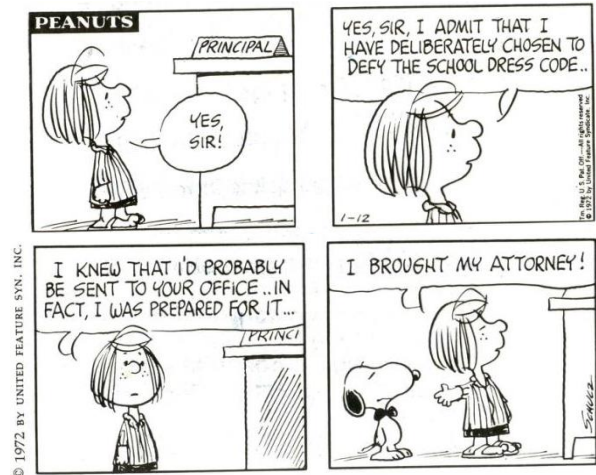


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Due Process for illegal immigrants: complex and chaotic

Steve Bakke  June 8, 2025



- From our Constitution's Amendment V: **No person shall be.....deprived of life, liberty, or property, without due process of law.....**
- From Amendment XIV, Section 1: **No state shall.....deprive any person of life, liberty, or property, without due process of law.....**

Those two virtually identical provisions mean, literally, that everybody, citizen or non-citizen, whether or not that non-citizen is legally in the U.S. - everybody is entitled to "due process of law." No less than Justice Antonin Scalia, writing for the Supreme Court in 1993 stated, "It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.

That's where clarity and simplicity end. Due process, or "rules and principles of fair review," can be different for every category of immigration violation and deportation proceeding. First, I will provide a very brief "layman's explanation" of what "due process of law" means when dealing with non-citizens, whether in the U.S. legally or illegally.

After four years of uncontrolled border entry, with few illegal entries having completed processing (or "due process" if you prefer). More than 10,000,000 undocumented immigrants illegally crossed our southern border during that time period.

We are a nation divided about how to deal with the millions of recent illegal crossings. Many have never been identified. Many of those who are identified have merely been assigned an "appearance date." And now, illegal immigrants who have never been thoroughly processed, which is most of them, are clamoring for a full-blown trials before deportation. They are supported in this effort by many "progressive" Americans.

Our judicial system was never designed for that, and while there are laws and rules, each category of "person" qualifies for a different definition of "due diligence." Many provisions of the Constitution apply to citizens and non-citizens such as freedom of speech, freedom of religion, and due process equal protection, but how they play out in practice is complex and often inconsistent because every case is different.

The Constitution does not guarantee a traditional trial for illegal immigration cases. And an immigration judge may not even be involved. Individuals are entitled to notices and have the right to be heard. Of course what constitutes these rights varies in practice because

every case seems to define its own process. For example, asylum cases are unique because there is a judge and the right of appeal.

A civil immigration proceeding for “removal” will have different “rights” than in a criminal proceeding. For example, the right to council isn’t available, rules of evidence differ, there’s no presumption of innocence, and hearsay evidence may be accepted. The “unalienable right” preventing unreasonable searches and seizures actually applies, however, in practice there’s also a “border search exception.” Courts have established that border searches aren’t considered “unreasonable.”

We have a process of “expedited removal.” Low level immigration officers can summarily enforce this without a “hearing.” This is part of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act. Briefly, it was intended to be applicable to non-citizen categories who either lack the proper entry documents or who seek or have sought entry through fraud or misrepresentation. However, “in actual practice,” its application can vary significantly.

Habeas corpus is a process whereby individuals can challenge in court the legality of their detention. The administration has mentioned the possibility of suspending habeas corpus. The Constitution states that habeas corpus “shall not be suspended, unless when, in cases of rebellion or invasion,” public safety requires it. Congress would have to authorize this, so it’s not likely this would be used.

Obviously, confusion and chaos seem to surround due process for immigration issues, largely due to the millions of recent illegal immigrant border crossings. The complexity, inconsistent application, and myriad of “levels of protection,” invited the Trump administration to test the boundaries on the relevant rules, laws, and real-world practices for this area of law. This issue is important, and the law and responsibilities must be clarified. Trumps actions will help get this done.

Anyone who thinks we can deport anything close to a majority of undocumented immigrants is kidding themselves. The President has to figure out the most reasonable way to proceed – and I think he’s trying. We must remember, those suffering from the “Trump Derangement Syndrome” are making it as hard as possible for this task to be accomplished. Trump’s enemies want his actions to look like a foolish waste of time.

Policy pundit Hugh Hewitt suggests we follow a process of aggressive pursuit of true criminals. And for non-criminals, establish a compromise solution for undocumented immigrants who would be productive residents if given a chance. Hewitt refers to this as “border hawk /regularization dove” policies. Hewitt believes this would be good policy and great politics. I’m inclined to agree with him.

Getting control of the border will solve much of this problem. But that won’t end the philosophical and political battle. We’re a divided country and once one “derangement syndrome” eventually runs out of steam, another is certain to replace it.