



Unsettled Episode 4

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.

Hiroshi:

Hi, Cristina.

Cristina:

Hi, Hiroshi. Hi, Alex.

Alex:

Hey, Cristina. Hey, Hiroshi.

Hiroshi:

Today we're going to focus on the Trump administration's efforts to cut back on birthright citizenship. But first, an update on our previous episode.

Before we go any further, I should disclose that I'm a member of the board of directors of the Rocky Mountain Immigrant Advocacy Network. And faculty co-director of the Center for Immigration Law and Policy at UCLA. Both entities have clients threatened by deportation under the Alien Enemies Act.

Cristina:

Any update on the Alien Enemies Act should start with the Supreme Court's extraordinary order that it issued around 1:00 a.m. on April 19. It was a response to a petition on its emergency docket from the ACLU, and the Court ordered the government to halt any plans to remove a class of noncitizens being held in the Northern District of Texas.

The Court did this – this is what makes it extraordinary – before the government could even respond to the ACLU's filing, before the Fifth Circuit could weigh in, before Justice Alito could finish the dissent he eventually published. Why did it do this?

Well, it appeared that the government was about to load another group of Venezuelans onto a plane to send them to the notorious prison in El Salvador—without the notice and process that the Supreme Court had said in an earlier opinion in April was required. In the lower courts, the government had claimed that there were no plans as far as they knew for planes to leave, but the justices did not wait for the government to back this up in front of the Supreme Court itself. So the Supreme Court's decision looks a lot to me and to many other commentators who have spoken in its aftermath like the Court has had enough with the government's foot dragging and its disingenuousness in these Alien Enemies Act cases.

It's also worth emphasizing that this order by the Court, as well as all the other court decisions that have come out in the cases involving the Alien Enemies Act, don't address any of the underlying merits of these removals under the AEA. So far, no court has addressed the fundamental question that we talked about in our last episode, whether the government can use this wartime authority to arrest, detain, and remove noncitizens who are part of the Tren De Aragua gang, which is not a foreign government or nation as the statute requires.

And I think the other aspect of this saga that has gotten insufficient attention is the fact that what the government has done and seems to want to keep doing is not deporting noncitizens in any remotely traditional sense of the word. They are not attempting to remove individuals to their countries of origin or to a third country where those individuals might be able to live freely. Instead, they're removing people without trial or conviction of a criminal offense to a prison where they have left the possibility of the detainees' release in the hands of a foreign government, which describes the prison as a place no one ever leaves. I think the extremity of these plans may be part of what is moving courts to try to stop the government in their tracks.

The extremity of this issue has also gotten a lot of attention in the case of Kilmar Abrego Garcia, which we talked about last time. There is no sign that the U.S. government is taking any steps to facilitate his return as the Supreme Court directed and to handle his case as if he had not been erroneously removed to El Salvador, which is also what the Supreme Court ordered.

But again, the lower courts are growing exasperated. The district judge who's overseeing the Abrego-Garcia case, Judge Xinis, has demanded regular updates from the government. And on April 22, she took them to task for their “willful and bad faith refusal to comply with discovery obligations” and their “specious” claims of the state secrets privilege. The Fourth Circuit, for its part, has rejected emergency appeals from the government asking them to rein in Judge Xinis,

and in an opinion that was written by Judge Harvey Wilkinson on April 17th, the court seemed to be speaking to the American public when rejecting the invitation to micromanage the district court. And I think Judge Wilkinson is worth quoting directly.

He says. "It is difficult in some cases to get to the very heart of the matter. But in this case, it is not hard at all. The government is asserting a right to stash away residents of this country in foreign prisons without the semblance of due process that is the foundation of our constitutional order. Further, it claims in essence that because it has rid itself of custody that there is nothing that can be done. This should be shocking, not only to judges, but to the intuitive sense of liberty that Americans far removed from courthouses still hold dear."

Hiroshi:

The topic for this episode is birthright citizenship and the president's executive order purporting to redefine the terms of the 14th Amendment. This is a fundamental aspect of the administration's initiatives on immigration. The 14th Amendment's Citizenship Clause reads as follows: "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside." The long-standing reading of this clause has conferred citizenship on almost all children born on U.S. soil, regardless of the immigration status of their parents, with narrow exceptions. The clause has long been understood and applied to confer citizenship on the children of undocumented parents and on the children of parents who are in the United States lawfully but temporarily. One of the administration's first executive orders advances the much narrower reading of the 14th Amendment that would exclude both of these categories of people from birthright citizenship.

About a dozen lawsuits have challenged executive order by arguing that it is contrary to the 14th Amendment and the citizenship laws enacted by Congress. Federal district courts in Massachusetts, Maryland, and Washington State have issued injunctions that keep the order from going into effect anywhere in the United States.

As an expert who can guide us through these issues, we're very fortunate to have with us Amanda Frost, who's David Lurton Masee Jr. Professor of Law at the University of Virginia School of Law. Amanda has written widely on citizenship, including her book, *You Are Not American: Citizenship Stripping from Dred Scott to the Dreamers*. Amanda, thank you for being with us today.

Amanda Frost:

Thank you for having me.

Hiroshi:

So let me start, Amanda, with a basic question. What does the executive order say?

Amanda:

It's kind of remarkable. The executive order first says that we've been getting the citizenship clause wrong. That's, of course, the first sentence of the 14th Amendment that you just read. We've been getting it wrong for the last century plus, because it excludes from

birthright citizenship children born to undocumented immigrants and children born to legal but temporarily present immigrants. And then it makes clear that [ex]cludes children born to people in the United States on student visas or temporary work visas, people who are often in the United States for years. So that's a very significant number of people who are excluded from birthright citizenship. That's the first part of the executive order.

The second part, section two of the order, says that the U.S. government will not issue or accept documentation of citizenship or demonstrating citizenship or claiming citizenship of those people, that is the children of undocumented immigrants or temporary immigrants, after February 19, 2025, so a month after the president took office and the order was issued. That suggests that its application would be prospective, but of course the reinterpretation it announces in section one is entirely retroactive. And then the last section just says executive agencies will follow that interpretation in section one. So it appears to be a sweeping revision of who can be a citizen that certainly will affect hundreds of thousands of people going forward every year and could affect millions of people already in the US.

Hiroshi:

So as we stated at the top, the citizenship clause of the Constitution says all persons born in the US are citizens. That's been the longstanding interpretation. And I want to ask you in a minute about the basis of that, the history of it, but let's first get right to the argument that the Trump administration's making. What is the argument made by the Trump administration or others about why children of undocumented migrants or temporary legal migrants are not covered by the citizenship clause?

Amanda:

Yes, and I should say their arguments seem to be shifting and evolving over time, but I'm going to be basing this on their most recent briefs that they filed on this question in the courts of appeals. So the citizenship clause, which is just a single sentence, says "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States." So the Trump administration argues that that caveat "subject to the jurisdiction thereof" is not intended to apply to those two groups, children of undocumented immigrants and children of legally present but temporary immigrants.

They make this argument based on a few theories. One is they say those groups of people do not have complete and total allegiance to the United States. And embedded in that argument is the idea that you can't have such allegiance unless you're domiciled in the United States, meaning you intend to remain. And then there's a hint of an argument that the U.S. must consent to the presence of an immigrant before their child is a birthright citizen. Of course, that argument would apply seemingly only to undocumented immigrants' children, not to legally present temporary immigrants. The allegiance argument is also hard to square with a system that allows dual citizens to have birthright citizen children as well as children of lawful permanent residents – who of course retain a foreign citizenship – for their children to have to be citizens. So I find their arguments somewhat inconsistent, but that's the best I can do in terms of explaining what they've argued so far in court.

Hiroshi:

The Supreme Court often looks at the original meaning of a constitutional provision. In other words, what the drafters of the language intended. So what do we know about the original meaning of the citizenship clause?

Amanda:

Constitutional interpretation involves text, the structure of the constitution, original understanding reflected in the drafters and the public understanding at the time, judicial precedent, and policy always comes in as well. And I'd say every single one of those, in my view, supports the mainstream interpretation of the citizenship clause as being nearly universal.

But to go to your question specifically about the original understanding, and I'll be brief but happy to dig in more if you'd like to explore more of this. In the antebellum era, 20 percent of the population was enslaved at the time of the Constitution's original ratification in 1789 and then there were free Black people, Native Americans as well. There were a lot of questions about who was a citizen of the United States and a lot of debate over that question. Then the Supreme Court squarely addressed that issue in *Dred Scott v. Sandford* in 1857. And that Court said no Black person, slave or free, could ever be a citizen of the United States. That's Chief Justice Taney speaking. And actually, I think this is overlooked, but he also said that no, "inferior or subordinate class of people could be citizens." Which I think in Taney's view would have included a whole lot of other people, including children, for example, of Chinese immigrants.

So, of course, then we fought a civil war and ended slavery, and the question for the Reconstruction Congress and the nation in 1865 is who is a citizen of the United States? We knew slavery was over, but the *Dred Scott* decision and these questions about who was a citizen remained. So the Reconstruction Congress said, let's end this once and for all. They first enacted the Civil Rights Act, giving equal rights to groups that had been denied them, certainly including the former slaves. And stated there that everyone born in the United States was a birthright citizen. And then they repeated that language and put it in the U.S. Constitution as the first section one of the 14th Amendment.

Hiroshi:

We'll take you up on your invitation to dig deeper into that, but let me jump ahead to the last part of the 19th century and ask you about an important interpretation of this citizenship clause that the Supreme Court issued in the 1890s. And that's the case of *United States v. Wong Kim Ark*. Can you tell us a bit about that case and what it said about the citizenship clause?

Amanda:

Wong Kim Ark is just a fascinating case. It came to the U.S. Supreme Court in 1898 at a moment when the federal government had abandoned Reconstruction for the most part. And the Court just two years before it issued the decision in *Plessy v. Ferguson*, saying that separate could be equal. So we had a nation that was somewhat, in fact, very hostile to many of the goals of the Reconstruction Congress. Wong Kim Ark was born to two Chinese immigrant parents who were living in San Francisco. He was born in Chinatown in San Francisco in the

early 1870s. He believed himself to be a birthright citizen. He was familiar enough with the law to know that. He traveled back and forth to China a few times. His parents actually left the United States when he was a child, but he lived almost all of his life in the United States and he visited China. He actually got married to a Chinese woman in China and had children. In 1895 he was coming back from one of those brief trips to return to his home in San Francisco and he was imprisoned by the government on a steamship, which said you can't disembark because you're not a citizen. And this was the test case.

They brought it up to the Supreme Court. As everyone knew, that's where it was going. And the argument was, frankly, very much what the Trump administration is arguing today, which is that that the birthright citizenship clause, section one of the 14th Amendment, does not grant universal birthright citizenship and it carves out the children of immigrants and it says those children are not subject to the jurisdiction of the United States and their parents weren't either. And so they are noncitizens. And the Supreme Court took over a year to decide this case. It was not clear what the outcome would be in this particular era. But in the end, a majority of the Court said this provision, section one, is clear. It uses universal language. And it is intended to apply to the children of all immigrants and it granted Wong Kim Ark citizenship as it did the children of all immigrants.

Hiroshi:

Amanda, let me follow up on one specific aspect of the Wong Kim Ark decision. Weren't his parents legally present? And doesn't that limit the relevance of the *Wong Kim Ark* decision to birthright citizenship for the children of undocumented parents?

Amanda:

So it's true that his parents were legally present. So yes, that is a point of difference between the *Wong Kim Ark* case and the claim that the children of undocumented immigrants are not citizens. And of course, people that want to distinguish that case make that argument. But as lawyers well know, you can't distinguish a case just because the facts are different. You have to look at the analysis and the rationale and see whether that supports the distinction that's being made. And I think one relevant point as well here is that Wong Kim Ark's parents' position in the United States was far from secure. So again, people that want to distinguish that case say, well, but the parents were domiciled, which was the word that the court used, and were legally present and domiciled in the United States, meaning they could stay permanently and they were settled. That's actually not true.

First of all, Wong Kim Ark's parents had left long before the case was litigated; in fact, they left shortly after there was a pogrom in San Francisco's Chinatown. So they were very familiar with racial violence, they were familiar with discriminatory laws, and they left the United States, one has to assume in part due to that. And the Supreme Court well knew the position of the Chinese immigrants in the United States was far from secure. They'd issued two decisions within the last ten years that upheld and allowed the government to both exclude returning Chinese immigrants and allow for the deportation of Chinese immigrants at the government's discretion and whim. So their position was not secure in the United States, and I really don't think that case can be distinguished on the ground that Wong's parents were permanent

residents with a legal status and therefore it doesn't apply to undocumented immigrants or temporary immigrants.

The other point I would make here about the *Wong Kim Ark* decision is that the Supreme Court, when looking at the language and the citizenship clause, said this language is universal. And if we start reading it to exclude the children of immigrants, that would apply not just to the children of Chinese immigrants. And the Court had been pretty openly hostile to Chinese immigrants and using quite racist language in its opinions at the time. It said not only would we have to exclude the children of Chinese immigrants, we'd have to exclude the children of English immigrants and Irish immigrants and German immigrants. And it was clear that problematic interpretation was what really bothered the court, how many people it would affect.

I think the *Wong Kim Ark* case is fascinating for a number of reasons. First, the Supreme Court itself recognized how radical the government's position was in arguing that children born to immigrants were not citizens, and it actually postponed the oral argument in the case until after the election because of course the government's argument would have suggested that millions of people who were planning to vote and those who would think they could be elected to office were not citizens and therefore ineligible to do both. So they postponed that oral argument.

I think also fascinating is the fact that the Solicitor General who argued the case was a man named Thomas Conrad. He was born into a slave-owning family in Virginia. He served in the Confederate army as an officer. He actually lost his citizenship himself briefly post-Civil War, as did every member of the Confederacy. And then before the Supreme Court of the United States, he really wanted to argue that the children of *Chinese* immigrants weren't citizens, that's clear from his correspondence, but he had to argue in order to comport with the language of the citizenship clause that the children of *all* immigrants aren't citizens. So he made that argument, extraordinary as it was.

And then he said in his briefs that the 14th Amendment to the U.S. Constitution was itself unconstitutional. I think the argument was because the southern states had been coerced into ratifying it to rejoin the union. As far as I know, it's the one and only time the Solicitor General has argued before the Supreme Court that a provision of the Constitution is itself unconstitutional. And that just shows you how extreme and radical that position was even in 1898 and certainly is today.

Cristina:

Amanda, we do know both from the debates over the 14th Amendment and then also from the Supreme Court's opinion in *Wong Kim Ark* that there were specific groups who were excluded and were understood to be encompassed in that "subject to the jurisdiction thereof" language. And those are the children of Native Americans, the children of diplomats, and the children of people who are hostile occupying forces. So how should we think about those exceptions? Because some of the arguments that people are making today are that those exceptions embody a principle, and that principle can be applied to exclude new groups of people like the children of unauthorized immigrants. So what do we make of those exclusions?

Amanda:

I would say exactly the opposite argument follows. So you have a Reconstruction Congress that adopts this very capacious language. All persons born or naturalized are citizens, with this carveout for those who are not subject to the jurisdiction thereof. Then you have them debating and mentioning in the debates: Well, of course, we don't want the children of diplomats, right? That makes total sense. That was the longstanding common law exception to the more ancient rule of *jus soli*, or birthright citizenship, and makes perfect sense. The French ambassador does not want her child born on U.S. soil to be a citizen. And then they, so they mentioned that explicitly and then they had a debate about Native Americans and decided those born within tribes who are separate sovereigns with whom the U.S. had treaty relations, and it always treated them as a unique country within a country in the United States, that those children should be excluded.

So the fact that they had those detailed conversations about who's carved out strongly suggests that they didn't intend to also carve out, without mentioning it, the children of all the travelers and visitors and temporary immigrants or those who came in violation of laws that at the time and before had barred people from importing slaves or had barred even free blacks from coming to the United States, as some great work by Gerry Neuman and Jack Chin and Paul Finkelman have shown. So the very idea that they would spend so much time talking about those narrow exceptions – and then we'd assume that they meant all these other groups, too – doesn't follow simply as logical.

Cristina:

So then even if we assume that at the time that they adopted the 14th Amendment, they didn't have a full sense of this category of unauthorized immigrants, and we didn't have a system of temporary immigrants in the same way that we do today, we nonetheless have Congress in 1940 and then again in 1952 enacting a statute that repeats the language of the 14th Amendment. What about the significance of that statute? What has changed between 1868, 1898 and then 1940 and 1952 that might obviate all of this discussion about the original understanding of the 14th Amendment, if anything?

Amanda:

That's important. So we have this constitutional provision that grants nearly universal birthright citizenship. But then we have a statute that tracks the same language of that constitutional provision. And what did Congress intend when it enacted that statute? It's clear from multiple sources that it intended to put into the U.S. Code the broadest possible view of birthright citizenship under the Constitution. So even if the Trump administration were correct – I don't think it is – but even if it were, that constitutional provision should be read more narrowly to exclude far more people – that is not what Congress intended when it put into the U.S. Code the birthright citizenship provision and when it reenacted it and recodified it in 1952. So we don't even have to get to the constitutional question. We could rest on the statute to say that this Trump executive order should never go into effect.

Cristina:

Do you know anything about the practice at the time in 1940, and 1952? If people, states, localities, hospitals, Congress, whoever, the executive branch was treating as citizens

people who were born in the United States regardless of who their parents were, unless they fell into one of these very specific categories that we talked about before, then we should understand those statutes as reflecting that view. But what do we know about whether there were people born to unauthorized immigrants in 1940 and 1952 being treated as citizens? Was there ever discussion of the issue or the issue of temporary sojourners giving birth to citizens at the time?

Amanda:

A couple of points here. One is looking at the background of the 1940 law that puts into the U.S. Code the birthright citizenship guarantee that I think is also in the Constitution. It's clear Congress intended it to apply to the children of undocumented immigrants, the children of temporary immigrants, but it's not just that one provision. The entire immigration and Nationality Act – the code that addresses immigration status and provides for the right to people to remain and also to be deported – assumes children born to undocumented immigrants and temporary immigrants are citizens. It's repeated throughout the code. We'd have to rewrite the entire code of immigration law if we're going to change our view of birthright citizenship. Congress assumed it in multiple places in that law.

I'll also add because I find it worth mentioning. Congress is also tasked under the Constitution with determining the eligibility of people to be members of Congress. And you have to be a citizen to serve in Congress. Congress has never challenged for membership in that body anyone who was born in the United States and claimed that they weren't a citizen because their parents were undocumented or temporary immigrants.

Alex:

Amanda, you mentioned at the start that the second section of the executive order purports to be prospective, that it would only take effect 30 days after the promulgation of the executive order. Which looks like it meant that only people born after that date would suffer the consequences of the order. But you also said that that wouldn't be the logical reading based on the first section, which purports to interpret the Constitution. Say a bit more about that and who was likely, do you think, to be excluded by the executive order from citizenship?

Amanda:

Even if we assume it's prospective only, that is, it only applies thirty days after the president, to babies born thirty days after the executive order is issued, so after February 19th, even if we assume that, the results would be chaotic and disastrous. For all of these new families, I estimate, and it's more of a guesstimate, about 300,000 children born every year would be excluded from citizenship based on this executive order. What does that mean for them? That means that they would be born undocumented with the possibility they could be deported away, even if their parents are legally present in the United States. That means they would be denied benefits that are limited to citizens, such as Medicaid, such as benefits like TANF for food assistance and other aid; they would be denied a social security number, meaning when they grow up they can't work legally. They would be denied a passport, meaning their legally present parents who might want to travel back and forth to their home country

couldn't leave with their child or return with their child. This would be disastrous for those families.

But not just those families. There's about 3.6 million children born in the United States every year. As a result of this executive order, each and every one of those families would have to demonstrate their citizenship and their status in order to ensure that their children are given citizenship status. This would now be a test of lineage and all these new families would have to satisfy federal immigration officials of their status. And this would get harder, right? In a generation from now, birthplace would no longer be the test of citizenship, so all of us would have to have documentation of our lineage in order to ensure our children are citizens. And that's just if it's prospective only.

If it's retroactive – it does seem like the government is saying, the Trump administration is saying, we've always gotten it wrong up till now, so none of the people born to undocumented immigrants or legal but temporary immigrants in the past are citizens. If that's its view, I don't see how someone gets a passport if their parents were student visa holders when they were born. I don't see how you don't make it retroactive. And that means it would affect millions of people. And the last thing I'll add is that in some of the government's filings in this case, asking for a lifting of the temporary restraining order, they said it would affect millions of people. So the government's view is that it would affect millions of people as well.

Alex:

Amanda, what do you make of the argument that birthright citizenship as it's been understood up until the adoption of the executive order actually provides an incentive or a reward for migrants who come to the United States outside legal channels?

Amanda:

First of all, there have been a number of studies on exactly what the pull and push factors are that lead people to come to the United States unlawfully. The number one pull factor is employment in the United States, the ability to work in the United States, earn a living, and have an economically better life. There's also, of course, the push factor of chaos or violence in a home country. So those are the primary reasons people come. There has been no evidence and no study that has ever demonstrated that the fact that someone's child is treated as a US citizen is a reason why they choose to enter with that status, if those other pull and push factors weren't present.

And that takes me to the final point I want to make, which is that if the Trump administration is truly upset about undocumented immigration, and they seem to be, then I don't understand why they aren't pursuing employers of undocumented immigrants. Undocumented immigrants are working in large numbers. They make up 8 percent of the workforce in Texas, for example. And yet I don't see executive orders targeting those employers or U.S. citizens or trying to fine or penalize them. That would be the most effective way of ending undocumented immigration or limiting it – not ending birthright citizenship for the children of undocumented immigrants. And by the way, the parents can't get status through those children for at least 21 years. So under the law, that is no incentive for the parents. It strikes me as very unlikely that that's what is motivating most undocumented immigrants. And the studies back me up on that.

Cristina:

Amanda, I agree with you that the argument that we should end birthright citizenship regardless of the legal merits because it would help to end illegal immigration is specious. Do you have a view as to what is motivating this executive order and what is motivating people to come up with historical justifications that we've never really heard before for the interpretation the executive order offers? Why is this part of this administration's policies and strategies?

Amanda:

I think there's a couple of things going on here. And frankly, they were the same things that were going on in 1898 when the U.S. government argued in Wong Kim Ark's case that the children of immigrants are not citizens. The government wanted to control the both who had political power, so that goes to who can vote, who can hold office, but also the meaning of American. And the Reconstruction Congress also wanted to control that and feared a future government that would not want to include every person born in the United States and living in the United States as an American – which is why it put it in the birthright citizenship clause. But we see the government in 1898 and the government today wanting to redefine the meaning of American. We see it, of course, in this claim about who can be a birthright citizen under the executive order we've been discussing, but we see other places as well. For example, in the last Trump administration and in this one, there's been an effort to denaturalize naturalized citizens. There was an office opened up, staffed by at least 35 people – funded in hundreds of millions of dollars in the last Trump administration – to investigate 700,000 naturalized American citizens. And potentially to strip those people of citizenship; and simply questioning citizenship chills speech. It means you don't want to bring yourself to the attention of the government. It means you're fearful of your ability to stay and remain. It's not, I think, that the Trump administration would deport every single child born to an undocumented or temporary immigrant. But now it would have control over all of those people and the rest of us who maybe couldn't prove to the government's satisfaction that our parents legally came, or our great-grandparents or great-great-grandparents for that matter.

Hiroshi:

Amanda, let me follow up on Cristina's question by asking you to put this in perspective worldwide or more globally. Does the prevailing broad reading of the citizenship clause make the United States an outlier on how it confers citizenship? Some countries in recent years or in the past have narrowed or abandoned broad birthright citizenship, if they ever had it at all. Could you speak to that and how the United States fits into worldwide perspective?

Amanda:

The United States is one of, I think it's 32 countries, that has universal automatic birthright citizenship, most of them located in the Western Hemisphere. It includes Mexico and Canada as two countries with the same rule. A lot of European countries, though, have given up on the most pure and automatic form of birthright citizenship—although I just want to be clear, they haven't abandoned the concept altogether. So France doesn't have birthright citizenship in the sense that a child born to undocumented immigrants in France is automatically a citizen at birth of France. But if that child is still there at age 18 then they're automatically a citizen if they

live long enough in France. So it's actually a much more inclusive rule than the Trump executive order; I'll just point that out.

But is the United States somewhat unusual and certainly different from Europe in its rule of automatic birthright citizenship? Yes, but I think that's because of our history. And it's what Eric Foner called the good kind of American exceptionalism. We're a nation founded on the idea that ancestry and lineage was not the test of one's ability to serve in government or join the society, or be considered a full and equal member. You're equal at birth. I think, Cristina, you're the one who said it's the reset button that sort of starts us off anew, afresh, as equals with each generation. And I love that analogy. And I think that is such an American idea. And that is so a part and parcel of who we are as a nation. And to replace it with a test of ancestry and lineage controlled by the government who has all of our documentation is to me a terrifying change in policy and frankly antithetical to what I think America values.

Cristina:

I like that thought of thinking about the good kind of American exceptionalism and holding on to things that might be unusual to us or to the rest of the Americas for that matter, but that we have for good reason. I also want to ask you, to tell us about the litigation that's working its way through the courts. I think you've given us really compelling reasons to think that the executive order is unlawful. And I think just about every court that has heard the case has said something to that effect. So what are we seeing in the courts? And what do you expect to happen ultimately if and when this gets to the Supreme Court on the merits?

Amanda:

A number of different judges have weighed in now. I've lost track of how many judges have weighed in. But the judges who have opined on this have all said that this executive order is at odds with the citizenship clause of the Constitution. They have called it blatantly unconstitutional. They have critiqued the very idea of making this a question in the United States in 2025. And these judges have been appointed by a range of presidents, including President Reagan and President Bush, as well as appointed by Democratic presidents. So we see a really universal judicial response. In terms of what I see in the future, we have, of course, the case going to the Supreme Court and being heard at oral argument on May 15. But that goes to the question of the scope of the injunction that was put in place by these lower courts, which enjoined the implementation of this executive order as being applied to anyone, not just the main plaintiffs, but anyone in the United States. So the scope of that executive order is before the Supreme Court in May. I would think that if the Court was going to reach this substantive question of whether the executive order is consistent with the statute as well as the constitutional provision, that would happen next year. I would hope and expect the Court would say it is both at odds with the statute and unconstitutional. But I am out of the business of predicting what the Supreme Court will do. I think it's very difficult to do that. But the suggestion from the lower courts is that judges think this is, as one judge said, blatantly unconstitutional.

Hiroshi:

Is there anything about the executive order or the litigation or the 14th Amendment Citizenship Clause itself that we haven't discussed that you think bears emphasis?

Amanda:

Yes, a couple things. One is, when I'm giving talks on this to various different groups, people are concerned about birth tourism. And I have to say my first reaction to that is, oh, but that's such a sideshow. But now that I hear people repeatedly talk about it and be concerned about it, I just want to make sure I've addressed it. So first I should say it's not a large number of people. It's hard to know exactly how many children are born to people who intentionally use a tourist visa to come into the United States for some short period of time to give birth.

Does it happen? Absolutely. It appears to be by everyone's estimate, including anti-immigrant groups, to be under 100,000 people a year, and in a country of our size, you know, in the 300 millions, that's a drop in the bucket. So it's not a large number of people, but nonetheless, it's concerning. So I think it's worth mentioning that there's actually ways to prevent that without ending birthright citizenship. And in fact, those ways have already been put into law. So there's a federal regulation put in place during the Trump administration, and not rescinded during the Biden administration, that says it's illegal to get a tourist visa for the purpose of giving birth in the United States. And the consular official and the customs and border protection official who screens people upon arrival can decide just by looking at someone who is in an advanced stage of pregnancy that that person should not be allowed into the United States because there's a chance they're coming in to give birth and that's their purpose. So if that regulation is enforced, I think that solves the problem of birth tourism. And in any case, it's a very small number of people. And to get rid of birthright citizenship and impose the test of ancestry and lineage on the rest of us simply to respond to that issue is, in my mind, a terrible policy choice and not at all required to deal with that particular problem.

Hiroshi:

Thank you, Amanda, for sharing your thoughts with us today. It's been a really rich conversation.

Amanda:

Thank you for having me.

Cristina:

There are two things that Amanda said in our discussion that I really want to emphasize because I think they are in many ways the most important aspects of this whole debate. The first is the idea that the president, through an executive order, could redefine the scope of citizenship is enormously worrying, unsettling, destabilizing. She talked about the control that doing that gives to a centralized authority. Citizenship is supposed to be the foundation of our ability to participate and live free lives. And if a president, based on some new interpretation of the Constitution that goes against the grain of 100 years of practice, can suddenly make millions of people no longer citizens, then I don't think we live in a constitutional democracy anymore.

And then the other thing that she emphasized that also seems to me to be critical is that the 14th Amendment is about the children born in the United States. It's not about the parents of those children. I think there's an intuition out there, and you hear this sometimes in mainstream discussions about this, that unauthorized immigrants should not be allowed to give birth to

citizens, that undoing birthright citizenship for those people is a way of punishing them or acknowledging that they did something illegal. But the whole point of the 14th Amendment, as I've always understood it, is to break that connection. It's to ensure that there are no castes in our society and that the children who are born in the United States who did not make the decision to come to the United States illegally or are blameless are in fact citizens of the United States if they're born here.

So severing that connection, that idea that you inherit the sins of your parents, seems critical, not just to the birthright citizenship clause, but to the whole meaning of the 14th Amendment. So I'm glad that she brought that up.

Alex:

You know, Cristina, for your first point I don't think it's quite fair to say the president was redefining the Constitution here. I think that the president was saying this, this is my understanding. It was clearly teed up for the Supreme Court, and the Supreme Court was going to have the final word here. And we do have doctrine that changes from time to time, the meaning of the 14th amendment in terms of racial segregation. And we can think of lots of cases where the Court has announced new doctrine because times have changed.

That's not an attempt to justify what the administration has done here. I don't agree with the executive order, but I think that I've heard this occasionally, the president has tried, this is not what you were saying, but the president is trying to amend the Constitution. And I think that it's not the right way to think about what's going on here.

Hiroshi:

There are a couple of ways to think about what Cristina said though, right? Some of this has to do with constitutional interpretation: what's the meaning of the citizenship clause? But the other has to do with the instability of citizenship itself as a simple, but very broad, understanding of what you'd have to do to prove your citizenship. And so what we're having here is not just the changing meaning of the Constitution. We're having the changing meaning of the role of citizenship in people's lives and how people can claim it and the precarity that even someone who is a citizen is facing.

Cristina:

I also think this issue on some level may come up in the May 15 arguments at the Supreme Court because that hearing is about nationwide injunctions. And so if the Supreme Court says that it was improper for district courts to issue nationwide injunctions, then you will have the executive order come into effect in some parts of the United States so that some people because of the president's fiat will, even if temporarily, lose their citizenship. And who knows what follows from that. And so even though the president might be teeing something up for the Supreme Court, what he's trying to accomplish in the interim, I think, is the form of chaos that Amanda was describing and also the shifting of the Overton window that Amanda was describing.

Alex:

Cristina, I think your point about the sowing chaos here is exactly right and what the Trump administration has tried to do across a wide range of issues. And I was particularly interested in Amanda's description of the consequences, even if this only applied prospectively, the kinds of serious consequences for thousands and thousands of people around the country is extreme and very important. Intuitively, if you ask people, you know, does it make sense that kids of undocumented immigrants are citizens? A lot of people say, no, that can't be right. The parents are here illegally. It runs into the problem you've just identified, but I was really heartened by a recent poll that I saw that 56 percent of Americans thought it was not proper to remove citizenship from the children of undocumented immigrants. It's not a result I would have expected. And it goes to the point, Cristina, you're making about how deep this principle really is in our, in our values and in our constitutional history.

Hiroshi:

What I think about the children goes to the point that Cristina amplified, which is thinking about the children and not about the parents. There's a broader point to be made here, and that is that one of the ways that we think about citizenship is it should be some kind of reward, or maybe a reward that should be withheld because it's an improper incentive or reward to the parents, sort of a judgment about the parents. But the other way to look at citizenship, which I personally think is much more not just wise, but consistent with American history, is that we're using citizenship, not as a reward, but rather as a vehicle to build a stronger country and to have participation going into the future. In other words, looking not at the parents, but the children and the grandchildren and the great grandchildren. So the idea that citizenship would be withheld from those groups is simply going to weaken the country going ahead. And that's a lot of what we're doing by emphasizing the children and not trying to judge the parents.

Cristina:

So the other thing that Amanda mentioned I think is important to emphasize here, including because it might have some bearing on the way the Supreme Court sees the birthright citizenship issue, is the denaturalization efforts of the last Trump administration. Stephen Miller has indicated that they want to supercharge those efforts under this administration. But we know that in cases where the government has tried to either denaturalize someone or expatriate someone, that the Supreme Court has been very, very cautious about permitting that. So for example, not long ago in the case *United States v. Maslenjak*, the Supreme Court held that in order to denaturalize someone, the fraud on which that denaturalization is based has to have been relevant to the actual procurement of citizenship. In other words, just because someone lied on their denaturalization application doesn't mean you can take their citizenship away from them. It has to have been related to the procurement of the citizenship. And that I think reflects, like a lot of other 14th Amendment cases, that the Court jealously guards the prerogative of citizenship and it is understood as the right to have rights, to put it in Hannah Arendt's terms, and the denaturalization or expatriation or the stripping of birthright citizenship of a certain class of people is a very dangerous power for the government to claim.

Alex:

You know, to follow on the denaturalization point here, there's a weird way in which the denaturalization statute plays back into the attempt to remove gang members from the United States. It works this way. The law says if you committed fraud or misrepresented during the naturalization proceeding, the naturalization could be taken away and that may seem reasonable to people. But then it goes further and it says that if within five years of being naturalized, you join a designated offending organization, the Communist Party, Anarchist Party, others who believe in overthrowing the United States – and language that would also include terrorists – then the government can say, even though this happened within five years after naturalization, that you were not attached to the Constitution the way you were supposed to be when you were naturalized. They can seek to denaturalize you based on that subsequent membership. so this could be used in the gang context by saying someone who took U.S. citizenship, and then joined a gang within five years, would now be subject to losing American citizenship and be deportable. And that may be something, when Miller claimed he was going to supercharge denaturalization, that may have been one aspect that he was looking at.

Cristina:

It is a frightening prospect.

Alex:

It is a frightening prospect, and I'm moved by your point here, Cristina, across all these fronts and attacks on citizenship. I think you're right. I think the Supreme Court's going to hold the line on this because we have to remember that in Nazi Germany, what happened first were the Jews were denaturalized. Citizenship was taken away from Jews. And then we know the results after that. And this removal of citizenship is seen as the removal of the right to have rights, as Arendt said. I think in It's really an extreme step.

Hiroshi:

It's also worth amplifying a point that Amanda made, which is that a lot of the purpose of the executive order is to make people feel anxious, make them afraid. And in many respects, whatever happens in court, the administration is pursuing something as much broader than the legal context.

Cristina:

I like to think, Hiroshi, that's why we have to keep talking about what's happening and offering a perspective on what's at stake.

Hiroshi:

So Cristina, could you tell us a bit about our next episode?

Cristina:

In the next episode, we are going to talk about the broader mass deportation strategy that this administration has initiated. We've talked about very egregious instances of using untested or barely tested legal authorities to deport particular classes of people. But in the midst of all of that, the administration is also building its capacity and its legal authorities to try to meet

its goal of removing a million people a year, which is not something we've seen in this country ever. So we're going to dive into how it's doing that. And what it might or might not be able to accomplish with those tools.

Hiroshi:

Thank you for listening to Unsettled, Immigration and 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, 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, the 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.