

Institute for
Constitutional Advocacy and Protection

GEORGETOWN LAW

Spotlight Forum
Senate Judiciary Committee Democrats and Senate Democrats

“Cruel and UnAmerican:
The Abuse of Immigrants to Attack our Constitutional Order”

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Distinguished Senators, thank you for inviting me to testify today.

I am currently a Visiting Professor of Law and the Executive Director of Georgetown Law’s non-partisan Institute for Constitutional Advocacy and Protection (ICAP). We use litigation, public education, and policy work to defend constitutional rights while working to ensure accountability for our governmental institutions. Previously, I served for nearly 20 years as a federal prosecutor, and three years at main Justice, first as Principal Deputy Assistant Attorney General and later Acting Assistant Attorney General for National Security. I left the Department of Justice to found ICAP in May 2017.

The Trump Administration’s multi-faceted mass deportation policy has raised serious constitutional questions that threaten the fundamental rights of both citizens and non-citizens.

Start with the President’s use of 10 U.S.C. § 12406 to prospectively federalize the National Guard to protect ICE agents and federal property during First Amendment-protected protests anywhere in the country. Saturday’s

presidential memorandum asserts that protests or acts of violence in response to ICE raids “constitute a form of rebellion against the authority of the United States”—a prerequisite to federalizing National Guard troops under § 12406—if they directly inhibit the execution of the laws. Although there *could* be protest activity directed at the government that becomes so pervasively violent that it might qualify as a rebellion—such as the attack on the U.S. Capitol on January 6, 2021—the presidential memorandum does not refer to any particular ongoing protest in any particular location (not even Los Angeles, where the National Guard has now been federalized and deployed), nor provide other support for such a conclusion. Instead, it purports to apply to protests that “are occurring or are likely to occur based on current threat assessments and planned operations.” And it gives the Secretary of Defense the power to use “regular armed forces” to augment the National Guard, authority that the Secretary has now used to mobilize 700 Marines, with the total number of federalized National Guard and Marines now far outnumbering the protesters, based on reporting. This assault on fundamental First Amendment rights of citizens and noncitizens is unprecedented, beyond the authority delegated by Congress, and meant to quash protected speech.

Next, consider the President’s Alien Enemies Act proclamation, used to remove Venezuelan detainees alleged to be members of Tren de Aragua to a detention center in El Salvador. Setting aside for now whether the Alien Enemies Act can be used in this way, all nine members of the Supreme Court agreed that the detainees are constitutionally entitled to due process of the law. That means notice that they are subject to removal under the Act “within a reasonable time and in such a manner” to allow them to seek judicial review *before* their removal occurs. The fundamental right to due process protects everyone—not just Venezuelan detainees—before the government deprives someone of “life, liberty, or property.” The Administration’s attempt to summarily remove other detainees to Libya and

South Sudan, and its mistaken removal of Kilmar Abrego Garcia without due process, are additional violations of due process rights. The justifications given—that the detainees are terrorists or criminals—is no excuse. Indeed, Fourth Circuit Judge J. Harvie Wilkinson III, writing about the Abrego Garcia case, cautioned: “If today the Executive claims the right to deport without due process and in disregard of court orders, what assurance will there be tomorrow that it will not deport American citizens and then disclaim responsibility to bring them home?”

And this is not all. The Administration has attempted to summarily strip foreign students and researchers of their visas for engaging in First Amendment-protected activity on university campuses. It has threatened criminal investigations of so-called sanctuary cities that choose as a matter of public safety not to voluntarily cooperate with federal immigration officials beyond what is required by federal law. It has charged a state judge for allegedly obstructing ICE’s attempt to arrest an immigrant appearing in her courtroom, and has charged a U.S. congressman with assaulting an ICE officer during attempted oversight at a detention center. These actions have consequential impacts on First Amendment rights as well as principles of federalism, separation of powers, and the rule of law.

Finally, no hearing on these topics would be complete without discussing President Trump’s executive order purporting to reinterpret the 14th Amendment to deny citizenship to newborn children unless at least one parent is a citizen or lawful permanent resident, even if the parents are here lawfully, but temporarily. Denying citizenship to newborns would irreparably harm not only them and their families, who may face deportations resulting in family separations, it also would impact newborns of U.S. citizens, for whom a birth certificate would no longer be sufficient proof of citizenship. Immediate legal challenges, including one brought by ICAP, resulted in nationwide preliminary injunctions based on the order’s blatant violation of the plain text of the 14th Amendment, 125-year-old binding

Supreme Court precedent, a congressional statute, and centuries of historical practice.

Thank you for the opportunity to testify today and I look forward to answering your questions. I also invite you to read my recent op-eds on these topics:

[*Dissecting the Trump Administration's Strategy for Defying Court Orders*](#), Just Security (March 25, 2025)

[*How the courts can get the truth about deported dad*](#), Washington Post (April 14, 2025)

[*What Alito got right in his El Salvador case dissent*](#), Washington Post (April 25, 2025)

Dissecting the Trump Administration's Strategy for Defying Court Orders

By [Mary B. McCord](#)

Published on March 25, 2025

"Tonight, a DC trial judge supported Tren de Aragua terrorists over the safety of Americans."

That [remarkable statement](#) by the Attorney General of the United States Pam Bondi on March 15 was certainly designed to get the public's attention. But it was a gross distortion of the temporary restraining order issued by U.S. District Chief Judge James Boasberg that day, prohibiting the immediate deportation of alleged members of a Venezuelan criminal gang that was recently [designated](#) a foreign terrorist organization.

Boasberg's order, issued during an emergency Saturday evening hearing, was based on his *preliminary* legal determination that President Trump's Alien Enemies Act Proclamation announced earlier that day was not a valid basis for deporting alleged members of the gang without due process. Boasberg did what the Supreme Court has held is the job of the judiciary since *Marbury v Madison* in 1803: "to say what the law is." Because Boasberg had concluded that the legal basis for the deportations was lacking, he ordered that any plane that might be in the air carrying deportees under the proclamation be returned to the United States. His order was unequivocal and included turning around planes even if they landed on the El Salvador tarmac:

[Y]ou shall inform your clients of this immediately, and that any plane containing these folks that is going to take off or is in the air needs to be returned to the United States, but those people need to be returned to the United States. However that's accomplished, whether turning around a plane or not embarking anyone on the plane or those people covered by this on the plane, I leave to you. But this is something that you need to make sure is complied with immediately (Tr. 43).

I would assume that means that they [the five named plaintiffs] are either not on the planes or that they will not be removed from the planes and will be brought back once the planes land in El Salvador. Is that fair? (Tr. 5; see also Tr. 44)

The court order to bring back any planes that were in the air at the time of the ruling, or once they had landed, has sparked the most dramatic showdown between the executive and judicial branches during Trump's second term.

The constitutional showdown is over whether the administration violated the court's order by flying two planes of alleged gang members to El Salvador, where they are now in a detention center, *after* the court's order not to remove them and to return any planes that may have already left the United States.

Bondi's statement exposes the political strategy the administration seems to be deploying to make this case the first real test of defiance of a court order.

By labelling the deportees "terrorists," the administration is no doubt banking on Americans giving it a pass on violating a court order. The administration has flipped the script in the court of public opinion: It's no longer about a judge holding the administration accountable for following the law and following a court's orders. It's about the administration holding a judge accountable for "supporting" terrorists. (Never mind that there has been little explanation concerning how the administration determined the deportees are members of Tren de Aragua, while several of their family members and lawyers have vociferously claimed [they are not](#).)

This apparent strategy could be used to sway public opinion in favor of resistance to other court orders too. Will Americans care about court orders to reinstate foreign aid when the president [has claimed](#) funds have gone to "male circumcision in Mozambique" or "social and behavior change in Uganda"? Will they be okay with defying court orders to rehire fired federal employees the president [has claimed](#) are "playing tennis" and "playing golf" instead of working?

The Trump administration has not yet outright defied a court order. In the case before Boasberg, the court is still trying to determine whether the administration *in fact* violated the court's order, and the government continues to resist providing the detailed flight information that would assist the court in making that determination (most recently [asserting](#) an unusual "state secrets" claim to block sharing information with the court even confidentially and without plaintiffs involved). In other cases where it appears there has been some level of non-compliance—such as with a [temporary restraining order](#) issued by Judge Amir Ali directing the State Department to resume dispersing congressionally appropriated foreign aid funds—the government is still making legal arguments in court about why it hasn't actually violated such orders. Some of the arguments are

dubious, but they at least show that the government sees value in making such legal arguments in the courts rather than openly claiming they don't need to.

Of course, *outside* the courtroom, various administration [officials](#), including the [Attorney General](#) herself, have made statements that seem to suggest otherwise.

Will there come a time when the arguments that Justice Department lawyers are making in the courts stray so far from the reality on the ground that we can say there is effective non-compliance? If so, will Americans care? Have some Americans already assumed the administration is defying court orders so that the actual constitutional crisis will be downplayed or missed? Does it matter to other Americans when a court determines the government has violated the separation of powers on which our democracy rests? Or a law enacted by Congress? If many Americans don't care about the rule of law when it's about so-called terrorists, or useless foreign aid, or lazy federal workers, will they care when it's about Medicare and Medicaid, Social Security, or their tax refunds? The slippery slope of noncompliance could lead to a hard lesson for Americans living in a country without the rule of law.

Editor's note: This piece is part of the [Collection: Just Security's Coverage of the Trump Administration's Executive Actions](#)

IMAGE: Judge James E. Boasberg, chief judge of the Federal District Court in DC, stands for a portrait at E. Barrett Prettyman Federal Courthouse in Washington, DC on March 16, 2023. (Photo by Carolyn Van Houten/The Washington Post via Getty Images)

FEATURED IMAGE: WASHINGTON, DC- March 16: Judge James E. Boasberg, chief judge of the Federal District Court in DC, stands for a portrait at E. Barrett Prettyman Federal Courthouse in Washington, DC on March 16, 2023. (Photo by Carolyn Van Houten/The Washington Post via Getty Images)

Opinion

How the courts can get the truth about deported dad

The courts can halt Trump administration word games on a man wrongly sent to a Salvadoran prison.

April 14, 2025

By Mary B. McCord

Mary B. McCord is the executive director of Georgetown Law School's Institute for Constitutional Advocacy and Protection and a former acting assistant attorney general for national security and longtime federal prosecutor.

The government's cat-and-mouse game with a federal district court in Maryland over the return of Kilmar Abrego García — erroneously deported in March to El Salvador — needs to stop. It's time for the U.S. officials, who can answer the court's questions about what the government has done and is doing to "facilitate" his return, to take the witness stand, raise their right hands, and swear to tell the truth, the whole truth and nothing but the truth.

Last Thursday, the Supreme Court denied the government's motion to vacate U.S. District Judge Paula Xinis's order to "facilitate and effectuate" Abrego García's return. The high court made clear that the lower court had "properly" required the government to "facilitate" his release from custody in El Salvador "and to ensure that his case is handled as it would have been had he not been improperly sent to El Salvador." It directed the lower court to "clarify" the meaning of "effectuate" in its order, with due regard to deference to the executive branch in conducting foreign affairs. And it directed that "the Government should be prepared to share what it can concerning the steps it has taken and the prospect of further steps."

And that's where the cat-and-mouse game began. Abrego García fled gang violence in El Salvador as teenager in 2011, is now married to a U.S. citizen, has U.S. citizen children, and has a 2019 court order requiring that he *not* be deported to El Salvador because of the likelihood of persecution there. Just hours after the Supreme Court's ruling Thursday evening, Xinis clarified that she was directing the government to "take all available steps to facilitate the return of Abrego García to the United States as soon as possible."

Xinis required the government to submit a sworn declaration by an official with personal knowledge, by Friday morning, answering three questions: (1) Abrego García's current physical location and custodial status; (2) what steps the government has taken to facilitate his immediate return to the U.S.; and (3) what additional steps the government will take to facilitate his return.

The government in response complained that Xinis's deadline was "unreasonable and impracticable." At a hearing on Friday afternoon, the government attorney was unable to answer what the judge said was "a very simple question ... where is he?" Nor could the attorney say what steps the government had taken to facilitate Abrego García's return. Clearly frustrated, Xinis ordered the government to file a declaration, again by an official with personal knowledge, by 5 p.m. each day, beginning Saturday, answering the judge's three questions.

As of Monday, only one question has been answered. A State Department official confirmed in a Saturday declaration what has been suspected all along — that Abrego García "is currently being held in the Terrorism Confinement Center in El Salvador." As for his custodial status, the official reported that Abrego García "is detained pursuant to the sovereign, domestic authority of El Salvador."

Does this mean that he is now being held by the Salvadoran government based on unknown and unreported charges leveled against him by *that* government, despite the fact that the only basis for deporting him was the U.S. government's mistake? Or does this mean that the Salvadoran government has used its "sovereign, domestic authority" to enter into some kind of agreement with the United States to house its deportees?

The answers make a difference, because they directly relate to what our government can do to facilitate his return. But we don't know the answers, because no explanation was given.

That's why Xini should order senior officials — the actual decision-makers — to testify about what steps the government has taken and will take to facilitate Abrego García's return. Though sworn declarations are often accepted by the courts as a substitute for in-person testimony from high-level government officials, when a declaration raises more questions than it answers — and suggests post hoc justifications for the government's actions, as may have occurred here — live testimony is warranted.

This is especially true when government officials are now suggesting outside of the courtroom that they are required only to allow Abrego García to return should the Salvadoran government release him. Under oath, subject to penalties of perjury and contempt of court, it will be harder to avoid answering the questions that both the district court and the Supreme Court have ordered the government to answer.

Without direct testimony, the government's wordplay will just continue. On Sunday, a Department of Homeland Security official submitted a declaration that stated that although Abrego García had been sent to El Salvador in violation of the 2019 court order, the official now understands that Abrego García could not benefit from that order "because of his membership in MS-13 which is now a designated foreign terrorist organization."

MS-13 was declared a foreign terrorist organization in late February. The government contends that Abrego García is a member of the gang but it has provided no current evidence for that claim. He was given no opportunity to contest the allegation before being flown out of the country. Is the government now claiming that it need not "facilitate" Abrego García's return — as directed by the Supreme Court — because it has determined he is a member of an organization newly deemed a foreign terrorist organization?

We don't know the answer to that question, either, because no explanation has been given.

What readers are saying

The comments express strong criticism of the Trump administration's handling of Kilmar Abrego Garcia's deportation, highlighting concerns about violations of international law and the U.S. Constitution. Many commenters accuse the administration of authoritarian behavior, defying... [Show more](#)

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Opinion

What Alito got right in his El Salvador case dissent

Deportation cases prove that Americans want due process under law.

April 25, 2025

By Mary B. McCord

Mary B. McCord is the executive director of Georgetown Law School's Institute for Constitutional Advocacy and Protection, a former acting assistant attorney general for national security, and a longtime federal prosecutor.

Critically, on the fundamental point, Justice Samuel A. Alito Jr. did not dissent.

When Americans are so profoundly divided about so much, it appears there's still one thing we agree on: Before the government deprives someone of "life, liberty, or property," it must provide what the Fifth Amendment requires: due process of law.

That's what all nine Supreme Court justices agreed on when they ruled on April 7 that Venezuelans detained under the president's Alien Enemies Act proclamation may not be flown out of the country to a foreign prison without the government first giving them notice "within a reasonable time and in such a manner" that they can challenge their removal in court.

It's why the court issued an emergency ruling in the middle of the night last week — after the American Civil Liberties Union petitioned the court to intervene as Venezuelans detained in Texas were being bussed by federal agents to the airport — directing the government not to remove them "until further order of this Court."

And it's why Alito, joined by Justice Clarence Thomas in dissenting from that April 19 decision, nevertheless agreed that "the Executive must proceed under the terms of our order" from April 7.

That is, the Trump administration must provide due process of law.

Or, as J. Harvie Wilkinson III, a judge on the U.S. Court of Appeals for the 4th Circuit, put it in a related ruling: Residents of this country should not be "stash[ed] away ... in foreign prisons without the semblance of due process that is the foundation of our constitutional order."

Wilkinson, an appointee of President Ronald Reagan, was writing on April 17 for the appellate panel that upheld a district court's order requiring U.S. officials to answer written questions, provide documents and testify under oath to determine what the government is doing to comply with the Supreme Court's April 10 directive to "facilitate" Kilmar Abrego García's release from custody in El Salvador. The high court also told the Trump Justice Department to ensure that Abrego García's case is handled "as it would have been" had he not been improperly deported.

When the justices spoke of handling his case "as it would have been," they were referring to providing Abrego García with the due process he deserved.

With its origins in the Magna Carta of 1215, due process is core to the rule of law in the United States. It requires not only notice and an opportunity to adjudicate rights and responsibilities before competent, independent judges, but also that the government (as well as judges) act in accordance with the law, not in violation of it. In this way, there is stability, predictability and, most of all, fairness.

Or as Alito put it: "Both the Executive and the Judiciary have an obligation to follow the law."

The due process clause in the Fifth Amendment is what protected Donald Trump when he was charged with criminal offenses. He wasn't just declared guilty by the government and locked in prison without the opportunity to contest the charges. But due process doesn't protect only those charged with crimes. It protects people such as Abrego García and the Venezuelans the government labels terrorists to get them out of the country. It protects the law firms that have been blacklisted by Trump from being deprived of their ability to pursue their profession. It protects universities such as Harvard from having federal funds cut off without following the procedures the law requires.

The due process clause exists to provide *all* of us our day in court. Challengers don't always win — maybe the federal government will be able to prove that some of those it seeks to deport are members of terrorist gangs and therefore deportable. But at least the accused would have had what the Constitution ensures: a fair shot at justice.

As Wilkinson wrote in Abrego García's case, "If today the Executive claims the right to deport without due process and in disregard of court orders, what assurance will there be tomorrow that it will not deport American citizens and then disclaim responsibility to bring them home?"

Though Americans differ greatly on immigration policy, we should all be able to agree that no one here should be deprived of life, liberty or property without due process of law — if not because of the importance of the rule of law, then at least out of self-interest.

What readers are saying

The comments reflect a strong consensus on the importance of due process, with many expressing concern over the Trump administration's disregard for it, particularly in deportation cases. There is significant criticism of Justice Alito, with commenters arguing that his actions... [Show more](#)

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