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IN BRIEF

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## Immigration According to Biden

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President Trump affected US immigration more than any other policy area in the United States. He entered office in 2017 with the intent of reducing both illegal and legal immigration. His policies barely impacted the population of [illegal immigrants](#) in the US. However, Trump succeeded in reducing the inflow of legal immigrants on [green cards](#), also known as lawful permanent residency, by about [91 percent](#) in the second half of fiscal year 2020, compared to the second half of the 2016 fiscal year. He further reduced the number of non-immigrant visas, which included temporary workers and tourists, by [93 percent](#) over the same time period. Trump enacted these [reductions](#) in legal immigration in April 2020 in response to the recession caused by COVID-19.

No other policy action by the Trump administration had an impact greater than the virtual end [of legal immigration](#). The focus on the actions of the president in an issue area that is supposed to be the domain of Congress is the result of a long legal and judicial drift that has given an enormous amount of power to the executive branch. My colleague David J. Bier and I refer to this as the [end of immigration law](#).

### Restarting legal migration

President Biden has [stated](#) that he wants to restart legal immigration because “immigrants help grow our economy and create jobs.” However, Biden has not done so yet. Without any additional actions, Trump’s ban on immigration expires at the end of March 2021, and Biden will probably not renew it. At that point, the Biden administration will have to reopen consulates and restart the visa processing and interview procedures that have been dormant for a year.

Biden has taken several tentative steps to make the legal immigration system function better when it is reopened. He repealed Trump’s so-called Muslim ban that reduced immigration from Muslim-majority countries based on [poorly reasoned national security justifications](#). Biden also ordered a review of a Trump-era regulation that gives immigration officials an enormous amount of power to ban individual immigrants if there is a [suspicion](#) that they could utilise the American [welfare](#) system at some point in the future. Immigrant consumption of welfare benefits could be easily curtailed with [different laws](#), but it’s [not currently a major problem either](#).

### Counting green cards

Biden could also change how the government counts green card allocations under its numerical caps. Currently, US law allows 140,000 green cards for skilled workers, but [fewer than half of them go to the workers themselves](#) because the rest are allocated to their immediate family members. No law or regulation requires counting the spouses and minor children of immigrant workers against the green card cap for skilled workers. Thus, Biden could immediately double the number of green cards for skilled workers by ordering a different method of counting them. He could also apply this reform to other family-based green card categories and increase those numbers by about 9 percent in the first year.

### Restarting refugee resettlement

One quirk of American immigration law is that Congress explicitly granted the president the power to set the number of refugees who can enter annually. Trump used that power to reduce the number of

refugees admitted from about 85,000 in the last year of the Obama administration to about 10,000 in 2020, the fewest since the programme's creation in 1980. In 2020, [he offered no slots at all to victims of political persecution, such as those in Hong Kong or other communist countries](#). Biden has already raised the refugee number for 2021 to 62,500 and said he wants to increase it to [125,000 in 2022](#).

### **Retaining Trump's border policies**

President Biden has also promised to reverse Trump's ban on almost all asylum applicants along the southwestern border of the US. The Trump administration forced many to wait in Mexico and other Central American countries for their asylum hearings. Biden has so far repealed some of Trump's actions that force additional asylum seekers to wait in Mexico, but he has not rescinded the regulations that virtually ban asylum. Furthermore, [another Trump-era rule that allows the Border Patrol to immediately deport anybody arrested along the border remains in place](#). Thus, even if Biden were to repeal all of Trump's asylum rules along the border, Border Patrol's policy could negate that if it remains unchanged.

### **The thorny issue of legalisation**

Although restarting legal immigration is most important, Biden is focusing most of his attention on reducing immigration enforcement inside of the US and legalising illegal immigrants. Biden has slowed the pace of deportations and changed the priorities to recently entered illegal immigrants and threats to public safety. [Although the courts are slowing down that policy change, he will be able to implement it shortly](#).

On the legalisation front, Biden released [a statement](#) calling on Congress to pass an immigration reform bill that would legalise virtually all illegal immigrants in the US. However, nobody has actually seen the text of that bill and it would likely fail if it were introduced. A likelier route toward legalisation would be a legislative package combining three main provisions: the [DREAM Act](#), which would legalise [several million illegal immigrants](#) who were brought to the country as children; a [measure that would slightly liberalise temporary visas for seasonal farm workers](#); and more border security. Even that package, which is very popular as legislation goes, will probably not become law as Congress is evenly divided between the

parties and will need 60 percent of the Senate to pass.

### **Bypassing the Congress?**

The poor legislative prospects of bills passing Congress leaves Biden with one tempting method to reform immigration: executive orders. Once Biden and his administration realise that they will not convince Congress to pass immigration reform legislation, he might attempt some very bold executive actions to legalise virtually all illegal immigrants, perhaps using the Temporary Protected Status (TPS) provision of US law. [TPS allows the president to grant legal immigration status to anyone in the US if their home country has been affected by a disaster](#) – and the statute specifically mentions “epidemic” as one such disaster.

Even if President Biden does not follow this route, a failure of legislation to become law is likely to prompt some bold and legally dubious thinking about how to push executive action to the maximum in service of legalising illegal immigrants, coupled with some minor actions to liberalise legal immigration. The end of immigration law in the US means that trying to divine the will of the president is the most valuable skill in attempting to predict immigration policy.

### **Conclusions**

President Biden should try to convince Congress to pass an immigration reform bill that would expand legal immigration and legalise most illegal immigrants. In the meantime, he should begin systematically rescinding every anti-immigration executive action by the Trump administration. He should also use his lawful powers as president to expand legal immigration opportunities. Lastly, Biden should work with Congress to reduce the power of future presidents to again reduce lawful immigration. If Biden is able to restore the legal immigration system to its former self on January 2021 then his administration should be judged as a tremendous success on this issue.

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