



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.

Today, we turn our attention to the government's efforts to remove Mahmoud Khalil, a former student at Columbia who was a lawful permanent resident of the United States, married to a US citizen who is on the verge of giving birth to their first child. Before we turn to our special guest who's going to help us understand the ins and outs and the implications of this case, I will lay out some of the key facts.

Mahmoud Khalil entered the United States in December 2022 on a student visa to pursue a master's degree at SIPA, the School of International and Public Affairs at Columbia. He became a lawful permanent resident in 2024 on the basis of his marriage to a U.S. citizen. He was born in a refugee camp in Syria and fled to Lebanon when Syria descended into war. And before coming to the United States, he worked for two British government programs in Lebanon. At Columbia, the thing that precipitated this case that we're going to talk about today was his work as a negotiator and spokesman for the campus protesters opposing the war in Gaza during the 2023-24 academic year. He was very visible in the media, because he never covered his face during the protests like a lot of other people did. He did not participate in the occupation of university buildings, but he did help negotiate with the administration for the students who did.

On March 8th, he was arrested in his apartment building, a Columbia-owned apartment building. As far as I know, it hasn't been shown that ICE agents had an arrest warrant from a judge. At first, the officer said the State Department had revoked his student visa. When his wife showed the agents his green card, showing that he was a permanent resident, confusion and a phone call ensued, but then the agent claimed that his green card had also been revoked.

He was briefly detained in Lower Manhattan, then transferred to Elizabeth, New Jersey, before he was sent to a detention center in Louisiana, where he remains. Lawyers immediately filed a habeas petition, that is a petition challenging the legality of his custody, and to make a long procedural story short, the government wants his case transferred to a court in Louisiana, but Judge Furman, a district judge in the Southern District of New York, who first had the case, has now ordered it transferred to the District of New Jersey since that's where Khalil was when his lawyers filed his petition, and Judge Farbiarz, a district judge in the District of New Jersey, has taken the case and affirmed Judge Furman's prior order blocking Khalil's removal until his case could be heard in court.

So as we'll discuss with our guest, the government has alleged two grounds for his removal, neither of which involves him having committed a crime, and importantly, neither of which involves terrorism-related offenses, which some people have suggested could be a basis for his removal. The first ground is that he willfully misrepresented aspects of his background when he applied for his green card. That would have made him inadmissible when he applied for his green card and would now make him deportable. Secondly, this government is citing a finding by the Secretary of State that his continued presence in the United States would have potentially serious adverse foreign policy consequences. Under the statutory provision that lays this out, when this ground is triggered by otherwise lawful speech, the Secretary of State must find personally that the non-citizen's presence would compromise a compelling foreign policy interest.

So before we dive into the details of this case, it's also worth noting that the government has sought to deport another Columbia student who was involved in campus protests using the same foreign policy grounds: Yunseo Chung, who is from South Korea, but has been a permanent resident since she was seven. A court has issued a temporary restraining order against ICE's efforts to remove her and ordered the government not to take her from the Southern District of New York.

So to get into all of this today, we're lucky to have Steve Vladeck with us. He is the Agnes Williams Sesquicentennial Professor of Federal Courts at Georgetown University Law Center. He's an expert on federal courts, national security law, and the

Supreme Court. He's a prolific writer and commentator, and among other things, the author of the popular Substack newsletter, One First, on the Supreme Court, as well as a host of other legal issues. Steve, welcome to the podcast.

Steve: Thank you so much, Cristina. Thanks for having me.

Cristina: So I want to start by asking you before we get into the details of the case, if you could put it into some context for us. Why is the government pursuing this case against a permanent resident? Why does it claim it's pursuing this case? And why do you think the government is going after these Columbia students?

Steve: Sure. I mean, I think as has been true with so many of the actions we've seen from the Trump administration, part of the overarching theme here is intimidation. You know, an effort seemingly concerted to try to chill, you know, almost anyone who's a non-citizen regardless of their immigration status. From being involved in really almost any activities that the government just deems to be unpopular. I mean, with regard to Khalil, it was, you know, the pro-Palestinian protests at Columbia last year. But there's no reason why it would be limited to that. And so I think part of why this case is a bellwether from probably both the government's perspective and mine is because it seems to raise the specter of the government being able to point to just about any non-citizen no matter how long they've been in the country, no matter how lawfully they've behaved while they've been in the country and say, you know, we don't like what you're doing and so we're going to remove you. And I think that's part of why folks reacted the way they did.

I'll say one last thing, you know, Cristina, you mentioned the two grounds on which the government is seeking Khalil's removal. The first one, the misrepresentations, that was sort of tacked on, you know, well after he was arrested. And the sort of the authority on which at least initially his arrest seems to be predicated is an authority that could be applied to anybody at any time. And I think that's why this case has become so visually and legally alarming to so many observers.

Cristina: Yeah, it's interesting that they tack that ground on, and you seem to be suggesting that maybe they're feeling some of the heat from the reaction to the use of this foreign policy ground, which we should explore some.

As far as this case being a bellwether, I'm interested in your view on why they would be going after lawful permanent residents. These are not people who have student visas, Khalil and Chung. These are people who have a right under statute that has been adjudicated by the government to remain permanently in the United States. They're on the path to citizenship. In general what protections do lawful permanent

residents have from being removed? It can't just happen arbitrarily, right? It can't just be that the government decides to revoke a green card and that's the end of the story.

Steve: That's right, and so there's plenty of case law, you know, including some from the Supreme Court, that the constitutional rights of individuals who are lawful permanent residents, you know, come pretty close to mirroring those of US citizens. But the one exception historically has been that they're still subject to removal. And you know, the sort of the place where the Constitution really kicks in in that setting is less the substantive grounds on which they can be removed and more the process to which they're entitled before they're removed. You know, in perhaps marked contrast to undocumented immigrants, there's just no question whatsoever that a lawful permanent resident has a complete right to notice, to a hearing, to judicial review, to all of that stuff before they can be removed.

What's tricky, Cristina, is that there's no right, at least historically, to pre-removal proceeding review. Even if you're a lawful permanent resident. And so, you know, I think a lot of folks were surprised that the government was able to just arrest a lawful permanent resident. That's I think less unprecedented here. Then some of the other stuff that's going on, what the status is not an immunity to arrest. The status is an entitlement to a whole lot of process to make sure that the grounds on which you can be removed are actually valid.

Cristina: And what about detention? I think the fact that he's being held in detention, Khalil's being held in detention in Louisiana has caused concern. It's one of the human elements of this story given also that his wife is about to have their first child that makes it a really difficult one to think about on the individual level. Do non-citizens who are permanent residents have the ability to challenge their detention or is this something that's within the discretion of the government to decide?

Steve: Yep. So individuals who are placed into removal proceedings are allowed to seek a bond and they're allowed to apply for a bond to be released pending the removal proceeding.

Part of why, Cristina, I think there's been so much effort on the part of Khalil's lawyers to litigate this issue, first in New York and then, as you said, in New Jersey, is because the immigration courts themselves are notoriously stingy when it comes to bonds pending removal proceedings versus maybe a federal district court that would be more inclined to release someone like Khalil without some clear showing on the government's part that he presents some kind of danger to the community or some kind of flight risk. So he definitely has a right to seek a bond. I think part of why there's been so much maneuvering about where this litigation is going to go forward is because of

the relative odds of getting a bond, right? If that's determined by Judge Farbiarz in New Jersey or by an immigration judge in Louisiana.

Cristina: Do you expect the, the location of the case to hold in New Jersey and do you, do we, know if he's applied for a bond yet or sought a bond and if that could be forthcoming?

Steve: So this is something that I suspect Alex and Hiroshi know much better than I do, but there is, you know, a fair amount of case law that is restrictive of the ability to basically sort of ever since 2005 that it's difficult for folks who are in immigration proceedings to also use habeas petitions in, you know, the sort of regular article three civilian judicial process as a collateral attack on the removal. And so Cristina, I think part of this is going to depend upon, you know, whether Khalil's able to convince Judge Farbiarz that part of his argument is not just a conventional attack on a removal proceeding, but rather as something that can be, can and should be litigated outside of the context of a normal removal.

Cristina: So there's definitely a complicated legal case here. I wanna broaden out to talk about the foreign policy ground, which will ultimately be, may be, the basis on which the case rises or falls. The ground that the government is citing as a basis for his removal has rarely been invoked. And in fact, in the nineties, a lower court judge, by the name of Maryanne Trump Barry, found this provision unconstitutionally vague. How far do you expect the government to push this ground in this case, in other cases? And, I think most importantly, do we expect the courts to defer to the Secretary of State's determination that this interferes, that his actions, his protests in some way interfere with the nation's foreign policy?

Steve: Yeah, I mean, so this is, this is, of course, the big question. I guess part of why I think the government added that second charge is because they're not confident that they're going to win on the the foreign policy ground either. I guess also just not to sound like a broken record, but that might also depend on where this gets litigated. I suspect that a federal district court in New Jersey and the third circuit are going to be much more skeptical about the foreign policy ground than an immigration judge in Louisiana and the Fifth Circuit.

But, you know, just to sort of, to take this out to the law for a second, it is really shocking that this provision could possibly survive a vagueness challenge. I mean, the whole point of the Supreme Court's Fifth Amendment vagueness jurisprudence is that individuals have a right to know what kind of conduct could get them into trouble, right? What kind of conduct is illegal? What kind of conduct could subject you to removal? And there's no substantive hook in the statute. I mean, you know, Secretary Rubio could

make a determination that anything would, quote, compromise a compelling United States foreign policy interest.

You know, that's part of why, Cristina, the one district court to ever actually consider this provision, the New Jersey district court, coincidentally enough, back in the 1990s held that it was unconstitutional. You know, the great irony, as you know, is that the judge was Maryanne Trump Barry, President Trump's late older sister. You know, and that rule was vacated on procedural grounds, but I don't know why it would come out any differently substantively today. I mean, it seems like if the vagueness doctrine means anything, it ought to mean that the government can't just remove you because they feel like it.

And I think also, Cristina, that obviates some of the messier First Amendment questions. About whether, for example, the government could, you know, remove a non-citizen because they don't like their speech, which is the real, to me, scary optics of the Khalil case.

Cristina: So the fact that the government added this other ground might mean that we won't get clear resolution as to whether the foreign policy ground is in fact unconstitutionally vague, but let's just say that they pursue that ground in the, in the Chung case and in this case and the not being forthcoming about the groups he was a part of as a ground for removal turns out not to be a viable ground.

What would you predict this Supreme Court would say—you're a close follower of the court—about these vagueness issues and whether there can be any repose for a non-citizen who might have to worry that anything they say could be declared by the Secretary of State to be contrary to U.S. foreign policy, which of course runs the gamut of just about any issue you could think of.

Steve: Yeah, I mean, it is always a dangerous mission to try to handicap the Supreme Court. You know, I think I can say with a fair amount of confidence that the government would walk in, I think, with at least two votes in its favor. I have a very hard time seeing either Justice Thomas or Justice Alito being troubled by this. Justice Alito actually dissented in the court's most recent, really important vagueness decision back in 2015, and that was a dissent from a Scalia majority opinion.

You know, Cristina, I don't know where the more sort of median Republican appointees would be. I mean, I have to think that someone like a Justice Amy Coney Barrett and even Neil Gorsuch, right, would be worried about the libertarian implications of the government having this kind of power, even over non-citizens. I think especially for those kinds of justices, the fact that Khalil is a green card holder would make a big

difference because, you know, it's not just an undocumented immigrant who the government is taking this action against.

So, you know, my suspicion is that there probably are at least five votes to hold that the foreign policy provision is unconstitutional. But I'd be wary if that were a First Amendment claim because the provision is set up basically to survive strict scrutiny. I mean, that's why it uses the language of a compelling interest. And so I don't have faith that this court would strike this provision down against a first amendment challenge because I think the whole point of the statute is it's narrowly tailored. The secretary has to make an individualized determination. That's why I think so much of the focus has been, to my mind, correctly on vagueness.

Cristina: Yeah, and the case that you mentioned is *Dimaya v. Sessions*, right? And there the court did show a willingness to, to not apply a ground for removal because it was unconstitutionally vague.

Steve: I recall, and I think Justice Gorsuch wrote *Dimaya*, so that's why I think, on the vagueness point, I have an easier time counting to five if I'm challenging the statute than if I'm the government.

Cristina: So we want to get into the, the First Amendment and speech issues and you, you raised them in a very general sense in the opening. I know Alex wants to pursue that with you. So I'll hand it over to you to talk about speech.

Alex: Thanks, Cristina. Hey, Steve, how you doing?

Steve: You know, every day is a new adventure, Alex, right?

Alex: Yeah, I know what you mean. just on the vagueness point, if I can stay on that for a minute, what strikes me about that is that not only is the ground that's stated in the statute vague that it somehow conflicts with the foreign policy of the United States and it's hard to know what that would mean, but it's almost applied in an ex post facto way, right? People are just out talking and then suddenly the secretary of state can come in and say, Hey, what you just said offends the foreign policy of the United States. Even if that had not been the foreign policy of the United States at the time the speech was. Was given, right? So there's sort of a double angle to it here.

But I do want to get to the First Amendment ground. I think people find it very curious that there's a possibility that someone can be deported for speech that will be protected under the First Amendment. What I mean by that is, what Khalil said at Columbia, there's no question that he could not be put in jail. That speech could not be

criminalized under First Amendment doctrine. In this country. So how is there even a chance that he could be deported for it?

Steve: I mean, it's the right question, Alex. I guess the best answer is that, you know, our immigration law, for better or for worse, and I would say for worse, has at least since the 1950s, and in some respects for even longer, given the government the power to I guess punish is the right word speech that is antithetical to the United States interest when it's made by noncitizens, not in a criminal context, but for example you know, if we had a, you know, a sort of a rally in support of Germany in the middle of World War II. Right. Would the government really be powerless to remove non-citizens who are trying to generate support for the Nazi regime? I think the answer probably ought to be yes, that speech is speech, even if it's unpopular speech. But, you know, that to me, Alex, is the origins of this provision that, you know, in hyper specific individual cases we're gonna require the Secretary of State to get personally involved, but if he or she does, you know, then if the speech is that significant a compromise of our foreign policy interests we're gonna let the government, you know, take advantage of it.

Now, Alex, one other point though. Because there's so little case law and precedent under this provision, I think it's also possible to argue that there's a First Amendment problem, especially as applied to green card holders, that maybe that power makes sense if we're talking about folks who don't have a long-term connection to the United States. But where we do, it's even harder to justify.

Alex: But I would think even—there's sort of an exception to the exception here in the statute that you point to, that generally the Secretary of State can get rid of you if what you're doing is contrary to foreign policy, but if it's simply based on speech, there has to be a compelling reason for doing so. But does that even meet the general First Amendment test, which requires kind of clear and present danger or incitement to violence or something. I mean, I'm surprised to hear you think that that might pass First Amendment scrutiny.

Steve: So, I mean, I don't think it ought to. I mean, let me start there, which is, you know, the Supreme Court has been clear even recently, I mean, as recently as, you know, two years ago in the *Counterman* case, that the First Amendment protects, you know, even dangerous speech as long as it's not a true threat. And, you know, the true threats jurisprudence is pretty well developed. Right. It has, I think, a lot of stuff going for it. Alex, I guess the problem is, is that this is a Supreme Court, the one we have today that has been, to my mind, overly deferential to national security and foreign relations claims at the sort of opposite end of free speech. And so, you know, the case that I lose sleep over is the Humanitarian Law Project case from 2010, in which the

Supreme Court applied a version of strict scrutiny to the material support statutes. This is, you know, these are statutes that criminalize the provision of, you know, services of lectures to designated foreign terrorist organizations. And the court said that's good enough to survive strict scrutiny.

So, Alex, it's not that I think it ought to survive a First Amendment challenge. It's that I think this court would be more likely to uphold it than I think most of its predecessors.

Alex: And I suppose you could also point to the Muslim ban case under the first Trump administration where the court upheld what was clearly a discriminatory ban on people coming to the country based on the foreign policy powers of the president. So there seems to be deference in this area. And as we know, in the immigration area, it's often been characterized as inevitably, immigration is a part of the foreign policy of the United States.

Steve: The doctrinal test, right, is, you know, is the restriction narrowly tailored to fulfill the compelling governmental interest? And, you know, I don't know that, I don't know that I would agree that the interest here is compelling, but I, I can see the Supreme Court saying, where Congress and the president, right, or at least where Congress and the Secretary of State have agreed, where Congress has said, you can do this if you find it compelling. And the Secretary says, I do find it compelling. That there is less room for courts to overturn that determination than in other spaces. I don't like that, but I think that's very much where this court could end up if that's what this comes down to.

Alex: Yeah. Hiroshi, over to you.

Hiroshi: Thanks, Steve, for being with us and sharing your insights on this. It's obviously very complicated, and let me just ask you to zoom out a bit and think of this as some people may regard this an isolated case. Some people may think it's part of a pattern. What's your thought on that? And can you give us some insight into what that pattern might be?

Steve: Sure. I mean, I think Hiroshi, my fear is that this is not an isolated case, right? My fear is that this was done with some deliberation as a way of both, one, sending, you know, shockwaves through various immigrant communities and especially through communities of, you know, non-citizen students in the United States. But two, to test the legal waters and to see what kind of legal precedent, you know, they might be able to set. I mean, I look at the Khalil case in much the same lens as I look at the Alien Enemy Act case with regard to the alleged Venezuelan gang members who we shipped off to El Salvador, which is that neither of those disputes by themselves are sort of an earthquake, you know, in their size and their scope, right? That we're, you know, we're

talking about, you know, one or two people on the Khalil side. We're talking about a couple hundred on the, you know, Venezuelan side.

But the sort of the message it sends about what this administration is willing to do and the fear it evokes in people about the specter of just being arrested off the street in the middle of the day. And the, I think the, the shockwaves it'll send overseas, I mean, to folks who are going to stop, you know, coming to the United States, Hiroshi, strikes me as all part of the plan. Right, that from the government's perspective is a feature of all of this, not a bug. And that's, that's the part I find most, I think, disappointing and depressing.

Hiroshi: And if I could put a couple of things into this that draw out of what you've said earlier, I think you'd already identified national security as one element here that the administration has intent on expanding and another is restriction on First Amendment activity. Are there other things of that nature that tie this together?

Steve: Well, I think also, you know the very public attacks by the administration against Columbia University. You know, I, I don't think it's a coincidence that Khalil's activity that the stuff that got him in the hot water was at Columbia and here is the university, you know, being one of the main targets of the administration. So, you know, part of this, I think, is also an attempt by the administration to, how do I say, coerce universities into being much, much more aggressive when it comes to suppressing exercises of constitutionally protected speech by students, by community members, you know, especially those who are non-citizens.

I mean, you know, I think from the administration's perspective, they want the speech suppressed whether it's by citizens or not. But you know, one of the ways to try to do that within at least some loose confines of the law is to try to use these authorities more aggressively to suppress that behavior by non-citizens.

Hiroshi: So we have national security, the first amendment, what it means to be a green card holder and higher education, all in one case. I think you've anticipated the question I was going to ask, but just to kind of put maybe a ribbon around this, this is a case that in some respects they win even if they lose in court. That is, if the idea really is to coerce or intimidate.

Steve: I mean, I think that's exactly right. And, you know, back to, you know, my exchange with Cristina about adding the misrepresentation charges in the notice to, in the revised notice to appear. You know, even if no adjudication ever happens on the applicability of the foreign policy provision, you know, now I think we're going to see more people changing their behavior as a result of it. I think we're going to see people

who are more fearful about, you know, speaking out publicly against things that they should be able to speak out publicly against.

And so, yeah, I mean, Hiroshi, I think this is one of the really frustrating things about where we are from a more broader accountability perspective is that the federal government pays very little price for losing these cases. You know, we have virtually no meaningful access to damages in these cases for a host of doctrinal reasons that you guys all know well. And so from the governance perspective, the worst case scenario is that, you know, they're going to slap on the wrist, but they've sent this message already and, you know, it's to me, it's like sort of printing something false and then retracting it, right? The falsehood gets a lot more attention than the retraction. Right. To me, Khalil's arrest will get a lot more attention than if this case ultimately fizzles out on some procedural ground. And I think that's, you know, that's all to the government's benefit and all to the, I think, harm of our rights.

Cristina: Steve, how do you operate as a lawyer in an environment like this where if the ultimate conclusion we come to is the government will win whether it loses its cases or not because of the way it's using its powers to intimidate people. There are lots of legitimate questions about the ins and outs of these cases. Is it worth litigating them? Is it worth understanding them? What good does it do to try to challenge the government's conclusions about foreign policy or to challenge the president's assertion that he has inherent authority to remove gang members and, and no one can scrutinize whether the people who he's actually removing are in fact gang members from Venezuela? How do we think about these legal minutiae given what you and Hiroshi have just said about the ultimate effects and purpose?

Steve: Well, I mean, I want to be as clear as possible. I think the litigation is absolutely essential and, and critical and, you know, not just Cristina for the reasons you suggested, but also because, you know, in a world in which the government weren't fearing litigation, it would be doing even more and it would be doing, you know, more aggressive things.

You know, Cristina, if they were not fearing litigation in the Khalil case, they would not have added the, you know, the misrepresentation grounds. So, you know, I think it's important to talk about what winning from the government's perspective means, right? They're, they're winning even by losing because of how much they're intimidating people and chilling speech. But that's still better than winning these cases because no one's bringing them. And so, you know, in the, in the Venezuelan case, for example, I mean, I know we haven't got into detail on that, but a court ruling that says you cannot remove people under the Alien Enemy Act without a hearing, you know, may be too little too late for the 270 some odd folks who got shipped off to El Salvador, but it's critical

going forward. And so, you know, I think two things can be true that this litigation is absolutely imperative in preventing the government from asserting and arrogating even more power.

But we should also be realistic that the litigation is, you know, can't undo the chill and the intimidation, you know, the sort of the, the threats that are implicit in everything the executive branch is doing. And so it's sort of, it's not the end of the sort of universe. It's not the end of the rule of law, but it is a real, real pressure point for it.

Cristina: And the litigation could be a way also of coping with the intimidation and the threats.

Steve: Exactly right. And, and so, you know I wrote a piece for the New York Times last week that I think is getting at some of this, which is listen, you know, a lot of what the administration is breaking is something that courts can't fix, right? It's going to take us—it's going to take a revitalized civil society. It's going to take Congress, hopefully at some point in the future. But it is still absolutely imperative for the courts to step in and prevent them from breaking more.

And to me, Cristina, the best sign of that is just how aggressive the administration's attacks have been on the federal judges who are ruling against them in these cases. If they didn't view these judges and these cases as a meaningful obstacle to what they're trying to accomplish, they wouldn't be complaining so loudly about them.

Alex: Steve, just a note to our listeners that the next episode of this podcast will concern itself with the Alien Enemies Act and the transportation of people, the Venezuelans to El Salvador.

I want to go back to the points you made, Steve, or Hiroshi's point, about even if the government loses, it wins because it will be chilling speech for people who are now worried about what they say. There is another side to this, which is [that] it has also sparked a real resistance movement. There have been petitions now signed by several million people. There have been op-eds. People are aware of this case and the overreach by the government. So beyond simply the court cases, which as you say are absolutely crucial, I think this has really launched the beginning of the pushback on many of these Trump policies that we just hadn't seen before.

Steve: So I think that's right, Alex, and I think it's not especially surprising in retrospect because, you know, for as much as I think folks might think that they care about their neighbors, what motivates people is seeing that these things can happen to them. And, you know, when someone who is living among us who is effectively, you know, who has the highest form of immigration status, is arrested coming back to their

apartment on a Saturday night and whisked off, you know, without anyone knowing where he is for thirty-six hours—that strikes at the fabric of what the rule of law is. And I think that's part of why the Khalil case, and as you guys are going to talk about next time, the Alien Enemy Act cases, really are, I think, such critical focal points, perhaps more so than some of the maybe larger volume structure of government litigation that we're seeing.

Hiroshi: Steve, let me ask you a question that goes into what you raised earlier about vagueness, and that is something that may prompt the Supreme Court or a majority of the Court to side for Khalil in this matter. I think about that and the idea is what you pointed out – that the vagueness idea is a basic principle of law, a basic principle of government. We know what we're supposed to do. We know what we're not supposed to. But it's fairly well settled, I think, that deportation grounds can be retroactive. And I'm wondering if that should sound a cautionary note to the vagueness idea, because it's often the case that people are deported for things that they did before those things became grounds for deporting you.

Steve: I mean, that's certainly true. I guess, you know, Hiroshi, the, the, the concern I think a modern court would have is that that's a sort of a due process construct, right? The question of like, you know, how much, how much can these laws be applied retroactively, right, but that the ground is still clear today. Versus a ground that is basically just an arbitrary delegation of power to the Secretary of State to act arbitrarily.

And so, you know, Hiroshi, I have to think that even this Court is going to be troubled by applying this ground, because if not, I mean, I, you know, I, I fear for the consequences. In a world in which the government has the power to, you know, to take these steps even against lawful permanent residents, maybe, I mean, maybe Hiroshi, the, you know, part of why we're seeing the government adding, you know, one or two additional cases in the same ballpark is because they're worried that maybe the LPRs, the lawful permanent residents are going to have stronger constitutional objections. But, you know, I think a lot of folks are coming to discover just how much power the government already has in the immigration space that maybe they don't fully appreciate. I think a lot of folks sort of sit back and think that most of our most aggressive immigration authorities are designed for undocumented immigrants or immigrants who commit crimes and are convicted of them.

And you know, the reality is as you guys know better than anybody is that the statutes are not nearly that narrow. And you know, the, to me, Hiroshi, yes, there's lots of bad case law out there, but I have to think that this would be a bridge too far even for the Supreme Court.

Hiroshi: And I think that one of the things you point to is that this is the decision of one person presumably in concert with others, but the Secretary of State, as opposed to the decision Congress makes to establish a deportability ground.

Steve: That's right. And so, you know, I mean, heaven forbid, maybe the non-delegation concerns on the Court might also crop up in this context. Although it strikes me that that's reinventing the wheel versus good old fashioned vagueness doctrine.

Cristina: So you very helpfully and astutely pointed out the extent to which discretion dominates this system or the fact that extra discretion in the hands of the executive drives a lot of the decision making and may or may not provide security for the people who are here, who are non-citizens. You could arguably say the flip side of that or the opposite end of the spectrum from discretion is the guarantee of due process of law, and you in one of your recent Substack essays wrote a reminder about why we have this principle due process of law in our Constitution and why it's so vital to the rule of law, and we've talked about it in relation to this case. We've talked about notice, the opportunity to be heard, being able to show that there are reasons why you should not be detained pending removal. But can you tell listeners why we should care about due process more generally as a bulwark of our system? I think a lot of people look at this case or they look at the Venezuelans who've been deported who are allegedly part of gangs and think they're not citizens. And as the administration has said, non-citizens don't have a right to be here. It's a privilege. It's a matter of grace. But that is, I think, inconsistent with the due process guarantees of the constitution. So tell me why people should care about the application of those guarantees to noncitizens and why they should care about their vitality as part of our system as a whole.

Steve: Well, that, I mean, that's probably a longer conversation than we have time for. But so, I mean, let's start, if we just start with the text of the due process clause, I mean, the text refers to persons, not citizens. You know, a world in which we thought the due process clause didn't apply to non-citizens simply because they're non-citizens is a world in which the government could summarily execute non-citizens, and you know, I don't mean to be sort of macabre, but like that's, that's where this ends, right. That due process is a right that basically protects us against arbitrary deprivations of life, liberty, and property.

And, you know, if that's not enough, Cristina, to persuade folks that due process matters, due process is also how we can be sure that the people against whom the government is invoking all of these very, very broad authorities actually are who the government says they are. A world in which there's no due process is a world in which authorities that are limited to non-citizens can regularly be used against citizens because how is the citizen going to prove that they're a citizen? What, what hero are

they going to have in which they can stop what's happening to them on the ground that they're a citizen?

So, you know, I would say that there's sort of the basic level that due process is something that ensures that all people are treated without arbitrariness. But, you know, even from a more self-interested and self-involved perspective, due process is also what makes sure that in our pan in our pantheon of rights, the folks who have the most rights, you know, are actually able to vindicate them. And I think that we should care about all of that, but at the very least we should care about the latter.

Cristina: So given what you care about, given what you're following, what would you say we should be watching for in the coming months? What should we all be paying attention to and, and what should we as scholars, concerned citizens, lawyers be doing in this moment to ensure that those values are reinforced and survive?

Steve: Well, let me take the latter part first. I mean, I think, I think having conversations like this one, I think talking to our friends, I think, you know, playing up the values of things like due process and things like judicial review. Now is the time if ever folks are waiting for that and I'm, I'm grateful that you guys are doing this. I will say, and this is maybe a good segue to your next episode, in the sort of, in the pecking order of cases that I'm losing sleep over, I think the Alien Enemy Act indication is in some respects an even bigger threat to core principles of rule of law than what has happened thus far to Mahmoud Khalil. I mean, I, you know, I think we're all troubled by the visual of Khalil being arrested in the middle of the night and whisked off to immigration detention. The government can't really do that on a retail basis to that many people. I mean, right: there are capacity constraints on how realistic a concern that's going to be on the ground.

What is striking about the government's position in the Venezuelan Alien Enemy Act case is that the statute they claim, and if not the statute, Article II gives the president the power to engage in mass summary removals of non-citizens without any judicial review. That should be chilling. And that should be terrifying. And so it's why I think, you know, we've seen so much media and so much attention paid to the tug of war between the government and chief judge Boasberg.

So I think there is at least an intuitive sense if not a well developed legal sense that that case as much as if not more so than the Khalil case is the biggest test we've seen in the first two plus months of the Trump administration of just how much we really still are living in what is a government of laws and not just a government of one man.

Cristina: Yeah, though, as you have pointed out here and elsewhere, the government has enormous power to act in the first instance, and then you can litigate it

after the fact, but then the damage is done. The Venezuelans are in a prison in El Salvador and that is a source of, of great concern, and so we'll, we'll keep talking about it, and I'm glad you think that that's something constructive for us all to be doing.

Steve, we can't thank you enough for taking the time to share your expertise with us and your insight. We're very grateful and keep on doing what you're doing.

Steve: You guys too. Thanks so much for having me.

Cristina: Thanks, Steve.

Alex: I thought Steve raised some really interesting points here, that I just wanted to underscore how much work this case does for the administration. And I think about that in three ways. I mean, first of all, it's an attempt to chill pro-Palestinian speech, which is a strong interest of theirs.

Second of all, it's a way to try to assert very muscular power in the immigration sphere. And if they win cases, it'll, it'll show that they've got that power.

And thirdly, it plays into their attack on higher education. He's right to say it's, it's no, it's no coincidence that Khalil was a student at Columbia, which has become the target of all the administration's attack on higher education and people are following that. So I think it's, it needs to be read in a very broad context here of accomplishing a number of goals for the administration, all of which I find deeply disturbing.

Cristina: Yeah, I think one of the things that I take away from the conversation is that, and something that I think we'll talk about throughout this podcast is, the way that threats and intimidation are playing a role and are going to continue to play a role in their pursuit of their policy and political objectives, whatever those might be. And they're not just limited to threatening deportation and detention before that, but to, as you say, threatening universities, threatening state and local government officials who don't want to participate in immigration enforcement, threatening civil servants, threatening law firms, and the big question is how much of the institutional supports we have that enable resistance and accountability will hold. And one of the reasons I think it's useful for us to be exploring all the ways in which the immigration policy is taking these turns is because it allows us to explore that, that, that bigger question.

Hiroshi: I've been reflecting in the last few minutes on what Steve said very astutely about the procedural side of things. In other words, *how* things get done by the government and what lawyers would call substantive. In other words, how precarious is life supposed to be if you're a noncitizen, even if you're a green card holder?

And one of the concerns that his comments bring up for me is the idea that suppose the government loses on the way that it proceeds against noncitizens, including green card holders. Suppose the government loses on how it goes about it. It's the wrong decision maker doing it – there isn't enough of a warrant. There isn't enough process. They can still, though losing there, establish the principle that the green card isn't as secure as you thought. Even if we can't do it in the executive branch, maybe Congress can impose conditions that the executive branch can't. And so there's two aspects of this assault actually on green card holders in the United States.

Cristina: Well, I think that was a sobering but also constructive first conversation. And we're going to pick up where we left off with the use of the Alien Enemies Act, executive discretion, enforcement, and the rights and status of non-citizens inside the United States on our next episode.

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, Cristina and Alex.

Alex: So long.

Cristina: See you later.