

Deportations and the Law

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[00:00:00.3] Jeffrey Rosen: Last week, President Trump invoked the Alien Enemies Act of 1798, a wartime authority, to summarily deport suspected members of a Venezuelan gang. The administration also attempted to deport a student activist at Columbia University on the basis of his alleged support for terrorism.

[00:00:22.2] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, President and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. This week, I'm pleased to welcome two thoughtful scholars on immigration law to explore whether or not these deportations are lawful. Adam Cox is the Robert A. Kindler professor of Law at New York University School of Law, where he teaches and writes about immigration law, constitutional law, and democracy. Adam's books include the *President and Immigration Law*, which he published in 2020 with co-author Cristina Rodriguez. Adam, it is wonderful to welcome you to We the People.

[00:01:10.5] Adam Cox: Thank you so much for having me.

[00:01:12.8] Jeffrey Rosen: And Ilya Somin is Professor of Law at George Mason University and the B. Kenneth Simon Chair in Constitutional Studies at the Cato Institute. His research focuses on constitutional law, federalism and migration rights. He's the author of *Free to Move: Foot Voting, Migration, and Political Freedom*. Ilya writes for the Volokh Conspiracy blog at Reason. Ilya, it's wonderful to welcome you to We the People.

[00:01:37.3] Ilya Somin: Thank you so much for having me.

[00:01:39.0] Jeffrey Rosen: Let's begin with the Alien Enemies Act case. The text of the Alien Enemies Act of 1798 reads, Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted or threatened, against the territory of the United States by any foreign nation or government, and the President makes a public proclamation of the event, all natives, citizens, denizens, or subject of the hostile nation or government, being of the age of 14 years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained,

secured, and removed as enemy aliens. Adam, please tell us about the history of that act, when it's been invoked before and how it's being invoked now.

[00:02:31.0] Adam Cox: So the Alien Enemies Act dates all the way back to the period just after the United States was founded. During a quasi war with France, Congress passed a trilogy of laws, two of which were heavily criticized at the time, the Alien Friends Act, which empowered the President to deport anyone whom the President deemed to be dangerous, the Sedition act, which punished all kinds of speech, and the Alien Enemies Act. Of the three, it was the one that was not particularly controversial. It was deemed by Congress to be an exercise of, or an implementation of the government's authority under the laws of war in international law. And the act, which, as you noted, allows during a war invasion for the arrest, detention, removal of enemy aliens, has been used only three times in the nation's history. The first was in the War of 1812, a declared war, the second was during World War I, a declared war, and the third was during World War II, also a declared war, though we should note the act was invoked by the President in the wake of the attack on Pearl Harbor even prior to Congress's formal declaration of war. So it's been limited to those rare occasions when our nation has been engaged in open and active hostilities in a declared war with another country.

[00:03:55.6] Jeffrey Rosen: Thank you so much for that and for teaching us that it's only been invoked three times before in relation to declared wars. Ilya, tell us about that language. It sounds like the second clause is the one that's at issue in this case. And it says that whenever any invasion or predatory incursion is perpetrated, attempted or threatened against the territory of the United States by any foreign nation or government, and the President makes a public proclamation of the event, then deportation is possible. At issue in this case includes, is the Tren de Aragua a foreign nation or government for purposes of the act, and was President Trump's order a legitimate determination here? And also, was his determination that they've conducted an invasion or predatory incursion under the act legitimate? Tell us about those issues.

[00:04:57.2] Ilya Somin: Yeah, so I think you've identified the issues pretty well. One issue is whether there's an invasion or predatory incursion going on. The answer to that question is pretty obvious. We know that mere drug smuggling or illegal migration is not an invasion or even a predatory incursion. As James Madison said around the same time as the Alien Enemies Act was adopted, an invasion is an operation of war. A predatory incursion also, I think is at least has to be a significant violent attack. What Tren de Aragua is doing is ordinary crime and drug smuggling and the like. And then there's a second issue. Even if there is an invasion or a predatory incursion, is it by a foreign nation or government? And here again, the answer is pretty obvious. We know the Tren de Aragua group is a private criminal gang. There are many such people involved in the illegal drug trade thanks to our war on drugs. And they're pretty obviously not nations or governments. And it is not enough that they may have some ties to the Venezuelan government, lots of organized crime groups, sometimes bribe or suborn government officials. That does not make them governments themselves.

[00:06:08.4] Jeffrey Rosen: Thanks so much for that. Adam, Ilya has suggested that what's at issue here is not an invasion or predatory incursion, and the group is not a foreign nation or government. What are the government's arguments on the other side?

[00:06:22.8] Adam Cox: So the government makes two arguments, one for each point. With respect to whether the invasion is by a foreign government, the government walks right up to the line in its briefing in court to suggest that Tren de Aragua TdA, as it's commonly known as well, is effectively the same thing as the Venezuelan government. That argument would have enormous implications. It would mean, if accepted, that we were in fact at war or that there was an invasion being perpetrated by Venezuela. And it is somewhat surprising even the president's limitation in the declaration. In past events, when we faced armed conflict with other nations, the proclamations issued by presidents have extended to all potential citizens of those nations. So even the limitation to the gang members itself suggests that the government may not fully buy its own argument about the idea of the gang and the state being one and the same.

[00:07:33.7] Adam Cox: Now, with respect to the question of invasion, obviously at the margins there might be some difficult questions about what constitutes an invasion. But here we don't have to get to those hard questions because the government has made crystal clear, both in public statements by the president and in court filings in the challenges to the exercise of this power, that they view an invasion as taking place any time any immigrant without authorization enters this country. So the definitions that they included in their court papers to argue what invasion meant included every act of illegal immigration. That would sweep in basically vast amounts of power into the president's office that hasn't been there historically.

[00:08:27.1] Jeffrey Rosen: Ilya, in a piece for Just Security, you also argued that President Trump's claim that the supposed invasion authorizes him to use the enemy's Alien act would accrete vast amounts of power in the executive and amount to a virtual blank check. Tell us more about that argument.

[00:08:51.1] Ilya Somin: The Constitution has several provisions that list powers to kick in in the event of an invasion and are pretty drastic and sweeping. One is the power to suspend a writ of habeas corpus, which in plain English for all you non lawyers out there, that means that they could detain people without filing any charges or without any due process or putting them on trial, and not just immigrants, but also US citizens. And then secondly, the Constitution also says that in the event of invasion, states could, "engage in war" in response, even without authorization from a federal government. And of course, the federal government itself could presumably wage war in response to invasion as well. So if illegal migration really is an invasion, that essentially means that pretty much anytime he wants, the President could, possibly with congressional authorization, suspend the writ of habeas corpus, and also he could wage war in response against the nations that those migrants come from. And even state governments could wage war even if the federal government didn't want to. And all of that just makes it further clear that it is just batshit ridiculous to claim that illegal migration qualifies as an invasion, because there is no way the Constitution would authorize the grant of such sweeping powers in response to a supposed invasion that just consists of illegal migration or of the smuggling of contraband across the border.

[00:10:16.1] Ilya Somin: They have also argued that smuggling contraband, in this case illegal drugs, qualifies as invasion as well. That is just very obviously totally at odds with both, sort of the ordinary language meaning of invasion, with the structure of the Constitution, and with anything that was intended by the framers and ratifiers at the time.

[00:10:35.6] Jeffrey Rosen: Adam, do you agree that it is ridiculous to claim that this is an invasion? And tell us about what lower courts have held on this question? Ilya notes that in 1996, the Second Circuit held that in order for a state to be afforded the protections of the invasion clause, it must be exposed to armed hostility from another political entity, such as another state or foreign country that's intending to overthrow the state's government. And he notes that the Third, Fifth, and Ninth Circuit have reached similar conclusions, most recently in one of the cases brought by Texas, where it claimed that it was under invasion and therefore could respond. Tell us about all of those cases and how they apply to this one.

[00:11:14.1] Adam Cox: Yeah, all of those cases undercut the government's argument. And it's no surprise that courts have been skeptical of aggressive claims that would convert ordinary unlawful activity, including crimes, into invasion for constitutional purposes, precisely because, as Ilya noted, there are such tremendous constitutional consequences of accepting that understanding of the term. But we can look outside the Constitution, too, to see why the administration's view about what counts as an invasion is pretty implausible. The President tweeted yesterday, for example, that, "if a president doesn't have the right to throw murderers and other criminals out of our country, then our country's in very big trouble and destined to fail." That's the sentiment of the President, that's what's reflected in the briefing, but that doesn't reflect the structure of American law, because for over a century, Congress has written Immigration laws that do provide for authority to deport non-citizens for a variety of reasons, including for criminal convictions, for acts of terrorism and the like. More recently, in the 1990s and in the wake of 9/11, Congress passed additional explicit statutory authorizations empowering the President and other executive branch officials to go after people who have engaged in acts of terrorism or other conduct that Congress believed to be a national security threat, like the provision of material support to a terrorist organization.

[00:12:49.1] Adam Cox: In all of those contexts where Congress has empowered presidents, it has also provided rules that presidents must abide by when they engage in those exercises of authority. People are provided statutory rights in deportation proceedings. Even in the terrorism removal context, in the wake of 9/11, when Congress gave the President exceptional power to arrest, detain and deport terrorist subjects, it still provided for judicial oversight and due process. And so the idea that this law, more than 200 years old, passed for the purpose of implementing the country's war powers, could override and make kind of a mere surplusage all of these other laws that Congress has adopted over the course of two centuries, suggest the implausibility of the administration's argument.

[00:13:43.6] Jeffrey Rosen: Ilya, you note that in previous litigation against the Biden administration, Texas's state government used the invasion argument to claim the state could adopt anti-immigration policies that might otherwise violate federal law. They relied on Article 1, Section 10, which says that no state shall without the consent of Congress engage in war unless actually invaded or in such imminent danger, as will not admit of delay. Tell us about the disposition of those claims and how courts responded to them.

[00:14:13.7] Ilya Somin: Yes, there's a couple of different cases. In one of them involving a state law that would have enabled the state to detain and possibly deport undocumented

immigrants, even in situations where federal law allowed them to stay, the Fifth Circuit ruled that there was no invasion for the reason Adam and I have been talking about, and therefore the state couldn't do that. In another case involving the placement of water buoys into Rio Grande, which might have been in violation of the Rivers and Harbors Act, a panel of the Fifth Circuit rejected the state's position and said that A, they were violating the Rivers and Harbors act, and B, there was no invasion. That panel was then overturned by the en banc Fifth Circuit with all 17 Fifth Circuit judges participating, but it overturned them just on the statutory question, saying this wasn't actually in violation of federal legislation. And only one judge, Judge Ho, reached the invasion issue, and he's the only federal judge ever in history so far to suggest that maybe illegal migration does qualify as an invasion, but he's very much isolated in his opinion. And it's notable that no other Fifth Circuit judge, not even the most conservative Fifth Circuit judges, there are quite a few of them, joined him in that opinion.

[00:15:35.8] Jeffrey Rosen: Adam, say more about the President's historic role in immigration law. In your book with Cristina Rodriguez, *The President and Immigration Law*, you argue that the current battles of the Trump and Obama eras reflect a deep historical truth about the structure of immigration policymaking, that the President stands at its center, that Congress has counterintuitively transferred power to the executive branch through discretionary judgments, and that the claim that the President has usurped congressional power in immigration policy is misguided. Tell us about how that's played out about history and how it applies today.

[00:16:13.7] Adam Cox: Yeah, I think my response to your last question actually kind of previews one of the core findings of our book. Our research uncovered that there were really two ways over the course of American history that the President had come to stand kind of at the center of immigration policymaking. One way was because Congress handed the President lots of power to regulate immigration. I just referred to some of those in my last answer, right, the power to deport people for committing various crimes, the power to deport people who have provided material support to terrorist organizations, the power to exclude people on all kinds of grounds. So it's absolutely true that there are a lot of formal delegations of power to the President and other executive branch officials to control who gets to come here and who is going to be forced to leave. Now, that's one source of authority. But there's been an additional source of authority that really arose in the second half of the 20th century when rates of unauthorized migration increased dramatically after Congress shut down what used to be very large scale temporary worker programs that operated for decades.

[00:17:18.2] Adam Cox: In the final third of the 20th century, that equilibrium, a political equilibrium where many were happy to make entry unlawful, but also to permit the unlawful entry of many, that left us with a system where more than 11 million people, that's half the people who are non-citizens living in this country, that's a stark fact, half of the people who don't have citizenship in this country are here without legal permission. And in that world, all those intricate rules about visas and deportation grounds become a lot less relevant because what really matters at the end of the day is whom the President and his administration chooses to exert enforcement authority against. Picking people out of that enormous pool of folks who are here in violation of law, that gives the President tremendous power. And we've seen that power in recent weeks with the arrest on Columbia's campus, with an arrest yesterday at Georgetown, and with evidence of people being excluded at the border. So those are the two main sources.

[00:18:13.7] Adam Cox: Now note, the one source I didn't mention, this is the last thing I'll say is, the administration is claiming that the president has essentially an inherent constitutional authority to deport people who he thinks is dangerous. That's a rarity, historically, for administrations to claim that kind of inherent authority. In our research in the book, we uncovered only a couple of pretty small instances of that. And courts have really never embraced the idea that the President acquires his power over immigration policy through Article 2 of the Constitution, giving him a kind of exclusive inherent authority to control those matters.

[00:18:56.3] Jeffrey Rosen: Ilya, in your book on foot voting, and migration and political freedom, you also address the question of discriminatory enforcement, in particular in chapter five, which talks about foot voting and self determination, you say if the majority ethnic group of a nation has the right to exclude members of other groups, why can't the ethnic majority of a particular region claim the right to exclude people from sub-national jurisdictions in the same federal system? Tell us more about the problem of discriminatory targeting of vulnerable minorities that also arises in the international migration context and how it may be playing out here.

[00:19:35.2] Ilya Somin: So your question sort of raises two questions, one of which is not that relevant to the US and one of which is. My book, which is more a work of political theory rather than a book about the US Immigration law as such, there's a part that focuses on the idea that you see in many countries, which say that there's a particular ethnic or racial or cultural group who are the true owners of the territory and therefore they have the right to exclude other people. So you can argue that the ethnically French people are the true owners of France, or the ethnic Japanese are the true owners of Japan and the like. In the book, I criticize that theory, but it's not that relevant to this discussion because you rarely hear this theory in the US because if it did apply to the US, then it would seem to have the implication that the true owners of the land are Native Americans and they have the right to expel all the rest of us. And for obvious reasons, you know, most Americans, particularly most white Americans, do not want to make a claim like that. What is relevant though, is that in immigration law, including in the US, there is a long history of ethnic and racial discrimination.

[00:20:38.9] Ilya Somin: Indeed, federal power over immigration largely dates to the Chinese Exclusion act of 1882, which was the act that led to litigation in which the Supreme Court wrongly, I think, actually ruled that the federal government has a general power to restrict immigration, despite the views of founders like James Madison, who argued otherwise, and despite the fact that there actually is not a provision in the Constitution which specifically says that the federal government has power over immigration. And so many of the laws historically which have restricted immigration have racial or ethnic motives or even are explicitly racially based in various ways.

[00:21:16.5] Ilya Somin: And today, while we have relatively little in the way of explicit racially or ethnically based standards written into the laws, we do have an enormous amount of ethnically and racially discriminatory enforcement. Indeed, immigration enforcement is almost the only area of federal law where there's an actual official policy allowing racial profiling. It's only allowed, "in 100 miles of a border area." But that turns out to be areas where two-thirds of

all Americans live. So there is a lot of racial discrimination and profiling here. It didn't just begin with this administration, but obviously it has become worse in recent weeks, as you see with reports of actual American citizens detained for hours or even days at a time simply because they spoke in Spanish to each other, as in one case involving Puerto Ricans, or they just seem like they look Hispanic or the like.

[00:22:14.4] Ilya Somin: And racial profiling is a problem in law enforcement of many kinds. It's very difficult to get rid of. But it's particularly a problem in immigration enforcement for obvious reasons. Even police officers who are not raving racial bigots or anything like that, or ICE officers or the like, they might engage in what economists call rational stereotyping, that is, they can rationally assume that a person who looks Hispanic or a person who's speaking Spanish or the like is more likely to be an undocumented immigrant. And while that may be rational behavior by the authorities in some economic systems, it is, in some economic sense, it's highly pernicious because it does subject people to discrimination simply based on their ethnicity or their appearance, or whether they might be speaking Spanish to each other or the like.

[00:23:04.3] Jeffrey Rosen: Adam, in the *Enemy Aliens* case, President Trump also cites the Guarantee Clause of Article IV, Section 4, of the Constitution, which says, the United States shall guarantee to every state in this union a republican form of government and shall protect each of them against invasion. And his claim is that the supposed invasion authorizes him to use the Alien Enemies Act. Tell us about the merits of the Guarantee Clause as a source of authority.

[00:23:31.4] Adam Cox: Well, the Supreme Court long ago rejected the idea that it would get involved in policing, you know, the Republican forms of Government of the states. And the clause has been rarely invoked, in part because states have not been subject to invasion. Now, again, I mean, I think we just keep returning to the same point, which is that essentially all of the administration's arguments rest on this really aggressive claim about what constitutes an invasion. And, you know, I think the claim they're making is consistent with arguments we see in other aspects of immigration enforcement under this second Trump administration, where there's a pervasive effort to redefine conduct that is not only not warlike, it's not even criminal, and sometimes it's not even unlawful, as though it were the very worst military invasion that the country could be subjected to. The president's view is that people who are lawfully in the country right now, people who were admitted with temporary protected status or with parole so they could seek asylum, the administration's official position is that all of those people who are currently lawfully in the country, they're here illegally, they are criminals by virtue of their illegal presence, although that is not true under immigration law, and they are thus invaders.

[00:25:01.5] Adam Cox: That's how we arrived at a point where, and this is the fact that I think needs to get repeated and understood clearly, a point where the administration arrested, under the Alien Enemies Act, people who hold temporary protected status who are currently lawfully in this country and remove them to a foreign nation where they're now incarcerated.

[00:25:23.7] Jeffrey Rosen: Ilya, you've noted that the constitutional text makes clear that invasion refers to an actual attack and the Guarantee Clause pairs invasion with domestic violence, which in the 18th century referred to uprisings against the state government, not the

modern, meaning denoting violence and intimate relationships. Tell us about that and about Frank Bowman's findings on the Guarantee Clause.

[00:25:45.6] Ilya Somin: Sure. So in law, as in life generally, we often understand the meanings of words through their context. So the word invasion in this clause of the Constitution, the Guarantee Clause is paired with domestic violence, which, as you said at that time, meant an uprising against the government, rather than people beating their intimate partners or engaging in violence in the household or the like, the way we use the word today. And that is one of many signs in the Constitution that the word invasion means a military attack and not just illegal migration or drug smuggling. It's worth noting also that the framers recognize that the Guarantee Clause protects states not only against invasions from abroad, but against invasions from other states, which at that time was a real issue. Like just a few years earlier, there had been a conflict between New York and New Hampshire over which one of them would get to rule the territory, which is now the state of Vermont, there was actual fighting over that. So it obviously would be ridiculous to say that, say, one state has invaded another if people illegally cross from one state to another, which in the 18th century was possible because states had their own migration restrictions, or if there's smuggling of some drug or other good into a state that's illegal.

[00:27:05.4] Ilya Somin: Like today, we have some states where marijuana is legal under their state laws and others where they're not. You can say it's a bad thing if people smuggle marijuana from a state where it's legal to one where it's not, but it's pretty obviously not an invasion, and it's certainly not something that authorizes the recipient state to wage war in response. And so if you look at the context of these words, and all words, particularly in legal interpretation, have to be read in context rather than just in isolation, it becomes even more clear that an invasion is a military attack and not just illegal migration or drug smuggling or ordinary crime.

[00:27:43.8] Jeffrey Rosen: Well, we jumped right into the merits of the case because they're so important. But there's an initial question, which is whether or not judges should review the Trump administration's determination that there was an invasion in the first place. And the administration will argue that this is a political question. In other words, it's not up to the courts to review the president's determination. Adam, what is the framework for evaluating whether or not this is a political question, and how is that claim likely to fare?

[00:28:18.6] Adam Cox: The Supreme Court created a framework for evaluating whether a legal issue counts as a so-called political question that is basically two parts. One possibility is that a legal issue could be a political question because a court decides that the Constitution has committed to some other branch of government the exclusive authority to decide what a part of the Constitution means. So, for example, when the Constitution gives the Houses of Congress the power, the Senate, for example, gets the power to set the procedures to be used in an impeachment proceeding and the court has held, well, the Constitution gave the Senate exclusive control to decide what those procedures should be, and so a court doesn't get to second guess the Senate's decision. The other situation in which the court has said an issue might be deemed a political question is if the court just can't figure out any manageable standard for it to evaluate the decision that's been made by some other government actor. If it just feels like it's at sea and what the court would be doing wouldn't count as law, then the court there as well suggests maybe it will deem an issue to be a political question.

[00:29:33.2] Adam Cox: Now, under that framework and consistent with history, it's going to be a big uphill battle for the administration to persuade a court that all of the issues that are in play right now in the litigation surrounding the application of the Alien Enemies Act are political questions. First, the act itself, on the face of the Alien Enemies Act, imagines that there will be, at least in some cases, judicial involvement. It speaks about in Section two, the role of courts. Second, historically, people who have been detained under the Alien Enemies Act have successfully filed suits, habeas petitions, that fancy Latin phrase that Ilya mentioned before, which basically means a lawsuit to challenge the legality of your detention at the hands of government officials. People filed those when they were arrested and detained and courts resolved them on the merits, deciding whether a person's detention was justified and lawful or not. Right? For both of those reasons, and I guess third, most recently, when the Court has considered even claims of inherent executive authority.

[00:30:45.0] Adam Cox: So recently, a previous administration argued that the Executive Branch had the exclusive authority to recognize governments and that meant they could control the content of what went on a person's passport who was born in Jerusalem, the court ultimately ruled in favor of the administration. It said, yes, the President has the exclusive power to recognize other governments, and yes, that means the President and not Congress gets to decide what's on that person's passport. But notice, the court reached the question and resolved it. It actually explicitly rejected the idea that the whole case should be non-justiciable because it bumped up against the President's foreign affairs powers.

[00:31:23.0] Jeffrey Rosen: Many thanks for calling out that case, the Zivotofsky case. And Ilya, I wanted to ask whether it's right that the only case where the Court has squarely dealt with the question of whether the Alien Enemies Act is a political question is the Watkins case from 1948 that involved a German national who was arrested on December 8, 1941. And he essentially says that we're not at war when he was arrested and therefore challenged his detention. And Justice Frankfurter, as he usually did, held that this is a political question. It's not for us to question a belief by the President that enemy aliens can be detained here. These are matters of political judgment. What's the bearing of the Watkins case on this one? And how do you think the political question claim will fare?

[00:32:13.6] Ilya Somin: So I would say a couple things about this. One is, I mean, I agree with everything that Adam said, but I would add to it that if the definition of invasion is a political question, that the President just determined however he wants, that means he can detain, he can declare an invasion anytime he wants, can't be questioned by the courts, and he can claim these powers of suspending the writ of habeas corpus and detaining people without trial, even American citizens. And it's just utterly implausible that the structure of the Constitution or the original meaning gives the President such vast, unreviewable powers and therefore there's no reason why this should be considered a political question. The case you're referring to, I believe, is the Ludecke vs Watkins case from 1948. I think it was more deferential to the President than it should have been. However, the court does specifically say that one of the things the court can review is whether there in fact was a declared war at the time of the detention. In this case, of course there was, because World War II was going on, which was pretty obviously a declared

war. There was another issue of the, as I noted, the case was decided in 1948, which was some years after the war ended and the government continued to detain the person.

[00:33:29.9] Ilya Somin: So they did say that maybe the president has discretion to detain people who were lawfully detained during an actual war, but then maybe there's a political determination of when the war actually ends. And amazingly enough, the federal government didn't fully determine that the war with Germany had ended until 1951. I think that was overly deferential, and they should have just reached a common sense conclusion that the war with Germany ended when Germany surrendered in May of 1945. But even though they got that wrong, they made clear that other issues related to the act could be litigated, such as whether there had been a war, at least at the time the person was detained, and also whether the person really was an enemy alien who was eligible to be detained. In this case, there wasn't much doubt the person was German, but you can imagine other cases where there could be doubts. And this is relevant to the *Tren de Aragua* case because of course, somewhat weirdly, the administration has not said we're at war with Venezuela, generally. We're only at war or dealing with an invasion by *Tren de Aragua*. And that raises the question of whether these people who have been detained and deported and imprisoned really are members of the drug gang or not.

[00:34:41.1] Ilya Somin: And in many cases, the evidence suggests that they're not, and certainly they were afforded zero due process on the issue of trying to determine whether they really fit or not. So I think it's just not true that that case says the Alien Enemies Act issues are completely unreviewable by the judiciary. At most it just grants some measure of deference on some questions, like the question of when the war is actually over, but not deference on the issue of whether there was a war in the first place or on the issue of whether the person in question actually fits the description of the kind of person who can be detained and deported.

[00:35:17.8] Jeffrey Rosen: Well, as we sum up the *Tren de Aragua* case, you've both strongly argued that both the President is exceeding his authority in claiming that this is invasion and that a war exists and that it shouldn't be considered a political question. Adam, can you imagine judges and ultimately justices of the Supreme Court reaching a different conclusion and upholding the deportation? And if they did, what would the reasoning that they invoke look like?

[00:35:47.4] Adam Cox: That's a fantastically difficult question to answer, as I think legal academics tend to be particularly bad prognosticators about the behavior of any judges, and in particular the Supreme Court. But if I had to speculate a little bit, I do think it is more likely if the Court were going to go down the path of sustaining the President's actions, of doing so on a basis that allowed the Court to avoid opining on the ultimate legality of what the President has done. We've seen lots of historical examples where the Supreme Court has blinked in just that way. The famous *Korematsu* decision concerning the internment of Japanese Americans is one in a way that was a rare occasion when the court did not do that and was heavily criticized by some members of the court. And I think we see in other instances the court doing everything it can to avoid having to decide some of these questions. So I think we would be looking at a decision that would sound in justice ability or some other doctrinal basis that would allow the court to duck the ultimate questions.

[00:36:58.1] Jeffrey Rosen: And same question to you, Ilya. If the court were to uphold the President's actions, what would the decision look like?

[00:37:05.0] Ilya Somin: I think it's very possible that it could look just the way that Adam described, that they could say it's a political question. I do think it's a little bit less likely that they could do this than in some other instances simply because of the vast sweeping power that the President then did have, then would potentially have to do things like suspend writ of habeas corpus and threaten the liberties even of native born American citizens. Another possibility is depending on what posture the case came to. I mean, they could make a ruling based on the scope of the judge's injunction or something like that, sort of making a ruling about remedies rather than about the substance of the law. Still another possibility that occurs to me, is they could say this is not an invasion, but it is a predatory incursion. I think that would be wrong for various reasons, but it would be less sweeping than saying it's an invasion. While the Alien Enemies Act can be used against a predatory incursion, there's no power to suspend a writ of habeas corpus or to engage in war in response to predatory incursions, though you would still have the problem that potentially you could have detention or deportation with little or no due process under the Alien Enemies Act.

[00:38:21.8] Ilya Somin: But in principle, the court could couple that with a ruling saying you do have to have due process to show that the person really is a member of Tren de Aragua or something like that. But Tren de Aragua was making a predatory incursion even if they weren't engaged in invasion. They would then also have to rule that somehow the Tren de Aragua is connected, sufficiently connected to the Venezuelan government, which would also be an issue. So I certainly don't recommend a ruling like this, and I think it would be very problematic, but it would be less bad than a ruling that says this is an invasion or a ruling which says the whole thing is a political question.

[00:38:58.4] Jeffrey Rosen: Many thanks for that and for a thoughtful discussion of the Tren de Aragua case. Let's now turn to the Mahmoud Khalil case. On March 8, immigration officers detained Mahmoud Khalil, who's a Columbia grad student, a student activist. Reportedly, they initially informed him that his student visa had been revoked, and when he said he's a green card holder, the officer informed him after a phone call that the green card had been revoked and the government is attempting to deport him. And they appear to be invoking, although the invocation isn't formal, a provision of law that says that an alien whose presence or activities in the United States the Secretary of State has reasonable grounds to believe would have potentially serious adverse foreign policy consequences for the United States is deportable. Adam, tell us more about the circumstances of Khalil's arrest and detention and on what grounds he's challenging it.

[00:40:00.9] Adam Cox: As you suggested, it appears that Khalil has been arrested primarily because of his participation in protests on Columbia's campus. Public statements by the administration suggest that his speech formed the basis of their decision that he should be deported. A recent arrest on Georgetown campus suggests further that the administration is extending this policy of arresting and placing in deportation proceedings under this particular provision people who are not citizens, whose speech the Administration disagrees with. For starters, I think it's a pretty clear case where it's speech that's serving as the basis of deportation. Now, this provision of immigration law is a relatively recent one. It's existed only since 1990. It

was actually added to the statute in 1990 by a Congress that was attempting to curtail a practice of the Reagan administration, which in the years leading up to the passage of this law, had repeatedly excluded, frequently, Communist Party members and others on the basis of their beliefs and speech. Congress, unhappy with those instances of ideological exclusion, sought to provide a basis in law to make clear when the Administration was seeking to invoke those sorts of grounds so that the Administration would not proceed as it had in the past, pretextually invoking non-speech grounds when it actually wanted to exclude people because of their speech.

[00:41:26.6] Adam Cox: That's why the statute was put in place. And it's been really seldom invoked since its passage. In the 35-odd years that it's been on the books, it's been charged against a non-citizen only about a dozen times. And the data that I've seen suggests that there are only a handful, maybe four instances in the last 35 years when a person has been ordered deported under this provision. And there's no evidence any of those four concern the person's speech as the basis for the foreign policy effect. So this is a pretty unprecedented exercise of authority by the Administration using a statute that's rarely invoked.

[00:42:13.6] Jeffrey Rosen: Thank you so much for that and for noting that there are only four instances where people have been deported on the provision. No evidence that concerned a person's speech. Ilya, in your piece in *The Volokh Conspiracy*, the case against deporting immigrants for pro-terrorist speech, you argue that the deportation would be a violation of the First Amendment, although you note that there's some ambiguity under current precedent about whether or not non-citizens can be deported for speech. Tell us about why you believe this violates the First Amendment.

[00:42:47.9] Ilya Somin: Yeah. So the case is simple. The First Amendment says that Congress is not allowed to make any law that violates their freedom of speech. And there is no exception for immigration law. Like there's no statement as well, except according to immigration there you can deport people for speech or penalize them for it. Now it might be said, well, people don't have a legal, or at least non-citizens don't have a legal right to be in the US, so then maybe they can be deported for their speech. But in virtually every other context, courts readily hold that you cannot deprive somebody of some government benefit or service merely based on their speech, even if you don't have a constitutional right to that benefit or service. So, for instance, if Congress were to pass a law saying only Republicans can get Social Security benefits, that would clearly be unconstitutional, even though there is no constitutional right to Social Security benefits. And Congress could, if it wanted to, just abolish Social Security or reduce benefits or something like that. And the same thing here. Even if the person doesn't have a constitutional right to be present in the United States, still penalizing them by denying them this government benefit or the like, that still, is it a violation of freedom of speech because it makes the grant of the benefit or denial of it turn on the content of their speech?

[00:44:06.6] Ilya Somin: And I would add the Supreme Court held in 1945 that non-citizens in the US do have a constitutional right of freedom of speech. There are various precedents that we can talk about where courts have allowed deportation of people based on their speech. But many of those, the most notable being the Supreme Court's *Harisiades* decision in 1952, were for speech that at the time was not protected by the First Amendment, even for American citizens. So at that time they upheld the deportation of people for being members of the Communist Party.

But as the Supreme Court noted in that very case, just a year before, in the Dennis case, the Supreme Court had upheld criminal punishment for being a member of the Communist Party, even for American citizens, I think that earlier decision was wrong and it has since been largely undone by later Supreme Court precedents. But at the time, being a member of the Communist Party was not protected free speech, even for native born American citizens. So in my view, the First Amendment precludes deportation of non-citizens or other penalizing of non-citizens for the content of their speech, at least so long as that speech is the kind that's generally protected by the First Amendment.

[00:45:25.8] Ilya Somin: And I would note that the statute that Adam mentioned, which they're trying to use, there is actually a ruling on the books, albeit not a binding precedent, which says that that statute is unconstitutional. Ironically, it was issued by Judge Maryanne Trump Barry, who was President Trump's sister. She was a district judge and she ruled that that law is unconstitutional. Her decision was overruled on appeal on other grounds. But nonetheless, I think she was correct in her ruling on that particular law. And I hope, you know, if this gets litigated again now that other judges will listen to Maryanne Trump Barry rather than to Donald Trump and follow her position on the issue.

[00:46:11.3] Jeffrey Rosen: Adam, in your very helpful explainer on this case, you also note that the Barry court concluded that the statute was unconstitutionally vague because there's no conceivable way an alien could know how to conform his activities into law, telling about the Barry decision and the other relevant cases that you address where the court has taken up the question of the free speech rights of immigrants.

[00:46:42.6] Adam Cox: That's right. So there are really two grounds on which it might be unconstitutional to deport someone like Khalil under this provision for having engaged in speech. The first, the one that's at issue in the Barry decision that Ilya just mentioned, is the idea long held by the Supreme Court, that a law is unconstitutionally void for vagueness. It's a violation of due process if the law is so vague as to not allow a person to know what it is that's going to get them in trouble if they do it. Judge Barry said this is just that kind of law because it contains absolutely no standards about what counts as a serious foreign policy consequence, because it doesn't actually even require any action by the person, the consequence could be the result of the person's mere presence in the country. And because it delegates to a single government official, the Secretary of State, the power to make that determination, the judge held that there just weren't sufficient standards to satisfy due process. So that's a due process problem. But there is this separate potential free speech problem.

[00:48:00.8] Adam Cox: As Ilya mentioned, the Supreme Court in the middle part of the 20th century said kind of without qualification, that resident non-citizens living in this country are protected by the First Amendment, just like citizens are. And at the same time, it's true that in the decades sense that plenty have argued and courts have in some cases decided cases that have been read to suggest that the free speech rights of non-citizens are somehow less, at least in immigration context. And there's really two ways those arguments have gone. One idea is to suggest that immigrants have fewer speech rights because they're not citizens. They lack the status of being part of the people, and therefore they don't receive the same protections. The other argument, the one that's been more frequently trotted out in court, is the idea that

immigration is somehow special. So maybe free speech works ordinarily, if you're a green card holder and you want to protest on Columbia's campus, you can't be criminally charged for that. But when it comes to immigration, the idea is maybe all bets are off. And the basis for that suggestion is this long standing idea that there's something constitutionally special or exceptional about immigration law that the ordinary rules of constitutional law don't apply when immigration's at stake. Now, it turns out First Amendment cases have been part of the reason that this idea has had such persistence in American thought.

[00:49:25.7] Adam Cox: But I think the cases that the courts decided actually don't support this kind of exceptionality. So since the 1950s, the Supreme Court has rejected some First Amendment claims brought by people on deportation. Ilya mentioned one case, and as he noted, it was at a time when free speech rights were not as robust as they are today. Twice since then, the Court has rejected free speech claims in immigration cases. But both of those cases involved essentially claims of selective prosecution, a claim that the government was using a facially neutral ground because of the person's speech to try to deport them. They were in violation of their visa, and they were deportable, but the argument was, well, you're only enforcing this visa rule against me because you don't like my speech. Courts, even outside the immigration context, are extremely reluctant to peek behind the motives of prosecutors. And in those cases, it's no surprise that the Supreme Court declined to decide whether the government was in fact motivated by a desire to suppress speech. Here in this case, none of those issues are really at stake because the administration's made pretty clear that it is, in fact, attempting to deport Khalil for his speech. And that might put the free speech issue for the first time, really in American history, squarely before the court.

[00:50:51.9] Jeffrey Rosen: For the first time in American history. Ilya, tell us more about the Supreme Court case law. The high watermark of free speech rights of immigrants, as you both noted, was a case from 1945. It's called *Bridges Against Wixon*. It involved an Australian immigrant who had entered the US in 1920, and he was trying to be deported in 1938 on allegations he was a member of the Communist Party. And the court, per Justice William O. Douglas, held that he could not be deported because the deportation is a penalty. Meticulous care must be exercised lest the procedure by which you're deprived of liberty not meet the essential standards of fairness. Since then, as you've both suggested, the Supreme Court has been more deferential to the government. During the Red Scare, it rejected the First Amendment claims of Communist party members. In 1972, it rejected a lawsuit by citizens who invited a Communist professor to speak. And in the 1990s, the court rejected the free speech claims of Palestinian students who alleged the government targeted them. Ilya, what do you make of the more recent cases? And how do you think that the Roberts Court might come down on this question?

[00:52:07.5] Ilya Somin: So I largely agree with what Adam said that those more recent cases don't squarely present the issue of whether you can openly deport people because of what would otherwise be First Amendment protected speech. The *Harisiades* case, which I mentioned earlier to some extent, did pose that question. But the court ultimately decided on the basis that the type of speech activity in question, being a member of the Communist Party was not protected, even for US Citizens. Therefore, it was not really a First Amendment right at all. As to what the Roberts Court will do, I don't know because it would bring into conflict sort of two trends within this court. On the one hand, the court in recent years, and I think quite rightly, has taken a very

broad view of free speech rights. I think that's actually one of the good things about the current court and it should be applauded. On the other hand, I do think it's been overly deferential on some immigration-related matters and also some determinations related to national security. So I'm not sure which of these trends will win out in the minds of key conservative Supreme Court justices.

[00:53:16.0] Ilya Somin: I said before, I think there should not be any immigration exception to the First Amendment. And also I think the special deference that has sometimes been given in immigration cases is very badly misplaced, as it was in the 2018 travel ban case, which I've written about, for example. But I recognize conservative Supreme Court justices may not go the right way on that particular issue. So if this case gets to the Supreme Court, I'm less optimistic about it than I would be about the Alien Enemies Act case if that gets to the Supreme Court. Because that one would be so blatant and pernicious if the court were to just let the Trump administration get away with it, that I think it's unlikely, though it's not impossible, but unlikely there would be five justices willing to do that. On the issue of sort of a double standard with respect to freedom of speech for immigration issues, I honestly don't know which way the court would go.

[00:54:07.9] Jeffrey Rosen: In your explainer in Just Security, which, We the People listeners check it out, because it's comprehensive and helpful, you note that there's another issue in the Kahlil case and that's can the government unilaterally revoke Khalil's status as a green card holder? And you say the answer is no. Tell us about that and how it might play out in the case?

[00:54:30.1] Adam Cox: Yes. In a lot of the early reporting about Kahlil's arrest, government officials emphasized the idea that because Kahlil had entered the United States on a visa, that a visa was a legal privilege and thus that the government was free to revoke it on its own without process. And that argument trades on a kind of half truth about the nature of visas in our federal immigration system. So it is true that visas can frequently be revoked by executive branch officials without much of any judicial oversight. But that's because what a visa is, is really just a legal permission for a person who's outside the country to come to the border to seek entry. So we speak colloquially as though people are living in the United States on a visa, but that's not really accurate as a matter of federal immigration law. Once a person enters the country, they're admitted to a particular status, and those statuses come with rights that Congress has written down in federal immigration law and that the court has backed up over the years with the requirement of due process. And so someone like Kahlil who was a green card holder, that means he has the status of a lawful permanent resident.

[00:55:54.0] Adam Cox: Congress is clear that when a lawful permanent resident is charged with being deportable, there are a number of statutory rights that he has, and there are a number of steps that the government has to go through before they can order him deported. They have to provide him with a hearing before a judge. They have to allow him to have a lawyer present with him if he can afford one. They have to allow him to cross examine witnesses and to submit evidence. So they have to allow essentially a mini trial. Now, to be sure, the protections provided to immigrants are much less than they might be. They don't look like the criminal system, for example, there's no right to a government appointed lawyer if you can't afford to get one

yourself. The proof beyond a reasonable doubt that applies in a criminal proceeding doesn't apply in immigration procedures proceeding.

[00:56:41.7] Adam Cox: So while the rights are watered down vis a vis the criminal system, there still are significant rights. And so this idea that executive branch officials can unilaterally make a decision that someone should be deported and simply revoke a document that permits that deportation, that's misleading, and in a way takes us back to where we started today because it connects to the Alien Enemies Act claim. There too, the administration wants to argue that the president or other high-ranking government officials can unilaterally make a decision, and without any involvement of other actors like courts, they can deport people from this country.

[00:57:23.8] Jeffrey Rosen: Thank you for bringing us back to that crucial point. Ilya, you argue in your case in *The Volokh Conspiracy*, to put it mildly, I have little sympathy for recent anti-Israeli campus protests. Nonetheless, deporting people for engaging in anti-Israel, pro-terrorist or pro-Hamas speech is both unconstitutional and unjust. It also risks creating a dangerous slippery slope. Remind us, as we conclude, what was the speech for which Khalil is being deported here? And would this mean that the government could basically deport any green card holder who engaged in an anti-Israel protest? Why are you concerned about a dangerous slippery slope?

[00:58:04.9] Ilya Somin: Because they're using the Section 1227 law, for the moment at least, they aren't relying on the law that I thought they might try to use, which is about speech that expresses support for a terrorist organization. And so in a sense, their current argument is even more pernicious and more dangerous than the one that I was trying to address in my piece, because it's no longer tied to whether the person was defending terrorism or promoting support for terrorism or the like. But even the terrorism linked law, I think is problematic, first, because, you know, expressing support for terrorism, while awful and terrible, is still protected First Amendment speech. But second, because there's obvious slippage and room for abuse on the question of what qualifies as support for terrorism. There are many conflicts around the world where there's terrorism of one kind or other going on, or at least it's possible to argue that it is. And there would be a concern that the administration would simply say, we don't like this side in the conflict and therefore anybody who supports or expresses support for that side, they can be seen as supporting terrorism, even if they haven't explicitly endorsed the terrorism.

[00:59:22.4] Ilya Somin: You can readily see this in a specific case of the Israeli Palestinian conflict. You can say there's the sort of a narrow definition of support for terrorism, which is explicitly endorsing Hamas's horrific terrorist attacks that happened on October 7th of 2023. You can have a broader definition which says, well, anybody who supports the Hamas or the Palestinian side of that conflict in any way is at least indirectly supporting terrorism because they're expressing sympathy for the side that's disengaging it. And you could go further in that and say, you know, anybody who criticizes Israeli government actions in Gaza or in the conflict more generally, that that's somehow supporting terrorism. Of course, you know, arguably attacking Israel may reduce support for Israel's efforts to curb the terrorism.

[01:00:10.1] Ilya Somin: So all of this is sort of a dangerous slippery slope. And again, even on the narrowest definition of expressing support for terrorism, while it's awful speech, it is still protected by the First Amendment. It obviously would be in the case of American citizens or

even in the case of non-citizens in any area other than immigration law. Like if a non citizen walked down the street and said, I think Hamas is wonderful and I support everything they do, including the October 7th attack, he could not be put in jail for that. He could not be charged with a crime for that. And I would contend for the same reason, he also should not be deportable for that.

[01:00:49.4] Jeffrey Rosen: Well, it's time for closing thoughts about Kahlil's arrest and detention. Adam, you said that this is the first time in American history that the speech claim is squarely presented in this particular context. Tell us why you believe that the deportation violates due process on the First Amendment. And if I can ask you to argue both sides, if the court were to rule in favor of the government, what do you think the basis might be?

[01:01:18.8] Adam Cox: I'll start with the government winning the case. I think the path to that is pretty clear. The court would likely trot out the kind of arguments about immigration exceptionalism that we saw the court deploy in cases about the Trump travel ban during President Trump's first term that upheld against constitutional challenge an executive order that barred entry to the country people from about a half dozen majority Muslim countries. And that opinion was really one of the first times when the court has followed through on the rhetoric of immigration exceptionalism in a way that actually led to an outcome that was fundamentally different than would have applied outside the immigration context at the time the case was decided. The court, even more recently in a case concerning habeas rights for people apprehended crossing the border, did the same thing, again deployed the rhetoric of immigration exceptionalism, the idea that things are different when immigration is at stake to hold, and I'm going to say this clearly because it's kind of startling, that a person who's in Arizona, having crossed the border into our country, has fewer rights to go to court and challenge the legality of his detention than alleged enemy combatants held at Guantanamo Bay.

[01:02:48.4] Adam Cox: If that's not immigration exceptionalism, I'm not really sure what is. And so I think that's the route we could expect the court to go down if it sustained against a constitutional challenge, the deportation of Khalil. Now, if the court does, as I believe it should, rule in favor of Khalil, and again, I'm going to say this is speculative because I'm terrible about court watching, I guess I'd predict that the court finds a way to avoid resolving the core First Amendment questions. It's got a pretty easy path in this case. The other argument, as I noted, is that this statute is void for vagueness. And maybe importantly, just three years ago, this Supreme Court, with the same membership, held unconstitutional, void for vague, a federal deportation statute. So it's not unheard of in this arena and that would provide the Court with an easy way out.

[01:03:46.2] Jeffrey Rosen: Thank you so much for that. Ilya, the last word in this really excellent discussion is to you, and it's the same question. If the court were to uphold the deportation here, what do you think the grounds would be? And why do you think that the court should hold that the deportation is illegal and unconstitutional?

[01:04:03.6] Ilya Somin: So on the first question, I basically agree with what Adam said. I don't have a lot to add except to say that if they were to say that this statute is void for vagueness, they could just adopt, I think, the pretty well written opinion that Judge Maryanne Trump Barry wrote

when she addressed this issue back in the 1990s. I think I've already expressed why I think this is unconstitutional or it would be unconstitutional to deport a person for speech. I obviously think the whole doctrine of immigration exceptionalism is wrong, but I do think it would be a further step to apply it to a situation which is A, the government is explicit that they're doing this for speech as opposed to in the travel ban case, where although Trump many times said that he was motivated by targeting Muslims, the official rationale put forward, but a government was this somewhat specious national security rationale, here they're not hiding the ball in that way. And also in this case, unlike in the Harisiades case, it would be for speech that is protected by the First Amendment in other contexts, whereas back then they could say, and they did say that membership of the Communist Party was not protected.

[01:05:19.6] Ilya Somin: I would add this last caveat, that some have argued that Mr. Khalil did more than just speak out against Israel or speak out in favor of Hamas, but that he was involved in various ways with sort of physical takeovers of buildings and other things that are illegal. So far, the administration has not claimed that as the basis for deporting him. And I would argue that if they do claim that, then at least they would need to adjudicate and prove that he really did do those other things. And so they have the option potentially of moderating their position and saying, we're not actually targeting this guy for speech, we're targeting him for these other things that we think he did, which are criminal or at least civil violations. But so far they haven't done that because I think they really do want to deport people for speech and they want to use this as the caste case to enable themselves to do that.

[01:06:12.1] Jeffrey Rosen: Thank you so much, Adam Cox and Ilya Somin for a thoughtful, deep and really clarifying discussion. It is so important in these highly charged cases carefully to walk through the various arguments on both sides, and you have helped us do that with great clarity and purpose. So, I've learned so much from you. And on behalf of We the People listeners, I want to say thank you, Adam Cox and Ilya Somin.

[01:06:38.4] Adam Cox: Thank you.

[01:06:39.0] Ilya Somin: Thank you.

[01:06:43.9] Jeffrey Rosen: This episode was produced by Samson Mostashari and Bill Pollock. It was engineered by Bill Pollock. Research was provided by Yara Daraiseh, Gyuha Lee, Samson Mostashari, and Cooper Smith. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional illumination, education, elucidation and debate. Please check out the new Constitution 101 course that we launched in partnership with khanacademy@constitutioncenter.org/khan101. Sign up for the newsletter @constitutioncenter.org/connect. And always remember that the National Constitution center is a private nonprofit. This podcast and all our work is organized only possible thanks to the generosity of private philanthropy, that means people like you across the country who are inspired by our nonpartisan mission of constitutional education and debate. Please consider supporting our efforts by donating today @constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.