

Understanding President Biden's Deportation Moratorium



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Late in the 2020 Democratic primary, Joe Biden along with several other candidates vowed to implement a temporary moratorium on deportations of undocumented individuals if elected.¹ And true to his word, he directed the Department of Homeland Security (DHS) to implement that moratorium on his first day in office, alongside a suite of other changes in immigration policy.² While much has changed since President Biden initially supported a pause in deportations back in February, the moratorium is intended to allow the new Administration to reset our immigration enforcement from the indiscriminate days of the Trump Administration and begin to realign our immigration system with our national interest and values. Here's what you need to know about why President Biden has issued a deportation moratorium, how it works, and how past administrations have utilized this kind of executive power.

1. Why Did President Biden Implement a Moratorium?

Until the global Covid-19 pandemic took over the lives of Americans from coast to coast, immigration was perhaps the biggest defining issue of Donald Trump's presidency. During his four years in the White House, Donald Trump unilaterally changed our nation's approach to immigrants. While comprehensive immigration reform and legislative protections for Dreamers languished in Congress, Trump took over 400 executive actions on immigration issues.³ And while many of these changes, from the Muslim ban to his attempted revocation of the Deferred Action for Childhood Arrivals (DACA) program, made national headlines, many more surreptitiously reshaped the face of our immigration system without notice.

Recalibrate our immigration system to undo Trump's actions will require time, especially when it comes to resetting immigration enforcement so that it reflects our values as a nation. Some of these Trump changes, like replacing targeted enforcement categories with a blanket mandate to maximize deportations, can be fixed almost immediately by the Biden Administration, but others that require a regulatory process to undo will require more effort and time, including a several month-long public review and comment period. This means many of Trump's policies could remain in place months after he has left office, including:

- **Expedited Removal** – The Department of Homeland Security issued a rule this year allowing undocumented immigrants living in the country for less than two years to be deported without a hearing before a judge, likely violating the right to due process that is accorded all those present in the United States by our Constitution, regardless of citizenship status.⁴
- **Public Charge Rules** – The Trump Administration also implemented long-expected regulations that threaten *legal* immigrants with deportation if they fall on hard financial times.⁵
- **Blocking Asylum Cases at the Border** – After forcing people who are seeking to petition for asylum under our laws to wait in often risky or dangerous circumstances in Mexico, Trump issued a regulation that blocks asylum cases where a person enters the US between ports of entry, though a requirement to enter at certain places has never been a part of our asylum laws.⁶

In addition to temporarily pausing the impacts of all of these Trump changes, this deportation moratorium comes while the nation continues to grapple with a deadly pandemic, at a time when deporting thousands of people poses significant health risks to immigration officers, immigrants, and people in other countries across the globe. While the widespread impacts of the pandemic had yet to hit America when Biden promised to implement this policy, our current circumstances intensify the need for a pause. Immigration detention standards have dramatically languished under the Trump Administration. Over 7000 people have tested positive for Covid-19 while in immigration detention, posing not just a risk for other detainees, but also for those who staff our immigration system and carry out deportations.⁷

And at the same time, much of our immigration system remains shuttered due to the pandemic. Immigration detention levels have been steadily dropping after the Trump Administration closed off most avenues for people to enter. There are currently about 16,700 individuals in immigration detention facilities as of November 2020, dramatically down from the daily 2019 average of 50,000 detainees.⁸ As global travel and migration remains shuttered, most undocumented immigrants remaining in our country have long-standing ties to the United States: exactly the population that most Americans believe should be able to earn a permanent pathway to legal status rather than being deported.

2. What Does the Moratorium Order Do?

President Biden's moratorium is a temporary pause on removals of undocumented immigrants from the country. For 100 days, beginning on January 22, final orders of removal (the typical final step in a deportation case) will not be carried out, with four exceptions:

- Those who the Acting Director of Immigration and Customs Enforcement (ICE) finds to be engaged or suspected of terrorism or espionage, or is a danger to national security;
- Anyone who was not in the United States before November 1, 2020;
- Individuals who agree to waive their right to stay in the United States, provided they were fully aware of the consequences and had an opportunity to access counsel; and,
- Anyone who the Acting Director of ICE determines by law is required to be removed.⁹

While the order stops nearly all standard removals, it does not prevent new apprehensions or detentions, as further discussed below. It also does not pause or cancel the proceedings of current cases or the filings of new cases, meaning someone could still be issued a removal order within the 100 days. That order would simply not be enforced until after the moratorium

ends. And practically, most immigration cases for those not in detention are already on hold due to the logistical hurdles created by the pandemic.¹⁰

The new Biden Administration policy directs DHS to use this time period of pause to conduct a top-to-bottom review of all immigration enforcement policies and recommend new ones in line with the new Administration and the nation's values. Additionally, it immediately replaced the prior Administration's enforcement priorities, which in practice had led to untargeted and indiscriminate enforcement including against those who have been here for years contributing to their communities. The Biden Administration's three new priorities for immigration enforcement focus on national security, recent arrivals, and public safety. Both during and after the pause on removals, enforcement will focus on:

- Those the Director of ICE determines are a national security threat by engaging in or suspected of terrorism or espionage, or whose detention or arrest is necessary to protect national security;
- Recent arrivals at the border, meaning anyone who attempted to cross the border unlawfully after November 1, 2020 or was not physically in the United States on that same date; and,
- Those who have been convicted of an "aggravated felony" as defined in the Immigration and Nationality Act, and who are determined to be a public safety threat.¹¹

These measures will strategically refocus immigration priorities while ensuring that in cases where the public safety is at risk, enforcement will continue. In the uncommon cases where there are serious safety or criminal concerns, ICE and other law enforcement will maintain custody of individuals and ICE is still authorized to seek transfers of priority individuals from local law enforcement. Moreover, while the pandemic brought significant drops in detention levels under the Trump Administration, nothing in the order mandates widespread releases of individuals. It simply instructs DHS officials to realign continued immigration detention and case proceedings with the new enforcement priorities.¹² And the current pause will provide sorely needed breathing space for our agencies to recalibrate enforcement to better reflect the broadly held American belief that undocumented people with longstanding ties to our communities should be able to earn a pathway to citizenship.¹³

3. Is a Deportation Moratorium Unprecedented?

Biden pausing deportations is not particularly novel. As discussed above, from March to September 2020, even the Trump Administration paused most enforcement actions because of the risks of the pandemic—to immigration officers, detainees, and countries receiving deported people.¹⁴ Other countries also have to consent to receiving their nationals back from the United States in order to complete a deportation. It is impossible for us to unilaterally send people to their country of origin. And with much of the globe still closing off travel from the United States, an official pause in deportations would change little in reality. Many countries are already blocking deportations from the United States while the pandemic persists.¹⁵

We've also similarly relaxed immigration rules during and after other crises. After Hurricane Katrina struck the Gulf Coast in 2005, the George W. Bush Administration unilaterally paused employer-verification requirements in the region, making it easier for essential businesses and communities to rebuild.¹⁶

The president also has broad discretion to prioritize and shape how our immigration laws are enforced. President Obama used that discretion to grant protections to millions of Dreamers and create immigration enforcement priorities that focused primarily on national security and public safety risks. A Biden Administration pause on deportations would utilize similar executive authority and discretion. As the world continues to grapple with the global pandemic, pausing standard deportations not only makes sense from a public safety and health perspective, it is entirely in line with the precedent set by prior administrations, including President Trump's.

Conclusion

At first glance, a moratorium on deportations may appear like a big shift in immigration policy. But this temporary pause is primarily intended to create time to return the American immigration system to pre-Trump practices and to weather the pandemic. It is both temporary in scope and clear in exceptions that safeguard national and public safety. While our immigration system faced immense challenges even before four years of Donald Trump, it has been left in shambles by the previous occupant of the White House, and President Biden's pause will help recalibrate and move the country forward.

ENDNOTES

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