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Legal Sidebar

# *J.G.G. v. Trump*: Supreme Court's Initial Review of Actions Taken Under the Alien Enemy Act

April 28, 2025

On February 20, 2025, the Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury, designated several international cartels as foreign terrorist organizations (FTOs), including the organization known as Tren de Aragua ("TdA"), as directed by Executive Order 14157, issued on January 20, 2025. President Trump subsequently invoked the Alien Enemy Act (also called the Alien Enemies Act) of 1798 (AEA), declaring that the TdA "is perpetrating, attempting, and threatening an invasion or predatory incursion against the territory of the United States." The proclamation claims that the group has infiltrated the United States and is conducting irregular warfare and other hostile actions in the country. It directs that "all Venezuelan citizens 14 years of age or older who are members of TdA, are within the United States, and are not actually naturalized or lawful permanent residents of the United States are liable to be apprehended, restrained, secured, and removed as Alien Enemies."

On March 15, 2025, five Venezuelans in immigration detention filed a lawsuit challenging their potential removal, arguing, among other things, that the AEA does not provide the President with the authority to remove individuals from the United States based on the circumstances described in the proclamation. The court issued a temporary restraining order enjoining for 14 days the removal of the five Venezuelans who are parties to the litigation and then expanded the order to certify the class of Venezuelans who are detained and potentially removable under the proclamation. The government appealed both orders and asked for an emergency stay pending appeal at the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit), contesting venue and asserting that it is likely to prevail on the merits, as described below.

A divided panel of the D.C. Circuit denied the stay of the temporary injunction, but the Supreme Court granted the government's application for an emergency stay and vacated the district court's order, holding that the petitioners may seek relief only by petitioning for habeas corpus in the district where they are detained.

This Legal Sidebar discusses the litigation, captioned *J.G.G. v. Trump*, with a focus on the government's argument that the United States is experiencing an "invasion" within the meaning of the AEA. For more information about historical application of the Act, see Legal Sidebar LSB11269, The Alien Enemy Act: History and Potential Use to Remove Members of International Criminal Cartels.

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LSB11295

## The AEA and Invasions by Foreign Powers

Unless Congress declares war, the President can invoke the AEA upon his determination and proclamation that a foreign nation or government is conducting or threatening an "invasion or predatory incursion" into the territory of the United States. Upon such a public proclamation, the government is authorized to detain all citizens and nationals of the "hostile nation or government" age 14 and above or remove those who are denied permission to remain and do not depart of their own accord in accordance with regulations promulgated for that purpose. Unless alien enemies are suspected of engaging in hostilities, the AEA requires that they be given adequate opportunity to settle their affairs prior to departure as stipulated in any treaty with the hostile nation or government or, if none, such time as the President deems "consistent with the public safety, and according to the dictates of humanity and national hospitality." Courts have held that the Act is an exercise of the war power and rests on the presumption that persons with allegiance to hostile governments pose a threat to the national security of the United States.

### The Current Described Invasion and Precedent

President Trump has issued a number of executive documents referencing the situation at the southern border as an "invasion." Although the Supreme Court has not directly addressed whether the unlawful entrance or presence of any alien may be treated as an "invasion" for purposes of the AEA, lower courts have rejected as non-justiciable states' invocation of the Invasion Clause (a part of the Guarantee Clause that provides that the federal government is responsible for protecting the states against invasion) as a way to claim a right to receive federal assistance to manage the number of aliens within their territories. Some of these courts also expressed skepticism that "invasion" for purposes of the Invasion Clause means anything other than hostile military invasion. Other lower courts have found unpersuasive the argument that a state has the right to engage in war pursuant to Article I, Section 10, clause 3, to defend against an "invasion" lodged by transnational cartel members or by an "influx of illegal crossings." A district court in Texas rejected Texas's contention that its immigration enforcement efforts amounted to engaging in war.

### Tren de Aragua as a Foreign Invader

The March 2025 proclamation asserts that TdA has infiltrated the Maduro government and is associated with regime-sponsored narco-terrorists. TdA, according to the proclamation, is conducting hostile activities and irregular warfare in the United States both directly and under the direction of the Maduro regime. Further, the proclamation states, transnational criminal organizations have gained control over sufficient territory in Venezuela to bring about a "hybrid criminal state" that is "perpetrating an invasion of and predatory incursion into the United States." Accordingly, the proclamation finds that an invasion or predatory incursion against U.S. territory is occurring and that, because TdA members are "chargeable with hostility," they will not be accorded the opportunity under the AEA to depart voluntarily. Further, the proclamation provides that any property associated with the group's hostile activities is subject to forfeiture.

In the government's appeal of the temporary restraining order enjoining removal of Venezuelan nationals as alien enemies, the government argues that the determination of an invasion for purposes of the AEA belongs exclusively to the President and that the district court's order impinges on the President's inherent Article II power. The government further asserts that the connections between TdA and the government of Venezuela are sufficient to make targeting the group's activities valid as against a "foreign nation or government" because TdA and Venezuela are "intertwined" for purposes of the AEA, and, in the alternative, the group controls sufficient territory to make it a "criminal *government*" (emphasis in

original). If TdA is not deemed a government, the government contends that TdA's designation as an FTO shows that it is the type of non-state actor the United States has historically targeted with its war powers.

Conceding that "invasion" may ordinarily connote a *military* invasion, the government suggests that a broader definition may be appropriate in this circumstance to establish that TdA is "perpetrating an invasion or a predatory incursion into the United States":

> An invasion is "[a]n intrusion or unwelcome incursion of some kind; esp., the hostile or forcible encroachment on another's rights," or "[t]he arrival somewhere of people or things who are not wanted there." Nor is there any requirement that the purposes of the incursion be to possess or hold territory of the invaded country. ... [TdA members'] illegal entry into and continued unlawful presence in the United States is an "unwelcome intrusion" of a foreign-government-linked entity that additionally entails hostile acts that are contrary to the rights of U.S. citizens to be free from criminality and violence.

In the alternative, the government urges that TdA's activities amount to a "predatory incursion" because any entry into the country contrary to the interests or laws of the United States may be described as such, similar to the raids from Mexico into Texas that occurred in the 1840s. In the government's interpretation, TdA, by "trafficking in substances and people, committing violent crimes, and conducting business that benefits a foreign government whose interests are antithetical to the United States" is engaged in a predatory incursion.

The D.C. Circuit denied the government's request for a stay of the district court's temporary restraining order pending appeal. Those panel members did not issue an opinion on the merits, but in finding that the plaintiffs are likely to prevail, two panel members cast doubt on the government's suggested definition of "invasion" or "predatory incursion" by a foreign power. The court further rejected the government's contention that actions taken pursuant to the AEA are unreviewable. One judge dissented on the basis that alien enemy challenges should be brought as habeas petitions in the district where the petitioners are detained, which would mean the case should have been filed in Texas.

The government's interpretation of the AEA as set forth in the *J.G.G.* case suggests that the Administration believes that Congress, by delegating authority to the President to proclaim an invasion or predatory incursion by a foreign country, intended that the law be available outside of actual wartime as an alternative to ordinary immigration procedures, at least where a national security rationale is asserted. The government's suggested definition of "invasion"—an "unwelcome incursion" or "arrival somewhere of people or things who are not wanted there"—and the suggestion that criminal activity is "hostile" or amounts to "irregular warfare," if conducted by an FTO, appear to be novel interpretations.

## *Trump v. J.G.G.* before Supreme Court

The government appealed the D.C. Circuit's denial of its request for a stay of the temporary restraining order to the Supreme Court on March 28, 2025. In seeking an immediate stay and vacatur of the district court's orders, the government emphasizes TdA's designation as an FTO and the President's determination that thousands of its members "have illegally 'infiltrated' the country" to destabilize the United States on behalf of the Maduro regime. In detaining designated TdA members "identified through a rigorous process" and immediately removing them by plane to El Salvador, the government states in its application for a stay that the President exercised his Article II power and statutory authority under the AEA to "protect the country against TdA members engaged in a campaign of terror, murder, and kidnapping, aimed at destabilizing our country." The brief further states that the President deemed these measures "imperative to prevent" TdA from posing a threat both in U.S. detention facilities and U.S. communities. The United States, according to its application, "has an overwhelming interest in removing these foreign actors whom the President has identified as engaging in 'irregular warfare' and 'hostile actions against the United States.'"

In support of the President's determinations, the government cites an Interpol announcement from November 2024 reporting the arrest in Tennessee of a "high-ranking [TdA] fugitive," apparently wanted for crimes committed in Venezuela. The government does not provide any examples of hostile acts or crimes committed in the United States attributable to TdA members but relies on the FTO designation and the President's determination. While the government notes that other means for removing TdA members are available, it states the AEA offers a "particularly expeditious, statutorily authorized removal method for individuals found to present serious national-security threats under specified circumstances."

Plaintiffs contend that the government is not harmed by the restraining order, which does not order any alleged TdA members released or prevent their removal under proceedings outlined in the Immigration and Nationality Act. They call the government's asserted harm based on potential interference with sensitive intergovernmental negotiations and the plaintiffs' alleged threat to national security conclusory and speculative. Plaintiffs argue that the equities favor them instead, because the restraining order is the only thing that prevents their summary removal to a high security prison in El Salvador with no opportunity to contest their status. They also dispute that the process for identifying TdA members is "rigorous," pointing to an Alien Enemy Validation Guide that permits an immigration officer to assign points for allegedly gang-related tattoos, social media posts, certain financial transactions, and hand gestures. Arrests and convictions are also considered, but designation as a TdA member does not require them and can be met with symbolism factors, which the plaintiffs argue are frequently misconstrued such that an innocuous tattoo can serve as a TdA signifier. The plaintiffs contest the government's assertion that cases under the AEA may be brought only as habeas petitions, arguing that theirs is not a "core" habeas claim and may be challenged through other means. Finally, the plaintiffs contend that the government's interpretation of the AEA—in particular the existence of an "invasion" by a "foreign nation or government" that is "against the territory of the United States"—is unlikely to prevail.

The government filed its reply brief on April 2, 2025, stating that the government does not contest that designated alien enemies have a right to challenge their designation but that they must do so by petitioning for habeas in the proper venue.

Without addressing the merits of the case or examining equities such as potential irreparable harm, five Justices found in favor of the government and, in a per curiam opinion, vacated the district court's temporary restraining orders. All nine justices agreed that aliens whom the government seeks to remove as alien enemies are entitled to notice and an adequate opportunity to challenge their status in court. The majority determined that those confined and found to be removable under the AEA may have their challenges heard but only in habeas proceedings brought in the district where the alien is detained. Justice Sotomayor, joined by Justices Kagan and Jackson (and joined in part by Justice Barrett), dissented, protesting the majority's establishment of a new rule requiring challenges under the AEA to be brought as habeas petitions with little consideration of the harm plaintiffs will suffer because of the disruption of their claims. She observed that the United States is not at war with Venezuela, nor is TdA a "foreign nation," and described the government's initial efforts in this matter as an attempt "to skirt both the requirements of the Act and the Constitution's guarantee of due process." She warned: "To the extent the Government removes even one individual without affording him notice and a meaningful opportunity to file and pursue habeas relief, it does so in direct contravention of an edict by the United States Supreme Court." Justice Jackson wrote a separate dissent, arguing that the majority was embarking on a "casual, inequitable, and ... inappropriate" use of the Court's non-merits docket (sometimes called the "shadow" docket) to decide "complex and monumental issues."

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