

# At the Starting Gate

## The Incoming Biden Administration's Immigration Plans

RETHINKING U.S. IMMIGRATION POLICY INITIATIVE

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NOVEMBER 2020

Immigration policy changes occurred at an unprecedented, even frenetic, pace during the Trump administration, which through more than 400 executive actions<sup>1</sup> methodically dismantled and reconstructed a system based on a worldview of immigration as a security and economic threat to Americans. The administration has sharply curtailed humanitarian protection, narrowed legal immigration channels and overall admissions, increased enforcement at the border, and reshaped relations with Mexico and neighbors further south over migration and asylum. Its actions were overwhelmingly done without Congress, which remained on the sidelines amid divisions between both chambers and political parties that have existed for two decades now.

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A new Biden administration will confront major challenges in building a system that treats immigration as an asset and regularly manages it in times of eco-

nomie boom and downturn. The grafting of a dizzying array of Trump executive actions, policy guidance, and regulatory changes—some interlocking and thus difficult to unwind—atop a long-antiquated immigration system presents complex hurdles for an incoming administration that has vowed to roll back key Trump changes and advance bold reforms.

The task will be immeasurably harder because public-health and economic responses to the COVID-19 pandemic will necessarily be the first and major priority, and possible Republican retention of the Senate would serve as a brake on the administration's agenda on immigration and other issues. President-elect Joe Biden also will be buffeted by pressure from his party's liberal wing while balancing his stated desire to appeal to all Americans—knowing that undoing some Trump policies could stoke significant migration from Central America and beyond.

At the same time, the incoming administration faces opportunities to work with Congress to build a 21st century immigration system, one with an immigrant selection system that can flexibly respond to changing economic and labor market conditions, that creates a pathway to legal status for unauthorized immigrants who are contributing members of U.S. society, and that rethinks its visa categories to attract and retain desired global talent. The incoming administration also can return the United States to its historic leadership role on the world stage in

humanitarian protection, create a fair and efficient asylum system, shape enforcement policies to target those who pose a risk to society, pivot the immigration detention system away from its punitive criminal incarceration model, and develop partnerships with other countries for long-term success.

Biden made these commitments during the campaign.<sup>2</sup> None will be easy to implement, particularly when confronting the realities of divided government. They will require careful sequencing, as well as a mix of executive-branch actions, rulemaking, and legislation to accomplish.

This policy brief looks at the challenges in some of the key areas where the Biden campaign has promised action. Drawing from Migration Policy Institute (MPI) research and forthcoming policy ideas,<sup>3</sup> the brief also sketches opportunities to create an immigration system built upon a worldview of immigration as asset, one that works in the national interest and benefits the economy as well as U.S.-born and immigrant communities alike.<sup>4</sup>

### **BOX 1** **About the Rethinking U.S. Immigration Policy Project**

This brief is part of a multiyear Migration Policy Institute (MPI) project, Rethinking U.S. Immigration Policy. At a time when U.S. immigration realities are changing rapidly, this initiative aims to generate a big-picture, evidence-driven vision of the role immigration can and should play in America's future. It will provide research, analysis, and policy ideas and proposals—both administrative and legislative—that reflect these new realities and needs for immigration to better align with U.S. national interests.

To learn more about the project and read other reports and policy briefs generated by the Rethinking U.S. Immigration Policy initiative, see [bit.ly/RethinkingImmigration](https://bit.ly/RethinkingImmigration).

## **1 The First 100 Days**

Biden has pledged significant immigration actions within the first 100 days of his presidency. Among these: A temporary moratorium on deportations;<sup>5</sup> creation of a road map for legalization of most of the estimated 11 million unauthorized immigrants; an end to family separation, prolonged immigration detention, and the Migrant Protection Protocols (better known as Remain in Mexico) program keeping asylum seekers in Mexico for the duration of their hearings for U.S. asylum; reinstatement of the Deferred Action for Childhood Arrivals (DACA) program; restoration of the Obama administration's immigration enforcement guidelines; and repeal of the Trump administration's travel ban on nationals from some Muslim-majority countries as well as its expanded definition of who constitutes a public charge for immigration application adjudication.<sup>6</sup>

While in theory executive actions can be revoked by a successor administration, some of the immigration changes President Donald Trump ordered would be easier to undo than others. A decision to require U.S. Citizenship and Immigration Services (USCIS) to reopen the DACA program to all qualified applicants, and not just those who have previously held DACA as the Trump administration has done in light of court decrees staving off its attempt to kill the program, could extend protection from deportation and work authorization to hundreds of thousands of additional unauthorized immigrants who arrived in the country as children.<sup>7</sup> A decision by new Department of Homeland Security (DHS) leadership to revert to earlier U.S. Immigration and Customs Enforcement (ICE) prosecutorial discretion guidelines targeting enforcement to noncitizens who pose criminal and national security risks could be done by memo; it would, however, undoubtedly prove highly unpopular within an ICE bureaucracy unshackled during the Trump administration.

Reversing the USCIS public-charge regulation will require more than the stroke of a pen. The agency likely would have to go through a notice and public comment period. Parallel State Department consular guidance on assessing intending immigrants' applications against similar public-charge standards could be undone with changes to the *Foreign Affairs Manual* used by consular officers.

Biden has boldly pledged that on his first day in office he will send Congress a bill that provides a road map for legalization for the unauthorized immigrant population.<sup>8</sup> Yet seeking congressional action on one of the most contentious immigration issues would inevitably be a challenging first step for the new administration, even as public support for immigration overall has risen to the highest recorded levels.<sup>9</sup> Rather than tackling a broad legalization, which congressional Republicans have traditionally opposed, the Biden team could advance proposals for granting legal status to specific populations, as MPI will outline in forthcoming work. Extending protections to current recipients of DACA or Temporary Protected Status (TPS) would be an important starting point. And other logical populations could include a broader set of unauthorized immigrants brought to the country as children, those who are married to U.S. citizens or lawful permanent residents, or essential workers as defined under pandemic guidelines.<sup>10</sup>

Finally, given the incoming administration's focus on responding to the COVID-19 pandemic at public-health and economic recovery levels, much of Biden's early political capital may be invested outside the immigration realm. The Obama administration faced a similar imperative with the 2008–09 recession and was faulted by immigrant-rights groups for sidelining immigration during a period when Democrats held the White House and Congress. After Republicans regained the House in the 2010 midterms and the Senate in 2014, the administration

confronted a sharply different political landscape on immigration.

## 2 The U.S.-Mexico Border

Trump has put his stamp in dramatic ways on the U.S.-Mexico border, most visibly with construction of 386 miles of fencing as part of a \$15 billion plan to build 738 miles of barriers along the nearly 2,000-mile border.<sup>11</sup> Congress appropriated \$4.5 billion for physical barriers, and the Trump administration has used emergency authorities to redirect about \$10.5 billion in funds from Defense Department and other accounts.

Biden has pledged to end that emergency designation and called for a halt to any further construction of the wall,<sup>12</sup> which is being built largely in low-traffic areas. The president-elect has discussed making significant investments in screening and other "smart border" technologies to better vet arriving passenger and cargo vehicles for illegal drugs and other contraband, while also improving cross-agency collaboration and cooperation with Mexico and Canada.<sup>13</sup>

The global pandemic put a chill on migration, with Border Patrol encounters of migrants arriving at the U.S.-Mexico border in fiscal year (FY) 2020 falling to less than half the elevated level of more than 851,000 apprehensions in FY 2019, when the Trump administration confronted a surge in arrivals of Central American families.<sup>14</sup> To deal with the mounting arrivals and deter others from making the journey, the administration took a series of actions to throttle asylum at the border (detailed in the next section), and in April 2018 launched a zero-tolerance policy that resulted in the separation of an estimated 3,900 to 4,100 children from their parents before Trump rescinded it in June 2018 amid a massive public outcry.<sup>15</sup> As of November 2020, the parents of 545 of

these children had yet to be located, and Biden has pledged to create a task force to do so.<sup>16</sup>

Amid the pandemic, the Trump administration turned to a 1944 health statute as authority to expel arriving migrants and asylum seekers;<sup>17</sup> between March and September, more than 205,000 expulsions, including 8,800 of unaccompanied children, had been carried out.<sup>18</sup> Even though the Biden administration could immediately lift the public-health order, doing so without having a considered new policy in place could quickly stoke major new flows at the border. Chaotic scenes of arrivals, as occurred in 2019 under the Trump administration, could narrow Biden's political maneuvering room on immigration. The Biden campaign has pledged to review the expulsion order but has not committed to lifting it immediately.<sup>19</sup>

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Border walls, expulsion orders, the near-total ending of asylum, and a 2006 congressionally mandated definition of effective border enforcement as zero illegal crossings do not represent successful, long-term strategies, nor do they meet U.S. and international law and agreements on protection. Instead, the U.S. government should aim for border management as a cross-agency, cross-governmental system that involves addressing mixed flows of economic and humanitarian migrants differently. Among MPI's recommendations: Creating multiagency reception centers near the border for one-stop screening of arrivals and speedy turnover to the relevant agency, and strengthening immigration governance within DHS.<sup>20</sup> Perhaps the most important effort that a new administration could undertake is fixing the asylum

system so that it is both fair and efficient, as MPI has outlined elsewhere.<sup>21</sup>

### 3 Asylum, the Immigration Courts, and Refugee Resettlement

Policies narrowing access to asylum and other humanitarian protections have been central to the Trump administration's strategy to deter arrivals at the U.S.-Mexico border. Among these has been creation of the Migrant Protection Protocols (MPP) in January 2019, which has forced more than 67,000 asylum seekers to wait in Mexico pending completion of their U.S. asylum hearings; as of the end of September 2020, 24,500 cases remained pending.<sup>22</sup> Asylum has been granted in fewer than 1 percent of MPP cases, according to court filings.<sup>23</sup>

Beyond MPP, the Trump administration effectively ended asylum at the southern border by imposing "metering" to limit the number of asylum claims submitted at U.S. ports of entry daily, making migrants ineligible for asylum if they fail to apply for it elsewhere en route to the United States, pressuring Central American governments to sign asylum cooperation agreements that require them to allow asylum seekers rejected at the U.S. border to seek asylum in those countries, and narrowing the grounds for asylum.<sup>24</sup> The overlapping and interlocking nature of these changes has been intentional and will make it difficult for the courts or for a Biden or successor administration to undo.<sup>25</sup>

Biden has spoken of ending MPP during his first 100 days in office. Unwinding the program would prove more complicated than simply issuing a memo. Among the decisions: What to do with migrants currently in MPP? What about those who aban-

doned their cases or were denied? Beyond possible rollbacks, the Biden campaign has outlined a forward-looking vision to surge asylum officers to the border and has endorsed an MPI proposal to have asylum officers adjudicate the full merits of border asylum cases rather than just the initial credible-fear interview.<sup>26</sup> Doing so would allow for efficient, fair adjudication of the asylum caseload, rather than the current practice of sending such cases to the overloaded immigration court system, where asylum cases can take two to three years to resolve. The Biden campaign also pledged to double the number of immigration judges and support staff.<sup>27</sup>

Beyond asylum, Biden has said he intends to raise refugee resettlement places to 125,000, up from the 15,000 set by the Trump administration for FY 2021—an all-time low for the U.S. refugee program.<sup>28</sup> During this administration, the United States saw its longstanding record as top resettlement country surpassed by Canada.<sup>29</sup> Whether Biden could meet the pledged return to strength of the U.S. program remains to be seen. Dramatic cuts to refugee admissions have hit the network of nonprofit agencies that do the work of refugee resettlement hard. Resettlement capacity has decreased nearly 40 percent since FY 2017, with national resettlement agencies closing approximately 134 partner sites.<sup>30</sup> Still, with a renewed focus on protection, the promised increase in resettlement places could serve as an important signal and recommitment given record humanitarian displacement globally.

## 4 Congress and the Federal Judiciary

The president-elect's pledge to offer a road map to legalize much of the unauthorized population, including with a legalization program for agricultural workers, would be a major legislative lift. With Republicans perhaps retaining control of the Senate and having padded their minority in the House, the

difficulties in achieving legislative success on such a highly contested issue cannot be overstated.

Biden also is expected to seek changes to the legal immigration system. Among the policy proposals his administration could consider that have been advanced by MPI and others: Creation of a "bridge" visa allowing immigrants of various skill levels to transition from nonimmigrant to legal permanent resident status;<sup>31</sup> reform of temporary worker visa programs; and an increase of employment-based green cards from the 140,000 annual cap they have been fixed at since 1990, along with creation of a mechanism to regularly adjust these numbers up or down based on economic conditions.<sup>32</sup> The proposals could, in some cases, pit Democratic constituencies against each other in the business vs. worker and the family-vs. employer-based immigration camps, as occurred during earlier immigration debates. Biden has underscored his support for the Diversity Visa Program and TPS, both of which Trump has sought to end.

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Whether the Biden administration will face the entrenched opposition in the courts that its predecessor has, on everything from the original 2017 travel ban to construction of the wall, the public-charge regulation, asylum changes, and more, remains to be seen. Given the success of Trump administration opponents in turning to litigation to slow or cancel some of the policies they decry, as well as Trump's success in getting conservatives on the bench—most notably cementing a 6-3 conservative majority on the Supreme Court with the elevation of Amy

Coney Barrett—Biden critics may turn to the courts as well. Yet the litigation landscape could be less crowded, given that executive actions on immigration under Biden are not likely to match those under Trump in number, pace, or scope.

## 5 Immigration Enforcement in the U.S. Interior

Though candidate Trump in 2016 pledged to create a “deportation force” that would remove millions of unauthorized immigrants, ICE has not come close to hitting the highs in arrests and removals that occurred during the early part of the Obama administration.<sup>33</sup> While recent ICE arrests have surpassed those in the final Obama years (143,000 in FY 2019 versus 110,000 in FY 2016), they remained less than half of those at the peak in FY 2011 (322,093).<sup>34</sup> Likewise with interior removals: the nearly 86,000 in FY 2019 were well under the nearly 238,000 in FY 2009.<sup>35</sup>

The brake on enforcement under the Trump administration came largely from “sanctuary” jurisdictions such as California, Illinois, and New York City that limit their cooperation with ICE, given that the majority of the agency’s arrests come via transfers of removable noncitizens from state prisons and local jails.<sup>36</sup> Even as ICE nearly doubled the number of detainees it issued between FY 2016 and FY 2019, asking state and local facilities to hold detainees for agency pickup, the number declined by jurisdictions not fully cooperating with ICE increased by more than 300 percent.<sup>37</sup>

In response to the drag “sanctuary” locales have imposed on immigration enforcement, the Trump administration has sought to strip some of their federal funding, filed lawsuits, and had ICE conduct high-profile enforcement operations in their back-

yards. It also ended the more collaborative Priority Enforcement Program (PEP) that shared criminal justice system fingerprints with immigration databases to determine if noncitizens were removable, and reinstated the predecessor Secure Communities program, which the Obama administration shelved as more and more jurisdictions rebelled against it. Biden could be expected to reinstate PEP and seek to rebuild traditional federal-state-local law enforcement relationships with jurisdictions that have limited their cooperation.

The Biden campaign has said it would refocus immigration enforcement on serious criminal offenders and national security threats, as did the Obama administration.<sup>38</sup> Upon taking office, Trump undid targeted prosecutorial discretion guidelines, essentially making all unauthorized immigrants a priority for removal; in practice, 64 percent of ICE arrests in FY 2019 were of noncitizens with criminal convictions, down from more than 85 percent during the FY 2008–11 peak of ICE activity.<sup>39</sup>

The president-elect also has pledged to end long-term immigration detention, amid rising concerns about the conditions that asylum seekers and other migrants face in prison-like facilities run by private contractors. The average daily population of ICE detainees has already fallen during the pandemic from a high of more than 55,000 in August 2019 to about 20,000 as of September 2020.<sup>40</sup> Instead, Biden has proposed the increased use of alternatives to custody such as the family case management program, used during the last two years of the Obama administration but terminated by the Trump administration in 2017.<sup>41</sup> Evaluations of successful alternatives to detention in a forthcoming MPI report show that participant compliance can be assured given solid risk-assessment screening, sound legal advice and representation, close monitoring—electronically, where warranted—and timely resolution of cases.<sup>42</sup>

## 6 International Cooperation

Under the Trump administration, the U.S. government has taken a largely unilateral approach to migration, both regionally and globally, arguing that immigration policy is solely a question of national sovereignty. It seems likely that a Biden administration will try to take a more cooperative approach to managing migration, likely signing the Global Compact for Safe, Orderly, and Regular Migration that Trump opposed when it was endorsed by 152 other UN Member States in December 2018,<sup>43</sup> and engaging proactively with global conversations on managing migrant and refugee flows.

Nowhere will this be more important than in the immediate neighborhood around the United States that stretches from Canada through Central America, a region in which some of the greatest migration pressures exist. Using the threat of tariffs and offers of cooperation, the Trump administration persuaded Mexico to accept MPP, which has resulted in thousands of asylum seekers waiting in Mexican border cities, often in tent encampments and under precarious living conditions. Mexico also stepped up immigration enforcement on its border with Guatemala and in the Mexican interior. And the Trump administration struck asylum cooperation agreements with El Salvador, Guatemala, and Honduras, under which these countries must accept some asylum seekers turned back by the United States (though only the agreement with Guatemala has been implemented, and it has been inactive since March 2020).<sup>44</sup>

As noted earlier, Biden has promised to terminate MPP, and he says he intends to do the same with the asylum agreements in Central America. Instead, his campaign has pledged to invest heavily in economic development, public security, and the rule of law in Central America.<sup>45</sup> His strategy seeks to build a new regional system based on sustained cooperation

while addressing root causes that fuel migration. Implementing this strategy will require balancing migration enforcement and humanitarian protections and designing a tailored investment strategy—all under careful sequencing given the ongoing pandemic that is expected to worsen conditions in the region.

To do this, the new administration must maintain existing enforcement efforts at the U.S.-Mexico border, and possibly even retain for a time the Centers for Disease Control and Prevention (CDC) order that allows for rapid migrant expulsions, while counting on the Mexican government to maintain its own enforcement efforts. At the same time the administration winds down MPP and terminates the asylum cooperation agreements, it must invest in protection systems closer to where people live, in cooperation with Mexico, Costa Rica, and Panama as well as with Canada, while rebuilding the U.S. asylum system.<sup>46</sup> Extending seasonal work opportunities to Central Americans can provide legal channels for those who would otherwise migrate illegally due to economic factors. Sustained and successful investment in the region will require a targeted approach to establish realistic goals and measure progress with transparency and buy-in from partner governments. Finally, administering all of these pieces of a new regional strategy requires a degree of inter-institutional coordination that is hard to attain, but critical if the incoming administration is to create a new approach to regional cooperation that can help successfully manage migration.<sup>47</sup>

## 7 A Way Forward?

Although the Trump administration implemented drastic measures to restrict immigration, public support for immigration has increased—including support for *more* immigration for the first time since Gallup began polling on this issue in 1965.<sup>48</sup> There may, therefore, be opportunities for the Biden ad-

ministration to advance reforms that reshape an immigration system whose legal architecture still rests largely on 1965 and 1990 amendments to the *Immigration and Nationality Act*.

The reopening of countries after the forced immobility imposed by the COVID-19 pandemic, labor force realignments as automation and offshoring leave their mark, the growing global hunt for talent, and the aging of U.S. society are among the urgent reminders that the United States needs active, intelligent management of its immigration system—and the flexibility to adapt and adjust as conditions

change. As corporate America, universities and colleges, community leaders, and others confront the sweeping immigration pullbacks enacted during the past four years, they may perhaps become more active voices for reform in Washington.

Still, given the plethora of changes the Trump administration has pushed to nearly every corner of the U.S. immigration system, and what will likely be a less-intense focus on immigration during the Biden years amid competing priorities and interests, it seems clear that the Trump stamp will remain on significant aspects of immigration for years to come.

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## Endnotes

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Doris Meissner, former Commissioner of the U.S. Immigration and Naturalization Service (INS), is a Senior Fellow at the Migration Policy Institute (MPI), where she directs the Institute's U.S. immigration policy work. Her responsibilities focus on the role of immigration in America's future and on administering the nation's immigration laws, systems, and government agencies. Her work and expertise also include immigration and politics, immigration enforcement, border control, cooperation with other countries, and immigration and national security.

From 1993 to 2000, she served in the Clinton administration as Commissioner of the INS. Her accomplishments included reforming the nation's asylum system; creating new strategies for managing U.S. borders; improving naturalization and other services for immigrants; shaping responses to migration and humanitarian emergencies; strengthening cooperation with Mexico, Canada, and other countries; and managing growth that doubled the agency's personnel and tripled its budget.

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## Acknowledgments

The authors thank Migration Policy Institute (MPI) President Andrew Selee and colleagues Muzaffar Chishti, Randy Capps, Julia Gelatt, Sarah Pierce, and Jessica Bolter for their insights and review.

MPI is grateful to the Ford Foundation, the Open Society Foundations, the Carnegie Corporation of New York, Unbound Philanthropy, and the 21st Century International Ladies' Garment Workers' Union (ILGWU) Heritage Fund for their support for this research.

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Suggested citation: Meissner, Doris and Michelle Mittelstadt. 2020. *At the Starting Gate: The Incoming Biden Administration's Immigration Plans*. Washington, DC: Migration Policy Institute.



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