"Is the time for deference to the Executive Branch over?"

By Mary B. McCord

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For good reasons, the courts have historically given substantial deference to the judgment of the Executive Branch on matters of national security and foreign policy. The national security departments and agencies of the Executive Branch are filled with seasoned intelligence analysts, counterterrorism and counterintelligence experts, and diplomats with decades of experience in analyzing and evaluating threats to U.S. nationals and U.S. national interests. Most presidents have started their day with an early-morning classified briefing by top intelligence officials. The National Security Council has staffed itself with career officials from the national security departments and agencies, who convene regularly for classified analysis and assessment of current and developing threats. These professionals in turn brief their agency heads, who frequently meet at the deputies' and principals' level to make recommendations to the President based on extensive inter-agency discussions and with the advice of legal counsel about compliance with both domestic and international law. The deference afforded by the courts has thus been based on the superior access to intelligence information and the extensive expertise of cadres of career professionals.

The time for this level of deference is over, at least during the current administration. In just eight months, we've seen intelligence professionals with decades of experience fired or stripped of their security clearances for political and retaliatory reasons, immigrants summarily removed from the country under a specious Alien Enemies Act proclamation without due process, and non-compliance with court orders under the guise of foreign diplomacy and national security. These and other instances have steadily eroded the functional underpinnings of the judiciary's historic deference and opened the door for grave abuses of power to the detriment of our constitutional order and individual rights.

On March 14, 2025, reports emerged that President Trump was expected to invoke the Alien Enemies Act to target members of a Venezuelan criminal gang, Tren de Aragua (TdA), which the government had recently designated as a foreign terrorist organization (FTO), for immediate deportation. Overnight, lawyers received information that the government had begun

moving Venezuelan men already in immigration custody and alleged to be members of TdA to facilities in Texas, where they were being staged for swift removal by plane. Although no AEA proclamation had been made public, lawyers rushed to court to seek a temporary restraining order (TRO) prohibiting the removals, worried that once the planes took off, the district court could lose jurisdiction. In the early morning of March 15, U.S. District Court Judge James Boasberg issued a TRO prohibiting the removal of the named plaintiffs until he could hold a hearing on the matter.

By the time the hearing convened in the afternoon, it had become public that the President had indeed signed a proclamation invoking the AEA against members of TdA aged 14 and older, calling for them to be "apprehended, restrained, secured, and removed as Alien Enemies." At the hearing, the Department of Justice (DOJ) lawyer explained that removals to El Salvador were planned, but that none of the named plaintiffs would be on any flights. Plaintiffs' counsel expressed concern that two flights may have taken off and that those deported may be destined for an El Salvadoran prison, and thus sought certification of a class. Judge Boasberg asked the government to confirm whether any planes carrying people being deported under the auspices of the AEA had taken off or were planned to depart in the next 48 hours. After a recess, government counsel said he could not provide further information due to national security concerns.

Taking up the reviewability of the proclamation, government counsel urged deference, arguing that the President had "broad discretion" to determine whether the predicates for an AEA invocation had been met, that the issue was a political question that could not be reviewed by the court, and that a TRO to maintain the status quo pending further briefing would "cut very deeply into the prerogatives of the executive" in matters of war powers, immigration, and foreign policy.

Preliminarily concluding that it could review the statutory terms of the AEA, that those terms did not provide a valid basis for deporting alleged TdA members without due process, and that the harm deportees would face if taken to a prison in another country over which he would lose jurisdiction would be irreparable, Judge Boasberg provisionally certified a class of non-citizens subject to the proclamation and issued a TRO for 14 days pending further briefing. He

then ordered government counsel to inform his clients "immediately" that "any plane containing these folks that is going to take off or is in the air needs to be returned to the United States."

A constitutional showdown ensued over whether the administration violated the Court's order by flying two planes of alleged TdA members to El Salvador—where the men were immediately housed in the country's notorious terrorist detention center—*after* the Court's order not to remove them and to return any planes that had may have already left the United States. This is when the government made its next argument for deference to the Executive. While government officials outside of court seemed to boast about defying a court order, including the Secretary of State retweeting an X post in which the President of El Salvador wrote "Oopsie . . . Too late [crying-laughing emoji]" above a news headline about the Court's order, DOJ attorneys represented to the Court that answering questions about its compliance "could implicate the affairs of United States allies and their cooperation with the United States Government in fighting terrorist organizations," "create serious repercussions for the Executive Branch's ability to conduct foreign affairs," and "intrude into the conduct of foreign affairs by the Government." In other words, the government told the Court to stop asking whether it had blatantly defied a court order, and instead just defer to the Executive's decision to spirit away immigrant detainees to a foreign prison with no due process as the unreviewable "conduct of foreign affairs."

Meanwhile, it turned out that deference to the Executive Branch as to the bases for the AEA proclamation was on shaky grounds. The AEA provides that "[w]henever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government," the President may make a proclamation that citizens of the hostile nation or government, 14 years or older, may be removed as alien enemies. 50 U.S.C. § 21. Although President Trump's proclamation declared that TdA was "perpetrating, attempting, and threatening an invasion or predatory incursion against the territory of the United States . . . both directly and at the direction, clandestine or otherwise, of the Maduro regime in Venezuela," it turns out that the National Intelligence Council (NIC) had assessed otherwise, and it had done so not once, but twice. Indeed, after apparently issuing an assessment undercutting the grounds for the President's AEA proclamation in late February, reported on by the New York Times just after the proclamation, the acting chief of staff for Director of National Intelligence

(DNI) Tulsi Gabbard asked the NIC to "rethink" the Venezuela assessment, and wrote to intelligence officials that additional analysis and rewriting were needed "so this document is not used against the DNI or POTUS." Despite these instructions, the subsequent NIC report, dated April 7, 2025, assessed that the Maduro regime "probably does not have a policy of cooperating with TDA and is not directing TDA movement to and operations in the United States." Although the FBI dissented, assessing with medium confidence that "some Venezuelan government officials likely facilitate the migration of [TdA] members from Venezuela to the United States to advance the Maduro regime's objective of undermining public safety in the United States," its primary sources were "one-time contacts with indirect access and who may have been motivated by the perceived possibility of a favorable immigration decision," which the rest of the IC seems to have found insufficient to undermine its overall conclusion.

Although there can be good reasons, such as the passage of time, that can and often do justify a reassessment of earlier intelligence analyses, the timeline of the request here, after the leak of the NIC assessment that undercut the President's AEA proclamation, raises significant questions about whether the request was meant to pressure the intelligence professionals to align their assessment more closely with the President's proclamation. And although the President is of course free to disregard the views of the intelligence community when making policy decisions, such disregard should give pause to courts that would otherwise defer to the Executive on matters of national security and foreign policy. Deference based on the Executive's superior access to intelligence information and advice from experienced analysts is unwarranted where the intelligence is ignored.

Such deference is also unwarranted where intelligence professionals are removed from their positions and stripped of their clearances for political and retaliatory purposes. A week after the declassified April 7 NIC assessment was publicly released, DNI Tulsi Gabbard fired the acting chair of the NIC and his deputy, both of whom had more than 25 years of experience. Gabbard's office explained that "The director is working alongside President Trump to end the weaponization and politicization of the intelligence community." By August, Gabbard announced that the office she leads—the Office of the Director of National Intelligence (ODNI)—would cut its staff by 40 percent. Gabbard claimed that the cuts were needed because the ODNI and intelligence community had become "rife with abuse of power, unauthorized leaks

of classified intelligence, and politicized weaponization of intelligence." She further stated that "[e]nding the weaponization of intelligence and holding bad actors accountable are essential to begin to earn the American people's trust which has long been eroded." At about the same time as this announcement, Gabbard revoked the security clearances of 37 current and former national security officials, including a senior intelligence official who had warned members of congress in 2020 about Russian efforts to interfere in the presidential election. Gabbard posted on X that the revocations were "at POTUS' direction" and claimed without evidence that those targeted "have abused the public trust by politicizing and manipulating intelligence, leaking classified intelligence without authorization, and/or committing intentional egregious violations of tradecraft standards." More than two dozen of those whose clearances were revoked had signed a 2019 National Security Action letter stating that impeachment proceedings were warranted for President Trump's appearing "to have leveraged the authority and resources of the highest office in the land to invite additional foreign interference into our democratic processes," in relation to the whistleblower allegations about his pressure on Ukraine. They were called out in an X post by far-right political activist and conspiracy theorist Laura Loomer, who urged revocation of their clearances and the firing of those still in the government.

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The cases involving the Alien Enemies Act provide just one example of the Trump administration urging deference as a shield against judicial review of unprecedented executive actions. The government has argued that courts must defer to the President's determination whether the statutory prerequisites for federalizing a state's National Guard under 10 U.S.C. § 12406, over the governor's objection, have been met. The President has invoked national security to impose sweeping tariffs, revoke student visas, blacklist law firms, end temporary protected status for immigrants from war-torn countries, and except civil servants across dozens of departments and agencies from collective bargaining rights, among many other examples. Are courts to defer to the Executive's judgment when reviewing challenges to these policies, simply because the government utters the talismanic words "national security"? When the historically grounded reasons for that deference are lacking and evidence of abuse abound, they should not.