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Investigative Note

Key Takeaway: The president has the authority to shut down the border and turn asylum seekers away.

The Issue: Anti-borders radicals claim that the president can't use the authority granted to him, by Congress, pursuant to 8 U.S.C. § 1182(f) to shut down the border and turn off the never-ending flow of bogus asylum seekers. However, they never seem to provide any black letter law indicating why 1182(f) (allegedly) doesn't apply to asylum and why it (allegedly) won't support a general shut-down of the border.

Of course, the reason why those who want to fill the U.S. with foreign law breakers can't furnish a coherent legal argument in defense of their position is that no such argument actually exists.

Why Americans Should Be Concerned?

Americans should be concerned because they're being lied to. In reality, the president ***CAN*** exercise the authority granted to him by 8 U.S.C. § 1182(f) and he ***SHOULD*** do exactly that in order to restore order to the border with Mexico.

The reason why the anti-borders radicals, who want to fill the U.S. with foreign law breakers, can't furnish a coherent legal argument in defense of their position is that no such argument actually exists. Let's break it down:

- The open borders radicals imply that both domestic immigration law and international human rights law require America to let asylum-seekers into the U.S. and allow them to await the adjudication of their claims here. But that is a gross misrepresentation.

- The U.S. acceded to the 1967 United Nations Protocol Relating to the Status of Refugees, the legal instrument that indicates preferred procedures for identifying potential refugees and asylees. However, as the International Justice Resource Center notes, neither the 1951 Refugee Convention, nor the 1967 protocol, nor any other international legal instrument "define[s] how States parties are to determine whether an individual meets the definition of a refugee. Instead, the establishment of asylum proceedings and refugee status determinations are left to each State party to develop."

- Consistent with its obligations under the 1967 Protocol, the U.S. has provided a comprehensive framework for granting relief to the persecuted – and has taken in more refugees

and asylees than all other nations combined. Asylum protections are set forth at 8 U.S.C. § 1158.

- But, in order to assure American sovereignty, Congress formulated asylum as a discretionary form of relief. As courts have consistently held from *Matter of Salim* in 1982, to the more recent *Patpanathan v. Attorney General* decided in 2014, the U.S. government is not required to grant asylum to anyone, even people who are clearly subject to persecution in their home country. And the U.S. may decide whether or not to furnish protection based on its own public safety, national security and foreign affairs interests.

- In making asylum a discretionary form of relief Congress was adhering to a basic principle of immigration law set forth by the Supreme Court in *Ekiu v. United States*. Therein the Court opined that, "It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions or to admit them only in such cases and upon such conditions as it may see fit to prescribe."

- The Court subsequently reaffirmed this position in *Kleindeinst v. Mandel*, when it held that unadmitted, nonresident aliens have no constitutional right of entry into this country.

- In short, the U.S. is under no obligation to admit *any* foreigners that it does not wish to admit, whether they are seeking asylum, or any other type of immigration status. And there is absolutely no domestic statutory provision or

principle of international law which requires the U.S. to allow foreigners into the U.S. to seek asylum.

- Just as the Supreme Court has been abundantly clear in holding that the U.S. is under no obligation to grant entry to any particular foreigner or group of foreigners, it has been amply clear that Congress has conferred upon the President of the United States the authority to close the border to all, or to particular classes of, aliens seeking admission to U.S. territory.

- In *Trump v. Hawaii*, the Supreme Court defined the limits of the President's power to restrict the entry of certain aliens, as delegated by Congress, pursuant to 8 U.S.C. § 1182(f).

- The text of § 1182(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."

- According to the Supreme Court: "By its terms, §1182(f) exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry ('[w]henever [he] finds that the entry' of aliens 'would be detrimental' to the national interest); whose entry to suspend ('all aliens or any class of aliens'); for how long ('for such period as he shall deem necessary'); and on what conditions ('any restrictions he may deem to be appropriate'). It is therefore unsurprising that we have previously observed that §1182(f) vests the President with

'ample power' to impose entry restrictions in addition to those elsewhere enumerated in the INA."

- In plain English, that means that whenever the President decides that the entry of either all aliens, or any particular class of aliens (*e.g.*, asylum seekers, tourists, international students), would be bad for the United States, he can, by proclamation, without taking any other action, suspend their admission for as long as he sees fit.

- *Trump v. Hawaii* affirmed earlier holdings in *Abourezk v. Reagan*, 785 F. 2d 1043, 1049, n. 2 (CADC 1986) (aff'd. per curiam) and *Sale* v. *Haitian Centers Council, Inc.*, 509 U. S. 155 (1993). In those cases, courts found that § 1182(f) grants the president "sweeping" powers to supplement the other grounds of inadmissibility set forth in the INA. Therefore, he/she may suspend or restrict the entry of virtually any foreign nationals whose presence on U.S. soil he/she finds would be detrimental to the best interests of the United States.

Unless you are comfortable perpetuating complete and utter falsehoods, it's kind of hard to argue that the terms of § 1182(f) include a carve out prohibiting the president from finding that allowing asylum seekers to enter the U.S. *en masse* has become detrimental to the interests of the United States, and temporarily banning their entry, until order can be restored to the southern border.

The open borders radicals would probably argue that there is a right to enter the U.S. to seek asylum and it would be a violation of international law to refuse to allow people who claim they require asylum protections to enter American territory. It is likely they'd also argue that this is a "civil rights" issue.

As we've seen, however, these claims are utterly spurious. There is no "right" to seek asylum. Foreigners have no "right" to enter the United States. And "civil rights" simply aren't a relevant factor when deciding whether to close the border to foreigners or not. As the Supreme Court noted in both *Matthews v. Diaz* and *Demore v. Kim*, "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." And why is that? Because foreign nationals are not citizens of the United States, nor are they members of the American polity – and the U.S. government is not legally or morally required to treat foreigners in the same manner that it treats U.S. citizens.

What's the solution?

Our immigration system isn't broken – far from it. The moral compasses of those charged with administering it are broken.

But the good news is that fixing the problem isn't rocket science.

The INA contains more than ample authority to address the current crisis.

Congress ***MUST*** hold the White House responsible and insist that the Executive Branch enforce the Immigration and Nationality Act as Congress has written it.