KEYNOTE TO IMMIGRATION IN THE TRUMP ERA SYMPOSIUM: JUDICIAL REVIEW AND THE IMMIGRATION LAWS

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I am privileged and honored to deliver a keynote at a symposium on "Immigration in the Trump Era." Immigration today is headline news and I look forward to sharing some thoughts on the subject. And it is

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law professors have had quite a challenge just keeping up with the many immigration initiatives of the last two years (and sometimes the last two days). And it is hard to believe that it has only been two years.
The overall tone of my message today may surprise some observers. It
is optimistic, which does not come naturally these days to many who follow contemporary immigration law and its enforcement. Although not always in agreement with specific decisions, I am content with the general direction of immigration law in the courts. Importantly, three recent Supreme Court decisions reveal much positive about the future direction of the judicial review of immigration matters. The three decisions are:

1. Sessions v. Dimaya;3

Let me be one of the first of many today to congratulate Professor
Andrew Knapp, Southwestern's Appellate Litigation Clinic, and Director Professor Gown Ramachandan, for prevailing in the U.S. Court of Appeals for the Ninth Circuit and U.S. Supreme Court. That work exemplifies the precise kind of clinical legal education that all law schools should have as

part of the curriculum. 4

2. Sessions v. Morales-Santana' ; and

3. Trump v. Hawaii.6

In two of the cases, Sessions v. Dimaya and Sessions v. Morales-Santana, the Supreme Court invalidated on constitutional grounds provisions of the immigration and nationality laws. This is nothing less than an extraordinary development. The third decision probably is the one with which most people in the audience-and the nation as a whole-are most

(contending that "the war on illegal immigration ... is a war against the perceived threat posed by Mexicans living in the United States").
3. 138 S. Ct. 1204 (2018).
4. See Lindsay M. Harris, "Learning in Baby Jail": Lessonsfrom Law Student Engagement
in Family Detention Centers,

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familiar. In Trump v. Hawaii,7 the Court by a 5-4 majority engaged in judicial review-although in a narrow, perhaps grudging fashion-and upheld the ban on the admission of noncitizens from several nations populated predominantly by Muslims; the Trump administration defended the "travel ban" on national security grounds, a rationale for which judicial deference to the Executive is at its zenith. Many, including four Justices, believed that anti-Muslim animus, not security and safety concerns, truly motivated the ban." But the fact that the Court engaged in any judicial review is newsworthy. As students of immigration legal history know, that has not always been the case.
A bit of background is necessary to understand why these decisions-particularly Trump v. Hawaii-lead me to be optimistic. One of the foundations of immigration law has been something called the "plenary power doctrine," which is akin to a constitution-free zone for the immigration laws and, at times, Executive actions. In 1889, the Supreme Court decided The Chinese Exclusion Case,9 which established the rule prohibiting judicial review of the immigration laws, a defining characteristic of what is known as "immigration exceptionalism." '1° According to the Court, Congress has "plenary power" over the immigration laws and the courts should not interfere with congressional immigration judgments. Although starkly incongruent with modern constitutional law," the plenary power doctrine remains, as they say, "good law," never having been overruled by the

Supreme Court.12

7. See id. at 2419-23. In reviewing the travel ban, the Court acknowledged precedent precluding judicial review of immigration matters. See id. at 2407, 2418-20. For criticism of the decision, see Robert S. Chang, Whitewashing Precedent: From the Chinese Exclusion Case to Korematsu to the Mfuslim Travel Ban Cases, 68 CASE W. RES. L. REV. 1183, 1187-89, 1209-13

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We have seen changes over time. Leading scholars have thoroughly documented the shift in the law. Steve Legomsky and Cristina Rodriguez's influential immigration casebook details the "cracks" in the plenary power doctrine in modem Supreme Court decisions.13 In a pair of classic articles, Hiroshi Motomura insightfully identifies techniques frequently employed by the courts to evade the dictates of the plenary power doctrine and its harsh results.' 4 Jack Chin in 2000 wrote of the demise of the plenary power doctrine.' 5 Although I questioned his argument at the time,' 6 he ultimately turned out to be more right than not.
Although the first panel of the symposium will delve into the intricacies
of the case, I want to highlight the significance of Sessions v. Dimaya to all of immigration law. I understand the decision to be an important step in a series of decisions in which the

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Supreme Court's 2015 decision in Johnson v. United States.23 In that case, the Court, in an opinion by Justice Antonin Scalia, found that the Armed Career Criminal Act's definition of "Violent felony" was so vague as to violate the due process clause.
After the death of Justice Scalia, the justices ordered re-argument in the Dimaya case, a move suggesting that the Justices were closely divided on the merits. 24 With Senate

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Chief Justice Roberts, joined by Justices Kennedy, Thomas, and Alito, dissented.3 The Chief distinguished Johnson v. United States on the basis of the different language in the two statutory provisions at issue. 3

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These developments should allow for optimism among immigration law professors, optimism that is much needed in these times. I readily admit that it remains to be seen whether and how far the Court will proceed along the path of meaningful constitutional review of the immigration laws. As I mentioned, Morales-Santana, for example, was the culmination of a number of closely contested

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and respected jurist committed to constitutional rights and the rights of immigrants,

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immigration in many ways influenced my entire academic career, for which I am forever indebted.
The Supreme Court's recent immigration decisions unquestionably reflect the continuation of the move of immigration law toward the legal mainstream and away from "immigration exceptionalism. '

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We see that on college campuses and states and cities from coast to coast. "Sanctuary"jurisdictions limiting state and local involvement in immigration enforcement, have multiplied.5 4 There now is even a call to "Abolish ICE," Immigration and Customs Enforcement.55 Activism is especially important because the courts can only do so much when it comes to ensuring the fair treatment of immigrants. To move that task forward, Congress must reform the immigration laws, which critics from both major political parties claim are "broken. ,