

# THE RESURGENCE OF THE ALIEN ENEMIES ACT

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*This research explores the resurgence of the 1798 Alien Enemies Act, particularly in the context of President Donald Trump’s proposed “Operation Aurora” immigration plan. President Trump’s campaign promise to deport illegal immigrants raises legal and constitutional challenges as it relies on the invocation of the Alien Enemies Act, which was historically used during wartime. The Alien Enemies Act allows the United States to deport aliens from enemy nations during times of war or conflict. Still, non-state actors, such as foreign gangs and cartels, remain legally ambiguous. This paper examines the historical context of the Alien Enemies Act, its previous enactments during the War of 1812, World War I, and World War II, and the legal complexities involved in its revival. Key obstacles include the need for a formal declaration of war or an “invasion” by a foreign nation, as well as the impact of recent legal rulings on immigration policy, such as the Huisha-Huisha v. Mayorkas case and Title 42. The research also considers an alternative path: renewing the expired Alien Friends Act, which would allow for deportations without the requirement of war or invasion. Finally, the study highlights broader national security concerns, including the risk of foreign espionage. It suggests that while the Alien Enemies Act presents significant hurdles, a strategic legal interpretation or revival of the Alien Friends Act might offer a more feasible solution for President Trump’s immigration strategy.*

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## INTRODUCTION

The 1798 Alien Enemies Act has resurfaced in the media by United States President Donald Trump, who announced his campaign promise to invoke it in his new immigration plan called “Operation Aurora,” named after the Colorado town that has been permeated with dangerous illegal immigrants from Venezuela.<sup>2</sup> The operation will work to deport all undocumented immigrants connected to known or suspected gang members, drug dealers, and cartel members living in the United States. While still a former president, Trump said that, if elected again, he “will send elite squads of ICE, Border Patrol, and federal law enforcement officers to arrest and deport every last illegal alien gang member until there is not a single one left in [the United States].”<sup>3</sup>

## I. SEDITION ACTS

The 18th-century Alien and Sedition Acts were enacted by President John Adams’ Administration when faced with an impending war with France. The XYZ Affair, between American and French diplomats, resulted in an undeclared quasi-war between the two countries. Federalists, the first political party of the United States, were concerned that, under Jefferson, French supporters from the Democratic-Republican Party would disrupt and sabotage their military advancement toward France. In June 1798, in the *Gazette of the United States*, Alexander Hamilton called Jefferson supporters “more Frenchmen than Americans.”<sup>4</sup> In response to the

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<sup>2</sup> Fernando Cervantes, *The Alien Enemies Act, last used in WWII internments, is part of Trump's immigration plan*, USA Today, 2024, at 1.

<sup>3</sup> Rachel Treisman, *Trump is promising deportations under the Alien Enemies Act of 1798. What is it?*, NPR, 2024, at 1.

<sup>4</sup> ADF, Hamilton Papers, *Gazette of the United States*, and *Philadelphia Daily Advertiser*, June 13, 1798.

suspensions of supporters of France, Adams enacted three new collective Alien laws specifically designed to weed out pro-French immigrants.<sup>5</sup> First, the Alien Friends Act gave the president power “to deport any alien whom [the president] considered dangerous.” Second, the Alien Enemies Act aimed to deport any alien who came from an enemy country at war with the United States. Last, the Sedition Act authorized the punishment of any person writing or printing “false, scandalous and malicious writing” against Congress or the president.<sup>6</sup> The Alien Enemies Act gave the president the power to detain and expel any individual who is a citizen of a warring nation. The Sedition Act was rejected by the Democratic-Republican minority in Congress, claiming that it was a violation of First Amendment rights that protect both freedom of speech and the press. President Adams signed it regardless, and the three collective Alien Enemies Acts were enacted on July 14, 1798, and were set to expire on his last day in office, in 1801. American opposition to the Sedition and Alien Friends Act fueled President Adams’ political downfall. By 1802, all the Alien and Sedition Acts had expired, except for the Alien Enemies Act, which continues to be upheld by various federal courts, including the Supreme Court, under war and national defense statutes.

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... 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 naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies.<sup>7</sup>

According to J. Gregory Sidak, the Alien Enemies Act is “one of the

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<sup>5</sup> History.com Editors, *Alien and Sedition Acts*, A&E Television Networks, 2023, at 1.

<sup>6</sup> John Adams & Abigail Adams, *The Alien and Seditions Act*, PBS, n.d., at 2.

<sup>7</sup> U.S. Const. art. I, §§ 21-24.

most sweeping delegations of power to the president to be found anywhere.”<sup>8</sup>

## II. ALIEN ENEMIES ACT INVOCATION

Since its establishment, the Alien Enemies Act (henceforth AEA) has been invoked thrice.

### A. *Lockington v. Smith*

The first reported case under the AEA was *Lockington v. Smith*<sup>9</sup> in the Pennsylvania Supreme Court in 1814. Charles Lockington, a subject of the British king, came to the United States before the declaration of war in 1812. When the War of 1812 broke out, Lockington was automatically classified as an enemy alien. By law, Lockington had to report to his local marshal, who would then relocate him to a designated safe area. Despite Lockington allegedly following those instructions, he was later found in Philadelphia, violating this order. Lockington was arrested and sent to prison. Lockington argued that he had rights as a resident despite being classified as an enemy alien. The court decided that Lockington had no municipal rights and that the government had every right to detain him under the Alien Enemy Act.<sup>10</sup>

### B. *Invocation During World War I and II*

The AEA was used for a second time, during World War I, to deport and imprison citizens of the German Empire, Austria-Hungary, the Ottoman Empire, and Bulgaria. During WWI, Assistant Attorney General Charles Warren argued in defense of the AEA, stating that “an army of spies,

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<sup>8</sup> *Ludecke*, 335 U.S. at 162.

<sup>9</sup> *Lockington v. Smith*, 1 Richard Peters 1, 1 (1817).

<sup>10</sup> *Lockington v. Smith*, 1 Richard Peters 1, 1 (1817).

incendiaries, and propagandists may be more dangerous than any army of soldiers.”<sup>11</sup> The third and final time the AEA was used was during World War II under President Franklin Roosevelt, who used it against Japanese, Italian, and German nationals. The 1946 *Ludecke v. Watkins*<sup>12</sup> case involved a German alien arrested in the United States after the U.S. declared war on Germany. Ludecke argued that the U.S. government lacked sufficient evidence to prove he was a threat. Despite his alleged innocence, Ludecke was considered rightfully detained under the AEA.<sup>13</sup>

C. *Korematsu v. U.S.*

*Korematsu v. U.S.*<sup>14</sup> began after the attack on Pearl Harbor in December 1941. President Franklin D. Roosevelt signed Executive Order 9066,<sup>15</sup> which gave the president the power to force the relocation of Japanese Americans living on the West Coast to internment camps. Korematsu, who was living in San Leandro, California, refused to comply and was then arrested. Korematsu argued that his conviction was unconstitutional and violated his rights as an American citizen. His case reached the Supreme Court and, despite being an American citizen, the court ruled, again based on the Alien Enemies Act, that Korematsu's rights did not outweigh the government's wartime authority.<sup>16</sup>

### III. THE TRUMP ADMINISTRATION

Suppose that President Trump follows through on his campaign promise and utilizes the Alien Enemies Act to remove foreign gang and

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<sup>11</sup> George Fishman, *The 225-year-old 'Alien Enemies Act' Needs to Come Out of Retirement*, Center for Immigration Studies, October 10, 2023, at 1.

<sup>12</sup> *Ludecke v. Watkins*, 335 U.S. 160 (1948)

<sup>13</sup> Katherine Yon Ebright, *The Alien Enemies Act, Explained*, Brennan Center for Justice, 2024, at 3.

<sup>14</sup> *Korematsu v. United States*, 323 U.S. 214 (1944) at 4.

<sup>15</sup> Executive Order No. 9006, 1942

<sup>16</sup> *Korematsu v. United States*, 323 U.S. 214 (1944) at 4.

cartel members. In that case, two legal obstacles must be addressed before its enactment. First, gangs and cartel activity would have to qualify as an “invasion” or “predatory incursion” into the United States.<sup>17</sup> The Center for Immigration Studies notes that the Alien Enemies Act was used to respond to a “traditional conflict between nations” and, according to Fishman, the federal courts have so far been resistant to considering illegal immigration an ‘invasion.’<sup>18</sup> This poses a challenge for the Trump administration, as the definition of what constitutes an invasion is a key piece for the successful application of the Alien Enemies Act. Second, it is important to understand that the Alien Enemies Act can only be invoked by a declaration of war or an invasion by a foreign government or nation.<sup>19</sup> This means that the Trump administration would need to establish an argument stating that foreign gangs and cartels are indeed an act of invasion by foreign nations.

According to the Washington Post, under the Biden-Harris Administration, illegal border crossing had “reached an all-time high of 2.2 million illegal migrants in 2022.”<sup>20</sup> Given the ongoing challenges of illegal immigration and illegal migrants involved in drug cartels, smuggling, and gangs in the United States, President Trump might want to consider renewing the Alien Friends Act instead. The Alien Friends Act expired at the end of John Adams's presidency in 1801, but renewing this piece of legislation would make Trump’s “Operation Aurora” a more comprehensive plan. Reviving the Alien Friends Act would allow the president to remove any aliens deemed dangerous to the U.S. without the initial requirement of a declaration of war or an invasion. Furthermore, the Trump administration can avoid the question of defining what constitutes an invasion, as required

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<sup>17</sup> Catherine Shoichet, *Trump is invoking the Alien Enemies Act. Here are answers to key questions about the 1798 law*, CNN, March 16, 2025, at 1.

<sup>18</sup> George Fishman, *The 225-year-old ‘Alien Enemies Act’ Needs to Come Out of Retirement*, Center for Immigration Studies, 2023, at 4.

<sup>19</sup> *Id.*

<sup>20</sup> Nick Miroff, *Trump vs. Biden on Immigration: 12 Charts Comparing U.S. Border Security*, Washington Post, 2024, at 4-5.

under the Alien Enemies Act.

The Alien Enemies Act would also face more significant legal challenges, specifically due to the D.C. Circuit's ruling in 2022 on the *Huisha-Huisha v. Mayorkas* case.<sup>21</sup> Title 42, The Public Health Service Act, enacted in 1944, was invoked for the first time in March 2020 since its creation. The order was implemented under President Trump's administration to stop the rapid spread of COVID-19 among migrants. Director of the Centers for Disease Control and Prevention Robert Redfield sealed the U.S. borders with Canada and Mexico and barred all migrants from entering the United States during the rapidly spreading pandemic. The migrants being expelled argued that Title 42 was a violation of their rights because expulsion to their countries would result in persecution and torture, similar to asylum seekers. This poses a legal threat to the Alien Enemies Act because many migrants may establish “credible fear” claims, leading to migrants remaining in the United States and thus undermining the Alien Enemies Act’s purpose. If federal courts apply this logic to the Alien Enemies Act, it would prolong foreign migrants’ stays in the United States, despite their required removal under the Alien Enemies Act.<sup>22</sup>

#### IV. CHINESE AND ACADEMIA

The relevance of the Alien Enemies Act extends beyond drug smuggling and gangs, particularly, to the national security threats posed by the People’s Republic of China in the United States. According to the Federal Bureau of Investigations, “more than 1.4 million international students and professors” take part in the United States academic environment.<sup>23</sup> The vast majority of Chinese students and teachers, of

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<sup>21</sup> *Huisha-Huisha v. Mayorkas*, 1 Lisa Bankins 1, 1 (1:21-cv-00100 2023).

<sup>22</sup> Uriel Garcia, *Here’s what you need to know about Title 42, the pandemic-era policy that quickly sends migrants to Mexico*, The Texas Tribune, 2023, at 5-6.

<sup>23</sup> Bill Priestap, *Student Visa Integrity: Protecting Educational Opportunity and National Security*, United States Government, June 6, 2018, at 1.

course, pose no threat to Americans and are, just like American colleagues, recognized for their academic achievements and contributions to American academia. Furthermore, the FBI explicitly recognizes and values the great benefits foreign students and professors provide. The “advanced research and cutting-edge technology” the United States produces, however, “also puts academia at risk of exploitation by foreign actors who do not follow our [American] rules.”<sup>24</sup> According to the FBI, the Chinese government has sponsored economic espionage in the past. For example, in 2020, a mathematics student at the University of California, Los Angeles was suspected and arrested for sending sensitive software to the Chinese military.<sup>25</sup> Hypothetically, if there were to be a formal declaration of war between the United States and China, the Alien Enemies Act would be far more productive than the hundreds of thousands of deportation cases in immigration court from Chinese students abroad in the United States.

## CONCLUSION

President Donald Trump’s plan to combat foreign gang and cartel activity through “Operation Aurora” will likely not be immediate. The Alien Enemies Act must either be amended or require the Trump Administration to justify a broader interpretation of “invasion” for the plan to follow through.

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<sup>24</sup> FBI, *China: The Risk to Academia*, Federal Bureau of Investigation, 2019, at 6.

<sup>25</sup> Alex Caprariello, *Have Chinese spies infiltrated US college campuses?*, News Nation, 2023, at 6.