

REVIVING THE ALIEN ENEMY: HOW ARCHAIC PROCEDURAL TOOLS CREATE MODERN MARKET UNCERTAINTY

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ABSTRACT

In January 2025, the President of the United States issued a proclamation that treated the situation at the southern border as an invasion and directed federal officers to bar certain noncitizens from invoking key Immigration and Nationality Act (“INA”) pathways, including asylum. This decision directed removal away from the INA’s screening track and toward an emergency model driven by status labels and rapid transfer. Within weeks, the Executive invoked the Alien Enemies Act of 1798 (“AEA”) against Venezuelan nationals alleged to be members of Tren de Aragua. Litigation followed, and the Supreme Court’s handling of the dispute shows why speed claims break down under a war powers statute. In *Trump v. J.G.G.*, the Court vacated temporary restraining orders while requiring notice timed to allow habeas relief before removal, holding that challenges must proceed through habeas petitions filed in the district of confinement. This structure turns removal into emergency federal litigation and invites uneven results across districts because the minimum notice window is left to case-by-case judgment.

Inconsistent interim rules create business risks when staffing and delivery depend on stable timelines. In agriculture, harvest labor cannot be replaced on short notice without loss. In construction, bid pricing and delay penalties assume a workforce that will remain available through the project phase. When the governing removal track can switch unexpectedly between ordinary immigration procedures and emergency war powers, employers respond with contingency staffing, shorter commitments, and added risk premiums.

Narrow repairs follow from this diagnosis: clarify the Alien Enemies Act trigger around state-linked armed action, codify a notice-and-habeas safeguard with a fixed pre-removal window and stable venue, and issue DHS guidance that keeps INA processing as the default while standardizing notice.

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I. INTRODUCTION

A. The 2025 Procedural Shift

On January 20, 2025, President Donald Trump framed conditions at the southern border as an invasion and directed federal officers to respond through emergency measures, rather than ordinary immigration screening.¹ The proclamation's practical effect was procedural. It treated a large class of noncitizens as participants in an invasion and then limited which Immigration and Nationality Act channels they could invoke after being encountered by federal immigration officials at or near the southern border.²

Section 2 of the proclamation restricted covered individuals from invoking provisions of the Immigration and Nationality Act that can delay or prevent removal, including asylum.³ The restriction altered which statutory steps could be triggered after an encounter and which decision-maker controlled the next stage. Once access to those channels is cut off by proclamation, removal turns on how far the Executive can move a person through custody and out of the country before ordinary statutory and constitutional limits reassert themselves.

Section 4 grounded the authority to suspend physical entry in Article II of the U.S. Constitution, framing such suspension as necessary to fulfill the Article IV duty to protect states against invasion.⁴ The combination of status-based classification and asserted constitutional authority to act outside routine statutory pathways produced a procedural shift. The proclamation treated the Immigration and Nationality Act as a set of rules the Executive could set aside when operational constraints made statutory screening ineffective at the border.⁵ The significance lies in the procedural consequences: the proclamation changed which procedures applied and where challenges could be filed. It also invoked an emergency framework that changed the timing and practical value of notice before removal.

That January 20 proclamation did not itself invoke the Alien Enemies Act. Its importance, rather, was that it recast the southern border as an "invasion" and thereby made a later turn to the Alien Enemies Act appear doctrinally and administratively available. Roughly seven weeks later, the Executive took that next step through a separate proclamation invoking the Alien Enemies Act against Venezuelan nationals alleged to be members of Tren de Aragua.⁶ The shift matters because it marks the bridge between two procedural worlds: the first move narrowed or displaced Immigration and Nationality Act pathways, while the second attempted to replace INA-centered screening with an older war-powers removal framework. That transition is the hinge for the analysis that

1. Proclamation No. 10888, 90 Fed. Reg. 8333, 8334-36 (Jan. 20, 2025).

2. *Id.* at 8334-35.

3. *Id.* at 8335 § 2.

4. *Id.* at 8336 § 4.

5. *Id.* at 8334-35.

6. Proclamation No. 10903, 90 Fed. Reg. at 13034-35.

follows.

B. Argument and Contribution

This Article argues that invoking an eighteenth-century war-powers statute as a substitute for modern adjudication inevitably triggers a habeas-centered judicial response, creating distinct downstream effects on labor-dependent markets.

The Executive's reliance on war-era procedure operates as a substitute for modern immigration adjudication. The Alien Enemies Act shifts the legal question away from Immigration and Nationality Act eligibility and toward an executive determination of enemy status.⁷ That shift is meant to accelerate removals by reducing reliance on immigration courts and ordinary Immigration and Nationality Act adjudication. The second step is that federal courts re-judicialize the system through habeas, notice, and venue rules. In *Trump v. J.G.G.*, the Court treated challenges to removal under the Alien Enemies Act as claims that must proceed in habeas and tied venue to the district of confinement.⁸ The Court also required notice in a form and time that allows detainees to seek habeas relief before removal occurs.⁹ Those requirements do not restore the Immigration and Nationality Act as the governing code; they instead impose a constitutional litigation pathway on top of an executive-driven removal model. This overlay produces market risk. When removals can shift between Immigration and Nationality Act processing and war-powers procedure, firms in labor-dependent sectors cannot plan workforce availability on stable legal assumptions. The uncertainty comes from timing and forum, because emergency procedures invite court-supervised bottlenecks that disrupt staffing and delivery schedules. This Article demonstrates that disputes over habeas-centered procedures impose private ordering costs that operate as indirect barriers analogous to non-tariff barriers in trade.

C. Structure and Method

Part II establishes the statutory baselines: how the INA structures expedited removal as a procedure with defined checkpoints, and how the AEA was built as a wartime tool with different triggers. Against this backdrop, Part III analyzes the 2025 litigation posture as a procedural system, focusing on what *J.G.G.* makes inevitable: habeas-centered venue fights, notice disputes, and repeated emergency applications that convert removal into constitutional litigation. Finally, Part IV offers targeted repairs designed to restore a predictable rule set without requiring a wholesale rewrite of immigration law.

7. Alien Enemies Act, 50 U.S.C. § 21 (2022).

8. *Trump v. J.G.G.*, 604 U.S. 670, 672 (2025) (per curiam).

9. *Id.* at 673.

II. HISTORY AND BACKGROUND

A. The Alien Enemies Act as a War-Powers Removal Regime

The Alien Enemies Act is a federal statute enacted in 1798, now codified in Title 50 of the U.S. Code, that authorizes a distinctive form of executive-controlled detention and removal when the nation is in a legally defined war posture.¹⁰ Its trigger is not unlawful entry, visa overstay, or any of the ordinary predicates of immigration enforcement.¹¹ The statute turns on a public proclamation after either a declared war, or an invasion or predatory incursion against U.S. territory by a foreign nation or government.¹² Once that trigger is met, the statute empowers the President to apprehend and remove noncitizen nationals of the hostile foreign power who meet the statute's age threshold.¹³ The design is categorical. The question is whether a person is an alien enemy as a function of nationality and the President's proclamation, not whether the person is removable under the Immigration and Nationality Act or poses an individualized danger.¹⁴

This structure makes sense in its original setting. The statute predates the modern federal immigration system and was enacted during a period of international conflict, when Congress and the President were building tools for national defense that were not meant to operate as part of ordinary peacetime administration.¹⁵ This historical context also explains why the statute's text and architecture do not resemble those of contemporary removal procedures. The Act does not build in an asylum screening mechanism or a regulated record suitable for routine judicial review. Instead, it assumes executive administration in a domain where political branches claim wide latitude, and courts often proceed cautiously.¹⁶ Even in wartime settings, however, the Act has not been treated as a legal vacuum. The canonical Supreme Court decision addressing removal under the Act is *Ludecke v. Watkins*, which arose after World War II and required the Court to confront how long the President's Act-based authority can persist after fighting ends.¹⁷ The Court treated the end of war as a political determination, but it still interpreted the statute and applied that construction to the case before it, holding that the Act's authority remained available until the war was terminated through recognized political acts such as a treaty,

10. Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (codified as amended at 50 U.S.C. §§ 21-24).

11. 50 U.S.C. § 21.

12. *Id.*

13. *Id.*; see also Jennifer K. Elsea, *The Alien Enemy Act: History and Potential Use to Remove Members of International Criminal Cartels*, CONG. RSCH. SERV. 2-3 (Apr. 2, 2025) [hereinafter *Alien Enemy Act CRS*].

14. 50 U.S.C. §§ 21-22; Alien Enemy Act CRS, *supra* note 13, at 2-3.

15. Alien Enemy Act CRS, *supra* note 13, at 1-3.

16. *Id.*; *Ludecke v. Watkins*, 335 U.S. 160, 163-65 (1948).

17. 335 U.S. at 166-67.

legislation, or a presidential proclamation.¹⁸ For present purposes, the significance is the baseline premise that even a war-powers removal statute still turns on statutory predicates that can become contested in litigation when the Executive invokes it.¹⁹

The same tension is visible when the Act's invasion language is transposed into a setting framed as domestic security rather than armed conflict between states. In 2025, litigation arising from an Alien Enemies Act proclamation, federal judges treated the meaning of "invasion" in the statute as a legal question and read it in a military sense rather than as a synonym for migration.²⁰ That reading tracks the statute's own linkage of invasion to conduct by a foreign nation or government, and it underscores a basic point that matters for the analysis that follows: the Act is a war-power instrument that expects identifiable wartime predicates, and the further an invocation moves from those predicates, the more likely the invocation generates contestable legal questions rather than administrative speed.²¹

B. Expedited Removal Under the INA as the Modern Fast-removal Baseline

The modern baseline for rapid border removals is not the Alien Enemies Act. It is an expedited removal of certain arriving or recently arrived noncitizens without placing them into full removal proceedings.²² The statutory logic is still severe. It is built to move quickly, and it constrains many forms of review. Yet it is not a blank check. Congress paired the fast-track mechanism with a defined screening step to address protection claims, and that step shapes how the system functions at the border.²³ The key procedural hinge is what happens when a person indicates fear of return or seeks asylum. In that posture, the statute and implementing practice channel the case into a credible fear process conducted by an asylum officer.²⁴ If the asylum officer finds no credible fear, the person can request review by an immigration judge, and the system sets short timelines for that review.²⁵ The process is streamlined and often conducted under intense operational pressure, but it still establishes a clear sequence of steps and a narrow screening inquiry: a fear claim triggers a credible-fear interview, and a negative determination can be reviewed by an immigration judge on an

18. *Id.* at 167-70.

19. *Id.* at 163-64, 170-72.

20. *D.B.U v. Trump*, 779 F.Supp.3d 1264, 1278-83 (D. Colo. 2025) (order granting emergency motion for temporary restraining order).

21. *Id.* at 1280-83.

22. Immigration and Nationality Act § 235(b)(1), 8 U.S.C. § 1225(b)(1); AM. IMMIGR. COUNCIL, *Expedited Removal Explainer* 1 (Feb. 20, 2025) [hereinafter *Expedited Removal Explainer*].

23. 8 U.S.C. § 1225(b)(1)(A)(ii), (B); *Expedited Removal Explainer*, *supra* note 22, at 1-2.

24. 8 U.S.C. § 1225(b)(1)(A)(ii), (B); *Expedited Removal Explainer*, *supra* note 22, at 2.

25. 8 U.S.C. § 1225(b)(1)(B)(iii)(III); *Expedited Removal Explainer*, *supra* note 22, at 2.

expedited timetable.²⁶

Congress also cabined federal court involvement in expedited removal. Judicial review of expedited removal orders is limited, and the Supreme Court has upheld significant limits in this domain, reinforcing the notion that expedited removal is designed to be fast largely because ordinary judicial oversight is sharply constrained.²⁷ In practical terms, expedited removal is the modern legal tool that tries to reconcile two goals that sit in tension: high-volume processing and a minimal protection screen for fear-based claims.²⁸ It is not a generous procedure, but it is a rule-based one with known decision points, and those decision points become important when the Executive seeks to reroute border enforcement away from the INA's procedural architecture.²⁹

C. The January 20, 2025, Proclamation: Limits on INA Procedure

The procedural pivot in January 2025 began with a presidential proclamation that framed conditions at the southern border as an invasion within the meaning of the Constitution's Guarantee Clause.³⁰ The proclamation's language does not present the border as the routine enforcement challenge to be addressed within the INA's ordinary channels; rather, it presents the border as a constitutional emergency in which standard statutory tools are described as ineffective in the border environment.³¹ This framing matters because it shifts the argument from how immigration statutes should be executed to whether the President may invoke constitutional protection-from-invasion language to justify measures that disable statutory pathways.

The proclamation subsequently operationalizes that reclassification by targeting procedure, not simply resources.³² Invoking 8 U.S.C. §§ 1182(f) and 1185(a), it declares that aliens "engaged in the invasion" across the southern border may be denied entry and restricted from invoking Immigration and Nationality Act provisions that would permit their continued presence in the United States, including asylum under 8 U.S.C. § 1158.³³ That move differs from the aggressive use of expedited removal because expedited removal remains inside the INA's screening framework: a fear claim triggers credible-fear screening and, after a negative determination, immigration-judge review on an expedited timetable.³⁴ The proclamation instead attempts to narrow which

26. 8 U.S.C. § 1225(b)(1)(B)(ii), (iii), (v); Expedited Removal Explainer, *supra* note 22, at 2.

27. 8 U.S.C. § 1252(a)(2)(A), (e); Dep't of Homeland Sec. v. Thuraissigiam, 591 U.S. 103 (2020).

28. 8 U.S.C. § 1225(b)(1)(B); Expedited Removal Explainer, *supra* note 22, at 2-3.

29. Expedited Removal Explainer, *supra* note 22, at 1-3.

30. U.S. CONST. art. IV, § 4; Proclamation No. 10888, 90 Fed. Reg. at 8334.

31. Proclamation No. 10888, 90 Fed. Reg. at 8334.

32. *Id.* at 8335 § 2.

33. *Id.*

34. Compare 8 U.S.C. § 1225(b)(1)(B), with Proclamation No. 10888, 90 Fed. Reg. at 8335 § 2.

INA procedures are available in the first place for the class it labels as “engaged in the invasion.” Section 4 separately rests that posture on asserted Article II authority and the Article IV duty to protect States against invasion.³⁵

That January proclamation is not itself an Alien Enemies Act proclamation, and it does not need to be to matter for the Alien Enemies Act story. It supplies the constitutional and rhetorical predicate that makes a later war-powers turn appear administratively available: if the border is an invasion, then a statute that turns on invasion or predatory-incursion language can be presented as an available tool.³⁶ Roughly seven weeks later, a separate proclamation purported to invoke the Alien Enemies Act against Venezuelan nationals alleged to be members of Tren de Aragua, while expressly linking Tren de Aragua to the Maduro regime in Venezuela.³⁷ Whatever the merits of that predicate, the chain of moves is clear: the executive posture began with reframing the border as an invasion and then shifted toward an eighteenth-century wartime statute that operates on a different procedural logic from the INA’s screening framework.³⁸

III. ANALYSIS

A. Applying the Alien Enemies Act Without a Modern Procedure

A modern immigration removal system depends on defined decision points and a workable avenue for review. The January 20 proclamation attempted to displace the Immigration and Nationality Act’s procedural framework without supplying a replacement structure that could operate at scale.³⁹ It framed the southern border as an invasion, described ordinary screening under the INA as potentially “wholly ineffective in the border environment,” and restricted access to Immigration and Nationality Act mechanisms that ordinarily govern screening and relief.⁴⁰ That move produced a procedural shock: the legal system is asked to carry out removals, but the governing rules are no longer the INA’s familiar sequence of statutory steps. The same proclamation explains that information gaps at the border make identity, background, and risk difficult to verify with sufficient reliability. On that account, the document justifies reliance on asserted Article II authority and related constitutional duties to act outside ordinary statutory pathways.⁴¹

Section 2 does the operational work. It restricts the invocation of Immigration and Nationality Act provisions that would otherwise permit continued presence in the United States, including asylum under 8 U.S.C. §

35. Proclamation No. 10888, 90 Fed. Reg. at 8336 § 4.

36. 50 U.S.C. § 21; Proclamation No. 10888, 90 Fed. Reg. at 8334-36.

37. Proclamation No. 10903, 90 Fed. Reg. at 13034-35.

38. *Id.*; Proclamation No. 10888, 90 Fed. Reg. at 8334-36.

39. Proclamation No. 10888, 90 Fed. Reg. at 8334-36; 8 U.S.C. § 1225(b)(1); Expedited Removal Explainer, *supra* note 22, at 1-3.

40. Proclamation No. 10888, 90 Fed. Reg. at 8334-35.

41. *Id.* at 8334-36.

1158.⁴² Section 4 separately rests the proclamation on asserted Article II authority and the Article IV duty to protect States against invasion.⁴³ Even though the January 20 instrument is not itself an Alien Enemies Act proclamation, its practical signal is clear: in the claimed emergency space, the Executive does not regard the INA as the controlling procedure.⁴⁴

At that point, the legal system faces a structural mismatch. The Immigration and Nationality Act is a removal framework with a built-in procedural architecture; the Alien Enemies Act is not.⁴⁵ The AEA authorizes detention and removal in narrow conditions tied to war, invasion, or predatory incursion by a foreign nation or government, and it speaks in the language of executive apprehension, restraint, and removal rather than in the language of hearings, administrative records, and appellate review.⁴⁶

The 2025 invocation of AEA illustrates that mismatch in concrete form. Proclamation No. 10903 declared that Venezuelan citizens aged fourteen or older who are members of Tren de Aragua, who are within the United States, and who are not naturalized citizens or lawful permanent residents, are liable to be apprehended and removed as alien enemies.⁴⁷ The legal trigger was framed in terms of invasion, but the operational classification was categorical and membership-based. That is the key procedural mismatch: the AEA supplies removal power, but it does not supply the INA's contemporary screening and review architecture for determining who fits the category, how disputes are resolved, and how errors are corrected before removal.⁴⁸

B. Re-Judicialization Through Habeas: Trump v. J.G.G. as the Friction Point

Trump v. J.G.G. is the clearest illustration of that re-judicialization. The government sought speed, but the litigation produced a different structure: removal is conditioned on notice and a real opportunity to file in the correct court, and forum rules channel disputes into habeas proceedings tied to the district of confinement.⁴⁹ Five detainees and a putative class sought to block removal under Proclamation No. 10903. The district court issued temporary restraining orders ("TROs"), including a class-wide order. The Supreme Court then vacated the TROs, but it did not resolve whether the Government's interpretation of the AEA was correct or whether the detainees fell within the statute's substantive scope. It instead resolved a threshold procedural question: the proper vehicle and the proper venue for these challenges.⁵⁰

42. Proclamation No. 10888, 90 Fed. Reg. at 8335 § 2; 8 U.S.C. § 1158.

43. Proclamation No. 10888, 90 Fed. Reg. at 8336 § 4; U.S. CONST. art. IV, § 4.

44. Proclamation No. 10888, 90 Fed. Reg. at 8334-36.

45. 8 U.S.C. § 1225(b)(1); 50 U.S.C. § 21; Alien Enemy Act CRS, *supra* note 13, at 1-3.

46. 50 U.S.C. §§ 21-22; Alien Enemy Act CRS, *supra* note 13, at 2-3.

47. Proclamation No. 10903, 90 Fed. Reg. at 13034-35.

48. 50 U.S.C. §§ 21-22; 8 U.S.C. § 1225(b)(1); Proclamation No. 10903, 90 Fed. Reg. at 13034-35.

49. 604 U.S. 670, 672-74 (2025).

50. *Id.* at 671-72.

The Court's central holding was procedural in form but operational in effect. It held that "challenges to removal under the AEA . . . must be brought in habeas."⁵¹ The reason is structural: when the relief sought would necessarily imply the invalidity of confinement and removal, the claim falls within the core of the writ even if the plaintiffs do not formally seek release. From that premise, the venue rule follows: "[f]or core habeas petitions,' 'jurisdiction lies in . . . the district of confinement,'" and because "the detainees [were] confined in Texas, [. . .] venue [was] improper in the District of Columbia."⁵² This alone is enough to create friction. A nationwide injunction strategy concentrates disputes. A district-of-confinement habeas model disperses them. By fragmenting jurisdiction, the ruling not only multiplies filing points and timelines but also raises administrative costs, as custody location becomes the dispositive legal factor.⁵³

The more important point for present purposes is what the Court said about minimum process. The Court reaffirmed that individuals "subject to detention and removal under the [AEA are] entitled to 'judicial review' [on] 'questions of interpretation and constitutionality,' [and] on whether [the person] 'is in fact an alien enemy fourteen years of age or older.'"⁵⁴ This statement matters because it prevents the AEA from operating as a pure executive designation regime. Even in an AEA posture, an individual can litigate whether the statute applies and whether the government has correctly classified the person. The Court then connected that entitlement to notice. It treated due process in removal as a baseline requirement and required that AEA detainees receive notice after the date of the order that they are subject to removal under the Act. The notice must be given within a reasonable time and in a manner that allows the person to actually seek habeas relief in the proper venue before removal occurs.⁵⁵ This is where speed turns into delay. The AEA's appeal, as an emergency tool, is that it bypasses the INA's administrative track. Once the Supreme Court requires notice time to enable habeas litigation, the bypass no longer eliminates procedure; it relocates procedure. The decision point shifts from immigration court to federal district court, and the timeline is no longer the INA's structured sequence, but a race between removal logistics and emergency habeas filings.⁵⁶

Two further features of the Court's approach deepen the friction. First, the Court did not provide a concrete minimum notice period. The order uses a reasonableness formulation tied to the practical ability to seek habeas in the proper venue. This is a standard, not a rule. It invites fact-specific litigation in each district where detainees are confined and where removal is imminent. The predictable result is divergence: different courts implement the standard

51. *Id.* at 672.

52. *Id.*

53. *Id.* at 672; *Rumsfeld v. Padilla*, 542 U.S. 426, 442-43 (2004).

54. *J.G.G.*, 604 U.S. at 672 (quoting *Ludecke v. Watkins*, 335 U.S. 160, 163-64, 172 n.17 (1948)).

55. *J.G.G.*, 604 U.S. at 673.

56. *Id.* at 672-73.

differently, producing inconsistent emergency rulings across jurisdictions. Second, the venue rule forces repeated litigation when custody changes. If detainees are transferred, the relevant district changes. Even if no party intends to manipulate the forum, ordinary detention logistics can reshuffle the litigation map. The consequence is that the legal status of an AEA removal can depend on where a person sleeps that week. That is not a stable procedural environment for any high-volume system.⁵⁷

Trump v. J.G.G. shows why using war powers for modern migration management is not simply a constitutional debate. It is an operational design problem. The AEA can be invoked quickly. A workable removal system cannot operate at scale without clear notice rules and an administrable review pathway. The Supreme Court supplied some of those elements, but it supplied them as constitutional minima enforced through habeas. That is the friction point: every removal becomes a potential federal emergency matter, and the government's attempt to simplify the system moves it into a more demanding forum.⁵⁸

C. Procedural Variation and Labor-Market Risk

Firms can adapt to strict rules when they can price them. The harder case is a regime that cannot be forecast in its timing or forum. Economic scholarship on policy uncertainty defines the concept as dispersion over the future legal environment, rather than the environment's severity.⁵⁹ When the dispersion widens, firms often delay investment and hiring,⁶⁰ or they rewrite contracts to shift risk onto counterparties.⁶¹

The 2025 Alien Enemies Act episode widened that dispersion because it made timing and forum contingent on rapid executive choices and emergency-docket litigation. The Supreme Court confirmed that people targeted for removal under the AEA must receive notice in time to seek habeas review before removal, and it also held that venue lies in the district of confinement.⁶² The Court did not set a minimum notice window. The open question, how much time is enough, was pushed down to a set of district courts whose answers were shaped by local facts, local procedural posture, and local circuit law, as *A.A.R.P.* soon confirmed.⁶³ The result was not a single national rule, but a moving map.⁶⁴

That map moved in verifiable ways in the first litigation cycle. The District

57. *Id.* at 672-73; *Padilla*, 542 U.S. at 442-43.

58. *J.G.G.*, 604 U.S. at 672-73.

59. Scott R. Baker, Nicholas Bloom & Steven J. Davis, *Measuring Economic Policy Uncertainty*, 131 Q.J. ECON. 1593, 1596-98, 1604-06 (2016).

60. Nicholas Bloom, *The Impact of Uncertainty Shocks*, 77 ECONOMETRICA 623, 625-29, 655-56 (2009).

61. Robert E. Scott & George G. Triantis, *Incomplete Contracts and the Theory of Contract Design*, 56 CASE W. RES. L. REV. 187, 187-90 (2005).

62. *J.G.G.*, 604 U.S. at 672-73.

63. *A.A.R.P. v. Trump*, 605 U.S. 91, 94-95, 98-99 (2025) (per curiam).

64. *J.G.G.*, 604 U.S. at 672-73; *A.A.R.P.*, 605 U.S. at 94-95, 98-99.

of Columbia's nationwide TRO in *J.G.G.* was vacated.⁶⁵ Thereafter, relief emerged unevenly across jurisdictions. The Southern District of New York granted preliminary injunctive relief in *G.F.F.*, and the Western District of Texas first issued temporary relief and then classwide permanent relief in *M.A.P.S.*⁶⁶ The District of Colorado granted preliminary relief in *D.B.U.*, and the Southern District of Texas entered permanent relief in *J.A.V.*⁶⁷ Because venue turns on the district of confinement, transfer decisions also became legally significant: moving a detainee can change the forum in which any habeas petition must be filed.⁶⁸ Notice disputes in adjacent removal litigation reinforce the same operational point: in *D.V.D.*, the district court imposed a specific pre-removal notice-and-opportunity regime for third-country removals, and the Supreme Court later stayed that injunction.⁶⁹ Meanwhile, emergency proceedings in *A.A.R.P.* reflected the continuing instability of notice timing on the Supreme Court's emergency docket.⁷⁰ The point is not merely doctrinal disagreement. It is observable procedural variation in timelines, venues, and interim relief under the same general removal posture.⁷¹

For labor-intensive industries, procedural variance translates into a labor-supply risk that has to be managed, priced, or avoided. Crop agriculture is a clear example. Recent USDA data show that in 2020-2022, 42% of hired crop farmworkers lacked work authorization.⁷² When an enforcement regime creates a credible possibility of rapid detention and removal whose notice period is litigated case by case, and whose forum can shift with transfers, growers and labor contractors face a planning problem that wages alone do not solve. Standard responses to legal uncertainty include adding labor buffers, shortening commitments, or shifting risk through contract pricing. Each response has a cost that appears as higher labor expense, lower output, or a higher contract premium charged to downstream buyers.⁷³

Construction presents the same translation mechanism in a different operational setting. Project bids are priced months in advance, and delay

65. *J.G.G.*, 604 U.S. at 671-72.

66. *G.F.F. v. Trump*, 781 F. Supp. 3d 195 (S.D.N.Y. 2025); *M.A.P.S. v. Garite*, No. 3:25-cv-00171, 2025 WL 1379220, at *1-2 (W.D. Tex. May 13, 2025); *M.A.P.S. v. Garite*, 786 F. Supp. 3d 1026, 1062-65 (W.D. Tex. 2025).

67. *D.B.U. v. Trump*, 781 F. Supp. 3d 1158 (D. Colo. 2025); *J.A.V. v. Trump*, 781 F. Supp. 3d 535 (S.D. Tex. 2025).

68. *J.G.G.*, 604 U.S. at 672; *Rumsfeld v. Padilla*, 542 U.S. 426, 442-43 (2004).

69. *D.V.D. v. U.S. Dep't of Homeland Sec.*, 778 F. Supp.3d 355, 392 (D. Mass. 2025); *Dep't of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153 (2025).

70. *A.A.R.P. v. Trump*, 605 U.S. 91, 94-95, 97-99 (2025) (per curiam).

71. See *J.G.G.*, 604 U.S. at 671-73; *A.A.R.P.*, 605 U.S. at 94-99; *D.B.U.*, 781 F. Supp. 3d at 1158; *G.F.F.*, 781 F. Supp. 3d at 195; *J.A.V.*, 781 F. Supp. 3d at 535; *M.A.P.S.*, 786 F. Supp. 3d at 1026.

72. Marcelo Castillo, *Legal Status of Hired Crop Farmworkers, fiscal 1991-2022*, U.S. DEP'T OF AGRIC., ECON. RSCH. SERV. (Sep. 12, 2025).

73. Baker, Bloom & Davis, *supra* note 59, at 1596-98, 1604-06; Bloom, *supra* note 60, at 625-29, 655-56; Scott & Triantis, *supra* note 61, at 187-90.

penalties are routine.⁷⁴ Workforce volatility is therefore priced as schedule risk. The American Immigration Council estimates that mass deportation would create especially acute labor shocks in construction, agriculture, and hospitality, and that undocumented immigrants account for 13.7% of the construction workforce.⁷⁵ Even when the AEA itself targets a narrower category, the 2025 litigation cycle matters because it shows that ordinary INA constraints can be displaced by a proclamation, and then governed through emergency habeas practice with uneven interim relief.⁷⁶ A contractor who cannot forecast whether a portion of the workforce will face swift detention, what notice will be provided, or what forum will control the dispute has only a few levers: add contingency to bids, rely more heavily on subcontracting chains, or delay starts until the legal environment stabilizes. Those levers raise costs and slow delivery. In that sense, procedural variance functions like a trade-adjacent drag: it raises the domestic cost of producing labor-intensive goods and services without changing a tariff schedule. The key point is concrete: the uncertainty here is concrete because it is anchored in the structure of review and in the observed divergence of interim relief across courts.⁷⁷

IV. RECOMMENDATIONS

A. Statutory Amendment: Define the AEA Trigger and Require Findings

Using an invasion label to reroute border enforcement away from the INA creates the core governance problem addressed here: the governing procedure becomes contingent on an executive characterization rather than on stable statutory predicates. The January 20 proclamation is explicit that the administration is not merely tightening ordinary removal; it is treating the border situation as an invasion and then using that characterization to restrict access to INA-based procedures, including asylum pathways that normally attach once a noncitizen is physically present or arriving.⁷⁸ The same document frames the

74. 48 C.F.R. § 36.213-3(a) (2025); Gen. Servs. Admin., Standard Form 1442, Solicitation, Offer, and Award (Construction, Alteration, or Repair) item 13(d) (rev. Dec. 2022); Tiffany A. Harrod, *The Clock is Ticking: Construction Delays and Liquidated Damages*, PECKAR & ABRAMSON (Aug. 15, 2023), https://www.pecklaw.com/client_alerts/the-clock-is-ticking-construction-delays-and-liquidated-damages/ [<https://perma.cc/C3UX-DEBU>]; Frederick Cohen & John S. Wojak, *Liquidated Damages for Delayed Completion in Construction Contracts*, N.Y. L.J. (2015).

75. AM. IMMIGR. COUNCIL, MASS DEPORTATION: DEVASTATING COSTS TO AMERICA, ITS BUDGET AND ECONOMY 2-4, 20-21 (2024).

76. See Proclamation No. 10888, 90 Fed. Reg. at 8334-36; *J.G.G.*, 604 U.S. at 672-73; *D.B.U.*, 781 F. Supp. 3d at 1158; *G.F.F.*, 781 F. Supp. 3d at 195; *J.A.V.*, 781 F. Supp. 3d at 535; *M.A.P.S.*, 786 F. Supp. 3d at 1026.

77. See *J.G.G.*, 604 U.S. at 671-73; *A.A.R.P. v. Trump*, 605 U.S. 91, 94-99 (2025) (per curiam); *D.B.U.*, 781 F. Supp. 3d at 1158; *G.F.F.*, 781 F. Supp. 3d at 195; *J.A.V.*, 781 F. Supp. 3d at 535; *M.A.P.S.*, 786 F. Supp. 3d at 1026; Baker, Bloom & Davis, *supra* note 59, at 1596-98, 1604-06.

78. Proclamation No. 10888, 90 Fed. Reg. at 8334-35; 8 U.S.C. § 1158(a)(1).

INA as functionally ineffective at the border and pairs statutory entry authorities with an asserted constitutional power to suspend physical entry.⁷⁹ When the trigger is framed this broadly, a labor market that depends on predictable enforcement baselines is exposed to the risk that the applicable rule-set can change by proclamation rather than by legislation.⁸⁰

Congress does not need to repeal the Alien Enemies Act to reduce this volatility. It can narrow the conditions under which the AEA can be invoked in modern immigration governance and force the executive to show its work in a way courts can evaluate without improvising thresholds on a case-by-case basis. The AEA's text already ties the extraordinary authority to a declared war or to an "invasion or predatory incursion perpetrated, attempted, or threatened" by a foreign nation or government.⁸¹ The current controversy turns on how elastic those terms are when the asserted threat is not a state's armed force, but cross-border movement associated with non-state actors. Commentary surrounding the 2025 invocation underscores that the statute was enacted as a wartime authority and that treating migration as the functional equivalent of an invasion pushes it beyond its historical use.⁸² A workable amendment would do two things. It would define invasion and predatory incursion for AEA purposes in military terms tied to state action, and it would require a proclamation invoking the AEA to include a short set of public factual findings connecting the asserted threat to a foreign nation or government.⁸³ This would not eliminate enforcement tools. It would instead reduce the discretionary space in which the executive can toggle between INA processes and war-power removals, a source of repeated emergency litigation and the regulatory shock that spills over into hiring decisions and contracting behavior.⁸⁴ A narrower trigger also improves judicial administration: courts can treat the threshold question as a concrete statutory inquiry rather than an open-ended dispute over whether the executive may redefine "invasion" to fit contemporary enforcement priorities.⁸⁵

In short, it is reasonable for Congress to propose a conceptual statutory direction to amend 50 U.S.C. § 21, specifying that an "invasion" must involve organized armed action attributable to a foreign state, including state-controlled forces. Additionally, the amendment would require any proclamation to explicitly identify the foreign state nexus and the nature of the armed threat.⁸⁶ This keeps the AEA available for its core scenario while making clear that the

79. Proclamation No. 10888, 90 Fed. Reg. at 8334, 8336.

80. Proclamation No. 10888, 90 Fed. Reg. at 8334-36; Baker, Bloom & Davis, *supra* note 59, at 1596-98, 1604-06; Bloom, *supra* note 60, at 625-29.

81. 50 U.S.C. § 21.

82. Alien Enemy Act CRS, *supra* note 13, at 1-3; *D.B.U.*, 2025 WL 1163530, at *10-12.

83. 50 U.S.C. § 21; Proclamation No. 10903, 90 Fed. Reg. at 13034-35 §§ 1, 4.

84. *Trump v. J.G.G.*, 604 U.S. 670, 672-73 (2025); *A.A.R.P. v. Trump*, 605 U.S. 91, 94-95 (2025) (per curiam); Baker, Bloom & Davis, *supra* note 59, at 1596-98.

85. *Ludecke v. Watkins*, 335 U.S. 163-64, 170-72 (1948); *D.B.U.*, 2025 WL 1163530, at *9-12.

86. 50 U.S.C. § 21; Alien Enemy Act CRS, *supra* note 13, at 1-3; *D.B.U.*, 2025 WL 1163530, at *10-12.

default governance of noncitizen removals remains with the INA.⁸⁷

B. Procedural Safeguard: Codify a Judicial Savings Clause

The Supreme Court's per curiam order in *Trump v. J.G.G.* illustrates a predictable dynamic: when the government tries to execute removal through a wartime statute that "largely preclude[s] judicial review," courts reintroduce process through habeas corpus, notice, and venue rules.⁸⁸ The Court treated challenges to AEA removal as core habeas, placed venue in the district of confinement, and, crucially, recognized that AEA detainees must receive notice and an opportunity to be heard that is appropriate to the case, with notice provided in time to allow a habeas filing before removal.⁸⁹ This holding is not a full procedural code. It is a minimum floor, delivered in emergency posture, leaving unresolved what counts as enough notice and what operational steps are required to make habeas review real rather than theoretical.⁹⁰

That gap is itself an engine of instability. When the legal minimum is expressed at a high level of generality, implementation disputes shift into urgent, jurisdiction-by-jurisdiction litigation. Post-order filings illustrate the problem: in the absence of a defined minimum notice period and a clear outline of what due process requires under the AEA, courts produced fragmented responses across districts as habeas petitions proliferated.⁹¹ This fragmentation is not just a rights problem. It is an administrative problem with market consequences because the enforcement environment becomes dependent on which district court happens to receive the next emergency filing and what interim relief it grants. A narrow savings clause can convert this unstable equilibrium into a predictable process without preventing removals in cases that genuinely satisfy the AEA trigger. The clause should set a short, fixed notice-and-wait period and specify the procedural vehicle and venue, so both the government and affected parties know what happens next. A savings clause could require written notice that identifies the Alien Enemies Act designation and the basic basis for it. It could also bar removal for a fixed period, such as forty-eight hours, after service of notice, while preserving habeas filing in the district of confinement and giving the court a real opportunity to rule on an emergency stay request.⁹² This approach tracks the Supreme Court's core requirements, notice sufficient to allow habeas in the proper venue, while removing the indeterminacy that fuels repeated emergency filings.⁹³ Even expedited removal under the INA is structured around a defined screening step for people who indicate fear of return. Credible fear screening and short-timeline immigration-judge review after a

87. 8 U.S.C. § 1225(b)(1); 50 U.S.C. § 21.

88. *J.G.G.*, 604 U.S. at 672 (quoting *Ludecke*, 335 U.S. at 163-64).

89. *J.G.G.*, 604 U.S. at 672-73; *A.A.R.P.*, 605 U.S. at 94-95.

90. *A.A.R.P.*, 605 U.S. at 95.

91. *A.A.R.P.*, 605 U.S. at 94-95, 99-100 (Kavanaugh, J., concurring).

92. *J.G.G.*, 604 U.S. at 672-73; *A.A.R.P.*, 605 U.S. at 94-95.

93. *J.G.G.*, 604 U.S. at 673; *A.A.R.P.*, 605 U.S. at 95.

negative credible fear finding make the process legible, even when the outcome is removal. The point is not that INA expedited removal is generous; it is not. The point is that it is legible. A savings clause for AEA removals would bring a similarly legible sequence to a context that otherwise invites ad hoc judicial reconstruction.⁹⁴

*C. Administrative Guidance: Treat INA Screening as the Default Baseline
Even in Emergency Removal Postures*

Legislation can narrow triggers and set a process floor, but executive implementation still determines whether the system behaves predictably on the ground. The January 20 proclamation directs rapid operational action and frames ordinary INA mechanisms as inadequate in the border environment.⁹⁵ When front-line operations receive that kind of instruction without a detailed procedural map, the predictable result is not speed; it is contestation about which rules apply, followed by litigation that forces a new rule-set back into the system.⁹⁶ DHS, therefore, should issue guidance making INA screening the default baseline unless and until a validly cabined AEA invocation applies.

The guidance should do two things: First, it should require documentation and service of notice in a standardized form that anticipates habeas review. The Supreme Court's order makes notice a prerequisite to meaningful judicial review in the district of confinement.⁹⁷ Standardizing notice content, service method, and timing is the difference between a right that exists on paper and a process that functions without repeated emergency intervention. It should also instruct that, where individuals raise fear-of-return claims, officers must route those claims into the INA's humanitarian screening channels rather than treating AEA labeling as a bypass. Second, it should require officers to route fear-of-return claims into INA humanitarian screening channels rather than treating an AEA label as a categorical bypass.⁹⁸ Even if the government ultimately argues that the AEA displaces parts of the INA for a narrow category of cases, treating fear screening as the default operational posture reduces the risk of erroneous removals that later generate emergency litigation, injunction practice, and sudden policy reversals, which is exactly the cycle that produces enforcement uncertainty and downstream economic disruption.⁹⁹

94. 8 U.S.C. § 1225(b)(1)(A)(ii), (B), (B)(iii)(III); Expedited Removal Explainer, *supra* note 22, at 1-2.

95. Proclamation No. 10888, 90 Fed. Reg. at 8334-36.

96. *Id.*; *J.G.G.*, 604 U.S. at 671-73; *A.A.R.P.*, 605 U.S. at 94-95.

97. *J.G.G.*, 604 U.S. at 672-73; *A.A.R.P.*, 605 U.S. at 94-95.

98. 8 U.S.C. § 1225(b)(1)(A)(ii), (B); Expedited Removal Explainer, *supra* note 22, at 1-2.

99. *J.G.G.*, 604 U.S. at 672-73; *A.A.R.P.*, 605 U.S. at 94-95; Baker, Bloom & Davis, *supra* note 59, at 1596-98; Bloom, *supra* note 60, at 625-29.

V. CONCLUSION

Developments in 2025 turned on procedure as much as on enforcement. The 2025 revival of the Alien Enemies Act demonstrates the perils of repurposing archaic war powers for modern migration management.¹⁰⁰ That decision mattered because modern immigration enforcement is built around channeling disputes into a structured set of statutory procedures, even when those procedures are expedited and heavily tilted toward removal.¹⁰¹ When the Executive signals that those channels can be sidelined by emergency framing, both courts and regulated actors face a basic question that the Immigration and Nationality Act is designed to suppress: which process governs today?¹⁰²

The Alien Enemies Act is an unusually blunt instrument for answering that question. Its design assumes a wartime posture in which the central task is classification, not adjudication: identify the covered group, detain, and remove.¹⁰³ Congress wrote modern immigration law on the opposite assumption. Even in expedited removal, the statute and implementing practice are organized around screening and documentation, credible fear as a threshold filter, recorded interviews, and a defined administrative sequence that can be reviewed in limited ways.¹⁰⁴ A wartime statute can be applied in peacetime, but it does not carry the institutional scaffolding that makes high-volume removal administrable in a system that still recognizes due process limits. When the Executive attempts to use a war-power procedure to bypass the immigration-law baseline, friction should be expected, and it will be legal friction that arrives as litigation, not as orderly administrative review.¹⁰⁵

Trump v. J.G.G. makes the mechanism visible. The Supreme Court vacated the temporary restraining orders entered by the District Court for the District of Columbia, but it did not accept the premise that Alien Enemies Act removals can proceed without meaningful judicial access. The Court required notice that is timed and delivered in a way that permits detainees to seek habeas relief before removal, and it held that the proper vehicle is habeas in the district of confinement.¹⁰⁶ Those instructions do not eliminate judicial involvement; they relocate it. Once notice and habeas are treated as required conditions of removal, a mass-removal operation under the Alien Enemies Act produces rapid, district-by-district federal litigation, with venue turning on where the government holds

100. Proclamation No. 10903, 90 Fed. Reg. at 13034-35; *J.G.G.*, 604 U.S. at 671-73; Alien Enemy Act CRS, *supra* note 13, at 1-3.

101. 8 U.S.C. § 1225(b)(1)(A)(ii), (B), (B)(iii)(III); Expedited Removal Explainer, *supra* note 22, at 1-3.

102. Proclamation No. 10888, 90 Fed. Reg. at 8334-36; *J.G.G.*, 604 U.S. at 672-73.

103. 50 U.S.C. §§ 21-22; Alien Enemy Act CRS, *supra* note 13, at 1-3; *Ludecke v. Watkins*, 335 U.S. 163-65 (1948).

104. 8 U.S.C. §§ 1225(b)(1), 1252(a)(2)(A), (e); Expedited Removal Explainer, *supra* note 22, at 1-3.

105. *J.G.G.*, 604 U.S. at 672-73; *A.A.R.P. v. Trump*, 605 U.S. 91, 94-95 (2025) (per curiam).

106. *J.G.G.*, 604 U.S. at 671-73.

people at a given moment.¹⁰⁷ That relocation has predictable consequences for uniformity. The Court did not set a minimum notice period or supply an operational standard beyond the requirement that notice must allow a real opportunity to file in the proper venue.¹⁰⁸ The result has been a wave of urgent habeas filings across districts and a patchwork of interim rules that differ by jurisdiction and procedural posture.¹⁰⁹ Post-*J.G.G.* decisions include class-based habeas relief in some districts and denials of emergency relief in others, with separate courts reaching materially different remedial endpoints on closely related records.¹¹⁰ That kind of variance is not a side issue. It is a feature of a system that has been forced by the government's own procedural choice to shift from a centralized administrative pipeline to decentralized emergency litigation.¹¹¹

Once the enforcement environment looks like that, market effects are not speculative. They are the ordinary response of firms to legal risk that cannot be priced with confidence.¹¹² A labor-dependent employer does not need a forecast of ultimate merit outcomes; it needs a stable understanding of near-term labor availability and the conditions under which workers may be detained, transferred, or removed. When removal authority can be asserted through an emergency statute, and when the operative safeguards depend on the district where a person is confined, planning becomes contingency planning.¹¹³ Seasonal industries adjust schedules and rely more heavily on subcontracting. Project-based industries tighten completion windows and rewrite termination clauses to allocate delay risk. Even without dramatic changes in headline enforcement numbers, uncertainty alone can raise contracting costs because each party prices in the risk that staffing plans will be disrupted by a rapid shift in procedure, compounded by uneven interim court standards.¹¹⁴

Targeted reforms follow from this diagnosis. A statutory clarification that ties Alien Enemies Act use to a defined trigger narrows the set of cases in which emergency framing can replace the immigration-law baseline.¹¹⁵ A notice-and-

107. *J.G.G.*, 604 U.S. at 672; *Rumsfeld v. Padilla*, 542 U.S. 426, 442-43 (2004).

108. *J.G.G.*, 604 U.S. at 673; *A.A.R.P.*, 605 U.S. at 95.

109. *A.A.R.P.*, 605 U.S. at 99-100 (Kavanaugh, J., concurring); *G.F.F. v. Trump*, 781 F. Supp. 3d 195 (S.D.N.Y. 2025); *D.B.U. v. Trump*, 781 F. Supp. 3d 1158 (D. Colo. 2025); *J.A.V. v. Trump*, 781 F. Supp. 3d 535 (S.D. Tex. 2025); *M.A.P.S. v. Garite*, 786 F. Supp. 3d 1026 (W.D. Tex. 2025).

110. *J.A.V.*, 781 F. Supp. 3d at 535 (granting class habeas relief and permanent injunctive relief); *M.A.P.S.*, 786 F. Supp. 3d at 1026 (granting class-wide habeas relief and permanent injunctive relief); *A.A.R.P.*, 605 U.S. at 91-95.

111. *J.G.G.*, 604 U.S. at 672-73; *A.A.R.P.*, 605 U.S. at 94-95, 99-100 (Kavanaugh, J., concurring).

112. *Baker, Bloom & Davis*, *supra* note 59, at 1596-98, 1604-06; *Bloom*, *supra* note 60, at 625-29, 655-56; *Scott & Triantis*, *supra* note 61, at 187-90.

113. *J.G.G.*, 604 U.S. at 672; *Rumsfeld v. Padilla*, 542 U.S. 426, 442-43 (2004).

114. *Baker, Bloom & Davis*, *supra* note 59, at 1596-98, 1604-06; *Bloom*, *supra* note 60, at 625-29, 655-56; *Scott & Triantis*, *supra* note 61, at 187-90; *AM. IMMIGR. COUNCIL*, *supra* note 75, at 20-21.

115. 50 U.S.C. § 21; Alien Enemy Act CRS, *supra* note 13, at 1-3.

habeas savings clause converts the Supreme Court's high-level requirement into an administrable rule that officers can follow, and courts can enforce without reinventing standards in each district.¹¹⁶ Agency guidance that treats Immigration and Nationality Act processing as the default channel reduces the incentive to treat emergency procedure as a routine solution to administrative congestion.¹¹⁷ None of these steps depends on denying the government tools for genuine armed conflict or foreign attack. They depend on insisting that, in peacetime, enforcement choices that destabilize procedure carry foreseeable costs, costs measured in judicial friction and in the market behavior that follows from procedural instability.¹¹⁸

116. *J.G.G.*, 604 U.S. at 672-73; *A.A.R.P.*, 605 U.S. at 94-95.

117. Proclamation No. 10888, 90 Fed. Reg. at 8334-36; 8 U.S.C. § 1225(b)(1)(A)(ii), (B); Expedited Removal Explainer, *supra* note 22, at 1-2.

118. 50 U.S.C. § 21; *J.G.G.*, 604 U.S. at 672-73; *A.A.R.P.*, 605 U.S. at 94-95; Baker, Bloom & Davis, *supra* note 59, at 1596-98, 1604-06.