



TRUMP IS NOT KING. HE CANNOT CHANGE THE US ASYLUM SYSTEM THROUGH EXECUTIVE ORDERS.

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Donald Trump probably thinks that section 212(f) of the Immigration and Nationality Act (INA) makes him king as far as immigration matters are concerned. As a president with autocratic impulses, INA § 212(f) gives him leeway to act out these impulses on immigrants, which he may not be able to do so readily on US citizens.

INA § 212(f) states,

“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 or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.”

Trump invoked INA § 212(f) through presidential proclamations to impose his [travel ban](#) against nationals of mainly Muslim countries. This was done to fulfill a campaign promise to impose a ban on Muslims. He decided without foundation that the entry of Iranian nationals (one of the countries subject to the ban) would be detrimental to the interests of the United States even though they came to pursue studies, marry a US citizen or visit relatives. The Supreme Court, unfortunately, upheld the third version of the [ban](#) in [Trump v. Hawaii](#) stating that INA § 212(f) “exudes deference to the President” and thus empowers him to deny entry of noncitizens if he determines that allowing entry “would be detrimental to the interests of the United States.”

Trump got more emboldened. On November 9, 2018, he issued another

[proclamation](#) invoking INA § 212(f), which banned people who cross the Southern border outside a designated port of entry from applying for asylum in the United States. The Department of Justice and Department of Homeland Security followed by jointly issuing a [rule](#) implementing the proclamation.

The key issue is whether INA § 212(f) allows a president like Trump with authoritarian impulses to override entire visa categories or change the US asylum system? Can Trump use INA § 212(f) to reorder the asylum system because he believes that the people in a caravan heading to the United States to apply for asylum are detrimental to the interests of the United States? INA § 208(a)(1) categorically allows any alien who is physically present in the United States to apply for asylum regardless of his or her manner of arrival in the United States “whether or not at a designated port of arrival.” Trump has attempted to change that by virtue of the authority given to him in INA § 212(f) by not allowing people who cross outside a port of entry from applying for asylum. Never mind that the administration has virtually closed the designated ports of entry for asylum seekers, which forces them to cross the border through irregular methods.

In [East Bay Sanctuary Covenant v. Trump](#), Judge Tigar on November 19, 2018 forcefully ruled that the president could not use INA § 212(f) to override Congress’s clearly expressed legislative intent. Indeed, even in *Trump v. Hawaii*, the administration successfully argued that INA § 212(f) only supplanted other provisions that allowed the administration to bar aliens from entering the United States, but did not expressly override statutory provisions. Thus, INA § 212(f) could not be used as a justification to override INA § 208.

Trump was obviously displeased with the ruling and branded Judge Tigar, who was appointed by President Obama, as an “Obama judge.” This resulted in an unusually strong rebuke from Chief Justice Robert who stated, “We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for.”

Trump then attacked Justice Robert in a [tweet](#) on Thanksgiving day:

“Justice Roberts can say what he wants, but the 9th Circuit is a complete & total disaster. It is out of control, has a horrible reputation, is overturned more than any Circuit in the Country, 79%, & is used to get an almost

guaranteed result. Judges must not Legislate Security...

.....and Safety at the Border, or anywhere else. They know nothing about it and are making our Country unsafe. Our great Law Enforcement professionals MUST BE ALLOWED TO DO THEIR JOB! If not there will be only bedlam, chaos, injury and death. We want the Constitution as written"

Trump is wrong. The judge was not legislating, but rather, was correctly interpreting INA § 208(a)(1), which allows any person physically present in the United States to apply for asylum regardless of whether they arrived through a port of entry or not. It is likely that even a judge appointed by President Bush or even Trump could have ruled the same way. Even the Supreme Court may find it easier to smack this proclamation down than the travel ban, which it found facially neutral on its face.

But Trump is still determined to stop the caravan. The media has [reported](#) that the US has won the support of the incoming Mexican government under Andrés Manuel López Obrador to let asylum claimants wait in Mexico while their claims are heard in the US. There are also reports now claiming that Mexican officials have denied that there is such a plan, but this is not inconsistent with the fact that negotiations are still underway even though a deal is not yet finalized. If the deal is put into place, which is being called "Remain in Mexico", Mexico will become a waiting room for America's asylum system.

It is not clear how this will work. If asylum claimants need to [pass the credible fear interview](#), they will then have to wait for their cases for several years on end in Mexico and may be subject to the continued abuse of smugglers who brought them to the US border as well as drug cartels who are predominant in the Mexican border towns. While the scheme will also allow the applicant to show that they have a reasonable fear of staying in Mexico, demonstrating that will require a higher standard than the credible fear standard. Many will not meet this standard and will unfortunately be subjected to persecution and abuse in Mexico while they wait out the outcome of their asylum claims in the US. Most claimants who base their asylum claims on gang based persecution or domestic violence will also likely lose, and they will be then directly deported to their country of origin. They will have difficulty in accessing US trained lawyers to assist them in the preparation of their asylum claims. There is also a good chance that Mexico may deport an asylum claimant under its own laws on

grounds that may not even constitute deportable offenses under US law.

What would the legal authority be for such a scheme? It is unclear, but INA § 235(b)(2)(C) provides that an alien who is arriving by land, whether or not from a designated port of entry, from a foreign territory contiguous to the US may be returned to that territory pending a proceeding under INA § 240.

A section 240 hearing offers the full panoply of rights of a removal hearing, including the right to appeal, as opposed to a limited asylum hearing before an Immigration Judge after an applicant passes the credible fear interview. INA § 235(b)(2)(C) does not contemplate a credible fear interview set forth in INA § 235(b)(1). Even a reasonable fear of remaining in Mexico is not contemplated and may be ultra vires the INA. The administration could try to bypass the credible fear interview process and issues a Notice to Appear that would initiate a removal proceeding under INA § 240. But this will create far more work for the administration. INA § 235(b)(2)(C) arguably applies to inspection of “other aliens” as opposed to those found inadmissible under sections 212(a)(6)(C) or 212(a)(7) under § 235(b)(1). Thus, INA § 235(b)(2)(C) provides dubious legal authority for a “Remain in Mexico” scheme.

Any new proclamation and rule to set into effect this new policy will most likely be successfully challenged in federal court. Instead of creating an orderly procedure to process a few thousand asylum claims under the INA, Trump seems hell bent on creating chaos and disorder. If he loses in court, Trump attacks the judge and also blames the media by calling in “fake news.” On November 25, 2018, the administration closed the San Ysidro port of entry near San Diego and [fired tear gas shells at people seeking asylum, including children in diapers](#). Cruelty is part of Trump’s nature. He also systematically separated migrant children from their parents as a stated deterrent policy. The morning after the tear gassing episode, Trump [tweeted](#) that he wants to close the border to asylum seekers, and without foundation, stated that “many of them are stone cold criminals.” The law does not allow him to even do that. To imagine an American president acting so cruelly before November 2016 was inconceivable. We only write in the faint hope that in addition to our courts, America will come to its senses and not tolerate this man any longer. We can only hope!