

## IMMIGRATION AND CIVIL RIGHTS IN AN ERA OF TRUMP

IHELG Monograph 18-

12

Kevin R. Johnson  
Dean and Mabie-Apallas Professor of  
Public Interest Law and Chicana/o Studies  
UC Davis School of Law  
Martin Luther King Jr. Hall  
400 Mrak Hall Drive  
Davis, California 95616  
Ph: 530-752-0243 | [Web Profile](#) | [SSRN](#)  
[krjohnson@ucdavis.edu](mailto:krjohnson@ucdavis.edu)

(forthcoming, Valp. U. L. Rev.,)

© 2019 , Kevin R. Johnson

## University of Houston Law Center/Institute for Higher Education Law and Governance (IHELG)

The University of Houston Institute for Higher Education Law and Governance (IHELG) provides a unique service to colleges and universities worldwide. It has as its primary aim providing information and publications to colleges and universities related to the field of higher education law, and also has a broader mission to be a focal point for discussion and thoughtful analysis of higher education legal issues. IHELG provides information, research, and analysis for those involved in managing the higher education enterprise internationally through publications, conferences, and the maintenance of a database of individuals and institutions. IHELG is especially concerned with creating dialogue and cooperation among academic institutions in the United States, and also has interests in higher education in industrialized nations and those in the developing countries of the Third World.

The UHLC/IHELG works in a series of concentric circles. At the core of the enterprise is the analytic study of postsecondary institutions--with special emphasis on the legal issues that affect colleges and universities. The next ring of the circle is made up of affiliated scholars whose research is in law and higher education as a field of study. Many scholars from all over the world have either spent time in residence, or have participated in Institute activities. Finally, many others from governmental agencies and legislative staff concerned with higher education participate in the activities of the Center. All IHELG monographs are available to a wide audience, at low cost.

### Programs and Resources

IHELG has as its purpose the stimulation of an international consciousness among higher education institutions concerning issues of higher education law and the provision of documentation and analysis relating to higher education development. The following activities form the core of the Institute's activities:

Higher Education Law Library

Houston Roundtable on Higher Education Law Houston

Roundtable on Higher Education Finance Publication series

Study opportunities

Conferences

Bibliographical and document service Networking and

commentary

Research projects funded internally or externally

## IMMIGRATION AND CIVIL RIGHTS IN AN ERA OF TRUMP

Kevin R. Johnson\*

I am humbled, honored, and in, fact, awed by the opportunity to give a lecture named after **Dr. Martin Luther King Jr.** Some wonderful speakers, including my friend [Angela Onwuachi-Willig](#), have delivered the lecture.

Located on a beautiful campus in a beautiful town, [Valparaiso University School of Law](#) has a long and illustrious history. As the [website](#) states, “law is more than a job; it is a vocation: a responsibility and opportunity to serve others.” These nicely put words concisely set an admirable goal for all of legal education.

Martin Luther King Jr., a civil rights icon, is not well-known for his positions on immigration. However, the principles for which his life stands can guide us in thinking about immigration law and its enforcement. Several principles, which I paraphrase here, struck me as particularly relevant:

1. People should be judged by “the content of their character,” not “the color of their skin.”
2. “The arc of moral universe is long but bends toward justice.”
3. “I choose to give my life to those who have been left out.”

I have spent time considering how immigration is one of the civil rights issues of the new millennium. Please do not get me wrong. I in no way mean to suggest that there are no other civil rights issues. Criminal justice, voting rights, equal educational opportunities, and employment discrimination unquestionably are among those civil rights concerns that deserve our attention. I modestly assert that immigration is among the issues that deserve consideration.

The title of my remarks – Immigration and Civil Rights in an Era of Trump – were designed to afford me flexibility in what I talk about. This is especially important because President Trump regularly has something new, novel, and newsworthy to say about immigration. Almost every day, it seems, we hear something new from the Trump administration about immigration. Indeed, as I deliver this lecture, the nation is in the midst of the longest shutdown of the U.S. government in U.S. history, a shutdown that centers on a dispute over whether billions of dollars of congressional funding should be provided for a wall along the U.S./Mexico border.

Immigration news from Washington, D.C. has been a constant since President Trump’s inauguration. Just a few months ago, President Trump threatened to issue an executive order ending [birthright citizenship as provided by the Fourteenth Amendment](#). He also declared the “caravan” of migrants from Central America to be a national “crises” and “invasion.” Through a number of policy changes, the Trump administration has sought to remake the asylum system, with little regard to the rule of law. I could go on but you get the general idea.

President Trump's immigration initiatives share two fundamental characteristics.

**First**, he consistently seeks to reduce immigration and specifically to reduce the number of immigrants of color coming to, and living in, the United States. These actions generally are contrary to the law prohibiting racial discrimination.

**Second**, despite the frequent claim that the administration is committed to simply enforcing the immigration laws, President Trump attacks judges who issue rulings with which he disagrees, calls for changes to our immigration laws that he claims are ridiculous, and all-too-often ignores the law. For example, President Trump, in my estimation, in many instances has sought to limit asylum eligibility in ways not permitted by Congress. To offer another example, few legal scholars believe that President Trump's has the power call to abolish birthright citizenship. That proposal exemplifies what is becoming more and more apparent: President Trump feels little need to adhere to the rule of law. This is especially hard for lawyers and law professors to accept.

**In the Immigration Act of 1965**, Congress amended the immigration laws to explicitly prohibit discrimination in the issuance of visas on the basis of race, sex, nationality, place of birth, or place of residence. Passed in the wake of the Civil Rights Act of 1964, the 1965 Act repealed laws mandating racial and national origin discrimination in the U.S. immigration laws. The momentum of the civil rights movement led by Dr. King transformed immigration law. In so doing, Congress established a blueprint for immigration diversity, allowing millions of people of color to immigrate to the United States. The nation saw a dramatic rise in immigration from Asia; U.S. law had barred Asian immigration from the late 1800s through the first half of the twentieth century.

The trajectory toward a more diverse nation, however, is likely to change due to a myriad of policies embraced by the Trump administration. Those policies can be aptly characterized as waging war on immigration diversity and the rule of law. President Trump's immigration actions show a desire to change that diversity, to take the nation back to the past to a time when Asians were excluded, when Mexicans were deported with impunity.

President Trump's racial goals should not be surprising. Unlike any president in modern U.S. history, he regularly makes racially-explosive comments about immigrants. Consider a few:

- Mexicans are "rapists" and "criminals";
- Salvadorans are MS-13 gang members;
- Muslims are "terrorists" who should be subject to "extreme vetting"; and
- El Salvador, Haiti, and nations in Africa are "s\*\*\*hole countries" and the United States should not be providing safe haven to citizens of those countries.

President Trump has followed up on the incendiary rhetoric with a number of policies, many of them in tension with, if not in outright violation of, the law. In sum, the Trump administration has taken some of the most aggressive immigration enforcement policies in modern U.S. history. The policies almost all aim to restrict noncitizens of color from immigrating to the United States.

I am working now on an article about what I characterize as the "new Latino repatriation." It shows how many of the administration's immigration measures in total

replicate (1) the [Mexican repatriation](#) of the 1930s, in which state, local, and federal governments forcibly “repatriated” persons of Mexican ancestry, including U.S. citizens, to Mexico; and (2) “[Operation Wetback](#)” in 1954, a military-style effort to remove Mexican immigrants in the Southwest. Not coincidentally, President Trump has endorsed “Operation Wetback” -- without using its official name -- as a legitimate policy approach to manage migration today.

Consider a few of the Trump administration policies that demonstrate the President’s desire to restrict immigration diversity and, in some instances, have been found to be unlawful.

### 1. *The Travel Bans*

Within days of his inauguration, President Trump issued an executive order that was intended to bar immigrants from a number of predominantly Muslim nations from entering the United States. The original travel ban was not carefully done and included obvious legal flaws. It, for example, was not clear whether it applied to lawful permanent residents. When the courts enjoined the first travel ban from going into effect, President Trump issued a revised version. The courts struck down the second version as unlawful and, in no small part, because of the President’s anti-Muslim statements. Although a 5-4 Supreme Court in [Trump v. Hawaii](#) upheld the third draft of the ban, four Justices would have concluded that the executive order was motivated by anti-Muslim animus, not national security concerns.

### 2. *“Chain Migration” and Reforming Legal Migration*

President Trump has called for ending “chain migration” and dramatically restricting family-based immigration to the United States. In that vein, he has expressed support for the [RAISE Act](#), which would reduce legal immigration by one-half through reducing family-based immigration. That change would have the greatest impact on prospective immigrants from Mexico, India, and China, the nations that today send the most immigrants to the United States. And cutting legal immigration would likely increase pressures for undocumented migration, as many noncitizens without lawful options for rejoining family will seek to rejoin family members without authorization.

The Trump administration also has sought to restrict legal immigration with a proposed rule that would tighten the “public charge” exclusion. The result is that many immigrants now decline to seek public benefits to which they are lawfully entitled. The rule also would limit migration of poor and working people to the United States, an outcome contrary to the “huddled masses” welcomed in the famous inscription on the Statue of Liberty. In a similar vein, the Trump administration has drastically cut the numbers of refugees admitted into the United States each year.

### 3. *“Zero Tolerance” Policies*

The Trump administration’s “zero tolerance” policies have targeted migrants from Mexico and Central America. In response to Central Americans seeking asylum, the Trump administration adopted a harsh detention and family separation policy, blaming the policy on the Democrats and the courts. A public outcry and litigation compelled the Trump administration to end family separation. As the 2016 midterm elections neared, similar rhetoric was used against asylum seekers from Central America – known as the

“migrant caravan” – who were in route to the U.S. border. Working to build a “crisis” mentality among the general public, President Trump has been waging war on asylum.

a. *Central American Asylum Applicants*

Courts have played important roles in halting the administration from engaging in racially charged policies designed to stop Latinx families from immigrating to the United States. In particular, the courts have upheld the rights of immigrant children subject to detention under what is known as the *Flores* settlement, to which President Clinton's Justice Department agreed in 1997. The Trump administration has railed against compliance with the settlement. It has proposed to undo the *Flores* settlement so that the administration can indefinitely detain immigrant children and their families.

Other presidents have taken steps to deter Central American asylum seekers from seeking relief in the United States. But none have taken measures as harsh as those adopted by the Trump administration.

b. *Sanctuary Cities*

The Trump administration has challenged “sanctuary” states and cities for refusing to fully cooperate with the U.S. government in immigration enforcement. Although the courts have for the most part blocked those efforts, the administration has tried to halt the flow of federal funds to “sanctuary” cities. Seeking to capitalize politically on tragedies, President Trump has been quick to blame sanctuary jurisdictions for crime. It is odd that conservatives -- the traditional defenders of state and local rights when it comes to civil rights -- today challenge local authority and autonomy with respect to immigration and immigrants.

c. *DACA*

The Trump administration has sought to eliminate the Obama administration's **Deferred Action for Childhood Arrivals** (DACA) policy for undocumented youth. The policy benefited hundreds of thousands of young undocumented immigrants, with more than 80 percent from Mexico and Central America. Courts have enjoined the rescission of DACA.

d. *TPS*

The Trump administration announced the end of **Temporary Protected Status for Haitians, Salvadorans, Nicaraguans, Hondurans and nationals of other developing nations**. TPS allows nationals of nations hit by mass violence or natural disaster to remain temporarily in the United States. More than 200,000 Salvadorans are threatened with the loss of TPS relief. To this point, courts have enjoined the end of TPS for nationals of El Salvador and other nations..

e. *Removals*

The Trump administration has aggressively increased removals and adopted approaches that would ensure that more than 95 percent of the noncitizens removed are from Mexico and Central America. Although many of the crime-removal programs are being carried forward from the Obama administration, the new administration has expanded the efforts and the crimes for which removal will be sought.

\*\*\*

These policies together would significantly reduce diversity in the number of immigrants admitted to, and permanently reside, in the United States. Importantly, such policies violate the spirit if not the letter of the 1965 amendment to the immigration laws and Congress's goal of promoting diversity in immigration. The courts have halted many of the more egregious violations of the law. The defunding of sanctuary cities has been halted. DACA's rescission has been halted. Stripping of TPS has been stopped. Although the travel ban eventually went into effect, litigation refined and narrowed the ban.

### **Conclusion**

Courts time and again have prohibited the Trump administration from pursuing immigration policies that violate the law. Legal and political attention must continue to be paid to these policies in order to prevent the country from returning to its pre-1965 law that fostered predominantly white immigrants white nation. Put simply, the unlawful war on immigrant diversity should not be permitted to continue. Political organization has been one response to the Trump immigration enforcement measures. The rise and fall of DACA energized immigrants' rights activism and marked the ascendance of a political movement. That may be one of the most important long term impacts of DACA. An "Abolish ICE" movement has emerged. Congress has the opportunity to act to reform and improve the immigration laws.

I think that Martin Luther King Jr. would condemn the unjust immigration initiatives of the Trump administration. He would object to judging immigrants by the color of their skin, not the content of their character. He would see the current initiatives as contrary to the arc of justice. Last but not least, Dr. King would call for us to protect immigrants who are "left out" and deserve our protection.

KJ