



Cristina: Welcome to Unsettled, Immigration in Turbulent Times. I'm Cristina Rodriguez.

Alex: I'm Alex Aleinikoff.

Hiroshi: And I'm Hiroshi Motomura.

Cristina: On this podcast, we examine the legal and political moves the Trump administration is making and put them into broader context at this unsettled moment in our history.

Alex: Welcome to the first episode of Unsettled.

Hi, Cristina.

Cristina: Hi, Alex.

Alex: Hey, Hiroshi.

Hiroshi: Hi, Alex. Hi, Cristina.

Cristina: Good to see you guys.

Alex: Nice to see you.

You know, we've got so much to talk about and every day seems to give us more. But, you know, I was thinking today we should start with the take on our name. Cristina, what do you mean by "unsettled"? What's unsettled to you?

Cristina: Well, there's a lot that this new presidential administration has unsettled, and in the immigration sphere, it's challenging bedrock constitutional precepts and upending assumptions about how the immigration system works. I think most fundamentally the fact that the president has issued an executive order purporting to redefine the citizenship clause of the 14th Amendment, is deeply unsettling. The president has sought to declare that over a century of legal interpretation and practice that understands the 14th Amendment to apply basically to anyone born in the United States and subject to the jurisdiction thereof means something different. So what was once an obscure and lopsided academic debate about whether the children of unauthorized immigrants were in fact citizens of the United States is now, because of this executive order, on the op-ed pages of New York Times.

There are mainstream commentators who are now saying that, of course it makes sense that the children of unauthorized immigrants shouldn't be allowed to be citizens of the United States. But that is contrary to the way the legal system up and down, left and right, has operated for over a hundred years, and it's inconsistent with the original meaning of the 14th amendment as the vast majority of scholars understand it.

The fact that the president thinks that he can issue an executive order that also contradicts statutes of Congress is also deeply unsettling. No matter what we think about the merits of birthright citizenship, that's not the way we should be defining who is a citizen of this country.

So that's just the beginning. But there are other elements of what the administration is doing that are similarly unsettling, changing what we thought we could take for granted. So an example of that is the security that we have long assumed that green card holders have now seems under threat. So the most glaring example of this, and I think we're going to talk about this in some depth later on in a subsequent episode, is the administration detaining and trying to deport a former Columbia student who was a permanent resident of the United States because of his First Amendment protected speech, because he was involved in the campus protests at Columbia. Regardless of what you think about those protests, the idea that someone would be arrested and detained who was a permanent resident of the United States because of that speech is concerning. And even more concerning is the ground that the administration is claiming for deporting him, that he is a threat to U.S. foreign policy—that is a ground of removal that has almost never been invoked and is stunningly broad and would allow the Secretary of State to basically declare anyone whose speech is somehow inconsistent with foreign policy who is a lawful permanent resident to be deported.

I could go on, the invocation of the Alien Enemies Act and the idea that the president has inherent authority, subject to no legal constraints, to deport hundreds of Venezuelans because the administration says without any proof in court that they are gang members, and then to send them not to their country of origin, but to a hellish prison in El Salvador, again, on the president's say-so, on the administration's say-so, is deeply unsettling. And the fact that the administration seems to be fulfilling something it's been teasing for a while, which is that it might not abide by court orders in this case of the deported Venezuelans is unsettling for the legal system as a whole.

So, you know, we all know that immigration politics has never been quiet or uncontested, but it seems uniquely unsettled right now. Concern and outrage over the Biden administration's border policies and the way Trump and Vance were able to exploit the issue in the election almost certainly affected the outcome of the election. Democrats in Congress are voting for harsh new immigration legislation that would have been unthinkable six months ago. And the way forward for people who believe in a humane and open immigration policy is murky at best. Hiroshi, how would you characterize what's unsettled about our moment?

Hiroshi: Well, unsettled of course is a very multidimensional word, as are the things that you mentioned as unsettling. I agree with all of those in terms of my own reaction, but let me just take a step back and talk about something that's a little bit more big picture. It's the way we talk about immigration law and what it is. I think of what's happened in the last ten or twenty years. It's to resurrect a way of thinking about immigration law that's been part of American history, maybe world history, or decades, maybe even centuries. That is the idea that the purpose of immigration law is to protect "us" on the inside from "them" on the outside. And that leads to a way of thinking about immigration law that centers the border. It puts the argument in terms of how high the border wall should be. It doesn't think about immigration law as the way we build communities, as who belongs in this community, how immigration affects the economy. For example, economic recovery. And prosperity. And if you think about immigration law as just the legal version of a border wall, then you think about immigration as a matter of outward facing regulation. Everything becomes a matter of national security. Everything becomes a matter of foreign affairs.

And so, you know, what does that lead to? It leads to looking at everything as a matter of Friends and enemies. This leads to using the Alien Enemies Act. It leads to looking at asylum and refugee as a matter of generosity that can't be afforded. We've seen most recently just in the last few days the invocation of the foreign policy, or I

should say foreign affairs ground for thinking about regulations as a way of escaping the normal obligation to issue regulations, preliminarily for official notice and comment.

And so this also leads to thinking about immigration regulation as a matter of emergency, as a matter of invasion, things of that nature, and that cycles back around, to what Cristina mentioned – that Immigration regulation is something that is a zone of exception. Instead of constitutional rights applying, constitutional rights are things we can't afford, according to this view. Because we are being invaded. And so you can see how this view of thinking about what immigration regulation does in the first place is a view that leads to narrowing citizenship, to sending people to El Salvador without due process, to exempting regulations from normal processes. Cutting off Islamic refugees and so forth.

There's more to say about that, but that's a way of thinking about each of these instances in a way that I think is not just deeply unsettling, but it's going to persist in a way that leads to profound damage to communities inside the United States, communities that include citizens and non-citizens alike. So that's, that's a way of thinking about what's unsettling. So Alex, what's unsettling for you?

Alex: You know, I'm finding our national immigration narrative unsettled. I mean, clearly under this administration, it's no longer give me your tired, your poor. We've cut off asylum and refugee admissions. Trump has ended TPS, temporary protected status programs for hundreds of thousands of non-citizens. The parole program that brought in Cubans and Haitians and Nicaraguans and Venezuelans has been terminated. So that's not the narrative, but what is the narrative?

I've got a couple of possibilities here. I'm not sure which is the right one. Maybe we can talk about that. The first would be Fortress America. Ending USAID meant that we have no responsibility for others in the world. We're going to pull up the drawbridge, fill the moat, not let anybody in. I think this is probably not right, because I think no matter what, we're still going to have high levels of legal immigration, which have averaged about a million a year—unless the Trump administration slows down the issuance of visas, but we haven't heard that. And I think there'll be new H-1B visas, which are the visas given to skilled workers, which Elon Musk is supporting and the like. So I don't think it'll mean a closing off of immigration. That's not what we saw in the first Trump administration.

Tom Friedman has spoken, his metaphor has been a high wall with a big gate. Maybe that's the right description. I'm not sure it really works as a narrative, so I'm going to let that one go.

A second possible narrative for the Trump administration is really a replay of our first immigration narrative: that the U.S.-- it conceives the U.S. as a white America demographically and culturally. You know, there are historical precedents here. The first naturalization statute permitted only white people--that's the language that was used--to naturalize the United States. Dred Scott said that black people slave or free were not citizens of the United States, then came Chinese exclusion, the national origin quota system. We know that story was to construct a largely white nation. In this story, the 1965 law, not seen so much as a civil rights law, but more as some kind of affirmative action that probably needs to be stopped. And unfortunately there is evidence in the Trump administration policies for this, for this view that this may be their narrative on leaving aside the Muslim ban and the comment about "shithole countries" from Trump one and thinking just about Trump two, but you know, we ended refugee admissions except for white Afrikaners from South Africa.

Other evidence here was the demonizing of Haitian migrants in Springfield, Ohio during the campaign. I think the attack on birthright citizenship that Cristina described can be seen in this light. We're about to have a new expanded travel ban. Virtually all the people subject to that ban will be immigrants of color. So we need to watch out to see if this becomes the actual narrative for this administration.

The third possibility might be, "give me your wealthy, your skilled; you can keep your huddled masses." So the gate that Tom Friedman talks about is for the rich. Trump has talked about a \$5 million gold visa. There'll be attempts to change the public charge rule, which is the rule that dates to the 19th century that keeps out people who are likely to get on the federal dole. That'll probably be stiffened to keep more low-income people out. As I said before, there'll be more H-1B visas for skilled workers. And this is all going to be to fuel the world of crypto and artificial intelligence. And, you know, this is sort of a big business approach, but I contrast it with the 19th century big business version, which wanted lots of low skilled workers who could build the U.S. industrial base and public infrastructure and also was used to undermine the growth of labor unions, but that's not the story this time. The goal of mass deportations threatens a vulnerable workforce that would be doing this kind of work. But we don't want undocumented immigrants in the coming virtual world. Robots can do healthcare. Driverless cars can deliver food. So maybe it's give me your wealthy, your skilled. Now, maybe it's unfair to ask the administration to have a coherent narrative. This is, after all, a transactional presidency, but let's see. So that's what I think is unsettled. Hiroshi, I think you look like you may want to come in here.

Hiroshi: Alex, what you said very much brings up what it means to have a nation of immigrants. Whether that's a statement of the past, or what that past looks like, or

whether it's a statement about how we build a country going forward. And that's something that I think will be a theme that we can carry through a lot of the episodes.

Alex: Cristina, back to you on some coming attractions here. What are we going to be doing with this podcast?

Cristina: So one of the things I hope that we'll do is a general matter, in addition to diving into a lot of what's happening and the changes in immigration law and policy, is to think along the lines that you just described and to try to connect what's happening to other developments in the world that suggest an overarching shift in narrative about what this country is for and what this country is about. So, your account of today's immigration policy looking a lot like the whites only immigration policy of the 19th century might bear some relationship to the way this administration has mercilessly gone after so-called diversity, equity, and inclusion programs, which has expanded into some people would say an assault on the civil rights laws—into the very idea that discrimination is something that we ought to police and prevent. And the notion that immigration policy is all about the discretion of those who are deciding whom to admit and that rights don't matter or people's interests outside of the United States don't matter I think is connected to a general resistance to accountability that one might be seeing across domains where the law is a useful tool for an administration that wants to use it to serve its ends, but it's not something that constrains the government or holds them to account. And I think both of those developments we're seeing very clearly emerging in the immigration setting, but I think there are larger developments about the nature of our constitutional system that we should keep track of.

But among the things that we will focus on in the next several months to try to tease out both what's happening to immigration policy and some of these larger themes that you and Hiroshi have talked about include a dive into the elements of the Trump Administration's mass deportation policy, to the use of the Alien Enemy Act, arguments about inherited authority to remove people from the United States, and how far will those efforts go?

We'll talk about the effort to redefine birthright citizenship, to exclude the children of unauthorized immigrants, and the children of people who are here on temporary visas. We'll also talk about the way the federal government is trying to prevent state and local governments that might not want to participate in immigration enforcement from asserting their autonomy and its more general attack on so-called sanctuary laws. We'll talk about the new registration laws that are an effort to create a record of who's in the country and who's not. And we'll talk about what's happening at the border, the potential use of the military and the claims that the country is being invaded and therefore the law must be suspended at the border.

So there's a great deal for us to think through. The first guest we'll have on the podcast (and we're going to talk to a series of guests over the next few months) is law professor Steve Vladeck, who not only is an expert in constitutional law and some of these authorities that we're talking about, but is also widely cited and widely referred to as an authority on the executive branch and what's happening in our present moment. And we're very excited to have the chance to talk to him next week about the case involving Mahmoud Khalil, the former Columbia student, the lawful permanent resident green card holder who's been arrested and detained because of his activism on behalf of Palestinians at Columbia last year. So we'll dive into the details of that case and what it means for some of these larger developments in the assertion of executive power and constitutional constraint.

Hiroshi: Thank you for listening to Unsettled: Immigration in Turbulent Times. You can find more information about the podcast, its transcripts, and other relevant documents at the website of the Zolberg Institute on Migration and Mobility. Special thanks to Achilles Kallergis for composing and recording our intro and outro and to Sahil Ansari, our engineer and producer. Goodbye, Christina and Alex.

Alex: So long.

Cristina: See you later.