

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

J.G.G., et al., )  
 )  
 Plaintiffs, )  
 )  
 vs. ) CASE NO. 1:25-cv-00766-JEB  
 )  
 DONALD J. TRUMP, et al., )  
 )  
 Defendants. )  
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TRANSCRIPT OF MOTION HEARING  
**BEFORE THE HONORABLE JAMES E. BOASBERG, CHIEF DISTRICT JUDGE**  
Friday - March 21, 2025  
2:31 p.m. - 3:47 p.m.  
Washington, DC

**FOR THE PLAINTIFFS:**

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Transcript Produced from the Stenographic Record

1   **FOR THE DEFENDANT:**

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6       DOJ-Civil Division  
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1 (Call to Order of the Court at 2:31 p.m.)

2 DEPUTY CLERK: We're here today for a motion hearing  
3 in Civil Action 25-766, *J.G.G., et al. versus President Donald*  
4 *J. Trump, et al.*

5 Beginning with counsel for the plaintiff, if you could  
6 please approach the lectern and identify yourself for the  
7 record.

8 MR. GELERNT: Good afternoon, Your Honor. Lee Gelernt  
9 from the ACLU for plaintiffs.

10 THE COURT: Good afternoon.

11 MR. GALINDO: Good afternoon. Daniel Galindo from the  
12 ACLU for the plaintiffs.

13 THE COURT: Welcome.

14 MS. PERRYMAN: Your Honor, Skye Perryman of Democracy  
15 Forward Foundation for the plaintiffs.

16 MR. TRIVEDI: Afternoon, Your Honor. Somil Trivedi  
17 from Democracy Forward Foundation for the plaintiffs.

18 THE COURT: Thank you.

19 MS. COOGLE: Good afternoon, Your Honor.  
20 Christine Coogle from the Democracy Forward Foundation for  
21 plaintiffs.

22 MR. SPITZER: And Arthur Spitzer from the ACLU for the  
23 plaintiffs.

24 MS. WIGGINS: Good afternoon, Your Honor.  
25 Audrey Wiggins from Democracy Forward Foundation for the

1 plaintiffs.

2 THE COURT: Okay. Welcome to all of you.

3 Government?

4 MR. ENSIGN: Good afternoon, Your Honor. Drew Ensign,  
5 Deputy Assistant Attorney General, for the United States.

6 THE COURT: Good afternoon.

7 MR. FLENTJE: August Flentje, Department of Justice.

8 THE COURT: Thank you.

9 MR. REUVENI: Good afternoon, Your Honor.  
10 Erez Reuveni, Department of Justice.

11 THE COURT: Thank you.

12 MR. WARD: Good afternoon, Your Honor. Brian Ward for  
13 DOJ.

14 THE COURT: Welcome.

15 Okay. So who will be arguing for the government?

16 MR. ENSIGN: I will, Your Honor.

17 THE COURT: Okay. So, Mr. Ensign, I noticed that  
18 after signing all of the pleadings, including the ones claiming  
19 my oral ruling wasn't binding and using the kind of intemperate  
20 and disrespectful language that I can't remember seeing from  
21 the United States, that you didn't even show up for the hearing  
22 on Monday to argue the issue about compliance. Why was that?

23 MR. ENSIGN: Your Honor, I was working on the motion  
24 to dissolve the TRO, which was due at midnight that night.

25 THE COURT: Okay. It wasn't because when I said to

1 act on my TRO immediately, that you knew exactly what I meant?

2 MR. ENSIGN: No. That was not the reason, Your Honor.

3 THE COURT: Okay. And can I ask you now how you  
4 interpreted that statement when we had our conversation on  
5 Saturday in which I treated all parties with respect and  
6 politeness and made that clear without raising my voice,  
7 without having any edge? I made it very clear what you had do  
8 to do. Did you not understand my statements in that hearing?

9 MR. ENSIGN: Your Honor, I understood your statements  
10 and your directive to -- to relay your directives to the  
11 clients, which I have done.

12 THE COURT: So you did tell them that it was an order  
13 from me to turn the planes around, or however -- in whatever  
14 fashion you could, to bring back people to the United States?  
15 You understood that?

16 MR. ENSIGN: Your Honor, I can speak to my  
17 understanding.

18 THE COURT: That's what I'm asking.

19 MR. ENSIGN: As to the specifics of what I told my  
20 clients, that is potentially covered by attorney-client  
21 privilege.

22 THE COURT: I'm just asking what you understood. Did  
23 you think that that was hypothetical, not serious, that it was  
24 going to be modified, or did you understand that when I said  
25 "do that immediately" that I meant it?

1           MR. ENSIGN: Your Honor, I understood your intent,  
2           that you meant that to be effective at that time.

3           THE COURT: So then if your clients or if -- if the  
4           pleadings, which have now been filed, say that my oral ruling  
5           was not binding, that wouldn't be consistent, then, with what  
6           you understood on Saturday?

7           MR. ENSIGN: Your Honor, I -- as to my understanding  
8           in that moment of what you had instructed, I understood your  
9           intent to be that what you were pronouncing would be binding.

10          THE COURT: Okay. And so, therefore, any statement to  
11          the contrary that it wasn't wouldn't be consistent with your  
12          understanding?

13          MR. ENSIGN: Not in my understanding in that  
14          particular, you know, 30-minute window of time, Your Honor.

15          THE COURT: All right. So here's my other concern,  
16          Mr. Ensign, that in the hearing, you told me, the first part of  
17          the hearing, which was between 5:00 and 5:22, that you had no  
18          details on the plane flights. Do you remember that?

19          MR. ENSIGN: Yes, Your Honor.

20          THE COURT: Okay. And then we had a recess for  
21          38 minutes for you to find details, and when you came back,  
22          even though the flights were in the air, which you all agree  
23          now, you still represented you had no details at all about  
24          those flights, correct?

25          MR. ENSIGN: That's correct, Your Honor. I did not

1 personally have knowledge of where the flights were or if there  
2 were flights at that moment.

3 THE COURT: And so either DHS sent someone to argue  
4 the hearing who knew nothing about the facts, not the law --  
5 that's what you're saying, that they -- no one told you any  
6 of -- anything about those flights, so you knew nothing about  
7 those flights when you appeared during that whole two hours  
8 from 5:00 to 7:00 in which the argument took place?

9 MR. ENSIGN: Your Honor, I was aware that plaintiffs  
10 had submitted evidence to chambers that we were copied on  
11 identifying flights, but I didn't have any information from the  
12 government as to the status of them.

13 THE COURT: And so yet, your clients had you come  
14 argue this and kept you in the dark about all of that?

15 MR. ENSIGN: Your Honor, I sought the information in  
16 that window between the two hearings and was unable to secure  
17 it from my clients.

18 THE COURT: I'm going to -- I'll say one other thing,  
19 Mr. Ensign, before we resume, and that is that I often tell my  
20 clerks before they go out into the world to practice law that  
21 the most valuable treasure they possess is their reputation and  
22 their credibility, and I just would ask you to make sure that  
23 your team retains that lesson.

24 Okay. We're now going to move on. We're going to  
25 move from the compliance question into the legal questions that

1 surround the TRO.

2           So I first want to make clear that nobody contests,  
3 including me, that the law and the cases interpreting them make  
4 very clear that the President has wide latitude to make  
5 decisions in the areas of national security and foreign  
6 affairs, including under the AEA, and that he has had such  
7 ability since the end of the 18th century via the AEA.

8           It is also clear that individuals must have the chance  
9 to show that they are indeed members of a class that the AEA  
10 defines. And my job is to find out where the balance lies.

11           So I would just like you to confirm a few basic facts,  
12 which -- and the reason I'm asking this is because we have had  
13 unusual public interest in this case, I think it would be  
14 helpful for the general public to clarify a few basic facts,  
15 which I trust you won't have any dispute about.

16           So first of all, this case is not just about the  
17 people removed on the flights on Saturday, correct?

18           MR. ENSIGN: That's correct, Your Honor. You  
19 certified a nationwide class action.

20           THE COURT: Well, I disagree with your -- the way you  
21 describe that. But the point is, there are more people  
22 involved than who were on the planes, correct?

23           MR. ENSIGN: That's correct, Your Honor.

24           THE COURT: In addition -- and what I mean by that is  
25 there are more people potentially subject to removal via the



1 proclamation, correct?

2 MR. ENSIGN: That's correct, Your Honor.

3 THE COURT: You also understand that my TROs did not  
4 order anybody to be released into the United States, correct?

5 MR. ENSIGN: That's correct, Your Honor.

6 THE COURT: And they also did not order that the  
7 government could not deport anyone via regular INA procedures,  
8 correct?

9 MR. ENSIGN: That's correct, Your Honor.

10 THE COURT: They only ordered that the government  
11 could not summarily deport in-custody noncitizens subject to  
12 the proclamation. If the government wants to continue to  
13 deport them, it may do so, but not in reliance on the AEA.  
14 Correct?

15 MR. ENSIGN: That's what I recall your order saying,  
16 yes, Your Honor.

17 THE COURT: All right. So -- and I'm -- thank you. I  
18 think it's important for the public to make sure that those  
19 facts are clear.

20 Now, you have maintained throughout that DHS has been  
21 fully complying with the law during these deportations, right?

22 MR. ENSIGN: That's correct, Your Honor. We've  
23 started to present those arguments in the motion to continue  
24 Monday's hearing, I believe, and we will be setting them forth  
25 in additional detail in the Tuesday hearing, in response to

1 your order to show cause.

2 THE COURT: So -- and, again, I'm not even worried  
3 about my -- I'm not talking -- you may have -- my question may  
4 have not been clear. What I'm talking about, that you've been  
5 fully complying not with my orders, but with the law,  
6 generally, in the deportations?

7 I'm not saying you're ignoring my law. This isn't a  
8 trick question. I'm just saying, the government is complying  
9 with the law in its deportations, correct?

10 MR. ENSIGN: The government is complying with the law  
11 as it understands the law to be.

12 THE COURT: Exactly. I guess -- and maybe you don't  
13 have the answers to this, but what's concerning to me is, if  
14 that's so, why was this proclamation essentially signed in the  
15 dark on Friday, Friday night, or early Saturday morning, and  
16 then these people rushed onto planes? I mean, it seems to me  
17 the only reason to do that is if you know it's a problem and  
18 you want to get them out of the country before suit is filed.

19 Can you tell me a little bit about the timing of this?

20 MR. ENSIGN: Your Honor, I don't have knowledge of  
21 those operational details. Certainly, as to when the -- Your  
22 Honor asked the question previously when the proclamation was  
23 effective, and it's effective upon when being published.

24 THE COURT: Right. And that's 3:53 p.m. Saturday,  
25 right?

1 MR. ENSIGN: That's my understanding, Your Honor.

2 THE COURT: That's in the declaration by Mr. Cerna?

3 MR. ENSIGN: That's correct.

4 THE COURT: But yet -- and I'm not asking for  
5 specifics on times, but within a couple of hours, you have  
6 agreed because you say the planes cleared U.S. airspace by --  
7 certainly by 7:00 p.m. So within a couple of hours, all these  
8 people were put on these flights, collected, put on these  
9 flights, and the flight has taken off, right?

10 MR. ENSIGN: That's my understanding of the record,  
11 Your Honor.

12 THE COURT: So in other words, it's certainly true  
13 that ICE had advanced notice of this proclamation because it's  
14 impossible that this could have happened within two hours?

15 MR. ENSIGN: Your Honor, I don't have specific  
16 knowledge, but that seems like a reasonable inference.

17 THE COURT: Okay. So now -- all right. Moving to the  
18 issue again that we're talking about today.

19 The question, as I've said, teed up is whether the  
20 government can summarily deport people without any  
21 individualized assessment of whether they actually fall into  
22 the category of the proclamation.

23 So again, the proclamation says, in relevant part in  
24 Section 1, "I proclaim that all Venezuelan citizens 14 years of  
25 age or older who are members of TdA, are within the

1 United States, and are not actually naturalized or lawful  
2 permanent residents of the United States, are liable to be  
3 apprehended, restrained, secured, and removed as alien  
4 enemies."

5 So what happens if someone is not a member of TdA or  
6 not a Venezuelan citizen or not a lawful permanent resident?  
7 How do they challenge their removal?

8 MR. ENSIGN: Your Honor, I think the SDNY's decision  
9 in the *Watkins* case suggest that review is available under  
10 habeas for those individualized determinations. While that  
11 court recognized that you couldn't bring facial challenges to  
12 the sufficiency of the President's determinations under the  
13 proclamation, the individualized applications of them may be  
14 reviewable in habeas. And that was --

15 THE COURT: But -- and that's a pre-1952 case, right?

16 MR. ENSIGN: That's correct, Your Honor. It was a  
17 1946 case that was affirmed by the Second Circuit.

18 THE COURT: Right. And so you, of course, know that  
19 habeas was the only way to challenge detention prior to the  
20 1952 INA, right?

21 MR. ENSIGN: Your Honor, I don't actually know that  
22 specifically. I mean, certainly, the INA is a more  
23 comprehensive immigration regulation statute, but there were  
24 other immigration statutes passed in the 1920s, and I am not  
25 sure how those might have interacted.

1           Certainly, even after the enactment of the INA, habeas  
2 continues to be available in some aspects of immigration law,  
3 as I know Your Honor has heard cases to that effect.

4           THE COURT: I agree. But the question, ultimately,  
5 which we will get to, is whether it's the sole basis to  
6 challenge. So I think they're very interesting questions and  
7 the plaintiffs spent a long time in their briefs, you spent a  
8 lot of time in your briefs, understandably, deciding whether  
9 the courts can adjudicate and whether the issues of terms in  
10 the AEA, like "invasion," "predatory incursion," or "foreign  
11 nation" or "government" can be reviewed.

12           And your contention is, those are not justiciable,  
13 that courts have held that -- that district courts like me  
14 cannot review the President's determination of those terms.

15           Is that correct?

16           MR. ENSIGN: Your Honor, as to whether or not the  
17 statutory preconditions of the AEA have been satisfied, that is  
18 correct, that is our position. There are other legal issues.  
19 For example, I think plaintiffs challenge that the INA  
20 essentially swallows the Alien Enemies Act, that that falls  
21 outside of that because that is not challenging the President's  
22 determinations, it's raising a separate legal argument that is  
23 outside of the sufficiency of the President's determinations.

24           THE COURT: But I guess -- but you do agree, and I  
25 think you just said it, that courts can challenge whether the

1 person is, in fact, an enemy alien covered by the proclamation,  
2 right?

3 MR. ENSIGN: Your Honor, I think that such challenges  
4 could potentially be brought in habeas, and certainly courts  
5 have recognized previously the ability to do so. The precise  
6 contours of that will depend on various doctrines, and indeed  
7 many people -- there have definitely already been habeas suits  
8 filed in Texas. I believe one is even set for trial next week.

9 So certainly, habeas is available to raise issues.  
10 The *Ludecke* case itself was a habeas challenge that, you know,  
11 notwithstanding the fact that the President's determinations  
12 were not reviewable, it did, in fact, review plaintiffs'  
13 constitutional challenges, but found them just simply and  
14 completely without merit.

15 THE COURT: But even more narrowly, *Ludecke* says at  
16 page 171, footnote 17, "The additional question as to whether  
17 the person restrained is, in fact, an alien enemy, 14 years of  
18 age or older, may also be reviewed by the courts."

19 And that's sort of a pretty clear statement that the  
20 question of whether you fall into the category that the  
21 proclamation covers is reviewable by the courts.

22 MR. ENSIGN: It is reviewable in the courts, is  
23 certainly what the *Watkins* case suggests. That's about all the  
24 precedent that we found on the subject. So, you know, it would  
25 be, of course, subject to other precedent that might be

1 developed by courts. But --

2 THE COURT: Well, so we've got -- I'm sorry. I didn't  
3 mean to interrupt.

4 MR. ENSIGN: No, Your Honor. I was just saying that  
5 the case law that's available shows that habeas is available  
6 for that.

7 THE COURT: Right. So, for example, *Clark* from the DC  
8 Circuit, the 1946 case, states at 294, quote, "The one  
9 question, whether the individual involved is or is not an alien  
10 enemy, is admitted by the attorney general to be open to  
11 judicial determination." And there are a number of other cases  
12 including, *Uhl*, U-h-l, a 1943 case from the Second Circuit that  
13 says the same thing. Right?

14 MR. ENSIGN: Your Honor, I believe that's correct.  
15 And I think there's an important distinction between that  
16 challenging the President's determinations that the statutory  
17 conditions have been met, which are not reviewable, and the  
18 rest, which are determinations of the executive in the context  
19 of sensitive foreign affairs and immigration, for which I  
20 think, you know, a very deferential review would be available,  
21 but it's not categorically barred as -- as in the case under  
22 *Ludecke* and *Citizens Protective League* for the President's  
23 determinations.

24 THE COURT: All right. And we will get to that  
25 standard in a minute. But just like the Guantanamo cases, you

1 agree that there the government also had to prove that  
2 detainees were members of Al-Qaeda, and that required robust  
3 judicial review, even though those people had never set foot in  
4 the United States. Fair?

5 MR. ENSIGN: Your Honor, certainly the Supreme Court  
6 in a series of cases made clear that habeas review was  
7 available. I think as to those challengers, they would dispute  
8 the idea that it was robust habeas review, but certainly  
9 something was available to them.

10 THE COURT: Let's talk about whether habeas is the  
11 sole avenue of review, because, as we know, the plaintiffs  
12 have, at least for now dismissed, without prejudice, their  
13 habeas claim, because there may well be a venue issue, which is  
14 what you raised in our hearing on Saturday, if they want to  
15 proceed in habeas.

16 But it seems that in these national security cases  
17 that while review is taking place in the habeas context, and,  
18 again, it had to prior to 1952, when the INA modern version was  
19 passed, the whole point in those cases is that the individuals  
20 were challenging their detention, right?

21 Name one of those cases in which the individual was  
22 not challenging their detention.

23 MR. ENSIGN: Well, Your Honor, I -- I think the  
24 Supreme Court's case in *Munaf versus Geren* is particularly  
25 instructive, and there it was people held in essentially U.S.



1 custody, alliance custody in Iraq, and they brought -- they  
2 brought a habeas challenge to prevent their challenge --  
3 their transfer to the government of Iraq.

4 And the first issue that the Supreme Court resolved  
5 was that in that case they held that review was available,  
6 specifically in habeas, to consider such a challenge, but they  
7 recognized the somewhat odd nature of it, notwithstanding the  
8 fact that habeas was available, describing it as: "Here the  
9 last thing plaintiffs want is a simple relief -- or simple  
10 release. That would expose them to apprehension by Iraqi  
11 authorities by criminal prosecution, precisely what petitioners  
12 went to federal court to avoid. At the end of the day  
13 what plaintiffs are really after" --

14 THE COURT: Go slower. We have a --

15 MR. ENSIGN: Oh. I apologize, Your Honor.

16 -- "is a court order requiring the United States to  
17 shelter them from the sovereign government seeking to answer  
18 for the alleged crimes."

19 But it's that same sort of somewhat counterintuitive  
20 habeas claim where the person is actually using habeas in a way  
21 to stay in custody.

22 But I think the right way to understand why this is a  
23 core habeas claim is that it's a challenge to the entirety of  
24 the federal government's authority to exercise any custody over  
25 these particular individuals under the AEA.

1           THE COURT: But it's not -- they're in custody. They  
2 know they're in custody. They are not asking -- I mean, they  
3 would be happy to be released. But what they're simply saying  
4 is, don't remove me, particularly to a country that's going to  
5 torture me. And we'll get to that shortly. But that's their  
6 challenge, is you cannot remove me. They're not asking for  
7 release.

8           MR. ENSIGN: Your Honor, I agree that that's an aspect  
9 of the challenge, but I think that's not the whole of it, and  
10 that's one of the reasons that it sounds in habeas. If I may,  
11 here under the AEA, the AEA authorizes both expulsion and  
12 detention, and the inescapable conclusion of their challenges  
13 would be that the government is entirely without authority  
14 either to hold them in custody indefinitely or to exercise  
15 custody over them for long enough to effectuate a removal.  
16 They are bringing a categorical challenge to the  
17 government's --

18           THE COURT: They're being removed anyway, and they're  
19 subject to INA removal regardless. So how can you say that's  
20 the argument they're making?

21           MR. ENSIGN: Your Honor, at the end of the day, they  
22 are challenging and asserting that the government is entirely  
23 without authority under the AEA to exercise custody over their  
24 persons. That is a core habeas claim.

25           THE COURT: They don't want the government to exercise

1 removal authority over their persons, not custody over their  
2 persons. Yes, they have to be in custody in order to be  
3 removed, but I think that's semantic, truly.

4 But let's move to the standard question, which you, I  
5 think, alluded to earlier.

6 So if these folks are entitled to some sort of  
7 hearing, some sort of individualized process, as *Ludecke* and  
8 other courts talk about, so what's the standard of review for  
9 the executive evidence? This was not an issue that was  
10 briefed? And I'm not sure I need to make a definitive finding  
11 here one way or the other. But what do you contend should be  
12 the standard of review for that evidence?

13 MR. ENSIGN: And sorry, Your Honor. When you say  
14 "that evidence," as to which factual question?

15 THE COURT: Of whether they are, in fact, subject to  
16 the proclamation. In other words, whether they are members  
17 of -- essentially members of TdA, as well as being Venezuelan  
18 and not out of PRs.

19 MR. ENSIGN: Your Honor, there's a dearth of case law  
20 on that, so I think you have to look to sort of generalized  
21 principles because we don't have binding precedent that answers  
22 that question. But because of the sensitive foreign affairs  
23 and immigration context, and as well as the war powers aspect,  
24 all of which are areas where courts have recognized that where  
25 review is available in courts it's done deferentially, given

1 the expertise of the executive in these particular matters.

2 THE COURT: Let me --

3 MR. ENSIGN: And so --

4 THE COURT: I'm sorry. Go ahead. I didn't mean to  
5 interrupt. Go ahead.

6 MR. ENSIGN: So I think several cases provide general  
7 guidance as to how those factual determinations would be done.  
8 You know, for example, the DC Circuit in *Islamic American*  
9 *Relief Agency* said, "Our review in this area at the  
10 intersection of national security, foreign policy, and  
11 administrative law is extremely deferential." That's 477 F.3d  
12 at 734.

13 *Humanitarian Law Project versus Holder*, the Supreme  
14 Court provided, "When it comes to collecting evidence and  
15 drawing factual inferences in the national security area, the  
16 lack of competence within the part of courts is marked."

17 THE COURT: There are a few -- okay. But how about,  
18 for example, in *Uhl*, U-h-l, 137 F.2d at 900, which cites *Walker*  
19 *versus Johnson*, the Supreme Court case from 1941, which under  
20 the AEA, and *Walker*, of course, required the Court to hold a  
21 hearing and really sort of talked about more de novo review,  
22 same as *Bauer versus Watkins*, Second Circuit from 1948, and  
23 then even more importantly, although it's not under the AEA, is  
24 *Hamdi versus Rumsfeld*, our Supreme Court case from 2004, where  
25 the Court rejected deference to the executive's factual

1 determination that an American citizen was an enemy combatant,  
2 at least without adversarial testing before a neutral  
3 decision-maker, that there was more robust judicial factfinding  
4 in those matters, wasn't there?

5 MR. ENSIGN: Your Honor, I believe that's the case. I  
6 mean, I think you can certainly point to competing strains of  
7 cases that would need to be resolved in habeas, but most  
8 importantly here is that this Court does not have habeas  
9 jurisdiction, both because plaintiffs dropped their habeas  
10 claim and because venue was never appropriate here to begin  
11 with.

12 THE COURT: And I understand your point on that. But  
13 assuming that I find that that's not necessary, that there is  
14 jurisdiction under the APA, how is this going to work? In  
15 other words, are you going to tell each person who is  
16 presumably going to be deported that they have the right to  
17 challenge? Do they have to raise it? Is it good enough that  
18 the plaintiffs have raised the class? What's the role of the  
19 courts in ensuring that individuals are not erroneously  
20 classified as TdA members and removed to some El Salvadoran  
21 prison when they're not even part of the proclamation? How is  
22 this going to happen?

23 MR. ENSIGN: Your Honor, I think we're likely to  
24 discover answers rather soon in that there are courts  
25 exercising habeas jurisdiction in Texas that are wrestling with

1 these questions right now. And certainly, there is a robust  
2 history of AEA cases being raised, specifically in the habeas  
3 -- I apologize.

4 There's certainly a robust history of AEA claims being  
5 challenged in the habeas context. We've cited multiple cases  
6 where that is. And so certainly, you know, the history shows  
7 that the federal courts have a role to play with habeas claims  
8 to adjudicate various actions, including, for example, the  
9 constitutional claims in *Ludecke*, unlike the factual challenges  
10 to the President's determinations were reviewable. They just  
11 were wholly without merit.

12 THE COURT: And so -- and also, you're -- yeah, I  
13 haven't heard you raise the question that these proceedings  
14 would be difficult because of national security concerns.

15 You're not -- that's not a problem, correct?

16 MR. ENSIGN: Your Honor, I mean, this is not such a  
17 habeas proceeding. I'm not -- I'm not counsel to those habeas  
18 proceedings. I think, to the extent that some issues could  
19 arise, they would be needed -- they would need to be  
20 adjudicated by those habeas corpus courts. That is not an  
21 issue that I've thought through, to be candid.

22 THE COURT: In fact, Congress has an answer for us,  
23 doesn't it? Because they created the Alien Terrorist Removal  
24 Court, and under 8 U.S.C. Section 1533, the government can file  
25 ex parte and under seal there. So if there's a national

1 security concern with having these hearings, whether via habeas  
2 or otherwise, you can always go to the ATRC, which would be a  
3 first, but that's what it's there for, right?

4 MR. ENSIGN: That is my understanding, that it's never  
5 been used previously, unlike the AEA, which has only been used  
6 somewhat sparingly within our history. But just because the  
7 government has another tool in its arsenal does not mean that  
8 the AEA has been impliedly repealed or that it's no longer  
9 available as authority to the President.

10 THE COURT: Let me go move on to a couple of other  
11 areas for you.

12 I trust that you're not contesting that aliens present  
13 in the United States are entitled to due process?

14 MR. ENSIGN: Your Honor, there are -- due process  
15 rights of aliens within the United States are often quite  
16 limited, and typically limited to that which is provided by  
17 statute, but courts have recognized some such rights.

18 THE COURT: Including in deportation proceedings?

19 MR. ENSIGN: Including in deportation proceedings in  
20 some very limited context.

21 THE COURT: Well, for example, in *Reno versus Flores*,  
22 a 1993 case with the Supreme Court, the Court said, quote, "It  
23 is well established that the Fifth Amendment entitles aliens to  
24 due process of law in deportation proceedings."

25 So you agree that's the --

1           MR. ENSIGN: Your Honor, I agree that's what the  
2 Supreme Court said. Although, as a practical matter, how those  
3 cases usually come out is whatever process Congress provided is  
4 sufficient to satisfy the process, and as a practical matter,  
5 the due process clause very rarely provides any sort of  
6 independent basis for setting aside or limiting the authority  
7 of the executive.

8           THE COURT: But if you determine that an alien is an  
9 alien enemy under the AEA, and may be summarily removed, then  
10 aren't you precluding this due process challenge? But, again,  
11 maybe that brings you back to your point, which is, you agree  
12 that aliens -- that folks under this proclamation have the  
13 right to challenge it, but it just has to be in a habeas  
14 proceeding?

15           MR. ENSIGN: Your Honor, I think as a factual matter,  
16 that has not been the case here. The five individual  
17 plaintiffs filed suit. They obtained a TRO. They are still in  
18 the United States. They were able to assert their  
19 constitutional claims. We are here today discussing those very  
20 constitutional claims.

21           THE COURT: Well, but we're not -- all we're doing  
22 today is deciding whether they have the right to do it. We're  
23 not discussing, are they, in fact, members of TdA and thereby  
24 deportable under the AEA in the proclamation. We're just --  
25 you've been contesting that they even have the right to raise



1     that, correct?

2             MR. ENSIGN: As to some of the issues, that's correct,  
3     Your Honor. But we -- certainly, a couple things I would say.  
4     One is that we're here on facial challenges. Plaintiffs have  
5     not attempted to assert individualized challenges. And that's  
6     certainly not the basis under which they secured a TRO. And,  
7     you know, we're here on a motion to dissolve that TRO. So  
8     those individual claims are not before you.

9             As to the facial claims, that's part of the likelihood  
10    of success on the merits that's very much before this court  
11    today. So we are, in fact, now hearing plaintiffs' facial  
12    claims. As to individualized claims, those would need to be  
13    brought in habeas. Plaintiffs originally --

14            THE COURT: Go ahead.

15            MR. ENSIGN: Plaintiffs originally asserted habeas  
16    claims and elected to withdraw them. To the extent that those  
17    plaintiffs want to file habeas claims in an appropriate venue,  
18    they could raise such claims in an appropriate manner. This  
19    suit is not an appropriate manner, though.

20            THE COURT: So let's go back to, briefly, the cause of  
21    action.

22            So you said in your brief that the plaintiffs don't  
23    have an APA cause of action because they can't sue the  
24    President under the APA, right?

25            MR. ENSIGN: That's one of the multiple reasons they

1 don't have an APA claim, Your Honor.

2 THE COURT: Because you would agree that they could  
3 use the APA to sue other officials who are implementing the  
4 proclamation. The APA wouldn't bar that, right?

5 MR. ENSIGN: Here it does, Your Honor, I think in  
6 several ways. As we have cited in the *Tulare* case, actions  
7 that merely implement the President's directive are not  
8 reviewable under the APA. So we think that bars APA review.

9 But more fundamentally, the availability of habeas  
10 claims as a way of raising challenges to AEA applications means  
11 that there's an adequate alternative remedy and that, thus, 5  
12 U.S.C. Section 702 precludes an APA claim because habeas is  
13 available.

14 THE COURT: But, for example, and this isn't a Supreme  
15 Court case, but a DC Circuit case, and they remind me  
16 frequently that I have to follow their holdings as well, so  
17 the *Reich* case, which is from 1996 there. So doesn't that hold  
18 that a nonstatutory ultra vires claim can proceed even if it's  
19 challenging the legality of a presidential executive order?

20 MR. ENSIGN: Your Honor, those implied causes of  
21 action and equity can in some instances be implied by the  
22 courts, but not -- courts have not implied them when  
23 alternative methods of review are available. And so because  
24 habeas review is available, an implied cause of action in  
25 equity is not here. And that's a rule that applies in general,

1 but it applies with special force as to the habeas context.

2           You know, for example, many prisoners have  
3 constitutional claims that readily fall within the four corners  
4 of the text of Section 1983, and so -- but if you were to look  
5 at 1983, an express cause of action, they should be able to  
6 bring their claims, but the Supreme Court has recognized that  
7 where habeas is available, you have to follow that and you  
8 can't follow even an express alternative cause of action. And  
9 so for that reason, an implied cause of action in equity is  
10 even more unavailable here.

11           THE COURT: Right. But the ultra vires claim against  
12 the executive proclamation, which you agree is essentially  
13 analogous to an executive order, right?

14           MR. ENSIGN: Your Honor, it has some differences, none  
15 of which are probably material here.

16           THE COURT: Right. So where it says that, "The  
17 executive's action here is essentially that the President does  
18 not insulate the entire executive branch from judicial review.  
19 We think it's well established that review of the legality of  
20 presidential action can ordinarily be obtained in a suit  
21 seeking to enjoin the officers who attempt to enforce the  
22 President's directive." That's citing Judge Scalia's  
23 concurrence.

24           Further that, "Even if the Secretary were acting at  
25 the behest of the President, this does not leave the courts

1 without power to review the legality of the action, for courts  
2 have power to compel subordinate executive officials that  
3 disobey illegal presidential commands."

4 So that's why it seems that the plaintiffs can bring  
5 an APA or ultra vires claim here even without running afoul of  
6 the APA's prohibition on suing the president. But your answer  
7 is, only in a non-habeas circumstance?

8 MR. ENSIGN: Your Honor, I think two elements of that.  
9 I think, yes, in a very real sense, the habeas claim is a sort  
10 of ultra vires challenge. It's saying, you are without  
11 authority to exercise custody over my body. And in a very real  
12 way, it is an ultra vires claim of its own.

13 And then I'd also direct the Court to an aspect of  
14 *Ludecke* where they recognized that the determinations of the  
15 attorney general made implementing the President's AEA  
16 declaration were not reviewable. The --

17 THE COURT: Again, *Ludecke* sort of -- I agree with you  
18 entirely, and I said -- that's the first thing I said today,  
19 that *Ludecke* does prevent courts reviewing a number of  
20 decisions the President makes, such as whether the  
21 United States is at war. But I think footnote 17 is all the  
22 plaintiffs need to address -- to get the justiciability on  
23 whether their clients are members of the TdA.

24 I just have one brief other area, and I'll release  
25 you, Mr. Ensign, which is, I want to talk about Farra,

1 F-a-r-r-a, 's implementation of the Convention against Torture.  
2 And that says, at 8 U.S.C. 1231, "It shall be the policy of the  
3 United States not to expel any person to a country in which  
4 there are substantial grounds for believing the person would be  
5 in danger of being subjected to torture, regardless of whether  
6 the person is physically present in the United States."

7 So we'll talk about the availability of a CAT claim,  
8 but certainly the plaintiffs have made out in their allegations  
9 that they would suffer torture in an El Salvadoran prison,  
10 correct? They've alleged that. And I actually have  
11 declarations to that effect, correct?

12 MR. ENSIGN: I agree they have alleged that.

13 THE COURT: So why can't they bring this claim, a CAT  
14 claim, under the APA?

15 MR. ENSIGN: Your Honor, because it would also sound  
16 in habeas. It would be a challenge to how the government was  
17 carrying out the AEA in the same sort of manner that has been  
18 reviewed in all the other AEA habeas claims. It would be, you  
19 cannot use the APA -- or, sorry, the AEA -- you lack authority  
20 to use it to exercise custody over me because the -- because  
21 CAT prevents you from doing so.

22 THE COURT: But in *Huisha-Huisha*, and that's spelled  
23 H-u-i-s-h-a, hyphen, H-u-i-s-h-a, against *Mayorkas*, the 2022 DC  
24 Circuit case where the circuit found that the executive could  
25 deport -- could legally deport migrants for public health

1 reasons under Title 42 during COVID, but had to provide them  
2 fair protections before doing so.

3 Why is that any different? There, they also had to  
4 hold the individuals, they had to have custody of them in order  
5 to deport them. So why wouldn't you be arguing they had to  
6 have brought that in habeas, too?

7 MR. ENSIGN: What is that? Why do they have to bring  
8 that in habeas? Because it, again, is a challenge to the  
9 government exercising custody over them on a particular legal  
10 basis. It's another form of saying, you may not use the AEA  
11 against me and against my person because I have a legal claim.  
12 You know, whether that be my conviction is invalid or other  
13 constitutional claims, all of them can be raised in habeas.  
14 And so I think a CAT claim could be raised in habeas. It can't  
15 be raised under the APA.

16 THE COURT: All right. Thank you very much,  
17 Mr. Ensign.

18 MR. ENSIGN: Thank you, Your Honor. If you don't  
19 mind, I would like to just clarify one thing from earlier, too.

20 We had an exchange about, you know, what my  
21 understanding was on Saturday.

22 THE COURT: Yes.

23 MR. ENSIGN: But certainly my own personal  
24 understanding of the law or aspects of the law that I may not  
25 have been aware of because my knowledge of law is limited

1 obviously does not limit the executive branch. And so --

2 THE COURT: And I wasn't asking about your knowledge  
3 of the law, and I don't expect you to know everything, and in  
4 fact for you to show up at that hearing with hours notice, I  
5 would not expect -- you knew far more law than I would have  
6 expected at that time.

7 I'm asking about the facts. What I'm concerned about  
8 is the facts you knew or didn't know, and more importantly,  
9 what you understood me to say, what you understood my order to  
10 say. That doesn't require any knowledge of the law. It just  
11 required common sense, listening to what I said and  
12 understanding what I said. And I think you made clear here  
13 today, which I appreciate, that you did understand what I said.

14 MR. ENSIGN: That's correct, Your Honor. But  
15 certainly, for example, we have set forth in our papers and  
16 will do why argument under Rule 65(d) that is not an argument  
17 that I was aware of at that time, which may --

18 THE COURT: Right. You talk about that it was not  
19 binding until it was in writing.

20 MR. ENSIGN: That's correct.

21 THE COURT: That's what you mean. But you didn't  
22 think -- we're going around in circles, but I think you have  
23 agreed you understood what I said when I told you to have this  
24 done immediately, and you intended to comply with that, I  
25 trust.

1 MR. ENSIGN: That was my understanding, Your Honor.

2 THE COURT: Okay. Thank you. Thank you, very much.

3 Mr. Gelernt. I mean, I know that you spent a lot of  
4 time, and we've all spent a lot of time on the justiciability  
5 of the AEA issues. I would rather spend my time where I did  
6 with Mr. Ensign.

7 So you're not forfeiting any of those arguments.  
8 You're not waiving them. I know you strongly pressed them, and  
9 I think they're tough arguments, both sides. I think they're  
10 hard, the legal issues. But what would be more helpful for me  
11 today, and then I'll give you a chance to say anything else you  
12 want, is to focus on the issues that I addressed with  
13 Mr. Ensign. And his principal argument, through response to  
14 many of my questions, was habeas, habeas, habeas. So let's  
15 hear you on that.

16 MR. GELERNT: So a few things, Your Honor. The first  
17 thing I would start off, and before we even get to that  
18 question, is that the government is obviously not giving people  
19 time to file habeas, so it's an illusory availability of  
20 habeas.

21 And I will tell the Court on information and belief,  
22 and I hope the Court will direct the government to provide this  
23 to you, we understand that the slip of paper that individuals  
24 are getting right before they're put on the plane says, "No  
25 review of this designation." And so I hope the government will



1 actually provide that to you. But that's our understanding --

2 THE COURT: But, again, you're not saying, I hope,  
3 that these are people who are being removed contrary to my  
4 order?

5 MR. GELERNT: Well, Your Honor, whether retroactively  
6 your order was violated is a separate question.

7 THE COURT: Right.

8 MR. GELERNT: I'm saying this is what the piece of  
9 paper the people got.

10 THE COURT: I'm sorry. They got previously, that are  
11 not getting currently? They're not getting prospectively?

12 MR. GELERNT: I assume they are not continuing to  
13 violate your order. But this is our understanding of what  
14 people got. Some of the people, as you know, the five named  
15 plaintiffs your TRO stopped, that was in the morning. But this  
16 is our understanding of the piece of paper. And even if it  
17 didn't say that, obviously they're rushing people onto a plane,  
18 so it's illusory. But let me just step back for a second.

19 I think the government is basically asking you to  
20 relook at now 50 years of law and several, several of your  
21 decisions. It's very clear, since *Prizer* in the early  
22 seventies, habeas, a core habeas, is when you're seeking  
23 release, as Your Honor has pointed out multiple times in this  
24 hearing and the prior hearing. We are not seeking release. We  
25 are not seeking to stop them from removing people under the

1 INA.

2 This is not a core habeas, and I think even the  
3 government concedes that if it's not a core habeas, the  
4 immediate custodian rule doesn't apply. Could it be brought in  
5 habeas? Yes, but that doesn't mean we can't bring it under  
6 other grounds. That's the *Aracelli* case we've cited, your  
7 cases. Even when it deals with detention, if the exact relief  
8 you're seeking is not release, you can bring it in a non-habeas  
9 way. And so that's IRLA case. That's your *Damus* case. And so  
10 I think we're just going over really well-tread ground here.

11 We could have brought it in habeas. We didn't have  
12 to. You know, I conceded at the Saturday night hearing, given  
13 the time pressure to stop those planes, that for purposes of  
14 that TRO, we would take our habeas off, and you said, you know,  
15 we can do it without prejudice. I mean, we would ask you to  
16 allow us to reinstate it now, but it's not necessary.

17 THE COURT: You can certainly amend your complaint to  
18 reinstate that. Again, there was an issue that you remember  
19 and the government remembers in the timeframe that you agreed  
20 to do that to moot any venue issue.

21 MR. GELERT: Right. Right. Exactly. And so I  
22 think, you know, the government is basically saying, because it  
23 could have been brought in habeas, it has to be brought in  
24 habeas and that's the only way. And the law has been clear for  
25 a long time.

1 I would just address the government's, you know,  
2 what's essentially a descriptive point, that lots of the AEA  
3 cases were in brought in habeas. As Your Honor has pointed  
4 out, that's because it predates many of the current statutes.  
5 But there were cases that were not brought in habeas that were  
6 allowed, and that's the *Citizens Protective League v. Clark* in  
7 the DC Circuit. That's the *Clark v. Burn* case. And so those  
8 are cases that weren't brought in habeas.

9 I think that, to the extent the government is saying,  
10 well, AEA is completely different and doesn't follow any of the  
11 rules, I don't even think they're saying that, but if they  
12 were, they are AEA cases that were brought in a non-habeas  
13 forum.

14 THE COURT: So let me ask you a couple of questions  
15 about that, some of the things that I asked Mr. Ensign. And,  
16 again, as I said to him, I'm not sure we have to figure all of  
17 this out today in order for me to maintain or modify my TRO.  
18 But how do you expect this process to play out? In other  
19 words, what should the plaintiffs, members of the class have to  
20 do? Do they have to say, before they're being removed, "I  
21 challenge my removal, I'm not a member of TdA"? Does the  
22 government have to hold a hearing for everybody to say, you get  
23 a hearing, are you a member of TdA, you are, okay, next? Are  
24 you not?

25 Before we even talk about the standard of proof,

1 again, I don't expect you to have this nailed down chapter and  
2 verse, just like the government didn't, but can you give me  
3 some sense of how you think --

4 MR. GELERNT: That's a fair question, Your Honor, and  
5 we're in really uncharted territory, right? Because, as Your  
6 Honor knows well, it's only been used three times in the  
7 country's history, the Alien Enemies Act.

8 Our understanding is the first two times, the War of  
9 1812 and World War I, there weren't even removals under those.  
10 So the only time there were removals was under World War II.  
11 And the government, even though we were in an actual war,  
12 because wherever, they set up a hearing board for people to be  
13 able to contest it, and then they could go to habeas. And so  
14 we don't know if the government is going to set up a hearing  
15 board. I think that might be the way to go. It might be that  
16 they're individual habeases.

17 Whether the government had to hold hearings without  
18 someone affirmatively asking, I think is a question that we  
19 would like to give a little more thought to and go back to some  
20 of the historical materials in World War II. But at a minimum,  
21 it has to be a meaningful chance. It can't be, you're going to  
22 be put on a plane in two hours, do you want a hearing, not be  
23 able to call a lawyer, anything like that.

24 So I would -- you know, and as Your Honor said, and I  
25 obviously recognize that's not directly at issue here, but we

1 would ask, if the Court ultimately upholds the TRO, that we  
2 would ask for a little more time to brief how that works. And  
3 I suspect the government is going to object to any type of  
4 procedure, meaningful procedure, but I don't know. Obviously,  
5 as Mr. Ensign said, we're not there yet.

6 THE COURT: When you say a hearing board, you're  
7 talking an administrative process?

8 MR. GELERNT: That's our understanding of how World  
9 War II worked, and so people got hearings, there was not these  
10 kind of summary removals.

11 THE COURT: And how about venue? Is that -- would  
12 claims be brought here in DC? Would there be -- would review  
13 be brought here? Would it remain if there is -- if our habeas  
14 claims are brought and they did get a hearing, then the habeas  
15 would be -- any follow-on habeas would be in Texas? Any  
16 thoughts on that?

17 MR. GELERNT: Yeah. I mean, those are all fair  
18 questions and hard questions. I still do not think they would  
19 have to be brought in habeas because they would not be seeking  
20 their release. They would simply be stopping their removal  
21 under the AEA. And it may be that the hearing board is set up  
22 here. It may be on video. I just don't know how the  
23 government would do it and whether the government would have an  
24 affirmative obligation to hold those hearings for everyone or  
25 whether the person would have to make a request.

1           THE COURT: But are you saying that an administrative  
2 hearing would be sufficient?

3           MR. GELERNT: No. And I apologize if I wasn't being  
4 clear. An administrative hearing could be the initial way it's  
5 done, but there would have to be some judicial review. Now,  
6 the standard of judicial review might depend on how full a  
7 hearing there was in the hearing board, whether there was a  
8 lawyer at the hearing board, all those types of things. And I  
9 think there's a lot of law about sort of how much judicial  
10 review there has to be of hearing boards, and we would want to  
11 brief it. But I think we are a long way from my understanding  
12 of the government being willing to provide people with this  
13 type of process.

14           THE COURT: And so would -- get a little more  
15 technical, and then I want to go back with some of the  
16 questions I asked Mr. Ensign.

17           So then if I believe that a TRO is warranted on the  
18 grounds that we have just talked about, which is that  
19 individualized hearings and some process are required for  
20 people who challenge that they are covered under the  
21 proclamation, then isn't the TRO that's issued right now too  
22 broad, and that shouldn't it be narrowed to say -- so right  
23 now, it says that "The government is enjoined from removing  
24 members of such class not otherwise subject to removal pursuant  
25 to the proclamation for 14 days." And, again, the class --

1 this may be a little harder in front of both of you. But the  
2 class, again, is all noncitizens in U.S. custody who are  
3 subject to the proclamation and its implementation.

4 So the question is, then, it would -- under the  
5 reasoning that I've talked about here, the government would not  
6 be enjoined from removing people who admit they're members  
7 of -- that they are covered by the proclamation or who don't  
8 challenge that.

9 MR. GELERNT: If there was a fair process for finding  
10 out whether they conceded it or weren't challenging it.

11 THE COURT: So, therefore, would the -- would the  
12 injunction have to be modified to include -- to refer to only  
13 people who have challenged their removal? In other words, the  
14 class would be something like -- I'm sorry. Injunction would  
15 cover, that the government is enjoined from removing members of  
16 such class not otherwise subject to removal and who have  
17 challenged their removal pursuant to the proclamation, blah,  
18 blah, blah, and so forth.

19 MR. GELERNT: Right. So let me make two points, the  
20 first directly responsive to what you're asking.

21 I think it would have to be a process that they would  
22 submit to you to see whether we all agree that that was  
23 providing meaningful process, so that they could actually -- so  
24 people could actually contest it, they understood it, they were  
25 being provided it in a language, they had time to ask their

1 lawyers what this means, all that. And so that would be my  
2 answer to that.

3 But if I could just step back for one second.

4 THE COURT: Yeah, go ahead. Well, let me -- I'm going  
5 to let you say that, but if -- you know, I'm also aware that  
6 the Court of Appeals has jurisdiction -- has the appeal, and  
7 that while I could deny a motion to vacate or motion for  
8 reconsideration, if I wanted to substantively modify the TRO, I  
9 would probably have to have an indicative ruling saying, if you  
10 returned this to me, I would modify it in the following  
11 fashion.

12 So what's your position on such -- you're saying the  
13 modification -- again, maybe the answer is you need to study  
14 the specific language of such modification.

15 MR. GELERNT: I mean, I probably would. And on the  
16 mechanical issue, I think, you know, we would probably say no,  
17 but I think it's more tied to the substantive point I would  
18 like to make, and then if you're not accepting that substantive  
19 point, I could circle back to the mechanical question of how  
20 you do this.

21 THE COURT: Go ahead.

22 MR. GELERNT: Fundamentally, there's two issues here,  
23 as Your Honor knows. The one we've been focusing on, I think,  
24 is the easy one. *Ludecke*, as you pointed out, footnote 17,  
25 could not have been clearer. You have to be able to contest



1 whether you fall within the Act; otherwise, anybody could just  
2 be taken off the street and removed under the AEA. That is  
3 absolutely true.

4 I think the government is really not, as I understand  
5 it, pushing against that. They're just simply saying, you have  
6 to bring it in habeas. And we've covered that ground. But the  
7 threshold questions about whether the Act can be used in this  
8 context, I think are absolutely reviewable and are critical  
9 because, otherwise, what we're looking at is the government  
10 being able to say, for any group in this country, any  
11 nationality, you have a gang and we don't think that's  
12 reviewable; so, therefore, we're going to remove anybody we can  
13 say is part of this gang under the Alien Enemies Act.

14 Again, to go back to where you started, that doesn't  
15 mean people are going to roam the streets. It doesn't mean  
16 people are going to get to stay in the country. They can be  
17 criminally prosecuted. They can be detained under the  
18 immigration laws. They can be removed.

19 There's the Alien Terrorist Court, but this is a very  
20 dangerous road we're going down where the Alien Enemies Act can  
21 be invoked against a gang and then anybody who is part of that  
22 gang -- and we don't even know what it means to be part of a  
23 gang if it's not a formal structure.

24 THE COURT: You mean the membership in the gang, how  
25 do you define membership?

1           MR. GELERNT: Exactly. I think as this case goes on,  
2 you're going to get a lot of experts saying that there is not  
3 all that formal a structure to TdA, probably less than other  
4 gangs.

5           THE COURT: I know they're certainly reporting,  
6 raising doubts about whether people are or are not members who  
7 are being deported.

8           MR. GELERNT: So let me try and just focus on the  
9 reviewability of the statutory predicates, and I'll start with  
10 the broader point that you made to start, which is, this  
11 statute gives the government extraordinary powers, gives the  
12 President. That's all the more reason why the statutory  
13 predicates have to be reviewable, to make sure the President is  
14 acting within the bounds that Congress sets. So it's  
15 ultimately a separation of powers question.

16           The government says those statutory predicates are not  
17 reviewable. Every case the government cites has broad language  
18 meant to say, once the statutory predicates are covered and  
19 found, then the President has broad power to decide who of that  
20 group are going to be removed.

21           But every case addressed statutory predicates or  
22 constitutionality. Because of the time, and I apologize, this  
23 is no excuse, but there are many, many, many Alien Enemies Act  
24 cases reviewing statutory predicates, and I can just, sort of  
25 if I could, just sort of list them for you and give you the

1 cites.

2           So just to start with, on the government's cases, the  
3 government cites *Schwarzkopf*. That reviewed the question of  
4 who was a citizen.

5           The government cites *ex parte Gilroy*. That reviewed  
6 who was a denizen within the Act.

7           The government cites *Citizens Protective League*. That  
8 consolidated three civil actions addressing multiple questions,  
9 including the constitutionality of the Act.

10           There are additional cases. There is the *D'Esquiva v.*  
11 *Uhl* case that addressed --

12           THE COURT: Why don't you spell that for the court  
13 reporter.

14           MR. GELERNT: Yes, I'm sorry. D, apostrophe, capital  
15 E-s-q-u-i-v-a, v. Uhl. And that's Second Circuit, 137  
16 F.Circuit 903.

17           There's the *Von Heymann v. Watkins*. The government  
18 cites that. That also had reviewability.

19           There's the *Schlueter* case, S-c-h-l-u-e-t-e-r. That's  
20 also against Watkins.

21           There are just -- there is the *Jaegeler* case after  
22 *Ludecke, J-a-e-g-e-l-e-r, v. Carusi*. That's a SCOTUS case that  
23 said that the war was over.

24           In each one of those cases, the statutory predicates  
25 were reviewed, and the constitutionality.

1           And *Ludecke* itself could not have been clearer. It  
2 said, "The construction and validity," it made that point  
3 twice, "can be reviewed, but what can't be reviewed is, once  
4 someone is within the Act," and it was all German nationals,  
5 "who from those people who were subject," in that case German  
6 nationals, "could be considered dangerous and subject to  
7 removal." That's what was not reviewable.

8           But whether you were a German national was routinely  
9 reviewed. There were cases about whether an Austrian person  
10 could be considered German.

11           THE COURT: I still think those are similar to what  
12 we're talking about here, which is the individualized  
13 reviewability of whether you fall within the Act, not the  
14 reviewability of whether this is an invasion or incursion.

15           MR. GELERNT: No, but they were all statutory  
16 predicate questions. Are you a citizen within the Act? Are  
17 you -- the constitutionality of the Act, whether you were a  
18 denizen within the Act, whether you were a native within the  
19 Act. Each one of them addressed different types of statutory  
20 predicates.

21           The reason there was no case about whether there was a  
22 foreign government is because it would be unheard of to  
23 Congress to be doing what they are doing. And in that sense, I  
24 think the *Utility Case v. EPA* says the Court should be wary,  
25 very skeptical of a newfound power in a 200-plus-year-old

1 statute. I mean, that's why there's no cases about foreign  
2 governments. That's why there's no cases about invasion or  
3 incursion.

4 We are so far afield from what Congress intended.  
5 This was passed as a wartime measure in 1798, but I think if  
6 you look at those cases, you will see in every one of those  
7 cases, they weren't about whether the individual was dangerous.  
8 They were about whether they fell within the statutory terms of  
9 the Act.

10 And so I understand, Your Honor, that there is an  
11 easier path with this TRO, but what that means is that they are  
12 going to find people who are members of the gangs. They could  
13 be low-level people, whatever membership actually means, or an  
14 associate, and all of a sudden they're going to be in an  
15 El Salvadoran prison. And then the next time there's going to  
16 be another gang and another gang and another gang. Any  
17 nationality in this country has gangs, and all of a sudden they  
18 could be subjected.

19 THE COURT: I agree, the policy ramifications of this  
20 are incredibly troublesome and problematic and concerning, and  
21 this, I agree, is an unprecedented and expanded use of an Act  
22 that has been used, as we have discussed, in the War of 1812,  
23 World War I, and World War II, where there was no question of  
24 whether there was a declaration of war and who the enemy was.

25 And the idea that it's being used against certain

1 Venezuelans who have individually come over to the  
2 United States, not as members of their government, but  
3 ostensibly as a member of a gang that's a quasi-hybrid criminal  
4 state, I agree with you that this is a long way from the  
5 heartland of the Act.

6           There's still a lot of language in Supreme Court cases  
7 that give me pause that I can go ahead and say this isn't a  
8 foreign state, this isn't an invasion, it's not an incursion.

9           MR. GELERT: Yeah. So, Your Honor, I guess in that  
10 sense, then, you know, we get that you are also under a quick  
11 timeframe here. Then we would ask that you leave the TRO in  
12 place and see how the circuit panel addresses that for now.

13           But the one thing I would say is, if Your Honor is  
14 even beginning to think about narrowing the injunction at some  
15 point down the line, I think if you didn't feel like you could  
16 address invasion or whether there is an incursion, which we,  
17 again, do think you can address because there is statutory  
18 terms, at a minimum, the proclamation doesn't name Venezuela.  
19 There is simply no way to say that that is a foreign  
20 government, that the TdA is a foreign government.

21           It's not saying -- like, in World War II, they said  
22 every German is an enemy alien, but the only ones we are going  
23 to act on and remove and detain are those that are dangerous.  
24 Here it doesn't say Venezuela is the object of the  
25 proclamation, or all Venezuelans. It says only TdA associates,

1 members. At a minimum, we think you have jurisdiction.

2 THE COURT: Venezuelan citizens who are members of  
3 TdA.

4 MR. GELERNT: Right. But that is, I think,  
5 understood. They're not going around and saying they can take  
6 any Venezuelan off the street and send them to El Salvador.

7 We would respectfully urge that, at a minimum, you go  
8 at least that far, because, otherwise, I think we are going to  
9 see person after person being sent there if they have -- if  
10 they can concoct any connection to a gang. And, obviously,  
11 then, it would depend a little on what standard is set for  
12 membership, but we're going to get into much more complicated  
13 questions that are of the government's doing by using this Act  
14 in such a different way.

15 THE COURT: Can I just ask you last if you want to  
16 respond to the government's response on my CAT questions. I  
17 mean, in other words, what I'm asking, again, is why if -- I  
18 understand that individuals cannot fight the administration's  
19 determinations of their CAT claims without a final removal  
20 order. But why can't they bring claims challenging the fact  
21 that the administration never gave them a chance to raise a CAT  
22 claim?

23 MR. GELERNT: They absolutely can, and Your Honor  
24 cited how we show that. I think that's one of the principal  
25 cases, because there also, the government wasn't using the

1 Immigration Act to remove someone. They were using the public  
2 health laws, Title 42, and the DC Circuit said, no, you have to  
3 at least give them screenings for -- not just CAT, but  
4 persecution, as well, under withholding.

5 So if the Alien Enemies Act can be used here, and if  
6 someone is found to fall within it, they absolutely have to be  
7 screened. And I think what Your Honor has already seen about  
8 what's happening in El Salvadoran prisons would give someone  
9 pause not to be doing these screenings.

10 If I could just say one other thing about your order  
11 on the third plane. I know that the government has said those  
12 removals were okay even though they took off after the Court's  
13 written order, and the government said they weren't solely  
14 based on the AEA, I take it from the government's careful  
15 language that they had final order, so maybe the other  
16 authority was the Immigration Act. I think that's implausible  
17 and we would ask the Court for clarification from the  
18 government.

19 The reason I say it's implausible is related to what  
20 you're asking me now. You have to, in your removal, not only  
21 have a final removal order, but it has to say where you're  
22 going to be sent to.

23 There is no way that these Venezuelans had final  
24 orders that said, you're going to be sent to El Salvador,  
25 unless after your Court's order during the hearing, they



1 crossed something out and changed it. There is very clear  
2 statutory language saying where someone can be sent, and it's a  
3 checklist where people can be sent. The Supreme Court has gone  
4 over that in the *Jama v. ICE* case.

5         There is no way that those Venezuelans could have been  
6 sent to El Salvador under any proper statutory interpretation  
7 of those provisions, and so we would really question how those  
8 people on the third flight were sent after your written order.

9         The other thing I would say, I'm not sure if  
10 Your Honor wants this, but we're going to put in an affidavit  
11 either tonight or over the weekend letting you know that people  
12 were -- who were on those planes were returned, that there were  
13 some people. They were not Venezuelan men, but it goes to the  
14 government's saying to you in their motion, well, it wasn't  
15 feasible to bring people back.

16         I can't really understand what the government is  
17 saying. Obviously, the Court wasn't saying, make a midair  
18 return even if you didn't have fuel. The government is saying,  
19 well, you didn't consider the lack of fuel. That sort of goes  
20 without saying.

21         But there were people who were brought back, and we  
22 will put in sworn declarations to show that some people landed  
23 but had to be brought back because the El Salvadoran government  
24 wouldn't take them because one was a mistake and they were not  
25 Venezuelan or El Salvadoran and the others weren't men and the

1 El Salvadoran President said, "I'm not taking women."

2 THE COURT: I assure you, Mr. Gelernt, the government  
3 is not being terribly cooperative at this point, but I will get  
4 to the bottom of whether they violated my order, who ordered  
5 this, and what the consequences will be.

6 All right. Thank you very much.

7 MR. GELERNT: Thank you, Your Honor.

8 THE COURT: Let me just -- Mr. Ensign, I just have a  
9 couple last questions, then, for you, and I'm happy if there is  
10 any final point or two you want to make.

11 So you want to give me your response to Mr. Gelernt's  
12 last point, which is there's a declaration saying that  
13 everybody on that plane, that third plane, was not subject --  
14 was not being deported solely on the basis of the proclamation?  
15 In fact, let me get that.

16 (Pause)

17 THE COURT: I have every other piece of paper. I can  
18 pull it up. But that was -- he stated that -- under oath, that  
19 nobody on that plane was sent there via the AEA.

20 So what's your response to Mr. Gelernt's point that  
21 there's no way that people deported solely under the INA were  
22 being sent to El Salvador, that Venezuelans weren't?

23 MR. ENSIGN: Your Honor, my understanding is that  
24 everyone on that third plane had a final order of removal.

25 THE COURT: But does it -- and that Venezuelans were

1 being deported to El Salvador?

2 MR. ENSIGN: Your Honor, I don't know the details of  
3 what those orders said, but what I understand and what I have  
4 been told is that everyone on the third plane had final orders  
5 of removal.

6 THE COURT: Well, okay. Then I may -- as we go  
7 through this, I will likely require more specific information  
8 about that because Mr. Gelernt seems to be raising a reasonable  
9 concern about this.

10 Okay. I'm happy if there are any -- so I'm not sure I  
11 gave you this opportunity, but if I gave the government the  
12 opportunity to say that you will have individual hearings  
13 before you deport anyone to ensure that they are members, to be  
14 assured they are actually covered by the proclamation, in other  
15 words, members of TdA, Venezuelans, not LPRs, are you prepared  
16 to do that?

17 MR. ENSIGN: No, Your Honor. I don't have  
18 authorization to do that. The position of the United States is  
19 that habeas relief provides whatever due process is available  
20 in these circumstances.

21 THE COURT: Okay. If you want to make any last point,  
22 I would be happy to hear it.

23 MR. ENSIGN: Yes, Your Honor, two very quick points,  
24 if I may.

25 As to habeas, I understood opposing counsel to say

1 that just because we could bring it, that's not dispositive,  
2 and I believe he suggested that the law changed in the  
3 seventies.

4 Here is what the DC Circuit said in 1996: "The key to  
5 plaintiff's inability to pursue a suit here is jurisdictional,  
6 and it rests merely on the availability, not the actual seeking  
7 of habeas elsewhere," end quote.

8 And it went on to further explain: "The availability  
9 of a habeas remedy in another district ousted us of  
10 jurisdiction over an alien's effort to pose a constitutional  
11 attack."

12 THE COURT: That's in what case?

13 MR. ENSIGN: That's in *Lobue versus Christopher*, 82  
14 F.3d --

15 THE COURT: I've got that cite. Thank you.

16 MR. ENSIGN: Second, Your Honor, as to the cases that  
17 opposing counsel cited suggesting that the preconditions were  
18 reviewable, we simply disagree with that. Both *Ludecke* and  
19 *Citizens Protective League* involve challenges specifically to  
20 whether or not a condition of the AEA were met.

21 In both cases, plaintiffs actually had very strong  
22 arguments that there was, in fact, no longer a war. As a  
23 factual matter, VE Day had been declared multiple years before,  
24 and Justice Black, in dissent, went on to explain that the idea  
25 that the war was still ongoing was pure fiction. But none of

1 that mattered because President Truman had determined that the  
2 war was still going, and that was the end of the matter for the  
3 courts.

4 Similarly, as the President's determination there's a  
5 war, as to whether or not there's an invasion or a predatory  
6 incursion, courts have no meaningful standards to adjudicate  
7 what constitutes an invasion. The Ninth Circuit has said as  
8 much in *California versus United States*. And, similarly, as to  
9 what qualifies as a state is a power that is entrusted to the  
10 President under Article II.

11 THE COURT: You would certainly agree that the  
12 hypotheticals Mr. Gelernt raises are awfully frightening, that  
13 if the courts can't review it, then the President could say  
14 that anybody is invading the United States, that if there  
15 were -- I think you cite a fishing vessel case, that if some  
16 fisherman from a foreign country comes into U.S. waters and the  
17 President says that's an invasion, nothing -- these fishing  
18 fleets, Chinese fishing fleets are an invasion of U.S. waters,  
19 any Chinese fisherman may be held and interned and deported,  
20 fair game, nothing we can do, right?

21 MR. ENSIGN: Your Honor, there could be individualized  
22 determinations, but --

23 THE COURT: If they're fishermen and if they're  
24 Chinese, but if they are concededly Chinese fishermen, they are  
25 out of luck, right?

1           MR. ENSIGN: I believe that's how Congress has set  
2 this up to be, and certainly what TdA is doing to --

3           THE COURT: Pretty alarming. Even you, I trust, would  
4 agree such a scenario would be pretty alarming?

5           MR. ENSIGN: Your Honor, it's entrusted to the  
6 political branches, and to the extent that that reaches  
7 outcomes that are unacceptable as a policy in political matter,  
8 the political branches exist to resolve that. Certainly,  
9 Congress could repeal or amend the AEA at any time.

10          THE COURT: Okay. Thank you, all. I appreciate it.

11          MR. GELERNT: Your Honor, just one housekeeping thing.

12          THE COURT: Yes.

13          MR. GELERNT: This is a small thing, but the  
14 government has made a big deal in the Court of Appeals that  
15 your class cert findings weren't reduced to writing, so we  
16 would respectfully ask that at some point you do that,  
17 certifying the class.

18          THE COURT: I think my minute order does. Just in  
19 terms of you mean on each numerosity to --

20          MR. GELERNT: The government seems to be suggesting  
21 that. I will leave it to you. But I'm just mentioning it as a  
22 cautionary matter.

23          THE COURT: All right. Thank you. Good weekend,  
24 everyone.

25          (Proceedings concluded at 3:47 p.m.)

## 1 CERTIFICATE

2 I, Sonja L. Reeves, Federal Official Court Reporter in and  
3 for the United States District Court of the District of  
4 Columbia, do hereby certify that the foregoing transcript is a  
5 true and accurate transcript from the original stenographic  
6 record in the above-entitled matter and that the transcript  
7 page format is in conformance with the regulations of the  
8 Judicial Conference of the United States.

9 Dated this 21st day of March, 2025.

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/s/ Sonja L. Reeves  
SONJA L. REEVES, RDR-CRR  
FEDERAL OFFICIAL COURT REPORTER

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