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Fifth Circuit Rules Trump's Use of Alien Enemies Act Is Illegal

By **Ilya Somin**

In ***W.M.M. v. Trump***, the US Court of Appeals for the Fifth Circuit ruled that President Trump's invocation of the Alien Enemies Act of 1798 (AEA) as a tool to deport Venezuelans is illegal. While multiple federal district courts have issued similar rulings, as have individual concurring opinions by judges **on two other circuit courts**, this is the first full-blown appellate court decision on the subject. It is therefore an important precedent. There

is a lengthy 130-page dissenting opinion by Judge Andrew Oldham. But its serious flaws merely confirm the weaknesses of the government's position.

The AEA allows detention and deportation of foreign citizens of relevant states (including legal immigrants, as well as illegal ones) "[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." Trump has tried to use the AEA to deport Venezuelan migrants the administration claims are members of the Tren de Aragua drug gang.

The Fifth Circuit majority opinion by Judge Leslie Southwick (a Republican George W. Bush appointee) holds that TdA's activities—drug smuggling, illegal migration, and related crimes—don't qualify as an "invasion" or a "predatory" incursion, and therefore the AEA cannot be used here. Everyone agrees there is no declared war.

On the definition of "invasion," Judge Southwick concludes, after a review of the evidence:

> Congress's use of the word in the AEA is consistent with the use in the Constitution, that "invasion" is a term about war in the traditional sense and requires military action by a foreign nation. Petitioners have the sense of the distinctions in saying that responding to another country's invasion is defensive; declaring war is an offensive, assertive action by Congress; and predatory incursion is for lesser conflicts. Of course, after this country has been attacked by an enemy with invading forces, Congress might then declare a war. That occurred in World War II after the attack on Pearl Harbor. Still, when the invasion precedes a declaration, the AEA applies when the invasion occurs or is attempted. Therefore, we define an invasion for purposes of the AEA as an act of war involving the entry into this country by a military force of or at least directed by another country or nation, with a hostile intent.

Every other court to have ruled on the definition of "invasion" has reached similar conclusions, and I argue for that conclusion in the **amicus brief** I coauthored in W.M.M. on behalf of the Brennan Center, the Cato Institute, and others.

Here is the Fifth Circuit on the definition of "predatory incursion":

> These different sources of contemporary meaning that we have identified from dictionaries, the writings of those from the time period of the enactment, and from the different requirements of the Alien Enemies Act and the Alien Friends Act, convince us that a "predatory incursion" described armed forces of some size and cohesion, engaged in something less than an invasion, whose objectives could vary widely, and are directed by a foreign government or nation. The success of an incursion could transform it into an invasion. In fact, it would be hard to distinguish some attempted invasions from a predatory incursion.

This too is similar to previous court decisions and to the approach outlined in our **amicus brief**, which explains that a "predatory incursion" is a smaller-scale act of war. The one exception is a district court opinion that adopted an extremely broad definition of "predatory incursion," which I critiqued **here**.

The majority also persuasively argues that the definitions of "invasion," "predatory incursion," and other statutory terms are not unreviewable issues simply left to executive discretion.

The majority does, however, rule that courts must, to a degree, defer to presidential fact-finding regarding whether an "invasion" or a "predatory incursion" is occurring. It concludes here that the facts alleged in the President's Proclamation do not meet the requirements of the correct definition of that term. This may leave open the possibility that the president could simply legalize the AEA by claiming the existence of different (more egregious) "facts," even if the claims are patently false. I have criticized excessive deference on such factual issues in this **recent article**, and in **the amicus brief**. Deference on factual questions should not allow the president to invoke extraordinary emergency powers merely by mouthing some words and making bogus, unsubstantiated claims.

That said, the majority does suggest that factual deference must be limited:

> The Supreme Court's recent *J.G.G.* opinion shows *Ludecke* is to be understood as requiring courts to interpret the AEA after the President has invoked it....

> Interpretation cannot be just an academic exercise, i.e., a court makes the effort to define a term like "invasion" but then cannot evaluate the facts before it for their fit with the interpretation. Thus, interpretation of the AEA allows a court to determine whether a declaration of war by Congress remains in effect, or whether an invasion or a predatory incursion has occurred. In other words, those questions are justiciable, and the executive's determination that certain facts constitute one or more of those events is not conclusive. The Supreme Court informs us that we are to interpret, and we do not create special rules for the AEA but simply use traditional statutory interpretive tools.

If courts must "use traditional... interpretive tools" and "determine... whether an invasion or a predatory incursion has occurred," they cannot simply blindly acquiesce to whatever factual claims the government might make, no matter how specious. Otherwise, interpretation will indeed become "just an academic exercise."

Prominent conservative Judge Andrew Oldham wrote a lengthy 130-page dissent. He's undoubtedly a highly capable jurist, but his herculean efforts here just underscore the radical and dangerous nature of the government's position.

Surprisingly, Judge Oldham doesn't seriously dispute the definitions of "invasion" and "predatory incursion." He just argues that these issues are left to the completely unreviewable discretion of the executive. If that's true, the president could use the AEA to detain or deport virtually any noncitizens he wants, at any time, for any reason, so long as he proclaims there is an "invasion" or "predatory incursion," regardless of whether anything even remotely resembling these things is actually happening. A power that is supposed to be used only in the event of a dire threat to national security would become a routine tool that can be deployed at the president's whim.

And, under Judge Oldham's analysis, the president also could deport and detain these people with little, if any, due process. He contends the government has no obligation to prove that the people detained are actually TdA members. And in fact, **there is no evidence** that most of those deported under the AEA are members of the gang or have committed any crimes at all. Thus, Judge Oldham is essentially claiming the AEA gives the president unlimited, unreviewable power to detain and deport non-citizens

—including legal migrants—whenever he wants (again, so long as he proclaims the right words).

Nothing in the AEA's text or history approaches this. Instead, the text says that the AEA can only be used when a war, invasion, predatory incursion, or threat thereof exists, not merely when the president says so.

Oldham argues in detail that various precedents require the latter outcome. But, as the majority notes, those precedents—including the Supreme Court's recent decision in *J.G.G.*—*specifically* indicate that there is room for judicial review. Moreover, if the AEA really did grant the president such unlimited power, one would have expected contemporaries in 1798 to point that out and object on constitutional grounds, as they did in the case of the contemporaneous Alien Friends Act, which really did give the president sweeping deportation and detention powers, even in peacetime, and which was duly denounced as unconstitutional by **James Madison** and Thomas Jefferson, among others. The Alien Enemies Act, by contrast, was far less controversial, precisely because it was understood to be limited to genuine wartime situations, not anything the president might speciously label as such.

Moreover, under the Suspension Clause of the Constitution, **in the event of an "invasion," the federal government can suspend the writ of habeas corpus**, and thereby detain people—including US citizens—without any due process. There is no way the Founders understood themselves to have given the president unreviewable authority to trigger that power anytime he wants.

I won't try to go through all of Judge Oldham's analysis of precedent here. But I will give one example of how problematic it is. The judge argues that the Supreme Court's 1862 decision in ***The Prize Cases*** gives the president unreviewable authority to determine that there is a war going on and exercise war powers accordingly. The majority opinion in that case does no such thing. Rather, it emphasized the fact that the then-ongoing Civil War was a conflict "which all the world acknowledges to be the greatest civil war known in the history of the human race." Thus, President Lincoln's power to establish a blockade in response could not be negated by "by subtle definitions and ingenious sophisms."

The Court then went on to make the point cited by Oldham:

> Whether the President, in fulfilling his duties as Commander-in-chief in suppressing an insurrection, has met with such armed hostile resistance and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure under the circumstances peculiar to the case.

But notice the president only gets deference on the question of whether the "insurrection" he is "fulfilling his duties" by combating is one of "such alarming proportions" as to justify a wartime blockade. He does *not* get deference on the question of whether an insurrection exists in the first place (in that case, as the Court noted, it obviously did). Had Lincoln instead imposed a blockade to prevent, say, illegal smuggling of contraband goods and then claimed smuggling qualifies as war, he would not get the same deference.

Judge Oldham's reliance on other precedents has similar flaws. Nearly all of them also arose from genuinely massive wars, not attempts to pass off drug smuggling or other similar activity as an "invasion." Oldham complains that "[f]or over 200 years, courts have recognized that the AEA vests sweeping discretionary powers in the Executive," and that "until President Trump took office a second time, courts had never countermanded the President's determination that an invasion, or other similar hostile activity, was threatened or ongoing." But the AEA has previously only been invoked in connection with three indisputable international conflicts: the War of 1812, World War I, and World War II. You don't have to be an expert to see the difference between these conflicts and the activities of a drug gang.

The majority, Judge Ramirez's concurring opinion, and the dissent also address a number of other issues, particularly various procedural questions. I will pass over them for now, as this post is already long.

The Trump administration may well appeal this case to the Supreme Court. If the Court takes it, I hope they, too, will recognize that the AEA doesn't give the president a blank check to wield sweeping extraordinary power whenever he wants.

In the meantime, litigation over this issue continues in various federal courts around the country.

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