



Biden might need years to reverse Trump's immigration policies on DACA, asylum, family separation, ICE raids, private detention and more

Alan Gomez and Daniel Gonzalez

November 12, 2020

Family separations. The travel ban. The wall. Gutting the asylum and refugee systems. Pushing to abolish DACA.

Those policies implemented by President Donald Trump helped define his legacy, fulfilling some of his campaign promises while enraging many Americans and further isolating the U.S. from the world. President-elect Joe Biden has vowed to reverse most of those restrictionist policies, but it could take months, or even many years, to do so.

In all, the Trump administration enacted more than 400 policy changes that have shrunk legal and illegal immigration channels into the United States. The process of overturning many of them will be straightforward — Biden can sign executive orders and his agency heads can issue memos or directives overriding Trump policies. Some changes, however, could take much longer to unwind due to long bureaucratic processes or legal challenges in court from states or groups that oppose the policy shifts.

Untangling the moves will be even more difficult given that so many of them overlap, forcing the Biden administration to carefully peel them back one by one without overwhelming the immigration system or encouraging a new wave of migrants. That conundrum can be seen most clearly along the southern border.

One Trump policy requires migrants to request asylum in Guatemala or Mexico before they reach the United States. Another Trump policy limits the number of people who can legally request asylum each day at U.S. ports of entry. And yet another Trump policy requires asylum seekers to remain in Mexico while their immigration case is decided.

The end result has been about 25,000 migrants currently living in dangerous, makeshift camps in Mexican border towns. If the Biden team rescinds all those Trump orders, it will have to develop a new plan to handle those asylum seekers.

"Detangling everything Trump did at the southern border may be Biden's biggest headache on immigration," said Sarah Pierce, policy analyst at the Migration Policy Institute, a Washington, D.C.-based, non-partisan organization that researches immigration policy.

The Biden team will also face intense pressure from immigration advocacy groups to grant entry to the tens of thousands of people who have been blocked from entering the U.S. by dozens of other changes made by Trump. His administration has blocked legal residents, relatives of U.S. citizens, refugees, asylum seekers, foreign workers and others for a variety of reasons, including national security and public health throughout the COVID-19 pandemic.

Get the Coronavirus Watch newsletter in your inbox.

Stay safe and informed with updates on the spread of the coronavirus

Delivery: Varies

Your Email

"You can come in on day one and...issue memos that will reset the world," said Karen Tumlin, founder and director of the Justice Action Center, a group that represents immigrants in court. "But can you unring the bell? Can you undo the damage?"

Biden will face a polarized nation when he's sworn in, meaning he'll likely face intense pushback in his attempts to reverse Trump's immigration policies. And if Republicans maintain control of the Senate — which won't be decided until two runoff elections in Georgia in January — he'll likely be forced to act alone through executive actions.

"Some of (Trump's policies) will remain in effect because the Biden administration will realize they are useful policies, or because they will not be able to undo them quickly because of wanting to avoid a political disaster of an influx at the border or because they receive so much push back in the form of litigation and just the fact that there is a certain amount of inertia with any government regulation," said Jessica Vaughan, policy studies director at the Center for Immigration Studies, a think tank that favored many of the policy changes implemented by the Trump administration.

Here's a look at some of the key immigration policy changes Biden could attempt in his first 100 days in office, and the documents he will have to strike down in the process:

Eliminating the travel ban

The policy: Sept. 24, 2017, executive order signed by Trump to implement a travel ban, his third attempt to enact the ban.

After vowing on the campaign trail to implement a "total and complete shutdown of Muslims from entering the United States," the president signed an executive order that did just that, temporarily barring people from seven majority-Muslim countries and completely halting the refugee program.

The first version was shot down by several federal judges. Trump then signed a second travel ban that was also eventually blocked by federal judges, including the U.S. Courts of Appeals for the 4th Circuit, which concluded that the order was "steeped in animus and directed at a single religious group."

The Supreme Court was in the middle of considering multiple challenges to the ban when Trump signed a third version of the travel ban in September 2017 that barred people from eight countries, including North Korea and Venezuela. That version was initially blocked by federal judges but ultimately upheld by the Supreme Court and remains in force today.

The Trump administration maintained that the ban was needed to overhaul the process used to vet foreigners to ensure that the country isn't allowing terrorists to sneak into the country through existing legal channels. But critics have continued fighting it through legal challenges and public pleas decrying what they still refer to as the "Muslim ban."

Marielena Hincapié, who has fought against the travel ban in court as executive director of National Immigration Law Center, said rescinding the travel ban is not a “first 100 days” goal for a Biden administration but a “day one” move.

"It really is about restoring who we are as a nation and making sure that we once again see immigrants as a strength to the nation," said Hincapié, who co-chaired the immigration section of a “Unity Task Force” created this summer by allies of Biden and his former Democratic challenger Sen. Bernie Sanders, D-Vt., to develop ideas and policies for a potential Biden administration.

How Biden could change it:

Biden can issue a new executive rescinding the ban and order the Department of Justice to stop defending the Trump ban in federal court.

Halting wall construction

The policy: Jan. 25, 2017, executive order Trump signed calling for the federal government to "plan, design, and construct a physical wall along the southern border."

Building a wall along the U.S.-Mexico border and making Mexico pay for it was Trump’s number one campaign promise.

Trump signed an executive order five days after taking office calling for the planning, designing and construction of a border wall. But Mexico’s president repeatedly said Mexico would never pay for the wall. And Congress refused to fund the \$13.2 billion the Trump administration requested to pay for border wall construction.

As of July, the Trump administration had secured \$15 billion for border construction, according to the Migration Policy Institute. But only about \$4.4 billion came from funding enacted by Congress, according to a Congressional Research Service report. The remaining 60% came from funds the Trump administration diverted from Pentagon accounts for military projects to construct new and replacement fencing along the southern border. In February 2019, Trump declared a national emergency over the border crisis to secure money from military projects to fund border barrier construction.

There were 653 miles of border barriers in place when Trump took office in 2017, which covered roughly a third of the length of the southern border. Of the 653 existing miles of barriers, about 350 miles was fencing designed to block pedestrians and about 300 miles was barriers designed to block vehicles.

Since then, the Trump administration has completed about 400 miles of new and replacement fencing as of the end of October, with plans to complete a total of 450 miles by the end of 2020. Most of the new fencing is 18- to 30-foot high "bollard" fencing — long steel slats filled with cement.

How Biden could change it:

Biden told NPR that although he would not tear down any of the border barriers already built "there will not be another foot of wall constructed on my administration." But some border construction projects may still get built after Biden takes office because contracts may have already been signed. Biden will likely direct the head of U.S. Customs and Border Protection, the

agency overseeing the border fencing project, to conduct an analysis to decide which projects are worth completing, scaling back or terminating from a financial and border security stand-point.

"President Trump may have boxed in Biden, which could require that Biden has to complete certain portions of the wall whether he likes it or not," said Scott Amey, general counsel for the nonprofit group Project on Government Oversight.

Reviving refugee system

The policy: Oct. 28, 2020, presidential determination signed by Trump capping refugee admissions at 15,000 for fiscal year 2021.

One of Trump's first acts as president was to suspend the entire refugee program, and indefinitely block all Syrians from entering the United States, in the name of national security. The program was restarted in October 2017 but halted again in March in the name of public health as the COVID-19 pandemic spread.

All along, the president has warned about the dangers of refugees, who he views as national security threats and drains on the U.S. economy. "It's a disgrace what they've done to your state," Trump said during a campaign stop in Minnesota in October, referring to refugees living there.

Presidents have the power to set the number of refugees the U.S. will accept each year, and Trump has established record lows every year he's been in office. The refugee cap has fallen from 110,000 in President Barack Obama's final year in office to 50,000 during Trump's first year in office, falling all the way to a 15,000 refugee cap announced by Trump in October, the lowest since the program was created in 1980.

The continuous reductions in refugee admissions have also led to layoffs and office closures at the nine humanitarian organizations that help relocate and assimilate refugees. Even if Biden raises the cap on refugees, it would take time for those organizations to rehire the staff needed to help refugees transition to the United States.

How Biden could change it:

Presidents usually set the refugee cap in the fall, just before the start of the new fiscal year. But Jacinta Ma, vice president of the National Immigration Forum, a Washington, D.C.-based group that advocates for immigrants, said Biden could immediately raise the refugee cap through an executive order. Trump set that precedent in March 2017 when he signed an executive order lowering the refugee cap to 50,000.

Protecting DACA

The policy: Sept. 5, 2017, memo signed by then-Homeland Security Secretary Elaine Duke terminating the Deferred Action for Childhood Arrivals (DACA) program.

After expressing support for undocumented immigrants illegally brought to the country as children during his 2016 presidential campaign, Trump announced in September 2017 that he was ending the Obama-era DACA program. Nearly 650,000 undocumented immigrants participated in the program, which protected them from deportation and allowed them to legally work in the U.S.

The Trump administration said it would end the program and gave Congress six months to pass a law to permanently protect the so-called Dreamers. The ensuing congressional battle resulted in a political slugfest that culminated in a temporary government shutdown, but no deal was struck.

The Dreamers were saved at the last minute by a federal judge, who ruled that the Trump administration used a flawed process to terminate DACA. That legal battle reached the U.S. Supreme Court in June, where Chief Justice John Roberts sided with the liberal wing of the Court in a 5-4 decision that allowed the program to endure. The court also ordered the administration to start accepting applications again.

That decision led to widespread relief for Dreamers who depend on the program to work, go to school and live without the constant fear of being detained and deported. Soon after the ruling, Trump threatened to try and end the program once again.

How Biden could change it:

Preserving the program would be simple: Biden's Department of Homeland Security could issue a new memorandum rescinding the 2017 memo that attempted to terminate the program. But Biden will also be urged by some Democratic lawmakers and pro-immigration activists to grant protections for Dreamers who were denied the ability to apply for the program during the two-year legal fight under Trump. He will be urged to expand the number of people eligible for DACA and to push Congress to pass a law to put DACA recipients on a path to citizenship.

Restoring the asylum system

The policy: June 11, 2018, decision signed by then-Attorney General Jeff Sessions limiting who can apply for asylum in the U.S.

The Trump administration has tried a variety of tactics to limit or halt asylum requests along the southern border, with federal judges striking down several of them. But they have been forging ahead on their goal of redefining, and limiting, who can apply for asylum in the United States.

Asylum is granted to people who fear persecution in their home countries based on their race, religion, nationality, membership in a particular social group or their political opinion. For years, that has included victims of domestic abuse and gang violence. But the Trump administration is trying to cut those groups out, which would be a particular blow to women and people in the LGBTQ community.

In 2018, then-Attorney General Jeff Sessions intervened in the asylum case of a Salvadoran woman who had been repeatedly abused by her husband and could not seek help from the Salvadoran government. Sessions issued a 31-page order that claimed only victims of systemic repression by a foreign government, not "private" crimes committed by relatives or gang members, qualify a person for asylum.

"The asylum statute is not a general hardship statute," he wrote.

Immigration attorneys challenged that memo in court and federal courts have responded with conflicting rulings, some bashing the Sessions directive and others upholding it. Blaine Bookey, the legal director for the Center for Gender and Refugee Studies who has represented the Salvadoran woman in court, said the memo has rendered asylum rulings in the U.S. a matter of chance.

"It still depends on the judge that you draw," she said.

The Trump administration is trying to lock in Sessions' directive through a new regulation, which has been moving through the rule-making process and could become a finalized federal rule in the coming weeks. Bookey describes the Sessions ruling, and the proposed rule, as "part of the administration's larger web of cruel and unlawful policies that have resulted in denial of protections and a return to dangerous conditions and even death."

How Biden could change it:

Biden's attorney general could quickly rescind the Sessions memo, reverting U.S. asylum policy to how it stood before Trump took office. But if the regulation implementing that policy becomes final before Biden takes office, it would take months to propose a new rule and get it finalized because U.S. law requires new rules to go through a prolonged process of public comments, reviews and final publication.

Allowing more migrants to request asylum

The policy: Customs and Border Protection policy that restricts the number of people who can request asylum each day at U.S. ports of entry.

U.S. Customs and Border Protection officials began limiting the number of undocumented immigrants requesting asylum at ports of entry in Southern California in 2016 under the Obama administration, said David Bier, immigration policy analyst at the Cato Institute, a Washington, D.C.-based libertarian think tank.

The Trump administration continued the so-called "metering" policy in 2017 and then expanded it to ports along the entire southern border in 2018 after groups of mostly Central American migrants began traveling through Mexico in caravans and arriving at ports of entry. Under the metering policy, only limited numbers of migrants requesting asylum are allowed into the United States daily at each port to be processed. The number of asylum seekers allowed in each day is based on available space at U.S. holding facilities. The number varies daily from port to port, but generally fewer than 50 asylum seekers have been processed daily at each port and often less.

Those not allowed in are placed on informal waitlists and "turned back" to wait in Mexico. At times, the number of asylum-seekers waiting at ports has ballooned into the thousands. Some asylum seekers have reported waiting weeks and sometimes months.

The policy is intended to address an unprecedented rise in the number of migrants and migrant families arriving at the border seeking asylum. It's also intended to address health and safety concerns resulting from overcrowding at ports of entry and CBP holding stations.

A class-action lawsuit filed in 2017 challenging the metering policy accused the Trump administration of trying to deter people from exercising their right to seek asylum under U.S. law. Critics also say metering pushes asylum seekers to cross the border illegally between official ports of entry, putting them in danger.

Under U.S. immigration law, people who arrive without legal authorization may seek asylum protections in the United States if they demonstrate a credible fear of persecution or torture if returned to their home country.

How Biden could change it:

Biden suggested during a Oct. 23 presidential debate with Trump that he would end the metering policy and return to allowing asylum seekers who arrive at the border to "make your case" based on the following premise, "why I deserve it under American law," instead of "sitting in squalor on the other side of the river."

To amend or end the policy, Biden would direct his U.S. Customs and Border Protection commissioner to issue a memo to CBP directors at ports of entry.

Ending 'Remain in Mexico' plan

The policy: Jan. 25, 2019, memo signed by then-Department of Homeland Security Secretary Kirstjen Nielsen ordering asylum applicants to return to Mexico while their case is decided.

In late 2018, the number of Central American migrants reaching the southern border of the U.S. skyrocketed due to raging violence, food insecurity and misconceptions fueled by smuggling organizations that the United States was allowing in parents who arrived at the border with children. Many were requesting asylum, a claim that Trump administration officials repeatedly questioned.

To help stem that flow, administration officials tried to broker a deal with Mexico to house asylum seekers. When those talks faltered, then-Homeland Security Secretary Kirstjen Nielsen forged ahead on her own, signing the Migrant Protection Protocols, better known as the "Remain in Mexico" plan, which forces asylum seekers to return to Mexico while their asylum case proceeds in U.S. immigration court.

The result was chaotic: migrants began creating makeshift camps in Mexican border towns, straining local resources and fostering unsafe living conditions for more than 60,000 migrants at its highest point. With no protection and no formal government response from Mexico, migrants complained of robberies, kidnappings, and unsanitary living conditions.

Nielsen and other Trump officials defended the plan, saying it was necessary to slow the flood of asylum seekers trying to enter the country. And they claimed it was needed because migrants who are released into the United States while their asylum cases proceed rarely appear at their court appearances.

But immigration advocates — and immigration court data — refute those claims. More than 80% of migrants who requested asylum from September 2018 to May 2019 attended all of their court hearings, according to a report from the Transactional Records Access Clearinghouse (TRAC), a research group at Syracuse University in New York. In the immigration plan that Biden pushed during his presidential campaign, Biden claimed he would end the Remain in Mexico plan within his first 100 days to "restore our asylum laws so that they do what they should be designed to do - protect people fleeing persecution."

How Biden could change it:

The process to rescind the policy is simple — a Homeland Security official could simply issue a new memorandum rescinding Nielsen's 2019 memo. But with tens of thousands of migrants waiting in Mexico because of the policy, the administration would need to develop a new system to allow them into the country and process their asylum requests.

Reopening the southern border

The policy: March 20, 2020, order signed by Centers for Disease Control and Prevention Director Robert Redfield suspending entry of people from countries where a communicable disease exists.

After limiting international travel from sections of China in the early days of the coronavirus pandemic, the Trump administration largely sealed off the northern border with Canada and the southern border with Mexico in March.

To do so, federal immigration agents relied on a law that allows the director of the Centers for Disease Control and Prevention to halt admission of foreigners if their home country is suffering from a communicable disease.

Through September, Customs and Border Protection agents have forced nearly 200,000 migrants — some requesting legal entry to the U.S., some trying to cross the border illegally — to return to Mexico by citing Title 42. Those expulsions affect all migrants — adults, unaccompanied minors, family units — and can be carried out in just a couple of hours.

During a trip to Arizona, CBP Acting Commissioner Mark Morgan praised the order as a way of slowing the spread of COVID-19 in the U.S. He described the nearly 50,000 migrants caught along the southern border in August, as "50,000 potential carriers of a deadly disease."

Immigration activists have objected to the blanket denial of would-be migrants, accusing the administration of using the COVID-19 pandemic as an excuse to achieve its long-standing goal of cutting off legal and illegal immigration from Mexico, Central America and South America.

How Biden could change it:

The CDC order must be renewed every 30 days, meaning Biden's CDC director could decide to simply let the most recent order sunset or could issue new guidance limiting the use of Title 42.

Pulling back ICE agents

The policy: Jan. 25, 2017, executive order signed by Trump allowing immigration agents to target all undocumented immigrants for arrest.

One of Trump's first actions after taking office was to eliminate the "enforcement priorities" established under Obama, which ordered Immigration and Customs Enforcement (ICE) agents to focus on undocumented immigrants with criminal records and to avoid so-called "collateral arrests," or picking up undocumented immigrants who they happened to come across each day.

Trump's order allowed ICE agents to arrest any undocumented immigrant they encountered, even if the person only had immigration violations on their record. The result was noticeable: in the final months of the Obama presidency, nearly 90% of undocumented immigrants arrested by ICE had a criminal record. That figure fell to 64% by 2019.

The Trump administration also resurrected the practice of large-scale work-site raids, used often by President George W. Bush but largely abandoned under Obama. Under Trump, the largest was a raid of seven poultry plants in central Mississippi in August 2019 that led to 680 arrests of undocumented workers, at least two who were still breastfeeding when they were arrested.

Overall ICE arrests increased from 110,000 in 2016 to 143,000 in 2019.

How Biden could change it:

He could sign a new executive order that voids Trump's directives and re-institutes the "enforcement priorities" for agents to target undocumented immigrants with criminal records.

Ending private immigration detention centers

The policy: Jan. 25, 2017, executive order signed by Trump that orders Homeland Security to "allocate all legally available resources" to add more immigration detention centers.

The federal government has long used private prisons companies to operate immigration detention centers, but Trump dramatically expanded the practice, leading to a record number of migrants detained and record profits for private prison companies.

The stocks of GEO Group and CoreCivic — the nation's two largest prison companies — doubled in the days after Trump's election. And in the four years since, ICE has signed contracts to open 19 new immigration detention centers run by private companies.

Critics have pleaded with ICE to cut its relationship with private prison companies given the widespread reports of abuse against detainees and substandard care for them. Biden has vowed to halt that practice, arguing that "no business should profit from the suffering of desperate people fleeing violence." But that could be one of the most difficult immigration policies to change due to contractual obligations and the government's reliance on the industry.

Over the past year, ICE has begun signing long-term contracts with private prison companies, cementing the relationship through several future administrations. In California, for example, ICE signed 15-year contracts with private facilities in San Francisco, Los Angeles and San Diego, meaning it would be difficult for a Biden administration to sever those contracts.

A USA TODAY analysis in 2019 found that more than 75% of the detainees held by ICE are housed in privately-run facilities. ICE only runs five detention centers, relying on state and local jails for the rest.

John Sandweg, who headed ICE in the Obama administration, said those numbers show that it would be impossible to simply cut off the private companies because ICE wouldn't have anywhere to put the tens of thousands of detainees usually housed there. Instead, Sandweg said Biden would have to completely rethink the idea of immigration detention, relying more on supervised release programs and less on long-term detention.

"You cannot just turn those off," Sandweg said. "The better question is, 'How do we end detention as we know it?'"

How Biden could change it:

Biden could sign an executive order rescinding Trump's detention-expanding directive and banning any new private prison contracts. But terminating existing contracts would take far longer and could require systemic changes — and congressional approval — that limits the number of migrants detained by the federal government.

Speeding up family reunifications

The policy: April 6, 2018, memo signed by then-Attorney General Jeff Sessions ordering a "zero-tolerance policy" to criminally prosecute all illegal border crossers.

Trump received so much bipartisan, international blowback for his family separation policy that in June 2018, after more than 5,000 migrant families had been separated at the border and Trump continued drawing fire from all sides, he signed an executive order halting the policy.

Trump didn't invent the practice of separating migrant families. Separations occurred sparingly under Obama in cases where a parent was deemed a criminal or a threat to their child. And separations have continued over the past two years in similar, isolated situations.

What was different under Trump is that family separations became a blanket policy applied to all undocumented immigrants crossing the border. All adults would be charged with criminal immigration violations, leading to a separation from their child since children are not allowed to be detained in adult detention centers for prolonged periods of time.

Now, more than two years after Trump banned the practice and a federal judge ordered all the families be reunited, much work remains to be done. More than 600 parents who were deported have yet to be located. In court documents, the administration estimates it could take another two years before they can implement a system to fully track immigrants across all U.S. agencies.

But all of those issues could be sped up under a Biden administration.

"Stopping future unlawful separations and making previously separated families whole is politically and legally and morally imperative," said Lee Gelernt, the ACLU attorney who has been leading the lawsuit to reunite separated families.

How Biden could change it:

Trump already signed an order rescinding the family separation policy, so Biden doesn't need to take any action. But Gelernt said Biden could do four things to right the enduring wrongs of the policy: grant legal status to families that were separated, allow parents who were deported to return to the United States, establish a fund to help separated families deal with the mental trauma they endured and put child welfare experts, not immigration agents, in charge of deciding whether future migrant families should be separated.

Reversing 'public charge' rule

The policy: On Oct. 10, 2018, U.S. Citizenship and Immigration Services filed a public charge rule change notice in the Federal Register to make immigrants who receive public assistance ineligible to receive green cards.

The Trump administration's public charge rule change would have allowed immigration officials to consider the use of food stamps, Medicaid, public housing vouchers and other forms of public assistance to deny green cards to immigrants.

The rule was part of the Trump administration's overall efforts to reduce legal immigration. Administration officials said the change would ensure that legal permanent residents could support themselves, and hence not become a "public charge" dependent on government assistance. Critics called it a wealth-test that discriminated against working-class immigrants.

The rule has faced legal challenges and has been winding through the courts.

A federal judge blocked the rule five days before it was to take effect on Oct. 15, 2019. But the Supreme Court ruled in January that the government could begin implementing the rule except in Illinois due to other court rulings. U.S. Citizenship and Immigration Services said the rule would take effect on Feb. 24, 2020, just as the coronavirus pandemic was beginning to hit the United States.

The new rule raised fears that immigrant families would avoid seeking medical attention because it could prevent them from getting green cards in the future. The Trump administration later amended the rule to say that COVID related medical care would not be considered by immigration officials when assessing green card applications.

In November, a federal judge struck down the public charge rule saying the Trump administration violated the Administrative Procedure Act, the law that governs the process for issuing new regulations. But an appeals court judge stayed the lower court's decision pending an appeal. It's possible that another court ruling could place the public charge rule on hold before the Jan. 20 presidential inauguration.

How Biden could change it:

Biden's attorney general could drop the appeal, letting stand the federal judge's ruling that the Trump administration unlawfully created the public charge rule, said Jesse Bless, director of federal litigation for the American Immigration Lawyers Association, a group representing 15,000 law professionals. Biden's Department of Homeland Security may also try to create a new public charge rule that replaces Trump's version with one more favorable to immigrants, Bless said. That would require following the same bureaucratic rule-making process that Trump used. The downside is that the rule-making process could take six months or longer before the new rule is finalized. A new public charge rule also could face legal challenges, Bless said.