



UNLOCKED

## What are the legal limitations of US immigration enforcement?

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### TRANSCRIPT

**Nancy Gibbs:**

Hi, I'm Nancy Gibbs, the director of the Shorenstein Center at Harvard's Kennedy School, and this is Unlocked. My guest today is Juliette Kayyem. She's a former assistant secretary for Homeland Security and an expert here at the Kennedy School on crisis management and national security who is going to help us unlock the question of who is allowed to enforce the law. Juliette, I want to start with the topic of the moment, which is immigration enforcement and what are the legal limits around how agents from ICE and immigration enforcement authorities are allowed to operate?

**Juliette Kayyem:**

It's all changing in real time, so any confusion is understandable. I'll give you the two top line rules. There are two agencies that can do immigration enforcement, the Customs and Border Protection, which is generally at the border at an entry point or at a border crossing, but the definition of what they view as a border is within 100 miles of a border. So things like in Los Angeles, CBP is being deployed.

The agency that's getting all the focus, however, is the second agency within the Department of Homeland Security, which is ICE, Immigration and Customs Enforcement. They are sort of shorthand your interior enforcement department. They have legal authority to detain and question any person who is in violation of their immigration status or they have reason to believe. Generally, in the past, ICE has focused on what even the administration calls the worst of the worst, but we are certainly seeing plenty of anecdotal evidence to show that that's not true.

**Nancy Gibbs:**

What counts as reason to believe that somebody might be? If you're a Hispanic man in a Home Depot parking lot, is the mere fact of your skin color and location sufficient reason to believe you might be in violation, and is that premise legal?

**Juliette Kayyem:**

It should not be, and generally, in the past has not been, but it does appear that ICE is using status in terms of employment, farms, parking lots of places like Home Depots, gardeners, status combined with, they'll deny it, some sort of racial identification or racial affinity. So you're seeing in Los Angeles, for example, the Hispanic community. At that stage, if they have reason to believe, they then can begin an interrogation. And some of these you are seeing in real time on the videos. They will argue that they've done their homework. In other words, that either a place has been known as a place that hires unlawfully.

So they would have reason to believe that the people working there, say a farm, are unlawful or that a specific person has failed to comply with their immigration status, missed a hearing, missed paperwork,

and that they're seeking to detain them. In some of the videos that we've seen, a mother being taken from her kids, they will argue that the mother had violated her immigration status. There is a third piece, which is, of course, in courtrooms, this is new, or in courthouses, and generally was forbidden. We're seeing a lot of tension between judges and the judiciary with these enforcements.

At this stage, it appears ICE is trying to increase their numbers by actually punishing the people who are trying to get their status in line, that's a catch-22. And we've seen almost a 40% drop off in immigration hearings and show ups because, of course, even if you're trying to act in a way that you're required to act, if you think someone's going to take you off the streets and detain you, you're not going to show up.

**Nancy Gibbs:**

So help us have a little background of who might be affected by that. If you are here as an asylum seeker who has applied for asylum, if you are here under a temporary protected status and the administration announces that they are revoking that temporary protected status from a whole category of people, are you now, you wake up on Monday morning and your status, you're here legally and on Tuesday morning you're not and you can now be taken into detention that day? Help us understand.

**Juliette Kayyem:**

No, it's a great category. All of these are different categories. So this is the new categories. They are trying to increase their numbers of deportations and found, as everyone has reported, that that's kind of hard to do because this crisis that they created as part of an election strategy really isn't true on the ground, it's much more regularized in the interior. So putting the border enforcement to the side, if you're looking at the interior, meaning someone who's already here and has established ties here, one way they're getting the numbers and therefore the ability to deport is switching your status. Earlier, I talked about the courtrooms. They're essentially saying the person who shows up to regularize or normalize their status, maybe they missed a hearing, maybe they missed paperwork five years ago, is being punished.

The second way they're doing it is TPS, temporary protective status. Literally, that pool of people go from a status that's protected from deportation to unprotected because it's a status that was authorized by a president, in some of these cases, as early as Bush too, in particular with the Haitians. So they believe that they're okay and then they repeal it to get a larger pool of unlawful immigrants, as is true for Haitians, for example. There are mechanisms in the revocation of TPS that do allow some tide period, but it's essentially a warning, "You need to get out." Most of those cases have been stayed by courts under the theory that that pool has a reliance interest and reliance rights on the original TPS status.

So Haitians, for example, were told by the Biden administration that they could have that status for years, and you can't simply revoke it without unjust harm. We'll see how these cases play out, but it's very important for reporters to know that the pool that they're trying to get isn't like the worst of the worst anymore. It's actually people that Republican and Democratic presidents in the past has deemed worthy of staying under a status, TPS, because horrible things are happening in their country because it's the right thing to do and then repealing it. Look, it's a numbers game for them.

**Nancy Gibbs:**

Is part of the problem of meeting the numbers, the fact that they have actually been very successful in reducing the number of people who are trying to come into this country legally in the first place?

**Juliette Kayyem:**

Yeah, it's absolutely right. And this was started with the Biden administration in the last six months. You certainly know I was very critical of the Biden administration's policies on border enforcement. They let that linger, no matter how much they tell you they didn't. They had a course correction six months before the end of their term when they realized they had to get much more serious about border enforcements.

In the last six months, you saw border crossings decline. Now they've really declined in the Trump administration. Part of that is, of course, greater resources in border enforcement, but the other is, of course, word is getting out that it's not simply, "If you cross the border, you'll be sent back," it's that you can be detained in pretty horrible circumstances.

**Nancy Gibbs:**

So help us understand that as well. We obviously have been hearing a lot about CECOT in El Salvador. We've heard President Trump visited the Alligator Alcatraz in the Everglades. Help us differentiate between civil versus criminal offense and how the two are typically handled.

**Juliette Kayyem:**

We've had three pools of how we think about undocumented immigrants. The first pool is people who are fine but for their status. So they either came in years ago, crossing a border unlawfully. In most instances, they just overstay a visitor visa or an education visa. They've done nothing wrong, they're parts of society. Republican and Democratic presidents have generally left that pool alone. There's cases of it, but generally, that pool has been left alone. And that's the debate about how do you deal with this 12 to 14 million people in this country whose sole illegality is how they got here, right? Everything else, they're contributing, they're paying taxes, all that stuff.

The second pool is a civil or misdemeanor crime. So you had a DUI 15 years ago, you failed to pay child support for two months, all of those are administrative or civil penalties. The Trump administration is going after those now despite what they promised, which was, of course, the worst of the worst. So you are just seeing a lot of evidence of that. And those people are being detained in conditions that are not reflective of whatever crime you say they allege. These are the horrible conditions that we're reading about simply because there's too many of them.

The third is the worst of the worst. So that would be what we call violent criminals. It doesn't have to be violent, but just people who contribute nothing, have done horrible things. Everybody, Democrat, Republican, wants them out. And that has been the focus in the past. There's been a merger of all three in the Trump administration, and the conditions of holding are pretty grim. It is not a penalty. It isn't even the ability to self-deport if someone wanted to. It is detention in facilities that are overcrowded and the fear tactics like this Alligator Alcatraz.

**Nancy Gibbs:**

There's recent polling that suggests broad concern about how ICE is operating of masked, plain clothed, unmarked vehicles. How does someone differentiate between legitimate enforcement and abduction?

**Juliette Kayyem:**

It's important to ask this question because even if ICE is authorized to make deportation or detention holding, how they're doing it is new. There's two reasons why you want your law enforcement to not be masked, to have identification, and to identify themselves. The first is, of course, so that the person knows that it's a legitimate law enforcement action. If four guys that were masked, unbadged came up to me, I'm screaming, "Holy hell," and I am kicking until I know what the heck is going on, and my status

is a US citizen. The other is to protect the agents. This is exceptionally dangerous for agents because I've seen some of these videos. I don't know what's going on.

And unless they identify themselves, you are going to get people very... Your mother's taken off and you have a gun. We have states that have stand your ground rules. If you don't know this as an ICE agent, you're in trouble. So it's a very bad change. It is unique. I don't know if someone is suing it, but something bad is going to happen. It is just clear. And I guess it already has because the DOJ itself, shock of all shocks, is alerting people to an increase in fake representations of ICE agents either for robbery, and I've seen one, I can't validate it, one case of rape. So this is just part of the nightmare that's being created by just not following long-established standards of conduct.

**Nancy Gibbs:**

Can you help us understand also how location matters? You mentioned about CPB enforcing at points of entry. Is any international airport a point of entry? Are the rules different about what even your rights as a citizen are at customs, at an airport, at the border compared to anyplace else in the country?

**Juliette Kayyem:**

The general rule is this, if you are a US citizen, all rights apply everywhere, including at a border. The United States, at least so far, cannot deny you access to the United States as a US citizen. They can, as part of border enforcement, ask you additional questions. I just went through CBP yesterday. I delete all the apps, there are no question about it. I don't know what my name, given how publicly critical I am with the administration, is. And they asked-

**Nancy Gibbs:**

But would they have the right to search your phone without a warrant or probable cause?

**Juliette Kayyem:**

They would not, but I would only be able to assert that right after. I know the law well enough that I can scare them until I buy time, but an average US citizen, I just view the experience as hostile now, and I think every American should. It's not a welcome home. For example, the questions that they would normally ask, they asked yesterday, who was I with? I was with my son, vacation. Did you meet anyone? All of those are normal. And if they're not happy with my answers, they can ask additional questions. But they, at least as far as the case law is now, cannot deny me entry. They could detain me until things are clarified. And you cannot lie to a law enforcement official. So if they find out I lied, that then is a different potential violation for you rather than just the mere entry.

Everyone else has lesser standards at our border, another is lesser right. So an immigrant on a lawful visa can certainly be denied. And that's what you're seeing from Europe in terms of the travel advisories. You're seeing it in my space, I do a lot of sports security concerns about FIFA, concerns about the Olympics. Even if the United States says, "Yes, you're allowed in," CBP has the last call. And that's why you're seeing the State Department, DHS, basically say that, saying, "We don't care what you think before you jump on the plane. You can be detained here." And it is detention. This is the thing that's a little bit worrisome for foreigners is it's not like they often just put you on the next plane back. They could hold you for some period of time, let alone just the stress of it. So that's why you're saying the plummeting in travel in the United States.

**Nancy Gibbs:**

I want to switch to now around immigration enforcement, around the role that the military, National Guard, or active duty troops are allowed to play within the United States itself. How does that differ from ICE and CPB, and does it differ across National Guard versus Reserves versus active duty?

**Juliette Kayyem:**

This process that Trump has started is obviously being assessed legally. So I'm going to give you the rules before. The rules were National Guard is often used in its state capacity by a governor for issues related to crowd control, issues related to public unrest. So arguably, I'm going to give the administration the benefit of the doubt, even if you thought that things were crazy in LA, which they weren't because it was like 0.02% of LA was impacted by the riots. A governor will often deploy, and we've seen this here before, but generally in a support role or almost always in a support role to local and state law enforcement. There is a trigger which Trump pulled, which is what's called federalizing the National Guard, that puts the National Guard out from being in a chain of command of the governor to being in the chain of command of the president.

There's a whole payment structure and stuff, but for our purposes, it is that they are on a mission from the federal government. In that capacity, under the Posse Comitatus law, they are not allowed to make arrests of US citizens, though they can assist law enforcement. So you saw some pictures of detentions. Was that an arrest or was that just holding someone? But that's the general rule. What we now know, and what's been widely reported is the president, for the first time ever in an urban unrest, in quotes, unrest, environment overruled or did not even seek a governor's approval. This is both legally suspect because the floor was so low for Trump to do this. There was a couple of arrests. This wasn't Katrina, this wasn't the LA riots. The LA riots had 78 people dead by the time Pete Wilson asked the president to federalize the National Guard.

One is just that the floor was dropped by Trump, and second, it was against the wishes of the governor. That piece has only happened before in the desegregation cases. I want to talk though about a third piece, which is the operational piece because we tend to end there. This is super dangerous and this is what I've been writing about, to deploy a military, right, not train. And we saw that by the subsequent deployment of the Marines who had to do four days of training, which I think was a slow role by the Pentagon for deployment. The rules of engagement are unclear and they're not integrated with state and local. So you saw a very strong stand by not the mayor of LA or the governor of California, but by the LA police chief saying, "I've got men and women deployed everywhere. I have no idea what these people are doing."

It turns out they were doing nothing. So that's the final story. About 5,000 between federalized National Guard and the active military, and they were performative. I think less than 1,000 actually did anything. And they take away from important national security and homeland security needs, including, for example, wildfires in California where California's National Guard is depleted from that.

**Nancy Gibbs:**

Finally, obviously, both journalists and the broader public are wrestling with a whole new set of practices around immigration enforcement. Are there things that you are seeing commonly misunderstood, mischaracterized in the way this issue is being explained?

**Juliette Kayyem:**

I'm going to be honest with you, don't believe the numbers that the administration is telling you, and in particular, the administration will claim that assaults on ICE have increased. In one day, I saw the difference between-

**Nancy Gibbs:**

413%.

**Juliette Kayyem:**

Yeah, but they told Fox News yesterday, 700%. And the raw numbers are pretty low, even with that increase in percentages. They are using the term assault disruption for simply people asserting their right because they're making lots of mistakes, as we've seen. So I think it's important now, and it took me a while to just get used to it, is I don't believe a number they're telling me, period.

And for reporters, drill down on those numbers. They just freely throw them out and no one has without any validation. The deployment of the Marines, for example, it's one thing to deploy 1,000-plus Marines, how many of them were activated? It was a couple dozen. So I think one thing is just push back on the numbers because the numbers can make it seem like things are really bad on the ground and their enforcement is really successful and there's a huge gap between those two.

**Nancy Gibbs:**

Juliette Kayyem, thank you so much for explaining the complexities of immigration enforcement and unlocking some of the mysteries of what is changing and what people should be on the lookout for. Thank you very much.

**Juliette Kayyem:**

Thanks for having me.