



Understanding INA Section 212(f): The President’s Authority to Suspend the Entry of Migrants

Under Section 212(f) of the Immigration and Nationality Act (INA), the president of the United States has the authority to “suspend the entry” of certain noncitizens into the United States under certain circumstances. Specifically, the section reads:

“[W]henver the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.”¹

While the language gives the president broad powers over the entry of noncitizens into the United States, that power is not universal. Importantly, INA § 212(f) does not allow the president to interfere with or subvert other parts of the INA or other federal laws. That includes INA § 208, which grants people the right to seek asylum in the United States:

“Any alien who is present in the United States or who arrives in the United States (whether or not in a designated port of arrival [. . .]) irrespective of such alien’s status, may apply for asylum.”²

While 212(f) authority has been used in recent years in an attempt to restrict access to asylum at the U.S./Mexico border, the courts have identified significant limitations.³ Some courts have also ruled that the president may not invoke this authority to address purely domestic considerations, such as high unemployment or costs to taxpayers.⁴

How have presidents used their authority under Section 212(f)?

Typically, presidents have used INA § 212(f) to suspend the entry of noncitizens who have an affiliation with a group that the U.S. government opposes, or who are engaged in objectionable conduct.⁵ Some examples include President Biden suspending the entry of certain immigrants and nonimmigrants who immigration officials determine to be “enabling corruption.”⁶ Similarly, President Trump suspended the entry of certain persons “contributing to the situation in Mali,” following the breakdown of a ceasefire agreement in that country.⁷ President Obama suspended the entry of certain persons who conducted “grave human rights abuses by the governments of Iran and Syria via Information Technology,”⁸ and President Bush suspended the entry of immigrants or nonimmigrants “engaged in or benefiting from corruption,”⁹ to name a few.



The Trump administration used this authority more broadly, to execute several large-scale restrictions on entry of noncitizens. In a series of orders known collectively as “the Muslim Ban” or “the travel ban,” President Trump used this authority to ban the entry of people from seven predominantly Muslim countries, even those who already had lawful permanent resident status.¹⁰ Courts found that this order was likely to deprive individuals of their due process rights by failing to give them such notice or a hearing prior to restricting their ability to travel.¹¹ In response, the Trump administration introduced a revised 90-day travel ban of individuals from the same countries, but exempted those with green cards and added restrictions on North Koreans and certain Venezuelan government officials.¹² This was largely seen as an attempt to circumvent constitutional challenges to the initial ban that it was based on racial or religious animus.¹³ Ultimately the third version of the travel ban was upheld by the Supreme Court in *Trump v. Hawaii* (2018). Notably, even in that decision, the court affirmed that 212(f) could not be used to “expressly override” other provisions of the INA.¹⁴

In one of the most sweeping uses of the authority, President Trump used 212(f) to suspend the entry of noncitizens at the U.S. southern border between ports of entry in October 2018.¹⁵ This proclamation was almost immediately challenged in the courts by several legal service providers in *East Bay Sanctuary Covenant v. Trump*.¹⁶ The Ninth Circuit Court of Appeals blocked the ban from being implemented. Another ban, commonly known as the “third-country transit ban,” was then introduced by Trump in 2019 in an attempt to prevent individuals from claiming asylum in the United States if they first transited through a third country. This ban was also challenged in the courts by the East Bay Sanctuary Covenant and related organizations. The litigation is ongoing, as subsequent rules limiting access to asylum in the United States continue to be challenged.

Some other uses remain legally uncertain. There is an ongoing debate about the extent to which the president can use this authority to restrict immigration in response to perceived domestic issues. In April of 2020, the Trump administration issued a proclamation temporarily suspending the entry of people with non-immigrant visas, ostensibly to curb unemployment during the COVID-19 pandemic.¹⁷ Some courts found that since unemployment within the United States was a purely domestic issue, the authority to suspend immigration should not apply, while other courts disagreed and held that this was within the president’s authority.¹⁸ A similar debate played out in court regarding a different suspension of entry signed by President Trump which banned the entry of certain noncitizens who lacked specific health insurance plans.¹⁹ Both proclamations were later revoked by President Biden before these disagreements reached the Supreme Court, and the question of whether the authority may be used to address purely domestic policy concerns remains an unsettled area of law.²⁰

Practical Implementation

Historically, the suspension of entry authority has typically applied to people at United States embassies and consulates applying for visas. If a consular officer determines that a person seeking a visa is subject to a 212(f) restriction, they typically refuse to issue a visa.



Increasingly, however, the restrictions have been implemented by U.S. Customs and Border Protection at the U.S. southern border, or by asylum officers in determining asylum eligibility at initial screenings.

Because of the broad discretionary authority granted by 212(f), the executive branch has had wide latitude in deciding when people can have their entry “suspended,” and who is authorized to make those determinations. In particular, people denied entry often do not have the power to challenge their denials in federal court (this is known as the “plenary power” doctrine).

However, as broad as this power may be, it is not limitless. It is notable, for example, that federal courts have held in the Trump “Muslim Ban” cases that the power to suspend entry does not allow the executive branch to completely ignore due process. And it is clear that the “plenary power” ends where other Congressionally-enacted law begins—such as with the INA’s asylum provisions.

Endnotes

¹ Immigration and Nationality Act § 212(f), 8 U.S.C. §1182(f).

² INA § 208, 8 U.S.C. 1158(a).

³ See generally, *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742 (9th Cir. 2018), *Gomez v. Trump*, 485 F. Supp. 3d 145 (D.D.C. 2020).

³ *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018).

⁴ *Nat'l Ass'n of Manufacturers v. United States Dep't of Homeland Sec.*, 491 F. Supp. 3d 549 (N.D. Cal. 2020), vacated as moot, *Nat'l Ass'n of Manufacturers v. U.S. Dep't of Homeland Sec.*, No. 20-17132, 2021 WL 1652546, at *1 (9th Cir. Apr. 8, 2021); but see *Doe v. Trump*, 984 F.3d 848 (9th Cir. 2020) (rejecting nondelegation challenge to INA 212(f)'s use for domestic policy matters).

⁵ 9 FAM 302.14-3(B)(1)(b)(2-3) (States that “Some Presidential Proclamations bar entry based on affiliation, ... Other Presidential Proclamations suspend the entry of persons based on objectionable conduct.”).

⁶ Ben Harrington & Theresa A. Reiss, Congressional Research Service, *Presidential Actions to Exclude Aliens Under INA § 212(F)* (2020).

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Protecting the Nation From Foreign Terrorist Entry Into the United States*, 82 Fed. Reg. 8977 (Feb 1, 2017).

¹¹ *Washington v. Trump*, 847 F.3d 1151, 1165 (9th Cir. 2017).

¹² *Protecting the Nation From Foreign Terrorist Entry Into the United States*, 82 Fed. Reg. 13209 (Mar. 9, 2017).

¹³ *Make the Road New York v. Pompeo*, 475 F. Supp. 3d 232 (S.D. New York, 2020).

¹⁴ *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

¹⁵ Proclamation 9822, *Addressing Mass Migration Through the Southern Border of the United States*, 83 Fed. Reg. 57661 (Nov. 15, 2018).

¹⁶ *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 909 F.3d 1219 (9th Cir. 2018).

¹⁷ Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak, 85 Fed. Reg. 23441, Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak, 85 Fed. Reg. 38263.

¹⁸ *Nat'l Ass'n of Manufacturers v. United States Dep't of Homeland Sec.*, 491 F. Supp. 3d 549, 563 (N.D. Cal. 2020).

¹⁹ *Doe v. Trump*, 418 F. Supp. 3d 573, 592 (D. Or. 2019), rev'd and vacated sub nom. *Doe #1 v. Trump*, 984 F.3d 848 (9th Cir. 2020), vacated on denial of reh'g en banc sub nom. *Doe #1 v. Biden*, 2 F.4th 1284 (9th Cir. 2021), Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System, in Order to Protect the Availability of Healthcare Benefits for Americans, 84 Fed. Reg. 53991 (Oct. 9, 2019).

²⁰ *Doe #1 v. Biden*, 2 F.4th 1284, 1285 (9th Cir. 2021).