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Legal Sidebar

Can the President "Close the Border"? Relevant Laws and Considerations

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The ongoing debate between some Members of Congress and the President over how to respond to the record number of alien encounters at the southern border has recently intensified. One disagreement centers on the scope of the existing authorities conferred by Congress to the executive branch to deter illegal border crossings. During the COVID-19 pandemic, the Trump and Biden Administrations imposed significant restrictions on alien entry and access to asylum that were tied to the declared national health emergency. The question remains whether the executive branch could impose similarly broad restrictions under existing immigration statutes in situations not tied to a declared public health emergency.

This Legal Sidebar identifies the statutes and legal issues related to the ongoing debate about the President's authority to close ports of entry or "close the border." The analysis is necessarily general, as a discussion regarding an executive decision to close some ports of entry to certain categories of non-U.S. nationals requires a different legal analysis than would a decision to close all ports on the southern border to all goods and persons seeking to enter the United States, including U.S. citizens and lawful permanent residents (LPRs). Moreover, the relationship between any port closure measures and the justification that the executive branch articulates would bear on the legal analysis. The discussion in this Sidebar mainly sets out the primary relevant authorities and the considerations that may be considered if the executive branch acts under such authorities.

Prior Executive Action

Prior to the Trump presidency, there were at least two occasions when past Presidents substantially restricted operations at ports of entry on the southern border. These past restrictions were short lived. Furthermore, these executive measures did not prompt legal challenges that required federal courts to assess the executive branch's authority for such actions. The measures taken on one of the occasions—the aftermath of President Kennedy's assassination in 1963—may have constituted a full closure of ports of entry on the southern border for much of the afternoon and evening of November 22, 1963. On another occasion, during President Reagan's Administration, nine ports of entry were closed for a matter of days after the abduction of a Drug Enforcement Administration agent in Mexico in 1985.

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While these closures were brief by operation and did not face any court challenge, President Trump's use of executive action to restrict the entry of certain individuals at the border faced judicial scrutiny. For example, President Trump's Proclamation 9645, which barred entry to nationals of seven countries, was upheld by the Supreme Court in a 5-4 decision in *Trump v. Hawaii* as a valid exercise of executive authority. The Trump Administration also implemented the Migrant Protection Protocols (also known as the "Remain in Mexico" policy), which required the return of non-Mexican nationals arriving illegally at the southern ports of entry to Mexico during the pendency of their formal removal proceedings. The Biden Administration later revoked the Remain in Mexico policy, an action that the Supreme Court affirmed, stating that the Secretary of Homeland Security had the discretion to implement the policy or to terminate it under existing law.

Another example during the Trump presidency was a presidential proclamation and a Department of Justice and Department of Homeland Security (DHS) interim final rule that would make certain aliens ineligible to apply for asylum. The Ninth Circuit held that the proclamation, combined with the rule, was invalid because it directly conflicted with 8 U.S.C. § 1158(a), which provides, among other things, that aliens arriving anywhere along the U.S. borders may apply for asylum. The court also held that the rule violated U.S. treaty obligations, including the principle of non-refoulement, thus affirming a lower court ruling enjoining enforcement of the rule. The Supreme Court denied an application to stay the injunction, with four Justices indicating that they would have granted the stay.

During the COVID-19 pandemic, the Trump Administration placed significant restrictions on the entry of certain aliens under two statutory authorities in light of the public health emergency: 42 U.S.C. § 265 and 19 U.S.C. § 1318, a provision of the Tariff Act of 1930. The Biden Administration continued restrictions based on the first of these statutory authorities, commonly referred to as the Title 42 order.

There were two lawsuits that were focused on the executive branch's Title 42 order. The first lawsuit challenged the lawfulness of the order in federal district court, and the court issued a preliminary injunction blocking its enforcement. The U.S. Court of Appeals for the District of Columbia Circuit affirmed the district court's ruling in part, holding that the executive branch could expel plaintiffs from the country (but not to places where they would be persecuted or tortured), and remanded proceedings back to the district court. On remand, the district court vacated the Title 42 order and entered a permanent injunction barring its enforcement. The government appealed the injunction, and the case was subsequently dismissed as moot upon a motion by the government, because the Biden Administration issued an order terminating the Title 42 entry restriction effective May 23, 2022.

In a separate case challenging the executive branch's decision to end the restrictions, a district court issued a preliminary injunction barring the Biden Administration from terminating the Title 42 order. On appeal, the Fifth Circuit instructed the district court to dismiss the case as moot following the Biden Administration's decision to terminate the COVID-19 public health emergency declaration on May 11, 2023. Prior to termination, President Biden also issued several proclamations during the COVID-19 public health emergency barring entry to nationals of certain designated countries and barring entry to unvaccinated nonimmigrant air travelers.

In 2019, President Trump, by proclamation, suspended from entry those immigrants who lacked health insurance or the means to pay medical expenses. A district court enjoined implementation of that proclamation as violating the non-delegation doctrine and separation of powers and as incapable of overriding other conflicting provisions of the Immigration and Nationality Act (INA). A divided Ninth Circuit reversed and upheld the proclamation, but that decision was vacated as moot on denial of rehearing en banc. While none of those decisions regarding the President's authority to bar entry to immigrants unable to pay for health insurance is precedential, they point to the complexity of the issue and the judicial disagreement regarding the scope of the President's authority to deny entry to arriving aliens at the border. President Trump also issued a proclamation suspending the entry of both immigrants and foreign nationals seeking admission on temporary nonimmigrant visas who allegedly posed a risk to

the labor market during the COVID-19 pandemic, and lower courts are divided on whether he had authority to do so.

Statutory Bases of Executive Authority

While the executive branch has substantially restricted alien entry pursuant to authorities triggered by a declared public health emergency, the extent to which the executive branch may rely on generally applicable immigration statutes to restrict or suspend entry on an equally broad scale remains untested. Federal statutes grant DHS general authority over operations to secure the border and specific authority to temporarily close "any ... port of entry" when necessary to protect national interests. Other statutes give the President broad authority to suspend the entry of aliens. Together, these statutes may authorize a range of targeted executive measures to close a port of entry or to restrict operations at some ports, at least in some circumstances.

First, 19 U.S.C. § 1318(b)(2), provides:

> [T]he Commissioner of U.S. Customs and Border Protection, when necessary to respond to a specific threat to human life or national interests, is authorized to close temporarily any Customs office or port of entry or take any other lesser action that may be necessary to respond to the specific threat.

More generally, the Homeland Security Act makes the Secretary of Homeland Security responsible for "[s]ecuring the borders, territorial waters, ports, terminals, waterways, and air, land, and sea transportation systems of the United States, including managing and coordinating those functions transferred to the Department at ports of entry." Similarly, 8 U.S.C. § 1103 grants the Secretary "the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens." However, the statute also directs DHS to follow certain inspection procedures, including for asylum seekers who lack valid entry documents, and constitutional principles grant U.S. citizens and LPRs certain rights with respect to reentering the country, as discussed further below.

Other statutes grant the executive branch broad authority to restrict the entry of aliens, including 8 U.S.C. § 1182(f), which provides:

> 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.

Another provision, 8 U.S.C. § 1185(a)(1), allows the President to restrict the entry of aliens according to "such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." In 1979, President Jimmy Carter, invoked Section 1185(a)(1) to deny visas to all Iranian nationals. In *Trump v. Hawaii*, which upheld Proclamation 9645 as a valid exercise of the President's authority under 8 U.S.C. § 1182(f), the Supreme Court reasoned that the statute "exudes deference to the President" and "vests [him] with 'ample power' to impose entry restrictions in addition to those elsewhere enumerated in the INA." The government also argued that § 1185(a)(1) supported the proclamation, and the Supreme Court noted that there was a "substantial overlap" between that statute and § 1182(f) but did not expressly rely on that provision in its analysis.

The Court emphasized that presidential determinations related to national security traditionally receive deference and declined to probe the national security justifications that the President gave for the proclamation's entry restrictions on broad categories of nationals of seven countries. However, the decision addressed only aliens who had not yet arrived in the United States, and thus, as discussed below,

the constitutional and statutory considerations that apply to those who have arrived in the United States were not part of the Court's consideration.

Potential Legal Obstacles to Border Closure

The foregoing authorities grant the executive branch a substantial measure of discretion to restrict operations at particular ports of entry or to limit the categories of aliens who may seek admission at those ports. In addition to the above-mentioned examples of invocation of those authorities, Customs and Border Protection (CBP) recently ordered the temporary suspension of the international railway crossing bridges in Eagle Pass and El Paso, Texas, in response to the resurgence of smuggling operations to move migrants through Mexico via freight trains. Under the Trump Administration in 2019, then-DHS Secretary Kirstjen Nielsen ordered CBP to reassign at least 750 officers from the Office of Field Operations (the entity that staffs the ports of entry) to Border Patrol operations in sectors "affected by the emergency" at the southern border. Even if this reassignment required CBP to slow or limit operations at some ports, the reassignment may have been within DHS's general authority to "secur[e] the borders" and CBP's specific authority under 19 U.S.C. § 1318(b)(2) to "close temporarily ... or take any other lesser action" at any port of entry in response to a threat to national interests.

More sweeping action by the President or DHS to limit entry at ports of entry might raise additional legal issues. For example, the extent of the authority that the port of entry and border operations statutes grant DHS remains untested. Although 19 U.S.C. § 1318 was invoked during the COVID-19 public health emergency to restrict and place conditions on travel over land borders (e.g., vaccination requirements), federal courts have not explored whether the statutory authority provided to CBP to close "any" port of entry "temporarily" would sustain the closure of many or all ports. Likewise, courts have not examined the bounds of the statute's authorization to close a port "temporarily" and only for "a specific threat to human life or national interests."

Beyond the question of statutory authority, sweeping action to close many or all ports of entry could raise issues under at least two countervailing legal considerations. First, the Supreme Court has recognized that, under the Due Process Clause of the Fifth Amendment, U.S. citizens possess a "substantive right ... to enter" the United States and that an LPR cannot be denied entry without a fair hearing on his or her admissibility. Any executive branch action that prevents U.S. citizens or LPRs from reentering the country through a port of entry could therefore raise constitutional questions. Second, the provisions governing the admissibility of aliens and the procedures that immigration officers must follow to evaluate admissibility are found in Title 8 of the *U.S. Code*. For instance, 8 U.S.C. § 1158 provides that any alien "who arrives in the United States" may apply for asylum. Citing this statutory right, the Ninth Circuit invalidated President Trump's proclamation that declared those arriving illegally at the southern border without going through ports of entry as ineligible for asylum. Challengers to any executive action that restricts entry at the border might argue that the action contravenes § 1158 by preventing asylum seekers from pursuing applications. A federal district court held that CBP's former metering policy, which required asylum seekers who had not yet crossed the international boundary line at the southern border to wait in Mexico if there were insufficient resources to process them at U.S. ports of entry, violates statutory requirements concerning the inspection and processing of asylum seekers at U.S. ports of entry. The appeal is currently pending before the Ninth Circuit. More broadly, challengers might argue that closing all ports of entry at the southern border is inconsistent with the statute's general scheme for determining which aliens are admissible to the United States as immigrants and nonimmigrants.

It remains unclear whether challenges asserting that a closure of a port of entry conflicts with statutory provisions would succeed, particularly if the closure is premised on 8 U.S.C. § 1182(f). The Supreme Court has "assume[d]" without deciding that the President lacks the power under § 1182(f) to impose entry restrictions that override other provisions within Title 8 (as opposed to entry restrictions that merely

supplement the statute). Any conflict between an executive action and a provision of the statute would raise concerns regarding the separation of powers. At least one lower federal court has explicitly ruled that while the President has "wide latitude" under § 1182(f), the "authority is not limitless" and that the President could not use that authority to override particular provisions of the statute that would violate the separation of powers.

In a different context, the Supreme Court in 1993 stated that § 1182(f) authorized the President to issue an executive order that established a naval blockade to deny illegal Haitian migrants the ability to enter this country during the Haitian exodus. That case, however, did not present the concern of an executive order or proclamation in conflict with provisions of the statute or U.S. treaty obligations, because, as the Court explained, the statutory protections found in Title 8 and the United Nations Convention Related to the Status of Refugees did not apply extraterritorially to acts of the U.S. Coast Guard on the high seas. Nevertheless, the case demonstrates the strength of the presidential power to act under 8 U.S.C. § 1182(f) to secure the border.

Recently, lower courts have addressed the scope of the President's § 1182(f) authority and are divided over whether there is a difference in the level of deference owing to presidential orders or proclamations that are domestic or economic in nature as opposed to those that involve foreign or international affairs. Numerous courts have held that the President is entitled to less deference when he acts in the domestic sphere. For example, one court held that a presidential proclamation suspending entire visa categories of nonimmigrant workers based on the stated purpose of protecting American citizens who might be without work during the COVID-19 public health emergency exceeded the President's § 1182(f) powers because the statute "does not afford the President unbridled authority to set domestic policy" and because the President lacks "monarchical" powers in the immigration context, which is "an area with clear legislative prerogative." Another court reached the opposite conclusion, however, in its analysis of the same proclamation and relied on the noted breadth of the Supreme Court's holding in *Trump v. Hawaii*. Several lower federal courts have also held that § 1182(f) applies only to the President's authority to restrict *entry* of aliens and cannot be used to suspend visa adjudications.

In summary, federal law supplies the executive branch with significant power to restrict the legal entry of goods and people at ports of entry, but how far that power goes remains unclear. As discussed above, while the Supreme Court upheld President Trump's Proclamation 9645 in *Trump v. Hawaii*, the lower courts have invalidated some of his other presidential proclamations and policies as exceeding executive authority and for conflicting with controlling provisions of the INA. If an Administration proffers a national security justification to close a limited number of ports of entry on the southern border or to bar specified categories of immigrant or nonimmigrant visa holders from applying for admission at ports of entry located on the southern border, a reviewing court might be more likely defer to the national security justification under *Trump v. Hawaii* and hold that the executive action fits within statutory authority. Broader action to close ports of entry to goods and people, however, could give rise to meritorious constitutional and statutory challenges.

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