

If he is elected to the presidency, Donald Trump will have statutory authority to suspend the entry of all Muslim aliens.

By Nolan Rappaport

In a news release on December 7, 2015, Donald J. Trump called for “a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on.”¹ To put this in perspective, this is just a campaign talking point. It is by now means a certainty that he actually would do this if he were to be elected. Nevertheless, he may intend to impose a temporary ban of some kind on Muslim admissions to the United States if he is elected and our country's representatives still have not figured out “what is going on.” Would he have the authority to do it? Yes, in fact, the discretionary power of the president to suspend alien admissions to the United States is much greater than his prosecutorial discretion over the enforcement of the immigration laws. The president has explicit statutory authority to suspend all or any class of alien admissions by issuing a proclamation saying he has found that the suspended alien admissions were detrimental to the interests of the United States, and his suspension can last as long as he deems necessary. Moreover, waivers are not available. This authority is provided by section 212(f) of the Immigration and Nationality Act (INA), which reads as follows:

Whenever 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.

Whenever the Attorney General finds that a commercial airline has failed to comply with regulations of the Attorney General relating to requirements of airlines for the detection of fraudulent documents used by passengers traveling to the United States (including the training of personnel in such detection), the Attorney General may suspend the entry of some or all aliens transported to the United States by such airline (Emphasis added).²

The fraudulent document part of this provision was added by section 124(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).³

Although section 212(f) has been in the INA since it was enacted in 1952, it only has been employed in relatively limited circumstances. Usually, it has been used to bar the entry of persons who have engaged in conduct deemed contrary to United States interests, such as undermining democratic institutions in a particular country, or engaging in human rights abuses, or other conduct deemed objectionable. It also has been employed, however, in other types of situations, such as interdicting Haitian nationals on the high seas and returning them to Haiti.⁴

I experienced the futility of trying to help someone who has been barred from admission to the United States by a presidential proclamation when I was an immigration counsel on the House Judiciary Committee. The spouse of a United States citizen had been refused

admission under a 212(f) proclamation when he had tried to entry the United States after a trip abroad. He tried to get around the proclamation by applying for asylum. He was paroled into the United States for an asylum hearing. Although the asylum hearing was held in the United States, technically he had not been admitted. Despite finding that the man had established a well-founded fear of persecution, the immigration judge denied his request for asylum because he was barred from admission by the presidential proclamation. The immigration judge also held, however, that the man could not be returned to his own country because his life or freedom would be threatened there.⁵ In other words, he was still barred by the proclamation from being admitted and allowed to remain in the United States, but he could not be returned to his own country. In effect, this put him in detention as a man without a country. He had been in detention for several years when his citizen spouse sought my help. I did everything I could think of to get him admitted or at least freed from detention, but I succeeded only in making a number of high-level government officials very angry. They refused to admit or release him unless the president issued a new proclamation exempting him from the one that was prohibiting his admission and the president's staff told me that was not going to happen. I got a call from the man's wife one morning telling me that he had been removed from his cell in the middle of the night and flown to a country adjacent to the one he could not be returned to. He was never heard from again.

Can A 212(f) Ban Be Based On Religious Affiliation?

This would not be acceptable in a domestically applied law, but it might be permitted in an immigration law. I am not aware of any Supreme Court decision that has limited Congress' plenary power to determine who will be admitted to the United States. Nevertheless, I don't think Trump would base the ban on language he used in a campaign talking point. He does not appear to have advisors or speechwriters who are experts on immigration law, but he would have such experts at his disposal if he were to become the president. It would not be difficult for him to design an appropriate class for the ban that would achieve his objective, which presumably is to suspend the entry of groups that may include terrorists until the government has found a way to identify the terrorists among them.

It may not even be possible to implement a 212(f) proclamation to deny entry to Muslims. How would border inspectors find out that an alien seeking admission to the United States is a Muslim? I am not aware of any country that includes a national's religious affiliations on its passports and terrorists who apply for a visa wouldn't admit that they are Muslims if that would bar them from admission to the United States. Also, there are so many Muslims in the world and they are nationals of so many countries that it would be extremely costly and burdensome to identify and exclude them. According to the Pew Research Center, Muslims are the fastest-growing religious group in the world. There were 1.6 billion Muslims in the world as of 2010, which was roughly 23% of the global population,⁶ and those numbers certainly have grown larger since then.

I predict that he would develop a criterion for the proclamation that would be similar to the one recently established by the overwhelmingly bipartisan Visa Waiver Program

Improvement and Terrorist Travel Prevention Act of 2015,⁷ which was enacted to prevent terrorists from using the Visa Waiver Program (VWP). Nationals who enter under the VWP are not subjected to the scrutiny of the visa application process. The Visa Waiver Program Improvement and Terrorist Travel Prevention Act prohibits travelers who are in one of the following categories from using the VWP:

- Nationals of VWP countries who have been present in Iraq, Syria, or countries listed under specified designation lists at any time on or after March 1, 2011 (with limited government/military exceptions); and
- Nationals of VWP countries who are also nationals of Iraq, Syria, Iran, or Sudan.⁸

Examples of 212(f) Proclamations

President Barack Obama. According to a report from the Congressional Research Service, President Obama could have used his authority under section 212(f) to support attempts to prevent the deadly Ebola hemorrhagic fever from being brought into the United States during an Ebola Outbreak in Africa in 2014, by denying entry to aliens who had been in places where they could have been exposed to it, but he refused to do it.⁹ As of April 13, 2016, the 2014 Ebola Outbreak has caused a total of 11,310 deaths in Guinea, Sierra Leone, and Liberia but only one death in the United States.¹⁰ He has used his 212(f) authority, however, in other situations. He refused entry to aliens who had violated or caused others to violate the U.S. economic and financial sanctions that were imposed on Iran and Syria.¹¹ He used it to suspend the entry of aliens who have participated in serious human rights and humanitarian violations and other abuses.¹² He used it to suspend the admission of certain persons from South Sudan.¹³ He suspended the entry of aliens who have provided goods, services, or technology to Iran or Syria which are likely to be used to facilitate computers or networks to commit serious human rights abuses by or on behalf of the Governments of Iran or Syria.¹⁴ And he suspended the entry of aliens subject to United Nations Security Council travel bans and International Emergency Economic Power Act sanctions.¹⁵

President George Bush. President Bush suspended the entry of aliens who were responsible for policies or actions that threatened the transition to democracy in Belarus.¹⁶ He suspended the entry of aliens who were public officials or former public officials who had engaged in or benefited from corruption.¹⁷ And he suspended the entry of aliens who were responsible for actions that threatened Zimbabwe's democratic institutions and its transition to a multi-party democracy.¹⁸

President William J. Clinton. President Clinton suspended the entry of foreign nationals who had impeded the peace process in Sierra Leone.¹⁹ He suspended the entry of Slobodan Milosevic and other persons who had carried out repressive actions against the civilian population in Kosovo; who had obstructed efforts to establish a peaceful and stable democracy; or who had engaged in financial transactions that materially support the Government of the FRY, the Government of the Republic of Serbia, Slobodan Milosevic, or members of the Milosevic regime.²⁰

President Ronald Reagan. President Reagan restricted the entrance into the United States of certain persons who had formulated or implemented the policies of Manuel Antonio Noriega or Manuel Solis Palma.²¹ He suspended the entry into the United States of Cuban nationals, with the exception of Cubans who were the beneficiaries of certain family-based visas.²² With some exceptions, he suspended the admission of officers or employees of the Government of Cuba or the Communist Party of Cuba holding diplomatic or official passports; and individuals who, notwithstanding the type of passport that they held, were considered by the Secretary of State to be officers or employees of the Government of Cuba or the Communist Party of Cuba.²³ And he ordered the return of any vessel and its passengers to the country from which it had come if there was reason to believe that an offense was being committed against the United States immigration laws, provided, however, that no person who was a refugee was returned without his consent.²⁴

¹ “Donald J. Trump Statement on Preventing Muslim Immigration” (December 7, 2015), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration>

² Section 212(f) of the Immigration and Nationality Act, “General Classes of Aliens Ineligible to Receive Visas and Ineligible for Admissions,” <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-2006/0-0-0-2364.html>

³ Section 124(b) of IIRIRA, “Compliance with Detection regulations,” <https://www.uscis.gov/sites/default/files/ocomm/ilink/0-0-0-10948.html#0-0-0-1141>

⁴ Congressional Research Service Legal Sidebar: “Can the President Bar Foreign Travelers from Ebola-Stricken Countries from Entering the United States?” (October 23, 2014), <https://fas.org/sgp/crs/misc/travelers.pdf>

⁵ Section 241(b)(3) of the INA, “Restriction on removal to a country where alien’s life or freedom would be threatened,” <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-6643.html>

⁶ Pew Research Center, “Muslims and Islam: Key findings in the U.S. and around the world” (December 7, 2015), <http://www.pewresearch.org/fact-tank/2015/12/07/muslims-and-islam-key-findings-in-the-u-s-and-around-the-world/>

⁷ “Final Vote Results For Roll Call 679,” 407 Yeas and 19 Nays in the House of Representatives (December 8, 2015), <http://clerk.house.gov/evs/2015/roll679.xml>

⁸ Visa Waiver Program Improvement and Terrorist Travel Prevention Act Frequently Asked Questions, “What are the new eligibility requirements for VWP travel?” at <http://www.cbp.gov/travel/international-visitors/visa-waiver-program/visa-waiver-program-improvement-and-terrorist-travel-prevention-act-faq>

⁹ Congressional Research Service Report on Ebola: Selected Legal Issues, “Blanket Restrictions on Entry of Travelers from Ebola-Stricken Countries” (December 16, 2014) at p. 6, <https://www.fas.org/sgp/crs/misc/R43829.pdf>

¹⁰ Centers for Disease Control and Prevention, “2014 Ebola Outbreak in West Africa – Case Counts” (As of April 13, 2016), <http://www.cdc.gov/vhf/ebola/outbreaks/2014-west-africa/case-counts.html>

¹¹ Executive Order 13608 – “Prohibiting Certain Transactions With and Suspending Entry Into the United States of Foreign Sanctions Evaders With Respect to Iran and Syria” (May 1, 2012), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/fse_eo.pdf

¹² Presidential Proclamation—“Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses” (August 04, 2011), <https://www.whitehouse.gov/the-press-office/2011/08/04/presidential-proclamation-suspension-entry-immigrants-and-nonimmigrants->

¹³ Executive Order 13664 of April 3, 2014, “Blocking Property of Certain Persons With Respect to South Sudan,” <https://www.justice.gov/sites/default/files/eoir/legacy/2014/04/10/pd07apr14.pdf>

¹⁴ Executive Order – “Blocking the Property and Suspending Entry into the United States of Certain Persons with Respect to Grave Human Rights Abuses by the Governments of Iran and Syria via

Information Technology” (April 23, 2012), <https://www.whitehouse.gov/the-press-office/2012/04/23/executive-order-blocking-property-and-suspending-entry-united-states-cer>

¹⁵ Proclamation 8693 – “Suspension of Entry of Aliens Subject to United Nations Security Council Travel Bans and International Emergency Economic Powers Act Sanctions” (July 24, 2011), <https://www.gpo.gov/fdsys/pkg/FR-2011-07-27/pdf/2011-19155.pdf>

¹⁶ Proclamation 8015 – “Suspension of Entry as Immigrants and Nonimmigrants of Persons Responsible for Policies or Actions That Threaten the Transition to Democracy in Belarus” (May 15, 2006), <https://georgewbush-whitehouse.archives.gov/news/releases/2006/05/20060515-6.html>

¹⁷ Proclamation 7750 – “To suspend entry as immigrants or nonimmigrants of persons engaged in or benefiting from corruption” (January 12, 2004), <https://georgewbush-whitehouse.archives.gov/news/releases/2004/01/20040112-3.html>

¹⁸ Proclamation 7524 – “Suspension of Entry as Immigrants and Nonimmigrants of Persons Responsible for Actions That Threaten Zimbabwe’s Democratic Institutions and Transition to a Multi-Party Democracy” (February 26, 2002), <https://georgewbush-whitehouse.archives.gov/news/releases/2002/02/20020222-4.html>

¹⁹ Proclamation 7359 – “Suspension of Entry as Immigrants and Nonimmigrants of Persons Impeding the Peace Process in Sierra Leone” (October 10, 2000), <https://www.gpo.gov/fdsys/pkg/STATUTE-114/pdf/STATUTE-114-Pg3403.pdf>

²⁰ Proclamation 7249 – “Suspension of Entry as Immigrants and Nonimmigrants of Persons Responsible for Repression of the Civilian Population in Kosovo or for Policies That Obstruct Democracy in the Federal Republic of Yugoslavia (Serbia and Montenegro) (‘FRY’) or Otherwise Lend Support to the Current Governments of the FRY and of the Republic of Serbia” (November 12, 1999), <https://www.gpo.gov/fdsys/pkg/WCPD-1999-11-15/pdf/WCPD-1999-11-15-Pg2366-2.pdf>

²¹ Proclamation 5829 – “Suspension of entry as immigrants and nonimmigrants of persons who formulate or implement the policies of the Noriega/Solis Palma regime” (June 10, 1988), <http://www.archives.gov/federal-register/codification/proclamations/05829.html>

²² Proclamation 5517 — “Suspension of Cuban immigration” (August 22, 1986), <http://www.archives.gov/federal-register/codification/proclamations/05517.html>

²³ Proclamation 5377 – “Suspension of entry as nonimmigrants by officers or employees of the Government of Cuba or the Communist Party of Cuba” (October 4, 1985), <http://www.archives.gov/federal-register/codification/proclamations/05377.html>

²⁴ Executive Order 12324 – “Interdiction of Illegal Aliens” (September 29, 1981), <http://www.presidency.ucsb.edu/ws/?pid=44317>

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