

Florida A&M University College of Law

## Scholarly Commons @ FAMU Law

---

Journal Publications

Faculty Works

---

2017

### Congress Did Not Give the President Unfettered Discretion to Exclude

Maritza I. Reyes

Follow this and additional works at: <https://commons.law.famu.edu/faculty-research>



Part of the [Civil Rights and Discrimination Commons](#), [Human Rights Law Commons](#), and the [Immigration Law Commons](#)

---

## A Member of the Law Professor Blogs Network

Thursday, February 9, 2017

### Congress Did Not Give the President Unfettered Discretion to Exclude by Professor Maritza Reyes

By Immigration Prof



As an immigration law professor, after covering the **Chinese Exclusion Case**, 130 U.S. 581 (1889), years before the issuance of President Trump's "Muslim ban" Executive Order, I often posed hypothetical bans based on race, nationality, and religion during our discussion of the case. Most students' initial reaction was that no such ban could be enacted. I would then introduce them to 8 U.S.C. § 1182(f) [Immigration Nationality Act section 212(f)]. Upon reading the statute, most students would gasp or react with an incredulous look on their faces.

The scenario I posed to my students is no longer a hypothetical. It is a case and controversy in several federal courts. During the oral arguments before the Ninth Circuit Court of Appeals, Judge Canby asked the Trump Administration's attorney: "Could the President simply say in the order we are not going to let any Muslims in?"

Based on a superficial reading of Section 212(f), the answer would be, yes, the statute, as written, states that "[w]henver 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/she may issue an Executive Order suspending "the entry of all aliens or any class of aliens as immigrants or nonimmigrants." This analysis does not include a First Amendment constitutional analysis; it is strictly an immigration law analysis.

From an immigration law perspective, I would argue that the President's discretionary authority under section 212(f) should be constrained by the language in the statute, which requires a finding "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." This is a condition precedent to the exercise of the power to exclude under the statute. To satisfy this requirement, the President must make an evidentiary showing that should be set out in any such executive order. President Trump did not do this. Instead, he made blanket assertions that entry of noncitizens from the banned countries "would be detrimental to the interests of the United States" without specifying why.

The Executive Order states that the interest involved is the protection of "the American people from terrorist attacks by foreign nationals admitted to the United States." Where is the evidence to support that the entry of visa holders, including refugees, from the banned countries will be detrimental to the interest in protecting the American people from terrorist attacks? Rather than protecting the American people from terrorist attacks, the President's Executive Order may serve to instigate terrorist attacks against the American people.

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court held that an immigration statute did not grant the Attorney General unlimited discretion "to hold indefinitely in confinement an alien ordered removed." The Attorney General argued that the statute meant what it literally stated regarding the granting of the power to detain. One of the stated purposes of the statute was protecting the community from "dangerous aliens."

The Court found nothing in the history of the detention statute that clearly demonstrated a congressional intent to authorize indefinite detention. Moreover, the Court held that reading an implicit limitation into the statute (a reasonably necessary period of detention) would allow it to avoid considering a constitutional question—*indefinite detention*. The Court explained that detention beyond a reasonable period would raise a problem under the Fifth Amendment's Due Process Clause. In the current case and controversy, several constitutional questions are being raised, including under the First Amendment's Free Establishment Clause.

The federal courts should interpret section 212(f) and hold that Congress did not grant the President unfettered discretion to decide that entry of all aliens or any class of aliens is detrimental to the United States. As in *Clark v. Martinez*, 543 U.S. 371 (2005), the sequel to *Zadvydas*, the statutory analysis is not about which class of aliens is involved, but about the congressional intent. Pursuant to *Zadvydas*, the courts should read a significant limitation into section 212(f)—*substantiation of the detriment finding*, including as applied to the purported interest to be protected from the alleged detriment. Because President Trump did not meet this threshold requirement, he had no authority to issue the Executive Order.

**Maritza Reyes is Associate Professor of Law at the Florida A&M University College of Law where she teaches immigration law, evidence, professional responsibility, civil procedure, and Latinos and the law.**

KJ

#### Related articles

Symposium on Kerry v. Din:	US court rejects appeal to immediately reinstate "Terrorism" and Trump's travel	Appeals court rejects demand to resume travel ban - for now	Trump may have undermined the legal case for his immigration	US court rejects bid to reinstate Trump travel ban
----------------------------	---	---	--	--

<https://lawprofessors.typepad.com/immigration/2017/02/congress-did-not-give-the-president-unfettered-discretion-to-exclude-by-professor-maritza-reyes.html>