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Unsettled Episode 3 Transcript

Unknown: Welcome to Unsettled, Immigration in Turbulent Times.
I'm Cristina Rodriguez.
I'm Alex Aleinikoff.
And I'm Hiroshi Motomura.

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.

Hello, everybody. Hello, Cristina.
Hi, Alex. Hey, Hiroshi.
Hey, Alex, Cristina.

This week we'll be talking about the Trump Administration's use of the Alien Enemies Act to deport more than 100 Venezuelans to a notorious prison in El Salvador. But first we'll do a quick update on the subject of our last episode, the Khalil case.

Hiroshi:

Mahmoud Khalil remains in immigration detention in Louisiana. His case continues in two separate proceedings. One's a lawsuit in federal district court in New Jersey where he claims that his detention violates federal immigration statutes and the U.S. Constitution. The other is before an immigration judge in Louisiana where he claims that he should not be deported from the United States. In the Louisiana case, the government filed a two-page memo signed by Secretary of State Marco Rubio saying that Mr. Khalil's presence in the United States, quote, would have potentially serious adverse foreign policy consequences for the United States, end quote. That's a quote from the statute and from the memo. But the memo offered no support for this claim other than to say that Mr. Khalil's actions and presence in the United States would undermine U.S. policy to combat anti-Semitism around the world and in the United States. The

immigration judge refused to look behind the Rubio statement and last week ruled that Mr. Khalil is deportable. He can appeal that decision to the Board of Immigration Appeals, which, like the immigration judge, is within the Department of Justice, and then to a federal appeals court. It's not clear if the federal court in New Jersey will entertain Mr. Khalil's claim that his deportation would violate his constitutional rights or whether that claim would be heard on appeal in Louisiana, probably a much less favorable federal court for Mr. Khalil. Stay tuned.

Alex:

We've all seen the videos: scores of men deported from the US without any formal process, flown to El Salvador, forced from a plane in shackles, heads down, rushed into a prison in El Salvador, a prison housing thousands of others, in conditions that are almost unimaginable. A week or so later, the Secretary of Homeland Security showed up posing at the Salvadoran prison, in front of cells filled with dozens of men.

To effectuate these removals the President invoked the Alien Enemies Act. And the Administration has said that those deported under this law—allegedly members of the Venezuelan gang Tren de Aragua are “the worst of the worst,” “serious criminals,” “terrorists.” But none of this has been proven in court because the deportations were carried out without prior notice, without a hearing, without the government having to disclose any of its evidence. And families of some of those deported dispute these claims, saying that their family members were not criminals or gang members but that they were given no opportunity to contest the claims. In fact, in one case, the government has conceded that it wrongly deported Kilmar Abrego Garcia, a native of El Salvador living legally in Maryland with his wife and child.

These deportations have sparked several lawsuits. Last week, the Supreme Court issued decisions in response to emergency motions in two cases. In the first—a lawsuit brought by the ACLU in Washington, D.C., alleging that the Venezuelans' deportation was illegal—the Court held on April 8 that the lawsuit had been brought in the wrong court: it should have been brought in Texas where the ACLU's clients were held in detention before they were sent to El Salvador. The administration hailed it as a big victory, but the case may perhaps be better read as giving the plaintiffs a significant victory because all nine Justices agreed that the constitutional guarantee of due process applies even when the government relies on the Alien Enemies Act to remove noncitizens from the United States. What that precisely means will now have to be worked out in the Texas case as the case is revived there. But if we take the Court seriously, it means that the removals to El Salvador were unconstitutional and illegal.

Important legal questions remain about the fate of those now in the El Salvador prison, and whether the US courts can order the government to bring them back to the United States. That was the subject of the second Supreme Court decision last week, concerning the plight of Mr. Abrego Garcia. On April 10, we again had a unanimous decision from the Supreme Court that the government has an obligation to “facilitate his return” but a majority also said that the lower court should clarify its directive that the government “effectuate” his return—and that raises the possibility that that demand may exceed the district court's authority. As we record this episode, Abrego Garcia remains in El Salvador and the government is continuing to resist his return.

So we're going to spend time today looking at the Alien Enemies Act, a law adopted in 1798 and signed by President John Adams as part of the infamous Alien and Sedition Acts that precipitated one of the first constitutional controversies in our country. This law has been

invoked only three times in its more than two century history. During the War of 1812, in World War I, and in World War II. To help us through these really tricky questions of law and policy and due process and human rights, we spoke with Liza Goitein and Katherine Yon Ebright, who are experts at the Brennan Center for Justice at New York University. Liza directs the Center's Liberty and National Security Program, and Katherine is a counsel at the Center. Our conversation occurred on April 9, before the Supreme Court's order in the *Abrego Garcia* case.

Thank you both for joining us today.

Liza: Thanks so much for having us.

Katherine: Thanks.

Alex:

So Liza and Katherine, let's start with the language of the Alien Enemies Act. And I'll, I'll read it here. It's a little bit long, but bear with me while I read the statute, it says, "whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion shall be perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President of the United States makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upward, . . . shall be liable to be apprehended, restrained, secured, and removed as alien enemies." I want to focus on two aspects of the Act. First, that it requires an invasion or predatory incursion into the United States. And secondly, that the invasion must be perpetrated by a foreign nation or government. Let's take these one by one. What's the administration's argument as to how there has been an invasion or predatory incursion by the Tren de Aragua gang.

Katherine:

Thanks, Alex. I'm happy to take that. And I want to start by underscoring that the Alien Enemies Act truly is a wartime law. As you said at the top, It's only been invoked three times, each time in a major international armed conflict: the War of 1812, World War I, World War II. And when it talks about an invasion or a predatory incursion, those terms refer to acts of war. But the government, to answer your question, has cooked up this theory that migration, narcotics trafficking, and gang violence nevertheless constitute an invasion or predatory incursion. And they're saying, despite the text, history, and design of this law, that those terms actually don't have to refer to acts of war. Maybe they're meant to be interpreted figuratively or rhetorically. There's no basis for that.

They do have an alternative argument. They're also saying that the president has recognized these civil and criminal acts in his March 15 proclamation invoking the law as, quote, "irregular warfare," and that the courts don't have the ability to second-guess the political judgment of the president that somehow civil and criminal acts are actually warfare. We'll get a little bit more into whether that's meritorious or not.

But to take the second part here about “foreign nation or government,” there's an equally-off base argument that Tren de Aragua constitutes a foreign government. And one theory here is that it's secretly a paramilitary wing of the Venezuelan government even as Venezuela cracks down on that gang. I'll note that it's been reported that the intelligence community provided Trump with an assessment in February that said Tren de Aragua is not in fact controlled by the Venezuelan government. So, you know, that theory may be out the window on the facts. Another theory that the administration has raised in the litigation is that Tren de Aragua is a de facto government or quasi-sovereign that controls territory and operates in Venezuela. But either way, I don't think you're going to see the United States or any other country extending diplomatic relations to this gang, concluding treaties with them or engaging with them in a way that's typical for states and governments.

Alex:

So, in short, you're skeptical of the applicability of the Alien Enemies Act to Tren de Aragua.

Katherine:

Yeah, I mean, I don't think the arguments are great. I think they're pretty legally and factually baseless. But it's also pretty clear here that the administration is hoping for judicial deference under a judicial doctrine called the political question doctrine. And they're hoping that that judicial deference will allow them to scrape by with these preposterous claims totally unscrutinized.

Alex:

So the administration has called members of the gang “terrorists” and the gang actually has been designated as a terrorist organization. Does that change the analysis under the Alien Enemies Act?

Liza:

No. As Katherine pointed out, the law requires an armed attack on the United States by a foreign government or nation. There are a couple of foreign terrorist organizations, I'll just call them FTOs, that act as de facto governments—I'm thinking of Hamas and the Islamic Revolutionary Guard Corps—[but] the vast majority do not. I think since 9-11, we've all gotten used to the idea that the way you address foreign terrorist groups is through war. But that is not by any means a given. The authority to designate FTOs is actually part of immigration law. It is not a wartime authority. And in fact, immigration law puts forward very specific procedures and in fact establishes a special court to deport members of foreign terrorist organizations, and that whole system established under immigration law is very different from the regime of summary removal under the Alien Enemies Act. So if anything, the designation of Tren de Aragua as an FTO triggers these special authorities within immigration law, not the Alien Enemies Act.

Cristina:

So you've both given us really good reasons for why the Alien Enemies Act doesn't apply. But let's say the Court buys into the political question argument that you raised, Katherine, or otherwise finds that it can't second guess the president's judgment that there is a predatory

incursion or invasion by this group. There still in this case seem to be so many shocking procedural irregularities with the way that it was handled. So even assuming the Act applies, there are people who were removed seemingly on the government's say so without any process. And as Alex mentioned at the top, the Supreme Court has just underscored that due process does apply in removals under this Act and generally. So what evidence is the government relying on here, if any, to justify having removed these people? Was there any opportunity for them to contest that they were members of Tren de Aragua? And what exactly is the rush? It seems like they're trying to do this or have done this as quickly as possible. So why is it that they're, they're doing this in such a slipshod fashion?

Katherine:

Yeah, several things here. First, I do want to say I think there are very strong arguments for why the political question doctrine should not apply and why the courts absolutely can address this on the merits. But moving to your question, while also taking several steps back, I'm glad that the absence of due process shocks the modern conscience. Because that's actually the mainstay of how the Alien Enemies Act has historically been interpreted and applied. This law, when it was last used in World War II, was the basis for interning over 31,000 non-citizens of Japanese, German, and Italian descent. Under the World War II proclamations, the FDR administration could intern any non-citizen that it deemed, "dangerous," and the courts refused to step in to second-guess whether those internees actually were dangerous as a matter of fact. So you had thousands of people in World War II put into camps because the administration had conflated ethnicity with disloyalty and dangerousness, as FDR's own attorney general would later acknowledge. And so, you flash forward, if you look at how the Trump administration applied the Alien Enemies Act for those March 15 deportations that already happened, there are some striking similarities. They'd already built up this idea that Venezuelans were dangerous. They're immigrant "invaders." And the fact that these individuals are Venezuelan, frankly, appeared to do a lot of the work for who, who is a supposed gang member. If you look at the administration's internal processes for identifying gang members—every-day totally mundane tattoos, a tattoo of a rose, a tiger, a crown—that somehow constituted evidence of membership. And I mean, I'm not an expert on who's a part of the Venezuelan gang or not, but there are experts who say that Tren de Aragua does not even use tattoos as a part of rites of passage or identification. Certainly not as a general matter.

I guess one thing though, if you look at that history of the Alien Enemies Act, where there's this total due process deprivation, and you want to weaponize that or you want to conduct mass deportations, you know, why not have these slipshod criteria? Why not move really, really quickly? If there's no external review, who's stopping you? There's nothing inside the Alien Enemies Act itself that says you get to have a hearing when the president tries to deport you. And as a result, then, we see before the Court stepped in this time, the administration had demonized and deported people who had absolutely no criminal records. 75% of the men who were deported to El Salvador had none. The remainder had, for the most part, crimes like larceny or drug possession. And there were even asylum seekers who had left Venezuela fleeing Tren de Aragua who were in that tranche of people deported.

I will say, my last thought on this is the upshot here is it's very helpful that the Supreme Court, as Alex mentioned at the top, just said that Venezuelan immigrants are entitled to due process even when this law is being invoked. And that they have to be allowed to bring habeas petitions to challenge their designation as gang members. That's a real step up from what we saw in the World War II period with the 31,000 people put into internment camps. And if immigrants have a real ability to file habeas petitions, bring these challenges, it'll substantially lessen the risk that completely innocent people are swept up in this.

Hiroshi:

We've been talking a lot about due process, but there are a couple of ways to expand the conversation, and one of them is to understand what is at stake. When someone is returned to another country or sent to another country they may not have even been to before, to face very difficult conditions, that may, in some cases, open up the risk that someone is subject to what amounts to torture within the definition of the Convention Against Torture. So could you care to comment on that side of things, on what is at stake when people are sent out of the country under these circumstances?

Katherine:

Yeah, happy Hiroshi to talk about the Convention Against Torture. So that's an international agreement or treaty that bars sending people to countries where they're likely to face torture. The United States has signed and ratified the convention. Congress has enacted legislation to implement it. It certainly is a legal obligation that's binding on the government. Based on the way that our implementing legislation is written to protect people against torture, and consistent with some case law regarding a different expulsion power under another statute from early in American history, there's reason to think that the torture prohibition actually modifies the power of the Alien Enemies Act. So even under that law, you shouldn't be able to send someone to a place where they're likely to face torture. Now the Venezuelan immigrants who were deported on March fifteen were sent to CECOT, the El Salvadoran prison where there have been allegations that torture takes place within those prison walls, that individuals are treated abhorrently. And there were journalists who accompanied that deportation flight who actually saw the Venezuelan immigrants deplane and some of them be assaulted after deplaning and entering into the prison. So I think this really does raise a risk of a violation of our obligations under the Convention Against Torture, the international obligations, but then also under that U.S. statute and regulations that implement the prohibition on returning people to places where they're going to face that kind of treatment.

Hiroshi:

Let me build, Katherine, on what you just said and ask you about the other piece of this. Not the specific harms, but: are people stuck indefinitely where the US government sends them under the invocation of the Alien Enemies Act? Is the United States really powerless to do anything about it because they're in another country, whether it's El Salvador or anywhere else?

Liza:

Yeah, I can jump in Hiroshi and answer that question. The administration has taken the position that they cannot be required to bring somebody back from El Salvador after they have been sent there. This came up in the case of an individual who was sent to CECOT and the administration later acknowledged that it was a result of an administrative error. A court ordered the administration to bring him back and the government's argument in court was they have no control. They have no power. The courts cannot possibly order this because it is now the government of El Salvador that is in charge and in control of all of these detainees.

My response to that is that one of two things is true. Either the Trump administration deported these individuals under the Alien Enemies Act and then washed its hands of them, and President Bukele on his own initiative is deciding to imprison them. Or the other alternative, President Trump asked President Bukele to detain them on our behalf and that the U.S. is essentially outsourcing the detention of these individuals. Now I should say, it's not clear what the legal authority would be in that case to have these people detained on behalf of the United States in a prison in El Salvador. The Alien Enemies Act does permit detention, as well as deportation. But if you look at President Trump's Proclamation, it authorized the detention of individuals until they could be removed. There was no suggestion that the detention authority of the Alien Enemies Act was being invoked for a long-term indefinite detention. But whatever the legal basis, it's pretty clear that El Salvador is detaining these individuals on behalf of the United States. The detention is taking place pursuant to an agreement with the United States. The United States is paying El Salvador \$6 million a year to imprison these people. If you look at some of the remarks by, for example, Secretary of State Marco Rubio after the detention happened, he said, "El Salvador has agreed to hold [these people] in their very good jails at a fair price that will also save our taxpayer dollars. President [Bukele] is not only the strongest security leader in our region, he's also a great friend of the U.S. thank you!" Right.

So literally the only context in which the administration hasn't said, in so many words, El Salvador is acting as our agent is when a court ordered the administration to bring back someone who was erroneously deported. If, in fact, President Bukele is detaining these people as a paid service to the United States, then President Trump can, of course, bring them back to the United States. And if Trump can bring them back, then the court has the authority to order Trump to bring them back. So as a legal matter, no, they are not stuck in El Salvador forever. But of course, the administration is going to maintain that the courts have no power to order him to have these people returned. So that's really where the dispute is going to be.

Hiroshi:

This is what is arising in the case of Mr. Abrego Garcia right now. And apparently it's one that raises a lot of issues that you mention.

Liza:

Which is presumably why the administration is taking the position that there's no way that it can return these people, because if it acknowledges in this case that it can have this person returned, that means that it can have anyone returned, and that could undo and hopefully will,

given the misuse of the Alien Enemies Act here, that will mean that others have to be returned as well. Now, to be clear, if those people are returned, they might still be held and detained in the United States. No one is talking right now about just sort of releasing them into this country. It is simply a matter of whether they can be detained in El Salvador in this prison that is notorious for human rights abuses, or whether they can, and should, be returned to the United States at this time.

Hiroshi:

This circles back to the due process question, right? In other words, to the extent there's no remedy after someone is removed from a country, that puts all the more emphasis on the due process question before someone is taken out of the United States.

Liza:

Yes, of course, if it is not possible to bring people back from El Salvador, it absolutely raises the stakes of the due process of question, but I would not want to concede for a second that there's no ability, either in practice or under the law, to bring back people who were deported mistakenly or illegally.

Cristina:

Katherine made a really compelling point about the significance of the Court having underscored that due process applied and that that is a step up from the way the Alien Enemies Act was used during World War II. And there's a lot to be said for that. But the Court also arguably made it much more difficult to challenge the administration's actions here. And it's technical, but by saying that people have to go through habeas where they're confined, they're saying that people have to bring individual challenges to their detention and deportation as opposed to being able as class to challenge the policy as a whole or the invocation of the Act as a whole. So how important is that part of the Supreme Court's decision and what might that suggest about the way the Court is going to approach its review of administration actions like this one in the future?

Liza:

Yes, there are definitely concerns with some aspects of the Court's ruling, even though the Court did underscore, and this is very important, that not only is there a right to habeas corpus, which I think everybody, even the government, had conceded this, but also that that right needs to be meaningful, which means that the notice has to be given. It has to be given within a reasonable time period and in a manner that will enable people to actually have a reasonable shot at obtaining judicial review. One of the problems with the decision is that it didn't put any flesh on the bones of what would be reasonable notice that will give people a meaningful opportunity. And, based on the government's conduct in this case, in this litigation and the deportations of the Venezuelans (and frankly based on the government's conduct over the last two and a half months), I think we can assume that the administration is going to take any leeway it's given and then some. So the question here is how will the administration interpret what reasonable notice and a meaningful opportunity to seek judicial review looks like? I strongly suspect that at some point the courts, probably very soon, will need to step in again

and explain what reasonable notice actually is. And my fear is that in the meantime, we could see another plane load of hundreds of Venezuelans deported without actually ever having had a chance to get relief in the courts.

Beyond that, you've raised some questions about how habeas proceedings can move forward and are those an adequate substitute essentially for the lawsuit that was brought in the first instance. There are definitely concerns there as well. In terms of whether a class action can be brought, the law is very unsettled on whether habeas class actions can be brought. They would presumably have to be brought district by district anyway as class actions because habeas petitions have to be filed within the district where people are confined. It is not at all clear how people who have already been deported to El Salvador would be able to file a habeas petition. What district would they file in? And there are some issues as well about what issues can be raised on a habeas petition. So, yes, this was a victory, this decision, for the plaintiffs in some very critical respects. But there are other respects in which, frankly, it wasn't, it was a setback. We will be watching this play out in the courts, I think, for a long time.

Hiroshi:

Let me zoom out a bit and ask you about the situation in the big picture. The administration is defending these actions as it's removing the worst of the worst. And not only is the category of gang member or terrorist an unsympathetic group of people to many Americans, but others might also dismiss this as immigration enforcement theater, and people might not view the government's use of the Alien Enemies Act and related tactics as a widespread threat. Could you comment on the broader significance of this?

Liza:

Sure. Whenever the government describes people who are detained without due process as the worst of the worst, be skeptical, be very skeptical. After 9-11, the Bush administration said that the people detained at Guantanamo were the worst of the worst. When the government's individual assessments of the risk posed by the detainees were leaked, there were many cases in which the only thing the assessment said was "no reason recorded for transfer." They had no idea why those people were at Guantanamo. When Trump moved 178 Venezuelans to Guantanamo, he said, again, that these were the worst of the worst criminals. Later in court, the administration had to acknowledge that a third of those detainees had no criminal record whatsoever. And now we have President Trump making similar claims about the Venezuelans deported to El Salvador. This time it appears that 75% of the people deported had no criminal record. There's already one case in which the administration has admitted that the person was removed as a result of an administrative error. This is the heartbreaking case of the Maryland father of a five-year-old autistic son [Abrego Garcia]. And, as has been mentioned, a picture is emerging from the stories told by family members, lawyers, and others of people being deported because of very, very common tattoos, or literally just being in the wrong place at the wrong time. So due process is not some kind of thumb on the scale in favor of terrorists and criminals. It's how you get to the truth. And if you get rid of due process, you virtually guarantee the deportation of innocent people.

Also, it's illegal. It's illegal to use the Alien Enemies Act when there is no invasion. It's illegal to deport people to a third country, specifically to a place where human rights abuses are occurring and you've given them no hearing to establish that they could be tortured there. This is a rule of law issue. And we should all care about the rule of law at a time when it is under assault in so many contexts that could affect any of us.

Cristina:

I want to ask you another question that implicates this larger rule of law set of issues. And both of you have written about the way the administration has invoked the concept of invasion or the language of emergency to justify taking extra legal acts, not just here, but at the border. And even in this case, the administration also appears to be making the argument that it has authority to act not just because of the Alien Enemies Act but also because the president has inherent authority to protect the nation or to act against invasion or incursions, so no law could restrain him in that authority. Is there anything to these arguments at all? Why are these arguments dangerous? And who gets to say if the president declares an emergency that in fact there is no emergency or invasion? Does anyone have the authority to say that?

Liza:

Yeah, there is a lot in that question. I think there are really three questions here. What does "invasion" mean as used in the Constitution and the law? Who gets to decide what it means? And then what does the existence of an invasion allow the president to do?

On the first question, the term "invasion" is used four times in the Constitution, and there's also a long-recognized implied power that the president has as commander in chief to repel invasions without waiting for congressional authorization. In all of these cases, just like with the Alien Enemies Act, the term "invasion" or "invaded" very clearly pertains to an act of war, an armed attack by a political entity. We know this from context. We know it from records of the Constitutional Convention. We know it from executive branch interpretations. We know it from court decisions.

Who gets to decide, right, whether the facts on the ground constitute an invasion? That's not a simple question. There are some cases in which courts have held that this is a political question. There are other cases in which courts have gone ahead and performed the analysis. In the Alien Enemies Act context, the DC Circuit ruled that what is or is not an invasion for purposes of the law is a question of statutory interpretation that courts are fully competent to resolve. But even in cases where the political question doctrine would otherwise apply, there is a [backstop]. The Supreme Court has held that if the president acts in bad faith, or at least the Supreme Court has suggested that if the president acts in bad faith, the courts could step in. There's case law saying that the political question cannot be used to shield an obvious mistake. Or it cannot be used to allow the president to engage in actions that are manifestly unauthorized by law. And those things would and should apply here.

But finally, let's just say that there is an invasion. Does that fact give the president the power under the Constitution, under some kind of implied power, to summarily deport, and I think the

answer here is also no. I mean, as I said before, as commander in chief, there is an implied power to militarily repel armed attackers. But there is no understood, implied power to deport civilians, and frankly, just the fact of the Alien Enemies Act's passage tells us that. This law was passed ten years after the Constitution was ratified and there would have been no need and there surely wouldn't have been the kind of debate over that law that you saw in the fifth Congress if the Constitution already gave those same powers to the president.

And the last point I'll make is even if there were some inherent authority on the part of the president to deport people, that would have to be done consistent with immigration law. The president would have no ability to suspend the rights or protections established by immigration law, such as the right to a hearing or the right to seek asylum, and that's because the Supreme Court has made very clear that even during wartime, there is only one circumstance in which the president can disregard a law passed by Congress, and that's when Congress is trespassing on powers that the Constitution commits exclusively to the president. And there's absolutely no argument that could be made that Congress lacks authority under the Constitution to pass immigration law. To the contrary, the Supreme Court has said that Congress has plenary power over immigration. This is a non-starter for so many reasons, but it's very dangerous and part of the danger of it is the kind of socializing of the concept that the president has these vast constitutional implied powers that he does not have. And so it's going to be really, really important for the courts to push back on that.

Alex:

From what you both have said, it seems really unsustainable that the Alien Enemies Act can be applied in the situation of the deportation of people allegedly gang members—we're not sure whether many of them were in fact, but it seems not applicable in that situation. It's hard to believe the Trump administration didn't know that as well. There's smart lawyers there who can read the law, who know the legislative history and the history of the Constitution and they can say the same things that we've been saying today. So I want to assume that the administration knows that it's a Hail Mary pass to have this thing sustained in court. And if they're likely to lose in court—unless the courts decide that they simply aren't going to look behind the declaration of the president, but that seems unlikely—what do you think is the larger game the Trump administration is playing here?

Katherine:

I genuinely do think that part of the goal here is to have the law apply. Doing so could unlock these tremendous regulatory detention or internment and deportation powers. And we've discussed the law is inapplicable for peacetime immigration enforcement, so the only way that this gets upheld is if there is that court deference that you just mentioned. If the courts say we can't second-guess those baseless claims simply because you're framing them within the national security. While the court shouldn't defer, it actually is possible, I'm not going to say probable, but it's conceivable that they will. And the administration has watched in the past twenty years, twenty-five years since 9-11, these deference doctrines grow and grow. And even before 9-11, starting in the Cold War, they saw these doctrines be weaponized in national security contexts to evade scrutiny of hostilities in El Salvador (coincidentally), Nicaragua,

Kosovo, et cetera, et cetera. And so I don't want to overstate the strength of the political question doctrine argument, but I also wouldn't want to understate it. It is a real issue that has to be grappled with by the lawyers and by the courts. Liza outlined various ways that I think the court should get around that doctrine. But I do think that part of the hope here is that if there are enough conservative jurists or jurists who defer to presidential power, maybe they can actually get this upheld.

The other goal, though, completely separate from the legal goal, is political. It is also about stoking fear, convincing immigrants to self-deport or withdraw from public life; and to some extent, of course, they have succeeded in sowing fear in immigrant and Latino communities.

In the past several weeks, I've been really heartened to see really robust defenses of due process coming from across the political spectrum. You saw Joe Rogan on his podcast criticize the Alien Enemies Act deportations as, quote, "horrific." You saw John Yoo, a Bush administration lawyer who wrote memos that justified legally the Black Sites Program, he wrote a piece that said the law shouldn't apply here and that the invocation was a mistake. And you've seen major conservative publications criticize the due process deprivations and underscore that due process is a value that protects all of us, whether we're here lawfully, unlawfully, whether we commit crimes, whether we don't, whether we're citizens. And so I'm hoping that this cross-partisan dialogue, this support for due process and rule of law, dispels some of that fear and convinces people that our system of checks and balances can work and needs to work.

Alex:

Katherine, on your first point, it really would be an act of the worst kind of bad faith if the government lawyers were to say, look, this obviously isn't an invasion and it's obvious that the gang is not a foreign government. But we think no court will second guess us. So go ahead and do it. Cristina and I both spent time in the federal government and I will, I won't speak for Cristina. I'll speak for myself that, you know, we did think our job was to have fidelity to the law and to the constitution and not to tell the president, you know, what he could get away with. But what you're describing is an entirely different view of government lawyering that I find pretty outrageous.

Katherine:

I completely agree that that's not what I think the role of the government lawyer should be, though maybe I'm speaking out of turn as I've never worked in the government. One thing that has been concerning for rule of law in this administration is there's reporting that the Office of the Legal Counsel, a part of DOJ that is supposed to assess administration policy for legality, constitutionality, that they've been marginalized and cut out of these major policy questions where there are legal difficulties. And so I think part of the struggle is how do you make sure that lawyers in the government are in the room when these decisions are taking place? And how do you ensure that government lawyers view their role not as how do I get to yes, but instead what is truly an appropriate interpretation or even the best interpretation of the law? It's hard to know what exactly we can do from the outside in support of that, other than continuing as individuals

to have these conversations and go to the courts and hope that the courts uphold an independent impartial judiciary and review when we see these lines being crossed.

Liza:

I can also weigh in on this. I mean, the one thing I would say is that I have been a government attorney who was defending agencies in civil litigation. And I think there is a difference between the role of government attorneys in litigation and the role of the Office of Legal Counsel. Government attorneys in litigation are expected to act as zealous advocates for their clients, their clients being the agencies. Now, of course, they are not allowed to say things they know to be untrue. They are not allowed to make arguments that are frivolous. But the Office of Legal Counsel is the place where the lawyer's job description is to give the president the best view of the law and not to be a zealous advocate for one side for the other. And that's why I think it is so disturbing to see these reports that OLC is being sidelined.

Alex:

So, you know, we have this weird situation of the government lawyer in the Abrego Garcia case. This is the Salvadoran person who was wrongfully deported back to El Salvador and the government concedes that. And the attorney for the United States went into court and said it was a mistake and I'm not getting answers from my client. And the next day, the attorney general removed the lawyer, put the lawyer on leave and said that the lawyer was not zealously defending the client here. And I must say, I viewed that as a brave statement of the lawyer and what I would expect a government lawyer actually to say.

Liza:

Well, the lawyer has that duty to the court, right? The lawyer has to tell the court the truth. He can't make things up. That lawyer was kind of in an untenable position if the administration felt like it was a firing offense for him to tell the truth. There's an attack on the legal profession writ large by this administration, when lawyers say or do things in opposition to the president and/or to the president's policies, the president's interests. This is within the government and it's outside.

Cristina:

It does make you wonder whether there are lawyers inside trying to prevent the turn to something like the Alien Enemies Act or whether fidelity to the man and fidelity to the policies are driving legal analysis from the beginning.

Liza:

Oh, I don't think they're driving it from the beginning. I am certain that there are attorneys in the government who are trying to do the right thing here.

Cristina

And the question is, who is listening.

Hiroshi:

For another view of rationality here, if we see all the lawsuits and all the legal positions as being fundamentally politically driven and not about winning in court, then from that perspective there is a perverse rationality to what's going on.

Alex:

Liza, Katherine, thanks so much. We really learned a lot. These are very difficult questions and you've helped us through many of them. Thanks so much for being here today.

Liza:

It was our pleasure. Thank you.

Alex:

You know, Cristina, Hiroshi, this is really an extraordinary situation. We have people snatched on the street, detained, flown to a foreign country, never given a chance to contest why they're being held or why they're being deported and then potentially held there forever in a horrendous prison. And now we hear from families that there's pretty good evidence that some of these people were not gang members at all. The use of the tattoos was all wrong. I mean, this is really the stuff of disappearances. And I just wonder what we make of this.

Hiroshi:

Look at the Supreme Court's opinion of April 8. There's a strong declaration, apparently nine justices agreed that due process applies, judicial review applies, but at the same time, the ways you get that review, the way you get due process are narrowed. It's not a broad scale lawsuit under the Administrative Procedure Act and instead it has to be in individual habeas cases apparently, and so one way to look at this is that there's a broad right in theory to due process and that's been declared, but the way it's going to actually be put into practice is really narrow. And this is a pattern I think we've seen in a lot of immigration cases over the last generation, if not longer.

Cristina:

The thing that I am in some ways most concerned about is that most people won't care about what we've just talked about for the last however many minutes because the government and the administration have primed people to think that they're only going after gang members, terrorists, people who are tearing at the fabric of our country, the lunatics, to put in the words of Marco Rubio in another context, and I am heartened by some of what our guests emphasize, which is that there are people across the ideological spectrum pointing to what Hiroshi just said, that if we take the power that they are asserting seriously, it is a power to disappear any one of us to a foreign prison where there's nothing a court can ultimately do about it. And even if that's a remote possibility, it is a chilling possibility. And perhaps that is what will resonate with people in a way that gives rise to the political resistance that is required to stop an administration from taking these kinds of steps, which they'll continue to do as long as it can get away with it.

Alex:

You know, I wonder what also whether the Supreme Court, yes, it forces people to go back into this narrow habeas jurisdiction where they bring an individual suit. But the Court does say they have to have time to do that. And I think people will find lawyers because lawyers are aware of these issues now. I think the government may just decide the game's not worth the candle. If every time they pick someone up before they can use the Alien Enemies Act, they have to give someone a hearing, they may say, yeah, it's not worth it. We'll just take people through regular immigration proceedings. So even though more narrow, it might actually be a pretty significant deterrent to using the Act and that's assuming the Court actually holds the Act applies, which I can't believe they can hold unless they decide that the political question doctrine means they're simply not going to look at the question at all.

Cristina:

Yeah, I agree they'd have to decide it on that basis and I do think that is a possibility even if it's not a probability. It may be that as we talked about, this is just theater. This is part of their larger interest in making it seem like they're taking every step possible to engage in immigration enforcement. It's popular and they'll move on to the next thing. And as we'll talk about in a subsequent episode, in many ways they're laying the groundwork for much farther-reaching deportations than what they might be able to accomplish under this Act, but they have started out with a bang by using it.

Hiroshi:

I think there's a substantial chance that the Supreme Court will say it is a political question, but that doesn't take away from what Cristina just said about this is politics or political theater, whatever you want to call it. Of the twelve initiatives, maybe twenty initiatives, that are underway, some of them will work for the administration legally. Some of them won't, but in some political sense, they're all working.

Cristina:

But what do we make of the April 10th decision in the *Abrego Garcia* case? We could think of it similarly to how we talked about the first decision with our guests—that the Court unanimously says the government has to facilitate the return of Abrego Garcia. Those two together could be read as the Court putting the government to some kind of requirement that it abide by the Constitution.

But at the same time, when it says that the government has to help “facilitate” the return, it also directs the district court to clarify what it means by “effectuate” and that anything the district court requires has to be with the due respect to the president's power in foreign affairs and over diplomacy. And since that order, the federal government has come back and offered its interpretation of “facilitate,” which is to say that facilitate means something on the domestic end like it does in other immigration contexts when someone is wrongfully deported, it can facilitate that person's re-entry, but there's nothing that the federal government can do to enable Abrego Garcia to get out of prison in El Salvador, that that's in the hands of El Salvador and that it's an intrusion into the administration's power of diplomacy, the president's power of diplomacy, to

suggest that they have to do anything to get El Salvador to act. So, ultimately, where does that leave the people incarcerated in CECOT? Again, the government has sent hundreds of people to a prison in El Salvador without a trial or conviction and is now claiming that it's left to the graces of El Salvador whether they will be released, including the person whom they have admitted they wrongly deported. So I'm not sure that the Supreme Court has actually offered Abrego Garcia very much hope in the end.

Hiroshi:

I think that reading of the two opinions together, the *Abrego Garcia* decision and the decision on the alien enemies act, I think that reading is correct, but I want to add that what we're seeing is something that has been a pattern, I think, in Supreme Court decision making in the immigration space and in particular on the role of courts, and that is that it says you have the right, but we're not going to make it easy for you to make good on that right, to claim that right. So for example, that the Alien Enemies Act might allow deportations, but there has to be due process, but we're going to require that due process be asserted in a court that's very hard for individual detainees and deportees to access.

This is a pattern that I think we've seen in Congress and the courts for at least the last generation, maybe well before that, and that is that we're going to stand up for the rule of law, but not make it easy for you to claim it in practice. It imagines a world in which everyone has a lawyer on call with easy access to courts. And so that's one problem with, or that's one source of, the wiggle room that we have here.

The other way I think about this and this is really stepping back from the legal doctrine is to try to look at it from the point of view of the president and trying to figure out, do I comply? How do I comply with this decision? I'm honestly not sure if that decision's been made yet. I think that part of the politics of this is seeing who cares about these deportees, and see how that plays out politically. The other is that, is there a way for the president to allow the deportees to be brought back, but in a way that doesn't appear to be compliant with the judiciary, but really more as a matter of his own wisdom and grace, or begrudging acceptance; but somehow to allow people to get the impression that he is deciding, that it's his decision to bring back Mr. Abrego Garcia and not out of compliance with the command of the courts.

Alex:

That's really interesting idea, Hiroshi, because what you're saying is that the government is not saying in these cases they can't bring him back. They're saying the courts can't require Hiroshi. them to bring him back, but they may be able to get him back and everyone is quite sure they could get him back if they, if they wanted to get him back. But they're just making a point here about separation of powers. But the king, through some kind of noblesse oblige, might decide to have him back in the kingdom if he so chooses.

Cristina:

It's worth, I think, making the separation of powers point and noting that the Biden administration made similar arguments when a district court in Texas tried to require them to reinstate a policy

from the Trump administration that required people to wait in Mexico while their asylum hearings were pending. And their argument was that in order to do that, we're going to have to re-engage the government of Mexico to ensure that they are okay that we're sending people back to Mexico pending their asylum hearings. And that is an intrusion into the president's power of diplomacy.

And so it's not as if the Trump administration is making this argument up altogether. It is a core separation of powers claim that executives across administrations make. I think the difference is that we're dealing with an individual who was wrongly deported and not just wrongly deported, but deported to a prison. And the government is claiming even though they deported him to that prison, there's nothing they can do in order to release him. And it goes back to Hiroshi's point that the Supreme Court may be defending these rights in theory, but in practice, the government is standing in the way of vindication of them through legal channels, even if they are going to decide that through political channels, it's in their best interest to bring him back since he has indeed generated a great deal of public sympathy.

Hiroshi: I think that it may be worth imagining what you would do if you were a mediator, mediating between Chief Justice Roberts and the President here. You might say, let's find a way for both sides to claim victory. So what you do is have the Supreme Court in that case state in a very noble way, we're going to stand up for the rule of law and for due process. That's the victory for the Supreme Court. And then the president says, well, that may be all good as a matter of what the courts say, but ultimately it's my decision; and my victory is that I will bring him back, but under my terms and on my timing.

Alex:

Well, we'll see. We're recording this in the middle of these quick moving events. And when we come back in a few weeks, we'll have answers to some of these questions.

Hiroshi, what's our next episode look like?

Hiroshi:

Our next episode is going to be on birthright citizenship. The president issued an executive order that limits the long-accepted definition of the 14th Amendment, the long-time interpretation of the 14th Amendment to apply to all persons born on U.S. soil, with some narrow exceptions. The executive order would narrow that substantially. We'll be speaking with Professor Amanda Frost of the University of Virginia School of Law, who has written extensively on this question.

Alex:

Hey, looking forward to it. Nice to talk to you guys. Have a good couple of weeks. We'll be back.

Cristina:

You too. See you soon.

Hiroshi:
See you.

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 Kalergis for composing and recording our intro and outro to Sahil Ansari, our engineer and producer, and to Laura Plata and Robert Rios for research support. This podcast is produced with generous support from the Oscar M. Reubhausen fund at Yale Law School, Zolberg Institute for Migration and Mobility at the New School, and the Center for Immigration Law and Policy at UCLA.

Alex:
So long.

Cristina:
See you later.