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Due Process and the Abrego Garcia Case

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English

The Supreme Court [ruled](#) on the evening of April 10 that the Trump administration must comply with a lower court's order to "facilitate" the release from custody of Kilmar Armando Abrego Garcia, an immigrant who was deported without a hearing to a mega prison in El Salvador. The case underscores the issue of due process and what legal protections are afforded to noncitizens.

Here, we'll explain what due process means, any limitations in its application to noncitizens, and the details of the Abrego Garcia case. In the process, we'll fact-check some comments officials have made about the case.

The Trump administration, which has said that Abrego Garcia was accidentally deported due to an "[administrative error](#)," has stalled on bringing him back despite court orders, [arguing](#) that U.S. agencies do "not have authority to forcibly extract an alien from the domestic custody of a foreign sovereign nation." Abrego Garcia was among the more than 250 immigrants who were deported by the administration to El Salvador on March 15.

"That's up to El Salvador, if they want to return him. That's not up to us," Attorney General Pam Bondi said during an [Oval Office meeting](#) between President Donald Trump and Salvadoran President Nayib Bukele on April 14. At the same meeting, Secretary of State Marco Rubio emphasized the diplomatic implications, saying, "The foreign policy of the United States is conducted by the President of the United States, not by a court."



President Donald Trump hosts a bilateral meeting with President Nayib Bukele of El Salvador, Monday, April 14 in the Oval Office. Official White House Photo by Abe McNatt.

But the case highlights what [some legal scholars](#) see as an effort by the Trump administration to erode due process — or the constitutional right to contest an arrest by the government — and set a precedent for making people unreachable by imprisoning them outside of the U.S.

"Why hasn't the Trump administration acted to secure Mr. Abrego Garcia's release? After all, he is there because of a government screw-up," law professors Erwin Chemerinsky and Laurence H. Tribe asked in an April 9 [opinion piece](#)

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Q: Have many of the mass shooters been transgender?

A: The number of transgender mass shooters in the U.S. varies depending on how "mass shooting" is defined, but is relatively small. The Gun Violence Archive, which uses a broader definition, lists five mass shootings by transgender or nonbinary people since January 2013. That's less than 0.1% of the mass shootings it says happened in that period.

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“The answer can only be that it is using this case to establish a truly chilling proposition: that no one can stop the Trump administration from imprisoning any people it wants anywhere else in the world,” they answered.

We reached out to the White House for a response to that proposition, but we didn’t receive a reply.

Some Trump administration officials, though, have suggested that there may be limits to due process. Border czar Tom Homan, for example, [said](#) that immigration agents are the “principal” judges of whether or not a detainee has gang affiliations and, if they determine that there is an affiliation, that detainee’s rights to due process are limited.

“People who are enemies of the United States don’t have the same level [of] due process [as in] the normal process,” Homan told Axios in an April [interview](#), making an apparent reference to the administration’s use of the [Alien Enemies Act](#) to expel immigrants it alleges are gang members. A challenge to the use of that law is currently working its way through the courts, [as we’ve explained](#).

And Trump’s homeland security adviser, [Stephen Miller](#), [posted on X](#) on April 1: “Friendly reminder: If you illegally invaded our country the only ‘process’ you are entitled to is deportation.”

But immigrants — including those who crossed the border without authorization — [have a right](#) to due process, legal experts say.

“The thing about due process is that it either applies to everyone present in the United States or it applies to no one,” Amy Grenier, of the American Immigration Lawyers Association, told us by email.

What Is Due Process?

The [Fifth and Fourteenth Amendments to the Constitution](#) establish the right to due process — the Fifth Amendment says that “[n]o person shall ... be deprived of life, liberty, or property, without due process of law.” The Fourteenth Amendment extends this obligation to the states.

“There is no way to have due process and decide a group of people are not entitled to it. Due process includes the opportunity to know the charges against you and to argue against them. If a government is ensuring due process, every individual removed will know why they are removed, and they will have an opportunity to make their case on why they should not be prior to removal,” Grenier said. “This is true even for the undocumented, even if someone is here without authorization.”

She noted that the Constitution uses the word “person,” not citizen — meaning that it applies to everyone.

“If due process applied only to citizens, or people who are here lawfully, yet at no point is there an opportunity to be heard or prove your case, how would a citizen prove they are a citizen prior to removal?” she asked.

[Kathleen Bush-Joseph](#), a lawyer and policy analyst at the Migration Policy Institute, agreed. “Constitutional protections apply to everyone and that’s the baseline,” she told us in a phone interview.

But, Bush-Joseph said, the legal process can differ, depending on how a person entered the country. For example, someone who overstayed a visa and has been present in the U.S. for years generally would go to immigration court before they could be deported, while someone who has been in the U.S. illegally for less than two years could be subject to an [expedited removal process](#). Under that process, an immigration officer can order a noncitizen to be removed, unless that person expresses a credible fear of returning to their home country and seeks asylum.

Previously, the [expedited removal](#) process had applied to those who were



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apprehended within 100 miles of the border within 14 days of having entered the country. However, Trump expanded expedited removal shortly after taking office to include anyone who illegally crossed the border within the prior two years and is apprehended anywhere in the country. The policy is being [challenged](#) in court as a violation of due process.

Bush-Joseph also noted that some other actions the Trump administration has taken suggest it may be trying to speed up the deportation of immigrants: namely, the [executive order](#) Trump signed on Jan. 20 calling the arrival of immigrants in the U.S. an “invasion” and the [requirement](#) that “all foreign nationals present in the United States longer than 30 days” must register with the government.

“President Trump and I have a clear message for those in our country illegally: leave now,” Department of Homeland Security Secretary Kristi Noem said in a [statement](#) urging compliance with the registration rule.

“So, the Trump administration is saying that immigrants affected by these announcements don’t have the same protections as U.S. citizens,” Bush-Joseph said.

Abrego Garcia

In Abrego Garcia’s case, he [came to the U.S.](#) without authorization in 2012, fleeing gang violence from [Barrio 18](#), which had targeted his family’s [pupusa](#) business in El Salvador, according to court documents.

He went to [live with his brother](#), a U.S. citizen, in Maryland and, in 2019, was arrested while waiting outside of a Home Depot to be hired as a day laborer. The Department of Homeland Security then moved to deport him under [Title 8](#) — which codifies [immigration laws](#), including those that govern asylum, removal and naturalization — because he was in the U.S. without having been legally admitted. Abrego Garcia then applied for asylum.

The Trump administration has highlighted a claim made in the arguments over whether he should be detained or let out on bond while awaiting the outcome of his asylum case. At the time, Abrego Garcia argued that he should be freed on bond, saying that he wasn’t a flight risk since he had lived in the U.S. for eight years and intended to marry his then girlfriend who was a U.S. citizen and was five months into a high-risk pregnancy. He also argued that he wasn’t a danger to the community, citing his lack of a criminal record.

DHS, however, argued that he should be kept in custody pending the outcome of the case because, it alleged, he was a member of the Salvadoran gang MS-13. Abrego Garcia and [his now wife](#) denied the allegation at the time and continue to do so today.

Two pieces of evidence were presented to support the claim that he was a member of MS-13. First, what he was wearing at the time of his arrest — “a Chicago Bulls hat and a hoodie with rolls of money covering the eyes, ears and mouth of the presidents on the separate denominations. Officers know such clothing to be indicative of the Hispanic gang culture,” the [arrest record](#) said. Second, a statement from a [now suspended officer](#) who cited an unnamed informant who said that Abrego Garcia was a member of the gang’s “Westerns clique,” which is based in New York — a state, Abrego Garcia’s lawyers say, he’s never been to.

The docket for his 2019 immigration case isn’t public, but documents from it [have been filed](#) in the current case. Bondi posted [some documents](#) from it on [social media](#). They show that an immigration judge who handled his bond hearing found that DHS’ contention that he was a member of MS-13 “appears to be trustworthy,” while also acknowledging that there were inconsistencies in the report DHS relied upon. The judge denied Abrego Garcia’s bond, and an immigration court appeals board issued a two-page order upholding her ruling.

Bondi overstated the findings from the bond hearing when she [said in the Oval Office meeting](#), “In 2019, two courts — an immigration court and an appellate

immigration court — ruled that he was a member of MS-13.” The courts didn’t “rule” on the issue; rather, they said that the report relied upon by DHS was inconsistent but “appears to be trustworthy” enough to deny bond.

A different immigration judge handled Abrego Garcia’s asylum claim. That judge didn’t rule on the issue of whether or not the government had proved Abrego Garcia was a member of MS-13, but the judge reviewed all the evidence presented in the case and found that Abrego Garcia “provided credible responses to the questions asked” and that his testimony was “consistent with his asylum application and other documents.” The judge didn’t grant asylum because Abrego Garcia had filed his application seven years after entering the U.S., “well-beyond the one-year filing deadline.”

However, the judge did grant him “withholding of removal,” which is a form of relief for migrants who fear persecution, as [explained](#) by the U.S. Citizenship and Immigration Services. Such a ruling prevents deportation to a person’s home country and allows that person the right to remain in the U.S. and work legally, but according to the [American Immigration Council](#), “the government is still allowed to deport that person to a different country if the other country agrees to accept them.” It does not allow a path to permanent residence or citizenship in the U.S.

The judge found that Abrego Garcia had “suffered past persecution as he was threatened with death on more than one occasion” and that “the facts here show that the Barrio 18 gang continues to threaten and harass the Abrego family over these several years, and does so even though the family has moved three times.” The judge ruled that he could not be sent back to a country where he would be likely to suffer persecution.

The government did not appeal that ruling, and Abrego Garcia has been living and working in Maryland ever since.

When Abrego Garcia was arrested on March 12, Immigration and Customs Enforcement officers didn’t provide a warrant and “told him only that his ‘status had changed,’” according to U.S. District Court Judge Paula Xinis’ [explanation of her April 4 decision](#) that he should be returned from El Salvador. He was shuttled between detainment facilities before being flown to El Salvador on March 15, without having seen a judge.

“Although the legal basis for the mass removal of hundreds of individuals to El Salvador remains disturbingly unclear, Abrego Garcia’s case is categorically different—there were no legal grounds whatsoever for his arrest, detention, or removal,” Xinis wrote, concluding that “his detention appears wholly lawless.”

Vice President JD Vance misrepresented the situation when he [posted on X](#), “Because he is not a citizen, he does not get a full jury trial by peers. In other words, whatever ‘due process’ he was entitled to, he received.” It’s true that Abrego Garcia received due process after being apprehended in 2019 — ultimately getting a judgment of withholding from removal — but he was not given due process before being removed from the country in March.

“The government could have presented its evidence before an immigration judge, the federal district court in Maryland, or in criminal proceedings as it has done in prosecuting cases of [other alleged MS-13 members](#),” foreign affairs expert [Tom Joscelyn](#) and law professor [Ryan Goodman](#) recently [explained](#) in the online publication Just Security.

Since Abrego Garcia was [removed under Title 8](#), that case would have been brought to an [immigration court](#), which [doesn’t have](#) jury trials. Rather, those cases are decided by immigration judges.

At this point, the Supreme Court has upheld Xinis’ April 4 order that the government should “facilitate” the release of Abrego Garcia and said it should “ensure that his case is handled as it would have been had he not been improperly sent to El Salvador.” The high court instructed the District Court to clarify the order to “effectuate” his return, “with due regard for the deference owed to the

Executive Branch in the conduct of foreign affairs,” and said the federal government “should be prepared to share what it can concerning the steps it has taken and the prospect of further steps.”

So far, the government hasn’t explained such steps. In a [court filing on April 21](#), lawyers for the administration maintained that since Abrego Garcia got to El Salvador “his detention was no longer a matter of the United States’ confinement, but a matter belonging to the government of El Salvador.”

Bukele, the country’s president, said in the Oval Office meeting on April 14 that he wouldn’t release Abrego Garcia and suggested the man was a “terrorist.”

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