

Immigrants, Institutions & Inequality: Why US Congress Must Enact Progressive Immigration Reform

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Abstract

This paper focuses on two aspects pertaining to immigrants, institutions, and inequality in the US. The first aspect is how the institution of the US presidency constructs social inequalities among immigrants. Through a comparison of the Biden and Trump administrations, I show that Democratic and Republican Presidents alike perpetuate inequalities among immigrants. The institutional construction of inequality within the immigrant population renders a significant proportion of immigrants deportable. Thus, Congress must pass laws to create pathways for the long-term, legal inclusion of immigrants vulnerable to deportation. The second aspect addressed in this paper is whether immigration reform in the US is best pursued by Congress or the President. I review scholarly opinion on this topic. Conservatives argue for greater control for Republican presidents and a lesser role for Democratic presidents. Progressives argue for a greater role for Democratic Presidents. I contribute to this literature by taking an altogether different stance. In contrast to the positions outlined, I argue that progressive immigration reform should come from Congress because it is the legislative body with the capacity to offer long-term solutions to the systemic deportability faced by immigrants.

Keywords: *Immigrants, inequalities, institutions.*

Introduction

Immigration Reform in 2024

2024 is a Presidential election year in the United States. As in previous election cycles, immigration policy is sure to be a significant talking point in presidential debates. Regardless of whether Democrats or Republicans win the presidency, undocumented immigrants are likely to continue to suffer without any substantive progressive immigration reform that offers a path to legalization for the millions of undocumented people and workers who reside in the US. The politicized performativity of liberalism and conservatism around presidential elections masks deeper questions about how presidential politics actually impact immigrant lives. Beyond rhetorical differences between Democratic and Republican presidential candidates on immigration, both parties have investments in fostering an atmosphere of immigrant deportability.

In this paper, I examine this issue from two perspectives. First, I pose the question, should US President determine US immigration policy, or is that Congress's purview? I review scholars' varied responses to this question. Conservative constitutional scholars argue in favor of greater control of immigration policy for Republican presidents and a lesser role for Democratic presidents. In contrast, progressive constitutional scholars have argued in favor of a greater role for Democratic Presidents. I contribute to this literature by

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presenting a progressive argument against presidential control of immigration policy, while arguing for the need and duty of Congress to enact progressive immigration reform. Second, I pose the question, are there substantive differences between Democratic and Republican Presidents on immigration policy? Through a comparison of the Biden-Harris administration with the Trump administration, I show how both Democratic and Republican Presidents perpetuate inequalities among immigrants, rendering a significant proportion of immigrants deportable. Immigrants deserve to live free from deportability. This requires Congress to pass laws and create visas and pathways for undocumented and legally precarious immigrants.

Presidential Administrations Foster Inequalities Among Immigrants

Democratic and Republican Presidential administrations alike foster inequalities within the immigrant population. Democratic administrations exclude the majority while including only an exceptional minority. Republican administrations, too, are worse for some groups compared to others. We can compare the two most recent US presidential administrations that appear different but reproduce structural inequalities among immigrants.

The Trump Presidential Administration (2017 to 2020)

Donald Trump's Presidential administration was similarly discrepant in its treatment of immigrants. On the surface, the Trump administration appeared unequivocally anti-immigrant. However, Trump's policies were far more detrimental for working-class Latinx immigrants than they were for economically privileged immigrants. From the early days of the Trump administration, the Attorney General Jeff Sessions proposed a crackdown against underprivileged immigrants: “We need to end this lawlessness that threatens the public safety, pulls down the wages of working Americans” (BBC, 2017). Within a week of assuming office on January 20, 2017, President Trump enacted three anti-immigrant Executive Orders that effectively punished immigrant presence and criminalized immigration. Trump's three Executive orders targeted racially and economically undesirable immigrants: undocumented immigrants, working-class Latinx asylum seekers, and Muslims. Trump's Executive orders stayed in place for the full duration of his presidential administration from January 2017 to January 2021 and were only rescinded when President Joe Biden took office. The Interior Order was rescinded on January 20, 2021 (Executive Order No. 13,993, 2021). The Muslim Ban was rescinded on January 20, 2021 (Proclamation No. 10,141, 2021.) The Border Security Order was rescinded on February 2, 2021 (Executive Order No. 14,010, 2021).

How does the Trump administration's treatment of undesirable immigrants compare with its treatment of more desirable immigrants? During the summer of the 2020 election year, Trump signed an anti-immigrant directive specifically targeting international students. On July 6, 2020, the Trump administration announced that international students enrolled in online courses for the Fall 2020 semester would have to return to their home countries (US Immigration and Customs Enforcement, 2020). Coming during the height of the coronavirus global pandemic, with global restrictions on travel and national restrictions on in-person classes, the anti-student directive seemed like a cruel and pointless measure, even by the Trump administration's standards. Notably, however, within two days of Trump issuing the directive against international students, two of the most powerful higher education institutions in the country, Harvard University and the Massachusetts Institute of Technology, filed a joint lawsuit against Immigration and Customs Enforcement and the Department of Homeland Security (Dickler, 2020). Further, the Attorney General of Massachusetts, Maura Healey led seventeen other Attorney Generals across the US in a lawsuit against the Trump administration (Office of Attorney General Maura Healey, 2020). Consequently, amidst much public, journalistic, and Congressional outcry, Trump's directive against international students was rescinded on July 14, 2020, a mere eight days after being announced.

The Trump case illuminates how the category of ‘undesirable’ immigrants is socially constructed and not solely the product of state machinations. During the Trump administration, international students received a lot of social and institutional support against state violence, without even having to ask. In contrast, working-class immigrants who were legally precarious or undocumented suffered unbridled attacks of state violence, without an equivalent amount of social support. US state, social, and economic actors reproduce class-based hierarchies among immigrants. Individual, institutional, and corporate actors have selective investments in protecting immigrants, valuing those with economic and cultural capital, while leaving others vulnerable to violence and destitution. International students come bearing financial and cultural capital, which contributes to their relative social desirability as immigrants. International students are a financial asset to the US: as foreign citizens, they are ineligible for nearly all forms of federal financial assistance and are only allowed to work on their college campuses. Further, the increased admissions of international students have offered US universities an easy way to boost racial ‘diversity’ on campus without attending to tectonic racial violence within US borders and how it shakes out across all levels of educational system. Certainly, international students face economic restrictions in the US. BIPOC international students face racial discrimination akin to US citizens with similar racial identities. Nonetheless, international students’ affiliation with higher education institutions affords protection against the vicissitudes of US immigration policy.

The Biden-Harris Presidential Administration (2021 to 2024)

On June 7, 2021, Vice-President Kamala Harris visited Guatemala on her first foreign policy trip. Herself the daughter of immigrants, Harris had a singular message for the Guatemalans intending to migrate to the US: “Do not come. Do not come. The United States will continue to enforce our laws and secure our borders” (Grant, 2021). “If you come to our border, you will be turned back,” she further stated (Grant, 2021). Less than a month later, on July 2, 2021, President Joe Biden held a naturalization ceremony at the White House, celebrating twenty-one new US citizens (Hunnicut, 2021). Congratulating the freshly minted citizens, the President said, “It’s dreams of immigrants like you that built America and continued to inject new energy, new vitality, new strength” (Hunnicut, 2021). The President further noted, “We’ve seen that most clearly during this pandemic, with immigrants as frontline workers and as scientists and researchers on the front lines of finding vaccines” (Hunnicut, 2021). Vice-President Harris’ statement in Guatemala poses a stark contrast to President Biden’s statement at the naturalization ceremony just a month later, posing a seeming contradiction. These disparate positions of the Biden-Harris administration reflect underlying contradictions within US immigration. Immigrants are only conditionally accepted into the US if it serves the interests of the US state, economy, and society to legalize them. By corollary, US presidential administrations are happy to leave large sections of the immigrant population undocumented, legally precarious, and deportable if it serves US interests to do so.

Whose Purview? Should Congress or the President Establish US Immigration Policy?

In this section, I present three sets of scholarly perspectives on the question of whether Congress or the President should establish immigration policy in the US: (i) conservatives against presidential control, (ii) conservatives for greater presidential control, and (iii) progressives for greater presidential control. I make a novel contribution to this literature by presenting an alternative position to all of the above: (iv) progressives against presidential control, where I argue for the necessity and duty of Congress to enact progressive immigration reform.

Conservatives Against Presidential Control

Conservatives argue against Presidential control of immigration policy when immigrants stand to benefit from Presidential intervention, as with Obama’s DREAM Act. Republican constitutionalists Robert J. Delahunty and John C. Yoo argue that the

authority to establish immigration policy lies with Congress rather than with the President (2013, p. 857). In their anti-Obama article satirically titled ‘Dream On,’ Delahunty and Yoo refer to the DREAM Act and Obama’s Executive order on Deferred Action for Childhood Arrivals (DACA) as an “‘open borders’ policy” (2013, p. 784) and “non-enforcement of the immigration laws” (p. 787). Delahunty and Yoo claim that President Obama was acting on double standard because in 2008, “Barack Obama vigorously denounced the Bush Administration” for excessive use of executive power, while, in their opinion, Obama’s Executive action on DACA constituted an instance of the same (Delahunty and Yoo, 2013, p. 781).

Yoo and Delahunty’s critique of Obama is politically motivated. John Yoo served as Deputy Assistant Attorney General for the Bush administration. On January 9, 2002, Yoo and Delahunty directed a memorandum to the Department of Defense in which they argued that terrorist suspects did not merit prisoner of war status and that the Bush administration did not have to abide by the War Crimes Act or the Geneva conventions in the War on Terror (Yoo & Delahunty, 2002). Ten days after the issuance of this memorandum, the Secretary of Defense Donald Rumsfeld issued a memorandum to the Joint Chiefs of Staff, noting, “The United States has determined that Al Qaida and Taliban individuals under the control of the Department of Defense are not entitled to prisoner of war status for purposes of the Geneva Conventions of 1949” (Rumsfeld, 2002). Yoo and Delahunty’s torture memo instigated and justified the torture of hundreds of Muslim suspects at Abu Ghraib, Guantanamo Bay, and dozens of other CIA-operated ‘black sites’ across the globe. During the 2008 campaign trail, Obama strongly critiqued the Bush administration’s abuse of executive power in its surveillance actions, torture of suspects, and defiance of the Supreme Court, stating, “‘In my view, torture is unconstitutional, and certain enhanced interrogation techniques like ‘waterboarding’ clearly constitute torture. And as noted, I reject the use of signing statements to make extreme and implausible claims of presidential authority’” (Obama in Savage, 2007). Delahunty and Yoo pose a false equivalence between Bush’s use of executive power in the War on Terror and Obama’s use of executive power in DACA. Bush exceeded executive authority to torture suspects, while, as President, Obama used executive power to protect a section of undocumented immigrants from deportation. Both of Obama’s positions on executive authority sought to protect vulnerable Arabs and Latinx people from extreme excesses of imperial and state violence. The same scholars who penned the legal rationalization for President Bush’s torture of hundreds of (predominantly Muslim) people from the Global South vehemently opposed President Obama’s deferral of deportation of some Global South immigrants. In this case, conservative arguments against presidential control of immigration are undergirded by desires for Global North states and empires to inflict greater violence on people from the Global South.

Conservatives for Greater Presidential Control

Scholars in favor of greater regulation of immigration (or more deportations) argue that the Presidential office should have an even greater role in immigration policy. Adam B. Cox & Cristina M. Rodriguez argue in favor of greater Presidential control of immigration on the grounds that there is already a de facto Congressional delegation of power to the President on immigration (2009). However, in their opinion, Congressional delegation of power to the president does not go far enough, as Congress sets immigration policy at the “front end,” while the President can only regulate policy at the “back end,” through immigration-enforcement (Cox & Rodriguez, 2009). This separation of power “can lead to perverse consequences, particularly with respect to the management of unauthorized immigration” (Cox and Rodriguez, 2009, p. 465). Ostensibly, the ‘perverse consequences’ referenced here are high levels of immigrant detention and deportation. Cox and Rodriguez suggest that the solution to mass deportation is to let fewer immigrants into the country in the first place (2009). In another article, Cristina M. Rodriguez argues that pro-immigrant policies “exacerbate pathologies associated with

illegal immigration and call for a structural response” (Rodriguez, 2010, p. 1787; emphasis added). In the same article, she references “high levels of socially dysfunctional illegal immigration” (Rodriguez, 2010, p. 1840; emphasis added). The choice to use metaphors like ‘pathologies’ and ‘dysfunctional’ to describe immigration suggests that the author considers immigration and perhaps also immigrants to be a form of social illness or disease. To cure these afore-mentioned alleged pathologies, Rodriguez argues that institutional reform in favor of Presidential primacy on immigration “could introduce much-needed flexibility and responsiveness into the system of immigrant screening” (1790). Flexibility is important so that the immigration system can “adapt to fluctuations in the U.S. labor market” (1793). In other words, a flexible immigration system can draw in immigrant labor when needed by capitalists and can push it back out (through deportations) when capitalist needs have been met. The argument for Presidential rather than Congressional primacy on immigration, is, in this case, a veneer for capitalist primacy on immigration.

Progressives for Greater Presidential Control

Given the absence of progressive immigration reform from Congress, progressive scholars have argued in favor of presidential control of immigration policy and DACA. In 2010, with President Obama’s support, the DREAM Act passed the House but did not pass the Senate (DREAM Act of 2010). Due to Republican control, Obama was not able to pass immigration reform through Congress (Hutchison, 2020, p. 81). Thus, any attempts at progressive immigration reform fell to the Presidency. In 2012, the Obama administration inaugurated DACA, which accomplished some objectives of the DREAM Act by deferring deportation for undocumented immigrants who arrived to the US as minors. The DACA program was officially launched through a 2012 DHS memorandum titled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children” authored by DHS Secretary Janet Napolitano (Napolitano, 2012).

Republican voters, legislators, and immigration-enforcement agencies opposed DACA. Meanwhile, progressive scholars have defended DACA. Lauren Gilbert argues that while anti-immigrant forces used archaic constitutional formalism to attack DACA, the Obama administration’s use of executive authority to institute DACA was constitutional (2013, p. 306). Responding to Delahunty and Yoo’s claim that the president cannot set immigration policy (2010), Shoba Sivaprasad Wadhia argues that “far from being a new policy that undercuts statutory law, prosecutorial discretion actions like DACA have been pursued by other presidents and part of the immigration system for at least thirty-five years” (2012, p. 60). Both the legislative and judicial branches of government have legitimated the president’s authority to set immigration policy (Wadhia, 2012). In fact, Obama’s executive action on DACA had both Congressional and judicial precedent. “Congress explicitly included ‘deferred action’ as a valid lawful status in the REAL ID Act of 2005” (Wadhia, 2012, p. 65). Further, the Supreme Court argued in favor of presidential discretion on immigration in *Arizona v. United States*, noting that “Discretion in the enforcement of immigration law embraces immediate human concerns” (in Wadhia, 2012, p. 64). Progressive scholars argue in favor of presidential authority in setting immigration policy on the grounds of constitutional validity and ethical necessity to provide immediate albeit temporary legal relief to a section of undocumented immigrants in the US.

Progressive Argument for Congress’s Duty to Immigrants

In contrast to the existing literature in which progressive scholars equate progressive immigration reform with greater presidential control, I argue against the idea of greater presidential control of immigration policy. From a progressive perspective aimed at long-term, macro-level structural change for immigrant benefit, Congress should play a greater role in setting immigration policy compared to the president. Relying on presidents to

enact progressive immigration policy is both principally and strategically misguided. It is principally misguided because it absolves elected legislators from doing their job to create laws to address immigrant undocumentedness and immigrant deportability. Congress's inaction on legalizing and naturalizing precarious and undocumented immigrants has resulted in increased immigrant detentions and deportations. Relying on Presidents to enact progressive immigration reform is strategically misguided for several reasons. First, there is no guarantee that a progressive president will be in office. Relying solely on the presidential office leaves immigration reform and immigrants vulnerable to political changes. Second, even if there is Presidential will for progressive immigration reform, initiatives such as DACA are at best, stop-gap measures that are limited in scope and can mitigate deportations for some, not all, precarious immigrants. Third, owing to their procedural nature, Executive actions can be here today but gone tomorrow, as illuminated by the ongoing judicial pushback against DACA up until 2023. Fourth, the executive branch of government represents the most repressive aspects of state power. During the Obama administration, Congress abrogated the responsibility to enact immigration reform. Consequently, the Department of Homeland Security (DHS), the umbrella institution for agencies like Immigration and Customs Enforcement and Customs and Border Protection was left to formulate immigration policy. The DACA policy was ultimately instituted through DHS. Executive agencies are not populated or run by democratically elected officials. Further, executive agencies such as those of immigration-enforcement and law-enforcement, represent the interests of state apparatuses rather than the interests of the people. Thus, it better serves the interests of immigrants if Congress enacts immigration reform.

All 11 Million

Presidential administrations reify social, economic, and political inequalities among immigrants. Even under the most progressive presidential administration, Executive Ordinances can be considered a stop-gap or interim measure to provide relief to some immigrants who are legally precarious. But it is also important to address the root cause of the extreme legal and social vulnerability faced by some immigrants, which is the systemic deportability of a section of the immigrant population, itself a predictable outcome of Congressional abrogation of immigration policy. Long-term solutions to the problems facing the immigrant community can only come from Congress taking a stand against racism and taking a stand for progressive values and immigrant rights. All immigrants in the US deserve legal status. All workers in the US deserve living wages. All people in the US deserve to live free from carceral violence. The agenda for progressive immigration reform is clear. Enact laws that offer pathways to legalization and naturalization for all immigrants who live in this country, including the 11 million undocumented.

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