



Quick Hits

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Immigration: A Sea Change Under Biden

While America has suffered from huge amounts of illegal immigration in recent decades, those wishing to enter illegally have generally at least had to evade the authorities. This has been a constant across presidential administrations of both parties. Under President Biden, however, there has been a sea change, as his administration has effectively refused to enforce federal immigration laws. Instead of turning back or detaining non-citizens who have no clear authorization to be in this country, the Biden administration has routinely apprehended them and then summarily released them into the United States.

At the same time, hordes of illegal aliens have crossed what is now essentially an open southwestern border.

Indeed, there have already been more “got-aways” (those detected but not apprehended) in the first two-and-a-half years under the Biden administration than there were in the eight years spanning the two prior presidential terms.¹ Huge numbers of migrants have journeyed to the U.S. border under Biden, encouraged by his rhetoric of leniency, and they generally haven’t been disappointed. Among those arrivals have been increasing numbers of foreign nationals on the terrorist watch list. In its refusal to “take care” that the immigration laws “be faithfully executed,” the Biden administration marks an abrupt—and unconstitutional—departure from all prior precedent.

Key Arguments

Biden Immigration Policy: A Profound Departure from Precedent and Law

- The Biden administration is emphasizing “equity” over law enforcement, in defiance of federal law.
- In just 2.5 years under Biden, there have already been 1 million more encounters (5.6 million) with non-citizens at the southwest border than there were in the prior 8 years (4.6 million) under Presidents Obama and Trump.²
- In December 2020, pre-Biden, the U.S. Border Patrol released 17 aliens into the U.S.; in December 2022, under Biden, it released 140,355—more than 8,000 times as many.³
- The number of encounters on the southwest border between the U.S. Border Patrol and those on the terrorist watchlist increased from 3 in fiscal years (FY) 2019–2020, to 238 in FY 2022–2023, a 79-fold increase.⁴
- In just two years under the Biden administration, the U.S.’s foreign-born population over the age of 16 rose by 3.9 million—more than enough people to populate a new Los Angeles.⁵

The Biden administration is emphasizing “equity” over law enforcement.

On his first day in office, President Biden issued an executive order declaring that his administration would “reset the policies and practices for enforcing civil immigration laws.”⁶ That same day, he issued a separate executive order on “equity,” declaring that his administration would pursue a policy of “advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality.”⁷ In a subsequent document, the Department of Homeland Security (DHS) quoted that passage from Biden and made clear that it was applying it “[i]n the immigration and enforcement context.”⁸

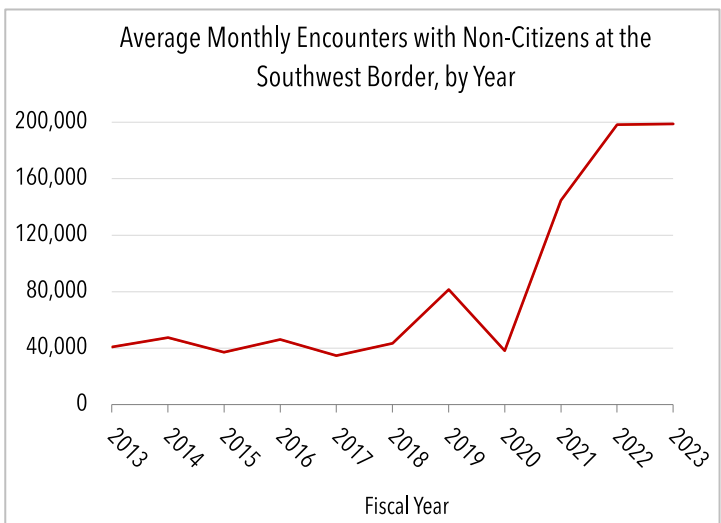
Thus, the Biden administration has emphasized “equity” over law enforcement, while prioritizing the well-being of foreign nationals over the well-being of American citizens. In the process, it has essentially substituted its own immigration policy for Congress’s, in plain violation of the constitutional separation of powers. “Policies pertaining to the entry of aliens,” Justice Frankfurter wrote for the Supreme Court in 1954, are “entrusted exclusively to Congress.”⁹ Yet this is not how things have played out since January 2021.

The number of encounters with non-citizens at the southwest border has skyrocketed.

The Biden administration almost immediately reversed a myriad of Trump administration policies for securing the border, including stopping construction of the border wall and eliminating the Migrant Protection Protocols (MPP). Under the MPP, better known as the “Remain in Mexico” policy, many asylum-seekers who had traveled from other countries through Mexico were returned to Mexico while awaiting their immigration proceedings.

In 2019, DHS called the MPP “an indispensable tool in addressing the ongoing crisis at the southern border and restoring integrity to the immigration system.”¹⁰ But Biden DHS Secretary Alejandro Mayorkas said the MPP had to be scrapped because it didn’t particularly “align with this Administration’s values.”¹¹

With Biden rolling out the red carpet, the number of encounters with non-citizens at the southwest land border has skyrocketed. (“Encounters” equal the number of people apprehended along the border by the Border Patrol plus the number deemed inadmissible at a port of entry by the Office of Field Operations (OFO).)¹²



- The average number of monthly encounters with non-citizens at the southwest border has risen from 47,876 in the eight years preceding Biden to 193,337 under Biden—a 4-fold increase.¹³
- After the Biden administration started closing family detention facilities during its first days in office, the number of encounters with individuals in a family unit rose from 4,406 in the last full month of the Trump administration (December 2020) to 83,499 in the sixth full month of the Biden administration (July 2021). That’s a 19-fold increase across a span of just over 200 days.¹⁴

The administration has violated federal law by using “parole” to release illegal aliens en masse.

The Immigration and Nationality Act (INA) states that if “an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a [removal] proceeding.”¹⁵ The INA also states that “if an alien asserts a credible fear of persecution, he or she shall be detained for further consideration of the application for asylum.”¹⁶ Justice Alito writes that these detention “requirements, as we have held, are mandatory.”¹⁷

The Biden administration asserts it can use “parole” or “prosecutorial discretion” to release illegal aliens into the U.S. as it sees fit. But this policy plainly violates federal law. Quoting the INA, Chief Justice Roberts writes for the

Supreme Court, “DHS may exercise its discretion to parole applicants ‘only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.’”¹⁸ In the past, DHS has construed this language to mean that those who would qualify might include, for example, a pregnant woman (for humanitarian reasons) or an alien scheduled to be a witness in a trial (providing significant public benefit).¹⁹ The Biden administration, however, is construing it to mean essentially anyone.

Over the past 2 years, the growth in the foreign-born population over age-16 is enough to populate a new Los Angeles.

U.S. Border Patrol (USBP) Chief Raul Ortiz testified that aliens encountered at the southwestern border during the Trump administration were released only under “very exigent circumstances.”²⁰ In December 2020, the last full month under Trump, the USBP released 17 aliens into the U.S. In February 2021, the first full month under Biden, the USBP released 8,798 aliens—more than 500 times as many. In September 2022, USBP releases cleared six figures (104,957) before rising to 140,355 in December 2022—more than 8,000 times the number from two years earlier.²¹

The Biden administration’s chief justification for releasing massive numbers of aliens is that it doesn’t have the space or personnel to detain them as the law requires. But per a 2023 DHS Inspector General report, “Since FY 2019, Congress has authorized most of the law enforcement personnel that CBP [Customs and Border Protection] and ICE [Immigration and Customs Enforcement] requested.”²² U.S. District Court Judge T. Kent Wetherell observes that DHS had the capacity to detain an average daily population (ADP) of 55,000 people just four years ago, but under the Biden administration “DHS requested a reduction to 32,500 ADP for fiscal year 2022” and for FY 2023 “requested a further reduction to 25,000 ADP.”²³ So, the Biden administration is releasing huge numbers of illegal aliens into the U.S. ostensibly because there isn’t enough detention space, while proposing further reductions in detention space.

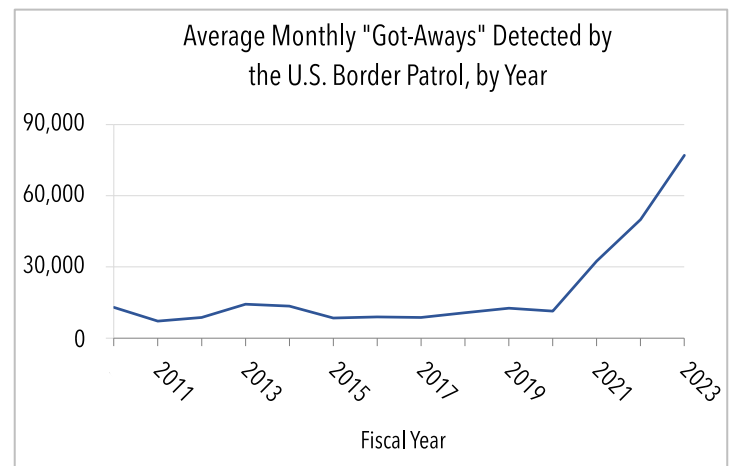
All of this is by design.

Among those in the U.S. who are over the age of 16, the foreign-born population rose from 42.9 million in May 2021 to 46.8 million in May 2023—an increase of 3.9 million in just two years. That’s more than enough people to populate a new Los Angeles.²⁴ This increase of 3.9 million over two years is likely unprecedented. It easily exceeds any *decade-long* increase in the foreign-born population prior to 1970–1980.²⁵

From May 2009 to May 2021—basically spanning the Obama and Trump administrations—foreign-born residents accounted for 31% of U.S. population growth among those over the age of 16. From May 2021 to May 2023, under Biden, that number rose to 72%—far outside of historical norms.²⁶ In addition to releasing huge numbers of illegal aliens into the U.S., the number who were detected but got away has ballooned under Biden:

- In each year from FY 2010–2020, “got-aways” averaged fewer than 15,000 per month.²⁷
- In 2021, the monthly average cleared 30,000; in 2022, it was 50,000; and in 2023 (so far), it has eclipsed 75,000. Across the first 17 months of FY 2022–2023, “got-aways” averaged more than 55,000 per month.²⁸

In a 2022 interview, Fox News anchor Bret Baier asked Secretary Mayorkas whether “it is the objective of the Biden administration to reduce—sharply reduce—the total number of illegal immigrants coming across the southern border.” Strikingly, Mayorkas wouldn’t answer yes, instead immediately replying, “It is the objective of the Biden administration to make sure that we have safe, legal, and orderly pathways for individuals to be able to access our legal system.”²⁹ This means having illegal aliens come to ports of entry and then releasing them into the interior of the country. The Biden administration insists on calling this “lawful” entry, but the law requires that those entering the U.S. without proper documentation be continuously detained until their claim can be adjudicated, since they don’t have the documents required to enter lawfully.³⁰



Judge Wetherell writes that Chief Ortiz “testified that the current surge differs from prior surges that he [has] seen over his lengthy career in that most of the aliens now being encountered at the Southwest Border are turning themselves in to USBP officers rather than trying to escape the officers.”³¹ Ortiz, whom the Biden administration selected as USBS chief, said aliens are likely “turning themselves in because they think they’re going to be released.”³²

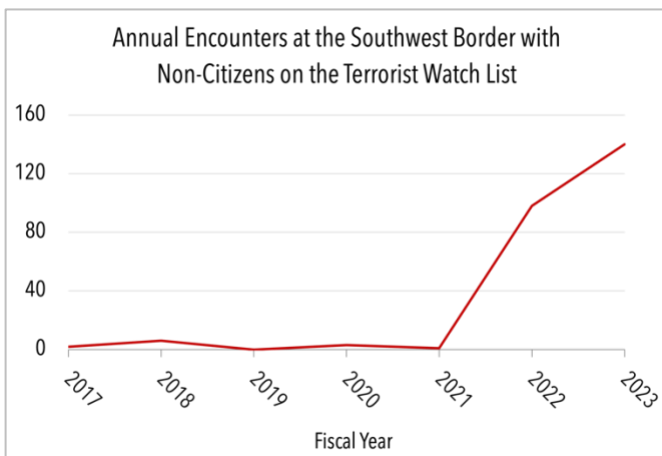
From February 2021 through May 2022, the Biden administration apprehended about 1.05 million migrants on the southwestern border and released them into the U.S.³³ Citing subsequent federal statistics, Andrew Arthur, a former federal immigration judge now at the Center for Immigration Studies (CIS), observes that this number cleared 1.7 million in February 2023.³⁴

The law says illegal aliens must be detained, since they lack the documents to enter “lawfully.”

That’s not including those who were detected but got away (totaling approximately 1.3 million from February 2021 through February 2023) or those who were never detected (an unknown number).³⁵ It’s also not including post-June 2022 releases by OFO or ICE, because they refuse to publish those numbers. Finally, it’s not including unaccompanied minors, some 280,000 of whom were apprehended and released between February 2021 and February 2023.

Adding in the unaccompanied minors and “got-aways” brings this total to about 3.3 million migrants who have either been released or escaped into the U.S.—not including the unreported OFO and ICE tallies, or the tallies of those who were never detected—through February 2023. That puts things on pace for about 6.4 million—roughly the equivalent of Los Angeles *plus* Chicago—over a full 4-year term, not even counting the unreported or undetected.

Our open border is inviting terrorists to enter the U.S.



The lawless quality of immigration under Biden invites human trafficking—per the DHS I.G. report, “FY 2022 set the record for migrant deaths with more than 800 migrants dying while attempting to cross the Southwest border.”³⁶ It also invites drug smuggling and terrorist activity.

While the Biden administration encourages aliens seeking to enter the U.S. to come to ports of entry, terrorists appear to prefer to enter in between the ports along what CIS’s Arthur calls “the current de facto open Southwest border.”³⁷ While no one knows how many potential terrorists have crossed that border over the past 2.5 years without being caught, the number that *have* been caught is alarming.

According to Customs and Border Protection statistics, the USBP had 11 encounters along the southwest border from FY 2017–2020 with non-citizens on the terrorist watchlist (officially known as the Terrorist Screening Dataset). Then there were 15 encounters in FY 2021 alone, surpassing the total for the prior four years combined. Following that, there were 238 encounters in FY 2022 and the first three-quarters of FY 2023—as many encounters *per month* as over the 48 months from FY 2017–2020.³⁸

The Way Ahead

The solution to this unprecedented breach of our southwestern border is obvious: The Biden administration needs to stop prioritizing illegal aliens over Americans, stop substituting its own policy for Congress’s, and *start* fulfilling its constitutional responsibility to enforce federal immigration laws, rather than abdicating that duty in the name of “equity.”

Endnotes

The American Main Street Initiative is grateful to Andrew Arthur and Steven Camarota at the Center for Immigration Studies for their expert knowledge and willing assistance.