

# US Immigration Policy in a Time of Lawlessness

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The United States is in a very dark place today in its immigration policies. The executive branch seems to be in a constant state of war against foreign-born people of all types. Children in mixed-legal-status immigrant families live in constant fear that their parents may get swept up in the Trump administration's deportation operations. Every day, the screws are being tightened on the asylum process, to keep all but a handful of refugees from getting protection in our country. Our legal immigration system is being undermined by a constant stream of draconian new regulations and "extreme vetting" of those seeking visas. Officials charged with implementing immigration laws are being pressured to cut legal corners and take actions that they know to be morally wrong. Those who refuse are eventually forced out (Davis and Shear 2019). How did the US fall into this rabbit hole of lawlessness and exclusion? Is there a realistic scenario for climbing out of it?

## The Trump-Miller Immigration Project

Since the first week of the Trump administration, the president and Stephen Miller, his chief domestic policy adviser, have worked diligently to build out the architecture of an extreme, restrictionist immigration policy. This has been done mainly via a series of executive orders and new federal regulations, with no congressional review and little media attention.

One of the earliest of these executive orders ended the Obama policy of targeted immigration enforcement in the US interior. Obama's immigration agents prioritized serious felons and security risks. Trump's enforcement policy dispensed with priorities. It called for an indiscriminate dragnet, using ICE agents armed only with administrative warrants—no order signed

by a judge, no probable cause demonstrated. The same executive order called for a massive expansion of so-called expedited removal, a legal mechanism for getting apprehended migrants out of the country as quickly as possible. They are asked to sign a document—which they usually don't understand—waiving their right to a hearing before an immigration judge. Expedited removal was created as part of the 1996 immigration law signed by Bill Clinton; what has changed is the indiscriminate use of it under Trump, to restrict due process.

Section 1325 of US immigration law defines unauthorized entry into the country as a criminal offense, but living in the US as an undocumented immigrant is just a civil offense—a misdemeanor. Criminal prosecutions for illegal entry began to increase under the George W. Bush and Obama administrations, but they have mushroomed under Trump. Beginning in April 2018, a large majority of apprehended migrants were held for prosecution on a criminal charge. The share of apprehended immigrants allowed to depart voluntarily, after a few hours of processing, dropped to less than one-quarter. As former attorney general Jeff Sessions defined this so-called zero tolerance policy, all undocumented aliens would be met with the full prosecutorial power of the Department of Justice. This was the death knell of the policy of prosecutorial discretion that governed immigration enforcement under Obama.

The Trump administration has been using Section 1325 to conduct mass prosecutions that raise serious legal and constitutional issues. People are arraigned and plead in batches of 50 or more, with no meaningful opportunity to have legal counsel. Section 1325 has also been used to separate migrant parents from their children. Since 2018,

more than 3,600 children have been separated from their parents so that a parent could be put into criminal custody.

The policy of prosecuting as many as possible immigrants on criminal charges has exploded the backlog in the US immigration court system to over one million cases, with just 444 immigration judges to hear them. The average immigration case now takes over seven hundred days for final resolution. This policy has also doubled the population of incarcerated immigrants, to more than 55,000 on a given night. They are being held in a gulag of immigration prisons and county jails contracted with ICE, stretching from coast to coast. Over 70 percent of the beds are in privately run, for-profit facilities. It is big business, costing US taxpayers upward of \$7.4 billion per year to detain immigrants who pose no threat to public safety.

Why not just release them into the US to await their hearings? Nearly all of them have at least one US-based relative waiting for them. The Trump administration claims they would not show up for their hearing. But if they are put into the Family Case Management Program, which was terminated by the administration in June 2017, over 99 percent would show up (Women's Refugee Commission 2018).

### Dismantling Asylum

Another major policy initiative since 2017 has been a systematic effort to dismantle the system for claiming asylum that has been in place since the 1980 Refugee Act was passed. Under Trump the annual visa allocation for refugees has been slashed by more than 80 percent, to just 18,000 in FY 2020 (Canada is resettling six times as many refugees as the US, on a per capita basis), and the grounds for claiming asylum have been drastically limited. A Trump executive order enables—indeed, encourages—states and localities to block resettlement of new refugees within their jurisdictions.

Various regulatory changes have also made it more difficult to claim asylum. One key change requires asylum seekers to apply in the first country through which they pass, and to have their claim denied

by that country, to make them eligible to seek protection in the United States. Asylum seekers from Honduras and El Salvador who reach the US border are being deported to Guatemala, even though it has hardly any capacity to adjudicate asylum claims. The administration also proposes to limit access to asylum by charging asylum seekers \$540 in fees to file an application and get a work permit. An executive order signed in September 2019 allows state and local officials to block refugee resettlement by private humanitarian organizations in their jurisdictions, potentially making it impossible for refugees who have waited for years to be reunited with their US-based relatives.

At the US-Mexican border, “turnback” and “metering” policies are in place. If an asylum seeker approaches an immigration officer at a legal port of entry, asking to make an asylum claim, she is told “We’re full—go away.” The metering policy puts one on a wait list for an initial vetting interview. The wait list at some of the major ports of entry, like Tijuana, has over 10,000 names. By December 2019, more than 55,000 asylum seekers who had reached the US border had been returned to Mexico to wait for a court date, including some who had been granted asylum protection by a US judge (federal agents have been using dubious paperwork to create time for government appeals).

In a bit of Orwellian doublespeak, the remain-in-Mexico policy is officially known as Migrant Protection Protocols (MPP). Returnees will be waiting, for months, if not years, in extremely dangerous border cities like Nuevo Laredo and Ciudad Juárez, where they are easy marks for criminal gangs. Extorting and kidnapping migrants have become new revenue streams for drug cartels. The Mexican government is enabling the Trump administration's bad behavior. Trump bullied Mexico's president into accepting the MPP scheme, in return for relief from a 25 percent tariff that Trump had threatened to impose on all goods imported from Mexico.

The Trump administration says it is doing these things to weed out people who are trying to file bogus asylum claims. But the real game is to force asylum seekers to wait so long for their hearing that they will give up and return to their country

of origin. Moreover, making them wait in Mexico sharply reduces their opportunity to get legal counsel. Researchers at Syracuse University found that just 1.3 percent of the asylum seekers who have been returned to Mexico had gained legal representation. Previous experience shows that 90 percent of those with legal representation ultimately have been granted asylum; fewer than 10 percent of those lacking counsel prevail.

The sustained assault on the US asylum system illustrates the Trump administration's larger modus operandi: do whatever you can, however illegal it may be, for as long as you can, until you get blocked by a federal appeals court or a Supreme Court ruling, then throw in the towel and remind your supporters that you fought the good fight. According to a detailed investigative report (Zengerle 2019), Trump and Miller have repeatedly bullied cabinet and subcabinet officials into taking actions that violate US and/or international law. As one of these officials recalled, "Trump's constant instinct was: just do it, and if we get sued, we get sued. Almost as if the first step is a lawsuit. I guess he thinks that because that's how business worked for him in the private sector. But federal law is different. There really isn't a settling step when you break federal law."

The administration may not get a settlement, but it can drag out litigation so it can keep doing extralegal things for as long as possible. An example: Trump's battle to use over \$6 billion diverted from the Defense Department's budget to build 450 miles of border wall, by declaring a national emergency and bypassing Congress. The administration has won a series of federal court decisions that allow wall construction to proceed while litigation continues.

Trump has endorsed various schemes fashioned by Miller to sharply reduce the overall level of *legal* immigration and, in the bargain, admit far fewer nonwhite immigrants. His latest plan introduces a points system that uses English language ability, age, education, and family income as criteria for determining eligibility to immigrate. The impact would be to disproportionately exclude people from Latin America and Africa. This scheme got

no traction in Congress, which normally sets immigration levels; now the administration is trying to accomplish the same end by regulation.

A new rule, published in August 2019, contains a much harsher interpretation of the long-standing "public charge" provision in US immigration law. The new rule can be used to deny entry to would-be immigrants based on a bureaucrat's expectation that they might use any of a long list of public benefits at some point in the future, including Medicaid, food stamps, and housing subsidies. This rule discourages immigrant parents from enrolling in programs like food stamps and Medicaid's Children's Health Insurance Program, which benefit US-citizen children in mixed-legal-status families.

Going further, the Trump administration announced in October 2019 that the US will start denying permanent resident visas to people who cannot prove that they will have health insurance upon arrival or the ability to pay for medical expenses going forward. This new regulation will mostly impact would-be immigrants from Latin America who are seeking family-based visas.

A new family detention rule, published in August 2019, nullifies the 1997 Flores consent decree that limits detention of migrant children under eighteen to 20 days. The new rule allows indefinite detention of migrant parents along with their children. The Trump administration claims, without evidence, that when the government is forced to release migrant families with children after 20 days, that incentivizes more illegal entries. It insists that the recent surge of asylum seekers is driven entirely by what they call "legal loopholes" like Flores. But parents fleeing gang and drug violence just want to protect their children.

These new federal regulations are integral to a broader strategy of undermining immigrants' rights through end runs around Congress and the federal courts. These measures are not just cruel; they won't work.

The Trump administration insists that everything they are doing will deter potential economic migrants and asylum seekers. But this is contradicted by a huge body of fieldwork-

based research. For example, the flow of new unauthorized migrants from Mexico is down sharply since 2008, but not because of the medieval wall that Trump keeps trying to build on the southwestern border. Many fewer Mexicans are showing up at the border mainly because the pool of potential migrants has been depleted by the falling birth rate and slower labor force growth in Mexico (Cornelius 2020).

On blanket prosecutions for unauthorized entry, there is no evidence that creating a criminal record for migrants whose only offense is unauthorized entry and incarcerating them for long periods is an effective deterrent; evidence from field research indicates that it is not (Fischbein, et al. 2013). The same applies to the new public charge rule. There is no scientific evidence that access to taxpayer-funded services shapes migration decisions, which are responses to extreme poverty, lack of physical security, and having family ties with the United States (Hiskey et al. 2018).

### Fixing It

Many of the things wrong with current US immigration policy could be fixed simply by reversing the anti-immigrant executive orders that have been pumped out by the Trump White House. But other problems require policy shifts, or rebudgeting, or new legislation. For example, in immigration enforcement, there should be a return to prioritizing prosecutions and deportations, as the Obama administration did. Serious felons and security threats should be targeted, not asylum seekers and economic migrants with no criminal record.

If the policy challenge is uncontrolled flows of asylum seekers, most of whom originate today in just three Central American countries, the US should be making a serious effort to address the root causes in these countries. Well-financed, well-targeted programs to boost development, support the rule of law, and mitigate the effects of climate change are needed. Instead, President Trump has ordered a cutoff of aid to these countries.

With respect to the legal immigration system, the US should be planning for a future of diminishing labor supply, rather than throwing up new barriers to would-be immigrants. The US birthrate is the lowest since 1918, well below what is needed to keep the country's population stable. Four states lost population in the 2010s, but another nine would have shrunk were it not for newly arriving immigrants. Emerging labor bottlenecks are exacerbated by a plummeting rate of internal migration, which is at a post-World War II low (Frey 2018). The US population is also aging rapidly: 70 years ago, there were 150 active workers for every 20 retirees; by 2050, just 56 workers will be supporting every 20 retirees (Karp and Nava 2019). The US must also find a way to replace 76 million retiring baby boomers, at a time of full employment (the unemployment rate is at a 50-year low of 3.5 percent).

A very strong economic case can be made that the US should be significantly increasing its intake of immigrants and refugees (Clausing 2019). It could start by revisiting the absurdly low caps on existing temporary foreign worker programs for both high-skilled and low-skilled jobs. These caps were set many years ago and have not been adjusted for changing economic conditions. For example, why should H-2B visas, used for temporary, low-skilled, non-agricultural workers, be capped at 66,000 a year, in a \$20 trillion economy? The US should also be increasing the number of permanent, employment-based visas, which are now capped at just 140,000 per year—fewer than Australia admits on this type of visa, despite having a population 14 times smaller than the US.

Beyond admitting more immigrants, the US needs to do a better job of dispersing them geographically. There are significant pileups of new arrivals in coastal cities, with too few going to interior destinations (Ozimek 2019). Through a new place-based visa program, legal immigrants and refugees could be steered to the places where they are needed most—the small cities and rural areas that have been losing population and whose tax bases are depleted.

## Conclusion: Exiting the Rabbit Hole

Now may be the optimal time to reframe immigration as a potential solution the United States' deepening demographic and fiscal deficits. Public support for immigration is at a record high, with nearly two-thirds of Americans wanting a higher level of immigration or to keep it at the current level (figure 2). Recent surveys show that four out of five Americans support offering undocumented immigrants a path to citizenship. Nearly nine out of ten Americans have a positive view of immigrants; they just want a well-regulated immigration system (PRRI 2019).

Generational changes should also have a major positive impact. Survey data show that millennials and Gen-Xers are much more supportive of immigrants than the two oldest generations: 75 percent of millennials agree that immigrants "strengthen our country because of their hard work and talents," compared with 44 percent of those born from 1928 to 1945 (Jones 2019). This is partly because young people today have much more experience with immigrants than older Americans. And the evidence shows clearly that the more direct, personal experience that people have with immigrants, the more accepting they are.

Generational succession in the electorate, combined with spreading labor shortages, will mean that more Americans will see immigrants not as threats and tax burdens but as essential partners in securing the country's economic future. The zero-sum political calculus that currently blocks comprehensive immigration reform in Congress will eventually weaken. Politicians may even come to see electoral benefit in embracing less restrictive policies, which can easily be justified on economic grounds.

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