

THE WEEK

How Biden can future-proof America's immigration system

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America's immigration system was broken even before President Donald Trump's white nationalist aide Stephen Miller took his hammer to it.

It is hard to remember, but four short years before Trump assumed office, the national conversation was focused on rolling back the red tape and bureaucratic obstacles that were preventing too many worthy immigrants from coming into the country. Yet far from deregulating the system, as would have behooved an administration allegedly dedicated to cutting bureaucracy, Trump, with Miller's help, systematically exploited every flaw in every part of the system to radically cut back immigration beyond anything anyone outside of ultra-restrictionist circles had ever imagined.

So President-elect Joe Biden will have to rebuild it brick-by-brick on a priority basis. But while he is doing so, he should also work with Congress to add layers of support to protect it from assaults by future Stephen Millers.

For the last four years, the headlines focused on the administration's more sensational anti-immigration initiatives including the "Muslim" travel ban; scrapping the DACA program that gave deportation relief to those who were brought to the United States without authorization as children; the Great Wall of Trump; a zero-tolerance border policy that ended up snatching babies from migrant moms seeking asylum and viciously separating families. In addition, the Migration Policy Institute has identified more than 400-plus behind-the-scenes executive actions and rule changes that have received less attention but have been even more effective in walling out immigrants.

Consider immigrant visas for the overseas family members — spouses, minor children, parents and siblings — of American citizens and permanent residents. Even before the pandemic, Cato Institute's David Bier calculated that immigration under this category had declined by about 24 percent compared to 2016 because the administration slowed processing and doubled the denial rate. But things came to a near complete halt during the pandemic. In May, the administration allowed a measly 782 immigrants in this category compared to the monthly average of 55,000 four years ago. How did Miller accomplish this feat? He used the pretext of the pandemic to shut down consular offices so that they could no longer conduct the mandatory in-person interviews. However, he did not allow them to switch to online interviews, putting applicants in a complete

bind. All in all, under this administration, about 738,000 fewer overseas family members of Americans will be admitted into the country — the other family separation policy that no one talks about.

But it's not just foreigners abroad whom Miller has thwarted. He also made it infinitely more difficult for foreign professionals and others already in the U.S. to upgrade temporary visas to green cards or permanent resident status. Compared to 2016, the Trump administration is approving less than half of their applications and by January, if the current rate persists, about 246,313 fewer such applicants will be able to get green cards.

It took Miller a few years to implement his diabolical plans to slam these two categories of immigrants. Not so with respect to refugees. Right off the bat he slashed the annual refugee cap from 110,000 under Obama to 15,000 now, a historic low. And he subjected them to such "extreme vetting" that the U.S. isn't even going to hit that ceiling. All in all, during Trump's tenure, America will end up admitting nearly 300,000 fewer refugees than if 2016 levels had been maintained.

Refugees of course settle permanently in the U.S. as do others seeking green cards. But Miller hasn't even spared tourists and business travelers who want to just visit America for a short time. Bier estimates that the Trump administration has issued nine million fewer visas than would have been the case had it maintained the 2016 rate. Some of this drop can be attributed to coronavirus-related travel restrictions, but much of it happened before that.

The upshot is that the backlog of applications for any kind of immigration benefit — green cards, temporary work visas, tourist visas, you name it — has skyrocketed. Before Trump assumed office, this backlog was two times the quarterly number of new applications, which was shameful enough. But now this backlog has almost doubled. Currently, seven million people wishing to come to the U.S. for any reason are cooling their heels.

America's immigration system is restrictive but it is not *this* restrictive. Congress has created all these programs to give immigrants functioning pathways to come to the country. But Miller and Trump have jammed literally all of them. Moreover, Bier and his Cato colleague Alex Nowrasteh point out, Miller's actions have contradicted every principle that Congress has enshrined in immigration law including family reunification, equal treatment by nationality, and humanitarian relief for those escaping persecution or political turmoil.

How did he accomplish this? Essentially by abusing grants of executive power in immigration law when he could. And when he couldn't, he grabbed these powers from other laws.

Consider how Trump's travel ban against mostly Muslim countries used one immigration law to subvert another. The Immigration Act of 1965 was expressly meant to end four decades of discriminatory national origins quotas that gave preference to white European immigrants over brown-skinned Asians and extend equal treatment to all. But the 1952 Immigration and Nationality Act also grants a president the authority to "suspend entry of aliens or a class of aliens" that he deems detrimental to "national interest." This has typically been used to bar agents

of a hostile power or hardened criminals — not impose a religious or national test. But Trump's travel ban invoked this authority to do exactly that.

When Trump couldn't turn immigration law against itself, he used other statutes to do so. For example, note Bier and Nowrasteh, when the pandemic hit, Miller prevailed on Trump to use the emergency powers he had invoked to suspend the family reunification program for the entire year. Moreover, he went out of his way to emphasize that he was doing so not to protect American health but American jobs. Basically, he was thumbing his nose at Congress that has explicitly and repeatedly rejected a labor market test for this program because it is too cruel to keep husbands and wives or parents and children separated. There are numerous other examples of similar power grabs by Miller to advance his restrictionist agenda.

The most urgent question now, with Trump and Miller on their way out, is what should Congress do to ensure that its will is respected in the future?

Bier and Nowrasteh recommend enacting a strict two-week limit on a president's ability to impose a travel ban, especially one based on nationality and religion. Any extension should require Congressional authorization, which ought to be granted only if the president can prove that there is some compelling — not just ordinary — national interest at stake.

In addition, I would suggest, instead of handing the president the authority to establish a ceiling for refugee admission, Congress should set a floor every year. If an administration is unable to hit the mandatory minimum quota, it should be required to offer an explanation. Moreover, right now immigrants whose visa petitions are denied have no recourse, regardless of whether they are sponsored by their families or employers. They are completely at the mercy of the federal bureaucracy. Rep. Sheila Jackson Lee (D-Calif.) has suggested offering some judicial recourse by creating a visa appeals board that can review the grounds of their rejection.

None of this is perfect. Congress has built executive discretion in immigration laws to allow the president to respond to emerging circumstances on the ground. And Trump is far from the first president to use that discretion not to welcome but to stop immigrants.

But Miller was unusually diabolical and motivated and took things to a whole new level. He had a keen understanding of the loopholes in America's immigration system and knew exactly how to exploit them in the service of an ultra-restrictionist agenda. His actions were effectively a stress test of the system and exposed its weaknesses. Biden should use that information to work with Congress to foolproof it against future Millers.