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Legal Sidebar

The Alien Enemy Act: History and Potential Use to Remove Members of International Criminal Cartels

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On January 20, 2025, President Trump issued an executive order (E.O.) to declare a national emergency pursuant to the International Emergency Economic Powers Act (IEEPA) to address the threat to U.S. national security posed by international cartels and certain transnational organizations. The E.O. states that such organizations are engaged in a destabilizing "campaign of violence and terror throughout the Western Hemisphere" and directs the Secretary of State and other Cabinet members to designate certain international cartels and other organizations as foreign terrorist organizations or specially designated global terrorists under Executive Order 13224 for supporting international terrorism. The E.O. also directs the Attorney General and Secretary of Homeland Security, in consultation with the Secretary of State, to make operational preparations within 14 days to implement any decision the President may make to invoke the Alien Enemy Act (also called the Alien Enemies Act) of 1798 to remove aliens designated as engaging in "any qualifying invasion or predatory incursion against the territory of the United States by a qualifying actor." The E.O. does not define "qualifying invasion" or "qualifying actor."

This Legal Sidebar provides a historical overview of the Alien Enemy Act and discusses the potential implications of invoking the act to remove members of international crime cartels and other transnational organizations from the United States. It is unclear how the invoked IEEPA authorities might interact with implementation of the Alien Enemy Act, and they are therefore outside the scope of this Legal Sidebar.

The Alien Enemy Act of 1798

The Alien Enemy Act of 1798 is a wartime measure that authorizes the President, during a declared war or in the event of an "invasion" or "predatory incursion" perpetrated or threatened by "any foreign nation or government," to issue regulations directing the conduct of or otherwise restraining citizens or nationals of the hostile nation or government. It was enacted as part of a set of national security measures known as the Alien and Sedition Acts meant to address tensions involving the French Republic. These laws included the Alien Act, the Sedition Act, and the Alien Enemy Act. Of these laws, only the Alien Enemy Act remains in force.

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The Alien Act empowered the President to order out of the country any alien whom he judged to be "dangerous to the peace and safety of the United States" or suspected to be concerned in any "treasonable or secret machinations" against the government. The law was controversial, with opponents arguing that "alien friends" within the United States are entitled to due process of law and the same protection from the government as citizens and should be tried in court rather than summarily deported on suspicion of disloyalty. Skeptics argued that such a measure could not be justified as a war power, even to prevent invasion. Proponents argued that aliens within the United States owe merely temporary allegiance to the United States and are therefore not entitled to the same rights as citizens and that all governments have the right to deport aliens who pose a danger.

The Alien Enemy Act drew less debate. Neither James Madison nor Thomas Jefferson, who opposed the Alien Act, raised any objections, and even some opponents of the Alien Act in Congress were careful to clarify that they had no qualms with respect to the Alien Enemy Act. The absence of objection to the Alien Enemy Act by the same generation that drafted the Constitution has been held by the Supreme Court to provide evidence of both the act's constitutionality and the prevailing understanding of the legal principle underlying it—that is, the fundamentally different position held by aliens on the basis of their formal allegiance to a government with which the United States is at war.

Historical Invocation of the Alien Enemy Act

Unless Congress declares war, the President can invoke the Alien Enemy Act only upon his determination and proclamation that a foreign nation or government is conducting or threatening an "invasion or predatory incursion" into the territory of the United States. Presumably, this phrase was meant to capture instances giving rise to the President's responsibility to repel an invasion by a foreign country without waiting for a congressional declaration of war. Upon such a proclamation, the government is authorized to detain or remove all citizens and nationals of the hostile country, age 14 and above, in accordance with regulations promulgated for that purpose and, unless suspected of engaging in hostilities, only after they are given adequate opportunity to depart of their own accord. The act is an exercise of the war power and rests on the presumption that persons with allegiance to a hostile government pose a threat to the national security of the United States.

While the act would permit regulations affecting all persons falling within the statutory definition of "alien enemy," it was the practice of the United States to intern only alien enemies who were found to constitute an active danger to the state, although other restrictions applied more broadly. Typically, alien enemies who were deemed to pose a threat have been interned for the duration of the war and released or repatriated at the end of hostilities.

The Alien Enemy Act was first used during the War of 1812 and thereafter during World War I and World War II. At the outset of World War II, President Franklin D. Roosevelt initially invoked the act against aliens from Japan, Germany, and Italy on the basis of an invasion or threatened invasion, but in each case, Congress declared war within a matter of days. President Truman cited the declarations of war in his 1945 order for the removal of "alien enemies now or hereafter interned within the continental limits of the United States … who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States."

At the outset of World War II, the internments were effected under civil authority of the Attorney General, who established "prohibited areas" in which no aliens of Japanese, Italian, or German descent were permitted to enter or remain, as well as a host of other restraints on affected aliens. Attorney General Francis Biddle created the Alien Enemy Control Unit to review the recommendations of hearing boards handling the cases of the more than 2,500 alien enemies in the temporary custody of the then-Immigration and Naturalization Service.

In February 1942, President Roosevelt extended the enemy internment program to cover certain U.S. citizens as well as alien enemies and turned over the authority to prescribe "military areas" to the Secretary of War, who further delegated the responsibilities under the order with respect to the West Coast to the commanding general of the Western Defense Command. The new order, Executive Order 9066, amended the policy established under the earlier proclamations regarding alien enemies and restricted areas but did not rely on the authority of the Alien Enemy Act, as the previous proclamations had done. Although the Department of Justice denied that the transfer of authority to the Department of War was motivated by a desire to avoid constitutional issues with regard to the restriction or detention of U.S. citizens, the House Select Committee Investigating National Defense Migration found the shift in authority significant, as it appeared to rely on the nation's war powers directly and could find no support in the Alien Enemy Act with respect to U.S. citizens.

Congress enacted legislation proposed by the War Department providing for punishment for the knowing violation of any exclusion order issued pursuant to Executive Order 9066 or similar executive order. A policy of mass evacuation from the West Coast of persons of Japanese descent—citizens as well as aliens—followed, which soon transformed into a system of compulsive internment at "relocation centers."

Judicial Challenges

Aliens affected by orders promulgated under the act did not have recourse to the courts to object to internment or removal orders on the grounds that the determination that they posed a threat was not made in accordance with due process of law under the Fifth Amendment. Affected aliens, however, could bring habeas corpus petitions to challenge their status as alien enemies or whether there existed a state of war. Because all instances of the act's use have occurred during a declared war, there has been no occasion for a court to examine whether an "invasion or predatory incursion" was underway.

The Supreme Court in *Ludecke v. Watkins*, a case concerning whether an alien enemy could be removed pursuant to the act although the war had ended, suggested its willingness to leave the question of hostilities to the President, despite acknowledging that the powers provided by the act may be subject to abuse. It was not contested in *Ludecke* that the United States had declared war against Germany and that active hostilities had occurred. Ludecke, a German national, argued that he was entitled to relief because hostilities had ended and there was in effect no German government. The Court held that it did not have the power to disregard the views of the political branches about the continued danger posed by alien enemies in the aftermath of the war and that the petitioner had no right to judicial review of the Attorney General's determination that he was dangerous and subject to removal.

In a series of cases, the Supreme Court limited but did not explicitly strike down the internment program, which began under the Alien Enemy Act but was expanded to cover U.S. citizens pursuant to war powers. In the 1943 case *Hirabayashi v. United States*, the Supreme Court found the curfew imposed upon persons of Japanese ancestry to be constitutional as a valid wartime security measure, even as implemented against U.S. citizens. The Court emphasized the importance of congressional ratification of the executive order that authorized curfews. In *Korematsu v. United States* (1944), the Supreme Court upheld the conviction of a U.S. citizen for remaining in his home despite the fact that it was located within a newly declared "Military Area" and was thus off-limits to persons of Japanese descent. The Court declined to consider the constitutionality of the detention itself, as Korematsu's conviction was for violating the exclusion order only.

In *Ex parte Endo*, decided the same day as *Korematsu*, the Supreme Court did not find adequate statutory underpinnings to support the internment of U.S. "loyal citizens." The Court ruled that the authority to exclude persons of Japanese ancestry from declared military areas did not encompass the authority to detain "concededly loyal" Americans. Such authority, the Court determined, could not be implied from the power to protect against espionage and sabotage during wartime. The Court declared its obligation to

interpret the wartime measure to allow for the "greatest possible accommodation between … liberties and the exigencies of war," which in turn required an assumption that Congress "intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."

The Court later determined that Congress terminated World War II by joint resolution in 1951, eliminating the authority to remove previously interned enemy aliens. The Court in 2018 expressly recognized that *Korematsu* had been "overruled in the court of history" and was "gravely wrong the day it was decided."

Members of International Cartels and Transnational Organizations as Alien Enemies Under the Act

As noted above, invocation of the Alien Enemy Act requires a declared war or an "invasion or predatory incursion [that] is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government." Many journalists, commentators, and legal scholars have observed that the act seems to contemplate a state of hostilities or war with a foreign country, possibly precipitated by an invasion or threatened invasion by military forces, and not a threat posed by foreign drug cartels or gangs, for example. Some argue that the entry of drug cartels into the United States could potentially be treated as an invasion if evidence shows that they are committing or intend to commit acts of hostility against a state's inhabitants or officials "on a scale or with a degree of organization that deliberately overthrows or curtails the lawful sovereignty of the state." Others make the case that constitutional references to "invasions" that would justify invocation of war powers such as the Alien Enemy Act should be interpreted to mean an invasion by a hostile military force.

President Trump's executive order claims that international drug cartels "functionally control, through a campaign of assassination, terror, rape, and brute force nearly all illegal traffic across the southern border of the United States." It also states that they function as "quasi-governmental entities, controlling nearly all aspects of society" in certain areas of Mexico and threaten "the safety of the American people, the security of the United States, and the stability of the international order in the Western Hemisphere." Under this view, the entry of and continued presence of persons associated with designated cartels may be deemed to be engaging in a "qualified invasion or predatory incursion." This theory appears to be unprecedented and has not been subject to judicial review.

Although the Supreme Court has not directly addressed whether the unlawful entrance or presence of any alien may be treated as an invasion, lower courts have rejected as non-justiciable states' invocation of the Invasion Clause (a part of the Guarantee Clause that provides that the federal government is responsible for protecting the states against invasion) to claim a right to receive federal assistance to manage the number of aliens within their territories. Some of these courts also expressed skepticism that "invasion" for purposes of the Invasion Clause means anything other than hostile military invasion. Other lower courts have found unpersuasive the argument that a state has the right to engage in war pursuant to Article I, Section 10, clause 3, to defend against an "invasion" lodged by transnational cartel members or by an "influx of illegal crossings." One district court rejected Texas's contention that its immigration enforcement efforts amounted to engaging in war.

Considerations for Congress

Although courts have generally deferred to the President's determinations regarding exigencies affecting the national security or treated the question as political and non-justiciable, it is conceivable that courts might be unwilling to accept a determination that members of certain international cartels and other transnational organizations are invading the territory of the United States as an enemy force from a foreign country for purposes of the Alien Enemy Act. The Supreme Court has stated that executive actions to meet an exigency must be justified under the circumstances prevailing at the time and not

"mere executive fiat." Congress may act to amend the Alien Enemy Act to the immigration context and to address perceived national security threats. There is one bill in the 119th Congress to repeal the Alien Enemy Act, H.R. 630/S. 193. The Neighbors Not Enemies Act, a bill to repeal the Alien Enemy Act, has been introduced in successive Congresses since the 116th Congress but has never been reported out of committee.

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