RESTRUCTURING IMMIGRATION ENFORCEMENT FEDERALISM

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I. INTRODUCTION

Perhaps more than other regulatory areas, the shift from Trump to Biden on immigration is seismic. The Trump presidency pushed the constitutional and regulatory limits of executive control over immigration policy, forcing courts to wrestle with the application of basic constitutional values in the immigration context. His policies resulted in pitched legal battles over religious discrimination, family integrity, judicial review, separation of powers, state sovereignty, and enforcement discretion. The Biden presidency, at least in its early stages, has signaled a retreat from the constitutional brinkmanship of the Trump era.

Yet, while Biden's first 100 days suggests a shift in tone and policy from his predecessor, every modern president – regardless of political stripe – has committed to some level of immigration enforcement and has energetically used executive authority to accomplish it. Indeed, in this regard, Biden benefits from Trump's constitutional and regulatory boundary-pushing. Even if Biden crafts a more humane immigration policy relative to his predecessor, he is certain to utilize the power accreted to the executive to construct it, and rely on that legal authority to justify enforcement prerogatives he implements within his articulated vision.

In crafting the balance between humane policy and enforcement, the federalism dimension of executive authority is often overlooked. A president's orientation towards the role of states and localities is critical because of the increasing importance of subfederal entities in either facilitating or resisting a president's immigration agenda. As a very recent example, a lawsuit from the state of Texas as plaintiff already has put on hold Biden's proposed 100-day moratorium on deportations. Even outside of such high profile interventions, and within the confines of long-standing federalism arrangements crafted by federal agencies, states and localities play an indispensable role in whether or not a President succeeds in instantiating his enforcement plan. On the integrationist side, states and localities possess the vital policymaking, infrastructure, and administrative

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resources that determine whether a president will be able to expand noncitizen access to education, employment, and public benefits.

This essay focuses on the possibilities the first 100 days of a Biden presidency holds for resetting the relationship between the federal government and states and localities vis-à-vis immigration enforcement and immigrant integration. First, as he has already begun to do in his first 100 days, Biden can use the federal government's litigation discretion to roll back Trump-era crackdowns on so-called "sanctuary cities", and to curb the proliferation of state-level immigration enforcement. Second, he may, consistent with federal law and presidential authority, eliminate or scale-back existing administrative arrangements that incorporate states and localities into enforcement schemes. While both these changes are well-within Biden's executive authority, presidential restructuring of enforcement federalism also faces formidable obstacles. Chief among them are the political economy of immigration enforcement that strongly incentivizes state and local integration into federal enforcement, and an immigration agency culture geared towards hyper-enforcement. This essay concludes by suggesting that Biden's proposed immigration legislation, if enacted, and his administration's relationship with integrationist-minded states, may offer a path to overcoming these challenges.

II. EXECUTIVE AUTHORITY TO ALTER ENFORCEMENT FEDERALISM

A. Anti-Sanctuary Policies and Litigation Discretion

Evidenced as early as his campaign speeches from 2015, the eradication of sanctuary cities was Trump's signature immigration federalism concern. During his term, Trump's tactics ranged from publicity campaigns to shame and bully jurisdictions that refused to aid in immigration enforcement, to leveraging billions of dollars in federal grants to coerce local participation, to high-profile raids in major sanctuary locales, to federal litigation against state laws that limited local enforcement cooperation with ICE and made immigration detention more difficult. Meanwhile, Trump's DOJ bolstered the legal case of enforcement-minded state-level officials who used state law to prosecute noncitizens for immigration-related violations. In his first 100 days, Biden decisively abandoned his predecessor's multi-faceted attack on sanctuary jurisdictions. Some policies – like the publicity and propaganda campaigns against sanctuary jurisdictions – are easy to discontinue. Other Trump-era interventions, however, threatened more lasting consequences for constitutional doctrine on enforcement federalism and required – and will continue to require – Biden's vigilance.

For example, Trump's DOJ attempted to leverage grants to localities to force them to abandon their non-cooperation policies. This novel anti-sanctuary tactic prompted several lawsuits from localities across the country. Ultimately, several district courts enjoined the new conditions, ruling that the DOJ was not authorized to alter grant conditions in that manner. Indeed, in some ways, these court battles spectacularly backfired for Trump's enforcement federalism agenda, with some courts reaching beyond the administrative and statutory

questions to find that the federal law undergirding Trump's anti-sanctuary push (8 U.S.C. § 1373) unconstitutionally commandeered localities.

Despite this string of litigation losses for Trump's anti-sanctuary crusade, Biden's first 100 days and beyond remain critical to the legal viability of sanctuary jurisdictions. Importantly, the Supreme Court never weighed in on the Trump-era policies, and despite nearly every court rejecting Trump's efforts, the Second Circuit upheld the DOJ's anti-sanctuary grant conditions in a 2020 decision. Thus, Biden's decision to have the DOJ drop its appeals of the anti-sanctuary cases, and request that the Supreme Court dismiss pending certiorari petitions might prove consequential in the long-term (the Supreme Court granted the request). Closing the loop, the DOJ under Attorney General Merrick Garland recently rescinded the Trump DOJ memo authorizing the anti-sanctuary conditions, and issued a legal notice specifying that the DOJ would no longer enforce those conditions. These actions diminish the possibility of a high court ruling that would have paved the legal pathway for future administrations with a Trumpian valence on enforcement federalism.

More proactively, the Biden DOJ might re-adopt the department's prior legal position urging preemption of state attempts to criminalize and prosecute immigration-related conduct. As states and localities enacted an unprecedented number of immigration enforcement measures in the late 2000's and early 2010's, the Obama Administration instigated preemption suits against Arizona's notorious SB 1070, and anti-immigrant laws in places like Alabama. The Trump Administration reversed course, nudging courts to permit states to prosecute noncitizens independently under state law, for immigration-related conduct. That federal support contributed in part to the Supreme Court's 2020 decision in *Kansas v. Garcia*. As the effects of *Kansas* manifest over the next several years, the Biden DOJ might course correct in lower federal courts, using litigation and amicus filings to return to Obama-era limitations.

B. Eliminating State and Local Immigration Enforcement

Beyond abandoning Trump's legal and financial assault on non-cooperating jurisdictions, Biden's rhetoric thus far signals the possibility of a more proactive, cooperative federalism stance with states and localities, regardless of their orientation towards enforcement. As a necessary but tepid first step towards this reorientation, Biden rescinded Trump's interior enforcement policies, issued new interim priorities, and instructed his DHS to – in non-specific terms – re-evaluate its civil immigration enforcement approach. This reconsideration's tangible policy outputs will define how radically different Biden ends up from his predecessors, including President Barack Obama for whom Biden served as Vice-President.

Within his authority, Biden might transform enforcement federalism in ways that profoundly alter the very foundation of immigration enforcement as presently constructed. Currently, under federal law and agency practice, DHS formally recruits state and local cooperation through two major programs. First, the Secure Communities Program (S-Comm), created in 2008 at the end of the

George W. Bush presidency and expanded nationwide during Obama's first term, automatically feeds information from every local arrest into federal immigration databases; second, 287(g) Agreements deputize local officers to enforce immigration law. Both S-Comm and 287(g) agreements are agency-level programs that each presidential administration may implement at their discretion. S-Comm is purely an agency-level creation; meanwhile, 287(g) agreements are statutorily authorized (8 U.S.C. § 1357(g)), but the law delegates to the federal executive the discretion whether to enter into any such agreement. Accordingly, Biden is at liberty to undo the current enforcement architecture, at least in so far as it incorporates state and local involvement.

Near the conclusion of his second term, the Obama Administration became more responsive to state and local resistance to these enforcement programs, ultimately replacing S-Comm with another federal-state enforcement program, curtailing 287(g) agreements, and softening its stance on federal detainer requests to localities. Fundamentally, however, Obama's DHS expanded and maintained state and local integration into the enforcement infrastructure. In the subsequent four years, the Trump Administration resurrected S-Comm, reinvigorated the practice of 287(g) agreements and ramped up pressure on jurisdictions to honor federal detain requests and grant access to noncitizens in local custody.

In comparison to Trump then, Biden's reversion to Obama-era enforcement might appear significant. Simply doing that, however, represents more of a rhetorical shift, rather than a substantial practical turn. Although Trump may have desired to quash sanctuary jurisdictions, compel local sharing of information with federal authorities, and override state anti-detention policies, federal courts' mostly thwarted his ambition, holding that his tactics violated administrative and statutory limits and the Tenth Amendment, and that state anti-detention policies did not violate the intergovernmental immunities doctrine. In effect, outside of Trump's brazen rhetoric, he was mostly relegated to the types of state and local participation available to the federal government during the Obama Administration. Thus, by simply distancing himself from Trump's heavy-handed plans and returning to Obama-era policies, Biden would be adopting a less antagonistic tone that would help dim the political spotlight on sanctuary jurisdictions, but ultimately would not be modifying the enforcement structure substantially.[1]

To truly restructure enforcement to inch towards humane and just ends, Biden must completely reimagine state and local involvement in contradistinction to both Obama and Trump. Doing so requires rethinking the necessity of including states and localities in civil immigration enforcement at all. A presidential decision to eliminate or drastically scale back state and local involvement in immigration enforcement fundamentally transforms the enforcement system by altering the quantity and characteristics of those who get funneled into federal

1. To be sure, Biden's decision to re-implement enforcement priorities, if adhered to by line-level ICE officers, might also represent a significant shift from Trump. Notoriously, Trump's DHS made all unlawfully present individuals a priority, thus encouraging indiscriminate enforcement against unauthorized noncitizens who were not national security threats, violent offenders, or otherwise serious public safety concerns.

removal processes. Currently, nearly one-third of the foreign born population in the U.S. (over 10 million people) do not possess lawful status as defined by the immigration code; meanwhile, only 200,000-400,000 such individuals in any given year will be removed through interior enforcement. Plainly, the gap between the law on the books and the law as enforced is not a rift, but a chasm.

Under these conditions, as Professor Hiroshi Motomura argues, local arrest decisions have become the "discretion that matters" for purposes of feeding the deportation machine. ICE relies on state and local arrests, detention, and facilities to hit its enforcement potential. Any scheme that installs state and local authorities as the gatekeepers to a federal enforcement system undermines the president's ability to calibrate the level of enforcement or to effectively prioritize individuals for enforcement. Of course, even under S-Comm and 287(g), the federal government retains ultimate authority to proceed or decline with removal prosecution. Nevertheless, the fact that local authorities deliver noncitizens into the system creates political exposure for the federal government and tends to loosen the federal government's control over its enforcement priorities.

III. CHALLENGES TO REIMAGINING ENFORCEMENT FEDERALISM

Restructuring enforcement federalism programs under federal agency control are unlikely to raise the deep and divisive constitutional questions prompted by Trump's executive actions. Instead of high-profile legal challenges, Biden's most difficult obstacles are likely to be found within the executive branch itself. Revolutionizing enforcement federalism faces the strong headwinds of legislative and funding incentives, and an institutional culture at odds with eliminating state and local involvement.

Federalism arrangements like S-Comm and 287(g) that involuntarily or voluntarily engage local enforcement allow the federal government to achieve significant levels of enforcement on the cheap. Rather than internalize the cost of enforcing broad congressional immigration mandates, DHS can leverage the massive personnel, information, and facilities resources of the thousands of law enforcement branches and officers across the country. In the political arena, the programs help presidents cast themselves as meaningfully committed to enforcement, and allows them to avoid the fallout if an unauthorized noncitizen in a sanctuary jurisdiction commits a high-profile crime.

This state of affairs facilitates federal legislative stasis as well. Leveraging local resources allows Congress perennially to ignore the actual enforcement costs of its expansive range of immigration violations. In contrast, eliminating federal programs that incorporate state and local resources would force federal executive officers, legislators, and courts to accept responsibility and blame for the impossibility of maximalist compliance with immigration law as written. Thus, there is a substantial inertia built into the system, with significant economic and political disincentives for any president, including Biden, to scale back the conscription of localities into immigration enforcement.

Adding to these incentives, ICE's institutional culture appears innately geared towards maximalist and haphazard enforcement. Throughout Obama's presidency, the ICE officers union opposed the President's attempts to implement limited or targeted enforcement, and later litigated against Obama's Deferred Action for Childhood Arrivals (DACA) program. Indeed, as Adam Cox and Cristina Rodriguez suggest, a motivating factor for creating the DACA program and housing it under U.S. Citizenship and Immigration Services, was to overcome the resistance of line-level ICE officers, who routinely disregarded Obama's enforcement priorities that would have protected the same population.

This institutional hyper-enforcement culture only deepened during the Trump Presidency. In 2016, the ICE employee union made the unprecedented decision to publicly endorse a candidate. In return, Trump rewarded line-level ICE officers by leaning into an unregulated enforcement ethos, understood by ICE leaders as "taking the handcuffs off" to engage in indiscriminate enforcement. In that same time, DHS grew to become the largest federal law enforcement force, eclipsing the FBI and other agencies. ICE's institutional drive towards maximalist enforcement inexorably requires jealously guarding – if not expanding – existing state and local enforcement programs that facilitate ICE apprehensions. Short of heeding calls to "abolish ICE" and reconstitute it with a different institutional culture, Biden will likely face internal dissent from within the agency to any radical restructuring of enforcement federalism.

IV. BIDEN'S IMMIGRATION BILL AND INTEGRATION FEDERALISM

Biden's challenge in seeking a more humane and targeted enforcement system then, will be to overcome these powerful disincentives to scaling back state and local involvement. The most plausible pathway out of this dilemma lies outside of his executive authority. As a necessary but insufficient first step, Biden will require congressional action to drastically reduces the unauthorized population. To this end, within his first 100 days, Biden introduced his vision for a comprehensive immigration overhaul, the centerpiece of which is the most ambitious and broadest legalization program in U.S. history. As proposed, the relevant portion of the Citizenship Act of 2021 would regularize the status of the overwhelming majority of the undocumented population, and provide a relatively quick path to citizenship for many.

Although enacting this bill would not directly alter state and local programs, its effects on enforcement federalism would be drastic. When the unauthorized population is no longer unauthorized, the importance of state and local arrest discretion is proportionally diminished. The pool of individuals with immigration status violations declines, thus decreasing the likelihood of low-priority noncitizens being funneled into the deportation machine. Moreover, with a greatly diminished pool of out-of-status noncitizens, the need to leverage state and local personnel and informational resources concomitantly dissipates. Relatedly, the institutional culture of ICE becomes less of a concern. Removing low-priority status violators from the potential enforcement pool necessarily reduces the available targets for rogue or indiscriminate agency enforcement.

It would be myopic, however, to believe that any one-time legalization drive will, by itself, stem the pressure to maintain or expand enforcement federalism. Any legalization program must be accompanied by broader amendments to the immigration code, aimed at rooting out draconian provisions that repeatedly manufacture "illegality". Without liberalizing lawful migration flows and rolling back the most punitive features of the code, our current immigration laws will continue to reproduce the problem of a massive undocumented population in the years subsequent to legalization. Of course, mass legalization plans and recalibration of lawful immigration rules face steep political odds, and several potential vetogates in Congress, including the filibuster. Enacting either one would be monumental on its own; both together would be nothing short of revolutionary.

Short of an "Immigration New Deal" enshrined in federal law, the Biden administration can concentrate greater resources and attention on integrationist, cooperative federalism possibilities. Beyond providing the scaffolding for heightened enforcement, federalism can also provide the connective tissue for progressive cooperation between executive agencies and states, which might include programs like joint federal-local naturalization campaigns and language classes, as well as facilitating education access and employment authorization. Here, the Biden administration can dedicate resources to amplifying trans-jurisdictional networks, helping to coordinate integrationist policy proliferation between immigrant friendly locales across the country. More modestly, when state or local integrationist programs are inevitably challenged by restrictionist states or organizations, the Biden DOJ can weigh-in to legally support these state and local efforts.

V. CONCLUSION

The scope of the immigration concerns facing President Biden is nearly unfathomable. To address a systemic problem that has been over 100 years in the making likely will take more than one presidential term or even one president, let alone the first 100 days of a term. Moreover, in attempting to implement comprehensive, forward-looking fixes, the fledgling administration will be beset by immediate concerns and humanitarian crises that draw attention away from long-term solutions.

Lurking beyond the immediate crises are more systemic and enduring questions of how our enforcement system is structured. Vital in that assessment is the increasing importance and role of states and localities in both resisting and entrenching the executive's immigration agenda. A truly humane and fundamental restricting of immigration policy requires an executive willing to reset, and perhaps eliminate, immigration enforcement federalism. Thus far, President Biden's rhetoric and initial actions suggest a different orientation towards state and local participation than his predecessors. Whether he is fully committed to reimagining the role of states and localities and overcoming ingrained incentives on immigration enforcement, remains to be seen.