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# Executive Authority to Exclude Aliens: In Brief

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## Summary

The Immigration and Nationality Act (INA) provides that individual aliens outside the United States are “inadmissible”—or barred from admission to the country—on health, criminal, security, and other grounds set forth in the INA. However, the INA also grants the Executive several broader authorities that could be used to exclude certain individual aliens or classes of aliens for reasons that are not specifically prescribed in the INA.

Section 212(f) of the INA is arguably the broadest and best known of these authorities. It provides, in relevant part, that

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.

Over the years, Presidents have relied upon Section 212(f) to suspend or otherwise restrict the entry of individual aliens and classes of aliens, often (although not always) in conjunction with the imposition of financial sanctions upon these aliens. Among those so excluded have been aliens whose actions “threaten the peace, security, or stability of Libya”; officials of the North Korean government; and aliens responsible for “serious human rights violations.”

Neither the text of Section 212(f) nor the case law to date suggests any firm legal limits upon the President’s exercise of his authority to exclude aliens under this provision. The central statutory constraint imposed on Section 212(f)’s exclusionary power is that the President must have found that the entry of any alien or class of aliens would be “detrimental to the interests of the United States.” The statute does not address (1) what factors should be considered in determining whether aliens’ entry is “detrimental” to U.S. interests; (2) when and how proclamations suspending or restricting entry should be issued; (3) what factors are to be considered in determining whether particular restrictions are “appropriate”; or (4) how long any restrictions should last. The limited case law addressing exercises of presidential authority under Section 212(f) also supports the view that this provision confers broad authority to bar or impose conditions upon the entry of aliens. Key among these cases is the Supreme Court’s 1993 decision in *Sale v. Haitian Centers Council, Inc.*, which held that the U.S. practice of interdicting persons fleeing Haiti outside U.S. territorial waters and returning them to their home country without allowing them to raise claims for asylum or withholding of removal did not violate the INA or the United Nations Convention Relating to the Status of Refugees. The U.S. practice had been established by Executive Order 12807, which was issued, in part, under the authority of Section 212(f) and “suspend[ed] the entry of aliens coming by sea to the United States without necessary documentation.” However, depending on their scope, future executive actions under Section 212(f) could potentially be seen to raise legal issues that have not been prompted by the Executive’s prior exercises of this authority.

Beyond Section 212(f), other provisions of the INA can also be seen to authorize the Executive to restrict aliens’ entry to the United States. Most notably, Section 214(a)(1) prescribes that the “admission of any alien to the United States as a nonimmigrant shall be for such time and under such conditions as [the Executive] may by regulations prescribe.” Section 215(a)(1) similarly provides that “it shall be unlawful for any alien” to enter or depart the United States “except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.” For example, President Carter cited Section 215(a)—rather than Section 212(f)—when authorizing the revocation of immigrant and nonimmigrant visas issued to Iranian citizens during the Iran Hostage Crisis.

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The Immigration and Nationality Act (INA) provides that individual aliens outside the United States are “inadmissible”—or generally barred from admission to the country<sup>1</sup>—on health, criminal, security, and other grounds set forth in the INA.<sup>2</sup> However, the INA also grants the Executive several broad authorities that could be used to exclude certain individual aliens or classes of aliens for reasons that are not specifically set forth in the INA. Section 212(f) of the INA is arguably the broadest and best known of these provisions,<sup>3</sup> but Sections 214(a)(1) and 215(a)(1) can also be seen to authorize the Executive to restrict aliens’ entry or admission to the United States.<sup>4</sup>

This report provides a brief overview of the Executive’s authority under these provisions of the INA. It begins with and focuses primarily on Section 212(f). It also briefly notes other provisions.

## Section 212(f) of the INA

The provisions currently in Section 212(f)—which have been part of the INA since its enactment in 1952<sup>5</sup>—state, in relevant part, that

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.<sup>6</sup>

Legislative history materials from the time of the INA’s enactment suggest that these provisions were seen to grant the President broad authority to bar or impose conditions upon the entry of aliens,<sup>7</sup> and Presidents over the years have relied upon Section 212(f) to suspend or restrict the entry of various groups of aliens, often (although not always) in conjunction with the imposition of financial sanctions upon them. Among those so excluded have been aliens whose actions

<sup>1</sup> The INA defines “admission” to mean “the lawful entry of an alien into the United States after inspection and authorization by an immigration officer.” INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A). The INA is codified in Title 8 of the United States Code, and references to the INA in this report also include references to the corresponding sections of Title 8.

<sup>2</sup> See INA § 212(a), 8 U.S.C. § 1182(a) (prescribing the inadmissibility of, among others, aliens who have a communicable disease of public health significance; have been convicted of two or more criminal offenses; have engaged in a terrorist activity; are permanently ineligible for citizenship; or have previously voted in violation of any federal, state, or local law). Certain of these grounds of inadmissibility may be waived. See, e.g., INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v) (authorizing the Executive to waive the 3- and 10-year bars upon the admission of aliens who have been unlawfully present in the United States for more than 180 days if the refusal of admission to the alien would result in “extreme hardship” to a parent or spouse who is a U.S. citizen or lawful permanent resident (LPR)).

<sup>3</sup> 8 U.S.C. § 1182(f).

<sup>4</sup> 8 U.S.C. §§ 1184(a)(1), 1185(a)(1). As is discussed later in this report, the term “entry” is no longer defined for purposes of the INA. See Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), P.L. 104-208, § 301(a), 110 Stat. 3009-575 (Sept. 30, 1996) (amending INA § 101(a)(13) so that it defines “admission,” instead of “entry”). However, at one time, the INA defined the term “entry” to mean “any coming of an alien into the United States, from any foreign port or place or from an outlying possession, whether voluntarily or otherwise.” INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1994). See *infra* notes 26-27 and accompanying text.

<sup>5</sup> 8 U.S.C. § 1182(f).

<sup>6</sup> See P.L. 82-414, § 212(e), 66 Stat. 188 (June 27, 1952).

<sup>7</sup> See, e.g., H.R. RPT. 1365, 82d Cong., 2d Sess., at 53 (Feb. 14, 1952) (“The bill vests in the President the authority to suspend the entry of all aliens if he finds that their entry would be detrimental to the interests of the United States, for such period as he shall deem necessary.”).

“threaten the peace, security, or stability of Libya”;<sup>8</sup> officials of the North Korean government or the Workers’ Party of North Korea;<sup>9</sup> aliens who have participated in “serious human rights violations”;<sup>10</sup> and others noted in **Table 1** below.

Neither the text of Section 212(f) nor the case law to date suggests any firm legal constraints upon the President’s exercise of his authority under Section 212(f), as is explained below. However, future executive actions under INA § 212(f) could potentially be seen to raise legal issues that have not been prompted by the Executive’s prior exercise of this authority.<sup>11</sup>

## Statutory Language and Executive Branch Interpretations

On its face, Section 212(f) would appear to give the President broad authority to preclude or otherwise restrict the entry into the United States of individual aliens or classes of aliens who are outside the United States and lack recognized ties to the country.<sup>12</sup> The central statutory constraint imposed on Section 212(f)’s exclusionary power is that the President must have found that the entry of any aliens or class of aliens would be “detrimental to the interests of the United States” in order to exclude the alien or class of aliens.<sup>13</sup> The statute does not address (1) what factors should be considered in determining whether aliens’ entry is “detrimental” to U.S. interests; (2) when and how proclamations suspending or restricting entry should be issued; (3) what factors are to be considered in determining whether particular restrictions are “appropriate”; or (4) how long any restrictions should last. There also do not appear to be any regulations addressing the exercise of presidential authority under Section 212(f).

The Department of State’s *Foreign Affairs Manual* (FAM) seemingly provides the only publicly available executive branch guidance on the President’s Section 212(f) authority. In relevant part, the FAM notes that Section 212(f) proclamations “typically” grant the Secretary of State authority to identify individuals covered by the proclamation and to waive its application for foreign policy

<sup>8</sup> See Executive Order 13726, Blocking Property and Suspending Entry Into the United States of Persons Contributing to the Situation in Libya, 81 Fed. Reg. 23559 (Apr. 21, 2016).

<sup>9</sup> See Executive Order 13687, Imposing Additional Sanctions With Respect To North Korea, 80 Fed. Reg. 819 (Jan. 6, 2015).

<sup>10</sup> See Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses, 76 Fed. Reg. 49277 (Aug. 9, 2011).

<sup>11</sup> Not knowing the form that future restrictions might take, or the grounds upon which such restrictions might be subject to legal challenges, it would be premature to assess whether specific restrictions might be within the Executive’s authority. However, it is important to note that aliens outside the United States who have no ties to the country generally have limited ability to challenge the denial of visas or admission to them. See, e.g., *Shaughnessy v. Mezei*, 345 U.S. 206, 216 (1953) (“Whatever our individual estimate of that policy and the fears on which it rests, respondent’s right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate.”); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (“[A]n alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe.”). But see *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (recognizing that U.S. persons adversely affected by the denial of a visa waiver to an alien outside the United States may have a right to challenge the denial under certain circumstances).

<sup>12</sup> LPRs who leave the United States for a brief period of time are distinguishable from, for example, refugees seeking to be admitted to the United States. See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (discussing due process concerns raised by the application to an LPR of a statute which provided for the exclusion of any alien who “at any time shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law”).

<sup>13</sup> INA § 212(f), 8 U.S.C. § 1182(f).

or other national interests.<sup>14</sup> The FAM also notes that such proclamations may bar entry based on either affiliation or “objectionable” conduct. In addition, it provides that Section 212(f) may reach persons who are inadmissible under other provisions of law, in which case, the “statutory inadmissibilities are to be considered prior to determining whether a Presidential Proclamation applies.”<sup>15</sup> However, the FAM is generally not seen as having the force of law to bind the executive branch.<sup>16</sup> Thus, the Executive would not need to engage in notice-and-comment rulemaking in order to alter particular practices contained in the FAM that have historically been associated with exercises of Section 212(f) authority (e.g., not relying on a 212(f) proclamation to bar the admission of aliens who are inadmissible on other grounds).<sup>17</sup>

## Judicial Constructions of Section 212(f)

The limited case law addressing exercises of presidential authority under Section 212(f) also supports the view that this provision of the INA confers broad authority to suspend or restrict the entry of aliens. Key among these cases is the Supreme Court’s 1993 decision in *Sale v. Haitian Centers Council, Inc.*, which held that the U.S. practice of interdicting persons fleeing Haiti outside U.S. territorial waters and returning them to their home country without allowing them to raise claims for asylum and withholding of removal did not violate either the INA or the United Nations Convention Relating to the Status of Refugees.<sup>18</sup> The U.S. practice had been established by Executive Order 12807, which was issued, in part, under the authority of Section 212(f) of the INA<sup>19</sup> and “suspend[ed] the entry of aliens coming by sea to the United States without necessary documentation.”<sup>20</sup> Although the *Sale* Court was primarily concerned with whether the INA and UN Convention provisions regarding withholding of removal applied extraterritorially,<sup>21</sup> it is arguably important for understanding the scope of the President’s Section 212(f) authority. In particular, the *Sale* decision arguably helped clarify the relationship between exercises of the authority granted by Section 212(f) and those granted by other provisions of the INA, as well as the meaning of *entry* for purposes of Section 212(f).

<sup>14</sup> 9 FAM § 302.11-3(B)(1), available at <https://fam.state.gov/Fam/FAM.aspx> (last accessed: Jan. 3, 2017).

<sup>15</sup> *Id.*

<sup>16</sup> See, e.g., *Patel v. U.S. Dep’t of State*, No. 11-cv-6-wmc, 2013 U.S. Dist. LEXIS 108592, at \*13 (W.D. Wis. Aug. 2, 2013) (“[T]he Foreign Affairs Manual is an internal guideline that sets forth agency practice and procedures. Because internal guidelines and agency manuals like the Foreign Affairs Manual are not subject to [Administrative Procedure Act] APA rulemaking procedures, they lack the force of law and do not bind agency discretion.”).

<sup>17</sup> For more on the constraints of the rulemaking process, see generally CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by (name redacted) and (name redacted); CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by (name redacted).

<sup>18</sup> 509 U.S. 155, 158-59 (1993). Specifically at issue in *Sale* were the provisions currently in INA § 241(b)(3)(B) and Article 33 of the Convention, which both bar the return of aliens to countries where their life or freedom would be threatened because of their race, religion, nationality, political opinion, or membership in a particular social group. The United States is technically a party to the 1967 UN Protocol Relating to the Status of Refugees, not the 1951 Convention Relating to the Status of Refugees. However, the Protocol incorporated articles 2 to 34 of the Convention, and it is customary for commentators to refer to the Convention, not the Protocol, when discussing these articles.

<sup>19</sup> Executive Order 12,807 also cited INA § 215(a)(1), which provides that “[u]nless otherwise ordered by the President, it shall be unlawful for any alien 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.” 8 U.S.C. § 1185(a)(1). For further discussion of this provision, see *infra* “Other Provisions of the INA”.

<sup>20</sup> See *Interdiction of Illegal Aliens*, 57 Fed. Reg. 23133 (June 1, 1992). President George H.W. Bush initially issued this order, but President Clinton left the order in place without modifications when he took office. It remained in effect at the time of the Court’s decision in *Sale*. See generally 509 U.S. at 165.

<sup>21</sup> *Sale*, 509 U.S. at 173-88.

In particular, the Court rejected the view of the U.S. Court of Appeals for the Second Circuit (“Second Circuit”) that interdiction was prohibited because of the INA’s prohibition upon the then-Attorney General returning an alien to a country where he or she would be persecuted.<sup>22</sup> The Second Circuit had reached this conclusion by noting that the Attorney General was the President’s “agent” in matters of immigration.<sup>23</sup> Therefore, it found that INA’s prohibition on the Attorney General returning aliens to countries where the alien’s life or freedom would be threatened because of the alien’s race, religion, nationality, political opinion, or membership in a particular social group should be imputed to the rest of the executive branch.<sup>24</sup> The Supreme Court disagreed, however, holding that the interdiction program created by the President did not “usurp[] authority that Congress has delegated to, or implicate[] responsibilities that it has imposed on, the Attorney General alone.”<sup>25</sup> The Court reached this conclusion, in part, because it viewed the INA as restricting only the then-Attorney General’s immigration-related responsibilities under the act. It did not view the INA as restricting the President’s actions in geographic areas outside of where Congress had authorized the Attorney General to act in the immigration context (i.e., outside the United States).<sup>26</sup> The upshot of this reasoning was that the Court declined to find that the interdiction program implemented under the authority of Section 212(f) ran afoul of statutory or treaty-based restrictions.

The *Sale* decision also helped define what is meant by the term *entry* as that term is used in Section 212(f). At the time when *Sale* was decided, the INA explicitly defined *entry* to encompass “any coming of an alien into the United States, from any foreign port or place or from an outlying possession, whether voluntarily or otherwise.”<sup>27</sup> Therefore, consistent with this definition, the Court distinguished between (1) aliens who are “on our shores seeking admission” or “on the threshold of initial entry,” and (2) aliens who are within the United States after entry, regardless of the legality of that entry.<sup>28</sup> While the statutory definition of *entry* that the Court relied upon was deleted from the INA as part of the amendments made by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 (P.L. 104-208),<sup>29</sup> the *Sale* Court’s construction of *entry* has persisted in discussions of Section 212(f) and in other contexts.<sup>30</sup>

<sup>22</sup> *Id.* at 171-72. For several decades, the authority to interpret, implement, and enforce the provisions of the INA was primarily vested in the Attorney General. The Attorney General, in turn, delegated this authority to the Immigration and Naturalization Service (INS) within the Department of Justice. Following the establishment of the Department of Homeland Security (DHS) pursuant to the Homeland Security Act of 2002 (P.L. 107-296), the INS was abolished and its functions were generally transferred to DHS. *See* 6 U.S.C. § 251. Although the INA still refers to the Attorney General in multiple places, such references are generally (although not universally) taken to mean the Secretary of Homeland Security. *See generally* CRS Legal Sidebar WSLG553, *Does It Matter Whether the INA Says DOJ or DHS?: An Example Involving Revocation of Asylum*, by (name redacted).

<sup>23</sup> *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1350, 1360 (2d Cir. 1992).

<sup>24</sup> *Id.* (“[W]e reject the government’s suggestion that since [the relevant provision of the INA] restricts actions of only the attorney general, the President might in any event assign the same “return” function to some other government official. Congress understood that the President’s agent for dealing with immigration matters is the attorney general, and we would find it difficult to believe that the proscription of [the INA]—returning an alien to his persecutors—was forbidden if done by the attorney general but permitted if done by some other arm of the executive branch.”).

<sup>25</sup> *Sale*, 509 U.S. at 172.

<sup>26</sup> *Id.* at 173. *See also* INA § 103(a)(1), 8 U.S.C. § 1103(a)(1) (“The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President....”).

<sup>27</sup> INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1994).

<sup>28</sup> *Sale*, 509 U.S. at 174.

<sup>29</sup> P.L. 104-208, § 301(a), 110 Stat. 3009-575 (amending Section 101(a)(13) of the INA to define *admission*, instead of (continued...))

Lower court decisions provide some further discussion of exercises of 212(f) authority that would seem to be consistent with *Sale*. The most recent of these, an unpublished 2003 decision by the Second Circuit in *Sesay v. Immigration and Naturalization Service [INS]*, granted deference to the Board of Immigration Appeals' (BIA's) determination that the alien petitioner was ineligible for asylum because a grant of asylum necessarily requires entry, and the petitioner's entry was barred by Presidential Proclamation 7062.<sup>31</sup> Previously, in its 1992 decision in *Haitian Refugee Center, Inc. v. Baker*, the U.S. Court of Appeals for the Eleventh Circuit had noted various precedents characterizing the power to exclude aliens from the country as an "inherent executive power" when opining that Section 212(f) "clearly grants the President broad discretionary authority to control the entry of aliens into the United States."<sup>32</sup> A lower court, the U.S. District Court for the Northern District of California, similarly emphasized the breadth of the executive's power over entry in conjunction with its discussion of Section 212(f) in its 1996 decision in *Encuentro del Canto Popular v. Christopher*, stating,

The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.<sup>33</sup>

Collectively, *Sale* and these other decisions suggest that Section 212(f) gives the Executive significant power to bar or impose conditions upon the entry of aliens "on our shores seeking admission" or "on the threshold of initial entry."<sup>34</sup> None of these decisions note any limitations upon the President's power under Section 212(f). This silence could, however, be seen, in part, to reflect the arguably limited nature of the Executive's use of its Section 212(f) authority to date. As **Table 1** below illustrates, prior exercises of presidential authority under Section 212(f) have

(...continued)

entry). See *supra* note 5.

<sup>30</sup> See, e.g., *Sesay v. INS*, 74 Fed. App'x 84, 86 (2d Cir. 2003) (considering the meaning of "entry" in the course of addressing whether a grant of asylum requires entry into the United States); *Matter of Rosas-Ramirez*, 22 I. & N. Dec. 616, 617 (BIA 1999) (discussing whether adjustment of status while within the United States constitutes an "admission" for purposes of INA § 237(a)(2)(A)(iii), and noting that admission is defined, in part, in terms of "entry").

<sup>31</sup> 74 Fed. App'x at 86. The BIA is the highest administrative tribunal for interpreting and applying immigration law. The Second Circuit noted, but did not address, arguments as to the relationship between Sections 212(d) and 212(f) in its decision. The Secretary of Homeland Security's authority to parole aliens into the United States under Section 212(d), however, could be seen as a counterpart to the President's authority under Section 212(f) in that the President may "parole"—or permit the entry into the United States—almost any alien, regardless of whether the alien is subject to one or more of the grounds of inadmissibility set forth in Section 212(a). See INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A) ("The Attorney General [later, Secretary of Homeland Security] may [subject to certain restrictions involving refugees and alien laborers] in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States....").

<sup>32</sup> 953 F.2d 1498, 1506-08 (11<sup>th</sup> Cir. 1992).

<sup>33</sup> 930 F. Supp. 1360, 1365 (N.D. Cal. 1996) (quoting *Knauff v. Shaughnessy*, 338 U.S. 537 (1949) (upholding the executive branch's determination to exclude the alien wife of a former U.S. servicemember, who was eligible for admission under the War Brides Act of 1945, because of concerns that her admission would endanger public safety)). The *Christopher* case arose from a challenge to the denial or revocation of visas to certain Cubans pursuant to Presidential Proclamation 5377, which suspended the entry of individuals whom the Secretary of State (or a designee) considered to be officers or employees of the Cuban government or Cuban Communist Party. As the district court noted, although the plaintiffs at times seem to have suggested that Section 212(f) itself is invalid, their argument was best construed as being that Presidential Proclamation 5377 was invalid because it conflicted with Section 901 of the Foreign Relations Authorization Act for FY1988-1989. *Id.* at 1363.

<sup>34</sup> *Sale*, 509 U.S. at 174.



differed in terms of which and how many aliens are subject to exclusion. In no case to date, though, has the Executive purported to take certain types of action, such as barring all aliens from entering the United States for an extended period of time or explicitly distinguishing between categories of aliens based on their religion. Any such restrictions could potentially be seen to raise legal issues that were not raised by prior exclusions. For example, if the Executive were to seek to bar the entry of all aliens, as immigrants or nonimmigrants, for an extended time, questions could be raised about whether the President’s action was consistent with Congress’s intent in enacting statutes which prescribe criteria for the issuance of family- and employment-based immigrant and nonimmigrant visas and authorize the issuance of certain numbers of such visas each year.<sup>35</sup> Similarly, if the President were to purport to exclude aliens based on their religion, an argument could potentially be made that this action is in tension with U.S. treaty obligations<sup>36</sup> or the First Amendment.<sup>37</sup> (Distinctions between aliens based on nationality, in contrast, have historically been viewed as a routine feature of immigration legislation and subjected to deferential “rational basis” review by the courts when challenged on constitutional grounds.<sup>38</sup>)

**Table I. Categories of Aliens Excluded under INA § 212(f)**

Arranged Chronologically, from the Most to the Least Recent,  
by the Date of Their Publication in the *Federal Register*

Date & President	Nature of the Exclusion
2016, Apr. 21 – Obama <i>Executive Order 13726, 81 Fed.</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have “contributed to the situation in Libya” in specified ways (e.g., engaging in “actions or policies that threaten the peace,

<sup>35</sup> For example, Section 203(a)(1) provides that “[q]ualified immigrants who are the unmarried sons or daughters of citizens of the United States *shall* be allocated visas in a number not to exceed 23,400” (with some additions possible) each year. *See* 8 U.S.C. § 1153(a)(1). “Shall” has been construed to indicate mandatory agency action when used in other contexts. *See, e.g.,* *Kirtsang v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1983 (2016); *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1931 (2016).

<sup>36</sup> For example, Article 2 of the International Covenant on Civil and Political Rights provides that “[e]ach State Party ... undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind” based on religion, among other things. United Nations, Human Rights, Office of the High Commissioner, International Covenant on Civil and Political Rights, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (last accessed: Jan. 14, 2017). The United States ratified this Convention in 1992, with certain reservations, understandings, and declarations. *See, e.g.,* Kristina Ash, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 NW. J. INT’L HUM. RTS. 1, 2 (2005). However, “Congress has not made the treaty enforceable in U.S. courts,” and commentators have disagreed as to whether it or other provisions of law (e.g., the First Amendment) could serve as basis for invalidating the exclusion of certain aliens because of their religion. *See, e.g.,* Debra Cassens Weiss, *Would SCOTUS Uphold Trump’s Plan to Bar Muslim Immigrants*, ABA J., Dec. 9, 2015, [http://www.abajournal.com/news/article/would\\_scotus\\_uphold\\_trumps\\_plan\\_to\\_bar\\_muslim\\_immigrants](http://www.abajournal.com/news/article/would_scotus_uphold_trumps_plan_to_bar_muslim_immigrants).

<sup>37</sup> Aliens outside the United States without recognized ties to the country might have difficulty in maintaining such a challenge. *See id.* However, in certain cases, a ban on the entry of persons based on religion could potentially be seen to impinge upon the First Amendment rights of U.S. citizens by, for example, excluding officers and teachers of that religion. *Cf. Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (recognizing that U.S. persons whose constitutional rights are adversely affected by the denial of a visa way to an alien outside the United States may have the right to challenge the denial in certain circumstances).

<sup>38</sup> *See, e.g.,* *Rajah v. Mukasey*, 544 F.3d 427, 435-36 (2d Cir. 2008) (quoting an earlier decision to the effect that the “most exacting level of scrutiny that we will impose on immigration legislation is rational basis review”); *Narenji v. Civiletti*, 617 F.2d 745, 748 (D.C. Cir. 1980) (“[C]lassifications among aliens based upon nationality are consistent with due process and equal protection if supported by a rational basis....”). There is a statutory restriction on discrimination based on nationality in the issuance of *immigrant* visas, but the legal significance of this provision does not appear to have been definitively addressed. *See* INA § 202(a)(1)(A), 8 U.S.C. § 1152(a)(1)(A).

Date & President	Nature of the Exclusion
Reg. 23559	security, or stability” of that country or may lead to or result in the misappropriation of Libyan state assets)
2016, Mar. 18 – Obama <i>Executive Order 13722, 81 Fed. Reg. 14943</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have engaged in certain transactions involving North Korea (e.g., selling or purchasing metal, graphite, coal, or software directly or indirectly to or from North Korea, or to persons acting for or on behalf of the North Korean government or the Workers’ Party of Korea)
2015, Nov. 25 – Obama <i>Executive Order 13712, 80 Fed. Reg. 73633</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have “contributed to the situation in Burundi” in specified ways (e.g., engaging in “actions or policies that threaten the peace, security, or stability of Burundi,” or “undermine democratic processes or institutions” in that country)
2015, Apr. 2 – Obama <i>Executive Order 13694, 80 Fed. Reg. 18077 (later amended by Executive Order 13757, 82 Fed. Reg. 1 (Jan. 3, 2017))</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have engaged in “significant malicious cyber-enabled activities” (e.g., harming or significantly compromising the provision of services by a computer or computer network that supports an entity in a critical infrastructure sector)
2015, Mar. 11 – Obama <i>Executive Order 13692, 80 Fed. Reg. 12747</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have “contributed to the situation in Venezuela” in specified ways (e.g., engaging in actions or policies that undermine democratic processes or institutions, significant acts of violence or conduct that constitutes a serious abuse or violation of human rights)
2015, Jan. 6 – Obama <i>Executive Order 13687, 80 Fed. Reg. 819</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens with specified connections to North Korea (e.g., officials of the North Korean government or the Workers’ Party of Korea)
2014, Dec. 24 – Obama <i>Executive Order 13685, 79 Fed. Reg. 77357</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have engaged in certain transactions involving the Crimea region of Ukraine (e.g., materially assisting, sponsoring, or providing financial, material, or technological support for, or goods or services to or in support of, persons whose property or interests are blocked pursuant to the order)
2014, May 15 – Obama <i>Executive Order 13667, 79 Fed. Reg. 28387</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have contributed to the conflict in the Central African Republic in specified ways (e.g., engaging in actions or policies that threaten the peace, security, or stability of that country, or that threaten transitional agreements or the political transition process)
2014, Apr. 7 – Obama <i>Executive Order 13664, 79 Fed. Reg. 19283</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have engaged in certain conduct as to South Sudan (e.g., actions or policies that “have the purpose or effect of expanding or extending the conflict” in that country, or obstructing reconciliation or peace talks or processes)
2014, Mar. 24 – Obama <i>Executive Order 13662, 79 Fed. Reg. 16169</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have contributed to the situation in Ukraine in specified ways (e.g., operating in the financial services, energy, metals and mining, engineering, or defense and related materiel sectors of the Russian Federation economy)
2014, Mar. 19 – Obama <i>Executive Order 13661, 79 Fed. Reg. 15535</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens determined to have contributed to the situation in Ukraine in specified ways (e.g., officials of the government of the Russian Federation, or persons who operate in the arms or related materiel sector)
2014, Mar. 10 – Obama	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens determined to have contributed to the situation in Ukraine in specified ways

Date & President	Nature of the Exclusion
<i>Executive Order 13660, 79 Fed. Reg. 13493</i>	(e.g., engagement in or responsibility for misappropriation of state assets of Ukraine or of economically significant entities in that country)
2013, June 5 – Obama <i>Executive Order 13645, 78 Fed. Reg. 33945</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who have engaged in certain conduct related to Iran (e.g., materially assisting, sponsoring, or providing support for, or goods or services to or in support of, any Iranian person included on the list of Specially Designated Nationals and Blocked Persons)
2012, Oct. 12 – Obama <i>Executive Order 13628, 77 Fed. Reg. 62139</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have engaged in certain actions involving Iran (e.g., knowingly transferring or facilitating the transfer of goods or technologies to Iran, to entities organized under Iranian law or subject to Iranian jurisdiction, or to Iranian nationals, that are likely to be used by the Iranian government to commit serious human rights abuses against the Iranian people)
2012, July 13 – Obama <i>Executive Order 13619, 77 Fed. Reg. 41243</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to threaten the peace, security, or stability of Burma in specified ways (e.g., participation in the commission of human rights abuses, or importing or exporting arms or related materiel to or from North Korea)
2012, May 3 – Obama <i>Executive Order 13608, 77 Fed. Reg. 26409</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have engaged in certain conduct as to Iran and Syria (e.g., facilitating deceptive transactions for or on behalf of any person subject to U.S. sanctions concerning Iran and Syria)
2012, Apr. 24 – Obama <i>Executive Order 13606, 77 Fed. Reg. 24571</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens determined to have engaged in specified conduct involving “grave human rights abuses by the governments of Iran and Syria via information technology” (e.g., operating or directing the operation of communications technology that facilitates computer or network disruption, monitoring, or tracking that could assist or enable serious human rights abuses by or on behalf of these governments)
2011, Aug. 9 – Obama <i>Proclamation 8697, 76 Fed. Reg. 49277</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who participate in serious human rights and humanitarian law violations and other abuses (e.g., planning, ordering, assisting, aiding and abetting, committing, or otherwise participating in “widespread or systemic violence against any civilian population” based, in whole or in part, on race, color, descent, sex, disability, language, religion, ethnicity, birth, political opinion, national origin, membership in a particular social group, membership in an indigenous group, or sexual orientation or gender identity)
2011, July 27 – Obama <i>Proclamation 8693, 76 Fed. Reg. 44751</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens subject to U.N. Security Council travel bans and International Emergency Economic Powers Act sanctions
2009, Jan. 22 – Bush <i>Proclamation 8342, 74 Fed. Reg. 4093</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of foreign government officials responsible for failing to combat trafficking in persons
2007, July 3 – Bush <i>Proclamation 8158, 72 Fed. Reg. 36587</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of persons responsible for policies or actions that threaten Lebanon’s sovereignty and democracy (e.g., current or former Lebanese government officials and private persons who “deliberately undermine or harm Lebanon’s sovereignty”)
2006, May 16 – Bush <i>Proclamation 8015, 71 Fed. Reg. 28541</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of persons responsible for policies or actions that threaten the transition to democracy in Belarus (e.g., Members of the government of Alyaksandr Lukashenka and other persons involved in policies or actions that “undermine or injure democratic institutions or impede the transition to democracy in Belarus”)
2004, Jan. 14 – Bush	Suspending the entry into the United States, as immigrants or nonimmigrants, of persons who have engaged in or benefitted from corruption in specified ways (e.g.,

Date & President	Nature of the Exclusion
<i>Proclamation 7750, 69 Fed. Reg. 2287</i>	current or former public officials whose solicitation or acceptance of articles of monetary value or other benefits has or had “serious adverse effects on the national interests of the United States”)
2002, Feb. 26 – Bush <i>Proclamation 7524, 67 Fed. Reg. 8857</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of persons responsible for actions that threaten Zimbabwe’s democratic institutions and transition to a multi-party democracy (e.g., Senior members of the government of Robert Mugabe, persons who through their business dealings with Zimbabwe government officials derive significant financial benefit from policies that undermine or injure Zimbabwe’s democratic institutions)
2001, June 29 – Bush <i>Proclamation 7452, 66 Fed. Reg. 34775</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of persons responsible for actions that threaten international stabilization efforts in the Western Balkans, or are responsible for wartime atrocities in that region
2000, Oct. 13 – Clinton <i>Proclamation 7359, 65 Fed. Reg. 60831</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who plan, engage in, or benefit from activities that support the Revolutionary United Front or otherwise impede the peace process in Sierra Leone
1999, Nov. 17 – Clinton <i>Proclamation 7249, 64 Fed. Reg. 62561</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens responsible for repression of the civilian population in Kosovo or policies that obstruct democracy in the Federal Republic of Yugoslavia (FRY) or otherwise lend support to the government of the FRY and the Republic of Serbia
1998, Jan. 16 – Clinton <i>Proclamation 7062, 63 Fed. Reg. 2871</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of members of the military junta in Sierra Leone and their family
1997, Dec. 16 – Clinton <i>Proclamation 7060, 62 Fed. Reg. 65987</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of senior officials of the National Union for the Total Independence of Angola (UNITA) and adult members of their immediate families
1996, Nov. 26 – Clinton <i>Proclamation 6958, 61 Fed. Reg. 60007</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of members of the government of Sudan, officials of that country, and members of the Sudanese armed forces
1996, Oct. 7 – Clinton <i>Proclamation 6925, 61 Fed. Reg. 52233</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of persons who “formulate, implement, or benefit from policies that impede Burma’s transition to democracy” and their immediate family members
1994, Oct. 27 – Clinton <i>Proclamation 6749, 59 Fed. Reg. 54117</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of certain aliens described in U.N. Security Council Resolution 942 (e.g., officers of the Bosnian Serb military and paramilitary forces and those acting on their behalf, or persons found to have provided financial, material, logistical, military, or other tangible support to Bosnian Serb forces in violation of relevant U.S. Security Council resolutions)
1994, Oct. 5 – Clinton <i>Proclamation 6730, 59 Fed. Reg. 50683</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who formulate, implement, or benefit from policies that impede Liberia’s transition to democracy and their immediate family
1994, May 10 – Clinton <i>Proclamation 6685, 59 Fed. Reg. 24337</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens described in U.N. Security Council Resolution 917 (e.g., officers of the Haitian military, including the police, and their immediate families; major participants in the 1991 Haitian coup d’etat)
1993, Dec. 14 – Clinton <i>Proclamation 6636, 58 Fed. Reg. 65525</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who formulate, implement, or benefit from policies that impede Nigeria’s transition to democracy and their immediate family
1993, June 23 – Clinton <i>Proclamation 6574, 58 Fed. Reg.</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of persons who formulate or benefit from policies that impede Zaire’s transition to

Date & President	Nature of the Exclusion
34209 1993, June 7 – Clinton <i>Proclamation 6569, 58 Fed. Reg. 31897</i>	democracy and their immediate family Suspending the entry into the United States, as immigrants or nonimmigrants, of persons who formulate, implement, or benefit from policies that impede the progress of negotiations to restore a constitutional government to Haiti and their immediate family
1992, June 1 – Bush <i>Executive Order 12807, 57 Fed. Reg. 23133</i>	Making provisions to enforce the suspension of the entry of undocumented aliens by sea and the interdiction of any covered vessel carrying such aliens
1988, Oct. 26 – Reagan <i>Proclamation 5887, 53 Fed. Reg. 43184</i>	Suspending the entry of specified Nicaraguan nationals into the United States as nonimmigrants (e.g., officers of the Nicaraguan government or the Sandinista National Liberation Front holding diplomatic or official passports)
1988, June 14 – Reagan <i>Proclamation 5829, 53 Fed. Reg. 22289</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of certain Panamanian nationals who formulate or implement the policies Manuel Antonio Noriega and Manuel Solis Palma, and their immediate families
1986, Aug. 26 – Reagan <i>Proclamation 5517, 51 Fed. Reg. 30470</i>	Suspending the entry of Cuban nationals as immigrants with certain specified exceptions (e.g., Cuban nationals applying for admission as immediate relatives under INA § 201(b))
1985, Oct. 10 – Reagan <i>Proclamation 5377, 50 Fed. Reg. 41329</i>	Suspending the entry of specified classes of Cuban nationals as nonimmigrants (e.g., officers or employees of the Cuban government or the Communist Party of Cuba holding diplomatic or official passports)
1981, Oct. 1 – Reagan <i>Proclamation 4865, 46 Fed. Reg. 48107</i>	Suspending the entry of undocumented aliens from the high seas, and directing the interdiction of certain vessels carrying such aliens

**Source:** Congressional Research Service, based on various sources cited in **Table I**.

**Note:** In a number of cases, the exclusions listed in **Table I** were expressly said to be waivable, in the Executive's discretion, when the entry of a particular alien otherwise subject to exclusion "would not be contrary to the interests of the United States." See, e.g., 50 Fed. Reg. 41329, at § 2 (Oct. 10, 1985).

## Other Provisions of the INA

Beyond Section 212(f), other provisions of the INA can also be seen to authorize the Executive to restrict aliens' entry to the United States.<sup>39</sup> Most notably, Section 214(a)(1) prescribes that the "admission of any alien to the United States as a nonimmigrant shall be for such time and under such conditions as [the Executive] may by regulations prescribe."<sup>40</sup> (Nonimmigrants are aliens admitted to the United States for a specific period of time and purpose pursuant to one of the

<sup>39</sup> In addition, yet other provisions of the INA could be seen to give the Executive discretion as to whether certain categories of aliens are admitted. For example, Section 207(a)(2) of the INA could be seen to give the Executive broad discretion in determining how many aliens are admitted to the United States as refugees each year. See 8 U.S.C. § 1157(a)(2). Other provisions outside immigration law could also apply. See National Defense Authorization Act for FY2017, P.L. 114-328, §§ 1261-1265, —Stat.—(Dec. 23, 2016) (sanctions for human rights abusers); Consolidated Appropriations Act, P.L. 114-113, § 7031(c), 129 Stat. 2755 (Dec. 18, 2015) (providing that certain foreign officials involved in "significant corruption" and their immediate family are ineligible for entry to the United States); Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, P.L. 112-208, §§ 404-406, 126 Stat. 1505-1509 (Dec. 14, 2012) (excluding certain aliens involved in human rights abuses).

<sup>40</sup> 8 U.S.C. § 1184(a)(1).

“lettered” visas set forth in Section 101(a)(15) of the INA.<sup>41</sup> Section 215(a)(1) similarly provides that “it shall be unlawful for any alien” to enter or depart the United States “except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.”<sup>42</sup> In the past, the Executive has relied upon Section 215(a)(1), in particular, to exclude certain aliens. For example, President Carter cited to Section 215(a) when authorizing the revocation of immigrant and nonimmigrant visas issued to Iranians during the Iran Hostage Crisis.<sup>43</sup>

The current Section 215(a) was enacted as part of the INA in 1952.<sup>44</sup> However, similar language appeared in earlier immigration-related statutes.<sup>45</sup> Both the earlier language and the initial version of Section 215(a) granted the President the power to impose additional restrictions upon aliens’ entry into and departure from the United States during times of war and, in some cases, “national emergency.”<sup>46</sup> The President’s exclusion of certain aliens under this authority<sup>47</sup> was upheld in several court cases, the most notable of which was arguably the Supreme Court’s 1950 decision in *United States ex rel. Knauff v. Shaughnessy*.<sup>48</sup> There, the Court rejected a challenge to the exclusion of a German “war bride” under regulations promulgated pursuant to Presidential Proclamation 2523, which was itself issued under the authority of a predecessor of Section 215(a).<sup>49</sup> In so doing, the Court rejected the excluded bride’s argument that both the regulations and the underlying statute constituted an impermissible delegation of legislative power, reasoning that “[t]he exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not

<sup>41</sup> *Id.* § 1101(a)(15) (defining an “immigrant” to mean “every alien *except* an alien who is within one of the following classes of nonimmigrant aliens....”) (emphasis added).

<sup>42</sup> *Id.* § 1184(a)(1).

<sup>43</sup> See Executive Order 12172, Delegation of Authority With Respect to Entry of Certain Aliens Into the United States, 44 Fed. Reg. 67947, 67947 (Nov. 28, 1979) (authorizing the Secretary of State and the Attorney General to exercise “in respect of Iranians holding *nonimmigrant visas*, the authority conferred upon the President by section 215(a)(1) of the Act of June 27, 1952 (8 USC 1185)...”) (emphasis added); Executive Order 12206, Amendment of Delegation of Authority with Respect to Entry of Certain Aliens Into the United States,” 45 Fed. Reg. 24101, 24201 (Apr. 7, 1980) (amending Executive Order 12172 to cover *immigrant*, as well as nonimmigrant visas). The exclusion addressed in *Sale* was also effectuated, in part, under the authority of Section 215(a). See *supra* note 19.

<sup>44</sup> See P.L. 82-414, § 212(e), 66 Stat. 190 (June 27, 1952).

<sup>45</sup> See P.L. 65-164, 40 Stat. 559 (May 22, 1918) (“[W]hen the United States is at war, if the President shall find that public safety requires that restrictions and prohibitions ... be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful [f]or 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 shall prescribe.”); P.L. 77-113, 55 Stat. 252 (June 20, 1941) (similar).

<sup>46</sup> See 66 Stat. 190 (war and national emergency); 55 Stat. 252 (war); 40 Stat. 559 (war).

<sup>47</sup> See, e.g., Proclamation 3,004, Control of Persons Leaving or Entering the United States, 18 Fed. Reg. 489 (Jan. 17, 1953) (President Truman relying, in part, on a predecessor to Section 215(a) to impose restrictions on the entry of aliens into the Panama Canal Zone and American Samoa); Proclamation 2,850, 14 Fed. Reg. 5173 (Aug. 19, 1949) (President Truman relying, in part, on a predecessor to Section 215(a) in excluding aliens whose entry executive officials deem “would be prejudicial to the interests of the United States”); Proclamation 2,523, Control of Persons Entering and Leaving the United States, 6 Fed. Reg. 2617 (Nov. 18, 1941) (similar, President Roosevelt).

<sup>48</sup> 338 U.S. 537 (1950). See also *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (noting the President’s power to exclude aliens in the course of finding that an alien who was so excluded, but whom no other country would accept, was not entitled to release into the United States). The *Mezei* Court, in particular, cited a number of precedents for the proposition that “the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.” 345 U.S. at 210 (citing *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *The Chinese Exclusion Case*, 130 U.S. 581 (1889); and *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)).

<sup>49</sup> *Knauff*, 338 U.S. at 540-42.

from legislative power but is inherent in the executive power to control the foreign affairs of the nation.”<sup>50</sup> Therefore, in the Court’s view, Congress could not have run afoul of the non-delegation doctrine by authorizing the President to exercise this power “for the best interests of the country” during wartime because the President already possessed such authority.<sup>51</sup> The *Knauff* Court similarly rejected the argument that the regulations in question were not “reasonable,” as required by the statutory authority under which they were issued—which in relevant part, made it unlawful for an alien to enter the United States “except under such reasonable rules ... as the President may prescribe.”<sup>52</sup> The Court did so because it viewed the regulations excluding aliens whose entry was “deemed prejudicial to the public interest” as “reasonable in the circumstances of the period for which they were authorized, namely, the national emergency of World War II.”<sup>53</sup>

The statutory language regarding war and national emergency—which arguably factored into the Court’s decision in *Knauff*—was deleted from Section 215(a) in 1978.<sup>54</sup> However, it seems unlikely that this deletion would serve as a basis for overruling the *Knauff* Court’s conclusions about whether the power in question was impermissibly delegated to the Executive,<sup>55</sup> or about what constitutes a “reasonable” regulation for purposes of Section 215(a).<sup>56</sup> *Knauff*’s statements about the inherent power of nations to exclude aliens outside the United States with no recognized ties to the country would also generally seem to remain good law.<sup>57</sup>

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<sup>50</sup> *Id.* at 542.

<sup>51</sup> *Id.* at 542-43 (“[T]here is no question of inappropriate delegation of legislative power involved here.”). The non-delegation doctrine precludes Congress from handing over its legislative powers to other branches of the federal government. However, Congress may “confer[] decisionmaking authority upon agencies, so long as it “lays down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.” See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (internal quotations omitted).

<sup>52</sup> 338 U.S. at 544.

<sup>53</sup> *Id.*

<sup>54</sup> P.L. 95-426, § 707(a), 92 Stat. 992-93 (Oct. 7, 1978).

<sup>55</sup> *Cf.* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315 (2000) (“Since 1935, the Supreme Court has not struck down an act of Congress on nondelegation grounds....”).

<sup>56</sup> There does not appear to be any court cases establishing what is meant by the term “reasonable regulations” for purposes of Section 215(a) and its predecessors. However, courts may grant considerable deference to the Executive’s determinations in this area, given the “plenary power” that the political branches are generally seen to have over immigration. *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (“For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.”).

<sup>57</sup> *See, e.g., Jean v. Nelson*, 472 U.S. 847, 875 (1985) (“It is in the area of entry] that the Government’s interest in protecting our sovereignty is at its strongest and that individual claims to constitutional entitlement are the least compelling.”); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (citing cases finding that the power to exclude is a “fundamental sovereign attribute”); *Kleindeinst v. Mandel*, 408 U.S. 753, 765 (similar) (1972). Certain limits to this power have, however, been recognized, particularly as to aliens with recognized ties to the United States or who would need to be detained in the United States to effectuate their exclusion. *See, e.g., CRS Legal Sidebar WSLG1695, Supreme Court to Hear Challenge to Aliens’ Detention Pending Removal Proceedings*, by (name redacted).

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