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In Our Justice System, Is Due Process Optional?

In a [Daily Press article](#) published on April 12, 2025, Jeffrey A. Breit—a former president of the Virginia Trial Lawyers Association who has taught at Harvard, William & Mary, and Columbia Law Schools—argues that the legal system is the backbone of democracy. It serves to keep power at all levels in check, ensuring that everyone—rich or poor, popular or not—receives fair treatment under the law. It requires that judges remain independent and arrive at their decisions based on legal principles, not political pressure.

What Is Due Process?

Due process is a set of procedures and norms, established by the rule of law and executed through our legal system, that is designed to protect *all* citizens who are accused of committing crimes or other offenses. It has its roots in the [Magna Carta](#), a document signed by King John of England in 1215, in which the king recognized and swore to honor certain basic rights of the church and barons. Due process through rule of law is a foundational principle of the United States, expressed in the Declaration of Independence and the Constitution, that guarantees no one is deprived of life, liberty, or property without fair legal procedures. Arrest and detention must be based on evidence, not on personal whims or “vibes.”

This justice through *process*, not *power*, is guaranteed by the Constitution, especially Amendments 5 and 14. In an autocratic state, by contrast, the politicization of legal and judicial systems removes due process by shifting procedural authority away from law and making it subject to a person or regime. Under such a system, people can be imprisoned or punished arbitrarily—without evidence, charges, or trials—based on what is expedient for whoever holds power.

Justice must be public, inspectable, and correctable, or the legal system risks becoming a tool of revenge or extortion disguised as law. In his article, Breit notes that if we lose trust in justice based on law, we risk losing democracy entirely.

Immigration and the Rule of Law

The recent arbitrary detentions of immigrants—including those legally in this country on student visas or temporary legal status—constitute an attack on due process. *All* individuals residing in the United States—with or without legal status—have constitutional rights, even if their *presence* in the country is not considered a right. These constitutional rights include the right to due process as well as protections against unreasonable searches and seizures, the right to legal counsel, and the right to remain silent when questioned by law enforcement in criminal matters.

After calling illegal immigration an “invasion”—a tenuous assertion unsupported by most definitions of that term—President Trump invoked the [Alien Enemies Act](#) (AEA) of 1798 to circumvent these immigrants’ rights, flouting the judicial order of U.S. District Judge James E. Boasberg. The most famous of these cases (and there are several) is that of Kilmar Armando Abrego Garcia—a Maryland man erroneously deported, along with others, to a prison in El Salvador with no access to legal counsel or any outside communication. In a [vague and confusing order](#), a majority of Supreme Court justices affirmed a portion of U.S. District [Judge Paula Xinis’s order](#) to return Abrego Garcia, who was deported under the AEA, to the United States. [According to Axios](#), the Trump administration is not fully complying with court rulings and is using stonewalling tactics to delay compliance or avoid it altogether. In fact, when asked why the administration has failed to follow the Supreme Court’s order to “facilitate” the return of officials have contended that their “administrative error” [does not obligate them](#) to return Abrego Garcia to the United States. White House spokesperson [Harrison Fields stated](#) that “U.S. courts lack the authority to compel the President to force a foreign nation to return an MS-13 terrorist alien.”



Kilmar Abrego Garcia was abducted to a prison in El Salvador by “administrative error” and has not been returned to the United States despite court orders. (Photo by Senator Chris Van Hollen)



Salvadoran justice minister Gustavo Villatoro (left) and U.S. Homeland Security Secretary Kristi Noem observe inmates in El Salvador's Terrorist Confinement Center (CECOT) in March 2025. (DHS photo by Tia Dufour)

The Trump administration has temporarily stopped invoking the AEA. Instead, the administration is now using other excuses to allow ICE to sweep up individuals without due process, unconcerned that legal residents and citizens are also being detained or deported in the process. The administration is facing the possibility of a contempt ruling in Abrego Garcia's case as well as another immigration case. Judge [Boasberg has stated](#) that probable cause exists to hold the Trump administration in contempt for defying the court order to stop deportation flights to El Salvador. [Judge Xinis](#) has also advised the administration that they could be charged with contempt of court for ignoring her order to return Abrego Garcia to the United States.

However, courts have no power to force compliance. Court orders are [enforced by United States marshals](#), who are part of the Department of Justice. Although the [DOJ has directed](#) the White House to follow judicial orders, Attorney General Pam

Bondi has shown little inclination to force the administration's compliance and instead appears to be functioning as a tool of the president rather than the guardian of an independent Justice Department. The Trump administration thus seems well positioned to stop a U.S. marshal from enforcing court orders.

It is important to recognize that the Trump administration's defiance of court orders is only one way it is circumventing the Constitution and federal law. On April 25, the Federal Bureau of Investigation under Director Kash Patel arrested a Wisconsin immigration judge, claiming that she was obstructing the arrest of an immigrant who had come before her court. The retribution Trump promised during his campaign is in full swing, and those who oppose his policies are in the crosshairs.

The Supreme Court has yet to hear and decide on several cases that will help determine the future of due process, not only for undocumented immigrants and legal residents but also for U.S. citizens. In the meantime, the Trump administration is clearly working to erode the power of the judiciary in a quest to establish Executive dominance over the other branches of government. These actions may soon force a constitutional crisis. Indeed, the League of Women Voters of the United States believes that we have already reached that point (see page 3 of this issue of the *Voter*).

—Martha Zavala, Advocacy Director