THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT
APPEAL NO. 2025-1

A. ZEBRA., on their own behalf and on behalf of others similarly situated, **B. GAZELLE,** on their own behalf and on behalf of others similarly situated, **Appellants (Petitioners below),** **v.** **DONALD J. TRUMP**, in his official capacity as President of the United States, **PAMELA BONDI**, Attorney General of the United States, in her official capacity, et. al., **Appellees (Respondents below).**	**Appeal from the U.S. District Court for the Northern District of Red State**

OPINION OF THE COURT

Before Lion, Tiger, and Bear, *Circuit Judges*.
Lion, *Circuit Judge*:

FACTUAL AND PROCEDURAL BACKGROUND

The Alien Enemies Act ("AEA"), adopted in 1798, authorizes removal of "natives, citizens, denizens, or subjects of the hostile nation" if there is a "declared war" with a foreign nation or government, or a nation or government is engaged in an "invasion or predatory incursion" of territory of the United States. 50 U.S.C. § 21. President Trump invoked the AEA to remove Venezuelan nationals who are members of Tren de Aragua ("TdA"), a designated foreign terrorist organization ("FTO").

The President's March 2025 Proclamation ("the Proclamation") explained 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.

Proclamation No. 10903 (Proclamation), 90 Fed. Reg. 13033, 13034 (March 14, 2025).

This litigation began after ICE detained the two named Appellants, natives of Venezuela, on the basis that they were TdA members and held them in the Preserve Detention Center in Big Cat, Red State. Acting pursuant to 28 U.S.C. § 2241, the Appellants filed a writ of habeas corpus in the United States District Court for the Northern District of Red State, alleging they were about to be removed to El Salvador under the terms of the Proclamation. They disputed they belonged to TdA and argued the Proclamation was unlawful. They sued on behalf of themselves and all other noncitizens in custody in the Northern District of Red State who are or will be subject to the Proclamation. No class certification has occurred.

The district court denied Appellants' motion for a temporary injunction against summary removal under the AEA. Appellants appealed. We now address whether the named Appellants are likely to succeed on the merits of their habeas claim that the AEA does not authorize their removal. To answer this question, we must address two issues: (A) whether, and if so, to what extent, a court can review the President's invocation of the AEA; and (B) if a court can conduct such a review, whether the President provided a sufficient basis to invoke the AEA to authorize Appellants' removal from the United States?

DISCUSSION

"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." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). We are contemporaneously issuing a separate opinion explaining why we find that Appellants have met their burden regarding irreparable harm, equitable balance, and public interest. This opinion is limited to the first injunction factor: whether Appellants are likely to succeed on the merits of their habeas claim.

Appellants claim that the authority the AEA grants to the President does not support this Proclamation. No one argues here that the Constitution would independently permit the detention or removal of individuals solely because they are citizens of a nation that is an enemy of this country or even because they are members of a terrorist organization. Therefore, our obligation is to interpret a statute. Undoubtedly, the President is entitled to broad discretion if the statute applies.

The point at which a court's authority ends and a President's unreviewable discretion begins is a key interpretive issue.

The President's Proclamation relies on the following authority:

> 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.

50 U.S.C. § 21.

The parties agree that, as preconditions to invoking the AEA, there must be a declared war, an invasion, or a predatory incursion by a foreign nation or government. There is no declared war. The parties disagree on the scope of our review and the meaning of the other terms — "invasion or predatory incursion."

We start with the degree of review we can give to the Proclamation.

A. Whether, and If So, To What Extent, A Court Can Review the President's Invocation of the AEA.

The Government contends "the AEA grants the President a near 'unlimited' authority to identify and countermand foreign invasions or predatory incursions." In its view, it is not for the courts to question the President's assertion that the actions of TdA members constitute an invasion or predatory incursion by a foreign government. Appellants argue the AEA does not authorize President Trump's Proclamation.

Our only task is one of statutory interpretation, which must start with the statutory text.

Prior invocations of the AEA provide context as we seek to understand the appropriate scope of our review. The AEA's authority has been invoked only three times before 2025. Two occurred after and the other just days before Congress declared war on the nation(s) covered by an AEA invocation. Those invocations were after war was declared in 1812 against Great Britain, after war was declared against Germany in 1917, and just before war was declared against the Axis Powers in 1941. *See* Amicus Brief of Constitutional Accountability Center 15-18.

The earliest AEA decision from a Supreme Court justice was by Chief Justice Marshall, "riding circuit" in December 1813. Marshall and a district judge, in a habeas suit filed in Virginia circuit court by a person jailed under the AEA, released the detainee from confinement. *See* Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien*, 9 Green Bag 2d 39, 41-42 (2005) (reproducing Marshall's decision in *United States v. Williams*). The release was ordered because the "alien enemy" was to be held until an opportunity to remove him arose, but there was no place designated for him to be taken. *Id.* Thus, the first time a Supreme Court justice considered the AEA, a

careful review of the validity of an alien's detention was made. The identified flaw was technical, but judicial review led to release.

The most useful judicial precedents on those prior invocations of the AEA occurred after World War II. The Government's primary authority on the limits to the judiciary's interpretive role is the 1948 decision of *Ludecke v. Watkins*, 335 U.S. 160 (1948). In that declared-war case, petitioners argued the President's authority to employ the AEA during a time of war "did not survive cessation of actual hostilities" via Germany's and Japan's formal surrenders in 1945. *Id.* at 166. The Court refused (with four dissenters) to review the President's determination that a state of war still existed. *Id.* at 170, 173. The Court's making its own determination "would be assuming the functions of the political agencies of the Government." *Id.* at 170.

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. *Id.* (footnote omitted).

In *Ludecke*, the Court explained that the AEA's "terms, purpose, and construction leave no doubt" that judicial review is precluded except for "questions of interpretation and constitutionality" of the Act. *Id.* at 163-64. Indeed, the Act "confers on the president very great discretionary powers" that are "as unlimited as the legislature could make [them]." *Id.* at 164 (first quoting *Brown v. United States*, 12 U.S. (8 Cranch) 11s0, 126 (1814) (Marshall, C.J.); and then quoting *Lockington v. Smith*, 15 F. Cas. 758, 760 (Washington, Circuit Justice, C.C.D. Pa. 1817) (No. 8,448)). "Such great war powers may be abused, . . . but that is a bad reason for having judges supervise their exercise, whatever the legal formulas within which such supervision would nominally be confined." *Id.* at 172. The "full responsibility for the just exercise of this great power may validly be left where the Congress has constitutionally placed it — on the President of the United States." *Id.* at 173.

We conclude that *Ludecke* resolves one issue about the scope of our review. If judicial review is precluded except for "questions of interpretation and constitutionality" of the Act, *id.* at 163, and we take that to refer to interpretating the statute's text and also applying the interpretation, then the President's fact-findings are not within our review authority. For example, Appellants here have challenged the President's finding that the Maduro regime in Venezuela is directing the actions of TdA in this country. We interpret the *Ludecke* Court to have made conclusive the President's "belief" that certain categories of aliens are enemies and engaged in hostile actions. *Id.* at 170. Thus, even though Appellants insist there is no basis to find the Maduro regime is directing TdA's action in the United States, it is not for a court to review a President's findings about the facts when he is employing the AEA. We accept all *Presidential* fact-findings about what events have occurred — including who is directing them.

Nonetheless, for us to defer to findings of fact, there must be findings of fact. The AEA specifies that the "President [must] make[] public proclamation of the event" giving rise to his invocation of the AEA. 50 U.S.C. § 21. The statute does not identify what, at a minimum, must be included in the proclamation. We conclude that proclaiming, without more, that an "invasion" or "predatory incursion" has occurred will not suffice. We know this because the precedents require "interpretation," which implies the application of law to facts. Thus, the proclamation must inform of what is believed to be occurring. Our role is then to see if those facts meet the meaning of the statute.[1]

The unreviewability of the President's factual findings is a discrete issue separate from whether the statutory label the Proclamation places on a finding is consistent with a court's interpretation of a statute. The needed interpretation is the meaning of a declared war, an invasion, or a predatory incursion. More clarity about a court's role was added in a habeas corpus proceeding brought by a German national confined by the United States Army in Germany. The Court held that the detention was constitutional, but courts had authority "to ascertain the existence of a state of war and whether he is an alien enemy and so subject to the Alien Enemy Act." *Johnson v. Eisentrager*, 339 U.S. 763, 775 (1950) (citing *Ludecke*, 335 U.S. at 160). That is a revised description of review from what *Ludecke* stated in that the existence of a state of war was explicitly mentioned as a valid subject. We conclude that the *Johnson* opinion means that a court was to assure itself that there was a declaration of war and that it had not been terminated. That issue arose in the next case.

The final relevant precedent coming out of World War II was *United States ex rel. Jaegeler v. Carusi*, 342 U.S. 347 (1952). The Court referred to the 1945 Presidential Proclamation under the AEA, seemingly still effective, that had authorized the Attorney General to detain and remove alien enemies "deemed by the Attorney General to be dangerous to the public peace and safety." *Id*. at 347 n.1; Proclamation No. 2655, 10 Fed. Reg. 8947, 8947 (July 20, 1945). The Attorney General used that authority to order a German prisoner in this country to be removed to Germany. *Jaegeler*, 342 U.S. at 347-48. While the prisoner's petition for writ of certiorari was pending, Congress by joint resolution declared the state of war between the United States and Germany at an end. *Id.* at 348 (citing Joint Resolution of Oct. 19, 1951, Pub. L. No. 82-181, 65 Stat. 451). The Court showed no interest in whether the President agreed that "the period of confusion and conflict which is characteristic of a state of war" was over. *Ludecke*, 333 U.S. at 170. Perhaps then-President Truman would have disagreed. At least as to this

[1] To the extent that cases about the reviewability of agency action could provide analogies, they are not contrary to what we identify as the scope of our review. Although sometimes the best reading of the statute is to afford discretion, we are still to police the outer bounds of that discretion, not to abdicate the judicial role altogether. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 395 (2024). Statutes can sometimes be read to preclude judicial review entirely, but there is a presumption in favor of reviewability that "can only be overcome by 'clear and convincing evidence' of congressional intent to preclude judicial review." *See Guerrero-Lasprilla v. Barr,* 589 U.S. 221, 229 (2020) (quoting *Reno v. Catholic Soc. Servs., Inc.,* 509 U.S. 43, 64 (1993)). The Supreme Court in *Ludecke* found some degree of judicial review precluded despite this presumption, but in the next breath it preserved judicial review of "questions of interpretation." *See Ludecke*, 335 U.S. at 163-64. Our scope of review is consistent with that holding, as we have explained.

AEA prerequisite, Congress itself could end its applicability, regardless of the President's agreement.

The other possible foundational events for invoking the AEA, an invasion or a predatory incursion, are for the President to determine. Congress seemingly has no role. Because there are no Supreme Court precedents reviewing the invocation of the AEA on either of those grounds, we consider Supreme Court decisions addressing the reviewability of executive determinations in other contexts.

One decision concerned the Militia Act of 1795. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827) (Story, J.). The controversy grew out of the War of 1812 between the United States and Great Britain. Mott was court martialed for not responding to the New York governor's calling out the militia, a call complying with the President's requisitioning troops from New York for the war. *Id.* at 28-29. The Militia Act, enacted three years before the AEA, provided that "whenever the United States shall be invaded, or be in imminent danger of invasion . . . it shall be lawful for the President . . . to call forth such number of the militia . . . as he may judge necessary to repel such invasion." *Id.* at 31 (quoting Militia Act of 1795, ch. 36, § 1, 1 Stat. 424). The Court recognized this power as limited "to cases of actual invasion, or of imminent danger of invasion." *Id.* at 29. In navigating that limitation, the Court answered questions that are relevant here:

> If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed, may decide for himself, and equally open to be contested by every militiaman who shall refuse to obey the orders of the President? We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons.

Id. at 29-30.

Obviously, the decision was in a different context. The state militias were being activated at the President's direction in response to an invasion of the United States by Great Britain in 1812. The Court was writing long after the 1815 end of that war, but it was discussing a situation in which the country had been physically invaded by the British Army in what at times is called the Second War of Independence, the loss of which could have ended independence. *See generally* The War of 1812: Writings from America's Second War of Independence (2013) (Donald R. Hickey ed.).

We conclude that the Supreme Court, in interpreting the Militia Act of 1795, held that it was for the President's unreviewable discretion to decide that circumstances exist that require the calling up of the militia, or in today's terminology, the National Guard. The present-day use of that authority is being litigated. *See Newsom v. Trump*, 141 F.4th 1032 (9th Cir. 2025). Even if a Supreme Court precedent concludes that litigation with

Mott unchanged, the need for troops as an immediate defense to an actual or threatened invasion is readily distinguishable for justiciability purposes from when residents of this country may be detained and removed.[2] This 1827 opinion concerning the Militia Act does not displace the on-point and century-plus later *Ludecke*, *Eisentrager*, and *Jaegeler* AEA opinions.

More helpful than *Mott* and much closer timewise to *Ludecke*, the Court considered whether Texas' governor exceeded his state-law authority by issuing a proclamation declaring martial law in certain counties that "were in a state of insurrection," and having a brigadier general of the Texas National Guard "take such steps as he might deem necessary" to enforce the law. *Sterling v. Constantin*, 287 U.S. 378, 387 (1932) (quotation marks omitted). The purported insurrectionists were East Texas oil and gas producers; the laws they violated were state regulators' limits on the amount of production. *Id.* at 387-88. The Supreme Court recognized that "[b]y virtue of his duty [under Texas law] to 'cause the laws to be faithfully executed,' the [governor was] appropriately vested with the discretion to determine whether an exigency *requiring military aid* for that purpose ha[d] arisen." *Id.* at 399 (emphasis added)."His decision to that effect [was] conclusive." *Id.* It then explained the limitations of "conclusive":

> It does not follow from the fact that the executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat.

Id. at 400.

The power being used was found in the Texas constitution and statutes, but the Court analogized it to the Presidential power recognized in *Mott*. *Id.* at 399. The Court upheld an injunction against the governor: "There was no military necessity which, from any point of view, could be taken to justify the action of the Governor in attempting to limit complainants' oil production." *Id.* at 403-04. Therefore, what was conclusive was only the governor's belief that circumstances existed that required "military aid." *Id.* at 399-400. The Court did not enjoin the *callup* of the militia. But, after leaving that decision solely in the executive's discretion, the Court did not hesitate to say the executive's categorization of the events as an insurrection did not prevent the judiciary's enjoining the use of troops to enforce production limits for oil and gas. *Id.* at 401–02.

Of importance, the label of "insurrection" did not enter into the Court's reasoning beyond what we just stated. For example, there was not discussion of any state statute providing that if the governor believes there is an "insurrection," certain actions can be

[2] Additionally, the Militia Act of 1795 was worded in a manner that more clearly gave unbounded discretion to the President. The Act used phrases such as "as he may judge" and "as he shall think proper" no fewer than three times in the section authorizing the President to call forth the militia. Militia Act of 1795, ch. 36 § 1, 1 Stat. at 424.

taken. Indeed, almost everything discussed in the *Sterling* opinion after stating the governor's belief that an exigency exists is conclusive, makes the use of the governor's military powers subject to judicial review. *Sterling* thus supports the proposition that when private rights are involved, as here, courts retain some role in judging the propriety of the use of war powers.[3] *See id.* at 400–01.

We sum up this way. *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 Congressional declaration of war 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. We are to interpret. We do not create special rules for the AEA but simply use traditional statutory interpretive tools

We now examine and interpret the key language.

B. Has the President Provided a Sufficient Basis to Invoke the AEA and Remove Appellants from the United States?

The AEA was born in 1798 from the threat of war with France. France was an American ally during the Revolutionary War, which formally ended with the Treaty of Paris in 1783, but ten years later relations soured. France viewed the 1794 Jay Treaty between the United States and Great Britain as a betrayal; French privateers began seizing American ships bound for British ports.[4] This spurred the undeclared naval conflict known as the Quasi-war. Gregory E. Fehlings, *America's First Limited War*, 53 Naval War Coll. R. 101, 111 (2000). Faced with French aggression at sea, President John Adams and the Federalist-controlled Congress worried French immigrants would act as

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[3] *The Prize Cases* are not to the contrary. *See The Brig Amy Warwick* (*The Prize Cases*), 67 U.S. (2 Black) 635 (1862). It is true that, even though private rights were involved, the Supreme Court referred to the President's "proclamation of blockade" as "official and conclusive evidence . . . that a state of war existed." *Id.* at 670. That was *dicta*, however: the only question before the court was not whether a state of war existed as a factual matter, but instead whether a state of war existed as a technical matter, *i.e.*, whether a war could exist between states of the same country and without a formal congressional declaration of war. *Id.* at 641, 646-47 (arguments of counsel). The Court resolved the latter question affirmatively. *Id.* at 669 (majority opinion). As to the former question, there was no doubt that the country was at war, a war that, as the Supreme Court emphasized, "all the world acknowledge[d] to be the greatest civil war known in the history of the human race." *Id.* That truth could not be evaded "by subtle definitions and ingenious sophisms." *Id.* at 670.

[4] "French officials encouraged that plunder by renting French warships to privateers, and they profited from it by taking payoffs from privateers whose captures they upheld in admiralty court." Gregory E. Fehlings, America's First Limited War, 53 Naval War Coll. R. 101, 120 (2000). "President Adams called it 'an unequivocal act of war on the commerce' of the United States." Id. at 121 (quoting President John Adams, Second Annual Message to Congress (Dec. 8,1798)).

agents to sabotage the American government. 11 John Spencer Bassett, The American Nation: A History 252 (1906). So, "they proceeded to devise a means of dealing with the objectionable aliens already in the country." *Id.* at 258. The resulting Laws included the AEA and its peacetime counterpart, the Alien Friends Act. *Id.* Only the AEA remains in force. What its words mean controls the President's use of its broad authority.

We interpret statutory "words consistent with their 'ordinary meaning . . . at the time Congress enacted the statute.'" *Wisconsin Cent. Ltd v. United States*, 585 U.S. 274, 277 (2018) (alteration in original) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). "We often look to dictionary definitions for help in discerning a word's ordinary meaning." *Cascabel Cattle Co*. *v. United States,* 955 F.3d 445, 451 (5th Cir. 2020). "[I]t is helpful to consider the interpretation of other statutory provisions that employ the same or similar language." *St. Tammany Par. ex rel. Davis v. Fed. Emergency Mgmt. Agency*, 556 F.3d 307, 320 (5th Cir. 2009) (quoting *Flowers v. S. Reg'l Physician Servs. Inc.*, 247 F.3d 229, 233 n.4 (5th Cir. 2001)). "[T]he text of a law controls over purported legislative intentions unmoored from any statutory text." *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 642 (2022). "[C]ourts, in construing a statute, may with propriety recur to the history of the times when it was passed . . . ." *Leo Sheep Co. v. United States*, 440 U.S. 668, 669 (1979) (quoting *United States v. Union Pac. R.R. Co.,* 91 U.S. 72, 79 (1875)).

We start with the meaning of "invasion," then "predatory incursion," and end with the effect of including "foreign nation or government" in the understanding of those terms.

1. Invasion

Appellants read "invasion" to require military hostilities, relying on these dictionary definitions:

> Invasion, Johnson's Dictionary (1773): Hostile entrance upon the rights or possessions of another; hostile encroachment.
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> Invasion, Webster's Dictionary (1828): A hostile entrance into the possessions of another; particularly, the entrance of a hostile army into a country for the purpose of conquest or plunder, or the attack of a military force. An attack on the rights of another; infringement or violation.

The Government's initial argument is that the terms are distinguishable simply because Congress used three terms and separated them with the disjunctive — "declared war . . . or any invasion or predatory incursion." 50 U.S.C. § 21. We accept that each term should be given a distinct meaning. That each means something different does not answer whether each does or does not require some level of military action. The Government's argument continues that because "declared war" already "cover[s] armed conflicts perpetrated by foreign armies," Congress must have intended "invasion" and "predatory incursion" to require something less. Consistent with that view, it interprets "invasion" to mean "a hostile attack or encroachment" and "predatory incursion" to mean "a coordinated entry into the United States with a common, destructive purpose." The

Government seemingly accepts that those entries would have to be by a nation or government.

The Government relies on some of the definitions listed above and the following:

> Invader, Johnson's Dictionary (1773): One who enters with hostility into the possessions of another.
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> Invasion, Frederick Barlow, The Complete English Dictionary (1773): The entrance or attack of an enemy on the dominions of another. The act of entering and attacking the possessions of another as an enemy. An [e]ncroachment.
>
> Invasion, Nathan Bailey, A Universal Etymological English Dictionary (25th ed. 1783): An inroad or descent upon a country, an usurpation, or [e]ncroachment.

There of course can be far less warlike meanings to the word "invasion," used colloquially or just in non-military contexts. Our focus is on a statute the United States Congress passed in anticipation of an armed conflict with another country. The formality of the occasion requires rejecting interpretations that wander far from that common understanding of an "invasion."

Equally formal use occurred not many years prior to passage of the AEA. The Constitutional Convention adopted a provision granting Congress the power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. Const. art. I, § 8, cl. 15 (emphasis added). The Constitution also specifies that "[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." U.S. Const. art. I, § 9, cl. 2 (emphasis added).[5] The variation "invaded" is also used:

> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay. U.S. Const. art. I, § 10, cl. 3 (emphasis added).

James Madison's interpretation of the meaning of "invasion" in specific reference to its use in the AEA is also important. We concede that the National Archives, which provide

[5] Article IV, Section 4 also uses the word "invasion": "The United States shall guarantee to every State in this Union a Republican Form of Government and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. Const. art. IV, § 4.

the text for many of our sources, explained that Madison, a partisan Jeffersonian, was stating his views during an intense political struggle with the Federalists who passed the AEA; his Founding Father credentials do not protect his comments from close scrutiny. *See* Editorial Note, James Madison, Report of 1800 (Jan. 7, 1800), in Founders Online [https://perma.cc/2D3N-N64Z]. Nonetheless, in his discussion of the Alien and Sedition Acts, Madison reasonably explained:

> Invasion is an operation of war. To protect against invasion is an exercise of the power of war. A power therefore not incident to war, cannot be incident to a particular modification of war. And as the removal of alien friends has appeared to be no incident to a general state of war, it cannot be incident to a partial state, or a particular modification of war.

Id.

In addition, 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. Appellants assert the distinctions as: 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 an enemy's invading forces have attacked this country, 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. Some of the definitions we have quoted also suggest the intent needs to be to conquer, occupy, or otherwise exercise some long-term control. We need not be that specific in this case. Appellants are likely to succeed in demonstrating that the Proclamation cannot be supported either by the existence of a declared war or an invasion.

2. Predatory Incursion

We now examine the remaining precondition for applicability of the AEA, "predatory incursion." The parties' primary interpretive disagreement about "predatory incursion" is whether its contemporary, 1798 meaning demanded some level of military action.

a. Definitions

First, some definitions.

> Predatory, Webster's Dictionary (1828): Plundering; pillaging; characterized by plundering; practicing rapine; as a predatory war; a predatory excursion; a predatory party.

> Incursion, Johnson's Dictionary (1773): Attack; mischievous occurrence. Invasion without conquest; inroad; ravage.
>
> Incursion, Webster's Dictionary (1828): Literally, a running into; hence, an entering into a territory with hostile intention; an inroad; applied to the expeditions of small parties or detachments of an enemy's army, entering a territory for attack, plunder or destruction of a post or magazine. Hence it differs from invasion, which is the hostile entrance of any army for conquest.

According to Appellants, the neighboring text supports their theory that military hostilities are required. Not only does the Act include this term alongside "declared war" and "invasion," but the Act refers to "alien enemies," which they argue is a law-of-nations concept that "require[s] armed hostilities between warring sovereigns." The Government contends Appellants' interpretation does not give independent meaning to each term in the disjunctive phrase "declared war . . . or any invasion or predatory incursion." 50 U.S.C. § 21. As mentioned before, we find little assistance in that argument because Congress could have been identifying different levels and categories of armed conflict that would justify use of the AEA. The Government also argues the language covering "attempted" or "threatened" predatory incursions reinforces the idea that "predatory incursion" extends beyond actual military hostilities. We conclude that the additional terms simply extend the AEA to failed efforts to commit an invasion or incursion but do not assist in defining the terms.

When Congress used the disjunctive "declared war . . . or any invasion or predatory incursion," it "intended each term to have a particular, nonsuperfluous meaning." *Dubin v. United States*, 599 U.S. 110, 126 (2023) (quoting *Bailey v. United States*, 516 U.S. 137, 146 (1995)). A "declared war" denotes a more formal announcement of armed conflict. The ordinary meaning of "invasion" covers military hostilities that are unaccompanied by a formal announcement of war. What did Congress mean when it added "predatory incursion"?

Based on the dictionary definitions and neighboring statutory text, a "predatory incursion," as used in the AEA, definitely applies to an unauthorized entrance by units of another nation's military to commit acts that are destructive to the interests of the United States, such as victimizing its people or property, for the benefit of a foreign power or its agents without the necessary objective of a long-term occupation or control of American territory. We will examine other relevant sources before deciding whether the phrase means more, or better put for the Government's argument, might mean less as well.

b. Contemporaneous Usage

We now consider how the term was used during the period of the adoption of the AEA. Some examples are of predatory incursions by Indian tribes:

> [T]he President . . . approves the measures you have taken, for preventing those predatory incursions of the Wabash Indians, which, for a considerable period past, have been so calamitous.

Letter from Henry Knox to Governor St. Clair (Aug. 23, 1790).

> You will pay a strict observance to the order I have forwarded to Major Peters relative to the observance of tranquility on the Indian Frontiers by guarding the Indian land from being illegally settled, and the industrious Frontier Inhabitant from Indian thieving and predatory incursions.

Letter from Charles Cotesworth Pinckney to Thomas Butler (Mar. 23, 1800). Whether the tribes themselves were directing the incursions would affect the applicability of the AEA, but we are gaining meaning from the examples.

An 1805 Supreme Court advocate used the phrase in the context of "an Indian War." *See Huidekoper's Lessee* v. *Douglass*, 7 U.S. (3 Cranch) 1, 11 (1805) (arguments of counsel).

Another case used the word "incursion" in a similar fashion, albeit in the reporter's syllabus — which shows another source for contemporaneous meaning:

> The place, to which they removed under this last treaty, is said to be exposed to incursions of hostile Indians, and that they are engaged in constant scenes of killing and scalping, and have to wage a war of extermination with more powerful tribes, before whom they will ultimately fall.

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 10 (1831) (syllabus) (quotation marks omitted).

The phrase "predatory incursion" was also used to refer to British forces and others during the Revolutionary War:

> [F]or as to our being able totally to prevent the desultory & predatory incursions of the Enemy (if they should have a disposition to exert themselves in that way) I do not think our whole Army competent to the object. I conceive, however, that Cavalry are much preferable for such services than Infantry, and it is for this reason, I shall not object to your retaining the two Corps before specified, so long as there may be occasion for them.

Letter from George Washington to Nathanael Greene (Jan. 29, 1783).

Each of these uses of the phrase during the Revolutionary War dealt with the actions of armed forces in a war between the United States and another country. Years later,

tensions arose between the United States and France. The phrase “predatory incursion” was used in that context, too:

> Instead of waiting [for] an actual invasion, I think the raising of the army ought now to be commenced. It would take many months to form & bring it into a state of discipline in which we could place any confidence. Small, predatory incursions of the French, tho’ they might occasion great destruction of property, would not be dangerous, and the militia might be sufficient to repel them; but what we have to guard against is an invasion by a powerful army of veterans: and I do not know any body of militia adequate to stop their progress; and a fatal pannic might be the consequence.

Letter from Timothy Pickering to Alexander Hamilton (June 9, 1798).

Other examples show the phrase used to refer to hostilities at sea or our seaports:

> If the war has exposed us to increased spoliations on the ocean, and to predatory the distance of the United States from Europe and the spirit & fortitude of the people happily diminish in a great degree, if they do not render [e]ntirely improbable, invasions in time of War. — Nevertheless, the unprotected situation of some of our principal Sea Ports, renders it proper to guard against the danger of sudden & predatory incursions.

John Adams, Address to Congress (May 16, 1797).

> incursions on the land, it has developed the national means of retaliating the former, and of providing protection against the latter; demonstrating to all, that every blow aimed at our maritime independence, is an impulse accelerating the growth of our maritime power.

James Madison, Address to Congress (Dec. 7, 1813).

Three decades later, the President used the phrase “predatory incursion” to describe the Mexican army’s entry into the Republic of Texas:

> [T]he war which has so long existed between Mexico and Texas which since the battle of San Jacinto has consisted altogether of predatory incursions, attended by circumstances revolting to humanity. . . . This Government, from time to time, exerted its friendly offices to bring about a termination of hostilities upon terms honorable alike to both the belligerents. Its efforts in this behalf proved unavailing. Mexico seemed, almost without an object, to persevere in the war . . . . Since your last session, Mexico has threatened to renew the war, and either made or proposes to make formidable preparations for invading Texas. She has

> issued decrees and proclamations, preparatory to the commencement of hostilities . . . .

President John Tyler, Address to Congress (Dec. 3, 1844).

One of the predatory incursions President Tyler likely was referencing occurred in 1843. Mexican General Rafael Vasquez led 1400 troops across the Rio Grande to San Antonio. Small detachments entered other towns. None did much damage, and all returned to Mexico after a few days. Stanley Siegel, A Political History of the Texas Republic 1836-1845, at 192-93 (1956). This raid "serve[d] notice that the reconquest of Texas might soon be attempted on a grand scale." *Id.* at 193.

These predatory incursions all involved a military force of some meaningful size, organized in a manner related to the kind of enemy involved, whether an Indian tribe, a distant foreign government who used its own forces or privateers, or an adjacent country using its own troops. Before reaching a conclusion, we consider a few more sources for meaning.

c. AEA and Other Contemporaneous Enactments

We add to the contemporaneous meaning of the statutory terms our understanding of the AEA's place in an array of contemporaneous statutes later labeled the Alien and Sedition Acts. In less than a month, Congress passed four related statutes:

- The Naturalization Act of 1798, ch. 54, 1 Stat. 566 (June 18, 1798);
- An Act Concerning Alien Friends, ch. 58, 1 Stat. 570 (June 25, 1798) (the "Alien Friends Act");
- An Act Respecting Alien Enemies, ch. 66, 1 Stat. 577 (July 6, 1798) (the "Alien Enemies Act" here the AEA);
- The Sedition Act of 1798, ch. 74, 1 Stat. 596 (July 14, 1798).

The Sedition Act applied to aliens and citizens because the Congressional majority was concerned with sedition from both groups. James Morton Smith, Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties 94 (1956). The Naturalization Act "established the longest residence requirement for citizenship in the history of the United States" at fourteen years, applicable to all immigrants arriving after 1794. *Id.* at 33-34. One historian, discussing all these 1798 enactments, concluded "there was an overlapping of the legislation affecting aliens," *id*. at 49, but it was also clear that each Act had a specific "problem" in mind.

We consider whether any overlap in the acts for the country's Friends and its Enemies helps the Government's argument. The Alien Friends Act did not require hostilities with a foreign nation or government. It simply granted the president power to "order all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United

States." Alien Friends Act § 1, 1 Stat. at 571. The Act expired by its own terms in 1800. *Id.* § 6, 1 Stat. at 572. Appellants contend that "[b]y using a different statute from the AEA to govern the peacetime removal of noncitizens a President deemed dangerous, Congress made clear that the President could not undertake the identical action under the AEA."

In response, the Government argues the relevant actions in President Trump's Proclamation could have fallen under the Alien Friends Act in addition to being supported by the AEA. We will examine what Congress included within these two acts and keep the coverage separate if textually required.

We have already identified the coverage of the AEA — predicate events fitting specific categories of hostility with another nation or government, and a resulting liability of "natives, citizens, denizens, or subjects of the hostile nation or government . . . to be apprehended, restrained, secured, and removed as alien enemies." 50 U.S.C. § 21. Using "Friends" to name, colloquially, the other Act is reasonable because no hostility with a foreign nation or government was required. Though the individual's home country was still ostensibly a "friend," this Act required that individual aliens be enemies, i.e., that they themselves were "dangerous to the peace and safety of the United States" or there were "reasonable grounds to suspect [they were] concerned in any treasonable or secret machinations against the government" of the United States, before they could be ordered to leave this country. Alien Friends Act § 1, 1 Stat. at 571. In other words, even though this country and another need not have been involved even in the lowest level of conflict the AEA required, the President could detain and remove aliens who were considered dangerous. No one was ever removed under this Act, but one historian reported that those considered for expulsion were Frenchmen of some significance and notoriety, not common criminals. Smith, Freedom's Fetters, *supra*, at 159-76.

There are several other details in each enactment, but the clear difference in *requirements* is that the Alien Friends Act allowed forced removal from the United States based solely on the perceived danger a specific alien posed to this country. There was no statutory interest in the actions of the alien's home nation or government, though the existence of hostile acts would not block use of the Alien Friends Act against a specific, dangerous alien. Conversely, the Alien Enemies Act demands specific categories of hostility by another nation or government before acting against an individual alien, but the individual need not exhibit personal hostility to this country.

As to what Act would more directly apply here, we summarize the President's Proclamation as identifying a terrorist organization engaged in actions that are dangerous to the peace and safety of this country, and whose members could be said to be involved in "secret machinations against the government" of this country. The Alien Friends Act would have covered those actions had it not expired 225 years ago. The only possibility that the AEA applies on the record before us is if the Proclamation identifies a predatory incursion by forces of a foreign nation or government.

d. Conclusion: Predatory Incursions and the Proclamation

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. The only reason for us to distinguish under the AEA would be to check our understanding of each term. Our understanding is that to some extent at least, the distinction between a predatory incursion and an invasion turns on the enemy's objectives, something often unknowable but, also, largely irrelevant under the AEA.

We still need to apply these understandings to the actions the Proclamation describes. We recognize that the way declared wars, invasions, and predatory incursions are fought will often not be the same, even in broad strokes, as in 1798. Modern warfare involves different categories of weapons, and the ability of nations to harm other nations can involve actions altogether different from the past, such as using computers to disrupt or even cripple an enemy. But that does not mean, for the AEA to apply, any current method of conducting hostilities suffices without showing it is in some manner comparable to an invasion or predatory incursion as understood in 1798.

Some guidance on updating the conditions to which a dated enactment applies can be found in caselaw applying the Constitution's protection of rights to modern conditions: "Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (citations omitted). Similar principles apply to statutes. Though "every statute's *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world." *Wisconsin Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018). In *Wisconsin Central,* the statutory word was "money," which for that statute's purpose "must always mean a 'medium of exchange'"; still, "the facts of the day" will allow the statute to apply to a medium unknown when the statute was adopted. *Id.*

In applying the centuries-old AEA to modern conditions, we still need to decide what are "modern forms" of invasion and predatory incursion (a "declared war" remains unchanged as requiring Congress to act). We examine the Proclamation for its relevant findings, then for each, consider whether, even if they are applying 1798 statutory words to much different actions, they are identifying modern forms of those actions. The findings are all found in the President's Proclamation, 90 Fed. Reg. at 13033–34.

- TdA . . . unlawfully infiltrated the United States and [is] conducting irregular warfare and undertaking hostile actions against the United States.

This statement is a summary of the specific findings and has no independent force under our analysis.

- 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.

A country's encouraging its residents and citizens to enter this country illegally is not the modern-day equivalent of sending an armed, organized force to occupy, to disrupt, or to otherwise harm the United States. The Proclamation does not include a finding that this mass immigration was an armed, organized force or forces. Mass immigration would have been possible when the AEA was written, and the AEA would not have covered it. The AEA does not apply today either.

- 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.

This finding refers to the previously identified actions and declares them to be an invasion and predatory incursion. We just held these actions are not within the reach of the AEA, and this finding does not change that holding.

- 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.

The additional findings here refer to irregular warfare and to the use of drug trafficking. There is no description of what is meant by irregular warfare. We have already held that factual assertions by the President are to be accepted, but freestanding labels to unstated actions are not relevant findings. We accept the finding that drug-trafficking is being used as a weapon, but we hold it is not within even an updated meaning of invasion or predatory incursion. The completely accurate implication of this finding is that drugs are a scourge and weaken our citizens and our country, but it is not beyond reason that in 1798 an enemy country could try to sicken and physically weaken those within the United States. That would not have been an invasion or predatory incursion then, and it is not one today.

- I find and declare that TdA is perpetrating, attempting, and threatening an invasion or predatory incursion against the territory of the United States.

There are no new factual assertions here; instead, the Proclamation is summarizing the findings that had already been made.

- 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.

Here, too, the findings are restating more clearly what was implied in earlier findings: the Maduro regime is directing the hostile actions.

- I further find and declare that all such members of TdA are a danger to the public peace or safety of the United States.

This factual finding concerning the danger posed by all TdA members is unreviewable by this court, but it is not finding facts that constitute an invasion or predatory incursion.

A supplemental record was filed with this court. It includes affidavits explaining the types of heinous crimes committed by TdA members who "coalesce to conduct" the acts; how TdA infiltrates and expands its geographical territory, including in urban areas; and how housing TdA members creates specific safety and administrative problems within ICE detention facilities. The supplemental record also includes an FBI Intelligence assessment explaining how Venezuela has used TdA to silence its critics in other countries. The assessment predicts, with medium confidence, that within six to eighteen months, some Venezuelan officials will leverage TdA members to "threaten, abduct, and kill members of the US-based Venezuelan diaspora who are vocal Maduro critics."

First, this evidence is not entitled to the preclusive effect of the President's own findings in the Proclamation. Instead, if not overcome by contrary evidence, these documents could be the basis for judicial findings of fact. Second, a court's finding of facts based on additional evidence would not even be relevant under the AEA if invocation of the Act depends on the President's beliefs about conditions. The court's findings, even if supportive of the Proclamation, might not mirror the President's unstated findings. Third, any decision now about the relevance under the AEA of any judicial fact-finding would be premature because the district court has not yet entertained evidence.

We accept each of the factual findings in the Proclamation, but not the labels applied to those findings. Instead, interpreting the AEA, we conclude that the findings do not support that an invasion or a predatory incursion has occurred. We therefore conclude that Appellants are likely to prove that the AEA was improperly invoked.

* * *

Our analysis (along with that of the other preliminary injunction factors which we discuss separately) leads us to GRANT a preliminary injunction to prevent removal because we find no invasion or predatory incursion and REMAND to the federal district court for further proceedings.

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT
APPEAL NO. 2025-1

A. ZEBRA, on their own behalf and on behalf of others similarly situated **B. GAZELLE,** on their own behalf and on behalf of others similarly situated, **Appellants (Petitioners below),** **v.** **DONALD J. TRUMP**, in his official capacity as President of the United States, **PAMELA BONDI**, Attorney General of the United States, in her official capacity, et. al. **Appellees (Respondents below).**	**Appeal from the U.S. District Court for the Northern District of Red State**

DISSENT

Tiger, *Circuit Judge*, dissenting:

Determining whether the Alien Enemies Act ("AEA") preconditions are satisfied—whether there is a declared war, or "any invasion or predatory incursion" being "perpetrated, attempted, or threatened," 50 U.S.C. § 21—depends upon "matters of political judgment for which judges have neither technical competence nor official responsibility." *Ludecke v. Watkins*, 335 U.S. 160, 170 (1948). *Ludecke* instructs that a President's declaration of an invasion, insurrection, or incursion is conclusive. And completely beyond the second-guessing powers of unelected federal judges. *See Id.*

However, the majority holds that President Trump is just an ordinary civil litigant. *His* declaration of a predatory incursion is *not* conclusive. Instead, he must plead sufficient facts—as if he were some run-of-the-mill plaintiff in a breach-of-contract case—to convince a federal judge that he is entitled to relief. Accordingly, I dissent.

***

The named Appellants are not entitled to a preliminary injunction blocking their removal under the AEA. They argue no invasion or predatory incursion has been perpetrated,

attempted, or threatened. Their argument fails. We cannot countermand the President's assessment. The named plaintiffs are not likely to succeed on the merits. They have also failed to clearly show that the other preliminary-injunction factors are satisfied, which I discuss in another contemporaneously issued dissent.

A. Courts Have No Authority to Determine Whether the President Properly Invoked the AEA.

For over 200 years, courts have recognized that the AEA vests sweeping discretionary powers in the Executive. And at least 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.

I start with *Ludecke v. Watkins*. That case holds that the political branches—not the courts—decide whether the AEA's preconditions are satisfied. Then, I explain that only my reading of *Ludecke* fits with over 200 years of Supreme Court precedent spanning various areas of law. Finally, I respond to several of the majority's arguments.

1. *Ludeke v. Watkins*

Ludecke arose from World War II. Specifically, in the wake of the attack on Pearl Harbor, President Roosevelt issued a series of proclamations declaring that Germany, Italy, and Japan were "threaten[ing]" "an invasion or predatory incursion upon the territory of the United States." Alien Enemies, German, Proclamation No. 2526; Alien, Enemies, Italian, Proclamation No. 2527; Alien Enemies, Japanese, Proclamation No. 2525. Under these Proclamations, the President determined that "[a]lien enemies deemed dangerous" should be "subject to summary apprehension." Proclamation No. 2525 (Japan); *see also* Proclamation No. 2526 (Germany) (incorporating "[t]he regulations contained in Proclamation No. 2525").

On December 8, 1941—the same day as FDR's Germany proclamation—a German citizen named Kurt Ludecke was arrested. *See Ludecke*, 335 U.S. at 162–63. Critically, Congress had not yet declared war on Germany when Ludecke was arrested. Congress did that later. *See* Joint Resolution Declaring War with Germany, S.J. Res. 119, 77th Cong. (Dec. 11, 1941). Nearly four years later, on May 7, 1945, Germany surrendered unconditionally. Two months after that, on July 14, 1945, President Harry S. Truman issued his own proclamation providing that all "dangerous" "alien enemies" were "subject . . . to removal from the United States." Removal of Alien Enemies, Proclamation No. 2655 (July 14, 1945). To block his removal, Ludecke filed a habeas petition. Ludecke argued, *inter alia*, that the President's authority under the AEA expired upon "cessation of actual hostilities." *Ludecke*, 335 U.S. at 166.

On June 21, 1948, over three years after Germany's unconditional surrender, the Supreme Court held that Ludecke was not entitled to habeas relief. That's because courts may *never* second-guess whether a "state of war" existed. *Id.* at 168. It is for the political branches—specifically, the President—to determine whether the powers

conferred under the AEA were still needed. And in 1948, "[t]he political branch of the Government ha[d] not brought the war with Germany to an[] end." *Id.* at 170. "On the contrary," the President "ha[d] proclaimed that 'a state of war still exist[ed].'" *Ibid.* (quoting Cessation of Hostilities of World War II, Proclamation No. 2714 (Dec. 31, 1946)). That the war was in fact over, and that Germany had in fact surrendered, was irrelevant. "The Court would be assuming the functions of the political agencies of the Government" to second-guess the President's determination. *Ibid.* Simply put, it was "not for [the Court] to question a belief by the President that enemy aliens" remained dangerous simply because "the guns [we]re silent." *Ibid.*

Ludecke's holding cannot be limited to only congressional declarations of war. The President invoked the AEA and arrested Ludecke *before* Congress declared war on Germany. And in upholding the President's actions, the Court's rationale swept far more broadly than declared wars. The Court focused on the fact that the *President* had proclaimed that a state of war continued to exist even after the shooting stopped. *Ibid.* The Court could not "question" the President's "belief" about the dangers "enemy aliens" posed. *Ibid.* Moreover, regardless of whether Congress or the President had made the judgment call required to trigger the AEA, *courts* had no business getting involved. On the contrary, determining whether the AEA's preconditions are satisfied is a "matter[] of political judgment for which judges have neither technical competence *nor official responsibility*." *Ibid.* (emphasis added).

Ludecke controls here. The President has determined that an invasion or predatory incursion is threatened. Countermanding that determination would mean "assum[ing] the functions" of the political branches. *Ibid.* That lies beyond our "official responsibility."

It also exceeds our "technical competence." *Ibid.* As Joseph Story wrote for the Court nearly 200 years ago, the "evidence upon which the President might decide that there is imminent danger of invasion, might be of a nature not constituting strict technical proof." *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 31 (1827). In other words, the decision is inherently uncertain, depending on "large elements of prophecy." *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). The "nature" of the decision "is political, not judicial." *Ibid.*; *cf. Seven Cnty. Infrastructure Coal. v. Eagle County*, 145 S. Ct. 1497, 1512 (2025) (explaining that fact-intensive applications of law to fact even in the ordinary administrative-law context often turn on political discretion more than legal analysis). And it is only by hearkening back to "Old Testament days, when judges . . . led the[]" people of Israel "into battle," that the majority can assert the authority to make a decision belonging to the Commander-in-Chief. *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1550–51 (D.C. Cir. 1984) (en banc) (Scalia, J., dissenting), *cert. granted, judgment vacated*, 471 U.S. 1113 (1985).

But suppose for a second there *were* some concrete evidence constituting "strict technical proof." *Mott*, 25 U.S. (12 Wheat.) at 31. Why should the President disclose it? I see no reason. "[T]he disclosure of the evidence might reveal important secrets of state." *Ibid.* And one of the very purposes of having a unitary Executive is to preserve "secrecy." The Federalist No. 70, at 424 (Clinton Rossiter ed., 1961) (Alexander

Hamilton) (hereinafter The Federalist). So the more people who get to know the relevant information, the more this crucial presidential "qualit[y] will be diminished." *Ibid.*

Some national-security secrets are better kept, well, *secret*—even from the other branches. *See also United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) ("Secrecy in respect of information gathered by [the President's confidential sources] may be highly necessary, and the premature disclosure of it productive of harmful results."). As the Supreme Court explained shortly after World War II with respect to disclosure of national security secrets by the President to the courts:

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences.

Chicago & S. Air Lines, 333 U.S. at 111. Because we cannot know the "secret" "information" upon which the President may be relying, it is "intolerable" for the majority to "nullify" the President's "action[]." *Ibid.*

As *Ludecke* explained long ago, "some statutes preclude judicial review." *Id.* at 163 (quotation omitted). The AEA "is such a statute." *Id.* at 164.

Ludecke's reasoning turned on basic principles in our law. As courts have long understood, the field of foreign relations implicates the sorts of factual and policy considerations that are "entirely incompetent to the examination and decision of a court of justice." *Coleman v. Miller*, 307 U.S. 433, 454–55 (1939) (quotation omitted). What is true of foreign relations generally is true of immigration law specifically, *Biden v. Texas*, 597 U.S. 785, 805 (2022), which is itself "vitally and intricately interwoven with . . . the conduct of foreign relations" and "the war power." *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952). Thus, courts have long "declined to run interference" in immigration law "without the *affirmative intention* of the Congress *clearly expressed*." *Biden*, 597 U.S. at 805 (emphasis added) (quotation omitted). Nothing in the AEA extends a *clear* and *affirmative* invitation to the courts to begin sticking their noses into sensitive foreign policy decisions implicating the war power. On the contrary, the AEA's "terms, purpose, and construction leave no doubt." *Ludecke*, 335 U.S. at 164. It leaves "full responsibility for the just exercise of this great power . . . where the Congress has constitutionally placed it—on the President of the United States." *Id.* at 173.

2. There's Only One Way to Read *Ludecke.*

My reading of *Ludecke* is the only reading that accords with Supreme Court precedent. The Executive always has conclusive power to find that an invasion, or similar hostility, is being perpetrated or threatened. That has been true when dealing with Executive

claims of authority under related statutes, such as the 1795 Militia Act or inherent Article II powers. It has even been true when *state* Executives have made the judgment call.

a.

First, consider the Supreme Court's early interpretation of a related statute passed shortly before the AEA, the Militia Act of 1795. The language of the Militia Act of 1795 should sound familiar; it largely mirrors the AEA's. The Militia Act provided that the President could call forth the militia "whenever the United States shall be *invaded* or be *in imminent danger of invasion* from any foreign nation or Indian tribe." An Act to Provide for Calling Forth the Militia, ch. 36, 1 Stat. 424 (1795) (emphasis added).

In *Martin v. Mott*, the Supreme Court addressed the authority of the President to invoke the Militia Act of 1795. During the War of 1812, President James Madison had called forth the militia under the Act. *See Mott*, 25 U.S. (12 Wheat.) at 28. A New York farmer, Jacob E. Mott, refused to show up for service, claiming the call was invalid. *See ibid.* The Supreme Court rejected Mott's claim.

Justice Story, writing for the Court, could not have been clearer: "We are all of [the] opinion, that the authority to decide whether the exigency has arisen" that would justify the President's exercise of authority under the Act "belongs exclusively to the President, and that his decision is conclusive upon all other persons." *Id.* at 30. In other words, the Supreme Court read the 1795 Militia Act to make the President "the sole and exclusive judge of the existence" of an invasion. *Id.* at 32; *see also* Jack Goldsmith, Martin v. Mott *Enters the Stage*, Executive Functions (June 16, 2025), https://perma.cc/YR54-MEU5 (explaining that "*Mott* interpreted" the 1795 Milita Act "to confer unreviewable discretion on the [P]resident").

Mott makes clear that even deferential review is too searching. As I explained earlier, "the evidence upon which the President might decide that there is imminent danger of invasion, might be of a nature not constituting strict technical proof." *Mott*, 25 U.S. (12 Wheat.) at 31. In other words, when Presidents decide that our Nation is under attack, they have *zero* obligation to base such decisions on facts provable in court. They have *zero* obligation to paper such decisions like litigation associates at law firms in New York paper commercial agreements. And they have *zero* obligation to come into court and convince a federal judge of the most delicate and dangerous affairs of state. *Supra*, at 822. Moreover, courts could not review any evidence the President might have because "the disclosure of th[at] evidence might reveal important secrets of state, which the public interest, and even safety, might imperiously demand to be kept in concealment." *Mott*, 25 U.S. (12 Wheat.) at 31. So courts have to keep their noses out of the matter.

b.

Mott is not the only case that awards conclusive effect to the President's determination of an invasion, insurrection, or any other real or threatened hostility. The Supreme Court

has also deferred to the President's determination in these contexts because of his inherent authority as Commander-in-Chief.

In the *Prize Cases*, for example, President Lincoln announced a blockade of southern ports after the southern rebels seized Fort Sumter. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2071 (2005). But the power to announce a blockade depended on the existence of "a state of war." *Prize Cases*, 67 U.S. (2 Black) 635, 666 (1862). Did a state of war exist? Per the Court, yes. But not because the Court got to review evidence, determine whether the United States could go to war with itself, or find facts as if adjudicating a bench trial on the nature of the armed conflict in South Carolina. The *only* thing that mattered was President Lincoln's announcement of the blockade, which was "itself official and conclusive evidence to the Court that a state of war existed." *Id.* at 670.

True, the Court acknowledged, the President had no power to "initiate or declare a war" unilaterally. *Id.* at 668. The power to declare war obviously lies with Congress. *See* U.S. Const. art. I, § 8, cl. 11. But that did not matter. As the Court explained, courts could not countermand the President's determination that a "state of war" *already* existed. Any contrary position would be intolerable: It would allow courts to "cripple the arm of the Government and paralyze its power by" the sort of "subtle definitions and ingenious sophisms" that are the hallmarks of lawyers. *See Prize Cases*, 67 U.S. (2 Black) at 669–70; *cf.* Bradley & Goldsmith, *supra*, at 2054 (expressing concern over limiting presidential authority based on some "metaphysical test for war"). Instead, in our constitutional system, the "question" of "[w]hether the President . . . ha[d] met with such armed hostile resistance" so as to make the hostilities a war was "to be decided *by him*." *Prize Cases*, 67 U.S. (2 Black) at 670.

c.

State executives also have the first and last word on the existence of insurrections, invasions, and other forms of real or threatened hostilities.

Take *Sterling v. Constantin*, for example. There, the Governor of Texas proclaimed that an insurrection was unfolding in East Texas because some oil barons were pumping too much oil. 287 U.S. at 386–89. "The troops were ordered in and the [oil] wells were closed." Charles Fairman, *Martial Rule, in the Light of* Sterling v. Constantin, 19 Cornell L.Q. 20, 21 (1933). Several owners of interests in oil and gas leaseholds sued. *Sterling*, 287 U.S. at 387. The district court granted judgment in the owners' favor. *See id.* at 392.

In explaining that judgment, the district court found there had never been "any actual riot, tumult, or insurrection, which would create a state of war existing in the field." *Id.* at 391 (quotation omitted). And not only that. The Governor had listed a host of fears concerning what might happen in East Texas. Even "if all of the conditions had come to pass" as the Governor feared, "they would have resulted merely in breaches of the peace" not "even remotely resembling . . . a state of war." *Ibid.* (quotation omitted). So "unless the Governor [could by] proclamation create an irrebuttable presumption that a

state of war exist[ed]," the court could only conclude there was no state of war. *Id.* at 392. (quotation omitted)

What did the Supreme Court say about all that? Did they presage today's majority opinion by saying the Executive's finding was so implausible it should be overridden by a handful of generals-in-robes? No. The Court held that the Governor's determination that there was an insurrection was "conclusive." *Id.* at 399. So no court could countermand it.

All of these cases recognize one fundamental principle: The President's judgment call as to the existence of a state of war, invasion, or insurrection is conclusive.

3. The Majority's Cases Don't Support Its Arguments.

Now time for some responses to the arguments on the other side. The majority offers several cases as if they support its position. None of them do. Next, the majority tries to undermine two of the cases that support my position. That fails.

a.

In response, the majority has only identified two partial sentences arguably saying that this court can countermand the President's determination that an invasion is perpetrated or threatened. Neither sentence comes close to bearing the weight the majority places on it. And the two additional cases the majority discusses do not support its position.

i.

Start with the first sentence (or really clause) the majority found. That clause comes from *Ludecke*, which was then quoted in *J.G.G.*, for the proposition that AEA designees are "entitled to 'judicial review' as to 'questions of interpretation and constitutionality' of the Act." *J.G.G.*, 145 S. Ct. at 1006 (quoting *Ludecke*, 335 U.S. at 163, 172 n.17). The majority reads this statement for all it could be worth—despite the fact that Justice Frankfurter's paean to judicial restraint in *Ludecke* does not contain any other clauses that comport with the majority's judicial-supremacist reading of that case.

The majority says that the very concept of "interpretation" requires searching judicial review. That is wrong. I have also "interpret[ed]" the Act. I did so *just as Ludecke did* by saying that President Trump's invocation of it is conclusive. And it is hard to see how that reading conflicts with *J.G.G.* because that case rested on, you guessed it, *Ludecke*. Is the power vested in the President by the AEA an awesome one? You bet it is. But that has never precluded a federal court from recognizing that the Constitution and the statute give the President conclusive power in this decision:

> *[W]e hold that full responsibility for the just exercise of this great power may validly be left where the Congress has constitutionally placed it—on the President of the United States*. The Founders in their wisdom made

> him not only the Commander-in-Chief but also the guiding organ in the conduct of our foreign affairs. He who was entrusted with such vast powers in relation to the outside world was also entrusted by Congress, almost throughout the whole life of the nation, with the disposition of alien enemies during a state of war. Such a page of history is worth more than a volume of rhetoric.

Ludecke, 335 U.S. at 173 (emphasis added).

This is not an anomalous reading of a statute. The "best reading of a statute" sometimes is "that it delegates discretionary authority to" the Executive. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 395 (2024). In such cases, the judicial duty "to independently interpret the statute" is "fulfill[ed] . . . by recognizing" the "delegation[]." *Ibid.*; *see also Dalton v. Specter*, 511 U.S. 462, 477 (1994) ("Where a statute . . . commits decisionmaking to the discretion of the President," the best reading of the statute is that "judicial review of the President's decision is not available."). So by treating the President's determination as conclusive, I am simply fulfilling the judicial obligation to render the best interpretation of the AEA—precisely as *Ludecke* did.

Nor is it anomalous to read *Ludecke* as asking *and answering* such questions of "interpretation." After all, the relevant clause in Justice Frankfurter's opinion for the Court says we can consider "'questions of interpretation *and constitutionality*' of the Act." *J.G.G.*, 145 S. Ct. at 1006 (quoting *Ludecke*, 335 U.S. at 163, 172 n.17) (emphasis added). Does that mean courts are now empowered to hold that the 227-year-old statute, which has been invoked numerous times over the centuries in numerous circumstances, is unconstitutional? Of course not. In the same breath that the *Ludecke* Court said courts can consider constitutional questions, it supplied in the answer: The statute "is valid as we have construed it." *Ludecke*, 335 U.S. at 170–71. So yes, courts can consider the constitutionality of the AEA, so long as they hold it constitutional. Just as they can interpret the statute, so long as they do not countermand the President's conclusive invocation of it.

That is how courts have long understood this presidential determination. As one commentator has explained, *Mott* held "[t]he President had unfettered discretion to invoke his authority" precisely "*because* Congress had specifically intended and delegated such" authority. Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 Yale L.J. 149, 174 (2004) (emphasis added). So too here.

That does not mean the President's *interpretation* of the AEA is conclusive. I am not arguing that the President has conclusive interpretative power to proclaim that AEA invasions include denying that baseball is our national pastime or double parking at the grocery store. I am arguing only that, consistent with precedent, we must treat the President's extraordinarily fact-intensive application of law-to-fact as conclusive.

Why does the majority disagree? It thinks that *Ludecke*'s reference to "questions of interpretation" necessarily includes both interpreting "the statute's text" and then

"applying the interpretation" to the facts—and that to conclude otherwise would be "abdicat[ing] the judicial role altogether." That is wrong. Not only does that drag *Ludecke* into conflict with the numerous cases I have discussed that make the President's determination conclusive, it also confuses the differing natures of the two inquiries. As the Supreme Court explained just a couple months ago when writing in the ordinary administrative-law context, although "the meaning of" a discrete term "is a question of law" that fits well within the Court's wheelhouse, a fact-intensive *application* of that same term may often be grounded more in judgments of policy than legal analysis. *Eagle County*, 145 S. Ct. at 1512. If that is true when dealing with domestic administrative law, it is *a fortiori* true when dealing with foreign affairs and national security. *See Al-Bihani v. Obama*, 619 F.3d 1, 40 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc) (emphasizing that "[a]pplying" certain legal rules "to particular factual situations" in the foreign affairs and national security contexts involves a great deal "of subjective judgment"). And if such policy judgments should not be "excessively second-guessed by a court" in the domestic administrative-law context, *Eagle County*, 145 S. Ct. at 1512, they most certainly should not be when the security of the Nation hangs in the balance, *Al-Bihani*, 619 F.3d at 40 (Kavanaugh, J., concurring in the denial of rehearing en banc) ("The President's execution of foreign affairs statutes often requires judgments of policy and principle, and the foreign policy expertise of the executive places it—not courts—in the best position to make those judgments." (quotation omitted)). So *Ludecke*'s reference to "questions of interpretation" by no means requires us to countermand the President's fact-intensive determination concerning what constitutes an invasion—let alone a *threatened* invasion.

The more the majority argues the statute requires armed conflict, the more obvious it is that we must defer to the President's *finding* of an armed conflict. That is what the Supreme Court told us to do in *Martin v. Mott* and the *Prize Cases*. And in *Ludecke* itself—where the AEA applied with conclusive force long after the shooting stopped. It is in the military context that the President, as Commander-in-Chief, gets the most sway.[1]

[1] The majority also points to the fact that some federal judges think TdA's armed conflict across the United States is not the sort of armed conflict that previous Presidents identified in invoking the AEA. *See ante*, at 3 ("Prior invocations of the AEA provide context as we seek to understand [our] role."). As an initial matter, I am not so sure. Woodrow Wilson invoked the AEA against German nationals during World War I. But as far as I know, during the Great War, German nationals did not violently overrun apartment complexes in the United States, murder law enforcement officers in the United States, or savagely beat to death innocent nursing students in the United States. So even if TdA's armed conflict is different from previous examples, I am not sure it is different in a way that matters. And even if it is different in a way that matters, I do not see how it could matter for determining the scope of our review. Maybe historical examples suggest President Wilson did not need to invoke the AEA? I have no idea. But that says nothing about the question of *who decides* whether the President needed to invoke the AEA. And under the AEA, the answer is simple: the President.

ii.

Okay now for the majority's second sentence. That sentence comes from *dicta* in *Johnson v. Eisentrager*, 339 U.S. 763 (1950). That *dictum* does nothing to support the majority's scrutinizing judicial review.

All *Johnson* said is that under the AEA, the court may "ascertain the existence of a state of war." *Id.* at 775 (citing *Ludecke*, 335 U.S. at 160). But *whether* a state of war exists and *how* one should go about figuring that out are two very different questions. Fortunately, *Ludecke*—the very case *Johnson* relied on—tells us how to answer the "how" question: We must determine whether "a state of war" exists by looking to the determination of the political branches. *See Ludecke*, 335 U.S. at 168–69. So *Johnson*'s *dictum*—even if given full force—cannot support the majority's decision to countermand the President's determination here.

iii.

The majority cites two more cases. But I do not understand either citation.

The first is *United States ex rel. Jaegeler v. Carusi*, 342 U.S. 347 (1952) (per curiam). But that case is wholly irrelevant. The President didn't even argue that a state of war existed when Jaegeler was ordered removed. Congress had enacted—and President Truman had approved—a joint resolution formally terminating the war between the U.S. and Germany before the Attorney General ordered Jaegeler's removal. *Id.* at 348; *see also* Brief for Respondents, *Jaegeler*, 342 U.S. 347 (No. 275), 1952 WL 82533, at *3 n.2 (noting that "the Joint Resolution ending the war with Germany . . . was approved by the President"). The Executive Branch lawyers, in their briefing before the Supreme Court, *explicitly acknowledged* that the war was over. *See* Brief for Respondents, *Jaegeler*, 342 U.S. 347 (No. 275), 1952 WL 82533, at *25–26. The Court deferred completely to the judgment of the political branches as to the existence of an armed conflict (or lack thereof). So the Court acted consistently with *Ludecke* by taking the Executive Branch at its word. The only fight was whether Jaegeler's removal order—which had been validly issued during the war—became retroactively unenforceable once the war ended. *Id.* at *25–35. So *Jaegeler* does nothing to vest *judges* with power to second-guess the President's invocation of the AEA.

The final case is *United States v. Williams*—an unpublished circuit court opinion. *Williams* did nothing to review a President's invocation of the AEA. Instead, *Williams* appears to have held only that "the regulations made by the President" did "not authorize the confinement of the petitioner." Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien*, 9 Green Bag 2d 39, 42 (2005) (quoting U.S. Circuit Court, Va., Order Book No. 9 (1811–16), at 264). Or as a news report published contemporaneously with *Williams* explained—and one can only hope that early American newspapers were more reliable reporters of cases than their modern counterparts—the problem was that "the marshal had not designated a place to which Williams should remove, as [his] instructions required." *Id.* at 43 & n.15 (quotation

omitted). Thus, the case held only that "the writ protected the individual's liberty against a *subordinate official's* action in excess of *delegated* authority, not a constitutional or statutory violation." *Id.* at 43 (emphasis added). The majority admits that Justice Marshall released the petitioner because of this "technical" flaw, which has nothing to do with the President's power to conclusively determine whether a state of war or threatened invasion exists. *Ante*, at 4. Yet the majority somehow reads *Williams* to support its holding that we can countermand the President's invocation of the AEA.

b. The Majority Tries, but Fails to Undermine Relevant Precedents

The majority next tries to undermine two of the precedents I have relied on: *Martin v. Mott* and *Sterling v. Constantin*.[2] Both efforts fail.

i.

Start with *Mott*. The majority does not even try to argue I have overread *Mott*. Instead, it admits *Mott* is a bad case for federal judges who desire to countermand the President. It agrees that *Mott* reads the Militia Act to confer "unreviewable discretion to decide that circumstances exist that require the calling up of the militia." *Ante*, at 6. How does the majority deal with that? It says, without explanation, that the AEA issue here presents a "different context": "the need for troops as an immediate defense to an actual or threatened invasion is readily distinguishable for justiciability purposes from when residents of this country may be detained and removed." *Id* at 6-7. Therefore, *Mott* "does not displace" *Ludecke*, *Eisentrager*, and *Jaegeler*. *Id.* at 7. After that, we hear no more mention of *Mott*.

It is unclear why the majority thinks *Mott* is distinguishable from *Ludecke*, *Eisentrager*, and *Jaegeler*. As I have explained, *Ludecke* says nary one word to contradict *Mott*, or anything else in my analysis. On the contrary, *Ludecke* emphasized that whether armed hostilities were ongoing was a "matter[] of political judgment for which judges have neither technical competence nor official responsibility." 335 U.S. at 170. And relying on the words of Justice Iredell a few decades before *Mott*, *Ludecke* emphasized that concerns that the President's powers under the AEA could "be abused" were irrelevant. *Id.* at 172 (citing *Case of Fries*, 9 F. Cas. 826, 914 (No. 5,126) (C.C.D. Pa. 1799) (jury charge given by Iredell, J.)). That sounds a whole lot like what Justice Story said in *Mott*. *See* 25 U.S. (12 Wheat.) at 31 (noting that determining whether there is an invasion is not subject to "technical proof" and emphasizing that judges have no role in second-guessing the President in this regard); *id.* at 32 ("It is no answer that such a power may be abused."). Moreover, as a general matter, *Ludecke* pointed to the past to support its holding, emphasizing that "a page of history is worth more than a volume of rhetoric." 335 U.S. at 173. I do not see why one should read Justice Frankfurter's opinion in

[2] The majority also attempts to distinguish *The Prize Cases*. But its way of doing so is confusing. The majority says "the only question before the court was not whether a state of war existed as a factual matter, but instead whether a state of war existed as a technical matter." *Ante*, at 8 n. 3 (citing *The Prize Cases*, 67 U.S. (2 Black) at 641, 646-47). It isn't clear why that distinction matters for deciding whether we can second-guess the President's determination.

Ludecke as breaking new ground, blessing searching review of presidential determinations related to armed conflicts, and undermining older authorities like *Mott*.

But suppose I am wrong in my reading of *Ludecke*. At most, the majority could contend that *Ludecke* is ambiguous or unclear—in that it has a singular half-sentence-long clause that could be read to support some minimal role for judges, sandwiched between page after page of insistence that the President's determinations are conclusive and beyond judicial review. Nothing in *Ludecke* comes anywhere close to cabining *Mott*. And we do not ordinarily read Supreme Court precedent to overrule "earlier authority *sub silentio*." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000). At worst, *Mott* should escape these later cases unscathed—exactly as the many Supreme Court justices who continue to cite *Mott* seem to think. *See, e.g.*, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 206 n.1 (2012) (Sotomayor, J., concurring in part and concurring in the judgment) (explaining that in *Mott*, the Court "declin[ed] to review the President's determination that an exigency had arisen" (quotation omitted)).

The majority's effort to get rid of *Mott* bears emphasis. The majority says Mott is distinguishable because, in that case, the President was acting "in response to an invasion," and that is somehow different from deciding "when residents of this country may be detained and removed." But isn't that the precise question presented here too? Isn't the AEA, which allows the President to remove alien enemies *that live in this country*, also triggered by an "actual" or "threatened" invasion? And I thought *Mott* told us that we should give the President's answer to that question conclusive effect. Rather than follow the Supreme Court's emphatic command in *Mott*, the majority decides the President's determination is irrelevant because there is no invasion, and it decides there is no invasion because the President's determination is irrelevant.

ii.

Next, the majority misunderstands *Sterling* and its import in this case. In *Sterling*, the Court held that even though it could not countermand the Executive's determination that there was an insurrection, the Court could still question whether the Executive's actions during that insurrection had exceeded the scope of his authority. *See Sterling*, 287 U.S. at 397–402.

In other words, in *Sterling*, there were two questions:

- **Question 1:** Was there an insurrection?

- **Question 2:** Therefore, what? What could the Executive do in response?

As to Question 1—whether there was an insurrection—*Sterling* said courts *cannot* second-guess the Governor's declaration of an insurrection. *See* 287 U.S. at 399 (holding that the Executive's "decision" as to whether there was an insurrection was "conclusive"). But as to Question 2, *Sterling* said that just because there is an insurrection does not mean the Executive can do whatever he wants in response. *See*

id. at 400 ("It does not follow from the fact that the Executive has this range of discretion, . . . that every sort of action the Governor may take, . . . is conclusively supported by mere executive fiat."). So the Governor could not shut down the printing presses because that would violate the First Amendment. Nor could he infringe the property rights of U.S. citizens. And the Court could say so.

That is the only sense in which the Governor's use of the "military powers" was left "subject to judicial review." *Ante*, at 8. The Court held "the measures of martial rule taken by the governor" in response to the insurrection were invalid because they "amounted to a taking of property without due process of law." Fairman, *supra*, at 20. The Court never suggested it could countermand the Governor's determination as to Question 1. Thus, the upshot of *Sterling*, as one contemporary commentator put it, is this: "[T]he courts must give conclusive value" to "the proclamation of a state of insurrection," but "not [to] the orders issued" in response. *Id.* at 33. Or to take an even more famous separation of powers case: Of course the President can wage war in Korea as the Commander in Chief **(Question 1)**, but that does not mean he can take private property from the owners of steel mills **(Question 2)**. *See The Steel Seizure Case*, 343 U.S. 579, 587-89 (1952).

So too here. We must give conclusive effect to the Executive's proclamation that an invasion is being perpetrated or threatened. But that does not mean we need to give conclusive effect to whatever the President might do in response. No one suggests, for instance, that if the President began detaining and removing toddlers under the AEA that that would be immune from judicial intervention. *See* 50 U.S.C. § 21 (providing that only those who are "fourteen years and upward" are "liable to be apprehended, restrained, secured, and removed as alien enemies").

But this shows that nothing in *Sterling* undermines my point. Detaining and removing toddlers under the AEA is unlawful *even if* an invasion is being perpetrated or threatened. And so too would it be unlawful to violate detained aliens' notice rights. In other words, just as in *Sterling*, we must treat as conclusive the Executive's determination that an insurrection, invasion, &c, is being perpetrated or threatened. But we need not let the President do literally whatever he wants in response.

B. Even if Courts Could Review the President's Invocation of the AEA, He Has Provided a Sufficient Basis to Use the AEA to Remove Appellants from the United States.

The majority urges that the scope of its review is narrow. It pretends to have accorded the President deference because it takes the facts alleged in the President's proclamation—and no other facts the President might have considered—as true. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). But then the majority says for it to "defer to findings of fact, there must be findings of fact." *Ante*, at 5. The majority declares outright that it can ignore the President's "mere conclusory statements." *Iqbal*, 556 U.S. at 678; *ibid.* ("A pleading that offers 'labels and conclusions . . . will not do.'" (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); *see also ante*, at 18 ("We

have already held that factual assertions by the President are to be accepted, but freestanding labels to unstated actions are not relevant findings."). Then it compares the President's well-pleaded facts to the majority's curated definition of a "predatory incursion" or "invasion" before concluding the President failed to state a claim under the AEA. *Iqbal*, 556 U.S. at 678-80.

1. The President Has No Obligation to Make Factual Findings

With all due respect, that is wrong. The President has *zero* obligation to produce "findings of fact" to us to defend his conclusion that an actual or threatened war or invasion exists. Treating the President as an ordinary civil plaintiff at the motion-to-dismiss stage is the opposite of what the AEA demands. Even ordinary immigration policy "is vitally and intricately interwoven with . . . the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Harisiades v. Shaughnessy,* 342 U.S. 580, 588-89 (1952). That is especially so with the AEA. So subjecting the President to ordinary 12(b)(6) scrutiny hardly respects the fact that these "matters are . . . largely immune from judicial inquiry or interference." *Id.* at 589.

Anyway, what does the majority think the President must do? Must he wait months before declaring an invasion is threatened, so that his lawyers can produce a 600-page proclamation defending his position in anticipation of judicial scrutiny? Does he need to create an appendix with the various intelligence assessments he relied on? Does he need to disclose an OLC memo that we can grade to determine if it comports with our understanding of predatory incursions? Should he proffer witnesses that violent TdA members can depose on the meaning of "invasion" and "incursion"? Does he need to wait for a federal court to conduct a bench trial on the extent of armed conflict that Venezuela is perpetuating inside the United States? How many bench trials would be enough before the President can act? Shouldn't he wait for several federal judges to enter final judgments? And presumably the appellate courts too? What about certiorari petitions? What if the Supreme Court waits years to intervene? Does that mean the United States could be beset by a predatory incursion for the entirety of the Trump Administration and that the President would remain powerless to act until given the green light by one or more federal judges?

These are absurd restrictions to impose on an emergency power. The power to act in response to invasions or predatory incursions is one "to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union." *Mott*, 25 U.S. (12 Wheat.) at 30. "[E]very delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard[ize] the public interests." *Ibid.* Our intervention would mean that "the hostile enterprise" of an invasion or predatory incursion "may be accomplished without the means of resistance." *Ibid.*

What's more, the majority's rule contravenes at least two Supreme Court precedents. In the *Prize Cases*, for example, President Lincoln never had to explain *why* he thought the activity of the southern rebels constituted a state of war. He announced a blockade,

and that blockade depended upon a "state of war" existing. 67 U.S. (2 Black) at 665-66. That "proclamation of blockade," and that proclamation alone, was "itself official and conclusive evidence to the Court that a state of war existed." *Id.* at 670. And in *Martin v. Mott*, the Court rejected Mott's claim that the President had to aver any facts whatsoever as to an invasion to validate the "exercise of" his power. 25 U.S. (12 Wheat.) at 32. What mattered was solely his "own judgment of the facts"—not any jury or court's assessment. *Id.* at 33. So the "judgment of the President [was] conclusive as to the existence of the exigency." *Ibid.*

The majority concedes that the AEA's language "does not identify what, at a minimum, must be included in the [President's] proclamation" for the President to invoke his AEA authority. *Ante*, at 4. But rather than take the AEA's text as further evidence that the President's decision is beyond our review, the majority decides for itself that the President's "proclaiming, without more," that an invasion exists "will not suffice." *Ibid.* We don't get to demand the President's homework.

2. The Majority Wrongly Overrides the President

It is worth pausing to reflect on what is really happening in the majority's opinion. The majority half-heartedly defines the critical terms "invasion" or "predatory incursion." *See, e.g.*, *ante*, at 17 (offering an open-ended and indeterminate definition of "predatory incursion" while leaving room for "updating"). It half-heartedly applies that definition to the facts. *See id.* at 17-19 (taking each individual fact offered by the President one-by-one and holding each individually does not amount to an invasion, so somehow all those facts put together cannot constitute an invasion either). And it half-heartedly takes the President's factual claims as true. *See id.* at 19. On that thin basis, our unelected court has overridden an action of "the most democratic and politically accountable official in" all the land—an action in defense of our national security that the sovereign people elected him to take. *Seila Law LLC v. CFPB*, 591 U.S. 197, 224 (2020).

There is much, much more that could be said about all of this. For instance, the majority ignores many of the definitions it purports to rely on. *See, e.g.*, *ante*, at 9 (offering two definitions of invasion, only one of which refers to "military force," before concluding that "invasion" "requires military action"). It disregards much of the historical evidence it cites. *See, e.g.*, *ante*, at 8 n. 4, 10-11 (relying on Madison's claim that "[i]nvasion is an operation of war" to hold that invasion "requires military action," while ignoring its own earlier statement that the Quasi War was "an unequivocal act of war *on the commerce of the United States*" (emphasis added) (quotation omitted)); *ante*, at 11-12 (offering a definition of "predatory incursion" before turning to multiple other, contemporary sources of evidence). And it does not even recognize that the AEA applies to *threatened* invasions or predatory incursions. *See, e.g.*, *ante*, at 3 ("[A]s preconditions to invoking the AEA, there *must be* a declared war, an invasion, or a predatory incursion." (emphasis added)); *see also ante*, at 11.

At bottom, the majority seems to think that whatever an invasion or predatory incursion is, it cannot be *this*. So it thinks it can stop the President from taking what it sees as

flagrantly unlawful and dangerous action. I have already explained why that is legally wrong. But let's zoom out to focus on the underlying vision of the relationship between the courts and the President that has led the majority down this path.

The majority appears to think this is just another administrative law dispute. Under ordinary ad-law circumstances, federal courts get the last say. So too, the majority appears to think, with determining whether an invasion is threatened against the territory of our sovereign Nation. Why? There is no legal support for that position. So best I can tell, it is because of some implicit notion that unless the President is subservient to courts, he cannot be subject to law. That is deeply mistaken. Regardless of what courts say or do, the President must follow the law. *See* U.S. Const. art. II, § 3. That obligation on the part of the President in no way implies any "authority" on the part of courts "to enforce" that obligation. *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2561 (2025). On the contrary, "the law" often "prohibits courts from doing so." *Ibid.*

Take one famous example—*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Folks love to remember Chief Justice Marshall's "invo[cation]" of "the venerable maxim *ubi jus ibi remedium* (Where there is a right, there is a remedy)." *Villarreal v. City of Laredo*, 134 F.4th 273, 277–78 (5th Cir. 2025) (Oldham, J., concurring). But we tend to forget the holding of the case: Even though the Executive Branch "had violated the law," the *Court* could not do anything about it. *CASA*, 145 S. Ct. at 2561. And "perhaps no court could" have. *Villarreal*, 134 F.4th at 278 (Oldham, J., concurring) (citing William Baude et al., Hart & Wechsler's The Federal Courts and the Federal System 89 n.6 (8th ed. 2025)). So however aspirational *Marbury*'s *dictum* about remedies might be, *Marbury*'s *holding* is what really merits reflection. Just because the Executive might violate the law does not mean the courts can do anything about it.

That is not to say that the President is a law unto himself. The White House Counsel, the Attorney General, or the Assistant Attorney General for the Office of Legal Counsel might disagree with this or that invocation of the AEA. And all these officials take oaths to uphold and defend the Constitution, laws, and treaties of the United States. These days the President takes his oath on national television—to much pomp and circumstance. And in discharging his solemn oath, the President presumably takes seriously the legal views of his advisors who take the same or similar oaths. So make no mistake: Executive Branch officials, including the President, are subject to law. But that does not mean unelected, unaccountable federal judges have the power to do anything about it in any particular case. *See Marbury*, 5 U.S. (1 Cranch) at 179–80.

The contrary vision of the majority sees courts as standing over and above our constitutional order. How can we be sure, the majority asks, that the President is respecting the law if there is no judge there to say "aye" or "nay"? I worry that this view of judges as guardians is increasingly ubiquitous these days. But it overlooks the ancient question: "[*Q*]*uis custodiet ipsos custodes*?" (Who is to guard the guards themselves?) Juvenal, Satire VI 347-48 (Lindsay Watson & Patricia Watson eds., Cambridge Univ. Press 2014). That is, this judicial supremacist view requires us to assume that judges are infallible and cannot overstep their own constitutional limits.

Unlike the majority, the Founders were aware of this issue and designed a system to protect against it. When the Founders considered how to allocate sovereign power in our federal system, they did not decide to fork it all over to judges and pray they would play nice. The Founders instead decided to make *all three branches*—yes, even the judicial—subject to checks and balances from the other two. That way, "[a]mbition" would "counteract ambition," and the fallen men—including the fallen judges—who would hold power in our Republic would stay in line. The Federalist No. 51, at 322 (James Madison); *see also Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 502 (5th Cir. 2020) (en banc) (Oldham, J., concurring) (discussing the "deep fears" expressed by "the Anti-Federalists" that "federal 'judges'" would "'extend the power of the courts'" (quoting Brutus XI, ¶ 2.9.140, *in* 2 The Complete Anti-Federalist 420 (Herbert Storing ed., 1981)). And one of the most important checks on the Judicial Branch is that some questions—including whether our Nation is under invasion—are wholly, totally, completely, and unreviewably allocated to someone who does not have "Judge" in his honorific.

But on the majority's telling, it is only Congress and the President who must submit to checks and balances. Meanwhile, the courts have a roving commission to police both, free from any oversight from the other two. So much for "the judiciary" being "beyond comparison the weakest of the three." The Federalist No. 78, at 465 (Alexander Hamilton).

3. The President's Determination is not Manifestly Unreasonable.

In any event, we cannot conclude the President's determination is "manifestly" unreasonable in this case for at least three additional reasons.

First, we do not know the President's evidence. The President need not—and often should not—disclose the national-security secrets upon which he is relying. That is as true today as it was during the Adams Administration; and the President's reluctance to disclose every bit of national-security evidence underlying his decisions does not mean he has no evidence. The President may simply be withholding the evidence because he thinks it may endanger government employees, or because he thinks it may escalate international tensions, or because of literally anything else that prudence and wise administration might require. Or perhaps disclosure of that intelligence would undermine other executive priorities, like tracking and arresting TdA's leaders. Our Constitutional order entrusts these considerations *to him*. *See Chicago & S. Air Lines*, 333 U.S. at 111. But if we do not know the President's evidence (and we have no authority to require him to show it to us), how in the world can we hold the President's conclusion from that evidence is manifestly wrong?

Second, federal judges have no competence to hold the President's determinations manifestly wrong. The AEA does not give the President authority only when an invasion or predatory incursion actually occurs. It gives the President authority whenever an invasion or predatory incursion is "attempted" or even "*threatened*." 50 U.S.C. § 21 (emphasis added). So even if whatever TdA is doing is not an "invasion" or "predatory

incursion," it does not matter. What matters is whether Venezuela is *threatening* an invasion. Answering that question "involve[s] large elements of prophecy." *Chicago & S. Air Lines*, 333 U.S. at 111. And we do not live in the days of Samuel, when the roles of prophet and judge were united. *See 1 Samuel* 7:15–17 (ESV). Under our constitutional order, judges must leave "*full* responsibility for" making this predictive judgment involving sensitive issues of national security "where the Congress has constitutionally placed it—on the President of the United States." *Ludecke*, 335 U.S. at 173 (emphasis added); *see also Dep't of Navy v. Egan*, 484 U.S. 518, 529 (1988) (questioning the courts' ability to override a "[p]redictive judgment" of the Executive Branch in matters implicating national security).

Third, suppose everything I have said is wrong. Is it so clear that what Venezuela is doing is *not* an invasion or predatory incursion?

As the affidavits the Government has submitted here show, Venezuelan aliens who are TdA members have taken over apartment complexes and killed civilians. Venezuela has given TdA the "green light" to slaughter law enforcement, and Venezuelan agents have done so. *Ibid.* All in all, TdA's organization, violence, and sophistication have made it a unique threat to the public safety—unlike any mere "gang" known to the Federal Government. *Ibid.*

True, the attacks I described above have not taken place upon military targets; they have taken place primarily upon civilian and commercial targets. But so too with many terrorist attacks—and no one doubts that those call for military responses. And at the time the AEA was passed, the law was clear that attacks upon civilian and commercial targets could still constitute armed hostilities. During the Quasi-War French privateers attacked and seized merchant ships. *See* Alexander DeConde, The Quasi-War: The Politics and Diplomacy of the Undeclared War with France 1797–1801, at 8-9, 127 (1966); *see also* Grotius, On the Rights of War and Peace: An Abridged Translation 405 (William Whewell trans. 1853) (1625) (lamenting the fact that privateering often did "not hurt the general body of the enemy, . . . but the innocent"). Those attacks primarily affected American *commerce*. *See* Stanley Elkins & Eric McKitrick, The Age of Federalism 529, 645 (1993) (explaining the massive effects the French privateers had on American commerce); *see also ante*, at 8, n.4 (noting that President Adams called the actions of the privateers "an unequivocal act of war on the commerce of the United States" (quotation omitted)). Moreover, the attacks resembled pure, unadulterated crime more than anything else. Nevertheless, they were deemed acts of war. The AEA's plain text contemplates such attacks upon civilian targets.

As Secretary of State Timothy Pickering wrote, "*predatory incursions* of the French" might only "occasion great destruction of property." Letter from Timothy Pickering to Alexander Hamilton (June 9, 1798) (emphasis added). And the Founders understood that "foreign *invaders*" might sometimes "seize the naked and defenseless" rather than military targets. The Federalist No. 25, at 166 (Alexander Hamilton). So it is unclear why it matters that TdA has attacked civilians. And it should be especially hard

to disregard TdA's violent attacks when they have not even been limited to "the naked and defenseless." *Ibid.*

Consider also the role "mass illegal migration" plays here. 90 Fed. Reg. at 13033 (discussing "mass illegal migration to the United States"). The history of the AEA shows that mass immigration is at bare minimum a relevant consideration in identifying whether an invasion is threatened and in planning the appropriate response. As I explained earlier, the AEA was partially grounded in worries about "the great number of" French "aliens" residing in the United States. 8 Annals of Cong. at 1577 (Rep. Sitgreaves). Federalists feared that among those aliens were innumerable "agents and spies spread all over the country." *Id.* at 1574 (Rep. Rutledge). Those agents and spies increased the risks associated with an invasion. So for national-security purposes, detentions and removals had to happen at once. *See id.* at 1577 (Rep. Sitgreaves).

So too here. The President might sensibly deem that mass immigration from a country like Venezuela raises concerns about threatened incursions or invasions. Today, as in the 1790s, the President of the United States is entitled to determine that enemy aliens in our country will "join" in a sudden "attack" by other forces. 8 Annals of Cong. at 1791 (Rep. 121 Otis). That is his decision and his alone. *See Chicago & S. Air Lines*, 333 U.S. at 111.

At bottom, today's decision boils down to this: The majority and the plaintiffs urge that we cannot trust the President. On their telling, the President may abuse his authority, so the court must usurp it.

That is a grave mistake. "[N]o doubt" the "powers" the AEA grants to the President "may be abused." *Ludecke*, 335 U.S. at 172. "[B]ut that is a bad reason for having judges supervise their exercise." *Ibid.* "[T]here is no power which is not susceptible of abuse." *Mott*, 25 U.S. (12 Wheat.) at 32. That includes the power the majority arrogates for itself today.

* * *

The majority's approach to this case is not only unprecedented—it is contrary to more than 200 years of precedent. It reflects a view of the Judicial power that is not only muscular—it is herculean. And it reflects a view of the Executive power that is not only diminutive—it is made subservient to the foreign-policy and public-safety hunches of every federal district judge in the country.

I respectfully but emphatically dissent.

IN THE SUPREME COURT OF THE UNITED STATES
APPEAL NO. 2025-2

DONALD J. TRUMP, in his official capacity as President of the United States, **PAMELA BONDI**, Attorney General of the United States, in her official capacity, et. al., **Petitioners (Appellees below),** **v.** **A. ZEBRA,** on their own behalf and on behalf of others similarly situated **B. GAZELLE,** on their own behalf and on behalf of others similarly situated, **Respondents (Appellants below).**	**On Petition for Certiorari from the United States Court of Appeals for the Fourteenth Circuit**

ORDER GRANTING CERTIORARI

The Government's petition for an order of certiorari to the U.S. Court of Appeals for the Fourteenth Circuit is GRANTED. Oral argument shall occur on October 29, 2025, in Crawfordsville, Indiana, and be limited to the following issues:

(A) Whether, and, if so, to what extent, a court can review the President's invocation of the Alien Enemies Act ("AEA"), 50 U.S.C. § 21; and (B) If a court can conduct such a review, whether the President provided a sufficient basis to invoke the AEA to authorize Respondents' removal from the United States?

Petitioners shall open and close the argument.

FOR THE COURT
C. Giraffe, Clerk of Court