AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Policy Brief: Presidential Authority to Block or Expel Migrants

Contact: Greg Chen at gchen@aila.org or Amy Grenier at agrenier@aila.org

Reportedly, President Biden is considering a new border policy that would restrict the number of migrants who can enter the United States and bar asylum seekers for extended periods. As reported, the legal basis for this border expulsion policy is Immigration and Nationality Act (INA) 212(f) (8 USC § 1182(f)), which gives the President power to suspend people from entering. AILA would oppose the broad exercise of this authority if it is done in a manner that prevents asylum seekers from receiving fair and accurate consideration of requests for asylum, a right guaranteed by U.S. law. While the legality of the new policy depends on its details, at least one federal court has already ruled on another Biden policy that restricts access to asylum at the border (the Circumvention of Legal Pathways regulation), finding that it fails to adequately grant access to asylum as required by the statute. From an operational perspective, it is unclear whether blocking access to asylum on a temporary basis is an effective deterrent or border management tool. Similar efforts have resulted in large numbers of people still coming and being forced to wait in Mexico in deplorable conditions vulnerable to crime and violence.

Sustained action is urgently needed to ensure the fair, orderly and more efficient processing of arriving migrants. Managing the border is no easy task and requires additional resources, coordination, and political commitment from both parties. A system that is both fair and orderly can be achieved, as laid out in AILA's recommendations to Congress and the President.

What is 212(f) authority?

INA 212(f) authorizes the President to suspend or impose restrictions on the entry of noncitizens when the President finds that their entry would be detrimental to the United States. The text reads:

> "[w]henever 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."

U.S. asylum law guarantees access to asylum.

The INA guarantees access to asylum for people arriving at the southern border: "[a]ny [noncitizen] who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival…" may apply for asylum. It is well-established that the statute's clear language requires the government to provide access to asylum even if the person enters without permission between ports of entry.[1]

How has 212(f) authority been used in the past?

Presidents have typically exercised authority under 212(f) to restrict the entry of specific, defined populations of individuals. In separate designations, President Biden has used 212(f) to suspend the entry of people who "undermin[e] peace, security, and stability in the West Bank;" 2) individuals involved with the Russian efforts in Ukraine; or people involved in the global illicit drug trade.

President Trump relied on 212(f) to implement broad restrictions on entry to the United States. For example, his various iterations of what is commonly known as the "Muslim Ban" were justified under 212(f). The first two versions of the Muslim Ban were challenged in court and struck down. The Supreme Court allowed a third version to stand in *Trump v. Hawaii* (2018) in a 5-4 vote. In *Hawaii*, the Court said "[w]e may assume that [212(f)] does not allow the President to expressly override particular provisions of the INA," but the Court found that there was no conflict between the statutory structure of the Visa Waiver Program and the President's use of 212(f).

President Trump also used 212(f) to suspend the entry of noncitizens between ports of entry across the southern border. When President Biden took office, he revoked both of these Trump proclamations.

How is 212(f) authority limited?

One limitation on a border expulsion policy based on 212(f) is the immigration statute itself– including our asylum laws. As discussed above, the President cannot override or conflict with the INA when using 212(f). Subsequent to the Supreme Court's ruling in *Hawaii*, a federal district court followed with the assertion that "[n]o court has found that Congress granted the President unfettered power, immune from judicial review, to issue a proclamation that directly conflicts with express provisions of the INA." The 9th Circuit also found Trump's policy that suspended entry at the southern border "unlawfully conflict[ed] with the text and congressional purpose of the INA." The court concluded that U.S law guarantees access to asylum and the 212(f) does not authorize the President to block access to asylum.

In the years after *Hawaii*, federal courts have also rejected the use of 212(f) when:

- The reasoning behind the use of 212(f) is "grounded purely on domestic rationales." The district court in *Young v. Trump*, addressing two COVID-related uses of 212(f) under the Trump administration, distinguished the case from *Hawaii* by noting that "where executive action under § 1182(f) is taken for reasons grounded in domestic policy, and not on international affairs and national security, a less deferential standard of review applies."
- The use of 212(f) was motivated by racial animus. A federal court concluded that the authority of 212(f) is limited by the Equal Protection Clause of the Fifth Amendment to the Constitution which protects against discriminatory animus and harm.[2]
- The use of 212(f) lacks a time limitation. In *Doe 1 v. Trump*, the 9th Circuit stated that the policy being challenged "is problematic in light of the absence of any language that

suggests even an implicit limitation, such as a limit measured by the occurrence of some future event or condition."[3]

How might President Biden block or expel asylum seekers using 212(f) authority?

While the administration has not published details, it is expected to use 212(f) to block or expel asylum seekers when the number of border apprehensions reaches a certain level. When the expulsion authority is "triggered," asylum seekers who are apprehended would likely be barred from seeking asylum and be rapidly deported. The ports of entry would likely remain open and a certain number of people could seek asylum at the ports. But even current capacity does not meet the demand, with people waiting four to five months–or longer–for a CBP One appointment in shelters in Mexico. This new policy could balloon the numbers of asylum seekers waiting in Mexico, where they are vulnerable to kidnapping, rape, and other violence at the hand of regional cartels. Even if the new policy ensures the continuing availability of CBP One appointments at ports of entry, it would not provide sufficient access to asylum to satisfy asylum law.

It is possible that the anticipated border policy will restrict access to asylum but allow people to seek more limited forms of humanitarian protection, such as "withholding of removal" (withholding) and Convention Against Torture (CAT) claims. As discussed above, the INA explicitly guarantees access to asylum for those at the border. A reliance on 212(f) that prevents access to asylum arguably directly conflicts with the INA.

It is possible that the Biden administration will justify its new policy in the way it has defended the Circumvention of Lawful Pathways (asylum transit ban) regulation, which limits access to asylum but creates limited exceptions and other options for some people. In *East Bay v. Biden*, the administration argued that the CLP is consistent with asylum law. The federal district court was not persuaded and found that there was a conflict with the INA and was concerned that the CLP did not provide adequate access to asylum even with the exceptions and alternatives the administration argued are available. The case is currently on appeal before the 9th Circuit.

Will a border expulsion policy harm migrants and asylum seekers?

Using 212(f) to block or expel asylum seekers at the border will likely have severe humanitarian consequences and may not effectively reduce border entries. If the expulsion authority is triggered, migrants will continue coming to the border and wait in Mexico. People waiting in unsafe conditions will be a boon to cartel expansion and exacerbate crime and fuel more narcotics smuggling on both sides of the border. Mexican cartel activity in the United States has already risen in recent years and is directly linked to drug and weapons trafficking.

Policies that close or limit entry at the border also result in increased crossing between ports of entry. The DHS Office of Inspector General twice found that under MPP "metering or turnbacks have been a direct cause of some asylum seekers choosing to cross between ports of entry, rather than wait months in Mexico in limbo with no guarantee of ever being permitted to access asylum at ports of entry."

Related resources:

- Congressional Research Service: Presidential Authority to Suspend Entry of Aliens Under 8 U.S.C. § 1182(f)
- AILA Sends Letter to Congress with Recommendations on FY2025 Appropriations
- Policy Brief: Barriers to Immigrant Visas Driving Migrants to the Southern Border
- Policy Brief: Border Solutions Are Attainable, but Proposals Under Consideration Fall Far Short

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[1] *See* East Bay Sanctuary Covenant, et al. v. Biden et. al., (N.D. Cal. July 25, 23) (order granting plaintiff's motion for summary judgement and denying defendants' motion for summary judgement, on appeal); Tim Ryan and Megan Mineiro, "Port-of-Entry Asylum Requirement Tossed by Federal Judge," *Courthouse News Service*, Aug, 2, 2019) https://www.courthousenews.com/port-of-entry-asylum-requirement-tossed-by-federal-judge/.

[2] When addressing several Trump administration actions including the use of 212(f) related to public charge concerns, a lower court in New York found that there was "a plausible inference that issuance of the . . . and Proclamation was based, at least in part, on discriminatory motives and their claims survive Defendants' motion to dismiss." *Make the Road New York v. Pompeo*.

[3] The 9th Circuit in *Doe 1 v. Trump*, addressing the same use of 212(f) related to public charge concerns by the Trump administration as litigated in Make the Road New York.