigration policies with increasingly aggressive tactics. Those jurisdictions can expect legal challenges to this approach as well, though likely not from the Trump Administration. President Trump envisions a centralized immigration policy and will use tactics to achieve this that will result in legal action and resistance from Democratic cities and states.

At a rally in Mosinee, WI, Trump said “We stopped asylum fraud, and we’ve deported 20,000 gang members and over half a million criminal illegal aliens of the worst kind. We’re enforcing the clear requirement that newcomers to our country must be self-sufficient and not reliant on welfare.”¹⁶ The president’s comments suggest that in a second term, he will continue to tighten asylum requirements. His comment that asylum-seekers must not be “reliant on welfare” relates to the administration’s new guidelines for who can be named a “public charge.” The term “public charge” refers to those who, upon entrance to the US, are likely to become dependent on the government for subsistence.¹⁷ As of February 2020, the Inadmissibility on Public Charge Grounds Final Rule established that throughout the nation, those deemed as a “public charge” are wholly inadmissible to the nation.¹⁸ Legal challenges to certain definitions

of “public charge,” like the welfare requirements, are percolating in lower courts. But as the law stands, President Trump created a centralized, restrictive, national definition for who can be admitted to the nation on asylum.

Looking Forward: Vice President Biden

In 2007, Vice President Joe Biden voiced opposition towards sanctuary jurisdictions.¹⁹ Although he condemned the Trump Administration’s policy, including the administration’s reaction to sanctuary cities, Biden’s position on using enforcement to ensure cooperation between federal, state, and local governments is unclear.²⁰ He has not mentioned “sanctuary” cities or jurisdictions in recent campaign speeches and does not mention them in his immigration platform.²¹ However, in a 2020 Nevada tele-rally, President Trump said that Joe Biden wants to “support sanctuary cities, which is just supporting crime.” Although not explicitly stated, Biden’s omission of this discussion might be because his proposed policies tend to coincide with the current sanctuary jurisdiction policy.

Biden promises to reinstate “sensible” enforcement policies and ensure that employers do not take advantage of immigrant workers. The 2020 Democratic National Convention platform echoes this sentiment, reading “We will ensure that enforcement mechanisms are humane and consistent with our values and international humanitarian obligations.”²² But those states that have a Republican leaning may disagree with what “sensible” is and refuse to adhere to such enforcement policies. Further, Biden promises

[trump-campaign-rally-speech-bemidji-minnesota-transcript-september-18](https://www.reuters.com/article/us-usa-immigration-sanctuary/court-allows-trump-to-withhold-funds-from-sanctuary-jurisdictions-idUSKCN20K2P0)

15 <https://www.reuters.com/article/us-usa-immigration-sanctuary/court-allows-trump-to-withhold-funds-from-sanctuary-jurisdictions-idUSKCN20K2P0>

16 <https://www.rev.com/blog/transcripts/donald-trump-mosinee-wi-rally-speech-transcript-september-17>

17 <https://www.nilc.org/issues/economic-support/public-charge-overview/>

18 <https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge>

19 <https://thehill.com/homenews/campaign/456638-biden-once-called-for-a-ban-on-sanctuary-cities-where-does-he-stand-now>

20 <https://thehill.com/homenews/campaign/456638-biden-once-called-for-a-ban-on-sanctuary-cities-where-does-he-stand-now>

21 <https://www.rev.com/blog/transcript-tag/joe-biden-transcripts>; <https://joebiden.com/immigration/>

22 <https://democrats.org/where-we-stand/party-platform/creating-a-21st-century-immigration-system/>

to “protect sensitive locations from immigration enforcement actions” and “end workplace raids.”²³ That promise suggests that Biden will not tolerate non-adherence to his left-leaning immigration policy. His insistence against restrictive enforcement would work towards centralizing immigration policy overall.

The 2020 DNC platform emphasizes that while a Biden Administration would try to centralize immigration, state dissent might result in inevitable decentralization. The platform states “We will protect sensitive locations like our schools, houses of worship, health care facilities, benefits offices, and DMVs from immigration enforcement actions . . . end programs that force state and local law enforcement to also be responsible for immigration enforcement.”²⁴ The intention to end state and local law enforcement’s responsibility for immigration enforcement is an extremely contentious one. In an effort to centralize immigration enforcement policy to the Democratic ideal, the platform calls into question the state’s authority for criminal enforcement through its police power.²⁵

However, in response, Biden can expect litigation similar to that which came during the Trump Administration, such as *Philadelphia v. Attorney General of the United States*. The 2019 case decided by the Third Circuit Court of Appeals questions the ability of the Attorney General to withhold grants from jurisdictions that do not cooperate with ICE by sharing the immigration status of those arrested.²⁶ Biden also plans on using federal dollars to help integrate immigrants into their communities and working to undo restrictive anti-immigrant state laws.²⁷ This action would also centralize immigration policy by Biden’s effort to ensure state laws align with

federal priorities.

Vice President Biden wants to expand asylum and accept more refugees into the United States, for which he can expect resistances from states with Republican governors. When Obama accepted 10,000 Syrian immigrants in his final term, many Republican state governors asserted that they would not accept these immigrants into their states.²⁸

While their immigration policies are politically opposite, both President Trump and Vice President Biden are intent on having states follow their respective immigration enforcement policies, which would work towards the centralization of policies. In both cases, states that oppose their policies will inevitably resist and take legal action.

23 <https://joebiden.com/immigration/>

24 <https://democrats.org/where-we-stand/party-platform/creating-a-21st-century-immigration-system/>

25 <https://www.everycrsreport.com/reports/RL32270.html>

26 https://ij.org/sc_case_entry/city-of-philadelphia-v-attorney-general-of-the-united-states/

27 <https://joebiden.com/immigration/>

28 <https://academic.oup.com/publius/article/48/3/372/5004795>