



To Stop ‘Frequent Fliers’ at the Border, Prosecute Recidivist Illegal Migrants

But few illegal entrants are prosecuted, likely because deterring illegal entries is not Biden’s border policy

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On May 17, my colleague Rob Law reported that CBP encountered more aliens at the Southwest border (234,088 — the population of Richmond, Va.) than in any prior month in history. In its monthly apologetic, CBP contends the “number of unique encounters nationwide in April” was really just 157,555, the rest being “recidivists”, that is aliens previously apprehended and expelled in the prior 12-month period. That raises the question of why the Biden administration hasn’t been prosecuting these “frequent fliers” at the border — because that is the best way to stop them from coming back.

The Recent Increase in Recidivists. DHS uses several different metrics to assess Border Patrol’s effectiveness in deterring illegal entrants, as a 2016 report from the Congressional Research Service (CRS) has explained. The recidivism rate is one. Simply put, if aliens keep coming back, Border Patrol agents — and border policies — aren’t deterring them.

High levels of recidivism, which had previously been used to measure the ineffectiveness of border policies, have been converted by the Biden administration into a hobbyhorse it uses to cover up just how bad the catastrophe at the border has become.

To paraphrase, DHS and other border apologists now regularly assert some version of “Things aren’t that bad because the number of ‘unique individuals’ (a designation of recent vintage) is lower than the hundreds of thousands of encounters we keep reporting on monthly.”

The recidivism rate has been on a rapid upward trajectory of late. As calculated by CBP for all U.S. borders (including the Canadian and coastal borders), the total rate of recidivism for illegal entrants was 14 percent in FY 2015, 12 percent in FY 2016, 10 percent in FY 2017, 11 percent in FY 2018, and 7 percent in FY 2019, before jumping to 26 percent in FY 2020 and 27 percent in FY 2021 and FY 2022 (through April).

It is curious that CBP under the Biden administration starts its count in FY 2015, when the recidivism rate was fairly low (and including FY 2019, when it was historically so). According

to a 2017 DHS analysis, the Southwest border recidivism rate was at or above 30 percent from FY 2005 until FY 2009, and only fell below 25 percent in FY 2011.

Nonetheless, as noted, the high recidivism rate of late has been used by various “experts” to parrot the Biden administration line that things are not as bad at the border as they appear, and in one instance in March 2021 to proclaim that the “Border Looks Identical to 2019 Without Repeat Crossers” (a point that did not age well).

One breathless August 2021 “fact check” (which also did not age well), in fact, took various Republican members of Congress to task for “misrepresent[ing] border data”, asserting:

As of July, there had been more than 1.3 million “encounters” at the southwest border in fiscal year 2021, according to U.S. Customs and Border Protection data. That does not mean that 1.3 million people crossed the border, nor does it mean that 1.3 million people tried to illegally enter the country.

That’s because the total figure for encounters includes some people who tried to enter the U.S. more than once during that time period. It also includes some people who attempted to enter the country legally through an official port of entry.

But there has been some confusion in the way the figures for encounters have been presented, including by some politicians who have been critical of how President Joe Biden’s administration has responded to a monthslong rise in illegal border migration.

The Reason for the Increase in Recidivists at the Border. That said, many of those same “experts” have correctly identified the reason for the increase in recidivists at the Southwest border: CDC orders directing the quick expulsion of illegal migrants at the land borders, issued under Title 42 of the U.S. Code in response to the Covid-19 pandemic.

As a writer at the libertarian CATO Institute explained presciently in September 2020: “Title 42 expulsions ... lower the costs for illegal border crossers. By removing them very rapidly and not enforcing consequences, apprehended and expelled illegal border crossers face lower costs in their attempts to cross the border.”

As CBP explained in its aforementioned apologetic (formally the press release for its “April 2022 Monthly Operational Update”): “Title 42 has contributed to a higher-than-usual number of migrants making multiple border crossing attempts, which means that total encounters somewhat overstate the number of unique individuals arriving at the border.

“Operation Streamline” and the Decrease in Recidivism in the New Millennium. A similar dynamic was at play in the early years of the new millennium when the rates of recidivism at the Southwest border, as noted, were also high.

Up until FY 2014, most illegal entrants were single Mexican adults, mostly males. In FY 2009, for example — as noted, the last year the recidivism rate at the Southwest border was above 30 percent — more than 91 percent of all illegal entrants apprehended by Border Patrol there were from Mexico.

Most of those single adult Mexican nationals apprehended entering illegally were quickly sent back through the closest border port of entry and returned through either voluntary return,

reinstatement of a prior removal order, or expedited removal. That put those who wanted to illegally reenter back close to the border, and not surprisingly many did reenter.

In response to this Mexican reentry problem, Border Patrol began implementing a program known as “Operation Streamline” in December 2005.

The point of Streamline was to deter illegal entrants by prosecuting them for illegal entry under section 275 of the Immigration and Nationality Act (INA) and illegal reentry after removal under section 276 of the INA.

As the Migration Policy Institute (MPI) concluded after reviewing the recidivism rates for various enforcement options at the border: “Migrants prosecuted in federal court ... were the least likely to return.” The recidivism rate was 31 percent for those who had been voluntarily returned, 18 percent of those subject to expedited removal, 16 percent of those returned under reinstatement, and 10 percent for prosecuted migrants (though some prosecuted for illegal reentry served more than 12 months and were released outside the window for counting recidivist entries).

Streamline started in the Del Rio, Texas, Border Patrol sector and was expanded to a “targeted enforcement zone” in the Laredo, Texas, sector in 2007 and to the entire Tucson, Ariz., sector by 2008.

According to Border Patrol estimates, between FY 2006 and FY 2011, nearly 168,900 apprehensions at the Southwest border resulted in referrals to the Department of Justice for prosecution — nearly 91,000 in FY 2012 and FY 2013 alone. MPI concluded that between 15 and 25 percent of illegal migrants were prosecuted for immigration crimes between FY 2011 and FY 2014 annually.

I should note that Streamline was not the only reason why the recidivism rate dropped in the 2010s. As the number of “other than Mexican” (OTM) migrants increased, recidivism also fell because OTM migrants were not sent back to Mexico (from which they could have quickly reentered), but rather to their home countries, meaning a longer trip back to the U.S. border.

Further, adult migrants entering illegally with children in family units (a demographic that also began rapidly increasing in FY 2014) were usually not prosecuted, with the exception of the short-lived “zero tolerance” policy under the Trump administration in the middle of 2018.

Still, it is impossible to discount the fact that prosecutions under Streamline deterred repeated border crossings.

Few Prosecutions for Illegal Entry Under the Biden Administration. Even though prosecution deters recidivists, and despite its complaints about recidivism, the Biden administration has prosecuted few illegal entrants, at least compared to the number of prosecutions in recent years.

In FY 2017, for example, nearly 36,650 individuals were prosecuted for illegal entry. That climbed to 68,470 illegal entry prosecutions in FY 2018 and 80,886 illegal entry prosecutions in FY 2019.

With the advent of Title 42 under the Trump administration in late March 2020, however, prosecutions fell, with 27,630 individuals prosecuted for illegal entry in FY 2020. That said, 87

percent of aliens apprehended by CBP at the Southwest border between the full implementation of Title 42 in April 2020 and the end of the Trump administration in January 2021 were expelled under Title 42.

Title 42 expulsions have fallen under the Biden administration, and in April, just 41 percent of aliens encountered by CBP (and 54 percent of single adults) were processed for expulsion under Title 42.

At the same time, however, only a handful of aliens have been prosecuted for illegal entry under the Biden administration. DOJ only charged 963 defendants with illegal entry under section 275 between February 2021 and March 2022.

Aliens who have been expelled under Title 42 have not been “removed” under the INA, and therefore are not subject to prosecution under section 276 of the INA for re-entry after removal. That said, even one illegal entry would subject the offender to a misdemeanor prosecution (carrying a sentence of up to six months) under section 275 of the INA, and a second entry to a felony prosecution carrying a sentence of up to two years.

Prosecution Would Deter Recidivists — but Deterrence Isn’t Biden Administration

Policy. The Cato analysis is correct when it states that Title 42 lowers the costs of illegal entry, but as the foregoing shows, prosecuting illegal entrants is a powerful deterrent. It’s one that the Biden administration has been loath to use, however — likely because the Biden administration no longer has a policy of deterring illegal migration.

One could argue that the point of Title 42 is to keep aliens from congregating in border detention facilities, and that aliens who are prosecuted would be detained for a longer period. Three points reveal the flaws in this argument.

First, ICE has unused detention space (costing taxpayers *\$40 million per month*) in which it could easily hold illegal migrants pending prosecution.

Second, as noted, prosecuting illegal entrants would mean that fewer recidivists would reenter illegally. That means that, in short order, fewer migrants would be detained, cutting the population at Border Patrol detention facilities, and freeing up agents to stop drugs, terrorists, and other aliens. Win-win-win-win-win.

Third, nothing in CDC’s Title 42 orders prevents DHS from prosecuting recidivist illegal entrants. And given that nearly half of the single adult migrants CBP encountered at the border in April weren’t expelled under Title 42, Title 42 — which mandates expulsion — really isn’t being vigorously enforced anyway.

The Biden administration is correct in stating that the number of “frequent fliers” apprehended at the Southwest border is high (though not historically so). If it wanted to deter recidivists, the president would prosecute them — but he isn’t, likely because deterring illegal entries isn’t Biden administration policy.