

Q&A

Uncertainty, Risk Loom for Immigration

The Trump administration's stated plans to limit immigration—long a complex and rapidly changing branch of the law—have raised concerns and questions about legal protections for immigrants. To sort through some current immigration-related issues, Chronicle staff writer Phil Gloude-mans sat down with Boston College Law Professor Daniel Kanstroom, faculty director of the Rappaport Center for Law and Public Policy, a Dean's Distinguished Scholar, founder of BC's Immigration and Asylum Clinic, and co-founder of the Post-Deportation Human Rights Project.

[This article has been edited for space; read the full version at <https://bit.ly/kanstroom-immigration-2025>]

Religious groups have sued the federal government to stop Immigration and Customs Enforcement (ICE) agents from conducting enforcement in places of worship, a policy they say infringes on congregants' right to freedom of religion and expression. Is their argument legitimate?

Kanstroom: The Trump administration's change of enforcement guidelines regarding places of worship has already inspired great uncertainty, fear, consternation, and resistance. There are several such lawsuits already filed, and more being contemplated by many religious groups, including Christian and Jews but also Sikhs, Quakers, and many others. As one legal complaint filed in Maryland puts it: "Allowing armed government agents wearing ICE-emblazoned jackets to park outside a religious service and monitor who enters or to interrupt the service and draw a congregant out during the middle of worship is anathema to plaintiffs' religious exercise."

"While there have been some scholarly debates since the mid-1990s about whether the Wong Kim Ark decision applies to the undocumented noncitizens of today, the clear consensus is that the logic and underlying principles of the 19th-century precedent is still compelling."

The essential legal claims highlight that the government has for decades recognized the sensitivity and dangers of enforcement actions in "protected areas," including houses of worship and places of religious ceremonies such as weddings and funerals. This longstanding prior policy was grounded in moral, political, and pragmatic considerations as much as legal ones, including First Amendment constitutional protections of religious freedoms to worship and to associate and statutory rules embodied in the Religious Freedom Restoration Act.

The basic Department of Homeland Security (DHS) enforcement model has long



BC Law Professor Daniel Kanstroom

PHOTO BY CAITLIN CUNNINGHAM

recognized that "exigent circumstances" could override such general protections, a position widely regarded as representing a sensible, legally legitimate balance (supervisor approval was also required in such cases). The new policy—published quickly and without public input or comment—eliminates all such standards and safeguards and suggests (rather blithely, in my view) that agents in the field rely on "common sense."

Courts will closely examine the chilling effects of the new policy and the way it was promulgated as potentially violative of United States "administrative" legal norms. I think that some of these claims are strong, though courts are unlikely to preclude enforcement in protected areas entirely.

At least 22 states and other organizations have sued over Trump's executive order to end birthright citizenship; three federal judges have ordered a freeze on the order. What is birthright citizenship and can the president stop it via executive action?

Birthright citizenship, originally grounded in English Common Law, was later given constitutional status in the 14th Amendment, adopted in 1868 following the Civil War. A main goal was to overrule the explicitly racist reasoning of the so-called Dred Scott case in which the Supreme Court had ruled that the Constitution did not grant American citizenship to people of black African descent—even if they were born in the U.S. They were thus denied all the "rights and privileges" of American citizenship.

The language of the 14th Amendment is quite expansive and simple: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

However, the question of how to interpret the phrase "subject to the jurisdiction thereof" immediately arose. It was litigated in a major Supreme Court case in 1898 involving Wong Kim Ark, a person born on U.S. soil of Chinese parents during a time when virtually all Chinese immigration was prohibited by law and Chinese people were prohibited from naturalizing. The court held that "subject to the jurisdiction thereof" should be interpreted "in the light of

the common law" which had included as subjects virtually all native-born children, with very few exceptions: those born to foreign rulers or diplomats; on foreign public ships; to enemy forces engaged in hostile occupation; and "Indian tribes not taxed." This understanding has been reaffirmed by innumerable court decisions since then and the 14th Amendment language has been written into the immigration statutes verbatim.

While there have been some scholarly debates since the mid-1990s about whether the Wong Kim Ark decision applies to the undocumented noncitizens of today, the clear consensus is that the logic and underlying principles of the 19th-century precedent is still compelling. Moreover, Trump's executive order would also seem to violate the consistent understanding of the statute and thus be subject to judicial overturning on that ground alone.

The Deferred Action for Childhood Arrivals (DACA) program allows undocumented immigrants who arrived in the U.S. as children to avoid deportation, enabling them to live and work in the U.S. openly and legally. But the program has been the subject of political and legal attacks, and in January, a federal appeals court ruled against it, while permitting renewals to continue. Could DACA be eliminated?

The short answer, unfortunately, is yes, DACA could be eliminated by the courts as it was never grounded in a statute. If that were to happen, DACA recipients could well face individualized removal proceedings, though many would have quite strong and compelling defenses. However, given the length of time that DACA has been in existence (since 2012) and the terrible consequences its elimination would portend, I think (and hope) that such a dramatic reversal is unlikely.

Any lower court decision attempting to do so would inevitably go back to the Supreme Court, which ruled against the first Trump administration's initial attempts to eliminate DACA, albeit on technical, proce-

dural grounds.

Trump's actions have raised questions regarding immigrants' rights and fundamental legal protections if ICE or other authorities enter a local school, workplace, or hospital. Is a court-issued judicial warrant required? Is a vocal assertion of rights, such as "I do not consent to this search" sufficient to thwart an in-person investigation? In Massachusetts, do we have the right to film an interaction with immigration officials or law enforcement?

These are quite difficult and complicated questions to answer. For one thing, we must distinguish formal rights from what is wise or practical to do in actual situations. Second, some rights vary state to state. Massachusetts, for example, has more robust protections for noncitizens' rights than, for example, Florida. Here, you are generally allowed to video record encounters with police or ICE agents. Also, immigration law is very complex, and people have many different statuses that can affect both what rights they have in principle and what is the best advice in real life.

I would say that all institutions—schools, hospitals, workplaces, etc.—and all people should take the current possibilities of ICE raids and interrogations and arrests very seriously. All institutions and all noncitizens also should seek training from legal experts to know their rights vis-à-vis immigration interrogations and arrests.

As a very general guidance, anyone—especially noncitizens—detained, interrogated, or arrested should consider politely but firmly declining to answer questions from government agents and ask for a lawyer if they can possibly hire one. There is generally no right to free counsel in removal proceedings, unfortunately, except in some places that have special programs, like New York City.

As a final note, I would urge all government agents and employees to maintain respect for the law and for the better norms of both law and discretion that have long guided practice in this always fraught arena.

Snapshot

Looking Forward

PHOTO BY ANN HERMES

Earlier this month, the Boston College Institute for the Study of Race and Culture co-sponsored the Future of Black Educators Summit—a series of discussions focusing on ways to cultivate and sustain Black educators. Among the presentations was "My Black Story in America," led by Lynch School of Education and Human Development Assistant Professor Earl Edwards.

