



COMMUNITY EXPLAINER

BIDEN ADMINISTRATION'S NEWEST EFFORTS TO CRIMINALIZE MIGRATION

On May 31, 2024 the Department of Justice (DOJ) [announced](#) it plans to use more resources and expand collaboration with the Department of Homeland Security (DHS) to increase immigration-related criminal prosecutions. Punishing people for coming to the United States does not prevent people from trying, because people are coming for life-or-death reasons or to be with their loved ones. Instead, these prosecutions will only serve to prevent asylum-seekers from seeking protection in the United States – which is their right – and to fuel the mass incarceration of Black and brown people.

The DOJ plans to increase immigration-related criminal prosecutions by:

- **Adding more prosecutors and support staff to U.S. Attorney Offices along the border** to “increase federal immigration-related prosecutions,” presumably through increased prosecutions of unauthorized entry and re-entry under 8 U.S.C. §§ 1325 and 1326.
- **Continuing to prioritize the prosecution of felony human smuggling cases**, which the DOJ claims “creates a deterrent effect ... that discourages future smuggling.”
- **Launching an “Anti-Smuggling Rewards (ASR) Initiative,”** which the DOJ says will provide financial rewards for information leading to the “identification, location, arrest, or conviction” of individuals allegedly engaged in smuggling activity. The DOJ states it will focus its efforts on “high-priority” targets like organized crime leaders and transnational organizations.
- **Increasing penalties for individuals convicted of smuggling.** DOJ already boasts of a 27 percent increase in felony smuggling prosecutions and hundreds of convictions, some with sentences of 30 or more years, but in its announcement, the agency states it will “seek new and increased penalties” against persons convicted of human smuggling.

Why is the Biden administration’s latest effort to criminalize migration alarming?

Escalating criminal prosecutions of immigrants and smugglers does not deter migration: Decades worth of data strongly suggests that prosecution of entry-related offenses [does not deter future migration](#), which is primarily driven by violence, persecution, economic necessity, climate change, and a

desire to reunite with family members in the United States. Rather, the criminalization of migration has for decades perpetuated the over-incarceration of Black and brown people while fueling family separation and blocking pathways to lawfully seek asylum. Despite DHS's and DOJ's long-held position that prosecutions deter immigrants from crossing into the United States, the DHS Office of Inspector General and the U.S. Government Accountability Office have, in [separate reports](#), found that the government's own data cannot actually support the theory that immigration prosecutions deter migration. The DOJ's proposition that prosecution and higher sentences for smugglers will help dismantle human smuggling operations and lead to fewer immigrants seeking to enter the country between ports of entry is also not borne out in the evidence. Smugglers are often [immigrants themselves](#) who have sought to escape similar conditions to those driving their clients to migrate. Prosecution of human smugglers will not work because other, more clandestine and perhaps more dangerous, smuggling operations will take the place of existing networks. When people have a need to migrate, they will find a way to move between borders, and neither the prosecution of entrants nor smugglers has ever worked to slow them down.

Laws that criminalize entry and reentry into the United States have an explicitly racist history and are applied in a discriminatory way: The laws used to criminally prosecute people for entering and reentering the United States without permission originate from a law passed in 1929 during the height of the eugenics movement. The racist and white supremacist [intention](#) of these laws was to keep the United States a white country. Today's enforcement of these laws works to realize this racist intent, as [more than 90 percent](#) of people charged under these laws are from Mexico, Central America, South America, and the Spanish-speaking Caribbean. A less commonly charged entry-related crime, which involves crossing between ports of entry and then failing to "report at a border crossing point," has been used [disproportionately](#) to charge people from Muslim-majority countries by the Assistant U.S. Attorney's office in Del Rio, Texas.

Prosecution of immigration-related offenses cost taxpayers millions of dollars a year and divert resources away from other priorities: While the government does not publish the total costs of prosecuting and incarcerating immigrants prosecuted for immigration-related offenses, one conservative 2019 estimate for the cost of these prosecutions for [one year in Tucson](#), Arizona was \$62.4 million. Another study estimated that between 2005 and 2015, [taxpayers paid more than \\$7 billion](#) to incarcerate immigrants charged or convicted for these crimes. Beyond fiscal costs, these prosecutions divert prosecutor resources; prosecutions for immigration-related offenses are charged [more than any other](#) category of federal crimes. As a June 2018 [letter](#) from 70 former U.S. Attorneys objecting to the Trump administration's zero tolerance prosecutions and family separation policy stated, "[i]t is a simple matter of fact that the time a Department attorney spends prosecuting misdemeanor illegal entry cases, may be time he or she does not spend investigating more significant crime."

The DOJ's renewed reliance on immigration prosecutions is being pursued in the context of narrowed asylum pathways to the United States: As the 2024 presidential election nears, the Biden administration is increasingly [pursuing failed Trump-era policies](#) that shut the border with Mexico to asylum seekers. These unlawful policies have foreclosed the option for many to seek asylum in the United States and have helped make the border even [more unsafe](#) for immigrants. Those who are desperate enough to cross between ports of entry and are apprehended may be prosecuted for unlawful entry and face up to six months in prison, or up to 20 years in prison if they are prosecuted for unlawful reentry. To attempt to avoid these consequences, immigrants may turn to more dangerous migration channels.

Giving more resources for the criminalization of migration will contribute to the further militarization of border communities: In addition to immigrants and their families, border communities will suffer yet another increase in disproportionate surveillance, abusive policing, and rampant racial profiling. Border communities have repeatedly [demanded support](#) with long-standing issues facing their communities, many of which do not have running water, electricity, or adequate funding for schools and teachers. Border militarization is more than unsightly—it can be fatal. In states like Texas, where anti-immigrant state policies like [Operation Lone Star](#) already target suspected immigrants for state criminal prosecution based on race and national origin, state law enforcement officers have killed more than 60 people in deadly high-speed chases.

What should the Biden administration do instead?

The Biden administration says it's concerned with the well-being of "vulnerable populations" and with "accountability." But increasing immigration-related prosecutions and the militarization of immigrant and border communities will do nothing to further these goals. Instead of increasing reliance on racist laws to punish immigrants and go after smugglers, the administration must focus on pursuing policies that are fair, humane and sensible, and that will provide real solutions. This includes continuing to build and expand on safe and lawful pathways for immigrants to come to the United States, like the successful [process](#) for Cubans, Haitians, Nicaraguans, and Venezuelans to seek temporary legal status in the United States through a sponsor. Solutions must also address the root problems causing mass migration and embrace fixing our immigration courts and hiring more asylum officers so that immigrants can be ensured justice and fairness in their immigration legal proceedings. All of this is possible if our leaders stop playing political theater and start leading with courage and humanity.



QUESTIONS?

If you have any questions about these Department of Justice policies, please reach out to Ann Garcia at ann@nipnl.org.