



Joint Interim Rule on Asylum and Presidential Proclamation: What You Need To Know

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What are these new policies?

On November 9, 2018, the Department of Homeland Security (DHS) and Department of Justice (DOJ) issued an [interim final rule](#) and a [presidential proclamation](#) affecting individuals seeking entry at the southern border of the United States. These executive actions place restrictions on asylum for certain noncitizens arriving in the United States.

What are these policies intended to do?

The interim final rule governs eligibility for asylum and screening procedures for those subject to a new presidential proclamation. Together, these executive actions suspend entry for noncitizens crossing the southern border and bar such noncitizens from asylum.

What is the scope of the joint interim rule and presidential proclamation?

The rule applies prospectively, so individuals who arrived in the United States before the effective date of November 9, 2018 are not covered. The rule also does not impact two related forms of relief known as withholding of removal and protection under the Convention Against Torture. These forms of relief are narrower and without the same benefits of asylum protection. No later than 90 days from the date of the presidential proclamation, November 9, 2018, the Secretary of State, Attorney General and Secretary of Homeland Security should submit to the President a recommendation on whether the suspension should be extended or renewed.

What legal authority is the administration relying upon to issue the interim final rule and presidential proclamation?

The joint interim rule points to several sections in the immigration statute known as the Immigration and Nationality Act (INA). Some of these sections are summarized below.

- [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 any restrictions he may deem to be appropriate.”
- [INA § 208\(d\)\(5\)\(B\)](#) states that “[t]he Attorney General may provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with this Act.”

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- [INA § 215\(a\)](#) states that it is “unlawful . . . for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.”
- [INA § 208\(b\)\(2\)\(C\)](#) states that the “Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).”

Has the administration used INA § 212(f) before?

Yes. [INA § 212\(f\)](#) was used as a basis for three travel bans issued by the President, each of which prohibits the entry of nationals from certain countries. On June 26, 2018, the Supreme Court of the United States issued an opinion in the case of [Hawaii v. Trump](#) (Travel Ban 3.0). Writing for the majority, Chief Justice Roberts held that the travel ban does not violate the INA and described INA § 212(f) as a “comprehensive delegation” which “exudes deference to the President in every clause.”

Is the President’s use of INA § 212(f) in the Travel Ban distinguishable?

Yes. In *Hawaii v. Trump*, the courts did not analyze the suspension clause at INA § 212(f) against the asylum provision at INA § 208(a).

What are the legal concerns with these executive actions?

There is a concern that the executive actions violate the immigration statute and other laws. While the interim final rule and presidential proclamation identify some sections of the immigration statute, these sections cannot be read in isolation to the statute as a whole, nor can it conflict with the U.S. Constitution, statutes and other laws. One concern is that these actions violate the statutory provision that governs asylum law and other laws. [INA § 208](#) states that any person physically present in the United States, regardless of how or where he or she entered is eligible to apply for asylum. The section states in part, “Any alien . . . who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) irrespective of such alien's status, may apply for asylum . . .” (emphasis added). Because the plain language of the INA is clear that any noncitizen is eligible for asylum regardless of her manner of entry, there is a concern that these policies violate the statute by restricting the availability of asylum seekers only to those who present at a designated port of arrival.

What is the administration issuing these policies?

It is the administration’s position that the United States has seen an increase in the number of noncitizens arriving at the United States between ports of entry along the southern border and that many of the asylum claims brought forth by this population are without merit.

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What are some of the countervailing views to the administration’s position taken by some refugee advocates and scholars?

Many asylum seekers arriving at the southern border are from the Northern Triangle which is comprised of Guatemala, El Salvador and Honduras. The violence and danger in these countries is [well documented](#). Individuals who have suffered or will suffer individual harm for a specific reason are eligible to apply for asylum under the immigration statute and other laws. Many of the asylum claims by individuals from the Northern Triangle are with merit.

What is an “Interim Final Rule”?

An [Interim Final Rule](#) becomes effective immediately upon publication and is an exception to the general rule that public notice and comment must take place before the effective date of a regulation. DOJ and DHS have concluded that a “good cause” exception exists to publish this asylum regulation as an interim final rule. Written comments can be submitted by the public for a period of sixty days from the date of publication.

What is a presidential proclamation?

A presidential proclamation is one form of presidential power and similar to an executive order. It is an order issued by the President of the United States and may possess the authority of law. See e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, [343 U.S. 579](#) (1952).

Have the new policies been challenged in the courts?

Yes. On November 9, 2018, the Southern Poverty Law Center, ACLU et. al. (plaintiffs) filed a lawsuit in a [federal district court](#) challenging the new policies as violating the U.S. Constitution, immigration statute, administrative law. On November 19, 2018, San Francisco court Judge Jon S. Tigar [issued a nationwide Temporary Restraining Order \(TRO\)](#) in the case of *East Bay Sanctuary Covenant et al v. Donald J. Trump et al* and ordered the government to “pre-Rule” practices when processing asylum applications. The court concluded that the government’s attempt to restrict *where* a noncitizen may apply for asylum directly violates Congress’ unambiguous intent that “place of entry not be disqualifying to an application for asylum.” The court also found serious questions raised as to whether the asylum rules violate administration law. Finally, the court found the plaintiffs satisfied the prongs necessary for a TRO.

The TRO took effect immediately and also allowed the government to argue why the rule should not be enjoined. Thereafter, the government filed a stay application to the Ninth Circuit Court of Appeals and plaintiffs filed a request for a preliminary injunction (PI) to the district court, onto which several amicus (friend of the court) briefs were filed, [including one](#) by immigration law scholars. On December 19, 2018, Judge Tigar [granting a preliminary injunction](#) (replacing the

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TRO), finding that the government failed to show how it could tailor a narrower remedy for the plaintiffs.

Meanwhile, the government asked the Supreme Court of the United States to “stay” the injunction made by Judge Tigar. On December 7, 2018, the Ninth Circuit Court of Appeals [denied the government’s request](#) for a stay pending appeal in the Ninth Circuit. On December 21, 2018 the Supreme Court also [denied](#) the government’s application for a stay by a vote of 5-4. Justices Thomas, Justice Alito, Justice Gorsuch, and Justice Kavanaugh would have granted the application for stay (allowed the asylum ban to operate throughout the litigation).

Separately, plaintiffs who included individuals who entered the United States outside ports of entry and two non-profits who serve refugees brought a second legal challenge in the District Court for the District of Columbia. On August 2, 2019, Judge Randolph D. Moss issued a [77-page opinion](#) holding that the court has subject matter jurisdiction, that the plaintiffs have standing to bring this lawsuit and that the asylum ban is contrary to the immigration statute at section 208.

What comes next will depend on how the appellate courts rule. In the meantime, the asylum ban remains blocked because of the nationwide injunction.

Importantly, under section 4 of the presidential proclamation, if any section of the proclamation is found to be invalid, the remainder of the proclamation shall remain effective.

Where can I find more resources?

See the [Penn State Law Center for Immigrants’ Rights Clinic](#) website for updates on this and other immigration policies. Also visit:

- [Department of Homeland Security](#)
- [American Immigration Lawyers Association](#)
- [American Immigration Council](#)
- [Human Rights First](#)

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