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Trump's Immigration Policy: Borderline Unconstitutional

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As of 2013, there are currently over 11 million undocumented immigrants in the United States (<http://www.pewhispanic.org/2013/01/29/a-nation-of-immigrants/>). In an interview (<http://www.cnn.com/2015/07/29/politics/donald-trump-immigration-plan-healthcare-flip-flop/index.html>) with CNN's Dana Bash, Trump said that if he were elected President, he would deport all undocumented immigrants, and then allow the "really good people" to re-enter the country through an expedited process. However, those "really good people" would not be recognized as citizens.

Mass deportation of all undocumented immigrants would take about 20 years and cost an estimated \$500 billion (<http://www.theatlantic.com/politics/archive/2015/03/the-conservative-case-against-enforcing-immigration-laws/387004/>). This includes the cost of all the police, judges, lawyers, enforcement agencies and transportation needed to find and deport 11 million people – but it does not include the cost of bringing back the "really good people."

However, the biggest question arising from Trump's plan is not the costs associated with it, but rather the constitutionality of the plan.

There is a basic constitutional understanding that the United States has broad power to protect its borders, to decide who may enter its territory, what people who enter can do while inside its borders, and how long those people may be allowed to stay.

Accordingly, the Trump Plan raises three interconnected issues: 1) which branch (if any) would have the authority to order the deportation of 11 million people; 2) does the deportation of 11 million people violate the Due Process Clause; and 3) if the plan splits up families with American-born children, would the American-born children be deported with their parents?

Which Branch Can Order the Deportation of 11 Million People?

Congress is the legislative branch and decides most issues by passing laws. The executive branch, led by the President, has very wide discretion in deciding how to enforce those laws. The judicial branch, consisting of federal district courts and ultimately the U.S. Supreme Court (the highest court in the land), can issue rulings that decide disputes, such as the question of which branch is ultimately responsible for immigration policy.

In 2014, President Obama issued an executive order that overhauled the nation's deportation policy (<https://www.washingtonpost.com/news/wonk/wp/2014/11/19/your-complete-guide-to-obamas-immigration-order/>). The executive order lifted the threat of deportation of more than 4 million illegal immigrants and was directed at people with no criminal record, whose children were U.S. citizens. However, lower courts blocked President Obama's executive action after twenty-six Republican-governed states sued to stop it, claiming he exceeded his presidential powers under the U.S. Constitution.

Trump has already publically stated that if he became President, he would create a "deportation force" that would go door-to-door looking for undocumented immigrants (<http://www.msnbc.com/morning-joe/watch/theres-going-to-be-a-trump-wall-564264515912>).

Trump has also laid out an immigration plan that calls for a nationwide system to verify workers' legal status (tripling the number of immigration and customs enforcement agents) and implements a tracking system to identify people who overstay their visas.

Donald Trump has yet to specify how he plans to execute his immigration plan. However, one thing is for sure: if he plans on utilizing an executive action to deport 11 million people, he will face similar push-back from those who believe he is exceeding his presidential power.

The Due Process Clause Applies to Illegal Immigrants and Requires a Hearing and Appeal

Although the federal government has broad power in protecting the nation's borders, neither the legislative or executive branch may violate the due process clause when deporting individuals – even if those individuals are undocumented.

The Fifth and Fourteenth Amendments to the U.S. Constitution each contain a due process clause (https://www.law.cornell.edu/wex/due_process). The due process clause states that federal or state governments may not take an individual's "life, liberty, or property" without due process of law.

While undocumented immigrants do not enjoy all of the rights granted to U.S. citizens by the Constitution – for example the right to vote – courts have ruled that, while they are within the borders of the United States, undocumented immigrants are granted the same fundamental constitutional rights granted to all Americans. In 2001, the U.S. Supreme Court ruled in *Zadvydas v. Davis* (<https://supreme.justia.com/cases/federal/us/533/678/case.html>) that the due process clause of the 14th Amendment applies to all undocumented immigrants in the United States whose presence is "unlawful, involuntary or transitory." This means that each and every one of the over 11 million undocumented immigrants Donald Trump wants to deport has the right to a hearing (and possibly an appeal) before they are ever deported.

Furthermore, even if Trump can identify every undocumented immigrant in this country, it would cost taxpayers millions of dollars to pay for all of the legal fees necessary to properly give every undocumented immigrant a fair trial. Moreover, attempting to deport large quantities of undocumented immigrants, without due process, would not only be blatantly unconstitutional – it would raise countless humanitarian issues as well.

Issue of Deportation of American-Born Children

Donald Trump has repeatedly vowed to end President Obama's deportation-relief policies for parents of American-born children. "We're going to keep families together, but they have to go," said Trump (<https://www.youtube.com/watch?v=eeY-FFU4MI4>). This effectively means that Trump is advocating for the abolishment of birthright citizenship and the deportation of children who are U.S. citizens.

"Birthright citizenship" is a principle stemming from the 14th Amendment (<https://www.law.cornell.edu/constitution/amendmentxiv>) of the U.S. Constitution; it refers to the idea that children of undocumented immigrants, born within the geographical limits of the U.S., are automatically entitled to American citizenship.

In other words: if a child is born in the United States, they are an American citizen, regardless of whether or not their parents are American citizens.

However, some have suggested (<https://www.aclu.org/frequently-asked-questions-defending-citizenship-under-14th-amendment-us-constitution>) that the 14th Amendment's phrase, "and subject to the jurisdiction thereof," is open to re-interpretation. State lawmakers across the country have even gone as far as to present legislation that claims the U.S. does not have jurisdiction over U.S.-born children of undocumented immigrants.

These attempts lack legal foundation. The U.S. Supreme Court decidedly addressed this issue in the landmark decision of *U.S. v. Wong Kim Ark*. (<http://caselaw.findlaw.com/us-supreme-court/169/649.html>) In *Ark*, the court held that a baby born in San Francisco, California to Chinese parents (who at the time were not permitted to naturalize as U.S. citizens) became a U.S. citizen at the time of his birth.

That case unambiguously defined the 14th amendment as it relates to citizenship, and it has been settled law for over 100 years. Moreover, the Supreme Court has since affirmed the understanding that undocumented immigrants are in fact "subject to the jurisdiction" of the United States under the 14th Amendment (<https://www.aclu.org/frequently-asked-questions-defending-citizenship-under-14th-amendment-us-constitution>).

Therefore, if Trump wants to take away a firmly established right of citizenship, he would have to amend the Constitution first.

The federal government's policy on immigration has risen to the top of the political and constitutional agenda, and over the next year, the nation will watch it develop. Donald Trump's plans for immigration reform have been revered by some for being refreshingly honest, and criticized by others for being prejudicial and impractical.

Only time will tell whether Trump will be elected to represent the Republican Party in the 2016 General Election. And only time will tell whether his plans – some of which are currently unconstitutional – will be ever be executed.

Tags: [14th Amendment](#), [birthright citizenship](#), [Constitution](#), [democrat](#), [deportation](#), [Donald Trump](#), [Due Process](#), [general election](#), [immigration](#), [primary](#), [republican](#)

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