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## STORM ON THE CONSTITUTION: THE FIRST DEPORTATION LAW

*Gregory Fehlings*<sup>†</sup>

America's history of deportation began with war and controversy. An undeclared war with France led Congress to pass the Alien Act of 1798, which for the first time authorized the federal government to deport aliens.<sup>1</sup> Although Congress justified the Alien Act as a temporary war measure against alien enemies, the Act drew forceful opposition from such luminaries as Thomas Jefferson and James Madison. They opposed the law anonymously in the Virginia and Kentucky Resolutions, declaring it an unconstitutional exercise of executive power and a violation of state sovereignty. "The first storm which broke upon the Constitution," observed federal Judge E. Barrett Prettyman, "centered upon the powers of the new Federal Government over aliens."<sup>2</sup> The intense constitutional controversy surrounding the Alien Act led to its demise and postponed later federal restrictions on immigration until the Civil War.

The constitutional controversy has remained unsettled to this day. The Supreme Court has never determined whether the Alien Act was

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1. Scholars have erroneously assumed the Alien Act of 1798 was not used against anyone. *See, e.g.*, DAVID McCULLOUGH, JOHN ADAMS 505 (2001) ("Adams never invoked the law . . ."); 3 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE § 71.01[1] (rev. ed. 1997) (the Alien Act "was never enforced"). Scholars have been misled by President John Adams' remark, made many years after expiration of the Alien Act, that the Act "was never executed by me in any instance." Letter from John Adams to Thomas Jefferson (June 14, 1813), in 10 THE WORKS OF JOHN ADAMS 42 (Charles F. Adams ed., 1856).

2. *Citizens Protective League v. Clark*, 155 F.2d 290, 293 (D.C. Cir. 1946) (Prettyman, J.), *cert. denied*, 329 U.S. 787 (1946).

constitutional,<sup>3</sup> but some Justices in dissenting or concurring opinions have adopted the conclusion of the Virginia and Kentucky Resolutions that the Alien Act was unconstitutional.<sup>4</sup> This conclusion appears unfounded. The constitutional law developed by the Court over the past 200 years strongly suggests the Alien Act was a valid exercise of federal power to control immigration and wage war.

## I. WAR WITH FRANCE

Fear of French intrigue and invasion motivated Congress in 1798 to enact laws for national defense. Although France had helped the United States win its independence during the Revolutionary War, the French Revolution had transformed the European nation. France had proclaimed itself a revolutionary republic, beheaded its king in 1793, and executed 17,000 people in eleven months. Following "The Terror," the French Directory, a ruling council of five directors, assumed power in 1795.<sup>5</sup> When Presidents George Washington and John Adams refused to allow the United States to be dragged into France's wars against Great Britain and other European powers, the Directory launched a retaliatory war of commercial plunder against America. The French seized over 2,000 American merchant ships during the war.<sup>6</sup>

After learning in the spring of 1798 that French Foreign Minister Charles Maurice de Talleyrand-Périgord had demanded bribes and tribute

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3. See *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 610-11 (1889) ("[T]he validity of its provisions was never brought to the test of judicial decision in the courts of the United States.").

4. See *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 156-57 (1973) (Douglas, J., concurring) ("The Alien and Sedition Acts, 1 Stat. 566, 570, 596, passed early in our history were plainly unconstitutional, as Jefferson believed."); *Fong Yue Ting v. United States*, 149 U.S. 698, 746-50 (1893) (Field, J., dissenting) (The Alien Act was "severely denounced by many of [America's] ablest statesmen and jurists as unconstitutional and barbarous . . ."); *Smith v. Turner (The Passenger Cases)*, 48 U.S. 283, 527 (1849) (Woodbury, J., dissenting) (The Alien Act "was generally denounced as unconstitutional, and suffered to expire without renewal; on the ground, among others assigned for it, that, if such a power existed at all, it was in the States, and not in the general government, unless under the war power, and then against alien enemies alone.").

5. CHRONICLE OF THE FRENCH REVOLUTION 415-16, 426, 437 (Jean Favier et al. eds., 1989). Politically motivated executions continued after the Directory assumed power, although not on the scale of "The Terror." The Directory also banished political opponents to the penal colony of French Guiana—grimly known as "the dry guillotine." CHRISTOPHER HIBBERT, *THE DAYS OF THE FRENCH REVOLUTION* 297-98 (1980).

6. MICHAEL T. PALMER, *STODDERT'S WAR* 6 (1987) (calculating the total at 2,309); S. REP. NO. 41-10 (1870), *reprinted in* 46 CONG. REC. 366, 377 (1910) (calculating the total at 2,290).

from a U.S. peace delegation in the so-called “XYZ affair” and that General Napoleon Bonaparte had assembled an invasion force, the U.S. Congress took measures to provide for internal security.<sup>7</sup> Among the most significant of these were the Alien and Sedition Acts. Within a four-week period in the summer of 1798, Congress enacted four statutes (the Alien Act, Alien Enemies Act, Naturalization Act, and Sedition Act) that became known collectively as the Alien and Sedition Acts. Three of the statutes were directed expressly at aliens. The fourth statute was the Sedition Act—a repressive law that imposed criminal penalties on aliens and citizens alike for disparaging high federal officials.<sup>8</sup> The Alien Act’s association with the infamous Sedition Act has cast the Alien Act into disrepute with many.<sup>9</sup> Fear that the French Revolution would spread to America and unrestrained political partisanship by the Federalists led to the enactment of the excessive and unconstitutional Sedition Act.<sup>10</sup>

Passions concerning the French Revolution split early American politics. Having endured Shay’s Rebellion and the Whiskey Rebellion, Federalists saw much to fear in the French Revolution. On the other hand, Democratic-Republicans, led by Thomas Jefferson, proudly supported the French Revolution as progeny of the American Revolution.<sup>11</sup> Jefferson wrote he preferred to see “half the world desolated” than see the French Revolution falter.<sup>12</sup> Democratic-Republicans, constant to the temper of the American Revolution, viewed Britain as a perpetual enemy. Conversely, the Federalists regarded Britain as a bulwark against French militancy.

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7. See ALEXANDER DECONDE, *THE QUASI-WAR* 10-12, 28, 41 (1966); ALAN SCHOM, *NAPOLEON BONAPARTE* 71-132 (1997).

8. Sedition Act, ch. 74, 1 Stat. 596 (1798). See generally Walter Berns, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal*, 1970 SUP. CT. REV. 109.

9. See, e.g., *Lee v. Weisman*, 505 U.S. 570, 626 (1992) (Souter, J., dissenting) (“Ten years after proposing the First Amendment, Congress passed the Alien and Sedition Acts, measures patently unconstitutional by modern standards.”); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 155 (1961) (Black, J., dissenting) ([T]he Alien and Sedition Acts . . . passed over vigorous Jeffersonian opposition, declared that it was necessary in order to protect the security of the Nation to give the President the broadest of powers over aliens and to make substantial inroads upon the freedoms of speech, press and assembly. The enforcement of these statutes, particularly the Sedition Act, constitutes one of the greatest blots on our country’s record of freedom.).

10. MCCULLOUGH, *supra* note 1, at 504-07. See *New York Times v. Sullivan*, 376 U.S. 255, 276 (1964) (concluding the Sedition Act was unconstitutional).

11. DECONDE, *supra* note 7, at 29, 55 n.71, 177-78.

12. Letter from Thomas Jefferson to William Short (Jan. 3, 1793), in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 478 (Adrienne Koch & William Peden eds., 1993).

An 18th-century Irish political philosopher and Liberal member of the British Parliament, Edmund Burke, delivered stern admonitions against the French Revolution. Although he had been an outspoken defender of the American Revolution, he ardently opposed the French Revolution and predicted it would degenerate into chaos and savagery. He also warned in 1790 that the French Revolution by its nature would spread violently to other countries.<sup>13</sup> Heeding the warnings of Burke, the British Parliament passed the Alien Act of 1793 and the Seditious Meetings and Assemblies Act of 1795 to prevent spread of the French Revolution to Britain.<sup>14</sup>

When France turned bellicose to the United States, the warnings in Burke's *Reflections on the Revolution in France* resounded in the halls of Congress. These warnings and the British Parliament's legislation against aliens influenced Congress to pass the Alien and Sedition Acts.<sup>15</sup> During the debate on the Acts, one Congressman exhorted, "Unless we follow their example and crush the viper in our breast, we shall not, like them, escape the scourge which awaits us."<sup>16</sup>

Congress enacted three laws directed at aliens (the Alien Act, Alien Enemies Act, and Naturalization Act) as Congress became alarmed over growing French hostility toward the United States and the potential for French invasion and insurrection. John Quincy Adams, President Adams' son and U.S. Ambassador to Prussia, advised his father that France intended to invade America's western frontier. The Speaker of the House, Jonathan Dayton, speculated publicly that troops already massed in French ports were destined for America. Innumerable others thought a French invasion imminent. To oppose such an invasion, President Adams summoned General George Washington from retirement to command the United States Army.<sup>17</sup>

Federal officials feared parts of America were rife with French agents and sympathizers who might rise up in support of an invasion.<sup>18</sup> St. George Tucker, Professor of Law at the College of William and Mary and later a judge on the Virginia Court of Appeals and the U.S. District Court, predicted that 100,000 U.S. inhabitants, including himself, would join a

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13. 7 *DICTIONARY OF NATIONAL BIOGRAPHY* 352-58 (Leslie Stephen ed., 1886).

14. Alien Act, 1793, 33 Geo. 3, ch. 4, at 10 (Eng.); Seditious Meetings and Assemblies Act, 1795, 38 Geo. 3, c. 8, at 564 (Eng.).

15. STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 712 (1993); ADRIENNE KOCH & WILLIAM PEDEN, *THE SELECTED WRITINGS OF JOHN AND JOHN QUINCY ADAMS* 39 (1946).

16. 8 *ANNALS OF CONG.* 1992 (1798) (Remarks of Rep. Robert Goodloe Harper).

17. JOHN FERLING, *JOHN ADAMS* 355-60 (1992); RICHARD H. KOHN, *EAGLE AND SWORD* 206 (1975); DECONDE, *supra*, note 7, at 96-97.

18. JOHN C. MILLER, *CRISIS IN FREEDOM* 14 (1963).

French invading army.<sup>19</sup> Washington anticipated that, if the French invaded America, they would invade the Southern states “because they will expect from the tenor of the debates in Congress, to find more friends there.”<sup>20</sup> Further north, U.S. District Judge Richard Peters discreetly reported “some dangerous aliens in the neighborhood of Philadelphia.”<sup>21</sup> Philadelphia, then America’s capital and largest city, teemed with French emigrés.<sup>22</sup> French emigré Médéric Louis-Elie Moreau de Saint-Méry wrote in his diary of the nation’s anxiety: “People acted as though a French invasion force might land in America at any moment. Everybody was suspicious of everybody else: everywhere one saw murderous glances.”<sup>23</sup>

Some have dismissed the widespread fears of French intrigue and invasion in 1798 as irrational—as xenophobia.<sup>24</sup> History, however, gave reasons for these fears. Only five years before passage of the Alien Act, the French *chargé d'affaires* to America, Edmond Charles Genet, had tried to undermine President Washington’s proclamation of American neutrality in the war between France and Britain. Genet commissioned American privateers to prey on British shipping, recruited Americans to fight for France, and prepared to launch a naval invasion of Canada from the United States.<sup>25</sup> After France recalled Genet at Washington’s insistence, the Directory plotted against the Federalist administration. “We must raise up the people and at the same time conceal the lever by

19. KOHN, *supra* note 17, at 216.

20. Letter from George Washington to Timothy Pickering (July 11, 1798), in 36 THE WRITINGS OF GEORGE WASHINGTON 324 (John C. Fitzpatrick ed., 1941); Letter from George Washington to Alexander Hamilton (July 14, 1798), in 36 THE WRITINGS OF GEORGE WASHINGTON 331-34 (John C. Fitzpatrick ed., 1941).

21. Letter from Timothy Pickering to William Rawle (Aug. 28, 1798), in 11 NATIONAL ARCHIVES, DOMESTIC LETTERS OF THE DEPARTMENT OF STATE, JUNE 30, 1798 - JUNE 29, 1799, at 64-65 (1943).

22. J. CHRISTOPHER HEROLD, THE AGE OF NAPOLEAN 318 (1963).

23. MÈDERIC LOUIS-ELIE MOREAU DE SAINT-MÉRY, MOREAU DE ST. MERY’S AMERICAN JOURNEY, 1793-1798, 252 (Kenneth Roberts & Anna M. Roberts trans., eds., 1947).

24. *E.g.*, *United States v. United States Dist. Court*, 407 U.S. 297, 329 (1972) (Douglas, J., concurring) (“[W]e are currently in the throes of another national seizure of paranoia, resembling the hysteria which surrounded the Alien and Sedition Acts . . .”); Select Commission on Immigration and Refugee Policy, *U.S. Immigration Policy and the National Interest*, reprinted in IMMIGRATION: PROCESS AND POLICY 44 (Thomas Alexander Aleinikoff et al. eds., 1995); JAMES M. SMITH, FREEDOM’S FETTERS 63-93 (1956).

25. HARRY AMMON, THE GENET MISSION 26-29, 44-93, 111-21 (1973). See *The Three Friends*, 166 U.S. 1, 52 (1897); *Geyer v. Michel*, 3 U.S. 285, 288 (1796) (“By the law of nations, no foreign power, its subjects or citizens, has any right to erect castles, [e]nlist troops, or equip vessels of war in the territory or ports of another. Such acts are breaches of neutrality . . .”).

which we do so," confided Charles Delacroix, Minister of Foreign Relations, to the Directory on January 16, 1796. He urged that the succeeding French *chargé d'affaires* "use all the means in his power in the United States to bring about a successful revolution and Washington's replacement."<sup>26</sup> After Washington announced his retirement, France campaigned against Vice President Adams and in favor of Thomas Jefferson during the presidential campaign of 1796.<sup>27</sup> Adams won by just three electoral votes.<sup>28</sup> Following President Adams' inauguration, at which he denounced foreign meddling in American politics, the Directory expelled the U.S. minister to France, severing its relations with the United States.<sup>29</sup>

Rioting broke out in the nation's capital during the undeclared war with France. "The multitude in Philadelphia, as it was," related President Adams coarsely, "were almost as ripe to pull me out of my house as they had been to dethrone Washington in the time of Genet." The Governor of Pennsylvania reacted to the threat by mobilizing the state militia to restore order.<sup>30</sup> Adams wrote tartly of the dangers leading to the enactment of federal immigration law:

We were then at war with France. French spies then swarmed in our cities and our country; some of them were intolerably impudent, turbulent and seditious. To check these, was the design of this law. Was there ever a government which had not authority to defend itself against spies in its own bosom—spies of an enemy at war?<sup>31</sup>

To counter these threats, Congress took the unprecedented step of enacting legislation restricting immigration.

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26. ALEXANDER DECONDE, *ENTANGLING ALLIANCE* 456-57 (1958).

27. *Id.* at 379-80.

28. ERIK W. AUSTIN, *POLITICAL FACTS OF THE UNITED STATES SINCE 1789*, at 94 (1986).

29. 2 U.S. CONGRESS, *AMERICAN STATE PAPERS: FOREIGN RELATIONS* 5-10 (Walter Lowrie & Matthew St. Clair Clarke eds., 1833); Inaugural Speech of John Adams (Mar. 4, 1798), in 9 *THE WORKS OF JOHN ADAMS* 108 (Charles F. Adams ed., 1854).

30. Letter of John Adams to the Printers of the Boston Patriot (June 10, 1809), in 9 *THE WORKS OF JOHN ADAMS* 279 (Charles F. Adams ed., 1854).

31. Letter from John Adams to Thomas Jefferson (June 14, 1813), in 10 *THE WORKS OF JOHN ADAMS* 42 (Charles F. Adams ed., 1854).

## II. FEDERAL CONTROL OF IMMIGRATION

Before 1798, Congress had not directly regulated immigration to America, leaving it instead to the states.<sup>32</sup> In the early years of the republic, Congress simply lacked any unilateral authority to legislate on matters of immigration and naturalization.<sup>33</sup> The states had exercised primary power over immigration and naturalization under the Articles of Confederation, and each state maintained its own immigration and naturalization laws.<sup>34</sup> When Congress wished to place restrictions on immigration, it proposed the states enact the restrictions.<sup>35</sup>

Even after the Constitution gave the federal government broader powers over commerce, foreign affairs, and national defense, the government hesitated to assert authority over immigration and override state regulation. Congress did not directly regulate immigration until war broke out with France. This undeclared war led Congress to pass the first exclusively federal immigration legislation.

The first component of the Alien and Sedition Acts enacted by Congress was the Naturalization Act, which increased from five to fourteen years the period of residence required to become a naturalized citizen. This was the first naturalization law to make no allowance for state regulation because Congress eliminated the previous requirement of admissibility under state law. Congress barred the naturalization of aliens of a country at war with the United States, and it commanded all white immigrants to register with the government. Congress required a fourteen-year period of registration before naturalization purportedly for reasons of national security, to promote investigation and monitoring of potentially subversive aliens, but opponents accused the Federalists in Congress of preventing immigrants from voting.<sup>36</sup>

32. See generally Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993).

33. See ARTICLES OF CONFEDERATION, art. II, IX.

34. MARION T. BENNETT, *AMERICAN IMMIGRATION POLICIES* 9 (1963); THE FEDERALIST NO. 42, at 285-86 (James Madison) (Jacob E. Cooke ed., 1961). Cf. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 872 (1995) (Thomas, J., dissenting) ("Before the Constitution was adopted, citizenship was controlled entirely by state law, and the different States established different criteria.").

35. See 34 JOURNALS OF THE CONTINENTAL CONGRESS 528-29 (Sept. 16, 1788) (congressional resolution that the states enact laws "for preventing the transportation of convicted malefactors from foreign countries into the United States.").

36. See Naturalization Act, 1 Stat. 566-69 (1798), *repealed by* Naturalization Act, § 2, 2 Stat. 153 (1802); DECONDE, *supra* note 7, at 94-95; ROGERS M. SMITH, *CIVIL IDEALS* 162-63 (1997). The fact that France required much longer than five years' residence for



After the Naturalization Act, Congress passed "An Act Concerning Aliens," better known as the "Alien Act."<sup>37</sup> As the Supreme Court later observed: "The act was passed during a period of great political excitement, and it was attacked and defended with great zeal and ability."<sup>38</sup> Congress modeled the Alien Act after the British Aliens Act of 1793, which authorized the expulsion of any alien considered dangerous.<sup>39</sup> The Democratic-Republicans called the Alien Act the "Alien Friends Act"—not for its benevolence to aliens but rather to distinguish it from the "Alien Enemies Act" which drew bipartisan approval.<sup>40</sup>

Generally, whether an alien is an "alien friend" or an "alien enemy" depends on his or her nationality. An "alien friend" is characteristically a subject or citizen of a country at peace with the nation hosting the alien. An "alien enemy" typically is a subject or citizen of a country at war with the host nation.<sup>41</sup> An important exception, however, is that an "alien enemy" includes an alien regardless of nationality who makes war or collaborates with those who make war against the host nation.<sup>42</sup> France,

naturalization influenced Congress. 8 ANNALS OF CONG. 1567 (1798) (Remarks of Rep. Sewell presenting House committee report).

37. An Act Concerning Aliens, ch. 58, 1 Stat. 570 (1798) [hereinafter Alien Act].

38. *Chae Chan Ping v. United States* (Chinese Exclusion Case), 130 U.S. 581, 610-11 (1889).

39. *ELKINS & MCKITRICK*, *supra* note 15, at 712. The British Aliens Act of 1793 required all arriving aliens to obtain identification papers upon arrival and to carry these papers at all times. The British Crown could order the expulsion of any alien judged to be dangerous. If the alien failed to depart as ordered, the alien could be imprisoned for life. Alien Act, 1793, 33 Geo. 3, ch. 4, at 10 (Eng.). Parliament later added the requirement that all aliens register and obtain licenses to remain in Britain. Alien Act of 1798, 38 Geo. III, ch. 50, at 681 (Eng.).

40. *SMITH*, *supra* note 24, at 35, 48-49.

41. *Johnson v. Eisentrager*, 339 U.S. 763, 769 n.2 (1950) (quoting *Techt v. Hughes*, 128 N.E. 185, 187, 229 N.Y. 222, 229 (1920)) (Cardozo, J.); *BLACK'S LAW DICTIONARY* 72 (6th ed. 1990). The term "alien friend" dates back to medieval England, where an alien friend was a foreigner who received from the host sovereign a license to reside and work. 9 *WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW* 96-98 (1926).

42. As noted by the Supreme Court, an alien who takes the side of a foreign enemy becomes an alien enemy, even though the alien's country is at peace or even in alliance with America:

[T]hose not inhabitants of a foreign state may be more potent and dangerous foes than if they were actually residents of that state. By uniting themselves to the cause of a foreign enemy they cast in their lot with his . . . Thus in *Vaughan's Case*, Lord Holt laid down the doctrines, "If the States (Dutch) be in alliance [with us], and the French at war with us, and certain Dutchmen . . . fight under the command of the French king, they are enemies to us, for the French subjection makes them French subjects in respect of all nations but their own."

beginning in 1797, treated Americans as alien enemies by denying entry and domicile to foreigners with U.S. passports.<sup>43</sup> The U.S. government, however, generally treated French aliens residing in the United States as alien friends rather than alien enemies, even though France was at war with America.<sup>44</sup>

Congress passed the Alien Act as a temporary war measure to expel selectively those aliens who posed a threat to America. The Alien Act was to expire in two years. The Act authorized the President to deport aliens whom he “shall judge dangerous to the peace and safety of the United States” or for whom he “shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government.” During the war with France, such aliens could be considered alien enemies. Indeed, all French citizens could be considered alien enemies, although the Alien Act did not go that far.<sup>45</sup>

The Alien Act authorized the President to expel an alien by signing an order that the alien leave the United States before a deadline specified by the President. Any alien who failed to depart could be criminally prosecuted and imprisoned upon conviction for up to three years. An alien so convicted “shall never after be admitted to become a citizen of the United States.” The President could forcibly remove an alien ordered to depart if “the public safety requires a speedy removal.” An alien ordered to depart might avoid these sanctions and remain in the country only by petitioning the President to grant the alien a license. The President could require any alien seeking a license to post a bond, and the President could

Miller v. United States, 78 U.S. 268, 311 (1870).

43. DECONDE, *supra* note 7, at 396 n.41. French immigration laws provided for the summary removal of any alien for any reason. See *In re Adam*, 1 Moo. P.C. 460, 476, 12 Eng. Rep. 889, 895 (1837) (“[U]nless a foreigner obtains from the Secretary of State a formal written authority to establish his domicile in France, he may . . . be ordered to quit the country at any moment, without any cause being assigned for his removal.”).

44. See FRANCES S. CHILDS, *FRENCH REFUGEE LIFE IN THE UNITED STATES, 1790-1800, 186-90* (1940); T. WOOD CLARK, *EMIGRES IN THE WILDERNESS* 55-56, 67-84 (1941). Though denominated and treated as alien friends, this did not change French aliens’ legal status:

Sometimes, though loosely, we speak of them as friends . . . The truth is that they are enemies, who, within the limits placed by the sovereign upon a revocable license, enjoy the privileges of friends. Their identification with friends is never complete. They are subject to one restriction or another betokening their enemy character.

Techt v. Hughes, 128 N.E. at 187, 229 N.Y. at 230 (1920) (citation omitted).

45. Alien Act, ch. 58, 1 Stat. 570 (1798). See *Ludecke v. Watkins*, 335 U.S. 160 (1948) (finding “state of war” existed so the Attorney General could exercise delegated authority to order removal (as alien enemies) of those aliens found to be “dangerous to the public peace and safety of the United States . . .”).

revoke the license at any time. The Alien Act also required captains of arriving ships to report all aliens on board. An alien who reentered the United States after having been expelled committed a criminal offense, and upon conviction, the alien faced imprisonment for as long as, in the opinion of the President, the public safety required. Federal courts had jurisdiction over "all crimes and offenses against this act," but all other matters lay within the President's authority.<sup>46</sup>

Jefferson surmised the principal aim of the Alien Act was the expulsion of two suspected French spies—Constantin Volney, a professor of history and former Secretary of the French National Assembly, and French General George Victor Collot.<sup>47</sup> Before passage of the Alien Act, no federal law blocked the immigration of foreign subversives. France took advantage of the omission. It dispatched Volney as a spy in 1793 on the pretext of conducting a scientific expedition of the Mississippi valley. In reality, his mission was to determine whether political conditions favored a French takeover of Louisiana.<sup>48</sup>

The other, more menacing French spy was General Collot. He had displayed hostility towards America when, as Governor of Guadeloupe, he had ordered confiscation of American merchant ships as early as 1793.<sup>49</sup> After British forces captured the French island in 1794, the British paroled

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46. Alien Act, ch. 58, 1 Stat. 570 (1798). Allowing an alien enemy a grace period to depart on his or her own comported with customary international law. *See, e.g.*, 2 HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 646 (1925 ed.). Under the Alien Enemies Act, the President's order that an alien depart is referred to as a "removal order." *United States ex rel. Zeller v. Watkins*, 167 F.2d 279, 282 (2d Cir. 1948). The author shall call the President's order to depart under the Alien Act an "expulsion order." "Expulsion" means forcing someone out of the United States who is actually within the United States or is treated as being so. "Deportation" means the moving of someone away from the United States, after his exclusion or expulsion." *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953). As an alternative to deportation, Congress, in 1917, created the privilege of voluntary departure, for which the alien must meet certain qualifications. *See* Immigration Act of Feb. 5, 1917, § 19(c), 39 Stat. 874; Immigration and Nationality Act (INA) § 240B, 8 U.S.C. § 1229c (2001). An alien deportable on national security grounds is ineligible for voluntary departure. INA §§ 240B(a)(1), (b)(1)(C), 8 U.S.C. §§ 1229c(a)(1), (b)(1)(C) (2001).

47. Letter from Thomas Jefferson to James Madison (Apr. 26, 1798), *in* 7 *THE WRITINGS OF THOMAS JEFFERSON* 245 (Paul L. Ford ed., 1896).

48. ALEXANDER DECONDE, *THIS AFFAIR OF LOUISIANA* 79 (1976). During the summer of 1797, Constantin Volney visited Mount Vernon. As he was leaving, he asked George Washington for a letter of recommendation. Wary of the suspicious Frenchman but wishing to be hospitable, Washington simply wrote on a piece of paper, "C. Volney needs no recommendation from Geo. Washington." PAUL L. FORD, *THE TRUE GEORGE WASHINGTON* 306 (1896).

49. *See United States v. Thomas*, 28 F.Cas. 75, 76 (C.C. Pa. 1800) (reprinting letters of British Ambassador to America, Robert Liston).

Collot to America where he was detained in Philadelphia to face a civil suit brought by an aggrieved ship owner. Collot obtained his release on bail, and the plaintiff eventually abandoned the suit. Collot remained in America to conduct espionage for France.<sup>50</sup>

The French *chargé d'affaires* in Philadelphia commissioned Collot in 1796 to reconnoiter the Ohio and Mississippi rivers and to assess secessionist sentiment among American frontiersmen. Collot traveled the rivers with a sketchbook, mapping the terrain for future military operations. He envisioned a French Louisiana empire that would stretch from the Allegheny Mountains to the Rockies, including territory then owned by the United States and Spain. The French Directory, acting on Collot's recommendations, sent agents among the American Indians urging them to take to the warpath against American settlers to prevent U.S. occupation of lands France secretly planned to acquire for itself.<sup>51</sup> The Alien Act gave the President new authority to expel Volney, Collot, and anyone else whom the President judged "dangerous to the peace and safety of the United States" or reasonably suspected of involvement "in any treasonable or secret machinations against the government."<sup>52</sup>

In July 1798, Congress passed the final component of the Alien and Sedition Acts—"An Act Respecting Alien Enemies," more widely known as the "Alien Enemies Act." It provided for the arrest, confinement or expulsion of aliens of an enemy nation

whenever there shall be a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion shall be perpetrated, attempted or threatened against the

50. See *Waters v. Collot*, 2 U.S. 247 (1796); 1 Op. Att'y Gen. 45-46 (1794); Letter from Robert Liston to Lord Grenville (Nov. 4, 1800), reprinted in George W. Kyle, *The Detention of General Collot*, 6 WILLIAM & MARY Q. 629-30 (3d ser., 1949); Letter from Timothy Pickering to French Consul General Letombe (July 26, 1797), in 10 NATIONAL ARCHIVES, DOMESTIC LETTERS OF THE DEPARTMENT OF STATE, MAR. 1, 1797 – JUNE 29, 1798, 90-91 (1943).

51. DECONDE, *supra* note 48, at 82-83; JOHN KEATS, *EMINENT DOMAIN* 269-70 (1973); DECONDE, *supra* note 26, at 446-53; George W. Kyle, *A Spy on the Western Waters: The Military Intelligence Mission of General Collot in 1796*, 34 MISS. VALLEY HIST. REV. 427-42 (1947).

Great activity has been exerted by [foreign agents], who have insinuated themselves among the Indian tribes residing within the territory of the United States, to influence them to transfer their affections and force to a foreign nation, to form them into a confederacy, and prepare them for war against the United States.

President John Adams' Speech to Both Houses of Congress (Nov. 23, 1797), in 9 THE WORKS OF JOHN ADAMS 123 (Charles F. Adams ed., 1854).

52. Alien Act, ch. 58, 1 Stat. 570 (1798).

territory of the United States, and the President of the United States shall make a public proclamation of the event.

Upon such a proclamation or such a declaration of war, the alien enemies could be arrested, detained, and removed from the United States without a hearing.<sup>53</sup> Since neither a declaration of war nor an invasion occurred, however, the Act was not invoked during the war with France. The Act, with minor revisions, remains part of the United States Code to this day and has been used as recently as 1950.<sup>54</sup>

### III. CONSTITUTIONAL WAR POWERS

The undeclared war between France and America led Congress to pass the Alien Act and Alien Enemies Act. The leading Federalist proponent of the Alien Act, Congressman Harrison Gray Otis of Massachusetts, is recorded in the debates on the law as stressing that "in a time of tranquillity, he should not desire to put a power like this into the hands of the Executive; but, in time of war, the citizens of France ought to be considered and treated and watched in a very different manner from citizens of our own country."<sup>55</sup> Congress passed the Alien Act and the Alien Enemies Act as implementations of its constitutional war powers.<sup>56</sup>

National defense in a time of war was a strong constitutional justification for the laws.<sup>57</sup> The Supreme Court, construing a statute

53. Alien Enemies Act, ch. 66, § 1, 1 Stat. 577 (1798). In addition to allowing the President to order alien enemies removed without a hearing, the Alien Enemies Act provided that federal or state courts could order alien enemies removed after a hearing. *Id.* § 2.

54. 50 U.S.C. §§ 21-24 (2001). See *United States ex rel. Vayjta v. Watkins*, 88 F. Supp. 51 (S.D.N.Y. 1949), *aff'd*, 179 F.2d 137 (2d Cir. 1950); *United States ex rel. Bejeuhr v. Shaughnessy*, 177 F.2d 436 (2d Cir. 1949), *cert. denied*, 338 U.S. 948 (1950).

55. 8 ANNALS OF CONG. 1791 (1798).

56. See *Fong Yue Ting v. United States*, 149 U.S. 698, 747 (1893) (Field, J., dissenting) ("[The Alien Act] was defended by its advocates as a war measure. John Adams . . . states in his correspondence that the bill was intended as a measure of that character."); *United States ex rel. Schlueter v. Watkins*, 67 F. Supp. 556, 564 (S.D.N.Y. 1946) ("The [Alien Enemies Act] must be read in the context of war and as an exercise of war power."), *aff'd*, 158 F.2d 853 (2d Cir. 1946); McCULLOUGH, *supra* note 1, at 505-507; IMMIGRATION: PROCESS AND POLICY, *supra* note 24, at 511 ("It is beyond dispute that the war power gives the federal government the authority to stop the entry of enemy aliens and to expel enemy aliens residing in the United States. This power was first granted to the President by one of the Alien and Sedition Acts and remains on the books today.").

57. See U.S. CONST. art. 1, § 8. Congress viewed the Alien Act as "an essential part of our general system of defense against France." 8 ANNALS OF CONG. 1579 (1798) (Remarks of Rep. Otis). *Accord* 8 ANNALS OF CONG. 2990-92 (1799) (conclusions of a House select committee).

authorizing confiscation of enemy property, has explained that Congress has broad authority to enact measures for national defense during wartime: "The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution."<sup>58</sup> Such war measures may properly include expulsion of aliens. "War, of course, is the most usual occasion for extensive resort to the power" of expulsion, noted the Supreme Court later during an undeclared war.<sup>59</sup>

The Alien Enemies Act was a vast exercise of constitutional war power.<sup>60</sup> The Alien Enemies Act conferred far greater authority than did the Alien Act. While the Alien Act allowed the President to expel selectively those aliens who posed a threat and provided a hearing at the alien's request, the Alien Enemies Act authorized the President to arrest, indefinitely detain, and remove alien enemies *en masse*, without hearing.<sup>61</sup>

Even though the Alien Enemies Act conferred broader powers than the Alien Act, the Alien Act drew strong criticism while the Alien Enemies Act did not. When Congressman Otis magnanimously moved to withdraw the Alien Enemies Act after the rancorous passage of the Alien Act, Swiss-born Congressman Albert Gallatin, House leader of the Democratic-Republicans, objected. Otis immediately retracted his motion, and Congress calmly passed the Alien Enemies Act.<sup>62</sup> The Act has been called "[o]ne of the most sweeping delegations of power to the President to be found anywhere in the *Statutes at Large*."<sup>63</sup> Supreme Court Justice Bushrod Washington, nephew of George Washington, remarked that the Act "appears to me as unlimited as the legislature could make it."<sup>64</sup> Unlike the Alien Act, the President could order aliens expelled under the Alien Enemies Act without regard to whether they are "dangerous" and without affording them any right to a hearing. The Alien Enemies Act authorized the President, after allowing a grace period for voluntary departure, to detain and deport alien enemies summarily. Yet

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58. *Stewart v. Kahn*, 78 U.S. 493, 506 (1870).

59. *Harisiades v. Shaughnessy*, 342 U.S. 580, 587 (1951) (case decided during the Korean War).

60. See *Ludecke v. Watkins*, 335 U.S. 160, 162, 171 n.18 (1948) (upholding constitutionality of the Alien Enemies Act).

61. Compare Alien Act, ch. 58, 1 Stat. 570 (1798), with Alien Enemies Act, ch. 66, 1 Stat. 577 (1798).

62. 8 ANNALS OF CONG. 2034-35 (1798).

63. J. Gregory Sidak, *War, Liberty and Enemy Aliens*, 67 N.Y.U. L. REV. 1402, 1407 (1992).

64. *Lockington v. Smith*, 15 F. Cas. 758, 760 (C.C.D. Pa. 1817) (No. 8,448).

the constitutionality of the law has long been settled.<sup>65</sup> Justice Felix Frankfurter noted, "There was never any questioning of the Alien Enemy Act of 1798 by either Jefferson or Madison nor did either ever suggest its repeal."<sup>66</sup>

Madison conceded that both the law of nations and congressional power to declare war authorized treating the citizens of the opposing country as enemies entitled to only summary justice.<sup>67</sup> Later as President, Madison used the Alien Enemies Act during the War of 1812 to intern alien enemies without hearing.<sup>68</sup> This was consistent with constitutional and international law.<sup>69</sup> A federal court has described the historically broad authority the government has over alien enemies:

The American courts, obedient to precedents running back to the early days of English law, have steadfastly maintained that the alien enemy has no rights other than those which the sovereign chooses to grant . . . . The control of alien enemies has been held to be a political matter in which the executive and the legislature may exercise an unhampered discretion.<sup>70</sup>

While Jefferson and Madison acknowledged the Alien Enemies Act was constitutional, they declared the Alien Act unconstitutional. Writing on behalf of the Virginia and Kentucky legislatures, Jefferson and Madison condemned the Alien Act because they did not regard the targets of the

65. *E.g.*, *United States ex rel. Schlueter v. Watkins*, 67 F. Supp. 556, 565 (S.D.N.Y. 1946), *aff'd*, 158 F.2d 853 (2d Cir. 1946) (constitutionality of the Alien Enemies Act is settled "in the light of the long history of the statute, the broad base of constitutional power from which it springs, the uniform recognition which has been accorded the statute as valid whenever occasion has arisen, and the [precedent court] decisions.").

66. *Ludecke v. Watkins*, 335 U.S. 160, 171 n.18 (1948).

67. Madison's Report on the Virginia Resolutions (Jan. 7, 1800), in 6 THE WRITINGS OF JAMES MADISON 360-61, 364-65 (Gaillard Hunt ed., 1906).

68. *See Lockington v. Smith*, 15 F. Cas. at 759-61 (holding President Madison had authority to order the U.S. Marshal to intern enemy aliens without hearing).

69. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 587-88 (1951) (citing international law in support of power to expel resident aliens in time of war); *Johnson v. Eisentrager*, 339 U.S. 763, 774 (1950) ("Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to wartime security."); *Ludecke v. Watkins*, 335 U.S. at 164 ("The very nature of the President's power to order the removal of all enemy aliens rejects the notion that courts may pass judgment upon the exercise of his discretion."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 722(h) (1987) ("Under the United States Constitution and laws, the United States government may, in time of war, arrest and intern enemy aliens and seize their assets, and may even deport them summarily.").

70. *United States ex rel. Schlueter v. Watkins*, 67 F. Supp. at 565.

Alien Act—French aliens and agents—as alien enemies.<sup>71</sup> Madison presumed the French were alien friends and he asserted that no alien friend could be expelled unless tried and punished according to a criminal code.<sup>72</sup> In taking pains to distinguish the Alien Enemies Act from the Alien Act, he sharply contrasted federal authority over alien friends from its authority over alien enemies:

With respect to alien enemies, no doubt has been intimated as to the Federal authority over them; the Constitution having expressly delegated to Congress the power to declare war against any nation, and, of course, to treat it and all its members as enemies. With respect to aliens who are not enemies, but members of nations in peace and amity with the United States, the power assumed by the act of Congress is denied to be constitutional; and it is, accordingly, against this act that the protest of the [Virginia] General Assembly is expressly and exclusively directed.<sup>73</sup>

According to Madison, who had become an honorary citizen of France, the Alien Act was unconstitutional because the French were alien friends.<sup>74</sup> Madison argued forcefully that war powers should not be used against alien friends.<sup>75</sup> French aliens and agents, however, were not alien friends because the U.S. was at war with France. In war, they became alien enemies.<sup>76</sup> Madison's argument would have been more influential if the aliens to be expelled under the Alien Act were of a nation at "peace

71. Kentucky Resolutions, para. 4, Nov. 19, 1798, in 4 THE DEBATES IN THE SEVERAL CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 541 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT'S DEBATES]; Madison's Report on the Virginia Resolutions, *supra* note 67, at 360-67. See *Johnson v. Eisentrager*, 339 U.S. 763, 775 n. 6 (1950) (noting that Jefferson and Madison criticized the Alien Act, not the Alien Enemies Act).

72. Madison's Report on the Virginia Resolutions, *supra* note 67, at 364-65.

73. *Id.* at 360-61.

74. See Letter from James Madison to J.M. Roland (April 1793), in 6 THE WRITINGS OF JAMES MADISON 125-26 (Gaillard Hunt ed., 1906).

75. Madison's Report on the Virginia Resolutions, *supra* note 67, at 360-61, 366-67 ("[T]he removal of alien enemies is an incident of the power of war . . . the removal of alien friends is not an incident of war."). Cf. *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931) (U.S. government shall not confiscate an alien's property without compensation, absent a state of war existing between the alien's country and the U.S.).

76. See *Bas v. Tingy* (The Eliza), 4 U.S. 37 (1800) (concluding that subjects of France are enemies); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 289-92 (1990) (Brennen, J., dissenting) (arguing that the search and seizure of vessels during the undeclared war with France was warranted because the French were "enemy aliens in wartime"); 8 ANNALS OF CONG. 1577 (1798) (Remarks of Rep. John Sitgreaves: "We do not owe to the citizens of France . . . the same hospitalities which we owe to those foreigners who are alien friends . . .").



and amity with the United States.” But France was not such a nation, even though there had been no declaration of war.<sup>77</sup>

The citizens of a belligerent state become alien enemies even when the war is undeclared, so long as Congress officially recognizes the state of war.<sup>78</sup> Congress officially recognized the war with France through legislation authorizing the capture of armed French ships, suspending commerce with France, and terminating treaties.<sup>79</sup> The Supreme Court concluded that the hostilities with France constituted war because they were “authorized by the legitimate authority of the two governments.” France had sent warships and privateers to plunder American shipping, and Congress had passed legislation to combat French depredations. The French therefore were our enemies. “If they were not our enemies,” wrote Justice Washington, “I know not what constitutes an enemy.”<sup>80</sup>

Because America was at war with France, the U.S. could expel French aliens as alien enemies.<sup>81</sup> “[D]isabilities this country lays upon the alien

77. See *Kennedy v. Ricker*, 14 F. Cas. 318, 320 (C.C.D.N.H. 1801) (No. 7,705) (“To constitute such a state of hostility [as to make the French enemies], it is not necessary that there should be a declaration of war on either side.”). Cf. *Marks v. United States*, 161 U.S. 297 (1896) (Indian tribe raiding U.S. settlements, without declaration of war, was not “in amity with the United States.”).

78. See *Matthews v. McStea*, 91 U.S. 7, 9 (1875) (“[T]he effect of a state of war, even when not declared, [is] that . . . all the members of each belligerent are respectively enemies of all members of the other belligerent.”); *Ware v. Hylton*, 3 U.S. 199, 262 (1796) (Iredell, J.) (government recognition of a state of war establishes “that a war in fact, tho’ not in name subsists, and therefore that the plaintiff is an alien enemy . . . .”); *Verano v. De Angelis Coal Co.*, 41 F. Supp. 954 (D.C. Pa. 1941) (alien was not an “alien enemy” since no “war” had been officially recognized), *later proceedings*, 44 F. Supp. 726 (D.C. Pa. 1942). *But see Dole v. Merch. Mut. Marine Ins. Co.*, 51 Me. 465, 470 (1863) (“[I]t is the fact [of war] that makes ‘enemies,’ and not any legislative act.”).

79. Act to Authorize the Defense of Merchant-Vessels, 1 Stat. 572 (1798); An Act to Provide Armament for the Protection of Trade, 1 Stat. 552 (1798), *amended by* Act of June 30, 1798, 1 Stat. 575 (1798); An Act to Protect the Commerce and Coasts, 1 Stat. 561 (1798), *amended by* Act of June 28, 1798, 1 Stat. 574 (1798), *amended by* Act of July 9, 1798, 1 Stat. 578 (1798); An Act to Declare the Treaties with France no longer Obligatory, ch. 67, 1 Stat. 578 (1798); An Act to Suspend the Commercial Intercourse, ch. 53, 1 Stat. 565 (1798), *amended by* Act of July 16, 1798, 1 Stat. 611 (1798). See *Massachusetts v. Laird*, 451 F.2d 26, 33 (1st Cir. 1971) (“It is clear that there can be an ‘enemy,’ even though our country is not in a declared war. The hostilities against France in 1799 were obviously not confined to repelling attack. This was an authorized but undeclared state of warfare.”) (citation omitted); Gregory Fehlings, *America’s First Limited War*, 53 NAVAL WAR C. REV. 101, 122-28 (2000), available at [www.nwc.navy.mil/press/Review/2000/summer/art4-Su0.html](http://www.nwc.navy.mil/press/Review/2000/summer/art4-Su0.html) (arguing the constitutionality of the undeclared war with France).

80. *Bas v. Tingy*, 4 U.S. at 40-43.

81. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 587 (1951) (“Though the resident alien may be personally loyal to the United States, if his nation becomes our enemy, his

who becomes also an enemy," the Supreme Court has explained, "are imposed temporarily as an incident of war and not as an incident of alienage."<sup>82</sup> In keeping with this principle, Congress made the Alien Act temporary by specifying that it would expire on June 25, 1800.<sup>83</sup> Thus, during America's war with France from 1798 to 1800, French aliens and agents became subject to expulsion from the United States.

Although the Alien Enemies Act was of indefinite duration, it provided for expulsion under more limited circumstances than the Alien Act. The Alien Enemies Act became effective only upon declaration of war or upon presidential proclamation of a perpetrated, attempted, or threatened "invasion or predatory incursion" on U.S. territory. On the other hand, the Alien Act became effective for two years upon enactment. Aware that France had sent spies to infiltrate a number of European countries before going to war and conquering them, Congress chose not to make operation of the Alien Act contingent upon a declaration of war or a proclaimed invasion.<sup>84</sup>

The Alien Act took effect without a declaration of war.<sup>85</sup> Nevertheless, the Alien Act was a proper implementation of congressional war power. The Constitution allows Congress to wage war without necessarily declaring it, and the Alien Act was an exercise of federal power to wage war.<sup>86</sup> Several constitutional war powers, independent of the

allegiance prevails over his personal preference and makes him also our enemy, liable to expulsion or internment . . ."); 8 ANNALS OF CONG. 2988 (1799) (House select committee: "[T]hough the United States, at the time of passing [the Alien Act], were not in a state of declared war, they were in a state of partial hostility, and had the power, by law, to provide, as by this act they have done, for removing dangerous aliens.").

82. *Johnson v. Eisentrager*, 339 U.S. 763, 772 (1950).

83. Alien Act, ch. 58, § 6, 1 Stat. 570 (1798).

84. 8 ANNALS OF CONG. 1578 (1798) (Remarks of Rep. Allen). *Cf.* *Haig v. Agee*, 453 U.S. 280, 303 (1981) ("History eloquently attests that grave problems of national security and foreign policy are by no means limited to times of formally declared war.").

Gentlemen talk about a declaration of war. Such a thing scarcely ever precedes war. War and declaration of war come together, like thunder and lightning. Indeed, if France finds she can enfeeble our councils by refraining to declare war, and that we will take no measures of effectual defence until this is done, it is probable she will not declare it, but will continue to annoy us at present.

8 ANNALS OF CONG. 1581 (1798) (Remarks of Rep. Otis).

85. Alien Act, ch. 58, 1 Stat. 570 (1798).

86. *See Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973) ("We are unanimously agreed that it is constitutionally permissible for Congress to use another means than a formal declaration of war to give its approval to a war . . ."); *United States v. Kroncke*, 459 F.2d 697, 702 (8th Cir. 1972) (rejecting argument that undeclared war is illegal); *Massachusetts v. Laird*, 451 F.2d 26, 33 (1st Cir. 1971) (the executive and legislative

power to declare war, supported the Alien Act: (1) the power to authorize captures; (2) the power to provide for a common defense; and (3) the power to make laws that are necessary and proper to implement other powers.

#### A. *The Power to Authorize Captures*

Supplementary to the power to declare war, the Constitution gives Congress the power to authorize the capture of enemies.<sup>87</sup> The Supreme Court has stated: "The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed."<sup>88</sup> In 1798, without declaring war, Congress used its powers of capture to authorize the seizure of armed enemy vessels and the expulsion of French aliens found on the vessels.<sup>89</sup> No one challenged the constitutionality of these acts. Chief Justice John Marshall later noted with regard to another law authorizing seizure of enemy property: "Respecting the power of government no doubt is entertained. That war gives the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded."<sup>90</sup>

Congressman Otis, speaking on the House floor, "believed Congress had clearly the power, from those words of the constitution which say, 'they shall grant letters of marque and reprisal'—reprisal doubtless, not only against ships but against property and persons."<sup>91</sup> Congress through the Alien Act could constitutionally authorize the capture and expulsion of

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branches share "the power to conduct undeclared hostilities" and the war with France "was an authorized but undeclared state of warfare"). *Contra* J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27 (1991) (using economic theorem to argue that Congress can authorize war only by formal declaration).

87. See U.S. CONST. art. 1, § 8, cl. 11 ("Congress shall have power to . . . declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."); *Baron v. Baltimore*, 32 U.S. 243, 249 (1833) ("To grant letters of marque and reprisal could lead directly to war; the power of declaring which is expressly given to Congress.").

88. *Miller v. United States*, 78 U.S. 268, 305 (1870).

89. See *An Act to Provide Armament for the Protection of Trade*, 1 Stat. 552 (1798), amended by *Act of June 30, 1798*, 1 Stat. 575 (1798); *An Act to Protect the Commerce and Coasts*, May 28, 1798, 1 Stat. 561 (1798), amended by *Act of June 28, 1798*, 1 Stat. 574 (1798), amended by *Act of July 9, 1798*, 1 Stat. 578 (1798); *Act Concerning French Citizens That Have Been or May be Captured and Brought into the United States*, Feb. 28, 1799, ch. 18, 1 Stat. 624 (1799); *Bas v. Tingy (The Eliza)*, 4 U.S. 378 (1800) (capture of French vessel authorized by Congress despite absence of a declaration of war).

90. *Brown v. United States*, 12 U.S. 110, 122 (1814).

91. 8 ANNALS OF CONG. 3051 (1799).

menacing French aliens inhabiting the United States just the same as Congress could authorize the capture and expulsion of French aliens serving on hostile French ships in U.S. territorial water.<sup>92</sup> Expulsion, declared the Supreme Court in 1952, “is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it.”<sup>93</sup>

### B. *The Power to Provide for a Common Defense*

Congress also has power to provide for the common defense of the United States and has a constitutional responsibility to protect the states against invasion.<sup>94</sup> The government need not wait until enemy forces appear on shore before acting.<sup>95</sup> It may act against those aliens who may facilitate an invasion. Supreme Court Justice James Iredell stated in 1799, in his instructions to a grand jury asked to bring an indictment for treason, that a nation for its own defense may expel alien enemies without a declaration of war:

The law of nations undoubtedly is, that when an alien goes into a foreign country, he goes under either an express or implied safe conduct. In most countries in Europe, I believe, an express passport is necessary for strangers. Where greater liberality is observed, yet it is always understood that the government may order away any alien whose stay is deemed incompatible with the safety of the country. Nothing is more common than to order away, on the eve of war, all aliens or subjects of the nation with whom the war is to take place. Why is that done, but that it is deemed unsafe to retain in the country, men

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92. John Marshall, *Address on the Constitutionality of the Alien and Sedition Laws (December 1798)*, in *THE POLITICAL THOUGHT OF AMERICAN STATESMEN* 106 (Morton J. Frisch & Richard G. Stevens eds., 1973) (“[R]eprisals may be made on the persons as well as the property of aliens . . . the removal of aliens [may] be power of reprisal on persons.”). *Contra* Madison’s Report on the Virginia Resolutions, *supra* note 67, at 365-66 (considering it “an abuse of words to call the removal of persons from a country a seizure or reprisal on them”).

93. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 587 (1951).

94. U.S. CONST. art. 1, § 8, cl. 1 (“The Congress shall have power to . . . provide for the common defence and general welfare of the United States”); U.S. CONST. art. 4, § 4 (“The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion . . .”).

95. See *Silesian American Corp. v. Clark*, 332 U.S. 469, 476 (1947) (“[W]e think reasonable preparation for the storm of war is a proper exercise of war power. This seizure of alien property, in time of emergency, is of that character.”); Madison’s Report on the Virginia Resolutions, *supra* note 67, at 366 (“To protect against invasion is an exercise of the power of war.”).

whose prepossessions are naturally so strong in favor of the enemy, that it may be apprehended that they will either join in arms, or do mischief by intrigue, in his favor? . . . And as [an] invasion may be attempted without a formal [declaration of] war, and [C]ongress ha[s] an express right to protect against invasion, as well as repel it, I presume [C]ongress would also have authority to prevent the arrival of any enemies, coming in the disguise of friends, to invade their country.<sup>96</sup>

Marshall agreed, before becoming Chief Justice, that expelling potentially subversive aliens is a legitimate way to fulfill the government's duty to protect against invasion.<sup>97</sup> Moreover, the Supreme Court has long recognized that the government may deport aliens who it reasonably believes endanger the country's peace and safety.<sup>98</sup> Thus, the Alien Act was a legitimate exercise of the power to prevent invasion and provide a common defense.

### C. *The Power to Make Laws that are Necessary and Proper*

Finally, to carry into effect Congress' several enumerated war powers,<sup>99</sup> the Constitution authorizes Congress to "make all laws which

96. 2 THE FOUNDERS' CONSTITUTION 580, 583 (Philip B. Kurland & Ralph Lerner eds., 1987) (quoting *Case of Fries*, 3 U.S. 515, 9 F. Cas. 826 (C.C.D. Pa. 1799) (No. 5,126)). In support of the Alien Act, the Massachusetts legislature pointed out: "The removal of aliens is the usual preliminary of hostility, and is justified by the invariable usages of nations." Massachusetts Resolutions, Feb. 1799, 4 ELLIOT'S DEBATES, *supra* note 71, at 538.

97. Marshall, *supra* note 92, at 107. While Marshall defended the Act, he regarded the Alien and Sedition Acts as ineffectual:

I am not an advocate for the alien and sedition bills; had I been in Congress when they passed, I should, unless my judgment could have been changed, certainly have opposed them. Yet, I do not think them fraught with all those mischiefs which many gentlemen ascribe to them. I should have opposed them because I think them useless; and because they are calculated to create unnecessary discontents and jealousies at a time when our very existence, as a nation, may depend on our union.

Letter from John Marshall to a Freeholder (Sept. 20, 1798), in 5 THE FOUNDERS' CONSTITUTION 131 (Philip B. Kurland & Ralph Lerner eds., 1987). Nevertheless, Marshall apparently later wrote a minority report of the Virginia legislature supporting the Alien and Sedition Acts. John Marshall, *Report of the Minority on the Virginia Resolutions* (Jan. 22, 1799). *Id.* at 136.

98. See *Fong Yue Ting v. United States*, 149 U.S. 698, 707-08 (1893) (citing legal experts saying that any country may expel those aliens whom "it has just cause to fear" will cause "disorder, contrary to the public safety").

99. The Constitution authorizes Congress to "declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." U.S. CONST. art. 1, § 8, cl. 11. The Constitution empowers Congress to "provide for the common defence," U.S. CONST. art. 1, § 8, cl. 1, to "raise and support armies," U.S. CONST. art. 1, § 8, cl. 12, to

shall be necessary and proper for carrying into execution the foregoing powers.”<sup>100</sup> Expulsion of alien enemies is a “necessary and proper” exercise of war powers. The Supreme Court noted during an undeclared war that “any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.”<sup>101</sup> A federal appeals court has further pointed out: “Under no concept of government could a nation be held powerless to rid itself of enemies within its borders in time of war, whether the individuals concerned be actually hostile or merely potentially so because of their allegiance.”<sup>102</sup>

Historian Durand Echeverria of Brown University has argued that enactment of a deportation law such as the Alien Act was necessary and proper to defend the country against foreign plots and espionage:

All too often, in recent years, American historians whose liberal sympathies are outraged by the specific provisions of the Alien Act of June 25, 1798, as passed by a partizan [sic] Congress, ignore the fact that some sort of federal law against alien agents like [French General George Victor] Collot was clearly justified. In the face of the documentary evidence in Collot’s own handwriting, it is difficult to be patient with the Jeffersonian Republicans’ constitutional argument that resident aliens were wholly within the jurisdiction of the several states and hence that Congress had no right or power to defend the United States from the plots and espionage of such individuals as General George Victor Collot.<sup>103</sup>

Without a law such as the Alien Act, the federal government would be powerless to expel foreign agents. Enactment of the Alien Act thus was “necessary and proper” to wage war and defend the nation.<sup>104</sup>

“provide and maintain a navy,” U.S. CONST. art. 1, § 8, cl. 13, to “provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions,” U.S. CONST. art. 1, § 8, cl. 15, to suspend the writ of habeas corpus “when in cases of rebellion or invasion the public safety may require it,” U.S. CONST. art. 1, § 9, cl. 2, and to “make rules for the government and regulation of the land and naval forces,” U.S. CONST. art. 1, § 8, cl. 14. The Constitution requires the federal government to protect each state “against invasion” and “against domestic violence.” U.S. CONST. art. 4, § 4.

100. U.S. CONST. art. 1, § 8, cl. 18.

101. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1951).

102. *Citizens Protective League v. Clark*, 155 F.2d 290, 294 (D.C. Cir. 1946) (Prettyman, J.), *cert. denied*, 329 U.S. 787 (1946).

103. Durand Echeverria, *General Collot’s Plans for a Reconnaissance of the Ohio and Mississippi Valleys, 1796*, 9 WILLIAM & MARY Q. 512, 513 (3d series, 1952).

104. See John Harrison, *The Constitution in Congress: The Federalist Period*, 15 CONST. COMMENT 383, 391 (1998).

## IV. VIRGINIA AND KENTUCKY RESOLUTIONS

Despite the war with France, leaders of the Democratic-Republican Party vehemently opposed the Alien Act. The Party's strength was in the South, and the members of Congress who opposed the Alien Act came predominantly from slave states.<sup>105</sup> Those legislators viewed the law as a threat to the institution of slavery.<sup>106</sup> Many whites opposed the Alien Act, believing federal control of immigration would preempt state laws restricting the entry of free blacks, whose presence many whites believed would make slaves more difficult to control.<sup>107</sup> Opposition to federal control of immigration, legal historian Charles Warren explained, "was based but slightly on abstract political doctrines relative to strict or broad

[The Alien Act] was about aliens who threatened national security. While there must be some limits to Congress' power to protect the country's institutions, or the principle of enumeration is meaningless, expelling specific individuals who are reasonably believed to threaten the nation is quite plausibly necessary and proper to a functioning government.

*Id.*

105. The House of Representatives passed the Alien Act by a vote of forty-six to forty. Thirty of those forty votes against the Act came from the South, while only five votes in favor came from Southern states. The vote in the Senate was similarly sectional. The Act passed by a vote of sixteen to seven, with Southern Senators casting all seven votes against, while only two votes in favor came from the South. Berns, *supra* note 8, at 116.

106. *See id.*, at 115-16 ("[T]he opponents of the Alien Friends bill . . . saw, or imagined, a connection between . . . the authority that permitted Congress to expel aliens, and the authority to affect an interest dearer to them than any other, an interest unconcerned with civil liberties as any interest could be: slavery."); MILLER, *supra* note 18, at 53, 164 (there was "apprehension felt in the Southern States that the Alien Act menaced the institution of slavery"); ANDREW C. McLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 470 (1935) ("The elementary issues in the controversy [over immigration] were in fact entangled with the slavery question.").

107. *See* Smith v. Turner (The Passenger Cases), 48 U.S. 283, 527 (1849) (Woodbury, J., dissenting) (denouncing the Alien Act's encroachment on state control over the entry of slaves and free blacks); *Id.* at 474 (Taney, C.J., dissenting) (warning that federal control of immigration could integrate free blacks into slave states "inevitably producing the most serious discontent, and ultimately leading to the most painful consequences" and adding, "I cannot imagine any power more unnecessary to the general government, and at the same time more dangerous and full of peril to the States"); IRA BERLIN, SLAVES WITHOUT MASTERS 46 (1974) ("Slaveholders feared that mobile free Negroes would intermingle with slaves, encourage them to run away, and foment insurrection. Thus, Southern legislatures devised new methods to limit mobility and prevent mixing with slaves."). Southern states worried especially about an influx of blacks from Saint-Domingue, where a slave uprising had occurred. Georgia in 1793, South Carolina in 1794, North Carolina in 1795, and Maryland in 1797 barred the entry of blacks from the West Indies. WINTHROP D. JORDON, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550-1812, at 380-82 (1968).

constructions of the Constitution, and very greatly on the concrete fear as to its effect on the power of the Southern States over slavery.”<sup>108</sup> The legislatures of Virginia and Kentucky passed resolutions in late 1798, anonymously written by Jefferson and Madison, condemning the Alien and Sedition Acts as unconstitutional.<sup>109</sup>

Although Jefferson and Madison opposed the Alien Act, they did not favor immigration. Jefferson believed large numbers of immigrants posed insuperable problems of assimilation for America. In his *Notes on the State of Virginia*, Jefferson wrote that an influx of foreigners would “warp and bias” government and render its laws “a heterogeneous, incoherent, distracted mass.”<sup>110</sup> James Madison declared immigrants who came to America “without adding to the strength or wealth of the community, are not the people we are in want of.”<sup>111</sup>

Despite these views, Madison and Jefferson used intermediaries in the Virginia and Kentucky legislatures to declare the Alien Act unconstitutional. The intermediaries submitted Jefferson’s arguments against the Alien and Sedition Acts as resolutions for adoption by the Kentucky legislature and Madison’s arguments as resolutions for adoption by the Virginia legislature.<sup>112</sup> The legislatures adopted the Virginia and Kentucky Resolutions between 1798 and 1800. They asserted that states had created the federal government and that the states had the right to judge when their creation exceeded its constitutional powers.<sup>113</sup> In their resolutions, Virginia and Kentucky hurled impassioned legal objections against the Alien Act, charging that it had unconstitutionally enlarged executive power and invaded state sovereignty. Kentucky declared that the “rightful remedy” for such an unconstitutional act of Congress was “nullification” by the states. Virginia argued states “have the right, and are in duty bound, to interpose” their authority to protect their residents

108. 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 168 (1926).

109. Virginia Resolutions, Dec. 24, 1798, in 4 ELLIOT’S DEBATES, *supra* note 71, at 528; Kentucky Resolutions, Nov. 19, 1798, in 4 ELLIOT’S DEBATES, *supra* note 71, at 540.

110. Thomas Jefferson, *Notes on the State of Virginia, Query VIII (1787)*, in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 203-04 (Adrienne Koch & William Peden eds., 1993). *But see* THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776) (complaining that the King of England “has endeavored to prevent the Population of these States; for that Purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their Migrations hither”).

111. 2 ANNALS OF CONG. 1150 (1790).

112. Adrienne Koch & Harry Ammon, *The Virginia and Kentucky Resolutions: An Episode in Jefferson’s and Madison’s Defense of Civil Liberties*, 5 WILLIAM & MARY Q. 145, 147-50 (3rd series, 1948).

113. *See* Madison’s Report on the Virginia Resolutions, *supra* note 67, at 367-69; DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 201-02 (1994).



against unconstitutional actions by the federal government.<sup>114</sup> The Alien Act ignited a conflict between nationalists' and states' rights proponents that exacerbated for over 60 years, eventually bringing on the Civil War.<sup>115</sup>

The Virginia and Kentucky legislatures ignored the Alien Act's constitutional justification based on the ongoing naval war between France and the United States. The legislatures assumed there was no war. They argued the Alien Act was unconstitutional for five reasons: (1) the law violated "due process of law" by allowing imprisonment of an alien who failed to comply with an expulsion order; (2) the law violated "due process" and the Sixth Amendment by authorizing an alien's expulsion without a judicial trial and procedural protections due in criminal prosecutions; (3) the law improperly vested judicial powers in the executive branch; (4) the Act delegated unconstitutionally broad power to the President; and (5) the states possessed sole authority to control immigration.<sup>116</sup> Even without the war power justification for the Alien Act, none of these constitutional objections were insurmountable.

#### A. *Imprisonment Violated "Due Process"*

The Virginia and Kentucky legislatures argued that to imprison anyone under the Alien Act would be unconstitutional according to the Fifth Amendment's Due Process Clause.<sup>117</sup> Due process of law requires a judicial trial of an alien before his or her imprisonment for a criminal violation of immigration law.<sup>118</sup> But the Alien Act *did* require a judicial trial for anyone imprisoned for crimes specified in the Act. The Act

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114. Virginia Resolutions, Dec. 24, 1798, in 4 ELLIOT'S DEBATES, *supra* note 71, at 528; Kentucky Resolutions, para. 4-6 & 9, Nov. 19, 1798, in 4 ELLIOT'S DEBATES, *supra* note 71, at 541-543; Kentucky Resolutions, Nov. 22, 1799, in 4 ELLIOT'S DEBATES, *supra* note 71, at 544-545; McLAUGHLIN, *supra* note 106, at 273-279; Berns, *supra* note 8, at 109, 130.

115. See *EEOC v. Wyoming*, 460 U.S. 226, 272 n.8 (1983) (Powell, J., dissenting) ("Thirty years later, Jefferson and Madison's views [in the Virginia and Kentucky Resolutions] were expanded by John C. Calhoun in his nullification doctrine—the extreme view that eventually led to the War Between the States."); Berns, *supra* note 8, at 142-43 ("[B]y insisting that the national government had no authority to legislate on the slavery issue, Madison and Jefferson . . . fostered a constitutional doctrine that made abolition impossible without war.").

116. See Address of the General Assembly to the People of the Commonwealth of Virginia, in 6 THE WRITINGS OF JAMES MADISON 338 (Gaillard Hunt ed., 1906); MAYER, *supra* note 113, at 203-04; 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1974-1975 (Leonard Levy ed., 1986).

117. Kentucky Resolutions of 1798, para. 6, Nov. 19, 1798, in 4 ELLIOT'S DEBATES, *supra* note 71, at 541-42; Address of the General Assembly to the People of the Commonwealth of Virginia, in 6 THE WRITINGS OF JAMES MADISON 338 (Gaillard Hunt ed., 1906).

118. *Wong Wing v. United States*, 163 U.S. 228, 237 (1896).

provided “the circuit and district courts of the United States, shall respectively have cognizance of *all* crimes and offenses against this Act.”<sup>119</sup> Virginia and Kentucky’s complaint that persons could be imprisoned under the Alien Act without trial was erroneous. The Alien Act afforded a judicial trial to any alien facing imprisonment for any crime defined by the Act.

The Alien Act did authorize detention incidental to arrest of an alien ordered expelled when “the public safety requires a speedy removal.”<sup>120</sup> But unlike the Alien Enemies Act, an alien could not be detained for the duration of the war.<sup>121</sup> The Alien Act implicitly authorized only the length of detention necessary to effect an alien’s removal. The Supreme Court has stated that “detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens,” requires no judicial trial.<sup>122</sup> The Alien Act therefore could authorize a deportable alien’s arrest and detention without judicial trial.

#### *B. Expelling an Alien Violated “Due Process” and the Sixth Amendment*

Virginia and Kentucky argued that the Alien Act violated “due process of law” and the Sixth Amendment by authorizing the expulsion of an alien without a judicial trial and without the procedural protections required in criminal prosecutions.<sup>123</sup> But the Alien Act’s omission of a

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119. Alien Act, ch. 58, § 4, 1 Stat. 570 (1798) (emphasis added). These crimes included failing to depart as ordered and reentering the United States after having been expelled. *Id.* Currently, an alien who willfully fails or refuses to depart from the United States within 90 days after a final order of removal commits a felony, punishable by up to ten years’ imprisonment. INA § 243(a)(1)(A), 8 U.S.C. § 1253(a)(1)(A) (2001). Reentry after deportation or removal is also a felony. INA § 276, 8 U.S.C. § 1326.

120. See Alien Act, ch. 58, § 2, 1 Stat. 570 (1798).

121. See *Ludecke v. Watkins*, 335 U.S. 160, 166 (1948) (prolonged internment of alien enemies during hostilities may be necessary because “deportations are hardly practicable during the pendency of what is colloquially known as the shooting war”); *Lockington v. Smith*, 15 F. Cas. 758, 760 (C.C.D. Pa. 1817) (No. 8,448) (Washington, Circuit Justice) (President can intern alien enemies with no intent to remove them). The Secretary of State believed the Alien Act’s provisions for the arrest and detention of aliens were inadequate. Letter from Timothy Pickering to President John Adams (Aug. 28, 1798), in 11 NATIONAL ARCHIVES, DOMESTIC LETTERS OF THE DEPARTMENT OF STATE, JUNE 30, 1798 – JUNE 29, 1799, at 64-65 (1943) (“I have been apprehensive of the [alien] law itself, in its not authorizing the Executive to apprehend and confine, or require sureties for their going, until they can be sent off, or that they depart from the United States.”).

122. *Wong Wing v. United States*, 163 U.S. at 235. Not all confinement is punishment. *Bell v. Wolfish*, 441 U.S. 520, 539 (1979).

123. Virginia Resolutions, para. 5, Dec. 24, 1798, in 4 ELLIOT’S DEBATES, *supra* note 71, at 542-43; Kentucky Resolutions, para. 9, Nov. 19, 1798, in 4 ELLIOT’S DEBATES, *supra* note

judicial trial and criminal procedural protections posed no constitutional impediment. No federal immigration legislation has ever required a judicial trial, except when a prima facie claim to U.S. citizenship is presented.<sup>124</sup> The Supreme Court has long held that deportation of aliens is not punishment and “the provisions of the Constitution securing the right of trial by jury have no application” to deportation proceedings.<sup>125</sup> “A deportation proceeding is a purely civil action” so “various protections that apply in the context of a criminal trial do not apply in a deportation hearing.”<sup>126</sup>

Congress specified no formal process for issuing an expulsion order; the President could simply issue an order whenever he was satisfied an alien posed a danger to public safety. Yet the fact that the Act specified no formal process preceding an expulsion order does not necessarily mean the law was unconstitutional. In 1903, when the Supreme Court rendered its first decision requiring due process to be accorded to an alien facing deportation, the Court sustained the constitutionality of two statutes that specified no formal process.<sup>127</sup> Even though the statutes appeared to give officials unfettered authority to order an alien’s deportation, the Court in *Yamataya v. Fisher*<sup>128</sup> concluded the statutes did “not require an interpretation that would invest executive or administrative officers with the absolute, arbitrary power implied in the contention of the appellants.” The Court imputed an administrative process to the statutes and decided that oral notice and an informal investigation provided due process of law.<sup>129</sup>

The Court in *Yamataya v. Fisher*<sup>130</sup> held that no alien could be deported “without opportunity, at some time, to be heard” but “not necessarily an opportunity upon a regular, set occasion, and according to

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71, at 542-43; Madison’s Report on the Virginia Resolutions, *supra* note 67, at 361-62, 369-71.

124. See INA § 242(b)(5)(B), 8 U.S.C. § 1252(b)(5)(B).

125. *United States ex. rel. Turner v. Williams*, 194 U.S. 279, 289-290 (1904). *Accord* *Carlson v. Landon*, 342 U.S. 524, 537 (1952) (“Deportation is not a criminal proceeding and has never been held to be punishment. No jury sits.”); *Mahler v. Eby*, 264 U.S. 32, 39 (1924) (“It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment.”).

126. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

127. See *Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U.S. 86 (1903) (upholding the constitutionality of the Act of Oct. 19, 1888, ch. 1210, 25 Stat. 566 (1888), and the Act of Mar. 3, 1891, ch. 551, § 11, 26 Stat. 1084 (1891)).

128. *Id.*

129. *Id.* at 101.

130. *Id.* at 86.

the forms of judicial procedure.”<sup>131</sup> The Court more recently has explained that due process of law is a flexible concept that varies according to three factors:

The constitutional sufficiency of procedures . . . varies with the circumstances . . . . In evaluating the procedures in any case, the courts must consider [1] the interest at stake for the individual, [2] the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and [3] the interest of the government in using the current procedures rather than additional or different procedures.<sup>132</sup>

The third factor, the interest of the government, is at its foremost when national security is affected. The Supreme Court has recognized that “no governmental interest is more compelling than the security of the nation.”<sup>133</sup> Due process of law must be circumscribed by the vital government interest at stake.<sup>134</sup>

The Alien Act provided due process of law. Although the Alien Act established no formal process for issuing an order of expulsion, the Act provided the following formal process for overturning the order:

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131. *Id.* at 98.

132. *Landon v. Plasencia*, 459 U.S. 21, 34 (1982). The Immigration and Nationality Act now requires a formal hearing process for deporting most aliens. *See* INA § 240, 8 U.S.C. § 1229a (2001). However, Congress has specified at least four methods of deporting aliens without a hearing. First, aliens convicted of aggravated felony crimes may be removed without hearing unless they are lawful permanent residents or request withholding of removal or Torture Convention protection. INA § 238(b), 8 U.S.C. § 1228(b); 8 C.F.R. 238.1; *United States v. Benitez-Villafuerte*, 186 F.3d 651 (5th Cir. 1999) (upholding constitutionality), *cert. denied*, 528 U.S. 1097 (2000). Second, aliens without lawful status who entered the United States without inspection and cannot prove presence in the U.S. for at least two years may be removed without a hearing, unless they have a credible fear of persecution in their country of nationality. INA § 235(b)(1)(A)(iii), 8 U.S.C. § 1225(b)(1)(A)(iii). Third, alien crewmen who land in the United States after April 1, 1997, and overstay their 90-day period of admission may be removed without hearing. INA § 252(b), 8 U.S.C. § 1282(b); 8 C.F.R. 252.2(b). Fourth, alien tourists who enter the United States without a visa under the Visa Waiver Program and overstay their authorized period of admission may be deported without a hearing. INA § 217, 8 U.S.C. § 1187.

133. *Haig v. Agee*, 453 U.S. 280, 307 (1981).

134. *Id.* at 307, 309-10 (upholding revocation of passport). *Accord* *Wayte v. United States*, 470 U.S. 598, 611-12 (1985) (“Unless a society has the capability and will to defend itself from the aggressions of others, constitutional protections of any sort have little meaning.”). The Supreme Court has also observed, “In the exercise of its broad powers over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.” *Mathews v. Diaz*, 426 U.S. 67, 80 (1976).

[I]f any alien so ordered to depart shall prove to the satisfaction of the President, by evidence to be taken before such person or persons as the President shall direct, who are for that purpose hereby authorized to administer oaths, that no injury or danger to the United States will arise from suffering such alien to reside therein, the President may grant a license to such alien to remain within the United States for such time as he shall judge proper, and at such place as he shall designate.<sup>135</sup>

President Adams entrusted to his Secretary of State the responsibility of receiving evidence from any alien applying for this license.<sup>136</sup> An alien ordered to depart thus could apply for a license to remain in the United States. Any alien enemy not ordered to depart had an implied, revocable license to remain in the U.S., according to international law.<sup>137</sup>

Commentators have largely overlooked the Alien Act's process for issuing a license. The oversight is unfortunate because the provision, allowing an alien ordered to depart to show cause why he or she should not be expelled, provided due process of law. After the President ordered an alien expelled under the Alien Act, the alien's opportunity to petition for a license compensated for the absence of a formal process for issuing the order to depart. The Alien Act provided for notice (served upon the alien) of his or her expulsion on national security grounds, a fair

135. Alien Act, ch. 58, § 1, 1 Stat. 570 (1798). When the government issues a license to an alien enemy, the alien is "thus exonerated from the character of an enemy . . . by an express act of the sovereign power of our own country." *Johnson v. Thirteen Bales*, 13 F. Cas. 836, 840 (C.C.D. N.Y. 1814).

136. Letter from John Adams to Timothy Pickering (Oct. 16, 1798), in 8 *THE WORKS OF JOHN ADAMS* 606 (Charles F. Adams ed., 1854). A single executive official may both investigate and decide whether the alien is to be expelled. *Marcello v. Bonds*, 349 U.S. 302, 305-06, 311 (1955). Congress need not specify how the President or his delegate exercises discretion whether to grant a license. See *INS v. Yang*, 519 U.S. 26 (1996); *Jean v. Nelson*, 472 U.S. 846, 862 (1985) ("[W]here Congress does not specify standards to guide the Attorney General's exercise of discretion in the immigration field, the Attorney General can rely on any reasonable factors of his own choosing.").

137. *Clarke v. Morey*, 10 Johns. 69 (N.Y. Sup. Ct. 1813) (Kent, C.J.).

The license is implied by law and the usage of nations [when the alien is already present in the United States]; if he came here since the war, a license is also implied, and the protection continues until the Executive shall think proper to order the plaintiff out of the United States . . . Until such order, the law grants permission to the alien to remain, though his sovereign be at war with us.

opportunity for the alien to be heard, and a hearing before an executive official upon the alien's request. Due process requires no more.<sup>138</sup>

Even though the Alien Act placed upon aliens ordered expelled the burden of proving they pose no danger, the Supreme Court has long held that the burden of overcoming a presumption of deportability may lawfully be imposed on aliens who have received no permanent resident status from the federal government.<sup>139</sup> Shifting the burden to the alien to overcome a presumption of deportability has been a fixture of immigration law for over a hundred years.<sup>140</sup> Even the document which commenced deportation proceedings has been referred to as an "Order to Show Cause"—so called because it purports to require an alien to show cause why he or she should not be deported.<sup>141</sup> While the Alien Act provided for a "show cause" hearing only after the President ordered the alien to depart, the hearing was not conducted "post-deprivation" because the alien was not forced to leave the country before seeking a license to remain. The alien could remain in the United States while applying for a license.<sup>142</sup>

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138. See *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597-98 (1953).

While an alien is allowed to remain here he is accorded certain constitutional protections but his license to remain is revocable at the sovereign's will; thereafter with respect to deportation he is entitled only to be given notice of the hearing and opportunity to show that he does not come within the classification of aliens whose deportation Congress has directed.

*United States ex rel. Harisiades v. Shaughnessy*, 187 F.2d 137, 141 (9th Cir. 1951), *aff'd*, 342 U.S. 580 (1952).

139. *Li Sing v. United States*, 180 U.S. 486, 493 (1901); *Fong Yue Ting v. United States*, 149 U.S. 698, 728-29 (1893) (cases upholding the validity of 1892 immigration law requiring alien to rebut a presumption of deportability).

140. See INA § 291, 8 U.S.C. § 1361 (2001) (alien has the burden of proving eligibility for a visa and proving time, place, and manner of entry); Immigration Act, § 23, 43 Stat. 153 (1924); Act of May 5, 1892, ch. 60, § 3, 27 Stat. 25 (1892), *repealed by* Act of Dec. 17, 1943, 57 Stat. 600 (1943).

141. See *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 150, 152 n.1 (1923); 8 C.F.R. 3.14 (1996); IMMIGRATION: PROCESS AND POLICY, *supra* note 24, at 587. Congress replaced deportation proceedings with removal proceedings and replaced the Order to Show Cause with the Notice to Appear, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), § 304(a), Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified at INA §§ 239-240, 8 U.S.C. §§ 1229-1229a (2001)).

142. See *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192 (D.C. Cir. 2001) (discussing "pre-deprivation" and "post-deprivation" due process). But "when there is a substantial likelihood of 'serious damage' to national security or foreign policy" due process requires nothing more than "a statement of reasons and an opportunity for a prompt postrevocation hearing." *Haig v. Agee*, 453 U.S. 280, 309-10 (1981).

If the President withheld a license for reasons of national security based on secret evidence, the alien might complain that such use of secret evidence denies the alien due process. Whether secret evidence may be used against an alien friend remains unclear.<sup>143</sup> An alien enemy, however, would have no grounds to complain. A federal appeals court has stressed:

[I]t is inconceivable that before an alien enemy could be removed from the territory of this country in time of war, the President should be compelled to spread upon the public record in a judicial proceeding the method by which the Government may detect enemy activity within our borders and the sources of information upon which it apprehends individual enemies.<sup>144</sup>

In any event, nothing in the Alien Act specified a licensing process that kept evidence secret. The Court in *Yamataya* stated: "An act of Congress must be taken to be constitutional unless the contrary plainly and palpably appears."<sup>145</sup> Since no alien ordered expelled under the Alien Act ever petitioned the President for a license, the issue never arose. If an alien had petitioned for a license unsuccessfully and federal authorities were about to remove the alien, the alien could have challenged the removal in federal court through a petition for writ of habeas corpus,<sup>146</sup> although the court's scope of review for an alien enemy would be narrow.<sup>147</sup>

### C. *The Alien Act Improperly Vested the Executive with Judicial Powers*

The Virginia and Kentucky legislatures argued that the Alien Act improperly vested judicial powers in the executive branch.<sup>148</sup> But this

143. *Compare* *Jay v. Boyd*, 351 U.S. 345 (1956) (using classified information *ex parte* and in camera to deny relief from deportation), *with*, *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1070 (9th Cir. 1995) ("[U]se of undisclosed information in adjudications should be presumptively unconstitutional. Only the most extraordinary circumstances could support one-sided process."), *appeal after remand*, 119 F.3d 1367 (9th Cir. 1997), *vacated*, 525 U.S. 471 (1999). *See generally* Michael Scaperlanda, *Are We That Far Gone?: Due Process and the Secret Deportation Proceedings*, 7 STAN. L. & POL'Y REV. 23 (1996).

144. *Citizens Protective League v. Clark*, 155 F.2d 290, 294 (D.C. Cir. 1946), *cert. denied*, 329 U.S. 787 (1946).

145. 189 U.S. 86, 101 (1903); *accord* *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) ("We have read significant limitations into other immigration statutes in order to avoid their constitutional invalidation.")

146. *INS v. St. Cyr*, 533 U.S. 289 (2001); *Heikkila v. Barber*, 345 U.S. 229 (1953).

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

148. *Virginia Resolutions*, para. 5, Dec. 24, 1798, in 4 ELLIOT'S DEBATES, *supra* note 71, at 528; *Kentucky Resolutions*, para. 6, 9, Nov. 19, 1798, in 4 ELLIOT'S DEBATES, *supra* note 71, at 541-43.

argument is incorrect. Deportation is not a judicial power; it is instead a power of the political branches.<sup>149</sup> At English common law, the Sovereign originally possessed sole power to expel aliens. The Sovereign and the British Parliament began to share this power when Parliament passed the first British deportation law in 1793.<sup>150</sup> In the United States, the Supreme Court has long recognized Congress and the Executive share inherent sovereign power to control immigration.<sup>151</sup> The Executive may not exercise the power without congressional authority, and Congress generally may not exercise the power except through the Executive.<sup>152</sup> The federal courts have concluded they lack authority to order an alien's deportation unless explicitly granted this power by Congress.<sup>153</sup> Until recently, Congress seldom granted the federal judiciary the necessary authority.<sup>154</sup>

149. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“Our cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.”); *Zakonaite v. Wolf*, 226 U.S. 272, 275 (1912) (mem.) (summarily dismissing the argument that deportation law “vests judicial power in the executive branch of the government”).

150. See *Alien Act of 1793*, 33 Geo. 3, ch. 4, at 10 (Eng.); *Fong Yue Ting v. United States*, 149 U.S. 698, 709 (1893).

151. See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (“[C]ontrol over matters of immigration is a sovereign prerogative, largely within the control of the executive and legislature.”); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 864 (1982) (“The power to regulate immigration—an attribute of sovereignty essential to the preservation of any nation—has been entrusted by the Constitution to the political branches of the Federal Government.”); *Harisiades v. Shaughnessy*, 342 U.S. 580, 587-89 (1952) (power to expel even permanent resident aliens is “confirmed by international law as a power inherent in every sovereign state” and is “exclusively entrusted to the political branches of government”).

152. *Mahler v. Eby*, 264 U.S. 32, 40 (1924).

153. See, e.g., *United States v. Flores-Urbe*, 106 F.3d 1485, 1487-88 (9th Cir. 1997) (describing the “settled national policy of entrusting immigration and deportation decisions to Congress and the Executive Branch in the first instance and limiting the role of the courts”); *United States v. Quaye*, 57 F.3d 447, 449-450 (5th Cir. 1995) (recognizing “Congress’ long tradition of granting the Executive Branch sole power to institute deportation proceedings against aliens”).

154. The Alien Enemies Act of 1798 (which remains in force) granted both the President and federal courts authority to deport alien enemies. Act of July 6, 1798, ch. 66, § 2, 1 Stat. 577 (1798) (codified at 50 U.S.C. § 23). In 1892, Congress gave federal courts authority to deport Chinese laborers. Act of May 5, 1892, ch. 60, § 6, 27 Stat. 25 (1892), *amended by* Act of Nov. 3, 1893, 28 Stat. 7 (1893), *repealed by* Act of Dec. 17, 1943, 57 Stat. 600 (1943). Fifty years after that authority ended, Congress in 1994 authorized federal courts to order deportation when sentencing aliens for deportable crimes. See *Immigration and Nationality Technical Corrections Act*, § 244(a), Pub. L. No. 103-416, 108 Stat. 4322 (1994). In 1996, Congress authorized the courts to order removal when sentencing any deportable



Moreover, the executive branch can exercise judicial power if it relates to matters involving "public rights,"<sup>155</sup> such as immigration.<sup>156</sup> Matters of "public rights" are non-criminal matters that "arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."<sup>157</sup> By contrast, private rights relate to "the liability of one individual to another under the law as defined."<sup>158</sup> Criminal prosecutions and private rights disputes lie at the core of the historically recognized judicial power. Public rights, on the other hand, are amenable to conclusive determination by the executive and legislative branches. The Framers of the Constitution expected that Congress could confine public rights matters (such as immigration) completely to non-judicial determination by the Executive.<sup>159</sup>

The Supreme Court has long held that deportation is to be exercised by the political branches and that the role of the courts is limited:

The doctrine is firmly established that the power to exclude or expel aliens is vested in the political departments of the government, to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to such regulations, except so far as the judicial department is authorized by treaty or by statute, or is required by the Constitution, to intervene.<sup>160</sup>

Thus, the President may exercise the power to deport when authorized by Congress.

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aliens, regardless of whether the aliens were convicted of deportable crimes. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), § 374, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified at INA § 238(d), 8 U.S.C. § 1228(d)).

155. *Crowell v. Benson*, 285 U.S. 22, 50 (1932).

156. *Lloyd Sabuado Societa v. Elting*, 287 U.S. 329, 335 (1932) (upholding agency-imposed fine on shipper for bringing illegal aliens); *Crowell v. Benson*, 285 U.S. at 50-51 (listing "immigration" among categories of "public rights"); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) (upholding agency-imposed fine on shipper for violating immigration laws); *Noriega-Perez v. United States*, 179 F.3d 1166, 1175 (9th Cir. 1999) (upholding INS-imposed fine on fraudulent document vender).

157. *Crowell v. Benson*, 285 U.S. at 50.

158. *Id.* at 51.

159. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67-70 (1982); *Crowell v. Benson*, 285 U.S. at 50-51.

160. *Fok Yung Yo v. United States*, 185 U.S. 296, 302 (1902). See *INS v. Ventura*, 123 S.Ct. 353, 355 (2002) (per curiam) (courts cannot substitute their judgment for an administrative judgment on immigration matters such as asylum).

*D. The Alien Act Delegated Unconstitutionally Broad Power to the President*

Madison argued that Congress violated separation of powers by delegating unconstitutionally broad power to the President in the Alien Act. The Act gave the President authority “to order all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart.”<sup>161</sup> For this, the Virginia legislature denounced the Alien Act as an improper delegation of legislative authority.<sup>162</sup>

This is a tenuous basis to overturn a deportation law. The Supreme Court has not struck down any federal legislation on this basis since 1935.<sup>163</sup> The Court has more recently stated:

Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors. So long as Congress lays down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform, such legislative action is not a forbidden delegation of legislative power.<sup>164</sup>

Only one federal court has ever found a deportation law to be an unconstitutional delegation of legislative power, and its decision was later reversed for lack of jurisdiction.<sup>165</sup> Furthermore, the federal court

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161. Alien Act, June 25, 1798, ch. 58, 1 Stat. 570.

162. Virginia Resolutions, para. 5, Dec. 1798, in ELLIOT’S DEBATES, *supra* note 71; Madison’s Report on the Virginia Resolutions, *supra* note 67, at 369-71.

163. *Clinton v. City of New York*, 531 U.S. 457, 485-86 (1998) (noting that the Court has only twice in its history (both times in 1935) held a congressional delegation of power to be an improper delegation of legislative power).

164. *Touby v. United States*, 500 U.S. 160, 165 (1989) (upholding law authorizing Attorney General to temporarily add a drug to the schedule of controlled substances).

165. See *Massieu v. Reno*, 915 F. Supp. 681 (D.N.J. 1996), *rev’d*, 91 F.3d 416 (3d Cir. 1996). Two district courts have struck down deportation or exclusion laws on the grounds that the laws interfered with freedom of speech. See *American-Arab Anti-Discrimination Committee v. Meese*, 714 F. Supp. 1060, 1082-184 (C.D. Cal. 1989) (striking down as unconstitutional a law (now repealed) that authorized deportation of aliens affiliated with an organization advocating unlawful destruction of property), *vacated sub nom.* *American-Arab Anti-Discrimination Comm. v. Nelson*, 970 F.2d 501 (9th Cir. 1992); *Rafeedie v. INS*, 795 F. Supp. 13 (D.D.C. 1992). The district court in *Rafeedie* struck down as unconstitutionally vague and overbroad a repealed law that had excluded aliens who, *inter alia*, sought to “enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest.” See INA § 212(a)(27)-(28), 8 U.S.C. § 1182(a)(27)-(28) (1952), *repealed by* Immigration Act, § 601, Nov. 29, 1990, Pub. L. No. 101-649, 104 Stat. 4994 (1990).

approved in general of deportations based on threats to public safety and national security. The court stated that such threats constitute adequate standards for the constitutional exercise of delegated authority to deport:

Even statutes rendering deportable an alien whose activities endanger the 'public safety' or jeopardize the 'national security' contain recognizable and judicially manageable, though not wholly precise, standards. 8 U.S.C. § 1251(a)(4)(A)(ii). Clearly, any alien would know that blowing up the World Trade Center or spying for a foreign sovereign would justify his or her deportation under these statutes.<sup>166</sup>

The Supreme Court, too, has found that threats to public safety and national security constitute adequate standards for delegating deportation authority. The Court has stated that a law authorizing the detention and deportation of those aliens who "would endanger the welfare or safety of the United States" is in general a proper delegation of power.<sup>167</sup>

The Supreme Court has yet to strike down a ground of inadmissibility or deportability as unconstitutional and has upheld statutes authorizing the deportation or exclusion of aliens on various grounds related to national security.<sup>168</sup> The Court in its landmark case of *Fong Yue Ting v. United States*,<sup>169</sup> affirming the power of the federal government to deport aliens, stated that the judiciary must not substitute their judgment for that of Congress:

The question of whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject.<sup>170</sup>

166. *Massieu v. Reno*, 915 F. Supp. at 700 n.18.

167. *Carlson v. Landon*, 342 U.S. 524, 527 n.3, 543-44 (1952). See also *Zadvydas v. Davis*, 533 U.S. 678, 725 (2001) (Kennedy, J., dissenting) ("Concepts of flight risk or future dangerousness are manageable legal categories.").

168. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (upholding constitutionality of exclusion of alien for advocating "world communism"); *Galvan v. Press*, 347 U.S. 522 (1954) (upholding constitutionality of deportation under Subversive Activity Control Act); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (upholding deportation of alien for past membership in Communist Party that advocated violent overthrow of the government); *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904) (upholding constitutionality of law excluding "anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States").

169. 149 U.S. 698 (1893).

170. *Id.* at 731. Accord *Harisiades v. Shaughnessy*, 342 U.S. at 597 (Frankfurter, J., concurring) ("[T]he right to terminate hospitality to aliens, the grounds on which such

The Supreme Court has accepted that Congress may delegate exceptionally broad authority to the Executive to control immigration<sup>171</sup> and has recognized that “Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than it customarily wields in domestic areas.”<sup>172</sup> The Court also has correlated executive authority to enforce immigration laws with the Executive’s historically broad authority to enforce extradition.<sup>173</sup> Observing these developments, legal historian Andrew C. McLaughlin of the University of Chicago wrote in 1935: “[T]he courts in comparatively recent days have gone so far in upholding the right to deport aliens that one must hesitate to condemn the Alien Act as a positive infringement of constitutional liberty because of its provisions granting wide executive power in this respect.”<sup>174</sup> Charles Warren further commented that the Supreme Court’s 1893 opinion in *Fong Yue Ting v. United States*<sup>175</sup> “seemed to justify the old Alien Law of 1798”—a point also noted by a Justice dissenting from the Court’s opinion.<sup>176</sup>

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determination shall be based, have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control.”).

171. *Mahler v. Eby*, 264 U.S. 32, 40-41 (1924) (recognizing Congress can authorize deportation only “by classification and by conferring power of selection within classes upon an executive agency”).

172. *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (upholding Section 215 of the INA and the delegation provisions of the Passport Act of 1926 giving the Executive authority to issue passports without setting standards to guide his discretion other than his own administrative regulations).

173. See *Fong Yue Ting v. United States*, 149 U.S. at 713-14. Cf. *Collins v. Miller*, 252 U.S. 364, 369 (1920); *Ornelas v. Ruiz*, 161 U.S. 502, 508-09 (1896) (cases citing *Fong Yue Ting* as authority for extradition). The nation’s first federal extradition established that, in the absence of contrary legislation, the Executive exercised exclusive authority to enforce treaties of extradition. President Adams in 1799 had ordered the extradition under Jay’s Treaty of an English sailor wanted by Britain for the murder of a naval officer during a mutiny. Democratic-Republican opponents submitted a resolution to Congress censuring Adams for “a dangerous interference of the executive with judicial decisions.” The House of Representatives overwhelmingly defeated the resolution by a vote of sixty-one to thirty-five, after Congressman John Marshall delivered a powerful speech defending the President. The House then passed, by sixty-two to thirty-five, a resolution approving the President’s action. Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely’s War and Responsibility*, 34 VA. J. INT’L L. 903, 935-37 (1994); DECONDE, *supra* note 7, at 204-05, 437. See also *United States v. Robbins*, 27 F. Cas. 825 (C.C.D.S.C. 1799) (No. 16,175) (denying alien’s petition for a writ of habeas corpus).

174. MCLAUGHLIN, *supra* note 106, at 320-23.

175. 149 U.S. 698 (1893).

176. *Id.* at 746-750 (Field, J., dissenting); WARREN, *supra* note 108, at 696.

Moreover, the Virginia legislature's argument against the breadth of the Alien Act was inconsistent with the legislature's previous acts delegating broad deportation power to Virginia's Governor. The legislature had authorized the Governor to expel or indefinitely detain, without hearing, "suspicious" aliens from foreign countries that were at war with the United States or that the President found had "hostile designs." The legislature first enacted this deportation law in 1785 after some Algerians landed at Richmond at a time when Barbary pirates raided American shipping in the Mediterranean Sea. Virginia renewed the law in 1792. The state law delegated power similar to that delegated by the vilified Alien Act. The notable difference was that the state law delegated the power to the Virginia Governor, rather than the President.<sup>177</sup>

*E. The States Possessed Sole Authority to Control Immigration*

A theme throughout the Virginia and Kentucky Resolutions' opposition to the Alien Act was the argument that the states retained exclusive power to control immigration.<sup>178</sup> While agreeing that aliens could be expelled, Virginia and Kentucky argued that only the states could expel them. The Kentucky legislature declared, "that alien friends are under the jurisdiction and protection of the laws of the State wherein they reside."<sup>179</sup> Virginia and Kentucky defiantly maintained that Congress lacked constitutional authority to control immigration.<sup>180</sup> They claimed the Tenth Amendment to the U.S. Constitution reserved this authority for the states alone, since the Constitution did not specifically grant Congress authority to restrict immigration.<sup>181</sup>

177. See Act Giving Powers to the Governor and Council, 12 Hening's (Va.) Stat. 48, 1 Va. Acts 16-17 (1985); Act for Reducing into one the Several Acts respecting the Powers and Duties of the Executive, § 2, 1 Va. Stat. at Large 8 (Sheperd's), 1792 Va. Acts ch. 6; Richard Leiby, *Terrorists by Another Name: The Barbary Pirates*, WASH. POST, Oct. 15, 2001, at C1. *But cf.* Madison's Report on the Virginia Resolutions, *supra* note 67, at 369 (distinguishing the Alien Act as allowing deportation of any dangerous alien whereas the Virginia law provided for deportation of aliens only from a hostile nation).

178. Virginia Resolutions, para. 3-5, Dec. 24, 1798, in 4 ELLIOT'S DEBATES, *supra* note 71, at 528-529; Kentucky Resolutions, para. 4-5, 9, Nov. 19, 1798, in 4 ELLIOT'S DEBATES, *supra* note 71, at 541-44; Madison's Report on the Virginia Resolutions, *supra* note 67, at 360, 368-69.

179. Kentucky Resolutions, para. 4, Nov. 19, 1798, in 4 ELLIOT'S DEBATES, *supra* note 71, at 541.

180. See Berns, *supra* note 8, at 131 ("Virginia was contending against a reading of the Commerce Clause that permitted Congress to regulate the movement of aliens and slaves . . . . The solution was to deny that the United States was a sovereign country.").

181. See U.S. CONST. amend. X. "Assertion of the Jeffersonians that alien friends were within the care of the states and the states alone can now be dismissed as untenable."

Nevertheless, Congress found that the Constitution implicitly authorized passage of the Alien Act. Congress concluded that, in addition to being an exercise of war power, control over immigration was an attribute of national sovereignty and lay within the constitutional power to “regulate commerce with foreign nations, and among the several States.”<sup>182</sup> After the Civil War, the Supreme Court agreed that national sovereignty<sup>183</sup> and the Commerce Clause<sup>184</sup> supported federal immigration law. But a long legal fight over applicability of these powers preceded the Civil War. Those who supported slavery perceived these federal powers as a threat. The potential for federal commerce power to displace state control over the movement of aliens, slaves, and free blacks brought forth what Walter Berns, Professor Emeritus of Government at Georgetown University, described as “assiduous efforts of Southern judges, including Southern judges on the Supreme Court, to deny any power to Congress over persons as subjects of commerce.”<sup>185</sup>

The legislatures of Kentucky and Virginia argued that the Constitution specifically forbade the federal government from regulating

MCLAUGHLIN, *supra* note 106, at 268. Current constitutional theory is the antithesis of the Jeffersonian doctrine of states’ rights. The Supreme Court has proclaimed that the states “can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states.” *Takahashi v. Fish & Game Comm.*, 334 U.S. 410, 419 (1948).

182. See U.S. CONST. art. I, § 8, cl. 3. Various congressmen, of course, offered other justifications for the Alien Act—some of them specious. See Andrew Lenner, *A Tale of Two Constitutions: Nationalism in the Federalist Era*, 40 AM. J. LEGAL HIST. 72, 93-99 (1996); SMITH, *supra* note 24, at 50-93.

183. See *Tiaco v. Forbes*, 228 U.S. 549, 556-57 (1913); *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893). While acknowledging that the power to control immigration is an attribute of sovereignty, the Democratic-Republicans had argued that the power belonged to individual states rather than the federal government. 8 ANNALS OF CONG. 2998-99 (1799) (Remarks of Rep. Gallatin). But the Supreme Court has held states can exercise sovereign power over immigration only when no federal law conflicts with their exercise of such power. See *DeCanas v. Bica*, 424 U.S. 351 (1976).

184. See *United States ex rel. Turner v. Williams*, 194 U.S. 279, 290 (1904); *Fok Yung Yo v. United States*, 185 U.S. 296, 302-03 (1902); *Edye v. Robertson* (Head Money Cases), 112 U.S. 580 (1884).

185. Walter Berns, *The Constitution and the Migration of Slaves*, 78 YALE L.J. 198, 215-22 (1968). See generally Mary Sarah Bilder, *The Struggle Over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743 (1996) (describing how early immigration to America was dominated by indentured servants, the slave trade, and commercial passengers, and how some Southern justices sought to deny the applicability of the Commerce Clause).

immigration until 1808.<sup>186</sup> They cited the Migration and Importation Clause of the Constitution, which read: "The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight . . ."<sup>187</sup> The clause limited federal commerce power, which is a source of federal control of immigration.<sup>188</sup>

Superficially, the clause might be interpreted to preclude federal legislation restricting immigration until 1808.<sup>189</sup> But this interpretation had two fatal problems. First, the clause forbade certain federal laws restricting entry or admission but not laws authorizing deportation or expulsion. Therefore, the clause did not apply to any expulsion ordered under the Alien Act.<sup>190</sup>

Second, the clause did not apply to immigrants in general. The term "such persons" in the clause was simply and solely a euphemism for "slaves."<sup>191</sup> The Speaker of the House, Jonathan Dayton of New Jersey, who had served as a delegate to the Constitutional Convention, explained

186. Kentucky Resolutions, para. 5, Nov. 19, 1798, in 4 ELLIOT'S DEBATES, *supra* note 71, at 541; Madison's Report on the Virginia Resolutions, *supra* note 67, at 367-69.

187. U.S. CONST. art. I, § 9, cl. 1. This clause was so dear to slave-state delegates that they secured a special constitutional guarantee that the clause could not be amended for its duration. See U.S. CONST. art. V.

188. *Gibbons v. Ogden*, 22 U.S. 1, 206-07 (1824) (the clause "constitutes an exception to the power of Congress to regulate commerce, and the exception is expressed in such words, as to manifest clearly the intention to continue the pre-existing right of the States to admit or exclude, for a period of time"); *The Wilson v. United States*, 30 F. Cas. 239, 243 (C.C.D. Va. 1820) (No. 17,846) (Marshall, Circuit Justice) (the clause "has been truly said to be a limitation of the power of congress to regulate commerce"); Berns, *supra* note 185, at 208-09 n.39 ("Everyone saw the importation and migration clause as a limitation on Congress' commerce power. It was obvious.").

189. Bilder, *supra* note 185, at 784 ("On its face, section 9 appeared to apply to immigration.").

190. Cf. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (cases contrasting deportation with exclusion). After passing the Alien Act, Congress considered but did not pass a separate bill to exclude French aliens. The bill was thought unnecessary since the Alien Act gave the President the power to deport dangerous aliens. 8 ANNALS OF CONG. 2063-68 (1798). Congress in 1996 diminished the dichotomy between deportation and exclusion by creating a removal process, which includes both. See *Illegal Immigration Reform and Immigrant Responsibility Act*, Division C, § 304, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified at INA § 240, 8 U.S.C. § 1229a (1996)).

191. *New York v. Compagnie Générale Transatlantique*, 107 U.S. 59, 62 (1883) ("There has never been any doubt that this clause had exclusive reference to persons of the African race."); *Butler v. Hopper*, 4 F. Cas. 904, 905 (C.C.D. Pa. 1806) (No. 2,241) (Washington, Circuit Justice) (the clause "restrains congress from prohibiting the importation of slaves prior to the year 1808"); Berns, *supra* note 185, at 202.

to Congress that South Carolina delegates had proposed the clause only “for the express purpose of preventing Congress from interfering with the introduction of slaves into the United States.” He further said the Framers avoided using the word “slaves” so as not to “stain the Constitutional code with such a term.”<sup>192</sup> The Migration and Importation Clause relinquished for almost twenty years all federal control over the entry of slaves into existing states, while allowing Congress to bar the spread of slavery into new states.<sup>193</sup> The clause was wholly concerned with slaves. It had nothing to do with free immigrants, as Jefferson and Madison both knew.<sup>194</sup>

Despite their several arguments against the Alien Act, the authors of the Virginia and Kentucky Resolutions embraced deportation—so long as the states, not the federal government, did the deporting.<sup>195</sup> As early as 1776, Jefferson that proposed Virginia deport free blacks, and a Virginia legislative committee headed by Jefferson developed a plan in 1777 for the

192. 8 ANNALS OF CONG. 1992-93 (1798). *Accord* JAMES MADISON, RECORDS OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787, at 617 (Charles C. Tansill ed., The Legal Classics Library 1989) (1926) (a Connecticut delegate objected to the term “slaves”; he “liked a description better than the terms proposed, which had been declined by the old Cong[re]ss and were not pleasing to some people”). *But see* SMITH, *supra* note 24, at 80-81 (presenting Georgia Representative Abraham Baldwin’s misstatement that the clause was intended to protect foreign immigration, which misstatement Speaker Dayton ascribed “either to absolute forgetfulness, or to willful misrepresentation”).

193. *See* Berns, *supra* note 185, at 215-22. During the life of the Migration and Importation Clause, Congress prohibited the migration and importation of slaves into the Northwest Territories and the Territory of Orleans. *See* Northwest Ordinance, ch. 8, 1 Stat. 50 (1789); Act of Mar. 26, 1804, ch. 38, § 10, 2 Stat. 283, 286 (1804). Chief Justice Roger Taney struck down these acts as unconstitutional, on grounds other than the Migration and Importation Clause, in his decision in *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

194. Letter from James Madison to Robert Walsh (Nov. 27, 1819), in 9 THE WRITINGS OF JAMES MADISON 1, 2-3 (Gaillard Hunt ed., 1906) (Madison wrote that delegates to the Constitutional Convention “had scruples against admitting the term ‘slaves’ into the Instrument. Hence the descriptive phrase ‘migration or importation of persons’” appears instead); THE FEDERALIST NO. 42, at 279, 281-82 (James Madison) (Jacob E. Cooke ed., 1961) (the Migration and Importation Clause pertains solely to “the importation of slaves”); David N. Meyer, *Justice Clarence Thomas and the Supreme Court’s Rediscovery of the Tenth Amendment*, 25 CAP. U. L. REV. 339, 418 n.287 (1996) (“Surely Jefferson knew the framers’ intent was to protect the foreign slave trade; however, he applied the language literally to prevent Congress from restricting the entry into America of ‘alien friends’—in this case, French nationals.”); Berns, *supra* note 185, at 223 (explaining why Jefferson and Madison “could have joined in a more or less deliberate campaign to distort the original meaning of the Constitution”).

195. *See* sources cited *supra* note 178.



gradual removal of all free blacks from the state.<sup>196</sup> In his 1787 *Notes on Virginia*, Jefferson recommended slaves be manumitted only upon condition they also be expelled.<sup>197</sup> The state legislature responded in 1793 by ordering the forcible removal of free blacks.<sup>198</sup> Madison also supported the removal of emancipated slaves, insisting "freed blacks ought to be permanently removed beyond the region occupied by, or allotted to, a white population."<sup>199</sup>

Both those who advocated removing blacks and those who defended slavery wanted control over immigration to remain in the hands of the states.<sup>200</sup> Only with this state control could states unilaterally exclude and expel free blacks, who numbered about 100,000 in 1798.<sup>201</sup> Many whites

196. 2 THE PAPERS OF THOMAS JEFFERSON, 470-73 (Julian P. Boyd ed., 1950); A. Leon Higginbotham, Jr. & Greer C. Bosworth, "Rather Than the Free:" *Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. L. REV. 17, 31 (1991).

197. Thomas Jefferson, *Notes on the State of Virginia, Query XIV (1787)*, in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 237-38 (Adrienne Koch & William Peden eds., 1993).

198. An Act to Prevent the Migration of Free Negroes and Mulattoes into this Commonwealth, 1 Va. Stat. at Large 239 (Shepherd's), 1793 Va. Acts ch. 23.

199. Letter from James Madison to Robert J. Evans (June 15, 1819), in 8 THE WRITINGS OF JAMES MADISON 440 (Gaillard Hunt ed., 1908). *Accord James Madison's Attitude Toward the Negro*, 6 J. NEGRO HIST. 74 (1921) ("Feeling that the thorough incorporation of the blacks into the community of whites would be prejudicial to the interests of the country, he had no other thought than that of deportation as a correlative of emancipation.").

200. See Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 939 (1991) ("[T]he distribution of authority between the states and the federal government regarding admission of aliens had explosive potential in antebellum society, because slave states insisted on control over the entry of free persons of color."); Berns, *supra* note 8, at 116 ("Whether pro- or anti-slavery, most southerners, including Jefferson and Madison . . . were united behind a policy of denying to the national government any competence to deal with the question of slavery.").

201. BERLIN, *supra* note 107, at 46. Some antebellum federal courts struck down, as unconstitutional infringements upon federal commerce power, state immigration laws excluding free blacks. See *The William Jarvis*, 29 F. Cas. 1309 (D. Mass. 1859) (No. 17,697); *The Cynosure*, 6 F. Cas. 1102 (D. Mass. 1844) (No. 3,529) (cases declaring invalid a Louisiana law excluding free blacks); *Elkison v. Deliesseline*, 8 F. Cas. 493 (C.C.D.S.C. 1823) (No. 4,366) (Johnson, Circuit Justice) (declaring invalid a South Carolina law excluding free blacks). The Supreme Court under Chief Justice Roger Taney, however, decided that a state possessed power to exclude and expel slaves and free blacks, both from abroad and from other states. See *Prigg v. Pennsylvania*, 41 U.S. 625 (1842) ("We entertain no doubt whatsoever, that the states, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example . . ."); *Groves v. Slaughter*, 40 U.S. 449 (1841) (by diversity of opinion) (Mississippi law excluding slaves). See also *Roberts v. Yates*, 20 F. Cas. 937 (C.C.D.S.C. 1853) (No. 11,919) (upholding South Carolina law barring free blacks).

believed that free blacks living in the midst of a slave-owning society threatened white dominance and provoked slave unrest.<sup>202</sup> The proponents of the Virginia and Kentucky Resolutions knew the federal government did not share their anxiety over the presence of free blacks and that President John Adams publicly opposed slavery.<sup>203</sup> Therefore, the Resolutions' proponents wanted to retain state control over immigration, against federal encroachment.<sup>204</sup>

Virginia and Kentucky called upon other states to join them in condemning the Alien Act.<sup>205</sup> No other state did so. The four Southern states of North Carolina, South Carolina, Tennessee and Georgia remained silent, and all ten states north of Virginia repudiated the Virginia and Kentucky Resolutions.<sup>206</sup> Moreover, the voting public renounced the Resolutions, handing Federalists in 1799 their largest majority ever in Congress.<sup>207</sup> But neither Virginia nor Kentucky backed down. The

202. Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2099 (1993) ("By 1860 every southern state prohibited the immigration of free blacks. Southern states believed free blacks threatened slavery and would have a pernicious influence on the behavior of slaves.").

The free Negro's insistent drive for independence and respectability shook the ideological foundations of the slave society. It challenged white racial assumptions and created doubts about the beneficence of slavery. More dangerous still, it demonstrated to slaves that blacks could be free, control their own institutions, and improve their lives without whites.

BERLIN, *supra* note 107, at 316.

203. See Paul Finkelman, *Civil Liberties and the Civil War: The Great Emancipator as Civil Libertarian*, 91 MICH. L. REV. 1353, 1366 n.66 (1993); Letter from John Adams to George Churchman (Jan. 24, 1801), in 9 THE WORKS OF JOHN ADAMS 92 (Charles F. Adams ed., 1854). Slavery divided the two political parties. For example, in the 1790s, while Philadelphia's Democratic-Republican newspapers published advertisements for the sale of slaves, the Federalist newspapers refused to. Paul Finkelman, *Federalist Party*, in JAMES MADISON AND THE AMERICAN NATION 1751-1836: AN ENCYCLOPEDIA 145 (Robert A. Rutland ed., 1994).

204. See Neuman, *supra* note 32, at 1889 ("[A] truly exclusive federal power over interstate and international migration would have been highly threatening under antebellum conditions. The federal government would have been forced to choose policies controlling the transborder movement of both blacks and slaves.").

205. Virginia Resolutions, para. 7, Dec. 24, 1798, in 4 ELLIOT'S DEBATES, *supra* note 71, at 529; Kentucky Resolutions, para. 9, Nov. 19, 1798, in 4 ELLIOT'S DEBATES, *supra* note 71, at 542-43.

206. Wayne D. Moore, *Reconceiving Interpretive Autonomy: Insights from the Virginia and Kentucky Resolutions*, 11 CONST. COMMENT 315, 328 (1994).

207. MILLER, *supra* note 18, at 178-79. See *Alien and Sedition Acts*, 1 ENCYCLOPEDIA BRITANNICA 270 (1990) ("The acts were the mildest wartime security measures ever taken in the United States, and they were widely popular."). But see 1 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE § 2.02 (rev. ed. 1997) (Alien Act

Virginia legislature passed additional resolutions in 1799 declaring their freedom from foreign influence, their allegiance to the Constitution, and their opposition to war with France.<sup>208</sup> Virginia also adopted a legislative report written by Madison, responding to prevalent criticisms of the 1798 resolutions.<sup>209</sup> The Kentucky legislature passed their second set of resolutions in 1799, asserting a state could nullify objectionable federal legislation—the defiant tone Jefferson had proposed for the original resolutions.<sup>210</sup> Nevertheless, both states professed a firm attachment to the Union,<sup>211</sup> and neither state blocked federal implementation of the Alien and Sedition Acts.<sup>212</sup> Virginia and Kentucky declined to adopt Jefferson's threat "to sever ourselves from that union we so much value, rather than give up the rights of self-government."<sup>213</sup> Jefferson, apparently embarrassed by the Virginia and Kentucky Resolutions, did not admit authorship for over twenty years.<sup>214</sup> However, the idea that states could individually or collectively reject federal legislation persisted until the Civil War.<sup>215</sup>

of 1798 "was very unpopular"). The Federalist majority in the House grew from fifty-eight to sixty-four seats in 1799. Although the Federalists lost one Senate seat, state legislatures elected the Senate until 1913. See U.S. CONST. amend. XVII.

208. Virginia Resolutions, Jan. 4, 1799, Va. Stat. at Large 193 (Shepherd's) (1799).

209. Madison's Report on the Virginia Resolutions, *supra* note 67, at 341.

210. Kentucky Resolutions, para. 2, Nov. 22, 1799, in 4 ELLIOT'S DEBATES, *supra* note 71, at 544. Jefferson used the words "nullify" and "nullification" in his original draft of the Kentucky Resolutions to indicate state repudiation of federal law. See Thomas Jefferson's Drafts of the Kentucky Resolutions (November 1798), in 7 THE WRITINGS OF THOMAS JEFFERSON 301 (Paul L. Ford ed., 1896). Kentucky's Resolutions of Nov. 19, 1798, presented a bowdlerized version of Jefferson's draft—without the incendiary words. But the following year, after being rebuffed by other states, the Kentucky legislature inserted the words in the second set of resolutions to emphasize the state's political resolve. MCLAUGHLIN, *supra* note 106, at 272-73.

211. Virginia Resolutions, para. 1-2, Dec. 24, 1798, in 4 ELLIOT'S DEBATES, *supra* note 71, at 528; Kentucky Resolutions, para. 1, Nov. 19, 1798, in 4 ELLIOT'S DEBATES, *supra* note 71, at 540; Kentucky Resolutions, para. 2, Nov. 22, 1799, in 4 ELLIOT'S DEBATES, *supra* note 71, at 545; Madison's Report on the Virginia Resolutions, *supra* note 67, at 405.

212. MCLAUGHLIN, *supra* note 106, at 272-81.

213. Letter of Thomas Jefferson to James Madison (Aug. 23, 1799), reprinted in Koch & Ammon, *supra* note 112, at 165-66.

214. Koch & Ammon, *supra* note 112, at 145. *But see* Bush v. Orleans Parish Sch. Bd., 188 F. Supp. 916, 923 (E.D. La. 1960) ("Jefferson was not proud of his work for he never admitted authorship."), *aff'd*, 365 U.S. 569 (1961).

215. EEOC v. Wyoming, 460 U.S. 226, 272 n.8 (1983) (Powell, J., dissenting) (the doctrines of interposition and nullification "were laid to rest in one of history's bloodiest fratricides, ending at Appomattox in 1865"); Paul L. Colby, *Two Views on the Legitimacy of Nonacquiescence in Judicial Opinions*, 61 TUL. L. REV. 1041, 1058-59 (1987) (the Kentucky Resolutions' interposition doctrine "was interred . . . on the battlefields of the Civil War").

## V. ENFORCEMENT OF THE ALIEN ACT

Despite the furor over the Alien Act, only one alien was expelled during its two-year duration.<sup>216</sup> The French spy Volney avoided deportation by leaving the United States on June 7, 1798, just three weeks before Congress passed the Alien Act. The deteriorating relations between France and America, the suspension of trade, and the prospect of being treated as enemies, by both the United States and France, led several shiploads of French aliens to leave America.<sup>217</sup> Thomas Jefferson wrote: “The threatening appearance from the alien bills have so alarmed the French who are among us, that they are going off. A ship, chartered by themselves for this purpose, will sail within about a fortnight for France, with as many as she can carry. Among these I believe will be Volney, who has in truth been the principal object aimed at by the law.”<sup>218</sup> After Volney arrived in France, Napoleon rewarded him with the office of senator and with the aristocratic title of count—strange compensation for a French revolutionary.<sup>219</sup>

Like Volney, the spy Collot also avoided deportation, but he did so while remaining in North America. Even though Adams ordered Collot expelled, Adams’ administration moved slowly. Federal agents kept Collot under surveillance, hoping he would lead them to other spies.<sup>220</sup>

216. *Alien and Sedition Acts*, 1 ENCYCLOPEDIA BRITANNICA 270 (15th ed. 1997) (“Only one alien was deported” under the Alien Act).

217. DECONDE, *supra* note 7, at 86-87, 405 n.29; CHILDS, *supra* note 44, at 188-91. According to international law, French aliens who remained in the United States during the undeclared war risked being regarded as enemies by their own country. See *Gates v. Goodloe*, 101 U.S. 612, 617 (1879) (“[I]t was the duty of a citizen when war breaks out, if it be a foreign war and he is abroad, to return without delay . . . .”); *Miller v. United States*, 78 U.S. 268, 310-11 (1870) (“It is ever a presumption that inhabitants of an enemy’s territory are enemies . . . even subjects or citizens of the government prosecuting the war against the state within which they reside.”).

218. Letter from Thomas Jefferson to James Madison (May 3, 1798), in 7 THE WRITINGS OF THOMAS JEFFERSON 248 (Paul L. Ford ed., 1896). Jefferson was incensed that the federal government had targeted his friend and confidant. FAWN M. BRODIE, THOMAS JEFFERSON 407 (1974).

219. *Volney, Constantin François Chassebœuf, Comte de*, 28 ENCYCLOPEDIA BRITANNICA 196 (11th ed. 1910). During the French Revolution, Volney, ironically, had argued as a member of the National Assembly that because of its aristocratic members it should be dissolved immediately and a new assembly formed excluding clerics and nobles. BAILEY STONE, THE GENESIS OF THE FRENCH REVOLUTION 225 (1994).

220. Letter from John Adams to Timothy Pickering (Oct. 16, 1798), in 8 THE WORKS OF JOHN ADAMS 606 (Charles F. Adams ed., 1854); Durand Echeverria, *General Collot’s Plans for a Reconnaissance of the Ohio and Mississippi Valleys, 1796*, 9 WILLIAM & MARY Q. 512, 514-15 (3d series, 1952).

While government agents did identify some accomplices, government inaction allowed them to escape. Adams' Secretary of State, Thomas Pickering, told the President in 1799 that "so many months had elapsed, and the session of Congress commenced, when other business pressed, the pursuit of these aliens was overlooked."<sup>221</sup> President Adams replied, "The alien law, I fear, will upon trial be found inadequate to the object intended, but I am willing to try it in the case of Collot."<sup>222</sup> Yet the government did not expel Collot.

When Collot asked the British ambassador for a letter of safe-conduct late in 1798 so he could return to France, Secretary Pickering, who originally favored expelling Collot, interceded to prevent his return. Pickering decided Collot would pose greater danger if he returned to France than if he remained in America. If allowed to return, Collot might convey valuable military intelligence and persuade the French Directory to launch an invasion of America. Since the federal government lacked authority under the Alien Act to detain alien enemies for the duration of the war, Pickering asked the British ambassador to detain Collot. The British complied with Pickering's request, detaining Collot in the United States as a prisoner of war for over a year. But after the United States and France began peace negotiations in 1800, Britain released Collot in a prisoner exchange. Collot sailed from America in August 1800—two months after the Alien Act expired.<sup>223</sup>

Other potential targets of the Alien Act also slipped away. An example is Collot's accomplice, a mysterious Swiss alien named Sweitzer, whom President Adams ordered expelled in 1798. Federal authorities apparently took no steps to expel Sweitzer, and he may have eventually returned to Europe of his own accord.<sup>224</sup> Another example is lawyer John Daly Burk, an Irish militant who fled Britain as a fugitive from justice to become a newspaper editor in New York. Upon hearing of the August 1798 French invasion of Ireland, he allegedly exclaimed that he wished the French would invade America and guillotine "every scoundrel in favor of this Government." New York authorities arrested Burk for common law

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221. Letter from Thomas Pickering to John Adams (Aug. 1, 1799), in 9 THE WORKS OF JOHN ADAMS 6 (Charles F. Adams ed., 1854).

222. Letter from John Adams to Thomas Pickering (Aug. 13, 1799), in 9 THE WORKS OF JOHN ADAMS 14 (Charles F. Adams ed., 1854).

223. Letter from Thomas Pickering to John Adams, (Aug. 1, 1799), *supra* note 221, at 6; SMITH, *supra* note 24, at 164-69; George W. Kyle, *The Detention of General Collot*, 6 WILLIAM & MARY Q. 628-30 (3rd series 1949).

224. Letter from John Adams to Timothy Pickering (Oct. 16, 1798), in 8 THE WORKS OF JOHN ADAMS 606 (Charles Francis Adams ed., 1854); Letter of Timothy Pickering to John Adams (Aug. 1, 1799), *supra* note 221, at 6; SMITH, *supra* note 24, at 166-67.

sedition libel. His benefactor, Aaron Burr, posted bond for his release and persuaded Secretary Pickering to have criminal charges dropped in exchange for Burk's promise to depart the country. Burk's planned to go to France to help launch another invasion of Ireland. But later, fearing British agents would capture him, Burk decided not to leave. Instead, he disappeared into Virginia, where he took an alias and became a college principal. The Alien Act lapsed while he remained incognito. Ironically, at a Virginia tavern in 1808, he insulted a Frenchman by damning the French "a pack of rascals." After challenging Burk to a duel, the piqued Frenchman shot him dead.<sup>225</sup>

The sole alien expelled under the Alien Act was a white Frenchman named Médéric-Louis-Élie Moreau de Saint-Méry. At the outbreak of the French Revolution, he became an enthusiastic proponent and a member of a revolutionary assembly of Paris. He quickly rose among the revolutionaries as his organizational and political talents were recognized. He helped arm the Paris mob for an assault on the Bastille, and, when it fell on July 14, 1789, he received the keys to the fortress and briefly became de facto ruler of Paris. He playfully remarked afterwards that he had been "King of Paris for three days."<sup>226</sup>

He presided over the Paris Commune until October 10, 1789, and then joined the Constituent Assembly. He served on the Judiciary Committee until radicals brutally attacked him on July 30, 1792. After a Jacobin faction overthrew the Girondins, who failed in their efforts to spread the revolution to neighboring countries through war, Moreau fled to Normandy. A crackdown following an unsuccessful Girondin uprising in Normandy compelled Moreau to leave for the port city of Le Havre. From Le Havre, he was fortunate to escape with his family by ship on November 9, 1793—just a day before a warrant for his arrest arrived. Moreau and his family arrived in America four months later. Moreau worked as a shipping agent in Norfolk and New York before moving to Philadelphia on October 14, 1794. In Philadelphia he set up a bookstore and printing press.<sup>227</sup>

Moreau welcomed French spies Collot and Volney and developed a close friendship with French Foreign Minister Talleyrand, whose mistreatment of a U.S. peace delegation created the "XYZ" scandal that

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225. DAVID A. WILSON, *UNITED IRISHMEN, UNITED STATES: IMMIGRANT RADICALS IN THE EARLY REPUBLIC* 49-50 (1998); MILLER, *supra* note 18, at 97-102.

226. *Moreau de Saint-Méry, Médéric-Louis-Élie*, 7 *DICTIONARY OF AMERICAN BIOGRAPHY* 156 (Dumas Malone ed., 1934); Stewart L. Mims, *Introduction to MOREAU DE SAINT-MÉRY*, *supra* note 23, at ix-xiii.

227. Mims, *supra* note 26, at xiii-xvi; *CHRONICLE OF THE FRENCH REVOLUTION* 415 (Jean Favier et al. eds., 1989); *Girondins*, 10 *ENCYCLOPEDIA BRITANNICA* 435-36 (13th ed. 1973).

led America to war. Moreau and Talleyrand recurrently expressed loyalty to each other in their exchange of letters, and Talleyrand gave Moreau's eldest son a job in the Ministry of Foreign Relations. Together Moreau and Talleyrand agreed that France must acquire Louisiana and that each of them would serve as its Governor once it became a French possession. The federal government suspected Moreau of secretly promoting French imperialism in North America.<sup>228</sup>

When President Adams drew up a list of aliens for expulsion, he included the names of General George Victor Collot, Constantin Volney, and Moreau de Saint-Méry. Adams later added the names of Collot's Swiss accomplice Sweitzer and the French economist and public official Pierre Samuel Du Pont de Nemours.<sup>229</sup> Except for Sweitzer, all the aliens ordered expelled were citizens of France. The government allowed DuPont to immigrate to the United States in 1799, however, when it became convinced he posed no threat.<sup>230</sup>

Adams used the Alien Act sparingly. He refused to use the Act to expel French diplomats already in the United States,<sup>231</sup> although Adams declined to grant diplomatic status to newly arrived French Consul-General Victor Marie Du Pont because of the suspension of diplomatic relations between the U.S. and France.<sup>232</sup> Adams also rejected Secretary Pickering's suggestion that the law be used to expel the scientist and political philosopher Dr. Joseph Priestley, who favored the French Revolution.<sup>233</sup> While the Sedition Act was used to intimidate and silence

228. MOREAU DE SAINT-MERY, *supra* note 23, at 206-07, 214-24, 243.

229. *Id.* at 253; Letter from John Adams to Timothy Pickering (Sept. 16, 1798), in 8 THE WORKS OF JOHN ADAMS 596 n.1 (Charles F. Adams ed., 1854); Letter from John Adams to Timothy Pickering (Oct. 16, 1798), in 8 THE WORKS OF JOHN ADAMS 606-07 (Charles F. Adams ed., 1854).

230. AMBROSE SARICKS, PIERRE SAMUEL DU PONT DE NEMOURS 269-359 (1965). *But see* SMITH, *supra* note 24, at 171 (incorrectly asserting the expulsion order "was never executed because DuPont did not arrive in the United States until after the expiration of the Alien Law").

231. Letter from John Adams to Thomas Pickering (Aug. 12, 1799), in 9 THE WORKS OF JOHN ADAMS 14 (Charles F. Adams ed., 1854) ("There is a respect due to public commissions which I should wish to preserve as far as may be consistent with safety."); SMITH, *supra* note 24, at 172.

232. Proclamation Revoking the Exequaturs of the French Consuls (July 13, 1798), in 9 THE WORKS OF JOHN ADAMS 170-72 (Charles F. Adams ed., 1854); SMITH, *supra* note 24, at 161, 172; ELKINS & MCKITRICK, *supra* note 15, at 666. *Cf.* U.S. CONST. art. II, § 3 (the President has discretion to "receive Ambassadors and other public Ministers").

233. Letter from John Adams to Timothy Pickering (Aug. 13, 1799), in 9 THE WORKS OF JOHN ADAMS 13-14 (Charles F. Adams ed., 1854); *Joseph Priestley*, 8 DICTIONARY OF AMERICAN BIOGRAPHY 223-25 (Dumas Malone ed., 1935).

political opponents, the Alien Act was never used that way.<sup>234</sup> Adams signed all expulsion orders himself, refusing to sign blank orders for the use of the Secretary of State. He decided, “We ought to give the law a strict construction, and therefore [I] doubt the propriety of delegating authority.”<sup>235</sup>

When Moreau learned President Adams had ordered him to depart, he employed a friendly Democratic-Republican senator to inquire of the President the *raison d'être* for the order. “Nothing in particular,” President Adams replied guardedly, “but he’s too French.”<sup>236</sup> Although Moreau could have applied for a license to remain in the United States, he chose not to oppose the expulsion order.<sup>237</sup>

While Moreau had planned to return to France next spring, the expulsion order hastened his departure.<sup>238</sup> Secretary Pickering issued Moreau, his wife, and daughter letters of safe-conduct on August 3, 1798, to allow them to travel in wartime without fear of arrest or detention.<sup>239</sup> Moreau and his family were provided free transportation home, although he had to pay extra to upgrade their quarters, buy provisions, and ship

234. The government partisanly prosecuted twenty-one persons under the Sedition Act and obtained convictions against eleven, all of whom were Democratic-Republican editors and publishers. When Jefferson became President, he pardoned them and reimbursed their fines. James Morton Smith, *Alien and Sedition Acts*, in JAMES MADISON AND THE AMERICAN NATION 1751-1836: AN ENCYCLOPEDIA 10-11 (Robert A. Rutland ed., 1994). See *United States v. Helstoski*, 442 U.S. 477, 493 (1979) (“The controversy over the Alien and Sedition Acts reminds us how one political party in control of both the Legislative and the Executive Branches sought to use the courts to destroy political opponents.”).

235. Letter from John Adams to Timothy Pickering (Oct. 16, 1798), in 8 THE WORKS OF JOHN ADAMS 606 (Charles F. Adams ed., 1854).

236. MOREAU DE SAINT-MERY, *supra* note 23, at 253.

237. See Alien Act, ch. 58, § 1, 1 Stat. 570 (1798); MOREAU DE SAINT-MERY, *supra* note 23, at 253-256. Giving precise reasons for expulsion may be unnecessary. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 588 n.14 (1952) (In strict law, a State can expel even domiciled aliens without so much as giving the reasons, the refusal of the expelling State to supply the reasons for expulsion to the home State of the expelled alien does not constitute an illegal, but only a very unfriendly act.”). If Moreau had requested a hearing, he could have asked for a detailed notice of the grounds for expulsion, or a bill of particulars. See *Ong Seen v. Burnett*, 232 F. 850, 852 (9th Cir. 1916); *Fougherouse v. Brownell*, 163 F. Supp. 580, 585 (D. Or. 1958).

238. MOREAU DE SAINT-MERY, *supra* note 23, at 249.

239. Letter of Safe Conduct from Timothy Pickering (Aug. 3, 1798), in 11 NATIONAL ARCHIVES, DOMESTIC LETTERS OF THE DEPARTMENT OF STATE, JUNE 30, 1798 - JUNE 29, 1799, at 35 (1943). See BLACK’S LAW DICTIONARY 1124 (6th ed. 1990); 1 KENT’S COMMENTARIES IN AMERICAN LAW 216 (John M. Gould ed., 14th ed. 1896) (defining “safe-conduct”).



their belongings. Moreau departed the United States from Newcastle, Delaware, on the ship *Adrastes*, on August 23, 1798.<sup>240</sup>

The threat of a French invasion diminished with American naval victories and the British destruction of a French fleet at the Battle of the Nile in August 1798.<sup>241</sup> After Napoleon ousted the French Directory in a Paris *coup d'état* a year later, he restored Franco-American relations. But when a peace settlement between the United States and France came on September 30, 1800,<sup>242</sup> news of it arrived too late to benefit either Adams or the Federalists. The Democratic-Republicans gained control of Congress in the fall elections, and their candidates Thomas Jefferson and Aaron Burr tied for the presidency, narrowly defeating Adams and Charles Cotesworth Pinckney. Adams would have won reelection except that the Constitution augmented the electoral vote of the Southern states by three-fifths of their slave population. The tie between Jefferson and Burr tossed the presidential race to the lame-duck House of Representatives, where Federalists reluctantly allowed Jefferson to become President.<sup>243</sup>

#### VI. AFTEREFFECT OF THE ALIEN ACT

The Alien Act established the precedent of the federal government's power to deport.<sup>244</sup> As the war with France subsided, however, Congress let the Act expire on June 24, 1800. The federal government did not reassert its power to control immigration until the War of 1812, when the threat of European invasion again arose. In 1813 Madison invoked the Alien Enemies Act of 1798 when he ordered the relocation or internment of British citizens residing within 40 miles of the Atlantic coast because of their "danger to public peace and safety."<sup>245</sup>

In an epistle John Adams indignantly pointed out to Jefferson the irony that President Madison, who like Jefferson had criticized the

240. MOREAU DE SAINT-MERY, *supra* note 23, at 253-56, 364.

241. DECONDE, *supra* note 7, at 128-30, 161, 210-28.

242. Convention Between the French Republic and the United States (Môrtefontaine Convention), 8 Stat. 178 (1800).

243. DAVID McCULLOUGH, JOHN ADAMS 556-62 (2001); Paul Finkelman, *The Color of Law: The Color Blind Constitution*, 87 NW. U. L. REV. 937, 971 (1993) (book review).

244. See EDWARD P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 15 (1981); ROY L. GARIS, IMMIGRATION RESTRICTION 32 (1927).

245. Presidential Proclamation (Feb. 23, 1813), *quoted in*, *In re Lockington*, Brightly, N.P. 269, 271 (Pa. Super. 1813), *enforced sub nom.* *Lockington v. Smith*, 15 F. Cas. 758 (C.C.D. Pa. 1817) (No. 8,448).

intended use of the Alien Act against French aliens, was then using analogous legislation against British aliens:

[W]hat is the conduct of our government now? Aliens are ordered to report their names, and obtain certificates once a month; and an industrious Scotchman, at this moment industriously laboring in my garden, is obliged to walk once a month to Boston, eight miles at least, to renew his certificate from the marshal. And a fat organist is ordered into the country, &c. All this is right. Every government has, by the law of nations, a right to make prisoners of war of every subject of an enemy. But a war with England differs not from a war with France. The law of nations is the same in both.<sup>246</sup>

At the conclusion of the War of 1812, the federal government returned to its previous practice of leaving control of immigration largely to the states.<sup>247</sup> The federal government did little to restrict immigration for about the next fifty years, although with the expiration of the Migration and Importation Clause in 1808 Congress banned the importation of slaves.<sup>248</sup> Congress passed laws to count arriving immigrants and to provide them a safer voyage.<sup>249</sup> Congress enacted twenty-four laws concerning citizenship and naturalization between 1798 and 1875.<sup>250</sup> The Southern states, however, remained dead set against any federal encroachment upon their laws on the entry and removal of free blacks. Congress' inability to resolve the vexing issue of control of free blacks prevented Congress in the antebellum era from displacing state laws and imposing federal control over immigration.<sup>251</sup>

246. Letter from John Adams to Thomas Jefferson (June 14, 1813), in 10 THE WORKS OF JOHN ADAMS 42 (Charles F. Adams ed., 1856).

247. Neuman, *supra* note 32, at 1833-34; GARIS, *supra* note 244, at 57-58.

248. Act of Mar. 2, 1807, ch. 22, 2 Stat. 426 (1807); Act of Mar. 3, 1819, ch. 101, 3 Stat. 532 (1819); Act of May 15, 1820, ch. 113, §§ 4-5, 3 Stat. 600 (1820); Act of June 16, 1860, ch. 136, 12 Stat. 40 (1860). See generally HUTCHINSON, *supra* note 244, at 19-46. Southern slave-owners benefited from the ban on importation of slaves, for it increased the value of the slaves they owned and produced. PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 126 (1996).

249. Act of Mar. 3, 1855, 10 Stat. 715 (1855); Act of Mar. 3, 1849, 9 Stat. 399 (1849); Act of May 17, 1848, 9 Stat. 220 (1848); Act of Feb. 22, 1847, 9 Stat. 127 (1847); Act of Mar. 2, 1819, 3 Stat. 489 (1819).

250. MARION T. BENNETT, *AMERICAN IMMIGRATION POLICIES* 9 (1963).

251. See Neuman, *supra* note 32, at 1866-80, 1889, 1897; HUTCHINSON, *supra* note 244, at 37, 40-41, 45-46. Cf. In re Ah Fong, 1 F. Cas. 213, 216 (C.C.D. Cal. 1874) (No. 102) (Field, Circuit Justice) (noting that much of the power that courts previously afforded states to control immigration "grew out of the necessity which the southern states, in which the institution of slavery existed, felt of excluding free negroes from their limits.").

Congress eventually began to assert its immigration powers during the Civil War—when federal supremacy was violently confirmed. Less than a year into the war, President Abraham Lincoln signed legislation in February 1862 prohibiting the importation of indentured labor from China.<sup>252</sup> Indentured immigration was akin to slavery, the abolition of which the federal government sought during the Civil War. Without Southern representatives to constrain Congress and with the government exercising its war powers, Congress passed this first restrictive federal immigration law since 1798.<sup>253</sup>

After the war, Congress prohibited immigration of slaves and indentured servants. Upon ratification of the Thirteenth Amendment to the Constitution in 1865,<sup>254</sup> Congress implemented it by passing the Anti-Peonage Act, which outlawed Mexican peonage and the Chinese coolie trade.<sup>255</sup> In 1869, Congress extended the ban on indentured immigration to Japan.<sup>256</sup>

The power of state legislatures to control immigration did not last long after the Civil War. In 1875, the Supreme Court unanimously struck down state immigration laws in New York and California as unconstitutional,<sup>257</sup> and Supreme Court Justice Stephen J. Field, while on circuit, suggested that if “further immigration is to be stopped, recourse

252. An Act to Prohibit the “Coolie Trade,” ch. 27, 12 Stat. 340 (1862).

253. See *The Prizes Cases*, 67 U.S. 635 (1862) (upholding blockade of rebel ports from enemy and alien ships, as an exercise of federal war power); *The Hound*, 12 F. Cas. 590, 592 (D.C.N.Y. 1864) (“Frauds may have been practiced upon the Chinese emigrants . . . [that] very likely induced congress to enact a law prohibiting American ships from participating in the business altogether . . .”); John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 *ASIAN L.J.* 55, 72-73 (1996) (“The proponents of this law sought to remedy the evil of ‘involuntary servitude’ or slavery. The Senate committee that proposed the bill analogized the ‘cooly trade’ to the slave trade . . . . To the extent that Chinese migrant labor was associated with slavery-like status, this early effort to regulate the trade during the Civil War is noteworthy.”).

254. U.S. CONST. amend. XIII (“Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.”).

255. An Act to Abolish and Forever Prohibit the System of Peonage, ch. 187, 14 Stat. 546 (1867). See *Robertson v. Baldwin*, 165 U.S. 275, 282 (1897) (Thirteenth Amendment’s prohibition of “involuntary servitude” was “intended to cover the system of Mexican peonage and the Chinese coolie trade, the practical operation of which might have been a revival of the institution of slavery under a different name”).

256. Act of Feb. 9, 1869, ch. 24, 15 Stat. 269 (1869).

257. See *Henderson v. Mayor of New York City*, 92 U.S. 259 (1875) (unanimous opinion) (striking down a New York head tax on immigrants and declaring preeminent federal power over immigration); *Chy Lung v. Freeman*, 92 U.S. 275 (1875) (unanimous opinion) (striking down a California law requiring bonds posted on arriving aliens).

must be had to the federal government, where the whole power over this subject lies.”<sup>258</sup> Congress responded by passing laws in 1875 and 1882 to prohibit entry of certain kinds of voluntary immigrants.<sup>259</sup> Added to this, Congress enacted companion legislation in 1888 that reintroduced the instrument of deportation.<sup>260</sup> Stung by the states’ rights controversy surrounding the Alien Act, Congress had taken nearly 90 years to pass another law authorizing deportation.<sup>261</sup>

## VII. CONCLUSION

Early in the nation’s history, the United States sought to deport aliens believed to pose a threat to national security. An undeclared war with France led Congress to pass its first deportation law—the Alien Act of 1798. Fearing a French invasion, Congress enacted the law to expel those aliens who would aid France. President John Adams used the Alien Act sparingly, however, and the federal government expelled only one alien—the French politician Médéric-Louis-Elie Moreau de Saint-Méry, suspected of secretly promoting France’s imperialist designs on North America. While Congress justified the Alien Act as a temporary war measure, states’ rights advocates opposed it as an unconstitutional exercise of executive power, an encroachment upon state sovereignty, and a threat to slavery. The constitutional controversy over America’s first deportation law foreshadowed the Civil War, and the controversy postponed the enactment of another federal deportation law for almost a century. The controversial issue of the Alien Act’s constitutionality was never resolved. But the law could have been justified as an exercise of war power against alien enemies, or as a proper delegation of legislative power on a matter of foreign affairs and national security that provided due process of law through a license hearing. Although the Supreme Court has never

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258. *In re Ah Fong*, 1 F. Cas. 213, 217 (C.C.D. Cal. 1874) (No. 102) (Field, Circuit Justice) (striking down California law requiring the posting of a bond by arriving immigrants). *Accord Ho Ak Kow v. Nunan*, 12 F. Cas. 252, 256 (C.C.D. Cal. 1879) (No. 6,546) (Field, Circuit Justice).

259. Act of Mar. 3, 1875, 18 Stat. 477 (1875) (prohibiting immigration for purposes of slavery and prostitution, and barring entry of felons); Immigration Act, 22 Stat. 214 (1882) (prohibiting immigration of convicts, “lunatics,” “idiots,” and indigents; levying a head tax on each immigrant).

260. Act of Sept. 13, 1888, § 13, 25 Stat. 476 (1888); Act of Oct. 19, 1888, 25 Stat. 566, 567 (1888).

261. Congress took four years longer to pass another registration law like that contained in the 1798 Naturalization Act. *Hines v. Davidowitz*, 312 U.S. 52, 70 (1941) (“So violent was the reaction to the 1798 laws that almost a century elapsed before a second registration act was passed.”).

determined the constitutionality of the Alien Act, its interpretations of the Constitution over the past two centuries strongly suggest that the statute was a valid exercise of federal power to control immigration and to wage war.