

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

Updated April 2, 2025

On January 20, 2025, President Trump issued an [executive order](#) (E.O.) declaring 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 [directed](#) 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. On February 20, 2025, the Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury, [designated](#) several international cartels as foreign terrorist organizations, including the organization known as Tren de Aragua (“TdA”).

The E.O. also directed 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.” On March 14, 2025, President Trump [invoked](#) the Act, declaring that TdA “is perpetrating, attempting, and threatening an invasion or predatory incursion against the territory of the United States.” The President’s proclamation directed that “all Venezuelan citizens 14 years of age or older who are members of TdA, are within the United States, and are not actually naturalized or lawful permanent residents of the United States are liable to be apprehended, restrained, secured, and removed as Alien Enemies.” On March 15, 2025, a [lawsuit](#) was filed, arguing, among other things, that the Act does not provide the President with the authority to remove individuals from the United States under these circumstances.

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. This Legal Sidebar also briefly discusses the current litigation

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LSB11269

regarding President Trump’s proclamation invoking the Act to remove members of TdA. 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.

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, 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](#) were [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.”

Prior 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, until now 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 and Current Litigation

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 explicitly 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.

To establish that TdA is a foreign nation or government invading the United States, the March 2025 proclamation **asserts** that the group has infiltrated the Maduro government and is associated with **regime-sponsored narco-terrorists**. Further, the proclamation **states**, transnational criminal organizations have gained control over sufficient territory in Venezuela to bring about a “hybrid criminal state” that is “perpetrating an invasion of and predatory incursion into the United States.” Separately, the proclamation **asserts** that 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.” TdA, according to the [proclamation](#), is conducting these hostile activities both directly and under the direction of the Maduro regime. Accordingly, the proclamation [finds](#) that an invasion or predatory incursion against U.S. territory is occurring and that, because TdA members are “[chargeable with hostility](#),” they will not be accorded the opportunity under the [statute](#) to depart voluntarily. Any property associated with the group’s hostile activities is subject to [forfeiture](#).

As previously noted, a group of plaintiffs (Venezuelan men in immigration custody) filed a [class action complaint and petition for writ of habeas corpus](#) with the U.S. District Court for the District of Columbia challenging the government’s use of the Act in this circumstance. The plaintiffs also filed [an emergency application for a temporary restraining order](#). On March 15, 2025, the district court [issued a temporary restraining order](#) to enjoin for 14 days the removal of five Venezuelans who are parties to the litigation and then [expanded](#) the order to [certify the class](#) of Venezuelans who are detained and potentially removable under the proclamation. It was [reported](#) the following day that the Trump Administration [removed](#) more than 200 aliens to El Salvador, [purportedly](#) as alien enemies.

The government [appealed](#) both orders and [asked](#) for an emergency stay during appeal at the U.S. Court of Appeals for the D.C. Circuit, [contesting](#) venue and [asserting](#), among other things, that it is likely to prevail on the merits. A divided panel of the D.C. Circuit [denied](#) the stay of the temporary injunction, meaning the government continues to be enjoined from carrying out more removals under the Act. The government has [filed](#) a request for an administrative stay and an application to vacate the district court judge’s decision with the Supreme Court.

Considerations for Congress

Courts have [generally deferred](#) to the President’s determinations regarding exigencies affecting the national security or, according to commentators, treated the question as [political](#) and [non-justiciable](#). Yet 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 [held](#) that, as opposed to “mere executive fiat,” executive actions to meet an exigency must be justified under the circumstances prevailing at the time. The Court further explained, “What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.” Congress may determine that such judicial questions and answers are the best way to clarify any ambiguity regarding the Alien Enemy Act. Alternatively, Congress may act to amend the Alien Enemy Act to adapt it to the immigration context and to address perceived national security threats. Conversely, Congress may consider limiting the Act by providing a restrictive definition for “invasion” and “predatory incursion” to clarify that such a situation is one in which the rules of war apply (as the Wilson Administration [interpreted](#) it).

A bill in the 119th Congress would repeal the Alien Enemy Act, [H.R. 630/S. 193](#). This bill, the [Neighbors Not Enemies Act](#), has been introduced in successive Congresses since the 116th Congress but has never been reported out of committee.

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