



Criminal Immigration Prosecutions Plummet, with One Smuggling Exception

Despite the record number of apprehensions at the Southwest border, few aliens face jailtime

Andrew Arthur

November 3rd, 2021

On November 1, the Transactional Records Access Clearinghouse (TRAC) at Syracuse University released a report captioned “Federal Immigration Prosecutions at Record Lows”. Despite promises from the Biden DHS that “repeat offenders” would be referred for criminal proceedings, prosecutions for most immigration-related offenses have plummeted since the start of the pandemic, and are unlikely to rise under the current administration. Only smuggling prosecutions are returning to normal.

TRAC’s report examines three different categories of border-related criminal immigration charges: Illegal entry under section 275 of the Immigration and Nationality Act (INA); illegal reentry of removed aliens under section 276 of the INA; and smuggling by bringing in and harboring illegal aliens under section 274 of the INA.

Illegal entry is both a civil ground of removability under the INA and, as noted, a criminal offense. A first offense for illegal entry is a criminal misdemeanor, subject to a sentence of not more than six months’ imprisonment and a fine (though most defendants receive time served).

If aliens reenter the United States after being ordered removed, they are subject to a felony sentence of not more than two years and a fine, even if they have not been previously prosecuted. Criminal convictions are the most significant consequence of entering the United States in violation of law, and therefore are also the strongest deterrent.

During the period of “zero tolerance” under the Trump administration, prosecutions for illegal entry under section 275 of the INA exceeded 6,000 per month between May 2018 and February 2019 (they peaked at 8,780 in June 2018). Even after that point, however, they exceeded 4,000 per month from March to August 2019, and only fell below 3,000 at the onset of the Covid-19 pandemic in April 2020.

Thanks to orders issued under Title 42 of the U.S. Code by the CDC in response to the pandemic, DHS began quickly expelling illegal migrants beginning in late March 2020, and therefore both the total number of illegal entrants and border-related criminal prosecutions fell, as TRAC explained.

In August 2020, there were just 21 prosecutions for illegal entry under section 275 of the INA, although prosecutions for illegal reentry began to increase that month (to 1,077, up from 324 in April).

Prosecutions for illegal entry haven't recovered thus far under the Biden administration, and by June 2021, they cratered at 12. All told under Biden, there have been just 178 prosecutions for illegal entry under section 275 of the INA.

Similarly, in February, the first full month of the Biden administration, there were a mere 997 prosecutions for illegal reentry after removal, down from a pre-pandemic Trump high of 4,035 in July 2019.

Even as Border Patrol apprehensions at the Southwest border surged in the spring and summer of 2020, monthly illegal-entry prosecutions exceeded 1,300 just once (in June, at 1,304), and have barely approached 1,100 since.

That said, however, smuggling and harboring prosecutions under section 274 of the INA have slowly climbed back up to their pre-pandemic levels.

The peak monthly total under the Trump administration in this category was hit in October 2019, when there were 613 prosecutions. That total fell to just 92 in April 2020, the depths of the pandemic, before rising to 467 in December 2020.

That trend has continued under the Biden administration — sort of. Post-inauguration, they reached their peak in April (559) before falling again to 370 in September.

Why the fluctuation in prosecutions for illegal entry and reentry between Trump and Biden? As TRAC explains:

The change in the number of federal prosecutions is often unrelated to the number of migrants coming across the border. Instead, prosecutions are largely driven by U.S. border policy. In order for migrants to be prosecuted in federal court, they typically must be referred to federal prosecutors by Customs and Border Protection. U.S. border policy has chosen to not criminally prosecute illegal border crossers before deporting them.

Criminally prosecuting aliens for smuggling and harboring under section 274 of the INA is politically safe; the president will likely not risk alienating those in his “progressive” base if he does so, and thus the return to the norm.

Prosecuting aliens for entering or reentering illegally, on the other hand, is likely to stir a backlash among those on the left for whom all illegal migrants are “asylum seekers” — regardless of whether they have a legitimate asylum claim or not.

The “family separation” and “kids in cages” tropes that Biden peddled on the campaign trail largely were premised on that period of “zero tolerance” (as I have explained in the past),

when adults in family units were sent to U.S. Marshals Service custody for prosecution, leaving their erstwhile accompanying children “unaccompanied”.

That required DHS to send those children to shelters run or contracted for by the Department of Health and Human Services, for placement with a “sponsor” in the United States — the legal source of their separation from their parents.

Consequently, the Biden administration is unlikely to prosecute any adult alien who enters with a child, even though the number of aliens in family units apprehended at the Southwest border increased more than sevenfold, to more than 451,000, over FY 2020.

Of course, aliens in family units are also likely to be quickly released from DHS custody, boosting the incentives for foreign national adults to bring a child with them when entering this country illegally.

That journey exposes those children to danger and trauma (as a bipartisan federal panel determined in 2019), and not prosecuting the adults entering in family units for illegal entry simply makes the incentives to bring a child along during that dangerous trek to the United States even greater.

Given the fact that the Biden administration is now proposing to make migrant families that were separated millionaires (as my colleague, Rob Law, explained on October 29), expect to see the number of illegal migrants entering with a child soar in FY 2022. Those children are not only a “get out of jail free” card, but an “avoid prosecution and get rich” one, too.

The pandemic and Title 42 orders plainly tamped down on the number of aliens who were prosecuted for illegal entry and reentry, but as the number of aliens entering illegally reached all-time highs at the Southwest border in FY 2021, prosecutions should have surged, as well.

That they did not is a policy choice on the part of the Biden administration, as explained above.

That said, in its August 2021 Monthly Operational Update, CBP asserted that it had begun “a Repeat Offender initiative, under which single adults who have previously been apprehended and deported under” the INA (as opposed to Title 42) would be “referred for prosecution” in July.

If that happened, it is not reflected in TRAC’s statistics: Prosecutions for illegal reentry instead fell between June (1,304) and September (1,067), with minor monthly fluctuations. Interestingly, CBP did not repeat this claim in its latest, September 2021, Operational Update.

TRAC cites to, of all sources, the libertarian Cato Institute for the proposition that: “Many immigration commentators. ... viewed criminal prosecution as a disincentive for crossing unlawfully.” I concur, and if Cato and I agree, it must be true.

By failing to prosecute aliens — and in particular aliens who have reentered the United States illegally after being ordered removed — the Biden administration is not using its best tool to discourage illegal immigration. That said, there are few if any Biden policies that would dissuade illegal migrants from violating U.S. law at the border, so non-prosecution is just more of the same.