



Biden's *Second* 100 Days

A look at continuing immigration policy changes

By Robert Law

A new president's first 100 days has become an unofficial benchmark for measuring accomplishments since Franklin D. Roosevelt's first term. Media outlets and policy organizations, including the [Center for Immigration Studies](#), routinely issue 100-day reports for a new administration. Rarely does the president receive a subsequent comprehensive analysis of his administration's actions until the midterm elections. With August 7 having marked President Biden's 200th day in office, the Center takes a renewed look at what has transpired since April 29 (Biden's 100th day). Consistent with the Center's [100-day report](#), this report does not grade or score the Biden administration's performance. Instead, it analyzes the impact of policy changes in the following areas:

- Border Security;
- Interior Enforcement; and
- Immigration Benefits.

Border Security

Record-Level Apprehensions. The Biden administration has overseen a historic, and worsening, crisis at the southern border that it continues to refuse to take responsibility for. In February 2021, the president's first full month in office, there were 101,095 U.S. Customs and Border Protection (CBP) encounters at the Southwest border (revised up from the initially reported 100,441), a 15-year [record high](#) for the month of February. Instead of being alarmed by this bucking of historical trends of decreased border-crossing attempts in the winter, the Biden administration attempted to deflect by claiming the numbers reflect a seasonal trend. Led by Department of Homeland Security (DHS) Secretary Alejandro Mayorkas, the Biden administration refused to call the border situation a crisis, instead opting to call it a "challenge" in an attempt to downplay what was happening on its watch. In the first 100 days, President Biden tapped Vice President Harris and former Ambassador to Mexico [Roberta Jacobson](#) as co-border czars. Illegal aliens kept coming in droves, as CBP encountered 173,265 aliens in March and 178,850 in April. Jacobson subsequently quit on Biden's 100th day.

Remarkably, the crisis has worsened during Biden's second 100 days in office. In fact, CBP encounters at the Southern Border have continued to climb each month of the Biden presidency. In May, CBP encountered 180,641 aliens, with Border Patrol apprehending 172,011 aliens within that total. As the numbers continued to skyrocket, and buck another historical trend of decreased crossing attempts after May, the Biden administration delayed publishing the June figures. Once they were finally released, the American people learned that CBP [encountered](#) just under 189,000 aliens at the Southern Border, with 178,416 apprehensions. In July, CBP encountered about 212,000 aliens, the [highest number in more than 20 years](#). Within this total, about 19,000 are unaccompanied alien children (UACs), reflecting yet another record high (the Biden administration held the previous high, from March 2021, at 18,877 UACs). Family units (FMU) accounted for nearly 83,000, up from 55,805. The only "good" news for the Biden administration is that the FMU apprehensions are slightly lower than the record 88,857 from May 2019.

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Elimination of Tools to Combat the Border Crisis. As covered in the Center’s 100-day report, the Biden administration’s swift actions to undo policies of the Trump administration created the environment that caused the historic surge of illegal aliens coming across the border. In short order, President Biden [stopped](#) the construction of any physical barrier along the southwest border; [suspended new enrollments](#) in the Migrant Protection Protocols (MPP, or also known as “Remain in Mexico”); [terminated](#) Asylum Cooperative Agreements (ACAs) with Guatemala, Honduras, and El Salvador; and ended streamlined, expedited credible fear screenings known as “Prompt Asylum Case Review” (PACR) for non-Mexicans, and “Humanitarian Asylum Review Program” (HARP), for Mexicans. And, despite continued concern about stopping the spread of Covid-19, the Biden administration is not fully utilizing the Centers for Disease Control and Prevention’s emergency health authority under Title 42 of the United States Code to turn away all aliens at the border. While the administration claims it is expelling all single adults, it is allowing in most family units (only 10,000 out of 83,000 in family units were expelled under Title 42 in July) and all UACs. Biden’s DHS recently resumed removing some FMUs through expedited removal proceedings, but still the majority are allowed into the country while they await immigration court hearings that are many years down the road.

In the second 100 days, the Biden administration continued to eliminate tools that would help secure the southern border. On June 1, DHS Secretary Mayorkas formally [ended](#) MPP and even declared that previous MPP enrollees who were ordered removed in absentia are now [eligible](#) “for processing into the United States”. The Biden administration has yet to explain how admitting aliens ordered removed is not a violation of [Section 140](#) of the Immigration and Nationality Act (INA), which stipulates that those who receive orders of removal shall be removed from the United States within 90 days. The effect of these moves is that all illegal aliens apprehended at the border, except for single adults being turned away under Title 42, are being processed *inside* the United States. As the border apprehension data discussed above shows, removing these tools encouraged more economic migrants to make the journey to the U.S. southern border. Instead of acknowledging that the border crisis is policy-driven, the Biden administration continues to put responsibility elsewhere. On August 2, Secretary Mayorkas went so far as to [blame](#) former President Trump for the border crisis, despite Trump having been out of office since January 20, 2021.

As previously covered, President Biden ended the national emergency at the southern border declared by President Trump to allow for the reprogramming of certain Department of Defense (DOD) funds to help build the border wall. Recently, Republicans on the Senate Homeland Security and Government Affairs Subcommittee on Government Operations and Border Management [found](#) that the Biden administration is wasting \$3 million a day in taxpayer dollars to *not* build the wall. In less than 200 days, the Biden administration has wasted at least \$2 billion paying contractors not to work. In addition to spending money to not construct the wall, the Biden administration does not even want to increase manpower to deal with the border crisis. Remarkably, DHS’s FY 2022 proposed budget contains [no](#) request for funding for additional border patrol.

Expanded CAM to Avoid Border Optics. Back in 2014, when the Obama-Biden administration had its own border crisis to deal with, they created the Central American Minors (CAM) refugee/parole program to deter the (then) record high numbers of unaccompanied alien children arriving at the southern border. Under CAM, lawfully present parents who were nationals of a Northern Triangle country could petition to have their children brought to the United States by the government instead of paying coyotes to smuggle them across the border. The program was unsuccessful because most parents who would want to take advantage of CAM are illegal aliens and those who were here lawfully already had legal immigration avenues to bring family to the U.S. In 2016, the Obama-Biden administration expanded sponsor eligibility beyond minor children, to include adult children, married children, biological parents, and “caregivers”. The Trump administration terminated CAM because aliens from the Northern Triangle generally do not meet the statutory definition of “refugee” and the parole aspect of the program was an unlawful categorical use of the parole authority.

In his first 100 days, President Biden announced that he was [reviving and expanding CAM](#) in two phases: first, processing eligible applicants that were closed when the Trump administration terminated CAM, and second, accepting new applications with updated guidance. Phase one ([restarting CAM](#)) occurred on March 10. The [“updated guidance”](#) was released on June 15, which the Center [analyzed](#) and found that it significantly expanded CAM. The increased eligibility was two-fold: first, legal guardians in addition to parents are allowed to sponsor, and second, illegal aliens who simply had filed a U-visa or asylum application by May 15, 2021, were also eligible to sponsor, in addition to those lawfully present (i.e., with TPS, deferred action, parole). The expansion of CAM is the Biden administration’s attempt to avoid the optics of a flood of illegal aliens being apprehended at the border, sending a clear signal to those in the Northern Triangle: Don’t come here illegally because we will come get you in “legally”.

Harris Focuses on “Root Causes”. Rather than directly dealing with the crisis at the U.S.-Mexico border, Border Czar and Vice President Kamala Harris rewrote her job description to address the so-called “root causes” of citizens of the Northern Triangle countries heading north to the United States without a legal immigration status. Throughout the Biden administration’s first 100 days, Harris refused to visit the southern border and did not even hold a press conference detailing her plan to solve root causes. In the second 100 days, in early June, Harris traveled to Guatemala, her first international trip as VP, to make the (unconvincing) case for why Central Americans should not come to the U.S. In an effort to do damage control from the consistent negative media coverage and polling that was hurting the new administration, Harris sat down for a one-on-one interview with NBC’s Lester Holt. The interview backfired, as Harris was unable to articulate a sound explanation for her steadfast refusal to visit the southern border. When Holt pressed Harris if she had “any plans to visit the border”, a clearly annoyed Harris dismissively responded, “at some point”. Harris then claimed “we’ve been to the border”, but Holt shot back that while other administration officials had indeed gone to the border, Harris had not. Harris’s response of “and I haven’t been to Europe either” went viral. Finally, after former President Trump announced that he was going to visit the border, the Harris team scrambled to get her down there ahead of the 45th president. However, Harris visited El Paso, Texas, when she [should have](#) gone to the Rio Grande Valley instead if she wanted to learn about the border crisis hotspot.

Over the past 200 days of the Biden administration, it has become clear that the plan for Central America is to send taxpayer dollars to those corrupt governments in the hopes that this will deter future flows of economic migrants surging across the border. Specifically, President Biden has pledged to send \$4 billion in American taxpayer money to Guatemala, Honduras, and El Salvador. This “investment”, even if successful, is a long-term strategy for bringing about change in the Northern Triangle and will do nothing to stop the current flood of economic migrants.

Additionally, the focus on the “root causes” of Central America leaves unaddressed the fact that the border crisis has become increasingly global. In June, more than a [quarter](#) of all apprehended aliens were from non-Mexico, non-Northern Triangle countries. Ecuadorians, Venezuelans, Brazilians, and Haitians were among the top nationalities of these extra-continental migrants. More aliens from non-Western Hemisphere countries are entering as well. The increasing diversity of nationalities comprising the border surge indicates that the pull factors of the Biden administration’s non-enforcement policies are stronger than any push factors limited to the Northern Triangle.

At the end of July, the Biden administration issued a “blueprint” and a “strategy” to address root causes. The Center [analyzed](#) both and found that they largely mirror previous documents that are more aspirational in language than they are substantive in problem solving.

Interior Enforcement

From the start of his administration, President Biden made it clear that he only intends to enforce U.S. immigration law in the narrowest of situations. On Day One, he [rescinded](#) President Trump’s enforcement priorities (every illegal alien is a priority) and ordered a [100-day deportation freeze](#). While a federal district judge enjoined the deportation freeze, it was a [mostly symbolic victory](#) for the rule of law because it did not order the Biden administration to actually remove any aliens. ICE’s Acting Director Tae Johnson followed this up with [new enforcement priorities](#) that the [Center](#) found limit the ability of ICE officers to arrest and remove aliens from the interior of the country, waste ICE resources it claims to be conserving, and generally create a chilling effect on ICE enforcement.

During the second 100 days, DHS instituted policies that drastically reduce the likelihood that an illegal alien released into the U.S. will ever be removed. Specifically, CPB is [releasing](#) many illegal aliens apprehended at the border into the United States without a Notice to Appear (NTA), a document that initiates removal proceedings. Instead, these illegal aliens are ordered to report to an ICE office within 60 days of entry to obtain an NTA. The practical impact of this policy is that immigration proceedings are not initiated against those who do not show up at ICE offices and they cannot be ordered removed in absentia. Thus far, at least 80 percent of those released without NTAs are not reporting to ICE offices. Taken together, there has been a [huge decline](#) in the percentage of aliens ordered removed during FY 2021, even with the Trump administration accounting for roughly three-and-half months of this period (October 1, 2020, to January 20, 2021).

ICE Discretion Policy. As has been stated, the Biden administration's policies on the border have created a situation in which tens of thousands of aliens are able to enter the United States without being encountered and placed in removal proceedings. Even many aliens who are encountered are not placed in removal proceedings, but are instead released into the United States without NTAs, the charging document that initiates removal proceedings. Under new [guidelines issued](#) to attorneys in ICE's Office of the Principal Legal Advisor (OPLA), who represent DHS in immigration proceedings before DOJ immigration courts within the Executive Office for Immigration Review (EOIR), even those aliens placed in removal proceedings will receive increased extra-legal leniency.

The guidance applies to enforcement decisions within the purview of OPLA: filing or canceling an NTA, moving to administratively close or continue proceedings, moving to dismiss proceedings, pursuing appeal, joining in a motion to grant relief or to reopen or remand removal proceedings and entering stipulations, and taking a position in bond proceedings. The policy's stated purpose is to implement "faithful and just execution of the immigration laws, consistent with DHS's and ICE's enforcement and removal priorities." However, with enforcement priorities that exempt nearly all illegal aliens from removal and waste limited ICE resources, it is questionable how "faithful" the Biden administration is in enforcing our immigration laws.

The OPLA guidance sets out a list of aggravating and mitigating factors. Any request for prosecutorial discretion must be documented in PLANet, an OPLA database, and even without a request from an alien, ICE attorneys are required to make an affirmative determination whether a favorable exercise of discretion is appropriate. An example of how enforcement priorities established by Acting ICE Director Tae Johnson in his February 18 [memo](#) apply to the immigration enforcement process is that ICE attorneys are now authorized to agree to a continuance for "good cause shown" when an alien falls outside presumed enforcement priorities regarding national security, border security, and public safety grounds. Similarly, the Tae Johnson memo says appeals should generally be reserved for those cases the administration deems priorities. Other cases, including those involving aliens likely to be granted relief, compelling humanitarian factors, or legal permanent residents, are to be generally dismissed.

The legal permanent resident provision, which encourages dismissal absent serious aggravating factors, is particularly noteworthy. Under the INA, aliens with LPR status are permitted to reside permanently in the United States unless they commit an offense that renders them removable. For example, under INA Section [237\(a\)\(2\)](#), any alien, including an LPR, convicted of two or more crimes involving moral turpitude, an aggravated felony, or a federal or state drug offense is removable. INA [Section 241\(a\)\(2\)](#) treats these cases very seriously, even mandating that aliens placed in removal proceedings and detained because of deportability under 237(a)(2) shall be "[u]nder no circumstance during the removal period" be released from detention. In practice, the new OPLA guidance deviates from the plain letter of the law and will allow LPRs convicted of all but the most heinous crimes to remain in the U.S.

There has been a large [decline](#) in the number of aliens ordered deported in 2021, and the OPLA guidance will only serve to exacerbate this trend. The guidance claims that "The size of the court backlog and extraordinary delays in completing cases ... undermine public confidence in this important pillar of the administration of the nation's immigration laws." Instead of focusing on how to streamline removals, ICE under the Biden administration has opted to just not add certain removable aliens on the docket.

Immigration Benefits

With the Biden administration's mass amnesty bill stalled in Congress, DHS continues to misapply its statutory authority to grant Temporary Protected Status (TPS) to hundreds of thousands of illegal aliens. According to [section 244](#) of the INA, the DHS secretary may designate a foreign country for TPS due to (1) ongoing armed conflict that poses a serious threat to the personal safety of aliens returning home; (2) an environmental disaster, because of which the home country requests TPS as it is unable, temporarily, to handle adequately the return of its nationals; or (3) extraordinary and temporary conditions that prevent aliens from returning home in safety. TPS is amnesty-lite because it affords illegal aliens a reprieve from removal and, more importantly, a work permit, Social Security number, and the ability to get a driver's license. And [there's nothing as permanent as a temporary immigration status](#).

In the Biden administration's first 100 days, DHS extended and [unlawfully "redesignated"](#) Syria for TPS (adding 1,800 illegal alien beneficiaries to the existing 6,700 population), and newly designated [Venezuela](#) (320,000) and [Burma](#) (1,600) for TPS. The Venezuela designation alone far surpassed the previous high designation of 262,500 Salvadorans. In the second 100 days, the Biden administration has continued its unlawful practice of extending and "redesignating" TPS designations when renewal decisions are required. On the smaller scale (but still unlawful), Secretary Mayorkas has added [500 Yemenis](#) and [100 Somalis](#) to the TPS population. On the larger scale, in May Secretary Mayorkas extended and "redesignated" [Haiti's](#) TPS designation, adding 100,000 illegal alien Haitians to the existing population of 55,000. Curiously, DHS slow-walked the publication of the TPS Haiti decision in the Federal Register despite timely publishing for all of the other notices. More than two months after the initial Mayorkas decision, where he said the cutoff date for eligibility is an (illegal) alien in the country by May 21, 2021, DHS finally published the notice in the Federal Register. In that notice, Mayorkas [unilaterally and in clear violation of the law](#) advanced the eligibility cutoff date to July 29. DHS failed to update its population estimate, so it is currently unclear how many additional Haitians will receive amnesty-lite having found a way into the United States since May 21. Combined, in a little more than six months, the Biden administration has handed out work permits to nearly 500,000 illegal aliens.

In July, more than nine years after President Obama unilaterally created the Deferred Action for Childhood Arrivals (DACA) executive amnesty program, federal district judge Andrew Hanen ruled it [unlawful](#). While the Biden administration had indicated it was developing a regulation to "preserve and fortify" DACA, Hanen's ruling [makes clear](#) that the Executive Branch lacks the authority, even under the Administrative Procedure Act's notice and comment rulemaking, to create an immigration benefits program absent congressional action. DHS subsequently revealed in a court document that it [approved some DACA requests in violation of the court order](#) (blaming human error) and President Biden has vowed that his administration will appeal the decision.

Conclusion

There has been a sustained, and worsening, crisis at the southern border since Joe Biden entered the Oval Office. The six full calendar months encompassed within the Biden administration's first 200 days have included record high apprehensions for particular months and ever recorded in any month. While advocates of unlimited immigration have complained about the limited application of the Title 42 expulsion authority that the Biden administration has kept in place, this is the only tool preventing a truly unfettered open border. Vice President Harris's focus on root causes in the Northern Triangle cannot solve the current border crisis and fails to address the fact that an increasing share of illegal aliens apprehended at the border are not from Mexico or Central America. Interior enforcement has been limited to the rarest of scenarios and the recent policy decision to release apprehended aliens into the interior of the country without an NTA increases the likelihood that these illegal aliens will never be returned home. DHS Secretary Mayorkas has turned USCIS into a work permit printing operation for hundreds of thousands of illegal aliens benefiting from amnesty-lite. The Biden administration does not seem to see the American people as stakeholders in U.S. immigration policy and views numerical limits, processing times, and screening and vetting as "barriers" to aliens obtaining immigration benefits. Polling continues to show that immigration is the issue President Biden is weakest on, but through 200 days his administration has not pivoted its policy stance. A new fiscal year will begin just before President Biden's 300th day in office, and it is no longer a question of whether this past year will set a record for border apprehensions, but how high above the previous record will it be?

From a regulatory standpoint, the Biden administration has spent its first 200 days withdrawing rules from the Federal Register that the Trump administration failed to complete. In the coming months, the Biden administration is expected to start publishing its own proposed rules, which will change the regulatory landscape of immigration policy if these regulations are finalized. According to the [Unified Agenda](#), DHS, through USCIS, will drastically change asylum law, including what qualifies as a "particular social group", which agency in the government has primary jurisdiction over defensive asylum claims (those raised by illegal aliens apprehended at the border in an effort to stop their removal), and the criteria for getting a work permit while an asylum application is pending. The rulemaking process under the Administrative Procedure Act is time-consuming, so it could take over a year before any of these changes are finalized.