



Yale Law School



ZOLBERG
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Center for Immigration
Law and Policy



Season 2, Episode 4

Alex: Hey, Hiroshi.

Hiroshi: Hey Alex.

Alex: It's just the two of us because we need to start with sad, happy news.

Sad that Cristina Rodriguez will no longer be co-hosting this podcast, but happy because she has recently been announced as the new dean of the Yale Law School. Yay for Cristina. Her expertise, her ability to communicate complex matters in a very relatable way for the general public. We're really gonna miss her.

Hiroshi: We'll miss Cristina a lot. She has a unique ability to combine what's highly relevant with what's original and insightful. And she's contributed so much to the conceptual framework and planning for this podcast. But we are, as Alex put it, both happy and sad, or sad and happy, that Cristina has this new and crucial role in the legal academy, and indeed in the national conversation.

So we wish her all the best in her new role.

Alex: This episode of unsettled is an edited version of a discussion that I had with Lee Gelernt as part of a Zolberg Institute seminar last week. Lee is deputy director of the ACLU Immigrants Rights Project, and he's really one of the nation's leading public interest litigators, having argued scores of cases before the Supreme Court and lower federal courts on many issues involving immigration. We spoke with Lee last season about a number of cases, the ACLU has filed challenging enforcement practices at the border, cases on Trump's executive orders on asylum and other topics. And today we get an update of some of these cases, but then we turn to more recent events in Minnesota and a discussion of the legality of ICE actions there: breaking into homes, pulling people from cars, stopping people on the street and demanding identification. A range of practices we've come to know all too well through the videos we've seen. So let's listen.

Alex.: Lee, welcome back.

The last time you were on the podcast, we discussed a number of cases that the ACLU has filed or been involved in, in challenging Trump immigration executive orders and policies and practices. Now I want to start with an update on a couple of those cases, and then I want to turn to, uh, the ICE operations in Minnesota and the constitutional issues that are raised there.

So let's start with the Alien Enemies Act cases. I, I'm sure our audience will remember that the Trump administration invoked the Act, which has only been used very rarely and only in wartime, uh, to remove migrants, primarily Venezuelans and some Salvadorians to this notorious prison in El Salvador called CECOT and they were removed without any kind of due process. Um, and, and in doing so, DHS flouted an order of a federal district court that told the government not to let the planes take off or any plane in the air should be brought back, and then apparently misrepresented to the court, uh, that the planes were in the air and were on their way to El Salvador.

Um, the judge in that case, Judge Boasberg initiated criminal contempt proceedings against the government. The government then sought to remove Judge Boasberg from the case, filing a misconduct charge against him. Where are we in this litigation?

Lee: Yeah, so a lot has happened since I joined you last time. And, and again, thanks for having me.

So there's essentially three strands to the Alien Enemies Act case. And, and as you mentioned, the Alien Enemies Act is a wartime authority. It was enacted in 1798, and what it does is allow the United States when we're at war, to make every national of the warring country, quote unquote, an enemy alien.

So it's only been used three times in our country's history, the war of 1812, when the British invaded, World War I and World War II. And what the Act says is the president may make people an enemy alien of another country when we're in a declared war or where we're being invaded, or there's a predatory incursion, all essentially sort of military activity.

The president this time, President Trump, has said, well, let me use it against criminal gangs this time—the Venezuelan gang Tren de Aragua, it goes by TDA—during peace time. So we challenged the right of the president to use it during peace time. And so three sort of strands have now emerged from our initial challenge. The first is that we are trying to stop its use from going forward ever again during peace time. And so we just had a hearing before the Fifth Circuit, en banc.

We originally won in a two to one decision, where they said, you can't use this wartime authority during peace time against a criminal gang. And so the government sought rehearing on banc. We just had the rehearing on banc. And that's an extraordinary situation because in the Fifth Circuit, because it's 17 judges, we'll see how that comes out.

But one way or the other, it's gonna end up in the Supreme Court. And indeed the Supreme Court has issued an extraordinary stay saying the government may not use the Alien Enemies Act until it comes back to the Supreme Court. The second part of it is, as you mentioned, that we rushed into court at one in the morning, March 14th or early morning Saturday, March 15th, because we thought that the president was gonna invoke it. We got into court in time. We had an emergency hearing before Judge Boasberg that Saturday night, March 15th.

He said, do not turn these men over to El Salvador to the CECOT prison under the Alien Enemies Act. They did. So we are trying to get the men back, or at a minimum, get them remote hearings. They were originally in CECOT for three months, tortured, abused, everything you can imagine-. then transferred to Venezuela where they originally fled persecution.

The government is not really saying they got due process, but it's saying Judge Boasberg doesn't have the authority to do anything for them because they were able to get them out of the country, which raises its own host of issues.

The third part is what you mentioned, which may in some ways be the biggest issue of all and transcend all these discrete, substantive issues, which is that Judge Boasberg is adamant that they understood his order not to turn people to or to El Salvador. They did it anyway. And so now he's initiated criminal contempt proceedings.

They originally appealed it immediately to the DC Circuit Court of Appeals. The DC Circuit Court of Appeals sent it back and said, he can go forward with this. The government was saying it's a separation of powers problem. He cannot investigate even criminal contempt for violating even if he found that they deliberately violated his order.

They then had to put affidavits in saying who was responsible. They put in two sentence affidavits from the lawyers who said we provided legal advice. They didn't say what the legal advice was. And then from Secretary Noem who said, I made the final decision, but she didn't say what she based it on. So Judge Boasberg said, well, these are completely deficient affidavits. I want to start with live testimony, and I want to first start with the whistleblower, Mr. Ruveni, who has since been fired from the Justice Department, who has said the DOJ lawyers were lying to Judge Boasberg. They clearly knew what the order meant and still violated it. So he wanted him to take the stand and also the high level DOJ lawyer who actually argued that hearing against me.

That Saturday night, the government said, we refuse to put anybody on the stand, so we're gonna go back to the Court of Appeals. It's now sitting in the Court of Appeals. My own sense is the government will not let anybody take the stand unless the Supreme Court says they have to. So this could reach the Supreme Court and then finally sort of put to the test, is the Supreme Court gonna have the backs of the district court judges and lower court judges?

All these substantive issues are enormously important, but the question of whether the Justice Department and the executive branch as a whole under Trump are gonna get to

ignore court orders raises the most fundamental questions about our system of government, about the rule of law.

Alex: Yeah, well there are two separate issues, both of which are absolutely fundamental constitutional issues. The first is whether you can send someone out of the country without any kind of process at all, which the Supreme Court has already said, no, you can't. And the second is, will judicial orders be obeyed? But now the government lodged the complaint seeking to remove the judge from the case saying, uh, it was a misconduct charge. What's that all about?

Lee: Yeah. This has been an extraordinary situation where not only are they not complying with orders, but then they're turning around and saying, well, this is just a liberal overstepping his bounds.

And rather than just straight appealing, first they were saying, calling for his impeachment, which Chief Justice Roberts finally had to come out and say, we don't call for the impeachment. The president and the executive branch don't call for the impeachment of a judge, just because they don't like the ruling.

But they then went further and said, we're gonna file a complaint against him for something he said at a private meeting with Chief Justice Roberts and the rest of the judges on his district court in DC where he simply was saying as, as far as I know, as far as has been reported, that the judges on his district were concerned about the Trump administration violating orders, which turned out to be very prescient

But that's the kind of thing that's normally discussed at one of those meetings. So the Justice Department and the Attorney General filed a complaint to have him removed from the case. The case was sent from the DC circuit to the sixth circuit, I think, so that it was completely neutral.

And Chief Judge Sutton said, no, there's absolutely nothing here. But just the fact that they're going after these judges in this way is implicating such enormous separation of powers [issues] and I look back on Trump One and I was litigating all these high profile cases, and the policies were extreme, no doubt, including in particular the family separation policy.

But I never had the feeling that the Justice Department lawyers were coming in and being outright disrespectful of the courts, much less violating the orders. It is a remarkable sea change. Now the lawyers both in court and in their papers are being just outright disrespectful to the courts and violating orders.

And I think that's one of the real changes between Trump one and Trump two. There's just a feeling like we can tell the public, look at these judges, they're stopping us from doing what we want, and therefore, you know, you should just look the other way. And I think what we've seen is the public saying, no, no, the rule of law matters.

But you know, perhaps more importantly, judges across the ideological spectrum are saying, the rule of law matters. You cannot simply violate orders.

Alex: Well, you've also seen the extraordinary situation of, of attorneys leaving the Department of Justice either refusing to work on cases, or in this case the, the whistleblower, the, the attorney who was originally involved in the case, unhappy with the positions he was being forced to take, which he thought were untruthful and he was fired. Right?

Lee: Yeah. And, and you know, so he is sort of the tip of the iceberg and he came out very courageously and did that. And now you see other Justice Department lawyers leaving in droves and saying this is not what I signed up for. And these are, these are lawyers, just to be clear, career lawyers who have represented Republican and Democratic administrations.

Alex: Let's move to a second case of yours. This takes us back to day one of Trump's second term. And I must say that seems like a lifetime ago, but if we remember, the president signed an extraordinary executive order. I'm gonna read the title of it here.

It's guaranteeing the state's protection against invasion, saying that undocumented migrants were invading the country along with a, a number of other provisions, to prevent this invasion. He purported to end the right of migrants to file asylum claims at the border. Uh, you filed a suit saying that violates domestic and international law, and where does that stand?

Lee: Yeah. I appreciate you asking about that because I feel like it's gone under the radar and we're expecting a decision from the Court of Appeals in DC um, very soon. And I think there's gonna be a lot of misunderstanding about it and a lot of, I think rhetoric, coming out of the administration about it that's gonna try and distort things.

So what happened was on day one, he implemented what he had been saying all through the campaign as, as you remember. The campaign was not talking a lot about interior enforcement. It was all about the border. Everything was about the border. So not surprisingly, on day one, he put in this um, executive order that said, I am ending all migration at the southern border, but in particular, nobody can apply for asylum. And as you said, it was, the claim was, I have this emergency power because we're being invaded by migrants. So this wasn't even, you know, specific to people who have criminal convictions. It was just everyone. So I think a few, a few things come out of this.

One is you see over and over the president saying we're in an emergency because we're being invaded, but not in any real sense invaded in wartime, invaded by migrants.

The other thing about it is what we have challenged is not the right of everyone to simply enter the country. I mean, the ACLU's position is not open borders, but what we have said is you at least need to be screened for asylum, for persecution.

And that is something we made a solemn promise. I mean, you know better than anybody, Alex, about this. We made a solemn promise after World War II the whole international community, that we wouldn't just send people back to persecution without at least a screening.

And what's interesting about how distorted the discussions become is I get a lot of people who say, "the border's in chaos, so we have to end asylum." Then I'll ask them, well, what about a family who is clearly gonna be persecuted, may be killed if they're sent back and solely because of their religion, because they're Christian or because they're Jewish.

And people invariably say, well, of course they need to be screened. Of course they need to be given protection. What people don't understand is there's no exceptions in this executive order by President Trump. No one gets screened for asylum, no matter how credible the evidence is. Even if you come lawfully up to the border and say, I'd like to apply for asylum no matter what the basis is.

And so we're simply saying the screening has to come back.

Alex: I think you're right that people have stopped focusing, uh, on this case, and in fact, you'll hear Democrats agree that Trump has closed the border, right? What's the argument for someone saying: we have closed the border; if you now allow asylum hearings again, like had happened in earlier times, that will then start the flood of entries again.

And you'll be back to the situation of many people seeking asylum having to be let into the country pending their determinations, and that produces the harms that Joe Biden claimed to have inflicted on, on the country. What's your answer?

Lee: Right. I personally am not one of those people who thinks these, they're all easy solutions, but I do think that we can't sort of throw the baby out with the bath water, that we are, we have never opposed streamlining procedures as long as there's due process and, and additional ways to tighten things up.

But I don't think we can go to the other extreme and have no asylum hearing. I think there needs to be a shift in enforcement priorities. We need additional people, uh, dealing with asylum at the border. But I also think that ultimately. We need to rethink how we're gonna let people in the country. I mean, we clearly have work shortages, and so there are people, no doubt, who are applying for asylum. And really what they want is the ability to work. So I do think we need to step back and think about, are we, can we provide ways to come and work here so people are not seeking asylum.

So we need to find a way. But yes, streamlining is one way, as long as there's due process, um, providing other avenues for people to come here. And, and you know, again, I'm not gonna sit there and say these are easy fixes, but I don't think we can say we've solved the problem simply by closing the border completely and saying there's no asylum.

Alex: Let me move to ICE and the interior enforcement here. You know, I, I can remember earlier days where ICE before it was called ICE was part of the Immigration Naturalization Service.

The internal officers would go out with a warrant to find someone who had a deportation order and, and they hadn't left, and they'd be arrested and they'd be sent out. Uh, or they would conduct work site enforcement– raids– at places of work where they either get a warrant or get consent from the person who ran the factory to come in and, and, and check papers of people.

That's what ICE and its predecessors did for years, that kind of work. And, and what we've seen first in Los Angeles and then in Chicago and now, uh, most tragically in Minneapolis, are what I guess people refer to as these roving patrols, that we have ICE stopping people in the street asking for IDs, pulling guns on observers.

ICE jumps out of a car and pulls their guns on people who are following them, going to parking lots and malls and hospitals and, and then using lethal force– killing–US citizens, uh, who were observing this. And I, I wanna ask you about the constitutional rules here, because I think they're generally not well understood.

And we need kind of a primer on this, but also your view about whether or not, what's happening here meets the constitutional standards. So first of all the legality of ICE entering a home with an administrative warrant, um, rather than a judicial warrant. How does ICE have an administrative warrant? What does that mean and what is their authority to use that to enter a home without the consent of the homeowner?

Lee: Yeah, I'm glad you started with that because I mean, one of the things that the framers of the Constitution really viewed as sacrosanct was the home. That going into a home was really something that needed, you know, safeguards.

Um, and so what we see now is ICE going into homes and also just knocking on doors and, and coercing their way in. And what they're using are administrative warrants, which is just a warrant signed by themselves. And so what we have said is, at least for the home, you need a judicial warrant, meaning a warrant signed by a judge, and the administration has said, not gonna do that. Now they've issued a memo saying, oh no, we think we can do it with our own warrants, our own administrative warrant signed by ourselves. So that is gonna be challenged for sure. We feel like Supreme Court precedent is clear that to go into a home you need a judicial warrant, and there's no exception just because it's immigration.

Alex: What's their argument as to why a court doesn't have to issue the warrant here?

Lee: You know, I want to say that I understand it fully and it's a coherent argument, but I think it's just that their view is immigration is sort of *sui generis* and it's its own thing. And administrative warrants have always been used by immigration officers on the streets. So why not the home? I don't find the argument particularly persuasive.

Alex: Yeah. So that's the home. Let's talk about public places: on the street, parking lot, a mall and whether ICE can demand to see identification or, or proof of lawful status. Here I'm thinking of, this is actually an ACLU case, the case of *Noem v. Vasquez Perdomo*. And, and that involved the ICE enforcement actions where they were stopping people, uh, on the streets and asking for identification.

As I understand, a lower federal court issued an injunction saying you can't do these kinds of stops if they're based on simply being at a particular location, the kind of work, whether you're speaking Spanish, what your apparent race or ethnicity is. Right? Right.

That came to the Supreme Court. The Supreme Court actually stayed the injunction, meaning the Supreme Court said that the lower court was wrong to have issued the prohibition on those actions in, in LA. Can you talk a bit about that?

Lee: Yeah. So, and we have now a similar case in Minnesota, and I just sort of wanna talk a little bit about what the Supreme Court's decision in the LA case has now led to in Minnesota. But, but you're right. So the government said, well, we can look at the four factors in combination.

One was clearly just ancestry or, you know, whether you look Latino. Another was whether you're speaking Spanish or English with a Spanish accent. Are you working in a low paying job? I mean, all basically clearly racial profiling. The Supreme Court allowed it, and Justice Kavanaugh wrote that he thought was okay, and he was the only justice who wrote a little bit.

Um, since then, interestingly, Justice Kavanaugh, maybe in response to what he's seeing in Minnesota has said, let's just be clear. You can't racially profile. And one thing Justice Kavanaugh said is, well, yes, I see that citizens are being stopped [and] asked, but they can always, that should end quickly if they show that they're a citizen.

And now what we've seen in Minnesota is citizens not being able to just say, I'm a citizen and walk away. They're being put in cars, not allowed to show documents for hours. Um, it's really gotten out of hand. The LA suit is still going on, but now in Minnesota, we have filed another suit.

And what we've said is sort of two types of things are going on. One is the profiling and it violates equal protection in particular going after Somalis, but also Latinos. And so just blatant racial discrimination, which in our view violates [the] equal protection clause. And I think the facts in Minnesota are so extreme. I think any court would have a tough time saying, well, that's fine to just go up to any person who looks Somali or any person who looks Latino in their view. The other strand of it is, what you also mentioned is the fourth amendment of needing "reasonable suspicion." You can't just go up to someone and say, let me see your papers.

I mean, that harkens back to bad things during World War II and in Germany that you need reasonable suspicion to think someone is not in the country law.

Alex: Lemme just interrupt for a second.

Lee: yeah,

Alex: The reasonable suspicion standard is less than the probable cause standard as lawyers talk about this.

Lee: Right. The initial stop can be based on reasonable suspicion, which is less than probable cause. It's hard to sort of define a bright line, but do you have a reasonable basis for thinking this person's in the country unlawfully?

And what that means, at a minimum is not just stopping everyone on the street and saying, let me see your papers, right. That is classic "show me your papers." You know, again, hearkening back to Germany. So you need reasonable suspicion to stop them. And then if probable cause emerges that they are in the country illegally, you still can't arrest them without a warrant unless they're fleeing.

And so what happens is, you're supposed to get a warrant if you want to arrest someone, unless you see them fleeing and you have probable cause, but the initial stops, don't require probable cause, but they absolutely require some basis, objective basis, by the officer to say, I'm gonna go up to this person and ask for their documents and try to talk to them.

But that's what's happening. These roving patrols, as you said, just stopping everyone, regardless of whether there's reasonable suspicion to think they're in the country illegally; then the person gets nervous and they say, oh, now we have probable cause we're gonna arrest them. I think the key is us documenting the facts.

So we have a lawsuit that's gonna be argued on the 17th of this month, and we have put in dozens and dozens of declarations from citizens who have been stopped and un, in contrast to what Justice Kavanaugh thought would happen, are not being allowed to just get their papers or show their papers or explain they're citizens, as well as non-citizens who are being stopped based on racial identity or just no suspicion whatsoever. And I think that's gonna be the key for us. We have so many declarations that the government has not been able to contest that hopefully people say, this has gotten out of hand.

You know, we really need to say, no, this can't happen. And that's all even apart from what you mentioned, which is the excessive force. It's excessive force as to people they're stopping, but also the protestors. And so we've also filed a case on behalf of the protestors and that's its own ballgame where they're saying, you know, they're saying the protestors can't watch.

The law is clear from the First Amendment standpoint, as long as you're not impeding the law enforcement conduct, you can observe. And that's a critical aspect of a democracy. So I'm hoping the amount of factual material we have put forth will show that ICE is outta control. And I think this is one of those moments, like the first term of

family separation that triggered outrage, worldwide outrage and protests. I think now we're seeing this in Minnesota, another flashpoint.

I remember when Trump was elected this time and then the inauguration, I constantly, constantly got questions from the media. Well, the public has decided they want more immigration enforcement, so there's probably nothing the ACLU really can do to push back. And I said then that the public voted for something vague and abstract.

They wanted, but they didn't think about what it would mean in practice. And so now you see the public coming back and saying, well, this is not what we meant. Arresting little children, pulling people out of their houses who have no criminal convictions, who are working for 30 years, maybe their kids in the military, and I think the big question now is where does the administration go? Who is ultimately gonna win out in the internal debate of, are they gonna keep doing this or are they gonna realize this is not what the public wanted.

Alex: Yeah.

I wonder whether there are ways the courts can really police this to use that phrase. so they say, okay, you have to have reasonable suspicion. How often are you gonna be able to demonstrate there was no reasonable suspicion?

You don't wanna get involved in a thousand cases of reasonable suspicion or not, right? So can the courts really make a difference here?

Lee: Yeah, that's an interesting question. You know, because something like reasonable suspicion, which is fact specific, is hard for the courts to, to police. So my own feeling is that any real civil rights change always needs to come from sort of public pushback to change what the administration's doing.

But I do think the courts will have a role because you see them getting increasingly frustrated with the administration, violating their rules. So for example, if we win and we show that they're not using reasonable suspicion, that they're just going up to anybody, and the court issues a very strong order saying what's happening, and then we document it a second time and go back to the court, I do think we're gonna see things like contempt happening and very strong sanctions.

But you're right, ultimately they can keep doing it and there's a limit to how many cases we can keep bringing. So that's why the public pushback has been so critical.

Alex: You're describing really widespread constitutional violations here, right? Whether it's warrantless entry of houses, or violation of the reasonable suspicion standard or et cetera, et cetera. I'm wondering about accountability here, um, other than elections.

JD Vance said that ICE officers have absolute immunity. You've already said that that's not a proper statement of the law, but what kinds of accountability exists here? Civil damage actions, impeachment.

Lee: That's a very good question. I think there's gonna need to be civil damage actions.

If there's civil damage cases against the officers, it'll make them think twice and they'll say, oh wait, maybe we are, you know, doing something wrong and the administration's just throwing, throwing us to the wolves.

I do think that there needs to be civil damage actions in conjunction with our actions saying there's systemic constitutional violations that the court needs to, to remedy. But the deterrence that comes from damage actions I think will be important. Those are hard to win, but I think they're worth bringing.

I also, obviously, you know, the question of whether there's ever gonna be a criminal prosecution for the two killings is a big deal, right? If all of a sudden these officers are on trial for their lives, you know, that sends a signal to other officers. Hey. Maybe we just don't want to be out there like, just because the administration's saying, treat this like a war and do whatever you want.

But you know, the administration is fighting so hard not to have criminal prosecution. I'd be shocked if we see criminal prosecution.

Alex: I want to leave Minneapolis and ask you about another, uh, issue in the news here and that's the ending of temporary protected status for Haitians. We can remind people that there are probably several million people in the United States with temporary protected status, which allows them to be in the United States and, and work, uh, and it's granted to various nationalities depending on what's going on in the home country.

And Haitians have had temporary protected status, TPS we call it, uh, for many years, and they're probably more than 300,000 Haitians, uh, with TPS. Um, the Department of Homeland Security State Department, uh, lifted TPS and was supposed to end last week. Um, a court case was brought and the district court, uh, blocked, uh, the lifting of TPS in part because of, uh, clear direction from the president and sort of almost racist things said by the Secretary of Homeland Security that made it look like this policy wasn't based on rationality or, or legitimate grounds, but rather for political reasons and other reasons. So it's on hold now, but if that is lifted, we have 300,000 people now vulnerable in the United States.

Is there any claim that could keep them in the United States or are they subject to these kinds of ice actions where any Haitian could simply be picked up and moved out?

Lee: Just to you know, back up a second, the idea that they no longer need temporary protected status is outrageous.

I mean, the State Department's saying, don't go to Haiti. It's too dangerous. Yet they're saying, fine to send all these people. At the end of the day, I don't think the administration can, can really get away with claiming that Haiti is fine to send people back. What their frontline argument is and I think, uh, almost all of it's gonna turn on: does the administration have unreviewable discretion to revoke TPS for anyone's such that the courts cannot interfere no matter how outrageous it is? You know, hopefully we ultimately prevail and the administration can't revoke TPS, but assuming that they get away with it, I think there'll be some people who can apply for asylum.

There may be people who have other ways to stay in the country through relatives, but I think a lot of people are just gonna get removed and they're gonna have to go through some type of proceeding. But if they don't have the ability to apply for asylum for whatever reason, procedural reason, or I think there's gonna be a lot of people removed and it's really a dangerous situation.

And you know, you've brought up Haiti 'cause it's the most recent and the opinion was super strong. Um, but. We've prevailed, you know, the advocates have prevailed with other TPS. They're just going down the line and revoking TPS for any country where it's a person of color, and so I think there's gonna be a lot of, lot of people vulnerable to being removed.

Alex: This is an area generally left the discretion of, of the executive branch as an act of foreign policy. What have the courts said that have blocked the various attempts to terminate TPS?

Lee: Yeah, you're right. I mean, generally speaking, it's an area left to the administration foreign policy. But that's because usually what Congress envisioned is very close calls on foreign policy, and the administration knows what the conditions are in a particular country, and I think what the courts are saying is this is so far removed from a legitimate decision and they're also not following the procedural rules that Congress set up to actually make a rational decision about whether it's not any longer in the US' interest to keep people here, whether those countries are now safe.

So it's a combination of sort of procedural and substantive. But what I think is really driving the cases is the fact that every judge can see that this is an outrageous decision. You know, whether you wanna say it's racially motivated completely, or just antagonism to immigrants, antagonism to immigrants from certain countries.

That raises a larger question I think, you know, you've talked about before is so many of our judicial doctrines are based on the assumption that the executive branch is acting in good faith.

So there's gonna be deference to the administration that the courts shouldn't interfere with all these national security and foreign policy decisions.

The Trump administration in this term has really thrown all of that into chaos, and when I would go into court initially in the beginning of Trump Two, you would hear the judges

say, well, Mr. Gelernt, you know, the court cases going back forever say, we need to defer, we need to take at face value anything the administration's saying, you now see district courts saying, and, and courts of appeals saying, well, wait. It doesn't seem anymore like those doctrines fit what this administration's willing to do. This administration has been willing to insulate themselves in those doctrines. That to me is an overriding issue that the courts are gonna have to figure out. And you see the district courts now really pushing back on that and saying, you know, in the past we might have deferred, but there's just too much evidence now that the administration is not being upfront with us.

Alex: So related to this, the administration has seemingly taken the position that anyone illegally in the country is a criminal alien. The argument was, we're only removing the worst of the worst. And then it was, well, now we're removing only criminal aliens. And then it's, well, anybody who's illegally in the country, uh, is a criminal alien. So if we remove TPS from Haitians, they're now criminal aliens and it fits within our priorities to remove them from the country. Can you straighten us out on the law here?

Lee: Yeah, that's another question I'm glad you asked about because I do feel like that's one of the really tricky things that the administration's trying to fool the public about. So originally, of course, they said we're only gonna go after the worst of the worst. And that didn't mean just someone who might be in the country without authorization. It meant, in the country without authorization and has committed a serious criminal offense on top of the immigration violation. So now it's very clear that that's not what the administration's doing. They're going after people, including families and children who have no criminal convictions. They may be in the country without authorization maybe, but they have not committed any criminal offenses. They've paid their taxes. They've lived here for 30 years. They're working. Their children may even be in the military. They may have even served in the military. So then now the administration realizes everyone knows that they're not simply going after the worst of the worst, although sometimes they continue to say it.

So what now they're saying is, well, everyone who's here without authorization is by definition a criminal alien. But the truth is, not even everyone who was here without authorization has committed a criminal offense. People who have overstayed their visa have not committed a criminal offense. They've committed a civil offense, and even the people who have entered without authorization have committed a misdemeanor.

So when you hear the administration say, we're only going after criminal aliens, you need to stop and say, well, wait. How are they saying that? Have they committed a criminal offense in addition to the immigration offense? Because that's the key. The administration's trying to get away with saying they're all criminals because entering the country is a misdemeanor.

The way to push back is to say, what offense have they committed on top of the immigration violation? The statistics show that very few people that they're going after actually have these criminal offenses in addition to the immigration violation.

Alex: Lee, thanks so much for being here today.

Lee: Yes, thank you Alex.

Hiroshi: I was struck by a lot of things that Lee mentioned, let me share an overall reaction. It's the breadth of the topics that we covered.

Of course, there's a crucial update on some of the most important cases pending the federal courts and how they relate to developments on the ground. And so it's of course a good chance to see how a number of themes we've addressed in this podcast relate to each other. Some are general and foundational, and others relate to specific topics, although I have to add they are huge topics.

But let me just focus on some foundational things that relate to Lee's comments. One is the shifting role of courts in a lot of the federal government's disrespect for the structure of government in the United States, for separation of powers, or the role of federal courts in general.

And some of this we've seen, as Lee mentioned, is judges' outright criticism of the executive branch's non-cooperation or disobedience in some cases, some manifesting itself in the prospect of penalties, including criminal sanctions, penalties on the federal government.

And the open question, what will be allowed to stand in that regard? And it's most fundamentally a shift in the judiciary's traditional deference to executive decision making in the immigration space.

I'm reminded of the Supreme Court's opinion in *Trump v. Hawaii*, the case involving the validity of the travel ban or the Muslim ban, whatever term you want to use. And the statements there that we, the Court, have to defer because the president we now have, which is the first Trump administration, is not the president we'll always have. And we have to look beyond that.

And I'm just wondering if the Court needs to rethink that. That's really where Lee was headed in light of what we've seen, not just in the first administration of Donald Trump but the second. So that's a very fundamental change. And I think that was one of the things that unifies a lot of Lee's comments and made them, I think, very coherent from that foundational perspective.

Alex: He also talked about the change in the lawyering that he's seen from the government between the first Trump administration and the second and raised questions about that. What I found interesting also in this discussion of the lawsuits was really, can these lawsuits change behavior?

I think given the reasonable suspicion standard, which is needed to trigger ICE stopping someone on the street, it's such a nebulous, amorphous standard. Will courts get involved really in looking at whether there was reasonable suspicion; and then the general coerciveness of an ICE stop or any police stop.

When someone comes up to you and stops you and says, can I see identification? It's very hard for someone to walk away from that or say, I'm not gonna show it to you. So that would be true whether or not the policeman or the ICE officer has reasonable

suspicion. And then I'd add to that the lack of any serious mechanisms of accountability here.

I'm not surprised to hear Lee stress public protest being the key. He pointed out that the one time that the first Trump administration changed a significant immigration policy was when the public protested the child separation policies.

And I think he was quite clear that it's gonna take public protest here to get significant change in some of the policies that we find most abhorrent.

Hiroshi: Yeah, I'm so glad that Lee addressed the relationship between litigation lawsuits on the one hand and public protest, public opinion on the other. I think it's always been true, as Lee mentioned, but especially true now that we have lawsuits not just being civil actions that try to win a result in court, but really are part of a larger advocacy campaign.

He also talked about how it's important to act in a way that is consistent with some goal that may be on the horizon or even beyond the horizon, but that people have to do what they think is the right thing, not just in lawsuits, but in public protest as well. And I think that is a reflection of a lot of things we've seen in public protests going back, back way before family separation and looking worldwide at things that create change.

I know for me as a law school educator I think it's important to stress, because I think in this moment it's easy to lose that often one can be hopeful in that type of community or group action.

Even if one is more hopeful than one is optimistic under the circumstances.

Alex: It's really been dramatic what the people of Minneapolis have put together in terms of the observing of ICE. The networks have built on social media, on Signal, to keep track of ICE operations and to warn people. It's really been the community coming together in many important ways.

In some ways Minneapolis is a huge loss for the administration in terms of public opinion about the horrors that they've seen and the doubling and tripling down by the administration on statements that are just lies. It's been a disaster from the public affairs side, if you wanna say it that way, and maybe even an inflection point in how the American people are thinking about this administration.

But on the immigration side, it may end up being a win for the administration in the following way. The administration's argument was, we need to do these street operations. We need to stop people on the street and go into other places because the cities and localities, the states aren't cooperating with us where we'd like to find undocumented migrants, and that's in jails and prisons. And if you just let us into those places, we won't be on the streets. We'll pick up people who, plainly are deportable or most likely are deportable. And we're taking out the people we say we're taking out, which are people who have been convicted of criminal offenses.

And ICE says they have to be on the streets because there was all this non-cooperation by states and localities. What Tom Homan seems to be getting is some shift from

sanctuary cities to allow some going back into the jails and the prisons– may not be exactly in, in the city of Minneapolis, but in other localities.

And if that's the result here then the administration may be able to think in terms of immigration policy they've ended up in a place they've wanted to be for a long time, but were unable to be because of the opposition of cities and localities.

Hiroshi: It is a form of coercion, or at least the way, that's the way I see it. There's constitutional law that says there are limits on the federal government's power to extract concessions from states and localities based on its budgeting.

We saw this in the law relating to state Medicaid and the federal government's attempt to get the states to expand Medicare coverage. And the Supreme Court stepped in and said that that is an overreach, it's a form of coercion of states. And it intrudes on state prerogatives.

And so this is something actually quite similar where the federal government is using a form of power or authority to try to get states and localities to give up some of the authority that it has, as a state or local government, with regard to its policing practices and its relationship to its residents. It's a form of "I'll agree to pull back, but only if you give me something I wouldn't otherwise get."

Alex: Yeah, we'll see. The courts, lower courts have rejected a claim brought by Minneapolis and Minnesota that the operation as a whole was a violation of state's rights. I don't know how sympathetic the courts will be in the area of immigration, which is seen as an overwhelmingly federal responsibility here.

Hiroshi: But that gets really to the issue of the, how much the courts are willing to defer to the executive branch in matters of what the federal branch calls immigration matters. One way to think about it is, and I think it is the right way to think about it, is that if the federal government through the executive branch is going to claim "invasion" and claim that essentially the borders are everywhere, that we need to use extraordinary law enforcement measures everywhere.

If that's the broad use of immigration that's being applied here, then that makes immigration law everywhere. And it means that the deference that the executive branch has traditionally gotten on immigration matters should be a much lower degree of deference.

And that's one thing that we may see if the courts decide that under this presidency deference is being requested or even demanded to an extent that is far outside the bounds of what the executive branch has called immigration in the past.

Alex: Yeah. And also there's these horrible graphic pictures of US citizens being killed on the streets, has to affect the court in some ways is they're wondering where to whom they should be deferring. Hiroshi, one other thought and I think I'm gonna say this on every podcast we have from now on, I'm gonna come back to this issue.

The answer here to me has got to be legalization, or at least part of a big answer because if undocumented migrants were given the chance to attain legal status, it wouldn't stop

all the bad behavior on these streets because everyone was being stopped, including citizens. But it would offer protection to millions of people in this country.

And one thing that may come out of the killings in Minneapolis may be now a move for some kind of legalization program. I'm seeing this from a moderate Republican from New York, Mike Lawler, who's proposed what he calls the Dignity Act, which wouldn't give people a path to citizenship, but would legalize the status of long-term undocumented migrants. And I really think this is an issue that should be picked up by both political parties in days ahead.

Hiroshi: That goes back to what Lee said about not being for open borders, but really wanting a system that works.

If you're trying to come up with a system that was the foundation for a lot of bad things going on, that violate the rule of law, due process and human rights, I guess what you would do is you'd create a population of 11 million people who are in precarious status or no immigration status at all.

This would allow the archetypical federal executive branch officer to decide to do what you want: claim outrage and go to extreme enforcement at some times, and yet look the other way at other times when the economy demands it.

And so that's all a consequence of the mismatch we have between the legal pathways and the asylum pathways and other humanitarian protections, the mismatch between those things. These are all difficult issues that need to be worked out. They need to be debated, but that debate isn't happening right now, because reform of the system seems to not be on the serious table for discussion.

Alex: Okay Hiroshi, great to talk as always. We'll be back in a few weeks with another episode of Unsettled.

Hiroshi: Good to talk Alex, and so glad that Lee was able to be with us today.