
STONY BROOK UNIVERSITY UNDERGRADUATE LAW REVIEW

VOLUME I

SPRING 2025

ISSUE I



ARTICLES

***J.G.G. v. Trump* and the Separation of Powers Doctrine:
Permissible or Impermissible
Judicial Intrusion Into the Executive Branch's
Constitutional and Statutory Powers?**

Robert A. Alessi, Esq.

**A Struggle for Power:
The Imperial Presidency vs. Independent Agencies**

Constantine Viennas

**President Obama and the AUMF:
A Tale of an Unbounded Executive and the Veil of Legality**

TJ Coffino

STONY BROOK UNIVERSITY UNDERGRADUATE LAW REVIEW

SPRING 2025



Edited by The Undergraduate Law Review at Stony Brook University

www.ulrsbu.org

LETTER FROM THE EDITOR-IN-CHIEF

VOL. 1

SPRING 2025

NO. 1

Dear Reader,

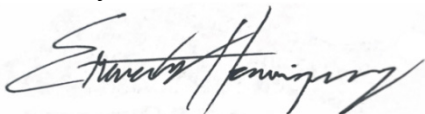
It is my great honor and pleasure to present the inaugural issue of the *Stony Brook Undergraduate Law Review*. When I started this club in September of 2024, I did not anticipate how quickly it would grow into the intellectually engaged community it is today. The ULR is a space where driven students gather to engage seriously with the law, challenge ideas, and shape discourse. After gaining official recognition in January, we went straight to work, accomplishing a great deal in a short amount of time. This issue is the product of the extraordinary commitment of our team, who have set the standard that will guide this organization for years to come. The work we present reflects both an ambitious first effort and an ongoing learning process. We consider our capabilities to be evolving, and this project has served as a practice run that allowed us to explore what must be improved.

The articles in this review are primarily centered around a very timely theme: the separation of powers and the expanding scope of executive authority. The volume opens with a contribution from Stony Brook professor and practicing attorney Robert Alessi, Esq. His piece offers a thoughtful legal analysis of *J.G.G. v. Trump*, a case that raises foundational questions about judicial intervention in executive matters like immigration and national security. Given the recent and ongoing nature of legal developments, it should be noted that this piece was submitted on May 1st, 2025.

Constantine Viennas follows with an examination of growing presidential control over independent regulatory agencies. By analyzing recent executive orders and the unitary executive theory, he highlights how these developments increasingly strain both precedent and congressional oversight. Finally, TJ Coffino offers a commentary that turns to the Authorization for Use of Military Force (AUMF), arguing that President Obama's interpretation of the statute reveals how legal frameworks that appear to constrain executive power can, in practice, enable its unchecked expansion.

After casting a wide net for submissions, we edited each article through multiple drafts and received feedback from faculty and legal professionals to ensure quality. Our editors and staff worked hard to fact-check and enforce Bluebook standards wherever possible while trying their best to push for clarity and effective legal reasoning at every stage. The result is a publication that reflects not only the talent of our writers but also the seriousness of our editorial team. I extend my sincere thanks to our editorial committee, executive board, writers, general staff, Gillian Farnan, and the legal professionals who generously shared their advice. The fact that we achieved so much in such a short amount of time is a testament to the potential of this organization. I am sure that the Undergraduate Law Review will remain committed to being the foremost beacon for legal scholarship on campus, and without further ado, I invite you to read our first issue.

Sincerely,



Ernesto Henriquez
Editor-in-Chief

TABLE OF CONTENTS

VOL. 1

SPRING 2025

NO. 1

<i>J.G.G. v. Trump</i> and the Separation of Powers Doctrine: Permissible or Impermissible Judicial Intrusion Into the Executive Branch’s Constitutional and Statutory Powers? <i>Robert A. Alessi, Esq.</i>	1
A Struggle for Power: The Imperial Presidency vs. Independent Agencies <i>Constantine Viennas</i>	63
President Obama and the AUMF: A Tale of an Unbound Executive and the Veil of Legality <i>TJ Coffino</i>	77

MASTHEAD

VOL. 1

SPRING 2025

NO. 1

EXECUTIVE BOARD

Ernesto Henriquez
Editor-in-Chief

Brian Chen
Managing Editor

Dashley Concepcion
Secretary

Saniya Lopez
Treasurer

Maryam Elfeky
Outreach Director

EDITORIAL COMMITTEE

Vincent Aloe
Executive Editor

Emma Hanham
Executive Editor

Shada Hussein Al-Alfy
Executive Editor

Emma Li
Executive Editor

Edwin Luis
Layout Editor

GENERAL STAFF

Gianni Garofola
Elene Kenchadze

Lucas Kelly

Valery Marquez

Nicole Miraglia

Neena Mir

Tuilaepa Katoanga

Pinzhuo Xu

Gillian Farnan
Faculty Advisor

INFORMATION

VOL. 1

SPRING 2025

NO. 1

Mission

The purpose of The Undergraduate Law Review at Stony Brook University is to foster legal scholarship and writing within the campus community. Managed entirely by students, our organization aims to provide an open platform for intellectual discussion on social issues, encouraging essays containing all viewpoints related to the field of law.

Submissions

The Undergraduate Law Review at Stony Brook University encourages submissions of a wide range of topics grounded in legal foundations. More info on specific guidelines can be found on our website at www.ulrsbu.org.

The views and opinions expressed in the articles published in The Undergraduate Law Review at Stony Brook University are those of the individual authors and do not necessarily reflect the official policy or position of the editorial committee, Stony Brook University, or any affiliated institutions. Although every effort has been made to ensure the accuracy of the information presented, The Undergraduate Law Review cannot accept any responsibility regarding the completeness, perfection, or currency of the content.

The articles featured in this journal were submitted on or before May 1, 2025. All rights to the original works remain with the authors unless otherwise noted.

For any issues, contact Lawreviewsbu@gmail.com

***J.G.G. v. Trump* and the Separation of Powers Doctrine: Permissible or Impermissible Judicial Intrusion Into the Executive Branch's Constitutional and Statutory Powers?**

By Robert A. Alessi, Esq.¹

INTRODUCTION

Over the past decade or so, the legal community has witnessed a remarkable increase in the number of cases in which federal judges have issued "nationwide" or "universal" injunctions and other rulings constraining the actual or contemplated exercise of power by the Executive Branch.² Notwithstanding the recent handwringing by some elected officials and

¹ Mr. Alessi is a partner at a law firm based in Long Island and New York City, specializing in, among other practice areas, constitutional law; commercial litigation at the pretrial, trial and appellate stages; government investigations; internal investigations and corporate governance matters. He is the Chair of his firm's Crisis Management, Investigations & Constitutional Law Practice Group and a partner in the firm's Litigation Practice Group. Mr. Alessi also serves as an Adjunct Professor in the Stony Brook University Department of Political Science, where he teaches, among other courses, *The Erosion of Civil Liberties & Privacy Rights*; *Civil Liberties & Civil Rights*; *Federal Government Power: Constitutional, Legal and Political Limitations*; *Introduction To Torts*; and *Pretrial, Trial & Appellate Practice*. (Mr. Alessi extends his gratitude to Domenique Masi for her invaluable assistance in the cite-checking of this article.)

² See, e.g., Joanna R. Lampe, "Nationwide Injunctions From January 20, 2025, Through March 27, 2025," CONG. RSCH. SERV., R48467, at 1 (Mar. 28, 2025), accessible at <https://www.congress.gov/crs-product/R48476> ("As of February 2020, the Department of Justice had identified 12 nationwide injunctions issued during the presidency of George W. Bush, 19 issued during Barack Obama's presidency, and 55 such injunctions issued during the first Trump Administration up to that point. In April 2024, the *Harvard Law Review* published an article with counts of nationwide injunctions through 2023 [*see District Court Reform: Nationwide Injunctions*, 137 HARV.L.REV. 1701 (2024)]. With respect to the four most recent presidential Administrations, the article identified six

commentators, many of these injunctions have been the product of well-reasoned judicial analysis.

However, recently we have witnessed federal judges venturing more and more boldly into areas and activities — such as foreign affairs, immigration and national security — that have long been considered core functions of the President and his or her cabinet members. Against the backdrop of the separation of powers doctrine, this article explores a pending putative class action lawsuit captioned *J.G.G. v. Trump*, now known as *J.A.V. v. Trump*,³ in which the United States District Court for the District of Columbia purported to enjoin the Executive Branch from engaging in contemplated national security and immigration-related conduct and to compel the Executive Branch to rescind certain decisions and actions that it had already made or executed in these areas.

The author recognizes that attempting to analyze and evaluate these dynamic constitutional issues in real time, through the lens of a frenetic, evolving pending lawsuit, is a precarious undertaking. Accelerated briefing, new factual developments and the issuance of

nationwide injunctions issued under the George W. Bush Administration, 12 under the Obama Administration, 64 under the first Trump Administration, and 14 from the first three years of the Biden Administration. A March 2025 CRS report identified 86 nationwide injunction cases from the first Trump Administration and 28 from the Biden Administration. This CRS [Congressional Research Service] report identifies [17] nationwide injunctions issued during the second Trump Administration between January 20, 2025, and March 27, 2025.").

³ The case was filed initially as *J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C. Mar. 15, 2025). By Order of the Supreme Court, dated April 7, 2025, the case was transferred to the United States District Court for the Southern District of Texas, the venue in which the plaintiffs are confined, where the lawsuit is captioned, *J.A.V. v. Trump*, No. 1:25-cv-00072 (S.D. Tex. Apr. 9, 2025). Unless otherwise noted, this lawsuit, in both its District of the District of Columbia and Southern District of Texas iterations, is referred to hereinafter simply as the "***J.G.G. Lawsuit***."

expedited judicial decisions can easily eclipse such an analysis, denying the author adequate time in which to step back and reflect more fully upon the issues. With this important caveat, the author proceeds humbly.⁴

I.

THE RESPECTIVE ROLES OF THE EXECUTIVE AND JUDICIAL BRANCHES UNDER THE SEPARATION OF POWERS DOCTRINE

A. Judicial Power: Generally

For Montesquieu, whose separation of powers doctrine was warmly embraced by the drafters of our Constitution, the Judicial Branch would naturally become the frail step-sister of the Legislative Branch and the Executive Branch. Montesquieu wrote: "Of the three powers above mentioned [legislative, executive and judicial], the judiciary is, in some measure, next to nothing."⁵

In defending the inchoate Constitution against accusations from the Anti-Federalists (in particular, Brutus, the likely pen name of Robert Yates⁶) that the courts would

⁴ This article addresses certain events and judicial rulings only through May 1, 2025.

⁵ 1 Montesquieu, *SPIRIT OF THE LAWS* at 204 (London: T. Evans, 1777).

⁶ *See, e.g.*, "Robert Yates," HISTORICAL SOCIETY OF THE NEW YORK COURTS, accessible at <https://history.nycourts.gov/figure/robert-yates/>.

accumulate tyrannical power,⁷ Alexander Hamilton assured critics in *Federalist No. 78* that the judiciary would in fact be the weakest of the three branches of the federal government:

This simple view of the matter suggests several important consequences. ***It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks.*** It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.' And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.⁸

Alas, of course, the exercise of power by the federal judiciary has far surpassed the limited role envisioned by the Framers and even Chief Justice Marshall's articulation of judicial review in *Marbury v. Madison*.⁹

⁷ Brutus XII (Feb. 7, 1788); Brutus XIII (Feb. 21, 1788) in THE COMPLETE ANTI-FEDERALIST at 422-25, 428-31 (Herbert J. Storing ed., University of Chicago Press 1998).

⁸ Alexander Hamilton, FEDERALIST NO. 78: THE JUDICIARY DEPARTMENT (footnotes omitted; emphasis added).

⁹ 5 U.S. (1 Cranch) 137 (1803).

Focusing upon Fourteenth Amendment jurisprudence in his trailblazing book, *Government By Judiciary*,¹⁰ Raoul Berger addressed the vast expansion of federal judicial power. He asserts that "the [Supreme] Court was not designed to act . . . as a 'continuing constitutional convention,'" but, instead, "the role assigned to it was far more modest: to police the boundaries drawn by the Constitution[.]"¹¹ Berger continued:

A common historic fallacy is to import our twentieth-century conceptions into the minds of the Founders. At the adoption of the Constitution the notion that judges, for example, could *make law* as an instrument of social change was altogether alien to colonial thinking. . . . [Indeed,] . . . fear of judicial discretion had long been part of colonial political rhetoric[.]¹²

Like several other scholars before him, Berger observed that James Madison and others suggested during the Constitutional Convention of 1787 the creation of a "Council of Revision," modeled on that of New York, which would be composed of the President and certain designated members of the judiciary and be vested with the power to review and veto proposed acts of Congress. The proposal was defeated in favor of a Presidential veto, in large measure due to objections to granting judges a policymaking role.¹³

In his dissenting opinion in *West Virginia State Board of Education v. Barnette*,¹⁴ Justice Frankfurter referenced the aborted Council of Revision in admonishing his brethren for

¹⁰ Raoul Berger, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (Liberty Fund, Inc. 2d ed. 1997).

¹¹ *Id.* at 3-4 (internal citation omitted).

¹² *Id.* at 327 (internal quotation omitted).

¹³ *Id.* at 322-26.

¹⁴ 319 U.S. 624 (1943) (Frankfurter, J., dissenting).

what he asserted was their policymaking impulse in striking a West Virginia statute requiring the Pledge of Allegiance to be recited in public schools:

It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law. In the light of all the circumstances, including the history of this question in this Court, it would require more daring than I possess to deny that reasonable legislators could have taken the action which is before us for review. Most unwillingly, therefore, I must differ from my brethren with regard to legislation like this.

* * *

[O]ur function [is not] comparable to that of a legislature, [n]or are we free to act as though we were a super legislature. Judicial self-restraint is equally necessary whenever an exercise of political or legislative power is challenged.

There is no warrant in the constitutional basis of this Court's authority for attributing different roles to it depending upon the nature of the challenge to the legislation. Our power does not vary according to the particular provision of the Bill of Rights which is invoked.

* * *

The framers of the federal Constitution might have chosen to assign an active share in the process of legislation to this Court. They had before them the well known example of New York's Council of Revision, which had been functioning since 1777. After stating that "laws inconsistent with the spirit of this constitution, or with the public good, may be hastily and unadvisedly passed," the state constitution made the judges of New York part of the legislative process by providing that "all bills which have passed the senate and assembly shall, before they become laws," be presented to a Council of which the judges constituted a majority, "for their revisal and consideration." Art. III, New York Constitution of 1777. Judges exercised this legislative function in New York for nearly fifty years. See Art. I, § 12, New York Constitution of 1821. ***But the framers of the Constitution denied such legislative powers to the federal judiciary. They chose instead to insulate the judiciary from the legislative function. They did not grant to this Court supervision over legislation.***¹⁵

In *Youngstown Sheet & Tube Co. v. Sawyer*,¹⁶ the Court held fatally defective President Truman's Executive Order directing the seizure of private steel mills in response to an

¹⁵ *Id.* at 647-50 (emphasis added).

¹⁶ 343 U.S. 579 (1952).

impending labor strike at those plants during the Korean War on the ground that the President was unable to identify an underlying constitutional or federal statutory grant of authority upon which his Executive Order was based. Justice Robert Jackson's concurring opinion articulated a tripartite analysis for evaluating the exercise of Executive Branch power under the separation of powers doctrine, while reminding the judiciary of its need to steer clear of political, policy or personality considerations in addressing such power.

In urging a holistic approach to the evaluation of the constitutionality of Presidential power, Justice Jackson explained:

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.

1. ***When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty.*** If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test

of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.¹⁷

Having formerly served as United States Solicitor General and then United States Attorney General in the administration of President Franklin Delano Roosevelt, Justice Jackson cautioned the judiciary to focus carefully upon the question at hand, eschewing shortsighted policy considerations or dislike of the current occupant of the office, when called upon to evaluate the exercise of Presidential Power:

The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote, of confounding the permanent executive office with its temporary occupant. The tendency is strong to emphasize transient results upon policies . . . and lose sight of enduring consequences upon the balanced power structure of our Republic.¹⁸

B. Executive Power Over Foreign Affairs, National Security and Immigration

Although his statement has since received a bit of scholarly and judicial refinement, then member of the House of Representatives John Marshall, who would later become Chief Justice of the United States, asserted sweepingly in a March 7, 1800 speech on the

¹⁷ *Id.* at 635-38 (emphasis added; internal citation omitted) (Jackson, J., concurring). The Court has endorsed Justice Jackson's three-pronged approach to evaluating the exercise of Presidential power. *See, e.g., Zivotofsky v. Kerry*, 576 U.S. 1, 2 (2015).

¹⁸ *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring).

House floor that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."¹⁹

Similarly, a February 15, 1816 report by the United States Senate Committee on Foreign Relations concluded:

The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations, and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee consider this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility, and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.²⁰

The Supreme Court has long recognized that the power of the Executive Branch is generally strongest in the related areas, among others, of national security, foreign affairs and immigration. In *United States v. Curtiss-Wright Export Corp.*,²¹ the Court explained:

It is quite apparent that if, in the maintenance of our international relations, embarrassment — perhaps serious embarrassment — is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time

¹⁹ 10 ANNALS OF CONG. 613 (1800). See, e.g., *Zivotofsky*, 576 U.S. at 21 ("*Curtiss-Wright* did not hold that the President is free from Congress' lawmaking power in the field of international relations. The President does have a unique role in communicating with foreign governments, as then-Congressman John Marshall acknowledged. . . . But whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law.").

²⁰ 8 U.S. S. Comm. Foreign Rels., S. Rep. at 24 (Feb. 15, 1816).

²¹ 299 U.S. 304 (1936).

of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty — a refusal the wisdom of which was recognized by the House itself, and has never since been doubted.²²

Two centuries later, in 2004, just a few years after the coordinated September 11, 2001 terrorist attacks upon the United States, the Court addressed in *Hamdi v. United States*²³ the detention of an American citizen as an enemy combatant at an American detention facility located in Guantanamo Bay. Although holding that "due process demands that a citizen held in the United States as an enemy combatant [must] be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker,"²⁴ the Court acknowledged "the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States. . . . Without doubt, our Constitution recognizes that core strategic matters of warring belong in the hands of those who are best positioned and most politically accountable for making them."²⁵

²² *Id.* at 320 (emphasis added). The *Curtiss-Wright* Court cited with approval both John Marshall's 1800 speech on the House floor and the Senate Committee on Foreign Relations' February 15, 1816 report. *See id.* at 319.

²³ 542 U.S. 507 (2004).

²⁴ *Id.* at 509.

²⁵ *Id.* at 531. *See also Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988) (courts are reluctant "to intrude upon the authority of the Executive in military and national security affairs").

In striking Arizona's immigration-related statutes in 2012, the Supreme Court, in *Arizona v. United States*,²⁶ left no doubt that the federal government controls immigration policy, including the decisions to deny foreign nationals access to the United States and to deport illegal aliens. It is the duty, of course, of the President to take care that such federal immigration laws are faithfully executed.²⁷ The *Arizona* Court explained:

The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. . . . This authority rests, in part, on the National Government's constitutional power to "establish [a] uniform Rule of Naturalization," U.S. Const., Art. I, § 8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations. . . .

The federal power to determine immigration policy is well settled. Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation. . . .

* * *

Federal governance of immigration and alien status is extensive and complex. Congress has specified categories of aliens who may not be admitted to the United States. See 8 U.S.C. § 1182. Unlawful entry and unlawful reentry into the country are federal offenses. §§ 1325, 1326. Once here, aliens are required to register with the Federal Government and to carry proof of status on their person. See §§1301–1306. Failure to do so is a federal misdemeanor. §§ 1304(e), 1306(a). Federal law also authorizes States to deny noncitizens a range of public benefits, § 1622; and it imposes sanctions on employers who hire unauthorized workers, §1324a. ***Congress has specified which aliens may be removed from the United States and the procedures for doing so.*** Aliens may be removed if they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law. See § 1227. Removal is a civil, not criminal, matter. ***A principal feature of the removal system is the broad discretion exercised by immigration officials.*** . . .

* * *

Some discretionary decisions involve policy choices that bear on this Nation's international relations. . . . ***The dynamic nature of relations with other***

²⁶ 567 U.S. 387 (2012).

²⁷ U.S. CONST., art. II, § 3 (the President "shall take Care that the Laws be faithfully executed").

*countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy[.]*²⁸

The Supreme Court also considered the Executive Branch's exercise of foreign policy-related power in *Zivotofsky*,²⁹ a case in which the Court was called upon to decide the constitutionality of a federal statute that directed the U.S. Secretary of State, upon the request of a United States citizen born in Jerusalem or the legal guardian thereof, to record the place of birth as Israel. In striking the statute as an unconstitutional infringement upon the President's power under the Reception Clause to formally "receive Ambassadors and other public Ministers," and thus recognize a foreign state,³⁰ the *Zivotofsky* Court reasoned:

The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue. . . . It is not for the President alone to determine the whole content of the Nation's foreign policy.

That said, judicial precedent and historical practice teach that it is for the President alone to make the specific decision of what foreign power he will recognize as legitimate, both for the Nation as a whole and for the purpose of making his own position clear within the context of recognition in discussions and negotiations with foreign nations. Recognition is an act with immediate and powerful significance for international relations, so the President's position must be clear. Congress cannot require him to contradict his own statement regarding a determination of formal recognition.³¹

In *Trump v. Hawaii*,³² the Supreme Court addressed the constitutionality of President Trump's September 2017 Proclamation suspending the entry into the United States of

²⁸ *United States v. Arizona*, 567 U.S. at 394-96 (emphasis added).

²⁹ 576 U.S. 1 (2015).

³⁰ U.S. CONST. art. II, § 3.

³¹ *Zivotofsky*, 576 U.S. at 21.

³² 585 U.S. 667 (2018).

nationals of certain countries that failed to share with the United States adequate information upon which the United States could make an informed terrorism-focused entry determination or that otherwise presented national security risks (the "**September 2017 Immigration Proclamation**").³³ The September 2017 Immigration Proclamation relied upon the President's Article II powers under the Constitution, as well as sweeping grants of authority provided to the President under the federal immigration statutes:

[B]y the authority vested in me by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(f) and 1185(a), and section 301 of title 3, United States Code, hereby find that, absent the measures set forth in this proclamation, the immigrant and nonimmigrant entry into the United States of persons described in section 2 of this proclamation would be detrimental to the interests of the United States, and that their entry should be subject to certain restrictions, limitations, and exceptions.³⁴

Title 8, Section 1182(f) of the United States Code (the Immigration and Nationality Act (the "*INA*")) provides, in part: "***Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.***"³⁵

³³ *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*, Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 27, 2017).

³⁴ *Id.*, 82 Fed. Reg. at 45161-62.

³⁵ 8 U.S.C. § 1182(f) (emphasis added).

Title 8, Section 1185(a)(1) of the United States Code (the INA) provides: "***Unless otherwise ordered by the President, it shall be unlawful . . . for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe[.]***"³⁶

The September 2017 Immigration Proclamation set forth the Executive Branch's policy as follows:

It is the policy of the United States to protect its citizens from terrorist attacks and other public-safety threats. Screening and vetting protocols and procedures associated with visa adjudications and other immigration processes play a critical role in implementing that policy. They enhance our ability to detect foreign nationals who may commit, aid, or support acts of terrorism, or otherwise pose a safety threat, and they aid our efforts to prevent such individuals from entering the United States.

* * *

After reviewing the Secretary of Homeland Security's report of September 15, 2017, and accounting for the foreign policy, national security, and counterterrorism objectives of the United States, I have determined to restrict and limit the entry of nationals of 7 countries found to be "inadequate" with respect to the baseline [screening and vetting protocols] described in subsection (c) of this section: Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen.³⁷

In upholding the President's September 2017 Immigration Proclamation, the Court observed that past Presidents had also acted under the broad inherent and statutory powers accorded the President in the realm of immigration and national security:

Presidents have repeatedly suspended entry not because the covered nationals themselves engaged in harmful acts but instead to retaliate for conduct by their governments that conflicted with U.S. foreign policy interests. See, e.g., Exec.

³⁶ 8 U.S.C. § 1185(a)(1) (emphasis added).

³⁷ *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*, Presidential Proclamation No. 9645, 82 Fed. Reg. 45161, 45162, 45164 (Sept. 27, 2017).

Order No. 13662, 3 CFR 233 (2014) (President Obama) (suspending entry of Russian nationals working in the financial services, energy, mining, engineering, or defense sectors, in light of the Russian Federation's "annexation of Crimea and its use of force in Ukraine"); Presidential Proclamation No. 6958, 3 CFR 133 (1997) (President Clinton) (suspending entry of Sudanese governmental and military personnel, citing "foreign policy interests of the United States" based on Sudan's refusal to comply with United Nations resolution). *And while some of these reprisals were directed at subsets of aliens from the countries at issue, others broadly suspended entry on the basis of nationality due to ongoing diplomatic disputes. For example, President Reagan invoked §1182(f) to suspend entry "as immigrants" by almost all Cuban nationals, to apply pressure on the Cuban Government.* Presidential Proclamation No. 5517, 3 CFR 102 (1986).³⁸

II.

THE FEDERAL INJUNCTION

Rule 65 of the Federal Rules of Civil Procedure empowers a federal court, as part of its equitable power, to issue a temporary restraining order and/or a preliminary (as opposed to permanent) injunction. The Supreme Court has established a four-part test that a plaintiff must satisfy in seeking the entry of a preliminary injunction: "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."³⁹

³⁸ *Trump v. Hawaii*, 585 U.S. 667, 693 (2018) (emphasis added).

³⁹ *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (internal citation omitted). See also *Starbucks Corp. v. McKinney*, 602 U.S. 339, 339 (2024) (applying the *Winter* four-factor preliminary injunction standard to requests by the National Labor Relations Board for preliminary injunctive relief under the National Labor Relations Act).

An important protection imposed by Rule 65 in favor of the enjoined party is the requirement that the plaintiff seeking an injunction post security to compensate the restrained or enjoined party in the event it is ultimately determined that the injunctive relief was wrongfully granted. Rule 65(c) provides: "The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security."⁴⁰

The Supreme Court has emphasized the extraordinary nature of an injunction, reminding the judiciary that: "***A preliminary injunction is an extraordinary remedy never awarded as of right.*** In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. ***In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.***"⁴¹

Although *Youngstown*,⁴² as noted, invalidated President Truman's Executive Order because it lacked a viable constitutional or federal statutory basis, Justice Frankfurter's concurring opinion nevertheless reminded the judiciary of the limited role of the federal courts, including in connection with the entry of injunctive relief:

The Framers, however, did not make the judiciary the overseer of our government. They were familiar with the revisory functions entrusted to judges in a few of the States, and refused to lodge such powers in this Court. . . .
Rigorous adherence to the narrow scope of the judicial function is especially

⁴⁰ Fed. R. Civ. P. 65(c).

⁴¹ *Winter*, 555 U.S. at 24 (internal quotation marks and citations omitted; emphasis added).

⁴² 343 U.S. 579 (1952).

demanded in controversies that arouse appeals to the Constitution. The attitude with which this Court must approach its duty when confronted with such issues is precisely the opposite of that normally manifested by the general public.

* * *

The path of duty for this Court, it bears repetition, lies in the opposite direction. Due regard for the implications of the distribution of powers in our Constitution and for the nature of the judicial process as the ultimate authority in interpreting the Constitution, has not only confined the Court within the narrow domain of appropriate adjudication. . . . It ought to be, but apparently is not, a matter of common understanding that clashes between different branches of the government should be avoided if a legal ground of less explosive potentialities is properly available. Constitutional adjudications are apt, by exposing differences, to exacerbate them.

So here, our first inquiry must be not into the powers of the President, but into the powers of a District Judge to issue a temporary injunction in the circumstances of this case. Familiar as that remedy is, it remains an extraordinary remedy.

* * *

*Again, a court of equity ought not to issue an injunction, even though a plaintiff otherwise makes out a case for it, if the plaintiff's right to an injunction is overborne by a commanding public interest against it.*⁴³

Justice Thomas has long expressed serious concerns about the issuance of federal injunctions that purport to prohibit Executive Branch action not just in the district or circuit in which the court sits, but across the entire nation. Justice Thomas explained:

Injunctions that prohibit the Executive Branch from applying a law or policy against anyone — often called "universal" or "nationwide" injunctions — have become increasingly common. District courts, including the one here, have begun imposing universal injunctions without considering their authority to grant such sweeping relief. *These injunctions are beginning to take a toll on the federal court system — preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch. I am skeptical that district courts have the authority to enter universal injunctions. These injunctions did not emerge until a century and a half after the founding. And they appear to be inconsistent with longstanding limits on*

⁴³ *Id.* at 593-96 (emphasis added) (Frankfurter, J., concurring).

*equitable relief and the power of Article III courts. If their popularity continues, this Court must address their legality.*⁴⁴

III.

THE EXECUTIVE BRANCH'S RECENT NATIONAL SECURITY FINDINGS, DECLARATIONS AND ACTIONS THAT HAVE SPAWNED PENDING LITIGATION SEEKING INJUNCTIVE RELIEF

It is against the foregoing background that the examination of the J.G.G. Lawsuit must be undertaken. However, to fully appreciate the breadth of the current insertion by the federal judiciary into the Executive Branch's national security/immigration prerogatives, it is necessary to first understand the nature of the Executive Branch policy decisions at issue in the J.G.G. Lawsuit.

A. The Designation of International Cartels, Including Tren de Aragua and MS-13, As Foreign Terrorist Organizations

Upon taking the oath of office for a second term on January 20, 2025, President Trump issued a Presidential Action titled *Designating Cartels and Other Organizations as Foreign*

⁴⁴ *Trump v. Hawaii*, 585 U.S. at 713-14 (emphasis added) (Thomas, J., concurring). *See also Dep't of Homeland Security v. New York*, 140 S. Ct. 599, 600 (2020) ("When a district court orders the government not to enforce a rule against the plaintiffs in the case before it, the court redresses the injury that gives rise to its jurisdiction in the first place. But when a court goes further than that, ordering the government to take (or not take) some action with respect to those who are strangers to the suit, it is hard to see how the court could still be acting in the judicial role of resolving cases and controversies. Injunctions like these thus raise serious questions about the scope of courts' equitable powers under Article III.") (internal citations omitted) (Thomas, J., concurring).

Recently, members of the Senate and the House proposed legislation that would curtail the power of the federal courts to issue nationwide injunctions. *See* S. 1206, 119th Cong. (2025); H.R. 1526, 119th Cong. (2025).

Terrorist Organizations and Specially Designated Global Terrorists (the "**FTO Presidential Action**").⁴⁵ The asserted purpose of the FTO Presidential Action, which was issued "[b]y the authority vested in" President Trump "by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, [and] the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*," was to "create[] a process by which certain international cartels (the Cartels) and other organizations will be designated as Foreign Terrorist Organizations, consistent with section 219 of the INA (8 U.S.C. 1189), or Specially Designated Global Terrorists, consistent with IEEPA (50 U.S.C. 1702) and Executive Order 13224 of September 23, 2001 (Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism), as amended."⁴⁶

The FTO Presidential Action then provides a summary of the threat posed to the United States by international cartels and other transnational organizations, including Tren de Aragua ("*TdA*") and La Mara Salvatrucha ("*MS-13*"):

(a) International cartels constitute a national-security threat beyond that posed by traditional organized crime, with activities encompassing:

- (i) convergence between themselves and a range of extra-hemispheric actors, from designated foreign-terror organizations to antagonistic foreign governments;
- (ii) complex adaptive systems, characteristic of entities engaged in insurgency and asymmetric warfare; and
- (iii) infiltration into foreign governments across the Western Hemisphere.

The Cartels have engaged in a campaign of violence and terror throughout the Western Hemisphere that has not only destabilized countries with significant importance for our national interests but also flooded the United States with deadly drugs, violent criminals, and vicious gangs.

⁴⁵ Exec. Order No. 14157, 90 Fed. Reg. 8439 (Jan. 29, 2025).

⁴⁶ *Id.*

The Cartels functionally control, through a campaign of assassination, terror, rape, and brute force nearly all illegal traffic across the southern border of the United States. In certain portions of Mexico, they function as quasi-governmental entities, controlling nearly all aspects of society. The Cartels' activities threaten the safety of the American people, the security of the United States, and the stability of the international order in the Western Hemisphere. Their activities, proximity to, and incursions into the physical territory of the United States pose an unacceptable national security risk to the United States.

(b) Other transnational organizations, such as Tren de Aragua (TdA) and La Mara Salvatrucha (MS-13) pose similar threats to the United States. Their campaigns of violence and terror in the United States and internationally are extraordinarily violent, vicious, and similarly threaten the stability of the international order in the Western Hemisphere.

(c) The Cartels and other transnational organizations, such as TdA and MS-13, operate both within and outside the United States. They present an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States. I hereby declare a national emergency, under IEEPA, to deal with those threats.⁴⁷

The FTO Presidential Action sets forth the policy of the federal government in dealing with the Cartels, TdA and MS-13 and directs the Secretary of State and other Executive Branch departments to make certain recommendations to advance said policy:

It is the policy of the United States to ensure the total elimination of these organizations' presence in the United States and their ability to threaten the territory, safety, and security of the United States through their extraterritorial command-and-control structures, thereby protecting the American people and the territorial integrity of the United States.

Within 14 days of the date of this order, the Secretary of State shall take all appropriate action, in consultation with the Secretary of the Treasury, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence, to make a recommendation regarding the designation of any cartel or other organization described in section 1 of this order as a Foreign Terrorist Organization consistent with 8 U.S.C. 1189 and/or a Specially Designated Global Terrorist consistent with 50 U.S.C. 1702 and Executive Order 13224.

Within 14 days of the date of this order, the Attorney General and the Secretary of Homeland Security shall take all appropriate action, in consultation with the

⁴⁷ *Id.* (emphasis added).

*Secretary of State, to make operational preparations regarding the implementation of any decision I make to invoke the Alien Enemies Act [also referred to hereinafter as the "AEA"], 50 U.S.C. 21 et seq., in relation to the existence of any qualifying invasion or predatory incursion against the territory of the United States by a qualifying actor, and to prepare such facilities as necessary to expedite the removal of those who may be designated under this order.*⁴⁸

Pursuant to the FTO Presidential Action, the Department of State announced on February 20, 2025 its *Designation of International Cartels* (the "**State Department FTO Designation**").⁴⁹ The State Department FTO Designation, declaring that "[t]he United States remains committed to protecting our nation, the American people, and our hemisphere by stopping the campaigns of violence and terror committed by international cartels and transnational organizations[,]" announced "the designation of Tren de Aragua (TdA), Mara Salvatrucha (MS-13), Cártel de Sinaloa, Cártel de Jalisco Nueva Generación (CJNG), Cártel del Noreste (CDN), La Nueva Familia Michoacana (LNFM), Cártel de Golfo (CDG), and Cárteles Unidos (CU) as Foreign Terrorist Organizations (FTOs) and Specially Designated Global Terrorists (SDGTs)."⁵⁰

The State Department FTO Designation addressed the threat posed by each of the organizations, summarizing the TdA and MS-13 threats as follows:

TdA is a transnational organization that originated in Venezuela with cells in Colombia, Peru, and Chile, with further reports of sporadic presence in Ecuador, Bolivia, and Brazil. This brutal criminal group has conducted kidnappings,

⁴⁸ *Id.* at 8439-40 (emphasis added).

⁴⁹ Public Notice No. 12672, 90 Fed. Reg. 1003 (Feb. 19, 2025).

⁵⁰ Press Release, U.S. Dep't of State, Designation of International Cartels (Feb. 20, 2025), accessible at <https://www.state.gov/designation-of-international-cartels/>.

extorted businesses, bribed public officials, authorized its members to attack and kill U.S. law enforcement, and assassinated a Venezuelan opposition figure.

MS-13 is a transnational organization that originated in Los Angeles but shifted to Central America as individuals were deported there from the United States. MS-13 actively recruits, organizes, and spreads violence in several countries, primarily in Central America and North America, including El Salvador, Honduras, Guatemala, Mexico, and the United States. MS-13 has conducted numerous violent attacks, including assassination and the use of IEDs [improvised explosive devices] and drones, against El Salvador government officials and facilities. Additionally, MS-13 uses public displays of violence to intimidate civilian populations to obtain and control territory and manipulate the electoral process in El Salvador.⁵¹

The process through which an organization is ultimately designated Foreign Terrorist Organization is as follows: "If the Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury, decides to make the designation, Congress is notified of the Secretary's intent to designate the organization and given seven days to review the designation, as the INA [Immigration and Nationality Act] requires. Upon the expiration of the seven-day waiting period and in the absence of Congressional action to block the designation, notice of the designation is published in the Federal Register, at which point the designation takes effect. By law an organization designated as an FTO may seek judicial review of the designation in the United States Court of Appeals for the District of Columbia Circuit not later than 30 days after the designation is published in the Federal Register."⁵²

The State Department's designation of TdA and MS-13 as foreign terrorist organizations, or FTOs, carries significant consequences:

⁵¹ *Id.*

⁵² U.S. Dep't of State, *Foreign Terrorist Organizations*, accessible at <https://www.state.gov/foreign-terrorist-organizations/>.

It is unlawful for a person in the United States or subject to the jurisdiction of the United States to knowingly provide "material support or resources" to a designated FTO. . . .

Representatives and members of a designated FTO, if they are aliens, are inadmissible to and, in certain circumstances, removable from the United States (see 8 U.S.C. §§ 1182(a)(3)(B)(i)(IV)-(V), 1227(a)(1)(A)).

Any U.S. financial institution that becomes aware that it has possession of or control over funds in which a designated FTO or its agent has an interest must retain possession of or control over the funds and report the funds to the Office of Foreign Assets Control of the U.S. Department of the Treasury.⁵³

B. Presidential Invocation of the Alien Enemies Act

On March 15, 2025, President Trump issued a Proclamation titled *Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren de Aragua* (the "**TdA Proclamation**").⁵⁴ The TdA Proclamation states, in part:

Tren de Aragua (TdA) is a designated Foreign Terrorist Organization with thousands of members, many of whom have unlawfully infiltrated the United States and are conducting irregular warfare and undertaking hostile actions against the United States. TdA operates in conjunction with Cártel de los Soles, the Nicolas Maduro regime-sponsored, narco-terrorism enterprise based in Venezuela, and commits brutal crimes, including murders, kidnappings, extortions, and human, drug, and weapons trafficking. TdA has engaged in and continues to engage in mass illegal migration to the United States to further its objectives of harming United States citizens, undermining public safety, and supporting the Maduro regime's goal of destabilizing democratic nations in the Americas, including the United States.

⁵³ *Id.* (emphasis added). 8 U.S.C. §§ 1182(a)(3)(B)(i)(IV) and (V) render inadmissible to the United States one who "is a representative . . . of . . . a terrorist organization . . . or a political, social, or other group that endorses or espouses terrorist activity; [or] is a member of a terrorist organization described in subclause (I) or (II) of clause (vi)[.]" 8 U.S.C. § 1227(a)(1)(A) provides that "[a]ny alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable."

⁵⁴ *Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren de Aragua*, Proclamation No. 10903, 90 Fed. Reg. 13033 (Mar. 20, 2025).

TdA is closely aligned with, and indeed has infiltrated, the Maduro regime, including its military and law enforcement apparatus. TdA grew significantly while Tareck El Aissami served as governor of Aragua between 2012 and 2017. In 2017, El Aissami was appointed as Vice President of Venezuela. Soon thereafter, the United States Department of the Treasury designated El Aissami as a Specially Designated Narcotics Trafficker under the Foreign Narcotics Kingpin Designation Act, 21 U.S.C. 1901 et seq. El Aissami is currently a United States fugitive facing charges arising from his violations of United States sanctions triggered by his Department of the Treasury designation.

Like El Aissami, Nicolas Maduro, who claims to act as Venezuela's President and asserts control over the security forces and other authorities in Venezuela, also maintains close ties to regime-sponsored narco-terrorists. Maduro leads the regime-sponsored enterprise Cártel de los Soles, which coordinates with and relies on TdA and other organizations to carry out its objective of using illegal narcotics as a weapon to "flood" the United States. In 2020, Maduro and other regime members were charged with narcoterrorism and other crimes in connection with this plot against America.

Over the years, Venezuelan national and local authorities have ceded ever-greater control over their territories to transnational criminal organizations, including TdA. The result is a hybrid criminal state that is perpetrating an invasion of and predatory incursion into the United States, and which poses a substantial danger to the United States. Indeed, in December 2024, INTERPOL Washington confirmed: "Tren de Aragua has emerged as a significant threat to the United States as it infiltrates migration flows from Venezuela." Evidence irrefutably demonstrates that TdA has invaded the United States and continues to invade, attempt to invade, and threaten to invade the country; perpetrated irregular warfare within the country; and used drug trafficking as a weapon against our citizens.⁵⁵

The Alien Enemies Act of 1798 that was invoked by the TdA Proclamation provides as follows:

Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to

⁵⁵ *Id.* (emphasis added).

direct the conduct to be observed on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety.⁵⁶

Chief Justice Marshall observed in *Brown v. United States* that the Alien Enemies Act "confers on the president very great discretionary powers respecting their persons[.]"⁵⁷

After identifying the perceived threat from TdA, which is asserted to be operating as an arm of the Venezuelan government, the TdA Proclamation makes the following findings and issues related directives:

I find and declare that TdA is perpetrating, attempting, and threatening an invasion or predatory incursion against the territory of the United States. TdA is undertaking hostile actions and conducting irregular warfare against the territory of the United States both directly and at the direction, clandestine or otherwise, of the Maduro regime in Venezuela. ***I make these findings using the full extent of my authority to conduct the Nation's foreign affairs under the Constitution. Based on these findings, and by the authority vested in me by the Constitution and the laws of the United States of America, including 50 U.S.C. 21, I proclaim 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. I further find and declare that all such members of TdA are, by virtue of their membership in that organization, chargeable with actual hostility against the United States and are therefore ineligible for the benefits of 50 U.S.C. 22. I further find and declare that all such members of TdA are a danger to the public peace or safety of the United States.***⁵⁸

⁵⁶ Alien Enemies Act of 1798, 50 U.S.C. § 21 (emphasis added).

⁵⁷ *Brown v. United States*, 12 U.S. (8 Cranch) 110, 126 (1814) (emphasis added).

⁵⁸ *Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren de Aragua*, Proclamation No. 10903, 90 Fed. Reg. 13033, 13034 (Mar. 20, 2025). 50 U.S.C. § 22 provides: "When an alien who becomes liable as an enemy, in the manner prescribed in section 21 of this title, is not chargeable with actual hostility, or other crime

The TdA Proclamation directs the United States Attorney General and the Secretary of Homeland Security, "consistent with applicable law, [to] apprehend, restrain, secure, and remove every Alien Enemy described in section 1 of this proclamation."⁵⁹

The TdA Proclamation provides additional guidelines for implementing the directives contained therein, including the following:

Pursuant to the authority vested in me by the Constitution and the laws of the United States of America, including the Alien Enemies Act, 50 U.S.C. 21 et seq., I hereby declare and establish the following regulations which I find necessary "in the premises and for the public safety":

(a) No Alien Enemy described in section 1 of this proclamation shall enter, attempt to enter, or be found within any territory subject to the jurisdiction of the United States. ***Any such Alien Enemy who enters, attempts to enter, or is found within such territory shall be immediately apprehended and detained until removed from the United States. All such Alien Enemies, wherever found within any territory subject to the jurisdiction of the United States, are subject to summary apprehension.***⁶⁰

against the public safety, he shall be allowed, for the recovery, disposal, and removal of his goods and effects, and for his departure, the full time which is or shall be stipulated by any treaty then in force between the United States and the hostile nation or government of which he is a native citizen, denizen, or subject; and where no such treaty exists, or is in force, the President may ascertain and declare such reasonable time as may be consistent with the public safety, and according to the dictates of humanity and national hospitality."

⁵⁹ *Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren de Aragua*, Proclamation No. 10903, 90 Fed. Reg. 13033, 13035 (Mar. 20, 2025).

⁶⁰ *Id.* (emphasis added). The Alien Enemies Act provides: "The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety." 50 U.S.C. § 21.

To ensure that the federal judiciary was placed on actual notice of the Executive Branch policy toward TdA, the TdA Proclamation directed the Attorney General "to prepare and publish a letter under her signature declaring the policy described in section 1 of this proclamation as the policy of the United States and attaching this proclamation. *I direct the Attorney General to transmit this letter to the Chief Justice of the United States, the chief judge of every circuit court of appeals, the chief judge of every district and territorial court of the United States, each Governor of a State and territory of the United States, and the highest-ranking judicial officer of each State and territory of the United States.*"⁶¹

IV.

THE *J.G.G.* LAWSUIT

While the J.G.G. Lawsuit is not the only such case currently pending before the federal judiciary, it raises certain important questions worthy of discussion.⁶² Again, because this case continues to evolve on an expedited basis, the following necessarily constitutes an

⁶¹ *Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren de Aragua*, Proclamation No. 10903, 90 Fed. Reg. 13033, 13034 (Mar. 20, 2025).

⁶² Among the several other currently pending cases in which the respective plaintiffs seek relief in response to the Executive Branch's invocation of its purported constitutional and statutory authority to detain and deport foreign nationals whom it asserts pose national security risks are the following: *Abrego Garcia v. Noem*, No. 8:25-cv-00951-PX (D. Md.); *Khalil v. Joyce*, No. 1:25-cv-01935-JMF (S.D.N.Y.), *transferred to the U.S. District Court for the District of New Jersey*, No. 2:25-cv-19063-MEF-MAH (D.N.J.); *W.M.M. v. Trump*, No. 1:25-cv-00059-JWH (N.D. Tex.) (referenced as *A.A.R.P. v. Trump* in the Supreme Court's April 19, 2025 Order addressed below).

interim snapshot that may be further shaped by subsequent court rulings and/or governmental actions.

A. The Plaintiffs' Claims

On March 15, 2025, the day on which the President issued his TdA Proclamation, five Texas-based plaintiff-petitioners (using pseudonyms) filed the J.G.G. Lawsuit as a putative class action against, among others, the President, the United States Secretary of State, the United States Attorney General and the Secretary of the United States Department of Homeland Security arising out of the then anticipated TdA Proclamation. The lawsuit was assigned to Chief Judge James E. Boasberg.

The plaintiffs asserted that the Alien Enemies Act cannot be used by the Executive Branch to remove them and therefore sought injunctive relief and a writ of *habeas corpus* (translated from the Latin as "you have the body").⁶³ The plaintiffs also allege that the removal procedures employed by the Government are arbitrary and capricious and thus violative of the Administrative Procedure Act (also referred to hereinafter as the "*APA*").⁶⁴

⁶³ See Class Action Complaint and Petition For Writ of Habeas Corpus ¶¶ 9-13, *J.G.G. v. Trump, No. 1:25-cv-00766-JEB (D.D.C.)* (Mar. 15, 2025) (Electronic Case Files ["*ECF*"] No. 1). See U.S. CONST., art. I, § 9, cl. 2 ("[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it"); 28 U.S.C. § 2241(a) ("Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had."); 28 U.S.C. § 2254 (remedies in federal court arising out of state custody). See also *Ex Parte Watkins*, 28 U.S.193, 193 (1830) (Marshall, C.J.) (characterizing a writ of *habeas corpus* as "a writ to liberate an individual from an unlawful imprisonment").

⁶⁴ 5 U.S.C. § 706(2)(A).

The named plaintiffs are Venezuelan nationals who are being detained at the El Valle Detention Center in Texas and, despite seeking a writ of *habeas corpus*, deliberately chose to file their lawsuit in the District of Columbia, which they may well have assumed would be a more plaintiff-friendly forum for a lawsuit against the current administration.⁶⁵ Ultimately, the Supreme Court held that, because the claims did indeed sound in *habeas*, venue was proper only in the Southern District of Texas.⁶⁶

B. Certification of a Plaintiff Class

The Complaint alleges that the named plaintiffs seek to represent a proposed class of "[a]ll noncitizens who were, are, or will be subject to the Alien Enemies Act Proclamation and/or its implementation."⁶⁷ Although the Government asserted at the March 15, 2025 hearing that it "oppose[s] class certification,"⁶⁸ the District Court — without providing the Government an opportunity to brief this critical threshold issue — asserted hastily that it "find[s] that class

⁶⁵ See Class Action Complaint and Petition For Writ of Habeas Corpus ¶¶ 9-13, *J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C.) (ECF No. 1). See also District of Columbia Board of Elections, GENERAL ELECTION 2024 – CERTIFIED RESULTS (last updated Dec. 2, 2024) (in the November 2024 Presidential election, President Trump received only 6.47% of the votes cast in Washington, DC), accessible at https://electionresults.dcboe.org/election_results/2024-General-Election.

⁶⁶ *Trump v. J.G.G.*, 604 U.S. ___ (2025), No. 24A931, Order on application to vacate Orders of the U.S. District Court for the District of Columbia (April 7, 2025) (*per curiam*).

⁶⁷ Class Action Complaint and Petition For Writ of Habeas Corpus ¶ 57, *J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C.) (ECF No. 1).

⁶⁸ *J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C.), Transcript of March 15, 2025 Motion Hearing held via Zoom before Judge Boasberg (ECF No. 20) at 6. Although the plaintiffs had filed a motion seeking class certification (ECF No. 4) on March 15, 2025, the very day on which they filed their Complaint (ECF No. 1) and the court held its 5:00 p.m. hearing, the government had obviously not yet been accorded an opportunity to file an opposition brief.

certification is warranted under Federal Rule of Civil Procedure 23(a) and 23(b)(2)[,]" and then added that "this is a provisional certification only[.]"⁶⁹

Rule 23(a) of the Federal Rules of Civil Procedure requires a court to conduct a careful analysis to determine whether "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class."⁷⁰ If Rule 23(a) is satisfied, a class may be certified under Rule 23(b) only if the court then finds the existence of one of three elements, including, under Rule 23(b)(2), that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]"⁷¹

The Supreme Court has made clear that "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'"⁷² Moreover, it is the burden of the named plaintiff to demonstrate an entitlement to class certification, and, in connection therewith, the trial court is required to conduct an in-depth analysis:

⁶⁹ *J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C.), Transcript of March 15, 2025 Motion Hearing held via Zoom before Judge Boasberg at 23-24 (ECF No. 20).

⁷⁰ Fed. R. Civ. P. 23(a)(1)-(4).

⁷¹ Fed. R. Civ. P. 23(b)(2).

⁷² *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011), quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979).

Rule 23 does not set forth a mere pleading standard. *A party seeking class certification must affirmatively demonstrate his compliance with the Rule* — that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc. . . . *[C]ertification is proper only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied[.]"* . . . *Frequently that "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim.* That cannot be helped. "[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action."⁷³

It is therefore difficult to understand how the District Court in the J.G.G. Lawsuit could have conducted a proper Rule 23 analysis without at least permitting the Government an opportunity to prepare and submit an opposition brief.

C. Pressure on the District Court To Act Immediately

In filing their *Emergency Application For a Temporary Restraining Order*, which the District Court granted, the plaintiffs asserted that, "if Plaintiffs are removed to the custody of another country, this Court will lose jurisdiction."⁷⁴ Given Judge Boasberg's oral directive issued toward the end of the March 15, 2025 hearing that concluded at 6:53 p.m.,⁷⁵ directing the Executive Branch to turn around a plane carrying certain alleged TdA members who were in the

⁷³ *Id.* at 350-51 (certain internal quotation marks omitted; non-bolded italicized emphasis in original; bolded italicized emphasis added).

⁷⁴ *J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C.), Emergency Application for a Temporary Restraining Order (ECF No. 3) at 1 (underscored emphasis in original). *See also J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C.), Transcript of March 15, 2025 Motion Hearing held via Zoom before Judge Boasberg (ECF No. 20) at 12 (counsel for plaintiffs asserted: "Our understanding from people on the ground, from different sources, is that planes are going right now taking Venezuelans to El Salvador and may be ending up in a Salvadoran prison[, which will] . . . divest this Court of jurisdiction[.]").

⁷⁵ *J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C.), Transcript of March 15, 2025 Motion Hearing held via Zoom before Judge Boasberg (ECF No. 20) at 47.

process of being removed to El Salvador (on or about March 8, 2025, Venezuela had suspended for two weeks its acceptance of Venezuelan deportees from the United States⁷⁶), it bears emphasizing that plaintiffs' counsel acknowledged that the Executive Branch's removal of the Venezuelan nationals to another country would result in the court's "**permanently losing jurisdiction.**"⁷⁷ Judge Boasberg agreed, stating that, if the Government planes had "already landed and discharged their occupants, aside from the five [named] plaintiffs [whose removal the court] enjoined earlier, . . . *I don't have jurisdiction to require their return.*"⁷⁸

After conceding that the request for *habeas* relief made the plaintiffs' application for a TRO "a reasonably close question" and that he had to rule on the request "with essentially 40 minutes' notice" because information about the Government's impending and in-progress

⁷⁶ See, e.g., Ewan Palmer, "Venezuela to Accept US Deportees in Win for Donald Trump," NEWSWEEK (Mar. 23, 2025), accessible at <https://www.newsweek.com/venezuela-resume-flights-us-deportations-trump-2049232>.

⁷⁷ *J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C.), Emergency Application for a Temporary Restraining Order (ECF No. 3) at 1 (boldface emphasis in original).

⁷⁸ *J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C.), Transcript of March 15, 2025 Motion Hearing held via Zoom before Judge Boasberg (ECF No. 20) at 44 (emphasis added). The District Court eventually commenced contempt proceedings against the Government on the belief that the Government violated the court's March 15, 2025 TRO by refusing to order the return of the Government planes transporting certain designated TdA members to El Salvador on that date. See *J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C.), ECF Nos. 80-81. An examination of that contempt proceeding is outside the scope of this article. *But cf. In re Providence Journal Co.*, 820 F.2d 1342, 1347 (1st Cir. 1986) (While the Collateral Bar Rule requires a party to obey a court Order with which it disagrees and then challenge it, rather than violating it before challenging it, there are exceptions to the rule: "[C]ourt orders are not sacrosanct. An order entered by a court clearly without jurisdiction over the contemnors or the subject matter is not protected by the collateral bar rule. . . . The same principle supports an exception to the collateral bar rule for transparently invalid court orders. Requiring a party subject to such an order to obey or face contempt would give the courts powers far in excess of any authorized by the Constitution or Congress.").

deportation flights to El Salvador had just come to light during the hearing (which was the first time the Government had been able to address the issue, since it had not yet had "an opportunity to brief it"⁷⁹), Judge Boasberg issued an oral TRO toward the end of the March 15, 2025 hearing.⁸⁰

D. The District Court's Temporary Restraining Orders

Having provisionally certified a plaintiff class of "noncitizens who were, are, or will be subject to the AEA proclamation and its implementation,"⁸¹ Judge Boasberg declared that "*a TRO is appropriate for the class members[,]*"⁸² and proceeded to issue the following directive to the Department of Justice attorney before him:

[A]ny [Government] 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.⁸³

⁷⁹ *J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C.), Transcript of March 15, 2025 Motion Hearing held via Zoom before Judge Boasberg (ECF No. 20) at 22.

⁸⁰ *Id.* at 43. *See also J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C.), Memorandum Opinion dated March 24, 2025 (ECF No. 53) at 9 ("[w]hether Plaintiffs could show a likelihood of success on the merits, as required for a TRO, presented novel and nuanced legal issues — issues not easily decipherable in the abbreviated timeframe resulting from the Government's decision to hastily dispatch flights as the legal proceedings were ongoing").

⁸¹ *J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C.), Transcript of March 15, 2025 Motion Hearing held via Zoom before Judge Boasberg (ECF No. 20) at 23.

⁸² *Id.* at 42 (emphasis added).

⁸³ *Id.* at 43 (emphasis added).

Despite the District Court's concession that, if the Government planes were to land in El Salvador and discharge their TdA deportees, the court would not have "jurisdiction to require their return,"⁸⁴ the court asserted the jurisdiction to order the return of any Government plane that was en route to El Salvador. In an extraordinary assertion of power, the District Court — upon learning that Government planes, laden with certain designated TdA members (exclusive of the five named plaintiffs), had taken off from a location outside the District of Columbia headed for El Salvador, a sovereign nation with which the Executive Branch, in advancing the national-security and foreign-policy interests of the United States pursuant to the TdA Proclamation and the Alien Enemies Act, had made detailed arrangements for the acceptance of the deportees — directed the Executive to abort the mission and return the members of the Foreign Terrorist Organization to the United States.

Recall that, in *Curtiss-Wright Export*,⁸⁵ the Supreme Court observed that "[i]t is quite apparent that, if in the maintenance of our international relations, embarrassment — perhaps serious embarrassment — is to be avoided and success for our aims achieved," the President is to be accorded "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war."⁸⁶ Of course, the Judicial Branch does not possess even the foreign-policy expertise and access to sensitive intelligence as does Congress.

⁸⁴ *Id.* at 44 (emphasis added).

⁸⁵ 299 U.S. 304 (1936).

⁸⁶ *Id.* at 320.

The District Court's original March 15, 2025 TRO was memorialized and extended in its March 24, 2025 Memorandum Opinion denying the Government's vacatur motion (the "*March 24, 2025 Opinion*").⁸⁷

As has too often become the norm when plaintiffs seek nationwide injunctions enjoining the Executive Branch, the District Court did not enforce against the plaintiffs in the J.G.G. Lawsuit the bond-posting requirement of the Federal Rules of Civil Procedure, which, as noted, provides: "*The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.*" The United States, its officers, and its agencies are not required to give security."⁸⁸

Just four days before the District Court issued its March 15, 2025 TRO, the President issued an Order addressing the posting of security for federal injunctions against the Executive Branch, which stated, among other things:

In recent weeks, activist organizations fueled by hundreds of millions of dollars in donations and sometimes even Government grants have obtained sweeping injunctions far beyond the scope of relief contemplated by the Federal Rules of

⁸⁷ *J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C.), Memorandum Opinion dated March 24, 2025 (ECF No. 53).

⁸⁸ Fed. R. Civ. P. 65(c). In the J.G.G. Lawsuit, the Government did request that the District Court require the plaintiffs to post security. *See J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C.), Defendants' Opposition To Motion For Preliminary Injunction, dated April 1, 2025 (ECF No. 72), at 32 ("To the extent the Court grants relief to Plaintiffs, Defendants respectfully request that the Court require Plaintiffs to post security for taxpayer funds expended during the pendency of the Court's Order in the event it is later determined that Defendants were wrongfully enjoined. The risk of harm here is not insubstantial and may include the cost of continued detention during the pendency of the injunction of individuals who would otherwise have been removed.")

Civil Procedure, functionally inserting themselves into the executive policy making process and therefore undermining the democratic process.

This anti-democratic takeover is orchestrated by forum-shopping organizations that repeatedly bring meritless suits, used for fundraising and political grandstanding, without any repercussions when they fail. Taxpayers are forced not only to cover the costs of their antics when funding and hiring decisions are enjoined, but must needlessly wait for Government policies they voted for. Moreover, this situation results in the Department of Justice, the Nation's chief law enforcement agency, dedicating substantial resources to fighting frivolous suits instead of defending public safety.

The effective administration of justice in the Federal courts depends on mechanisms that deter frivolous litigation, protect parties from unwarranted costs, and streamline judicial processes. One key mechanism is Federal Rule of Civil Procedure 65(c) (Rule 65(c)), which mandates that a party seeking a preliminary injunction or temporary restraining order (injunction) provide security in an amount that the court considers proper to cover potential costs and damages to the enjoined or restrained party if the injunction is wrongly issued. Consistent enforcement of this rule is critical to ensuring that taxpayers do not foot the bill for costs or damages caused by wrongly issued preliminary relief by activist judges and to achieving the effective administration of justice.

Therefore, it is the policy of the United States to demand that parties seeking injunctions against the Federal Government must cover the costs and damages incurred if the Government is ultimately found to have been wrongfully enjoined or restrained. Federal courts should hold litigants accountable for their misrepresentations and ill-granted injunctions.⁸⁹

(i) The Constitutional and Statutory Authority For the Executive Branch's TdA-Focused Actions

Although the March 24, 2025 Opinion questions the wisdom and viability of the Alien Enemies Act upon which President Trump's TdA Proclamation is based,⁹⁰ the fact is that

⁸⁹ *Ensuring the Enforcement of Federal Rule of Civil Procedure 65(c)*, Daily Comp. Pres. Docs. 2025 DCPD 00336 (Mar. 11, 2025), accessible at <https://www.whitehouse.gov/presidential-actions/2025/03/ensuring-the-enforcement-of-federal-rule-of-civil-procedure-65c/>.

⁹⁰ *See Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren de Aragua*, Proclamation No. 10903, Fed. Reg. 13033 (Mar. 20, 2025), accessible at <https://www.whitehouse.gov/presidential-actions/2025/03/invocation-of-the-alien-enemies-act-regarding-the-invasion-of-the-united-states-by-tren-de-aragua/>; *J.G.G. v.*

the statute remains on the books and, especially when coupled with the President's core Article II powers, provides at least presumptive support for the Executive Branch's deportation of the alleged members of the Foreign Terrorist Organization, TdA. As the March 24, 2025 Opinion itself acknowledges, the U.S. Court of Appeals for the D.C. Circuit has held: "***The Alien Enemy Act is constitutional, both as an exercise of power conferred upon the Federal Government and as a grant of power by the Congress to the President.***"⁹¹

As noted, by adopting the tripartite analysis of Presidential power articulated in Justice Jackson's concurring opinion in *Youngstown*,⁹² the Supreme Court has recognized that Presidential actions pursuant to express and implied grants of congressional power — such as those taken here pursuant to the TdA Proclamation — are the most protected. Justice Jackson explained: "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government, as an undivided whole, lacks power. . . . [T]he burden of persuasion would rest heavily upon any who might attack it."⁹³

Trump, No. 1:25-cv-00766-JEB (D.D.C.), Memorandum Opinion dated March 24, 2025 (ECF No. 53) at 1, 3-5.

⁹¹ *Citizens Protective League v. Clark*, 155 F.2d 290, 293 (D.C. Cir. 1946) (emphasis added). See *J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C.), Memorandum Opinion dated March 24, 2025 (ECF No. 53) at 5. Note that, in older cases, courts referred to the "Alien ***Enemy*** Act," while more recent cases refer to the "Alien ***Enemies*** Act."

⁹² 343 U.S. 579 (1952) (Jackson, J., concurring).

⁹³ *Id.* at 635-37. See *Zivotofsky*, 576 U.S. at 2.

After rejecting the Government's argument that all of the plaintiffs' claims, including their claim under the Administrative Procedure Act, seek *habeas* relief and should therefore have been filed in the Southern District of Texas, where the plaintiffs were detained,⁹⁴ the District Court found that the plaintiffs had demonstrated with respect to their APA claim the requisite likelihood of success on the merits warranting injunctive relief.⁹⁵ Focusing upon the APA claim, the March 24, 2025 Opinion postpones to a later date the determination of several thorny constitutional issues that one might reasonably conclude impact an assessment of the likelihood of plaintiffs' success on the merits of all their claims, including their APA claim: "***In any event, these complicated issues bearing on fundamental questions of Judicial, Congressional, and Executive power need not be settled at this early posture.***"⁹⁶

**(ii) Threshold Justiciability Issues
Under the Political-Question Doctrine**

In *Baker v. Carr*,⁹⁷ the Supreme Court, addressing claims for legislative reapportionment, "consider[ed] the contours of 'political question doctrine[.]'"⁹⁸ In so doing, the Court explained: "We have said that, 'In determining whether a question falls within [the Political-Question Doctrine], the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are

⁹⁴ *J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C.), Memorandum Opinion dated March 24, 2025 (ECF No. 53) at 13-18.

⁹⁵ *Id.* at 29.

⁹⁶ *Id.* at 23 (emphasis added).

⁹⁷ 369 U.S. 186 (1962).

⁹⁸ *Id.* at 210.

dominant considerations.' . . . ***The nonjusticiability of a political question is primarily a function of the separation of powers.***"⁹⁹ The Court summarized the factors to be considered by courts in evaluating the applicability of the Political-Question Doctrine:

Prominent on the surface of any case held to involve a political question is found [1] ***a textually demonstrable constitutional commitment of the issue to a coordinate political department***; or [2] ***a lack of judicially discoverable and manageable standards for resolving it***; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] ***the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government***; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹⁰⁰

The March 24, 2025 Opinion observes that "the Government more fundamentally asserts that the Court has no business intruding into these nonjusticiable political questions."¹⁰¹ Although acknowledging the seriousness of the issue raised by this argument, the District Court nevertheless punted, relegating the resolution of this issue, as well, to some future point in time: "***Given the broad powers the Executive possesses in national security and foreign affairs, this issue is a close call, and one the Court need not resolve today.***"¹⁰²

Ultimately, however, the District Court asserted that, at a later date, it will be empowered to decide whether the defined terms set forth in the Alien Enemies Act can be read to authorize the TdA Proclamation. In responding to the plaintiffs' argument that the TdA

⁹⁹ *Id.* at 210-11.

¹⁰⁰ *Id.* at 217 (emphasis added).

¹⁰¹ *J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C.), Memorandum Opinion dated March 24, 2025 (ECF No. 53) at 19.

¹⁰² *Id.* (emphasis added).

Proclamation is not authorized by the Alien Enemies Act because TdA is not a "foreign nation or government" and its actions do not constitute as "invasion or predatory incursion," as those terms are used in the Act, the District Court stopped short of asserting that, under the Political-Question Doctrine, there are in fact, in the language of *Baker v. Carr*, "judicially discoverable and manageable standards for resolving"¹⁰³ those issues:

[T]his Court is confident that it can — and therefore must, at the appropriate time — construe the terms "nation," "government," "invasion," and "predatory incursion" [as used in the Alien Enemies Act]. . . . While doing so may be no light undertaking, it is a judicial one. ***A harder question is whether, based on those definitions, this or any court would be empowered to decide if the characteristics of Tren de Aragua qualify it as a 'nation' or 'government,' or if its conduct constitutes a 'perpetrated, attempted, or threatened' "invasion" or "predatory incursion." There may be judicially discoverable and manageable criteria that would allow the court to do so.*** In such a scenario, the Executive's view would not be dispositive, but it would be important: its "evaluation of the facts" and "informed judgment" would be afforded significant "respect."¹⁰⁴

In reaching the above conclusion, the District Court had to address *Ludecke v. Watkins*,¹⁰⁵ a case in which the Supreme Court considered the justiciability of the Alien Enemies Act. In July 1945, President Truman directed the removal from the United States of all enemy aliens "deemed by the Attorney General to be dangerous" to the public safety. The Attorney General, in turn, ordered the removal of the petitioner, Ludecke, a German national. Justice Frankfurter, writing for the Court, held that the President's delegated removal of enemy aliens under the Alien Enemies Act was beyond judicial review, writing:

¹⁰³ 369 U.S. 186, 217 (1962).

¹⁰⁴ *J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C.), Memorandum Opinion dated March 24, 2025 (ECF No. 53) at 22 (citation omitted). *See also* Section IV(F), below, addressing the construction of the key terms set forth in the Alien Enemies Act proffered by the Southern District of Texas in *J.A.V. v. Trump*, No. 1:25-cv-00072 (S.D. Tex.).

¹⁰⁵ 335 U.S. 160 (1948).

The very nature of the President's power to order the removal of all enemy aliens rejects the notion that courts may pass judgment upon the exercise of his discretion. This view was expressed by Mr. Justice Iredell shortly after the Act was passed, *Case of Fries*, 9 Fed.Cas. No. 5126, and every judge before whom the question has since come has held that the statute barred judicial review. We would so read the Act if it came before us without the impressive gloss of history.

The power with which Congress vested the President had to be executed by him through others. He provided for the removal of such enemy aliens as were "deemed by the Attorney General" to be dangerous. But such a finding at the President's behest was likewise not to be subjected to the scrutiny of courts. For one thing, removal was contingent not upon a finding that in fact an alien was "dangerous[,]" [which is not a required finding under the Act]. The President was careful to call for the removal of aliens "deemed by the Attorney General to be dangerous." But the short answer is that the Attorney General was the President's voice and conscience. ***A war power of the President not subject to judicial review is not transmuted into a judicially reviewable action because the President chooses to have that power exercised within narrower limits than Congress authorized.***

* * *

"The state of war" may be terminated by treaty or legislation or Presidential proclamation. Whatever the modes, its termination is a political act. Whether and when it would be open to this Court to find that a war, though merely formally kept alive, had in fact ended is a question too fraught with gravity even to be adequately formulated when not compelled.

* * *

It is not for us to question a belief by the President that enemy aliens who were justifiably deemed fit subjects for internment during active hostilities do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come. These are matters of political judgment for which judges have neither technical competence nor official responsibility.

* * *

The [Alien Enemies] Act is almost as old as the Constitution, and it would savor of doctrinaire audacity now to find the statute offensive to some emanation of the Bill of Rights.¹⁰⁶

¹⁰⁶ *Id.* at 160, 164-66, 168-71 (emphasis added). *Cf. Trump v. Hawaii*, 585 U.S. 667, 712 (2018) (Section 1182(f) of the Immigration Nationality Act "does not set forth any judicially enforceable limits that constrain the President. . . . Nor could it, since the President has *inherent* authority to exclude aliens from the country.") (emphasis in original) (Thomas, J., concurring).

The *Ludecke* Court cited favorably to *Lockington v. Smith*,¹⁰⁷ an 1817 decision of what was then called the Circuit Court for the District of Pennsylvania that addressed the Alien Enemies Act. *Lockington*, decided 19 years after the passage of the Alien Enemies Act, left no doubt as to the unfettered discretion accorded the President under the statute. Circuit Justice Washington wrote:

[T]he power of the president under the first section of the law, to establish by his proclamation or other public acts, rules and regulations for apprehending, restraining, securing, and removing alien enemies, under the circumstances stated in that section, *appears to me to be as unlimited as the legislature could make it. He alone is authorized to direct the conduct to be observed on the part of the United States towards such alien enemies, and to prescribe the manner and degree of restraint to which they should be subject; to declare in what cases, and on what terms, their residence should be permitted, and to provide for the removal of those whom he should not permit to remain, in the United States, and who should refuse or neglect to depart; and, to avoid all doubt as to the extent of his power, he is authorised in general and unqualified terms, to establish any regulations which he should think necessary in the premises, and for the public safety.*¹⁰⁸

The *Lockington* court also rejected the suggestion that the President's directives pursuant to the Alien Enemies Act are not self-executing, but instead require judicial intervention:

It is, in the next place contended, that after the president has established such regulations as he may think necessary, the judicial authority must in every instance be resorted to enforce them, and that the marshal can act only under such authority. *Such a construction would, in my opinion, be at variance with the spirit as well as with the letter of the law, the great object of which was to provide for the public safety, by imposing such restraints upon alien enemies, as the chief executive magistrate of the United States might think, necessary, and of which his particular situation enabled him best to judge.*

* * *

¹⁰⁷ 15 Fed. Cas. 758, Case No. 8448 (C.C. D.Pa. 1817), accessible at <https://www.courtlistener.com/opinion/9304179/lockington-v-smith/>.

¹⁰⁸ *Id.* at 760 (emphasis added).

If [the President] is confined to regulations which require the interposition and aid of the judiciary to give them effect, then this restriction of his authority must be deduced by mere construction from expressions as unqualified as the legislature could have used. ***I do not feel myself authorised to impose limits to the authority of the executive magistrate which congress, in the exercise of its constitutional powers, has not seen fit to impose. Nothing in short, can be more clear to my mind, from an attentive consideration of the act in all its parts, than that congress intended to make the judiciary auxiliary to the executive, in effecting the great objects of the law; and that each department was intended to act independently of the other, except that the former was to make the ordinances of the latter, the rule of its decisions.***¹⁰⁹

In attempting to distinguish *Ludecke*, the District Court's March 24, 2025 Opinion narrowed the political questions that the Supreme Court placed off limits to judicial review, suggesting that the Court itself engaged in construction of the Alien Enemies Act.¹¹⁰ In so doing, the District Court seems to have unfairly limited the overarching holding of *Ludecke*, while failing to mention *Lockington*, which *Ludecke* cites favorably.¹¹¹

¹⁰⁹ *Id.* at 761 (emphasis added).

¹¹⁰ *J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C.), Memorandum Opinion dated March 24, 2025 (ECF No. 53) at 21-22.

¹¹¹ The District Court also cited *United States ex rel. Jaegeler v. Carusi*, 342 U.S. 347 (1952) (*per curiam*), in which the Supreme Court held that a Joint Resolution of Congress officially ending the state of war that had existed between the United States and Germany terminated the Executive Branch's power to remove enemy aliens under the Alien Enemies Act. *See J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C.), Memorandum Opinion dated March 24, 2025 (ECF No. 53) at 21. Given its reliance upon said Joint Resolution of Congress, it is difficult to see how the perfunctory *per curiam* decision in *Jaegeler*, which contains no substantive analysis of the Alien Enemies Act, advances the District Court's position in any meaningful way.

See also Section IV(F), below, addressing the Political-Question Doctrine analysis engaged in by the Southern District of Texas in *J.A.V. v. Trump*, No. 1:25-cv-00072 (S.D. Tex.).

(iii) Due Process Under the APA

As noted, the District Court's conclusion that the plaintiffs demonstrated a likelihood of success on the merits rested upon plaintiffs' claim that, under the APA (and the Due Process Clause of the Fifth Amendment), they have a due process right to challenge their designation as members of TdA. The District Court wrote: "The Court holds that they may do so under the APA, and that they may not be removed from the United States until those challenges have been adjudicated. It further holds that all class members must be given the opportunity to challenge their classifications as alien enemies, if they wish to do so, before they may be lawfully removed from the United States pursuant to the [TdA] Proclamation."¹¹²

In support of its APA/due process holding, the District Court cited several cases in which relatively small numbers of individuals were permitted to mount discrete challenges to the Government's enemy designation.¹¹³ However, even if judicial review of the Executive Branch's actions pursuant to the Alien Enemies Act and the TdA Proclamation is required, the cases upon which the District Court relied do not necessarily provide a roadmap for the situation at hand, where the Government has alleged that *thousands* of enemy aliens have invaded the country through its porous southern border over the past few years.¹¹⁴

¹¹² *J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C.), Memorandum Opinion dated March 24, 2025 (ECF No. 53) at 24.

¹¹³ *Id.* at 24-29.

¹¹⁴ *Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren de Aragua*, Proclamation No. 10903, 90 Fed. Reg. 13033 (Mar. 20, 2025) ("***Tren de Aragua (TdA) is a designated Foreign Terrorist Organization with thousands of members, many of whom have unlawfully infiltrated the United States and are conducting irregular warfare and undertaking hostile actions against the United States***") (emphasis added), accessible at <https://www.whitehouse.gov/presidential->

Is there a feasible administrative process pursuant to which each individual taken into custody for deportation as a foreign national member of TdA — each member of the District Court's provisionally certified class of "[a]ll noncitizens who were, are, or will be subject to the Alien Enemies Act Proclamation and/or its implementation"¹¹⁵ — can challenge his designation to "assert[] that he is an American citizen, a lawful permanent resident, or not a member of Tren de Aragua"?¹¹⁶ The District Court acknowledged the challenges and then, as it did with respect to certain other issues addressed above, kicked the can down the road:

Even were agency adjudication to be provided, hard questions would nonetheless remain concerning what deference, if any, the agency's factual determinations should receive from the reviewing court — especially when those determinations themselves would decide the lawful scope of the agency's authority and may implicate constitutional rights. . . .

The Court need not resolve such quandaries today, even though they loom on the horizon.¹¹⁷

actions/2025/03/invocation-of-the-alien-enemies-act-regarding-the-invasion-of-the-united-states-by-tren-de-aragua/. See Press Release, "American Sheriff Alliance Issues Call For Action Against Tren de Aragua," *American Sheriff Alliance* (Aug. 13, 2024) ("Last week, law enforcement across the country was notified that ***the Venezuelan-based gang, Tren de Aragua (TDA), had issued a 'green light' to its members to attack and fire upon U.S. law enforcement officers. The gang, which originated in the Venezuelan prison system, boasts a membership of over 5,000 members and many have made their way into the United States.***") (emphasis added), accessible at <https://www.sheriffs.org/american-sheriff-alliance-issues-call-for-action-against-tren-de-aragua>.

¹¹⁵ Class Action Complaint and Petition For Writ of Habeas Corpus ¶ 57, *J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C.) (ECF No. 1). See also *J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C.), Transcript of March 15, 2025 Motion Hearing held via Zoom before Judge Boasberg (ECF No. 20) at 23.

¹¹⁶ *J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C.), Memorandum Opinion dated March 24, 2025 (ECF No. 53) at 29.

¹¹⁷ *Id.* at 28-29. The District Court cites *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). See *J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C.), Memorandum Opinion dated March 24, 2025 (ECF No. 53) at 29. *Hamdi* was one of the Supreme Court's *habeas corpus* decisions arising out of the capture and detention by the Government of terrorist

E. The Supreme Court's April 7, 2025 and April 19, 2025 Decisions in the J.G.G. Lawsuit and a Related Lawsuit

After the D.C. Circuit denied the Government's emergency motion to stay the District Court's March 15, 2025 and March 24, 2025 TROs in the J.G.G. Lawsuit,¹¹⁸ the Supreme Court, on April 7, 2025, vacated the TROs, holding that the plaintiffs' claims sound in *habeas* and thus must be litigated in the Texas federal district in which they are being detained.¹¹⁹ The Supreme Court also made clear that the plaintiffs have a Fifth Amendment Due Process right to seek *habeas* relief prior to their removal, as well as "judicial review as to questions of interpretation and constitutionality of the [Alien Enemies] Act[.]"¹²⁰

operatives following the September 11, 2001 al Qaeda terrorist attacks upon the United States. Although the case does underscore the need to permit due process challenges to Government detention, it is distinguishable in certain respects from the District Court's holdings. As noted, *Hamdi* involved *an American citizen* whom the Government asserted could be detained indefinitely as an enemy combatant under the post-September 11, 2001 congressional resolution known as the Authorization for Use of Military Force or AUMF, 115 Stat. 224. Finding that "[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant[.]" Justice O'Connor outlined the limited due process rights to which the petitioner was entitled: "[A] citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." 542 U.S. at 519, 533. The Court went on to endorse a truncated procedure in which, once the Government proffers credible evidence of the petitioner's enemy combatant status, the burden shifts to the petitioner to rebut the evidence. *Id.* at 534. *Cf. Boumediene v. Bush*, 553 U.S. 723 (2008) (foreign nationals held by the Government may also challenge their enemy-combatant designation).

¹¹⁸ See *Trump v. J.G.G.*, No. 25-5067 (D.C. Cir. March 26, 2025) (*per curiam*).

¹¹⁹ *Trump v. J.G.G.*, 604 U.S. ___, No. 24A931 (Apr. 7, 2025).

¹²⁰ *Id.* Justice Sotomayor's reference in her dissent (which was joined by Justices Kagan, Jackson and, in part, Barrett) to "the President's unprecedented *peacetime invocation* of a wartime law known as the Alien Enemies Act" (emphasis added) certainly reveals her view that the Act does not provide support for the actions undertaken by the Executive Branch pursuant to the TdA Proclamation. However, her assertion that "[t]he

In the early morning of Saturday, April 19, 2025, the Supreme Court intervened in a related case pending before the Fifth Circuit Court of Appeals, captioned *A.A.R.P. v. Trump*,¹²¹ to issue an Order prohibiting the Government from removing pursuant to the TdA Proclamation and the Alien Enemies Act a putative class of detainees pending the issuance of a superseding Order by the Court. In an opinion published later that day, Justices Alito and Thomas dissented, writing: "In sum, literally in the middle of the night, the Court issued unprecedented and legally questionable relief without giving the lower courts a chance to rule, without hearing from the opposing party, within eight hours of receiving the application, with dubious factual support for its order, and without providing any explanation for its order."¹²²

F. The May 1, 2025 Decision of the Southern District of Texas

On May 1, 2025, a few weeks after the J.G.G. Lawsuit was transferred to the U.S. District Court for the Southern District of Texas, the court issued a decision addressing the applicability of the Political-Question Doctrine and proffering its substantive construction of the

Government's conduct in this litigation poses an extraordinary threat to the rule of law" (*id.*) is specious; the very review by the Supreme Court (and other courts) of the Executive Branch's actions in the case in which she writes demonstrates that the "rule of law" remains robust. The Executive Branch's exercise of constitutional and statutory power that it believes it possesses, which exercise is almost always subjected to some degree of judicial review and/or congressional oversight triggered by those who disagree with such assertion of power, hardly constitutes "an extraordinary threat to the rule of law."

¹²¹ 604 U.S. ___, No. 24A1007 (Apr. 19, 2025).

¹²² *Id.* (Alito, J., dissenting).

key terms used in the Alien Enemies Act (the "*May 1, 2025 Texas Opinion*").¹²³ Although, in its May 1, 2025 Texas Opinion, the District Court rejected the wholesale application of the Political-Question Doctrine and found that the activities of the TdA members described in the TdA Proclamation do not constitute an "invasion" or "predatory incursion" under the Alien Enemies Act, the court's analysis actually undermines its conclusions.

(i) The Political-Question Doctrine Revisited

As noted, the Alien Enemies Act provides that, "*[w]henever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government*, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies."¹²⁴

In working through its analysis under the Political-Question Doctrine, the District Court summarized the Government's argument under *Baker v. Carr*¹²⁵ as follows:

[The Government] contend[s] that "the determination that an 'invasion' or 'predatory incursion' is being perpetrated sits at the intersection of two areas that the Constitution commits to the political branches: (1) foreign affairs, []; and (2) immigration policy[.]" . . . Second, [the Government] argue[s] that "no

¹²³ *J.A.V. v. Trump*, No. 1:25-cv-00072 (S.D. Tex.), Order and Opinion dated May 1, 2025 (ECF No. 58).

¹²⁴ Alien Enemies Act of 1798, 50 U.S.C. § 21 (emphasis added).

¹²⁵ 369 U.S. 186 (1962).

manageable standards permit[] courts to assess exactly when hostile entry and criminal and violent acts constitute an 'invasion' or 'predatory incursion' for AEA purposes."¹²⁶

Attempting to thread a needle, the District Court then concluded that it possessed the power to conduct the following limited analysis:

No court appears to have applied the *Baker* analysis to the AEA. Based on the Supreme Court's decisions regarding the AEA, as well as the principles enumerated in *Baker*, the Court concludes that[,] ***while it may not adjudicate the veracity of the factual statements in the [TdA] Proclamation, or the propriety of the steps taken by the President as to Venezuelan aliens and TdA members, the Court retains the authority to construe the AEA's terms and determine whether the announced basis for the Proclamation properly invokes the statute.***¹²⁷

Yet, the District Court's subsequent analysis underscores the impracticability of endeavoring to neatly bifurcate the Executive Branch's factual statements in support of its Proclamation from the broad discretion accorded the President to determine whether the described acts and threats constitute an "invasion" and/or "predatory incursion" under the Alien Enemies Act. Indeed, it would seem that it is precisely because those terms defy brightline definitions that Congress properly ceded to the Executive Branch — which, with respect to national security and foreign affairs, possesses unique expertise founded upon sophisticated military and law enforcement capabilities and intelligence resources — the discretion and judgment to make the determination as to whether an "invasion" or "predatory incursion" has occurred, been attempted or threatened against the United States.

¹²⁶ *J.A.V. v. Trump*, No. 1:25-cv-00072 (S.D. Tex.), Order and Opinion dated May 1, 2025 (ECF No. 58) at 15 (brackets in original).

¹²⁷ *Id.* (emphasis added).

The District Court asserts that "construing the language of the AEA does not require courts to adjudicate the wisdom of the President's foreign policy and national security decisions. Determining what conduct constitutes an 'invasion' or 'predatory incursion' for purposes of the AEA is distinct from ascertaining whether such events have in fact occurred or are being threatened."¹²⁸ In attempting to support this assertion, the court sets forth an analysis that demonstrates ultimately the futility of trying to make such a metaphysical distinction, thereby underscoring the *Baker v. Carr* admonition that the Political-Question Doctrine precludes judicial review where, among other things, there is "a lack of judicially discoverable and manageable standards for resolving" the issue; it is impossible to decide the issue "without an initial policy determination of a kind clearly for nonjudicial discretion"; or it is impossible for a court to make an "independent resolution without expressing lack of the respect due coordinate branches of government[.]"¹²⁹

The District Court does concede that the Executive Branch possesses much discretion under the Alien Enemies Act:

[I]t is left to the Executive Branch to determine whether a foreign nation or government has threatened or perpetrated activity that includes such an entry [into the United States]. As to this decision, the court may not delve into whether the Executive Branch possesses sufficient support for its conclusion, or whether the court agrees with the Executive Branch's determinations. That analysis would require the Executive Branch to disclose to the court the domestic and foreign intelligence that undergirds the finding of an actual or threatened invasion or predatory incursion. And requiring the Executive Branch to do so would run counter to the admonition that "it is inconceivable that before an alien enemy could be removed from the territory of this country in time of war, the President should be compelled to spread upon the public record in a judicial

¹²⁸ *Id.* at 17.

¹²⁹ *Baker v. Carr*, 369 U.S. at 217.

proceeding the method by which the Government may detect enemy activity within our borders[.]”¹³⁰

Despite the fact that only the President, but neither the Legislative Branch nor the Judicial Branch, is referenced in the Alien Enemies Act — and despite the fact that the Act contains no requirement on the part of the President to publish the findings underlying his or her invocation of the statute, requiring instead only that the President “make public proclamation of the event” constituting the “invasion or predatory incursion . . . perpetrated, attempted or threatened against the territory of the United States”¹³¹ — the District Court affixed to the statute an additional requirement: “[T]he Court concludes that a Presidential declaration invoking the AEA must include sufficient factual statements or refer to other pronouncements that enable a court to determine whether the alleged conduct satisfies the conditions that support the invocation of the statute.”¹³²

The District Court may not properly amend the Alien Enemies Act to impose upon the President fact-finding requirements that Congress did not deem necessary.¹³³

¹³⁰ *J.A.V. v. Trump*, No. 1:25-cv-00072 (S.D. Tex.), Order and Opinion dated May 1, 2025 (ECF No. 58) at 18 (internal citations omitted; non-boldface italicized emphasis in original; boldface italicized emphasis added).

¹³¹ Alien Enemies Act, 50 U.S.C. § 21.

¹³² *J.A.V. v. Trump*, No. 1:25-cv-00072 (S.D. Tex.), Order and Opinion dated May 1, 2025 (ECF No. 58) at 19 (emphasis added).

¹³³ The District Court's citation to *United States v. Abbott*, 110 F.4th 700, 736 (5th Cir. 2024), is misplaced. In *Abbott*, a state government, seeking to invoke the State Invasion Clause of the Constitution, argued that an invasion of its territory had occurred as a result of the Federal Government's failure to secure the southern border of the United States. See CONST., art. I, § 10, cl. 3 (“[n]o State shall, without the Consent of Congress, . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay”). Unlike the J.G.G. Lawsuit, *Abbott* did not involve the exercise of Presidential

Consideration of the situation addressed by the Supreme Court in *Trump v. Hawaii*¹³⁴ is useful here. As noted, that case called upon the Court to address the President's invocation of Section 1182(f) of the Immigration and Nationality Act¹³⁵ to temporarily bar entry into the United States of citizens of certain nations that had failed to provide adequate information to permit the Government to assess the risk of terrorism associated with the entry into the country of said foreign nationals. The immigration statute at issue expressly requires the President to make findings, providing, in part, as follows:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.¹³⁶

Explaining that "[t]he sole prerequisite set forth in § 1182 is that the President 'find[]' that the entry of the covered aliens 'would be detrimental to the interests of the United States[,]'" the Supreme Court noted that such a finding was set forth adequately in the President's Proclamation.¹³⁷ The plaintiffs, however, challenged the sufficiency of that articulated finding, making an argument "grounded on the premise that § 1182(f) not only requires the President to *make* a finding that entry 'would be detrimental to the interests of the United States,' but also to

power in the realm of immigration, national security, foreign affairs and immigration pursuant to an express grant of congressional authority.

¹³⁴ 585 U.S. 667 (2018).

¹³⁵ 8 U.S.C. § 1182(f).

¹³⁶ *Id.* (emphasis added).

¹³⁷ *Trump v. Hawaii*, 585 U.S. at 668.

explain that finding with sufficient detail to enable judicial review."¹³⁸ Even though Section 1182(f) of the Immigration and Nationality Act — *unlike the Alien Enemies Act* — requires the President to make, and presumably publish, an express factual finding as a condition precedent to invoking the statute, the Court rejected the plaintiffs' argument:

[Plaintiffs'] premise is questionable. *See Webster v. Doe*, 486 U.S. 592, 600 (1988) (concluding that a statute authorizing the CIA Director to terminate an employee when the Director "shall deem such termination necessary or advisable in the interests of the United States" forecloses "any meaningful judicial standard of review"). But even assuming that some form of review is appropriate, plaintiffs' attacks on the sufficiency of the President's findings cannot be sustained. . . .

Moreover, plaintiffs' request for a searching inquiry into the persuasiveness of the President's justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere.¹³⁹

Doubling down on its extra-statutory demand for the publication of Executive Branch fact findings in support of the TdA Proclamation, the Southern District of Texas asserted: "While a President's declaration invoking the AEA need not disclose all of the information that the Executive Branch possesses to support its invocation of the statute, it must identify sufficient information to permit judicial review of whether the foreign nation or government's conduct

¹³⁸ *Id.* at 685-86 (emphasis in original).

¹³⁹ *Id.* at 686 (emphasis added). *See also Holder v. Humanitarian Law Project*, 561 U.S. 1, 34-35 (2010) ("[N]ational security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess. . . . In this context, conclusions must often be based on informed judgment rather than concrete evidence, and that reality affects what we may reasonably insist on from the Government. The material-support statute is, on its face, a preventive measure — it criminalizes not terrorist attacks themselves, but aid that makes the attacks more likely to occur. The Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions."), *cited in Trump v. Hawaii*, 585 U.S. at 686-87.

constitutes an actual, attempted, or threatened invasion or predatory incursion of the United States."¹⁴⁰

Putting aside that the Alien Enemies Act does not require the publication of supporting Executive Branch fact finding, how much information constitutes "sufficient information" under the District Court's requirement? The question itself demonstrates the unworkability under the *Baker v. Carr* standards of such asserted judicial review.¹⁴¹ Inextricably intertwined with the District Court's evaluation of the sufficiency of the factual underpinning for the TdA Proclamation is its consideration of the substantive nature of those facts "to determine whether the alleged conduct satisfies the conditions that support the invocation of the statute."¹⁴²

Even if the Alien Enemies Act could be reasonably read to require the President to publish the factual support for the invocation of the Act, surely the TdA Proclamation, as well as the FTO Presidential Action, the State Department FTO Designation and the other sources referenced therein, fully satisfies that requirement.¹⁴³ The TdA Proclamation, referencing the conclusions advanced in the FTO Presidential Action and the State Department FTO Designation pursuant to which FTO was designated a Foreign Terrorist Organization, states:

¹⁴⁰ *J.A.V. v. Trump*, No. 1:25-cv-00072 (S.D. Tex.), Order and Opinion dated May 1, 2025 (ECF No. 58) at 20.

¹⁴¹ *Baker v. Carr*, 369 U.S. at 217. This will be so even if the court conducts *in camera* review of the Government's factual support for the TdA Proclamation. *Cf. J.A.V. v. Trump*, No. 1:25-cv-00072 (S.D. Tex.), Order and Opinion dated May 1, 2025 (ECF No. 58) at 20 n.7.

¹⁴² *J.A.V. v. Trump*, No. 1:25-cv-00072 (S.D. Tex.), Order and Opinion dated May 1, 2025 (ECF No. 58) at 19.

¹⁴³ The District Court purports to require that the TdA Proclamation "include sufficient factual statements *or refer to other pronouncements*["*Id.* (emphasis added).

Over the years, Venezuelan national and local authorities have ceded ever-greater control over their territories to transnational criminal organizations, including TdA. The result is a hybrid criminal state that is perpetrating an invasion of and predatory incursion into the United States, and which poses a substantial danger to the United States. Indeed, in December 2024, INTERPOL Washington confirmed: "Tren de Aragua has emerged as a significant threat to the United States as it infiltrates migration flows from Venezuela." *Evidence irrefutably demonstrates that TdA has invaded the United States and continues to invade, attempt to invade, and threaten to invade the country; perpetrated irregular warfare within the country; and used drug trafficking as a weapon against our citizens.*¹⁴⁴

(ii) Defining the Terms "Foreign Nation or Government," "Invasion" and "Predatory Incursion," as Used in the Alien Enemies Act

As with its Political-Question Doctrine analysis, the District Court's reasoning with respect to the key Alien Enemies Act terms at issue — "foreign nation or government," "invasion" and "predatory incursion" — do not support its ultimate conclusion that the TdA Proclamation falls outside the Act.

While contending that "resolving the precise meaning of 'foreign nation or government' is unnecessary to resolve the issues in this lawsuit[,]"¹⁴⁵ the District Court concludes properly that the TdA Proclamation satisfies the requirement in the Alien Enemies Act that a "foreign nation or government" perpetrate the actual, attempted or threatened invasion or predatory incursion identified in said Proclamation: "[T]he Court finds that the Proclamation places the government of Venezuela as the controlling entity over TdA's activities in the United

¹⁴⁴ *Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren de Aragua*, Proclamation No. 10903, 90 Fed. Reg. 13033 (Mar. 20, 2025) (emphasis added).

¹⁴⁵ *J.A.V. v. Trump*, No. 1:25-cv-00072 (S.D. Tex.), Order and Opinion dated May 1, 2025 (ECF No. 58) at 32.

States. . . . In other words, the Proclamation declares that the country of Venezuela, through [its ostensible President, Nicolás] Maduro, directs and controls TdA's activities in the United States. [The Government] accurately characterize[s] the Proclamation's message: 'TdA has become indistinguishable from the Venezuelan state.' . . . As a result, *the Court concludes that the Proclamation places responsibility for TdA's actions in the United States on the Venezuelan government, which satisfies this aspect of the AEA.*"¹⁴⁶

After sifting the competing historical sources cited by the Government and the plaintiffs, as supplemented by its own limited research, the District Court accorded restrictive meanings to the Alien Enemies Act terms at issue, "invasion" and "predatory incursion." Despite the Government's having proffered evidence demonstrating that "an invasion can include any 'hostile entrance' or 'hostile encroachment,' while a 'predatory incursion' encompasses (1) an entry into the United States (2) for purposes contrary to the interests or laws of the United States[,]"¹⁴⁷ the District Court relied upon other historical sources to conclude as follows:

The Proclamation makes no reference to and in no manner suggests that a threat exists of an organized, armed group of individuals entering the United States at the direction of Venezuela *to conquer the country or assume control over a portion of the nation*. Thus, the Proclamation's language cannot be read as

¹⁴⁶ *Id.* at 32-33 (emphasis added). Mr. Maduro is referred to herein as the "ostensible President" of Venezuela because of widespread reports of fraud in connection with the July 2024 Venezuela presidential election that prompted the Biden Administration to recognize Maduro's opponent as the elected candidate. *See, e.g.*, Julie Turkewitz, "U.S. Recognizes Maduro's Rival as Winner of Venezuelan Election," N.Y. TIMES (Aug. 1, 2024), accessible at <https://www.nytimes.com/2024/08/01/world/americas/venezuela-election-gonzalez-maduro.html>.

¹⁴⁷ *J.A.V. v. Trump*, No. 1:25-cv-00072 (S.D. Tex.), Order and Opinion dated May 1, 2025 (ECF No. 58) at 27.

describing conduct that falls within the meaning of 'invasion' for purposes of the AEA.¹⁴⁸

Apart from the fact that a Presidential statement setting forth the factual predicate for the invocation of the Alien Enemies Act is a requirement found nowhere in the statute, the District Court misreads the Act and ignores the realities of terrorist acts.

Contrary to the District Court's suggestion, the Alien Enemies Act does not require that the President determine that the designated alien enemies have entered, have attempted to enter or are threatening to "enter[] the United States at the direction of Venezuela *to conquer the country or assume control over a portion of the nation.*"¹⁴⁹ Moreover, prior to making the above-quoted finding, the District Court seemed to eschew the need for attempted or actual subjugation or territorial conquest, explaining that, "while the Court finds that an 'invasion' or 'predatory incursion' must involve an organized, armed force entering the United States *to engage in conduct destructive of property and human life in a specific geographical area, the action need not be a precursor to actual war.*"¹⁵⁰

In any event, the District Court glosses over the fact that the threats posed by TdA, as outlined in the TdA Proclamation and other declarations referenced therein, fall squarely

¹⁴⁸ *Id.* at 33-34 (emphasis added). The District Court asserts dubiously that, because the Government proffered, and the court found, only a handful of examples from the late 1700s in which the terms "invasion" and "incursion" were used to describe actions other than those by an "armed force entering a territory to destroy property, plunder, and harm individuals, with a subsequent retreat from that territory[,]" those usages do not reflect "the plain, ordinary meaning" of the terms. *Id.* at 30-31.

¹⁴⁹ *J.A.V. v. Trump*, No. 1:25-cv-00072 (S.D. Tex.), Order and Opinion dated May 1, 2025 (ECF No. 58) at 34 (emphasis added).

¹⁵⁰ *Id.* at 31.

within the concept of asymmetrical or "irregular" warfare — in which the objectives of terrorist and other organizations are to wreak carnage, trigger chaos, sow fear and destroy the infrastructure of more powerful nation states, without necessarily seeking to subjugate the population or acquire territory:

U.S. military doctrine distinguishes between two types of warfare: traditional warfare and irregular warfare. In Department of Defense (DOD) Joint Publication (JP) 1 *Joint Warfighting*, conventional warfare is characterized as 'a violent struggle for domination between nation-states or coalitions and alliances of nation-states, fought with conventional forces.' The publication differentiates between that and irregular warfare (IW), which is defined as '*a form of warfare where states and non-state actors campaign to assure or coerce states or other groups through indirect, non-attributable, or asymmetric activities, either as the primary approach or in concert with conventional warfare.*' . . .

. . . IW actors may use nontraditional methods such as guerrilla warfare, terrorism, sabotage, subversion, criminal activities, and insurgency in their efforts to control the target population. In IW, a less powerful adversary seeks to disrupt or negate the military capabilities and advantages of a more powerful military force, which usually serves that nation's established government.¹⁵¹

The District Court further found that the TdA Proclamation fails to satisfy the "predatory incursion" requirement of the Alien Enemies Act: "[T]he Proclamation does not describe an armed group of individuals entering the United States as an organized unit to attack a city, coastal town, or other defined geographical area, with the purpose of plundering or destroying property and lives. While the Proclamation references that TdA members have harmed lives in the United States and engage in crime, the Proclamation does not suggest that

¹⁵¹ Catherine A. Theohary, "Defense Primer: What Is Irregular Warfare?" CONG. RSCH. SERV., IF12565, at 1 (Nov. 29, 2024) (emphasis in original), accessible at <https://www.congress.gov/crs-product/IF12565>. See generally *Hamdi*, 542 U.S. at 518 ("[t]here can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those [September 11, 2001] attacks, are individuals Congress sought to target in passing the AUMF [Authorization For the Use of Military Force]").

they have done so through an organized armed attack, or that Venezuela has threatened or attempted such an attack through TdA members. As a result, the Proclamation falls short of describing a 'predatory incursion' as that concept was understood at the time of the AEA's enactment."¹⁵²

This conclusion, which, again, rests upon a requirement that the President provide a detailed explanation for the invocation of the Alien Enemies Act that is not contained in the statute, is undermined by the clear language set forth in the FTO Presidential Action, the State Department FTO Designation and the TdA Proclamation, which the District Court inexplicably ignores in reaching its conclusion. Respectfully, the only plausible reading of the collective statements set forth in the FTO Presidential Action, the State Department FTO Designation and the TdA Proclamation is that Venezuela, through TdA, an armed terrorist organization that the Venezuelan government has groomed to execute its destructive foreign policy objectives, has in fact executed, attempted and threatened organized armed incursions into "defined geographical area[s] [of the United States], with the purpose of plundering or destroying property and lives".¹⁵³

Tren de Aragua (TdA) is a designated Foreign Terrorist Organization with thousands of members, many of whom have unlawfully infiltrated the United States and are conducting irregular warfare and undertaking hostile actions against the United States. TdA operates in conjunction with Cártel de los Soles, the Nicolas Maduro regime-sponsored, narco-terrorism enterprise based in Venezuela, and commits brutal crimes, including murders, kidnappings, extortions, and human, drug, and weapons trafficking. TdA has engaged in and continues to engage in mass illegal migration to the United States to further its objectives of harming United States citizens, undermining public safety, and

¹⁵² *J.A.V. v. Trump*, No. 1:25-cv-00072 (S.D. Tex.), Order and Opinion dated May 1, 2025 (ECF No. 58) at 34.

¹⁵³ *Id.*

supporting the Maduro regime's goal of destabilizing democratic nations in the Americas, including the United States.

* * *

Over the years, Venezuelan national and local authorities have ceded ever-greater control over their territories to transnational criminal organizations, including TdA. *The result is a hybrid criminal state that is perpetrating an invasion of and predatory incursion into the United States, and which poses a substantial danger to the United States. . . . Evidence irrefutably demonstrates that TdA has invaded the United States and continues to invade, attempt to invade, and threaten to invade the country; perpetrated irregular warfare within the country; and used drug trafficking as a weapon against our citizens.*¹⁵⁴

CONCLUSION

The recent judicial scrutiny of the Executive Branch's implementation of the TdA Proclamation, including through the J.G.G. Lawsuit, raises serious constitutional issues that will necessarily have to be addressed by the Supreme Court.

Even if, as previewed in the Supreme Court's April 7, 2025 decision in the J.G.G. Lawsuit¹⁵⁵ and its April 19, 2025 Order in the related *A.A.R.P.* case,¹⁵⁶ the Court ultimately holds that individuals detained pursuant to the TdA Proclamation have pre-deportation due process rights to (a) seek *habeas* relief, (b) attempt to rebut their designations as TdA members thereunder and (c) challenge the constitutionality of the Alien Enemies Act, as applied through said Proclamation, the Court will be called upon to consider a workable procedure for such

¹⁵⁴ *Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren de Aragua*, Proclamation No. 10903, 90 Fed. Reg. 13033 (Mar. 20, 2025) (emphasis added).

¹⁵⁵ *Trump v. J.G.G.*, 604 U.S. ___, No. 24A931 (Apr. 7, 2025).

¹⁵⁶ *A.A.R.P. v. Trump*, 604 U.S. ___, No. 24A1007 (Apr. 19, 2025).

challenges. This will raise a host of constitutional, legal and logistical questions that will need to be addressed, including, but not limited to, the following:

- (a) Will the potentially thousands of alleged TdA members subject to deportation under the TdA Proclamation be required to mount such challenges on an individualized basis — since the specific evidence will likely vary as to each (which, again, makes the certification of a plaintiff class questionable) — and, if so, what will be the scope of the due process rights to which each person is entitled?
- (b) How much evidence will the Government be required to share in defending its TdA designations?
- (c) Will the courts review the Government's evidence *in camera* given its national security implications?
- (d) Once the Government provides such evidence, will the burden shift to the designated TdA member to prove that he is not in fact a member of that Foreign Terrorist Organization?
- (e) Will such due process challenges be expedited or will the Government be forced to incarcerate the alleged TdA members for lengthy periods of time while the challenges work their way through the trial and appellate courts?
- (f) If the Government is in fact forced to hold the designated TdA members for extended periods of time, as their due process challenges percolate, will judges become more likely to order the release of the detainees on *habeas* grounds, thereby eviscerating the core objective of the TdA Proclamation?

In addition, of course, the Court will have to grapple with the critical underlying questions concerning the substantive construction and application of the TdA Proclamation, as well as the Alien Enemies Act upon which it is premised.

While there appear to be multiple grounds upon which the Supreme Court could properly conclude as a threshold matter that judicial review of these issues is precluded altogether under the Political-Question Doctrine, if the Court rejects the applicability of said Doctrine to the J.G.G. Lawsuit and similar pending ones, the Court will be required to navigate a separation-of-powers minefield in which the core national security/foreign affairs/immigration

obligations of the Executive Branch, as supplemented by congressional legislation, clash with the oversight instincts of the Judicial Branch.

—