

THE ALIEN ENEMIES ACT OF 1798

Andrew Kent*

For the first time since World War II—and for the first time ever outside a formally declared war—an American president has invoked the Alien Enemies Act of 1798 to detain and deport noncitizens. Enacted during the Quasi-War with France, the Act’s operative language remains largely unchanged today. In March 2025, President Donald J. Trump proclaimed that members of the Venezuelan gang Tren de Aragua present in the United States are “alien enemies,” asserting that their activities, allegedly coordinated with President Nicolás Maduro’s government, constitute an “invasion” or “predatory incursion” within the meaning of the statute. Litigation challenging the invocation of the Alien Enemies Act on the merits is pending before a number of federal courts, and may reach the U.S. Supreme Court in time.

This litigation, together with the Supreme Court’s direction that statutes be interpreted according to their original meaning, makes possible—and necessary—the first comprehensive account of the Alien Enemies Act as it was understood at enactment. Drawing on legal, diplomatic, political, and intellectual history, this Article reconstructs the statute’s background in the law of nations, Anglo-American common law, and eighteenth-century British and American practice. It shows that by 1798, “alien enemies” was a well-established legal status, arising categorically based on nationality during a state of war. The Act codified that settled understanding; it did not create a broader or more flexible concept tied to individual dangerousness, as the Trump administration now contends. Through a close examination of the historical record, this Article concludes that the Trump administration’s 2025 invocation of the Act is unlawful. There has been no “invasion” or “predatory incursion” as those terms were understood in 1798, and no one presently in the United States can properly be classified as an “alien enemy” under the statute’s original meaning. The Alien Enemies Act is not an instrument for restraining dangerous individuals outside of wartime—a function governed instead by criminal law and immigration law.

* Joseph M. McLaughlin Chair, Fordham University School of Law. Many thanks to Abner Greene, Philip Hamburger, Lee Kovarsky, Thomas Lee, and Scott Rein for helpful comments on earlier versions, and to James Brudney, Martin Flaherty, Ethan Leib, and Michael Ramsey for useful discussions. Thanks to Danielle Dascher of Fordham’s Law Library for her research support. I submitted an amicus brief, based on an earlier version of this Article, in *W.M.M. v. Trump*, No. 25-10534, 2026 WL 2349473 (5th Cir. Aug. 13, 2026) (en banc) (amicus brief filed Nov. 13, 2025), <https://ssrn.com/abstract=5761043>, in support of the alleged alien enemy habeas petitioners.

While this Article addresses and answers questions of current importance, its scope and legal historical analysis also aim for broader significance. Enacted amid intense partisan conflict and a grave international crisis, the Alien Enemies Act's story illuminates enduring constitutional and legal issues, including the division of war powers between Congress and the president; the important role of Congress in interpreting the U.S. Constitution; the complex inheritance in early American law of the English common law, British governmental practices, and the law of nations; the historical scope of congressional authority over immigration and deportation; and, during the founding era and early republic, the availability of habeas corpus and judicial review in national security cases and the status and rights of noncitizens in wartime.

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INTRODUCTION

President Donald J. Trump has invoked the Alien Enemies Act, a 1798 statute,¹ to authorize the detention and removal from the United States of members of the Venezuelan criminal gang Tren de Aragua.² This was the first ever invocation of the Act outside a declared war,³ and the administration’s use of the statute has triggered substantial litigation. The modern U.S. Supreme Court directs that a statute be given the meaning it had

1. An Act Respecting Alien Enemies, ch. 66, 1 Stat. 577 (1798) (codified as amended at 50 U.S.C. §§ 21–24) [hereinafter 1798 AEA]. This Article will also refer to the Alien Enemies Act of 1798 as “the Act.”

2. Proclamation No. 10903, 90 Fed. Reg. 13033, 13034 (Mar. 20, 2025).

3. In the War of 1812 and World War I, the Alien Enemies Act was invoked after a formal declaration of war by Congress. For the War of 1812, see *infra* Part VI.A. For World War I, see Proclamation No. 1364, 40 Stat. 1650 (1917). In 1941, President Franklin D. Roosevelt invoked the Alien Enemies Act as to Japanese, German, and Italian nationals in the United States after the Pearl Harbor attack and just before Congress declared war on those countries. See Proclamation No. 2525, 6 Fed. Reg. 6321 (Dec. 10, 1941), *reprinted in* 55 Stat. 1700 (1941) (Japanese); Proclamation No. 2526, 6 Fed. Reg. 6323 (Dec. 10, 1941), *reprinted in* 55 Stat. 1705 (1941) (Germans); Proclamation No. 2527, 6 Fed. Reg. 6324 (Dec. 10, 1941), *reprinted in* 55 Stat. 1707 (1941) (Italians). For the proposition that these were the only invocations of the Alien Enemies Act before 2025, see JENNIFER K. ELSEA, CONG. RSCH. SERV., LSB11269, THE ALIEN ENEMY ACT: HISTORY AND POTENTIAL USE TO REMOVE MEMBERS OF INTERNATIONAL CRIMINAL CARTELS 3 (2025).

“at the time Congress enacted” it.⁴ A legal historical inquiry is thus needed to engage in contemporary statutory interpretation. This Article, the first-ever comprehensive analysis of the statute, supplies that needed history. The historical research presented here is extensive because American founding-era understandings of law, liberty, public order, politics, and constitutionalism were, in many ways, very different from ours today.⁵

The relevant history is also fascinating, not only answering questions about the meaning of the Act but also illuminating major and enduring questions about, among other things, the division of war powers between Congress and the president, the scope of congressional authority over immigration and deportation, the availability of habeas corpus and judicial review in national security cases, and international law protections of the rights of noncitizens in both war and peace.

Litigation about the legality of the Trump administration’s invocation of the Alien Enemies Act is pending before a number of federal courts.⁶ The case appears reasonably likely to reach the Supreme Court, which has already intervened twice on its emergency docket in Alien Enemies Act cases,⁷ almost certainly in recognition of the importance of the legal questions presented.

The key part of the Alien Enemies Act of 1798 is very similar to that which is codified in U.S. law today, differing only in immaterial ways.⁸ In its first section, the original 1798 statute provided:

That 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 territory of the United States, by any foreign nation or government, and the President of the United States shall make public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upward, who shall be within the

4. *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 277 (2018) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

5. See generally JONATHAN GIENAPP, *AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE* 41 (2024) (discussing the “profound differences” in constitutional and other thought); STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800*, at 5 (1993) (noting that the “mentality” of the American revolutionary and founding eras is “exceedingly difficult to recover”).

6. See *Alien Enemies Act Tracker*, LAWFARE, <https://www.lawfaremedia.org/projects-series/trials-of-the-trump-administration/tracking-trump-administration-litigation/alien-enemies-act-tracker> (on file with the *Fordham Law Review*) (last visited Aug. 14, 2026) (noting litigation in the United States District Courts for the Southern District of New York, the District of Colorado, the Southern and Western Districts of Texas, the Central District of California, and the Western District of Pennsylvania). The litigation that was being treated as the merits test case was mooted as this Article was being finished, when the Trump administration deported the named petitioners under ordinary immigration law. See *W.M.M. v. Trump*, 154 F.4th 207 (5th Cir.) (holding that the invocation of the Alien Enemies Act was illegal), *vacated and reh’g granted en banc*, 154 F.4th 319 (5th Cir. 2025), *dismissed as moot*, No. 25-10534, 2026 WL 2349473 (5th Cir. Aug. 13, 2026) (en banc).

7. See *infra* notes 38–43 and accompanying text.

8. See *Ludecke v. Watkins*, 335 U.S. 160, 162 (1948) (noting that the Act is “virtually unchanged since 1798”).

United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies.⁹

The Trump administration’s briefing in the 2025 litigation has advanced a very broad and historically unprecedented reading of the statute in two principal respects. First, the administration argues that Tren de Aragua’s activities in the United States constitute an “invasion” and “predatory incursion” by a “foreign nation or government,” stating that the then-existing Venezuelan government of President Nicolás Maduro directed Tren de Aragua to act as a kind of sleeper cell to come to the United States and attack U.S. persons.¹⁰ Second, in the three prior instances when the Act has been invoked—the War of 1812, World War I, and World War II—presidents followed the statute and legal background principles of alien enemy status by declaring that “all” nationals of the enemy foreign government were alien enemies.¹¹ The Trump administration has made no proclamation about Venezuelans generally but rather asserts that only Tren de Aragua members are alien enemies.¹²

This Article explains why the Trump administration’s use of the Alien Enemies Act is illegal—clearly contrary to the statute’s meaning. The most important term in the statute is “alien enemies.” The current litigation has not accorded this term the centrality that it deserves. The concept of an “alien enemy” was well-known in the law of nations,¹³ Anglo-American common law and statutory law, and government practice as of 1798. The term meant, with some nuance and qualification around the edges, a subject or a citizen of an enemy nation during a time of war.¹⁴ Under this background law, alien enemies were under various disabilities because of their status.¹⁵ Trade and all other kinds of commercial intercourse with alien enemies were banned; a government could confiscate the property of alien enemies; in some circumstances, alien enemies could not access the courts to seek the protection of the laws; and governments could detain, exclude, or remove

9. 1798 AEA, *supra* note 1, § 1, 1 Stat. at 577.

10. *See infra* Part I.

11. For the War of 1812, see *infra* notes 404–06 and accompanying text. For World War I and World War II, see the proclamations cited in *supra* note 3. The Act originally covered males aged fourteen and up. *See supra* note 9 and accompanying text. After a World War I-era change, it no longer applies only to males. *See* 50 U.S.C. § 21. By “all” in the main text, I mean all persons within the demographic and age criteria.

12. *See infra* note 47 and accompanying text.

13. The “law of nations” in eighteenth-century Anglo-America consisted of treaties, customary practices of states, general principles of domestic law common to all “civilized” countries, and the laws of nature as applicable to states rather than individuals. *See* Thomas H. Lee, *The Law of Nations and the Judicial Branch*, 106 GEO. L.J. 1707, 1715–22 (2018); Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 YALE L.J. 2202, 2212–13 (2015). To learn how natural law reasoning should guide the behavior of states, the American founding generation relied heavily on learned treatises by European publicists, such as Jean-Jacques Burlamaqui, Christian Wolff, Hugo Grotius, Samuel von Pufendorf, and, most importantly, Emer de Vattel. *See* Duncan Hollis, *The Original Meaning of Treaties*, 173 U. PA. L. REV. 1333, 1346 (2025); Cleveland & Dodge, *supra*, at 2212–13.

14. *See infra* Part III.A.

15. For details, see *infra* Part III.B.

alien enemies from the country. Under international law, the common law, and Anglo-American government practice prior to 1798, these harsh consequences occurred only in wartime because alien enemies existed only in wartime. The Alien Enemies Act codified this settled understanding.¹⁶

In the Act, an “invasion” is a large-scale offensive military attack on U.S. territory by a foreign state, while an “incursion” is a somewhat smaller-scale offensive military attack or raid that is more rapid and brief.¹⁷ The adjective “predatory” conveys that the incursion was for the (or a) purpose of plunder or pillage. The aggressor, according to the statute, must be a “foreign nation or government,” not a non-state actor, and the attack must enter the United States, that is, be “against the territory of the United States.”¹⁸ These interpretations of the Act’s key terms are confirmed by all available methods of statutory interpretation¹⁹: carefully reading the full 1798 text and examining the Act’s purposes and its political, diplomatic, and military contexts;²⁰ considering related statutes; understanding background rules of common law, international law, and government practice; and finding definitions of key words in dictionaries²¹ and contemporaneous linguistic usage, including in congressional debates of 1798.²²

From 1797 to 1801, the United States was engaged in what many historians call the Quasi-War with France, a “long crisis of half war and half peace” which “dominated” the administration of President John Adams.²³ When the Alien Enemies Act passed through Congress, that body had already recognized that the United States was in a state of partial armed hostilities with France at sea, limited to naval action and privateering.²⁴ The Alien Enemies Act originated in the U.S. House of Representatives, and no one in the House²⁵ was recorded arguing that the power to detain alien enemies should be recognized to already exist by background principles of law. When Congress legislated about alien enemies, it carefully reserved removal, detention, and other restraints for instances where war was “declared” or where a foreign government’s forces attempted, threatened, or effected a military attack on the land of the United States.²⁶ President Adams never

16. See *infra* Parts IV.D.3, V.

17. See *infra* Part V.

18. 1798 AEA, *supra* note 1, § 1, 1 Stat. at 577; see also 50 U.S.C. § 21.

19. To date, a primary tool of litigants and judges has been early modern dictionaries, but these have very significant limitations. See *infra* note 355 and accompanying text. They must be extensively supplemented by more reliable means of finding eighteenth-century statutory meaning.

20. See *infra* Parts III.B–C, IV.

21. See *infra* Part V.B.

22. See *infra* Parts IV.C–D, V.A, V.C.

23. ALEXANDER DECONDE, *THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1797–1801*, at vii, 4 (1966).

24. See *infra* Part IV.C.

25. Senate debates were only very briefly recorded at this time, generally limited to formal actions such as motions and roll call votes.

26. See *infra* Part IV.D.3.

invoked the Alien Enemies Act during the Quasi-War.²⁷ No qualifying military attack on U.S. territory occurred.

The Congress that passed the Alien Enemies Act was fully familiar with the phenomena of immigrants in the United States who might be hostile to the country and its government, or committing crimes in the United States, or possibly allied with a hostile foreign power in the event of future war. French and third-country pro-French aliens, especially Irish immigrants with radical or even revolutionary leanings, made up this group in the United States in the late 1790s. No one seems to have thought that these potentially hostile immigrants were themselves an “invasion” or “predatory incursion” that triggered the Alien Enemies Act.²⁸

Interpreting the Alien Enemies Act correctly, as a categorical wartime statute, does not disable the government from protecting the country. In 1798, potentially dangerous aliens who were not properly deemed alien enemies could still be surveilled, restrained, and deported by the government under the criminal law and what we would today call immigration law.²⁹ Today’s provisions of the Immigration and Nationality Act³⁰ that allow detention and removal of dangerous noncitizens had a predecessor in the Alien Law,³¹ passed just before the Alien Enemies Act. This statute, which supplemented a revised Naturalization Act of 1798,³² also created a system of alien registration.³³ In the 1790s, as today, federal and state criminal law allowed prosecution of dangerous acts by aliens.³⁴

Because some scholars and commentators have presented rather one-sided views of the Fifth Congress and the Adams administration,³⁵ I seek to present

27. See TERRI DIANE HALPERIN, *THE ALIEN AND SEDITION ACTS OF 1798: TESTING THE CONSTITUTION* 6 (2016).

28. See *infra* Part IV.D.3.

29. See *infra* Part IV.D.

30. Ch. 477, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

31. An Act Concerning Aliens, ch. 58, 1 Stat. 570 (1798). In 1798, this statute was usually referred to as the Alien Act or the Alien Law. Later, it became common to call it the Alien Friends Act, to distinguish it from the Alien Enemies Act. I use “Alien Law” to preserve contemporary usage while also making it easier for readers to distinguish the statute from the Alien Enemies Act.

32. Ch. 54, 1 Stat. 566 (repealed 1802).

33. See *infra* Parts IV.D.1–2.

34. See *infra* Part VI.B.3.

35. A good amount of scholarship on the Adams administration and Quasi-War period presents the emerging Republican Party, which opposed the Washington-Adams-Hamilton Federalists, as mostly honorable civil libertarians and lovers of peace standing up to paranoid, xenophobic, repressive, extreme Federalists, who were allegedly acting at least in part in bad faith and out of political partisanship, and bent on war with France and tyranny at home. See, e.g., DUMAS MALONE, *JEFFERSON AND THE ORDEAL OF LIBERTY* 384 (1962) (describing the Aliens, Naturalization, and Sedition Acts of 1798 as enacted “under conditions of fear and patriotic hysteria” by “extremists” who were able “to exploit war psychology for domestic political purposes”); DECONDE, *supra* note 23, at 78, 83, 85, 94 (describing “belligerent” Federalist “extremists” acting with “hysteria” and “a paranoiac fear of ill-defined conspiracies,” who “under the guise of patriotism” were spurring the United States to war with France in order to use that crisis for “purging the government of domestic Jacobins and alleged traitors” and allowing their party, “as patriots, the chance to crush internal opposition in the name of national security”).

a more balanced and accurate picture. Pervasive violence and plundering by France on U.S. commerce and merchant sailors, and France's threats to attack U.S. territory, were real.³⁶ Domestic unrest and violence in the United States were likewise real. And strident Republican opposition to the Alien Law, authorizing deportation of non-alien enemies, was not altogether altruistic. Indeed, it was motivated in part by wanting to limit congressional power to interfere with slavery, which they viewed as a state matter.³⁷

After introducing the present controversy over the Alien Enemies Act in Part I, the remainder of this Article seeks to understand the statute at the time of its 1798 enactment. Part II gives context for the Act by examining the military, diplomatic, political, ideological, and constitutional contexts as understood in 1798. Part III then examines the crucial legal regime for reading the Alien Enemies Act: the rules defining and governing treatment of alien enemies and alien friends.

Part IV analyzes the work product and debates of the second session of the Fifth Congress. Among other things, this part explores legislation and debates reflecting the understanding that the United States and France were in a state of partial armed hostilities at sea when the Alien Enemies Act passed. But as noted, this did not lead members of Congress to think that under background law or in the proposed Alien Enemies Act, French citizens in the United States were detainable as alien enemies. This part shows how thoughtfully Congress debated and calibrated its responses to French aggression and how carefully it limited presidential discretion in other acts related to the French crisis, providing some contextual evidence that the Alien Enemies Act was similarly careful and measured.

Having established the traditional meaning of "alien enemies" in Part III, and Congress's purposes and understandings as seen in House debates about the proposed Alien Enemies Act and related statutes in Part IV, Part V enlists further aids to define the triggering terms of the Act that are at issue in legal disputes today: "invasion" and "predatory incursion." Dictionaries, common usage, and basic canons of statutory interpretation known in the founding era are deployed.

Part VI interprets all relevant powers, duties, and liabilities in the Alien Enemies Act and clarifies other disputed terms besides the triggering language. This part looks closely at powers of detention and removal, codified international law protections found in the Alien Enemies Act, and the availability of judicial review for detentions under the Act.

As to judicial review, the modern Supreme Court has held that "[c]hallenges to removal under the AEA . . . must be brought in habeas,"³⁸ and that Alien Enemies Act detainees have a constitutional due process right to notice and a reasonable opportunity to be heard before removal, sufficient

36. See *infra* notes 92, 99, 204, 214–18, 227 and accompanying text.

37. See Walter Berns, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal*, 1970 SUP. CT. REV. 109, 116.

38. *Trump v. J.G.G.*, 145 S. Ct. 1003, 1005 (2025).

to “allow [detainees] to actually seek habeas relief.”³⁹ Cognizable issues on habeas include the adequacy of the notice and the opportunity to be heard, whether the detainee “is in fact an alien enemy” under the terms of the Act,⁴⁰ and questions of the “interpretation and constitutionality” of the Act, also described by the Court as questions of “the construction and validity of the statute.”⁴¹ The Court has cautioned, however, that “[t]he 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*,”⁴² but left it somewhat unclear what issues involve unreviewable presidential “discretion” as opposed to reviewable “interpretation” or “construction” of the Act.⁴³ Because the Supreme Court has already answered a number of important questions about judicial review, Part VI is confined to showing that, as of 1798, it seems very likely that a detainee who disputed whether they were actually an alien enemy would have had a right to seek review of that question via habeas corpus.

A Conclusion briefly situates the U.S. government’s approach to immigrants, internal security, and national defense in an international context. The 1790s were a period of large migrant inflows for many European and North American states and colonies, and the reasons for emigration were often seen as raising national security concerns for the receiving states, including the United States.⁴⁴ Far from being unusually extreme, the response to this by the Federalists in Congress and the U.S. executive branch was moderate when compared to the policies adopted by, for example, France and Britain.

39. A.A.R.P. v. Trump, 145 S. Ct. 1364, 1368 (2025) (quoting *J.G.G.*, 145 S. Ct. at 1006).

40. *J.G.G.*, 145 S. Ct. at 1006 (quoting *Ludecke v. Watkins*, 335 U.S. 160, 171 n.17 (1948)).

41. *J.G.G.*, 145 S. Ct. at 1006 (quoting *Ludecke*, 335 U.S. at 163); *Ludecke*, 335 U.S. at 163–65, 170–71. In *Ludecke v. Watkins*, 335 U.S. 160 (1948), heard after the active hostilities of World War II ended by the surrender of the United States’ enemies, the Court allowed a detained German alien enemy “to question the [continued] existence of the ‘declared war,’” but deferred to the political branches, which had not formally terminated the state of war, to resolve that question. *Id.* at 170–73.

42. *Ludecke*, 335 U.S. at 164 (emphasis added).

43. See also *J.G.G.*, 145 S. Ct. at 1005 (stating that the Alien Enemies Act “largely ‘preclude[s] judicial review’” (alteration in original) (quoting *Ludecke*, 335 U.S. at 163)). For an attempt to sort through some of the questions about judicial review in cases challenging President Trump’s use of the statute, see Andrew Kent, *AEA Litigation: Enforcing Congress’s Limits on Delegated Power*, LAWFARE (Mar. 18, 2026), <https://www.lawfaremedia.org/article/aea-litigation--enforcing-congress-s-limits-on-delegated-power> [https://perma.cc/7KD8-Q2SG].

44. On immigration to the United States, see *infra* notes 89–90, 268–69 and accompanying text. On immigration in the 1790s to other states and territories, see Jan C. Jansen, *Aliens in a Revolutionary World: Refugees, Migration Control and Subjecthood in the British Atlantic, 1790s–1820s*, 255 PAST & PRESENT 189, 196–203 (2021).

I. INVOCATION OF THE ALIEN
ENEMIES ACT IN 2025

On February 20, 2025, Secretary of State Marco Rubio, acting under 8 U.S.C. § 1189 and an executive order by President Trump,⁴⁵ designated Tren de Aragua as a Foreign Terrorist Organization (FTO) and its members Specially Designated Global Terrorists (SDGT).⁴⁶ President Trump then issued a proclamation in mid-March 2025 invoking the Alien Enemies Act, determining that Tren de Aragua—“TdA,” as the administration refers to it—“is perpetrating, attempting, and threatening an invasion or predatory incursion against the territory of the United States,” and that its members (if fourteen years or older, and not U.S. citizens or lawful permanent residents) would be detained and removed from the United States as “Alien Enemies” under the Alien Enemies Act.⁴⁷

President Trump’s proclamation announced that Tren de Aragua’s invasion and predatory incursion is occurring “at the direction, clandestine or otherwise, of the Maduro regime in Venezuela.”⁴⁸ The proclamation also states that “all such members of TdA are, by virtue of their membership in that organization, chargeable with actual hostility against the United States” and a “danger to the public peace or safety of the United States,” rendering them ineligible for the Act’s allowance of reasonable time for voluntary departure and resolving affairs regarding their property in the United States—in other words, allowing removal immediately after detention.⁴⁹

About half a year after President Trump invoked the Alien Enemies Act, his administration conducted military strikes on several vessels in international waters which were allegedly manned, at least in part, by Tren de Aragua, and allegedly carried narcotics meant for sale in the United States.⁵⁰ Reportedly, the administration subsequently sent a notice under the War Powers Resolution⁵¹ to several congressional committees stating that

45. Exec. Order No. 14157, 90 Fed. Reg. 8439 (Jan. 29, 2025) (Designating Cartels and Other Organizations as Foreign Terrorist Organizations and Specially Designated Global Terrorists).

46. Foreign Terrorist Organization Designations, 90 Fed. Reg. 10030 (Feb. 20, 2025); Specially Designated Global Terrorist Designations, 90 Fed. Reg. 10030 (Feb. 20, 2025).

47. Proclamation No. 10903, 90 Fed. Reg. 13033, 13034 (Mar. 20, 2025) (Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren de Aragua).

48. *Id.* “Nicolas Maduro, who claims to act as Venezuela’s President . . . leads the regime-sponsored enterprise *Cártel de los Soles*, which coordinates with and relies on TdA . . . to carry out its objective of using illegal narcotics as a weapon.” *Id.* at 13033. News reporting and release of some government documents suggest that there is not unanimity within the U.S. government about the connection to President Maduro’s government. See Charlie Savage & Julian E. Barnes, *Spy Agencies Do Not Think Venezuela Directs Gang, Declassified Memo Shows*, N.Y. TIMES (May 5, 2025), <https://www.nytimes.com/2025/05/05/us/trump-venezuela-gang-ties-spy-memo.html> (on file with the *Fordham Law Review*).

49. Proclamation No. 10903, 90 Fed. Reg. at 13034.

50. For a legal analysis of the strikes, see Matthew C. Waxman, *Armed Conflict?: Trump’s Venezuela Boat Strikes Test U.S. Law*, COUNCIL ON FOREIGN RELS. (Oct. 15, 2025), <https://www.cfr.org/articles/armed-conflict-trumps-venezuela-boat-strikes-test-us-law> [<https://perma.cc/ELY6-2NGV>].

51. 50 U.S.C. §§ 1541–1548.

the United States conducted the attacks in “self-defense” and that the president has “determined that the United States is in a noninternational armed conflict with these designated terrorist organizations,” whose actions “constitute an armed attack against the United States.”⁵²

These U.S. military strikes were followed by a partial naval blockade of Venezuela, aimed at interdicting petroleum exports.⁵³ Then, in early January 2026, a U.S. air and land attack captured President Maduro and brought him to the United States for criminal indictment.⁵⁴ In other words, the “Maduro regime,” a foundation of President Trump’s invocation of the Alien Enemies Act because it ties Tren de Aragua to a “foreign nation or government” in the Act’s first section, no longer exists.

It is somewhat unclear why President Trump invoked the Alien Enemies Act, since the FTO and SDGT designations gave the U.S. government broad authority to exclude Tren de Aragua members from the United States at entry and to deport them if found in the country.⁵⁵ One can make guesses. For instance, perhaps the president was informed (incorrectly) that Alien Enemies Act removals would be subject to no judicial review.⁵⁶ Perhaps the administration was advised that using a wartime authority and framing events as warlike would help persuade courts to give more deference to the executive branch’s factual assertions or legal positions. Perhaps proclaiming that unauthorized immigrant gang members were engaged in an “invasion” was thought by the Trump administration to assist with shaping public perceptions about its immigration policies.⁵⁷ Whatever the reasons, the

52. Charlie Savage & Eric Schmitt, *Trump ‘Determined’ the U.S. Is Now in a War with Drug Cartels, Congress Is Told*, N.Y. TIMES (Oct. 2, 2025), <https://www.nytimes.com/2025/10/02/us/politics/trump-drug-cartels-war.html> (on file with the *Fordham Law Review*) (quoting portions of a confidential notice to Congress obtained by the *New York Times*).

53. CFR Editors, *United States Announces Blockade on Venezuela*, COUNCIL ON FOREIGN RELS. (Dec. 17, 2025), <https://www.cfr.org/articles/united-states-announces-blockade-venezuela> [https://perma.cc/7RQQ-YL28].

54. Mariel Ferragamo, *A Guide to Maduro’s Capture and Venezuela’s Uncertain Future*, COUNCIL ON FOREIGN RELS. (Jan. 8, 2026), <https://www.cfr.org/articles/guide-maduros-capture-and-venezuelas-uncertain-future> (on file with the *Fordham Law Review*).

55. On the statutory framework under the immigration law, see generally MICHAEL JOHN GARCIA & RUTH ELLEN WASEM, CONG. RSCH. SERV., RL32564, IMMIGRATION: TERRORIST GROUNDS FOR EXCLUSION AND REMOVAL OF ALIENS (2010).

56. Attorney General Pamela J. Bondi issued a memorandum in March 2025 stating that a person classified as an alien enemy and ordered to be removed could not challenge those decisions in “a hearing before an immigration judge,” by “an appeal . . . to the Board of Immigration Appeals,” or by “judicial review . . . in any court of the United States.” Memorandum from Att’y Gen. to L. Enf’t Officers on Guidance for Implementing the Alien Enemies Act, § 5(a) (Mar. 14, 2025), <https://www.justice.gov/oip/media/1440676/dl> [https://perma.cc/B9J4-KRQT].

57. See generally Exec. Order No. 14287, 90 Fed. Reg. 18761, 18761 (May 2, 2025) (relying in part on the federal government’s duty under Article IV of the Constitution to “protect” the U.S. states “against Invasion” as authority for an executive order about “sanctuary jurisdictions” and other immigration issues).

president has invoked the Alien Enemies Act, and U.S. courts are now assessing the legality of that action.⁵⁸

In this litigation, the U.S. government asserts that both “invasion” and “predatory incursion” in the Alien Enemies Act are terms that include but are “not limited to military attacks,” and that an invasion could more broadly mean any “hostile entrance,” including “hostile acts of mass migration.”⁵⁹ The government maintains that Tren de Aragua actions in the United States fall within both of the statutory terms because “TdA’s illegal entry and continued unlawful presence is an encroachment on U.S. territory that entails hostile acts contrary to the rights of citizens to be free from criminality and violence.”⁶⁰ In fall 2025, a panel of the U.S. Court of Appeals for the Fifth Circuit rejected the government’s broad reading of the statute and enjoined its application to the habeas petitioners,⁶¹ but that opinion was vacated pending a decision on rehearing en banc, and the en banc court found the case moot.⁶² One judge, dissenting from the now-vacated panel decision, would have held that the president’s determination was “conclusive” of whether an invasion and predatory incursion were occurring; the dissent also indicated that the Act’s statutory predicates were met by Tren de Aragua’s activities.⁶³

II. THE CONTEXTS OF THE ALIEN ENEMIES ACT

The United States’ Quasi-War with France, lasting from 1797 to 1801, was the result of events beginning nearly a decade earlier, starting with the French Revolution. This part gives a brief background on the international and domestic events that led the United States into a limited, maritime war with France and caused the Fifth Congress to enact the Alien Enemies Act. The part focuses on how the French wars and France’s mistreatment of the United States—a neutral party in the wars—impacted the commerce, diplomacy, and domestic politics of the United States. It also details the growth of bitter partisan politics in the 1790s, including rising concerns of the emerging Federalist Party about immigration and national security. Finally, this part

58. *W.M.M. v. Trump*, 154 F.4th 207 (5th Cir.), *vacated and reh’g granted en banc*, 154 F.4th 319 (5th Cir. 2025), *dismissed as moot*, No. 25-10534, 2026 WL 2349473 (5th Cir. Aug. 13, 2026) (en banc); *see supra* note 6 and accompanying text.

59. Supplemental Brief for Respondents-Appellees at 40–41, 47–48, *W.M.M. v. Trump*, No. 25-10534, 2026 WL 2349473 (5th Cir. Aug. 13, 2026) (en banc).

60. *J.A.V. v. Trump*, 781 F. Supp. 3d 535, 558 (S.D. Tex. 2025) (quoting the U.S. government’s briefing); *see also* Supplemental Brief for Respondents-Appellees at 37, *supra* note 59 (“[T]he terms ‘predatory incursion’ and ‘invasion’ cover a wide range of hostile entries, not just organized military hostilities.”).

61. *W.M.M.*, 154 F.4th at 223 (“[W]e define an invasion for purposes of the AEA as an act of war involving the entry into this country by a military force of or at least directed by another country or nation, with a hostile intent.”); *id.* at 227 (“[A] ‘predatory incursion’ described armed forces of some size and cohesion, engaged in something less than an invasion, whose objectives could vary widely, and are directed by a foreign government or nation. The success of an incursion could transform it into an invasion. In fact, it would be hard to distinguish some attempted invasions from a predatory incursion.”).

62. *See supra* note 6 and accompanying text.

63. *W.M.M.*, 154 F.4th at 240, 273, 277–79 (Oldham, J., dissenting).

discusses the shared executive-congressional understandings about constitutional war powers that decisively shaped the Alien Enemies Act and much other legislative and executive activity of the Quasi-War.

*A. French Wars and the Politics and
Diplomacy of the United States*

In 1792, revolutionary France went to war with Austria and Prussia, conducted massacres at home, and executed King Louis XVI; in 1793, France declared war on Britain, Spain, and the Dutch Republic, and revolutionary leaders continued to kill internal enemies.⁶⁴ About 17,000 people were executed by revolutionary tribunals in 1793 and 1794 during the Great Terror.⁶⁵ Over the next decade, France also fought Sardinia, Russia, Naples, Portugal, the Ottoman Empire, and other principalities and countries.⁶⁶ Over the 1790s, multiple smaller European states were de facto or de jure incorporated into an expanding French empire.⁶⁷

Politics and popular feeling in the United States were divided over the European wars. The United States had won its independence from Britain with decisive help from France, and many Americans were thus naturally pro-French and anti-British.⁶⁸ Dating from 1778, the United States and France had a treaty of alliance that contained a U.S. military guarantee of French possessions in the Caribbean, and also a standard treaty of amity and commerce.⁶⁹ People who became the leaders of the Republican Party wanted the U.S. government to lean in a pro-French and anti-British direction from the outset of government under the new U.S. Constitution.⁷⁰

When France's 1789 revolution at first appeared moderate, many Americans supported the French people's aspirations.⁷¹ But when word reached the United States of the execution of the French king and the Reign of Terror that followed, with perhaps 20,000 to 40,000 victims, public opinion in the United States started turning against the French cause.⁷² Many

64. See JEREMY D. POPKIN, *A SHORT HISTORY OF THE FRENCH REVOLUTION* 66, 68–70, 76–78, 84 (8th ed. 2024).

65. *Id.* at 93.

66. See generally PAUL W. SCHROEDER, *THE TRANSFORMATION OF EUROPEAN POLITICS, 1763–1848*, at 100–200 (1994) (discussing the wars resulting from the French Revolution during 1792–1798).

67. See *infra* note 91 and accompanying text.

68. See DANIEL GEORGE LANG, *FOREIGN POLICY IN THE EARLY REPUBLIC: THE LAW OF NATIONS AND THE BALANCE OF POWER* 78 (1985).

69. Treaty of Alliance, Fr.-U.S., art. 11, Feb. 6, 1778, 8 Stat. 6; Treaty of Amity and Commerce, Fr.-U.S., Feb. 6, 1778, 8 Stat. 12.

70. See REGINALD HORSMAN, *THE DIPLOMACY OF THE NEW REPUBLIC, 1776–1815*, at 44–45 (1985); RICHARD BUEL, *SECURING THE REVOLUTION: IDEOLOGY IN AMERICAN POLITICS, 1789–1815*, at 29 (1972). In this Article, I refer to “Republicans” and “Federalists” to assist the reader in identifying the views and positions of government officials and other people. I am aware that indicia of formal political parties were first developing as the 1790s progressed.

71. See GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 174–75 (2009); ELKINS & MCKITRICK, *supra* note 5, at 309–10.

72. See HALPERIN, *supra* note 27, at 14–15; ELKINS & MCKITRICK, *supra* note 5, at 311.

Republicans, though, retained a warm regard for the progressing French Revolution, while many Federalists reacted with growing horror.⁷³

In an effort to avoid war with Britain or France, President George Washington proclaimed the neutrality of the United States in 1793, soon ratified by Congress,⁷⁴ and then executed the Jay Treaty of 1794 with Great Britain.⁷⁵ France and their Republican supporters saw both these actions as indications that the Washington administration was favoring Great Britain in its war with France. From 1793 on, both Great Britain and France aggressively practiced wartime commerce raiding in the Atlantic and Caribbean, often targeting American vessels and cargo for allegedly running blockades, carrying contraband to the enemy, or other supposed violations of the United States' neutrality.⁷⁶ Domestic opinion and politics in the United States became more polarized and bitter,⁷⁷ and France increased its depredations on neutral U.S. commerce.⁷⁸

As political parties emerged in the 1790s, gradually overcoming the previously widespread view that parties and "factions" were dangerous to a republic and perhaps even illegitimate, U.S. politics were divided over more than just foreign policy and relations with France and Britain. The Federalists were stronger in New England and the coastal South, while Republicans were stronger in more rural and agrarian areas.⁷⁹ Compared to the Republicans, Federalists drew their leadership and public support more from merchant, commercial, professional, and other prosperous men; more from cities and towns than rural areas; more from traditionalists in religion, and conservatives and elitists in their political and social views; and more from the native born than from immigrants.⁸⁰ Federalists' fear of dangerous immigration to the United States became a key divide between the emerging

73. See, e.g., WOOD, *supra* note 71, at 176–77; LANCE BANNING, THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY 208–46 (1978).

74. See ELKINS & MCKITRICK, *supra* note 5, at 336–40; WILLIAM R. CASTO, FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL 25–34 (2006). For Congress's statute, see Act of June 5, 1794, ch. 50, 1 Stat. 381.

75. Treaty of Amity, Commerce and Navigation, Gr. Brit.-U.S., Nov. 19, 1794, 8 Stat. 116.

76. See 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 141, 312–13, 315, 327, 449–52, 461, 469 (William S. Hein & Co. 1998) (1833) [hereinafter ASP: FOREIGN RELATIONS]; ELKINS & MCKITRICK, *supra* note 5, at 354–56.

77. See JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 256–61 (2018); JAMES ROGER SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS 117–37 (1993); ELKINS & MCKITRICK, *supra* note 5, at 341–65.

78. See ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 139–40 (1976); JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 5 (1956).

79. See John F. Hoadley, *The Emergence of Political Parties in Congress, 1789–1803*, 74 AM. POL. SCI. REV. 757, 776–77 (1980).

80. See GIENAPP, *supra* note 77, at 258–59; WOOD, *supra* note 71, at 147, 164–73, 216–17, 225–26, 234; JOHN C. MILLER, THE FEDERALIST ERA 1789–1801, at 100–04 (1960); Hoadley, *supra* note 79, at 776–77.

parties.⁸¹ Federalists also tended to be more national in their outlook compared to more locally oriented Republicans, and they favored a stronger national government while Republicans organized themselves around states' rights and a narrow construction of federal constitutional powers.⁸²

When President Washington retired after his two terms, the two most important Federalist leaders were John Adams and Alexander Hamilton. The core Republican leaders were Virginians—Thomas Jefferson, James Madison, James Monroe, John Taylor, John Nicholas, and William Branch Giles—many of whom were slave-owning aristocrats. The one non-Virginian was Albert Gallatin of Pennsylvania, a naturalized citizen originally from Switzerland.

By the mid-1790s, as Gordon Wood explains, “[n]either party accepted the legitimacy or existence of the other. Indeed, each believed that the other was out to destroy the country.”⁸³ Republicans were often described by Federalists as “Jacobins,” said to be committed to radical democracy, social unrest, and even anarchy or violent revolution in the United States, perhaps aided by French arms.⁸⁴ In turn, many Republicans portrayed Federalists as barely secret monarchists,⁸⁵ partisans of elite social and economic interests, and eager for war against France in order to aid Britain.⁸⁶

A number of deeply unfortunate pro-French miscues by prominent Republicans in government, French provocations, and some overt collusion between Republicans and French officials to influence U.S. politics and government, radicalized Federalists' views of the other party.⁸⁷ The most public and damaging incident was a threat by the French minister to the

81. See DOUGLAS BRADBURN, *THE CITIZENSHIP REVOLUTION: POLITICS AND THE CREATION OF THE AMERICAN UNION 1774–1804*, at 130–37, 160–67 (2009); ELKINS & MCKITRICK, *supra* note 5, at 590–91.

82. BRADBURN, *supra* note 81, at 124; BANNING, *supra* note 73, at 206, 264–66; MILLER, *supra* note 80, at 100.

83. WOOD, *supra* note 71, at 161.

84. HALPERIN, *supra* note 27, at 26–27; WOOD, *supra* note 71, at 177–78, 216–17, 243, 718; BRADBURN, *supra* note 81, at 103, 127; SHARP, *supra* note 77, at 151; SMITH, *supra* note 78, at 11–12, 14, 20–21. For contemporaneous statements, see 8 ANNALS OF CONG. 1479, 1482 (Apr. 20, 1798) (statement of Rep. John Allen, Federalist from Connecticut) (reminding the House that France threatens to continue to “ravage our coasts,” and that France says it has a “French party in America” helping them); Letter from President George Washington to Timothy Pickering, Sec’y of State (July 11, 1798), *reprinted by* NAT’L ARCHIVES: FOUNDERS ONLINE [hereinafter NAFO], <https://founders.archives.gov/documents/Washington/06-02-02-0310> [<https://perma.cc/5GZV-AJ6H>] (stating that “[i]f the French should be so mad as openly, and formidably, to invade these United States . . . their operations will commence in the Southern quarter,” because, among other reasons, “they will expect, from the tenor of the debates in Congress, to find more friends there,” and “there can be no doubt of their arming our own Negroes against us”).

85. BRADBURN, *supra* note 81, at 127.

86. WOOD, *supra* note 71, at 179–80, 216–17; SHARP, *supra* note 77, at 152.

87. See LINDSAY M. CHERVINSKY, *MAKING THE PRESIDENCY: JOHN ADAMS AND THE PRECEDENTS THAT FORGED THE REPUBLIC* 66–67 (2024); ELKINS & MCKITRICK, *supra* note 5, at 341–65, 425–26, 498–503, 566; SHARP, *supra* note 77, at 106–07, 121–22, 151; MILLER, *supra* note 80, at 169–70; ALEXANDER DECONDE, *ENTANGLING ALLIANCE: POLITICS & DIPLOMACY UNDER GEORGE WASHINGTON* 247–48, 353, 358–59, 374–75, 381, 423–55 (1958).

United States that war could result if Thomas Jefferson was not selected over John Adams in the 1796 presidential election.⁸⁸

As noted, immigration to the United States in the 1790s worried many Federalists and contributed to domestic unrest and political polarization. People fleeing unsettled political situations abroad were viewed suspiciously by many Federalists. There were French immigrants, often committed to revolutionary ideals, but fleeing the increasingly violent and repressive series of French governments; some Black immigrants from Saint-Domingue (now Haiti) presumed to support the antislavery rebellion there; and many Irish immigrants, thought to support violent independence from Britain and to be committed to radical politics and the Jeffersonian-Republican cause in America.⁸⁹ Federalists generally thought a peaceful and successful nation required a populace that formed a “true national community” having a relatively homogenous “national character,” which was undermined by large immigrant inflows from places with different mores and cultures.⁹⁰

Reports from Europe increased the worries of Federalists about pro-French immigrants and support of France from Republican political leaders. They learned that Napoleon’s armies and French intelligence services used indigenous spies and pro-French politicians and activists to undermine the governments in the Netherlands, Switzerland, Genoa, Venice, and elsewhere, and turn them into French puppet states.⁹¹

To punish the United States for its Jay Treaty with Britain, to help fund its wars, and to take advantage of what it thought was a weak United States, France in 1796 increased its quasi-piratical campaign against neutral U.S. shipping in the Atlantic and Caribbean, seizing hundreds of vessels per year.⁹² With essentially no navy since 1785, the United States was initially defenseless against France’s maritime attacks.⁹³ France offered unconvincing justifications for how their actions were consistent with treaties with the United States and the law of nations.⁹⁴

88. See HALPERIN, *supra* note 27, at 36; SHARP, *supra* note 77, at 151.

89. See HALPERIN, *supra* note 27, at 30–39, 44–45; BRADBURN, *supra* note 81, at 130, 133; SMITH, *supra* note 78, at 22–25.

90. BRADBURN, *supra* note 81, at 140, 150–51, 159–61; see also MILLER, *supra* note 80, at 100, 108–16.

91. WOOD, *supra* note 71, at 246; HALPERIN, *supra* note 27, at 36–38, 43; BRADBURN, *supra* note 81, at 150–51; ELKINS & MCKITRICK, *supra* note 5, at 503–04, 564, 566; BUEL, *supra* note 70, at 174; DECONDE, *supra* note 23, at 99.

92. See Schedule of the Names of American Vessels Captured by the French, and of the Circumstances Attending Them, Extracted from the Philadelphia Gazette, and the Gazette of the United States, and Commencing with July, 1796, *reprinted in* 2 ASP: FOREIGN RELATIONS, *supra* note 76, at 57–61; Letter from Timothy Pickering, Sec’y of State, to Samuel Sewall, Comm. on Com. and Manufactures (Dec. 27, 1797), *reprinted in* 1 NAVAL DOCUMENTS RELATED TO THE QUASI-WAR BETWEEN THE UNITED STATES AND FRANCE 20–36 (1935) [hereinafter NAVAL DOCUMENTS]; DECONDE, *supra* note 23, at 9; ELKINS & MCKITRICK, *supra* note 5, at 537–38.

93. See Dudley W. Knox, *Preface*, in NAVAL DOCUMENTS, *supra* note 92, at v–vi.

94. For an analysis of French illegality by Alexander Hamilton, see Titus Manlius, *The Stand No. V*, N.Y. COM. ADVERTISER, Apr. 16, 1798, *reprinted by* NAFO, *supra* note 84, <https://founders.archives.gov/documents/Hamilton/01-21-02-0237> [https://perma.cc/ZQ5R-J7YC].

*B. Coercive Alien Regulation
Is First Contemplated in 1797*

The conception of the Alien Enemies Act began in spring 1797. President John Adams had hoped that diplomacy would resolve the crisis with France, as it had earlier with Britain.⁹⁵ But when news reached the United States about the French government's insulting treatment and expulsion of the newly appointed U.S. ambassador, Charles Cotesworth Pinckney, President Adams realized that a stronger response was required.⁹⁶

Before the first session of the Fifth Congress assembled, President Adams sought private opinions from his cabinet about what to do by executive action and what to request of Congress. In these kinds of situations, the cabinet secretaries tended to take their direction from Hamilton. After consulting Hamilton, Secretary of State Timothy Pickering, a vigorously anti-French Federalist from Massachusetts, recommended to President Adams a variety of measures, including building naval vessels, fortifying ports, adding more artillery units to the U.S. Army for coastal defense, increasing the militia, authorizing a "provisional army" of substantial size, allowing U.S. merchant vessels to arm themselves for defensive purposes against French raiders, and a limited embargo on U.S. ships leaving port unless they could be protected by convoy.⁹⁷ Secretary Pickering also recommended that "a law be passed authorizing the Executive to cause spies and persons justly suspected of designs hostile or injurious to the United States, to be apprehended—offenders against the provisions of the law to be tried and punished—and foreigners compelled to quit the territories of the United States."⁹⁸

President Adams's message to Congress of May 16, 1797, stated that French warfare against neutral U.S. shipping violated the law of nations and the 1778 treaty between the two countries, resulting in substantial "depredations on our commerce [and] personal injuries to our citizens."⁹⁹ He urged Congress to adopt the defensive military measures suggested by Secretary Pickering and Hamilton.¹⁰⁰

Though President Adams, in his message, did not adopt all of Secretary Pickering's recommendations—notably, he declined to call for legislation punishing spies and seditious activity and authorizing deportation of unwanted foreigners—President Adams and Secretary Pickering were aligned in important respects in spring 1797. Together, Secretary Pickering's suggestions—which he surely communicated to his allies in and out of Congress—and President Adams's message were a key formative event for the eventual Alien Enemies Act.

95. See ELKINS & MCKITRICK, *supra* note 5, at 544–45.

96. See *id.* at 550–51.

97. Letter from Timothy Pickering, Sec'y of State, to President John Adams (May 1, 1797), *reprinted by* NAFO, *supra* note 84, <https://founders.archives.gov/documents/Adams/99-02-02-1954> [<https://perma.cc/3HWB-XQ3Y>].

98. *Id.*

99. Speech of President John Adams (May 16, 1797), *reprinted in* 1 ASP: FOREIGN RELATIONS, *supra* note 76, at 41.

100. *Id.*

President Adams stated the following, which may partially explain why the term “predatory incursion” was used in the Alien Enemies Act:

But besides a protection of our commerce on the seas, I think it highly necessary to protect it at home, where it is collected in our most important ports. The distance of the United States from Europe, and the well known promptitude, ardor, and courage of the people in defence of their country, happily diminish the probability of invasion; nevertheless, to *guard against sudden and predatory incursions*, the situation of some of our principal seaports demands your consideration.¹⁰¹

As of 1797, “predatory incursion” was not a legal term of art in U.S. or international law, but its meaning is rather easily discerned. As discussed below in Part V, the term generally meant a small-scale and usually rapid and brief military raid or expedition by land or sea, aimed at least in part at plunder and destruction. President Washington had used the term in this way in an address to Congress in his second term.¹⁰²

President Adams also announced in his opening address that, having a sincere desire “to preserve peace and friendship with all nations,” he would “institute a fresh attempt at negotiation” and send a new diplomatic delegation to Paris.¹⁰³ The delegation was comprised of Elbridge Gerry, John Marshall, and Charles Cotesworth Pinckney.

Representative William Loughton Smith, a Federalist from South Carolina, introduced the president’s legislative program in the House a few days later in early June 1797.¹⁰⁴ But Republicans “denounced” President Adams’s address “as being essentially a war speech,”¹⁰⁵ and stymied most of the legislative proposals during the first session.¹⁰⁶ Privately, leading Republicans like Jefferson apparently thought American merchants and Federalist politicians were actively in league with the British government to lead the United States into war against France.¹⁰⁷

C. Shared Understandings of Congress’s Control over War

To understand Congress’s actions and its members’ debates during the French crisis, one must understand that the Constitution’s distribution of war powers between Congress and the president was conceived of differently in the founding era than it is today. The best works of modern scholarship show that Congress’s Article I power to “declare war” was understood in early America—as it was for over a century later—to give Congress the power to decide whether to initiate war with a foreign country by either proclamation

101. *Id.* (emphasis added).

102. *See infra* note 385 and accompanying text.

103. Speech of President John Adams, *supra* note 99.

104. 7 ANNALS OF CONG. 240 (June 5, 1797).

105. ELKINS & MCKITRICK, *supra* note 5, at 552.

106. *See id.* at 555; DECONDE, *supra* note 23, at 31; SMITH, *supra* note 78, at 13–14.

107. ELKINS & MCKITRICK, *supra* note 5, at 554–55.

or deed.¹⁰⁸ As Professor Michael Ramsey explains, “in eighteenth-century usage ‘declaring’ war could refer to an act that began a state of war, as well as to a formal proclamation.”¹⁰⁹

Congress also had control of what might be called “lesser” war powers—coercive measures against foreign persons or property that often preceded or coincided with full war. Under Article I’s Marque and Reprisal Clause and its Captures Clause,¹¹⁰ Congress was solely empowered to decide when and under what circumstances to authorize U.S. naval vessels or privateers on the seas, or executive officials on land, to seize and condemn alien property as a coercive tool.¹¹¹ Congress also controlled embargoes—whether peaceful, covering only U.S. vessels, or hostile, detaining foreign vessels in U.S. port—under the Foreign Commerce Clause.¹¹²

In the founding era, there was widespread agreement that under the Constitution’s distribution of war powers, when a foreign state had “declared” war on the United States—that is, formally proclaimed it or clearly showed by actions an intention to initiate war—“only Congress may decide whether the nation will wage war” in response.¹¹³ Not all modern scholars agree that this was the original constitutional meaning,¹¹⁴ but voluminous evidence from the 1790s shows that the broader view of congressional power described above was very widely accepted. Examining

108. See Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 309–15 (2008) [hereinafter Prakash, *Separation*]; Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1569–1609 (2002); Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War,”* 93 CORNELL L. REV. 45, 67–94 (2007) [hereinafter Prakash, *Unleashing*]; William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 696–700 (2007).

109. Michael D. Ramsey, *Text and History in the War Powers Debate: A Response to Professor Yoo*, 69 U. CHI. L. REV. 1685, 1688 (2002). The major academic proponent of a different view is Professor John Yoo. His work argues that the power to “declare war” was understood at the founding to be simply a power to announce a change in legal status, and that the president was understood to have full constitutional power to decide to initiate military conflicts. See, e.g., John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996). He is clearly wrong, as shown by the work of Professors Ramsey and Prakash and many other scholars. See generally Saikrishna Bangalore Prakash, *Deciphering the Commander-in-Chief Clause*, 133 YALE L.J. 1 (2023) (refuting Yoo’s reading of the Commander-in-Chief Clause); Julian Davis Mortenson, *Executive Power and the Discipline of History*, 78 U. CHI. L. REV. 377, 393 (2011) (noting “how discredited Yoo’s views are among scholars who have studied the historical question”).

110. See U.S. CONST. art. I, § 8, cl. 11 (“The Congress shall have Power To . . . declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.”).

111. See Prakash, *Separation*, *supra* note 108, at 316–21; J. Andrew Kent, *Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 915–16 (2007). For a somewhat narrower reading of the original meaning, see generally Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683 (2009).

112. See Kent, *supra* note 111, at 916; Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 349 (2001).

113. Prakash, *Unleashing*, *supra* note 108, at 94.

114. See, e.g., Ramsey, *supra* note 108, at 1546 (“Congress’s declare-war power does not limit the President’s power to respond to an attack.”).

the Washington administration's views regarding potential military conflict with Native American tribes, Professor Saikrishna Prakash demonstrates that President Washington and his cabinet agreed that only Congress could decide that the country would engage in "offensive" military actions in response to a stated declaration of war or a military attack by a tribe.¹¹⁵ Congress, exercising its constitutional control of the subject, at times "rejected" provisions of bills "that authorized offensive expeditions against the Indian nations that had declared war" against the United States.¹¹⁶ Even when a tribe or foreign nation indicated by word or deed that it was initiating war against the United States, the Constitution was understood to allow the president to only "adopt defensive measures meant to protect American lives, property and territory," and only "so long as such measures did not amount to an informal declaration of war."¹¹⁷ These understandings persisted into the Quasi-War period under the Adams administration.¹¹⁸

In the 1790s, the understanding that Congress controlled war and war-related coercive measures also applied to controlling alien enemy status. Leading cases about Virginians' prewar debts to British creditors demonstrate this. John Marshall, as a private lawyer representing American debtors in numerous cases, pleaded and argued, among other defenses, that Great Britain had violated the 1783 Treaty of Paris, including by encouraging and assisting Native American tribes to engage in "war & hostility" against Americans, which would mean the treaty was void, the countries were again at war, and British subjects, being alien enemies, could not sue in U.S. courts.¹¹⁹ Justice James Iredell rejected this defense in the circuit court, but not because Marshall and other lawyers for American creditors were wrong that alien enemies could not sue—Iredell agreed with that. Rather, Iredell opined that (1) a court's decision about whether a treaty was no longer in effect due to breach "must be grounded on the solemn Declaration of Congress alone," and (2) the defense "that a War in fact tho' not in name subsists, and therefore the Plaintiff is an Alien Enemy," was defective in the absence of "a Declaration that we are in a state of War from that part of the Sovereignty of the Union to which that important subject is committed,"

115. Prakash, *Unleashing*, *supra* note 108, at 97–101 (quoting external and internal statements by President Washington, Secretary of War Henry Knox, and Secretary of State Jefferson, and noting the agreement of Secretary of the Treasury Hamilton).

116. *Id.* at 99.

117. *Id.* at 97.

118. *See infra* Parts IV.C–D.

119. *Jones v. Walker*, Amended Pleas, Nov. 23, 1791, *reprinted in* 5 THE PAPERS OF JOHN MARSHALL DIGITAL EDITION: SELECTED LAW CASES, 1784–1800, at 280–87 (Charles Hobson ed., 2014) (on file with the *Fordham Law Review*) [hereinafter PJMD]. This was a defense that Marshall used in many cases. *See Jones v. Walker*, Editorial Note, *in* 5 PJMD, *supra*, at 264–69.

namely “Congress.”¹²⁰ Sitting on circuit in the same case, Chief Justice John Jay agreed with Iredell.¹²¹

The view that Congress, under its war powers, controlled matters concerning alien enemies is seen in a decision dating from the War of 1812. The Supreme Court, per Chief Justice John Marshall, ruled that the existence of a state of war triggers the U.S. government’s “full right to take the persons and . . . property of the enemy wherever found.”¹²² But under the Constitution, the Court explained, there must be “some existing law” of Congress to authorize such actions because Congress, not the president alone, has the power to “declare war” and to “grant letters of marque and reprisal [and] make rules concerning captures on land and water.”¹²³ The Court noted that the Alien Enemies Act reflected the constitutional principle that express authorization from Congress was required before the president could take action against alien enemies, and that mere assertions by the executive that a state of war existed were not enough.¹²⁴

III. “ALIEN ENEMIES” IN BACKGROUND PRINCIPLES OF LAW

The Alien Enemies Act passed in summer 1798 with Republican support, even though the Republican Party opposed many other war measures, particularly the Alien Law. As a historian of the era writes, “[t]he Republicans had no objections to a well-drawn bill governing the control of

120. *Ware v. Hylton*, James Iredell’s Circuit Court Opinion, June 7, 1793, *reprinted in* 7 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 263, 266–68 (Maeva Marcus ed., 2003) [hereinafter DHSC]. Like *Jones v. Walker*, *Ware v. Hylton* was an action brought against Virginia debtors by the British firm, Farrell & Jones, with the debtor defended by Marshall (assisted by other lawyers). When both British partners died, Ware was appointed executor for the firm’s assets and was now the plaintiff in U.S. courts. See *Jones v. Walker*, Editorial Note, in 5 PJMD, *supra* note 119.

121. Chief Justice Jay recognized that if “the King of Great Britain had become the *enemy* of the United States, in *that sense* which would justify the court in considering his subjects as being *alien enemies* . . . consequently [they would be] incapable of maintaining actions in our courts.” *Ware v. Hylton*, John Jay’s Circuit Court Opinion, June 7, 1793, *reprinted in* 7 DHSC, *supra* note 120, at 293. But, Jay continued, “[t]here is a wide distinction between a power who is unfriendly and inimical to, and a power actually at war with the United States, and they with him.” *Id.* Like Iredell, Jay held that the courts must decide this issue by reference to the actions of “the power vested with the right to make war,” i.e., Congress. *Id.* at 293–94.

122. *Brown v. United States*, 12 U.S. (8 Cranch) 110, 122–23, 126 (1814).

123. *Id.* at 123, 126 (quoting U.S. CONST. art. I, § 8, cl. 11).

124. See *id.* at 126. In 1798, a few of the more legally aggressive Federalist members of the House thought that when war existed, “the President already possesses, as Commander-in-Chief,” power to detain alien enemies. 8 ANNALS OF CONG. 1791 (May 22, 1798) (statement of Rep. Harrison Gray Otis, Federalist from Massachusetts). But, other House members disagreed vehemently. Samuel Dana, a Federalist from Connecticut, argued that under “monarchical Governments,” regulation of alien enemies could be left to “the law of nations . . . yet, in this country, where the sovereignty of the country is vested by the Constitution in Congress, these regulations must be fixed by law.” See *id.* at 1580 (May 3, 1798). Congress in 1798 decided it should specify by statute when the president could treat people as alien enemies inside the United States, consistent with its control of war. See *infra* Part V.D.

enemy aliens.”¹²⁵ Some early language in drafts of the Alien Enemies Act was objectionable for Republicans and some Federalists,¹²⁶ but once the offending language was removed, a number of Republicans supported passage of the Act.¹²⁷

A number of Republicans supported the more modest Alien Enemies Act, as eventually passed, because it was understood that Congress could constitutionally enact it using its war powers and that it did not infringe on the legal rights of alien enemies in the United States. This is seen in debates leading up to the enactment of the 1798 statute,¹²⁸ and in both commentary¹²⁹ and governmental actions¹³⁰ after its passage. An important example of subsequent commentary is a report, authored by James Madison (who was set on the task by Vice President Thomas Jefferson), that was then issued by the Republican-controlled Virginia General Assembly in 1800. This report, which attacked the Alien Law as unconstitutional, did not complain about the Alien Enemies Act. The report stated that, “[w]ith 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

125. SMITH, *supra* note 78, at 35.

126. For example, an early bill draft provided that alien enemies “shall . . . be subject, with their goods and effects, to a just retaliation of any unusual severities, restraints, and confiscations, which shall be suffered by the citizens of the United States, resident within the territory of the hostile Nation or Government, and inflicted by their authority.” 8 ANNALS OF CONG. 1785 (May 22, 1798). Matthew Lyon, a Republican from Vermont, immediately stated that he was not “willing to give a power to the President which might enable him to distress innocent persons.” *Id.* at 1786. James Bayard, a Federalist from Delaware, objected that parts of the bill were “so indefinite that a person cannot ascertain when he commits an offense.” *Id.* at 1788.

127. See WOOD, *supra* note 71, at 249 (stating that Republicans in Congress “had no serious objection to restraining enemy aliens during wartime”).

128. See *infra* Part IV.D.3.

129. One important piece of evidence is that most of the speeches, resolutions, petitions, and other public documents created by legislators and citizen groups in 1799 and 1800 to express opposition to the constitutionality and policies of the Alien Law and the Sedition Act simply ignored the Alien Enemies Act. See, e.g., 9 ANNALS OF CONG. 2993 (Feb. 25, 1799) (statement of Rep. Albert Gallatin) (noting that petitions had been received by Congress opposing the Alien Law and Sedition Act, but “[n]o petition has been presented against” the Alien Enemies Act). The famous (or infamous) Virginia and Kentucky Resolutions, written by Madison and Jefferson, respectively, did not condemn the Alien Enemies Act but savaged the Alien Law and Sedition Act, and implied that states could treat these federal statutes as null and void. See Resolutions Adopted by the Kentucky General Assembly (Nov. 10, 1798), reprinted by NAFO, *supra* note 84, <https://founders.archives.gov/documents/Jefferson/01-30-02-0370-0004> [<https://perma.cc/R6X9-UM8S>]; Virginia Resolutions, in the House of Delegates (Dec. 21, 1798), reprinted by NAFO, *supra* note 84, <https://founders.archives.gov/documents/Madison/01-17-02-0128> [<https://perma.cc/WGN2-QHXX>].

130. When Republicans took control of the presidency and Congress in 1801, they did not repeal the Alien Enemies Act. They did soften the Naturalization Act but retained the 1798 version’s ban on alien enemies seeking naturalization. See Act of Apr. 14, 1802, ch. 28, § 1, 2 Stat. 153, 154.

enemies.”¹³¹ Madison’s report further opined that the law of nations “authorizes the expulsion of” any alien enemies “as may be found within the country,” and thus “the act of Congress, for the removal of alien enemies . . . is justified by the constitution.”¹³²

This rare consensus in the Fifth Congress was possible because the term “alien enemy” was a well-known and frequently used term of art in Anglo-American government and law. Although there were some unsettled legal issues about alien enemy status, almost all the core legal rules were clear. The substance of those rules was approved, and their proper application during wartime was considered appropriate on a bipartisan basis. For the Fifth Congress, the Alien Enemies Act reflected continuity with preexisting law and practice—hence its relatively uncontroversial nature in 1798.

A. *The Definition of “Alien Enemy”*

In English law, as set forth by Sir William Blackstone, “[t]he first and most obvious division of the people is into aliens and natural-born subjects.”¹³³ An “alien” was a “foreigner,” a person “born in another country, under the obedience of another prince,” sometimes called a “stranger.”¹³⁴ Blackstone’s definition was that “natural-born subjects” were those “born within the dominions of the crown of England, that is, within the ligeance, or as it is generally called, the allegiance of the king,” who had a “perpetual” and “natural” allegiance to the crown, while “aliens” were those “born out of

131. REPORT OF VIRGINIA GENERAL ASSEMBLY ON THE ALIEN AND SEDITION ACTS, reprinted by NAFO, *supra* note 84, <https://founders.archives.gov/documents/Madison/01-17-02-0202> [<https://perma.cc/6T86-GW4L>] (often called “The Report of 1800”).

132. *Id.* On the other hand, the Alien Law was unconstitutional, the report argued, because, among other reasons, Congress lacked an enumerated power over the topic and so that power was reserved to the U.S. states. *See id.*

133. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 235 (*354) (Wilfrid Prest ed., Oxford Univ. Press 2016) (1765). I will cite Blackstone with both the modern Oxford pagination and the standard star* convention because star* pagination is not uniform across all editions of the Commentaries.

134. *See* NOAH WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE 9 (New Haven, Sidney’s Press 1806) (“Alien . . . a foreigner, a stranger”); 1 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW, ALPHABETICALLY DIGESTED UNDER PROPER TITLES (Dublin, Luke White 6th ed. 1793) (defining in § Aliens that “[a]n Alien is one born in a strange Country and different Society, to which he is presumed to have a natural and necessary Allegiance”); 1 EDWARD WOOD, A COMPLETE BODY OF CONVEYANCING, IN THEORY AND PRACTICE 217 (Dublin, William Porter 6th ed. 1792) (contrasting the legal rights of “[a]n alien enemy, that is, one born under another prince in enmity with the [British] king” and “one born in another country, under the obedience of another prince in amity with our king, who is amongst us accounted as an alien amy [friend]”).

[allegiance],” those “stranger born.”¹³⁵ There was much nuance,¹³⁶ but these are the basic definitions.

Generally speaking, a foreigner who was a citizen or subject of a government at war with England (and later, Great Britain and then the United Kingdom) was an alien enemy, and a foreigner who was a citizen or subject of a country at peace with England was an alien friend (sometimes called an alien in amity, alien in league, or alien *ami* or *amy*, using the Law French term for “friend”).¹³⁷ These rules were understood to be part of English common law and the law of nations.

Americans came to reject the English idea of a “natural” and “perpetual” allegiance owed to the monarch or other sovereign power of the land in which one was born.¹³⁸ But notwithstanding this important difference, American law and governmental practice carried forward crucial distinctions drawn from English law and international law: free people were divided into two classes, subject (and post-U.S. independence, citizen) versus alien, and within the category of alien, alien friend versus alien enemy.

Under background principles of eighteenth-century common law and international law, a country became an “enemy” or in “enmity,” thus creating alien enemy status of its nationals, in two basic ways: when war was formally declared or when a country “slips suddenly into a war without any

135. 1 BLACKSTONE, *supra* note 133, at 235, 237 (*354, 357–58). For another source agreeing with Blackstone’s definitions, see 1 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY (London, Law-Printers to the King 1764) (distinguishing in § Alien between “natural born subjects whose parents, at the time of their birth, were under the actual obedience of our King, and whose place of birth was within his dominions,” a “denizen,” and an “Alien . . . one born in a strange country”). On denizens, see the next note.

136. English law had a variety of subtleties concerning subjecthood. For instance, acting under the royal prerogative, the English monarch could by letters patent make an alien into a “denizen,” giving rights to take real estate by purchase or devise, lacked by aliens. 1 BLACKSTONE, *supra* note 133, at 240 (*362). Greater privileges in English law came from “[n]aturalization,” which could not “be performed but by act of parliament,” and put an alien “in exactly the same state as if he had been born in the king’s ligeance,” with a caveat. *Id.* Neither a denizen nor a naturalized subject could be “a member of the privy council, or parliament.” *Id.*

137. See, e.g., *The Great Case of Monopolies*, Between the East-India Company, Plaintiffs, and Tho. Sandys, Defendant, 36 Car. II, reprinted in 7 A COMPLETE COLLECTION OF STATE-TRIALS, AND PROCEEDINGS FOR HIGH-TREASON, AND OTHER CRIMES AND MISDEAMEANOURS 530 (London, T. Wright 4th ed. 1778) (reporting the statement of the Attorney-General of England, Sir Robert Sawyer, that “[t]he Common Law, and our Law-books, take notice of but two sorts of Foreigners, alien friends, and alien enemies”); see also Andrew Kent, *Judicial Review for Enemy Fighters: The Court’s Fateful Turn in Ex parte Quirin, the Nazi Saboteur Case*, 66 VAND. L. REV. 153, 178–79, 188–89 (2013) [hereinafter Kent, *Judicial*]; Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1860 (2009); J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 527 (2007) [hereinafter Kent, *Global Constitution*]. On the definition of alien enemy specifically, see 2 GILES JACOB & T.E. TOMLINS, THE LAW-DICTIONARY (London, Andrew Strahan 10th ed. 1797) (stating in § King V.3 that an alien enemy is a person of “a nation . . . at enmity with England”); 1 BACON, *supra* note 134 (stating in § Abatement(B)(3) that “[a]n Alien Enemy [is] one whose King is in Enmity with ours”).

138. See BRADBURN, *supra* note 81, at 104–06; JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870, at 173–209 (1978).

solemnity,” by being the aggressor or defender in a military attack.¹³⁹ In other words, war triggered alien enemy status.

Writers on the law of nations uniformly stated this view of alien enemy status. For instance, Emer de Vattel, a Swiss law of nations publicist frequently relied on by Americans in the eighteenth and nineteenth centuries, wrote that “[t]he enemy is he with whom a nation is at open war,” and in time of war, the “two nations are enemies, and all the subjects of the one are enemies to all the subjects of the other.”¹⁴⁰

There is also substantial domestic U.S. authority showing that, as of 1798, alien enemy status was understood to arise with the advent of war. In the 1780s and 1790s, American courts often adjudicated suits by British creditors seeking to recover debts from Americans undertaken prior to the American Revolutionary War.¹⁴¹ In *Ware v. Hylton*,¹⁴² discussed above, Justice Iredell made clear that a British creditor could only be considered an alien enemy, and thus barred from suing the debtor, if the United States was presently “in a state of War” with Great Britain.¹⁴³ In doing so, Justice Iredell rejected an argument from the debtors’ lawyers that the creditor was “an Alien Enemy” because “a War in fact tho’ not in name subsists” due to Britain’s alleged breaches of the 1783 peace treaty that ended the Revolutionary War.¹⁴⁴

In the same case on circuit, Chief Justice Jay agreed that British subjects were not alien enemies as to the United States in 1793. Following well-established rules of the common law and the law of nations, Chief Justice Jay wrote that alien enemy status turned on being “actually at war,” and further explained:

There is a wide distinction between a power who is unfriendly and inimical to, and a power actually at war with the United States, and they with him. There is, also, a wide distinction between the existence of causes which would justify a war, and the existence of actual war in consequence of them.¹⁴⁵

139. 2 JACOB & TOMLINS, *supra* note 137 (§ King V.3); *see also* 2 BLACKSTONE, *supra* note 133, at 271 (*401) (discussing the treatment of the goods of a “foreigner . . . resident in England,” who becomes an “alien enemy” “after[] a war breaks out between his country and ours”); 1 *id.* at 239 (*360) (contrasting alien enemies with “alien-friends,” that is, foreigners “whose countries are in peace with ours”).

140. EMER DE VATTEL, *THE LAW OF NATIONS*, bk. III, ch. V, §§ 69–70, at 509 (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1758).

141. *See* Wythe Holt, “To Establish Justice”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1430–39; Charles F. Hobson, *The Recovery of British Debts in the Federal Circuit Court of Virginia, 1790 to 1797*, 92 VA. MAG. HIST. & BIOGRAPHY 176, 176–99 (1984).

142. *Ware v. Hylton*, James Iredell’s Circuit Court Opinion, June 7, 1793, *reprinted in* 7 DHSC, *supra* note 120, at 268.

143. *Id.*

144. *Id.*

145. *Ware v. Hylton*, John Jay’s Circuit Court Opinion, June 7, 1793, *reprinted in* 7 DHSC, *supra* note 120, at 293; *see also* *Hamilton v. Eaton*, 11 F. Cas. 336, 338 (C.C.D.N.C. 1792) (No. 5,980) (opinion of Sitgreaves, J.) (discussing “British subjects” and “their disability as alien enemies to sue,” and stating that “[e]very one knows that disability can only exist during the continuance of a war”).

This rule is also seen in many bilateral treaties of the United States entered into prior to 1798, which contained articles protecting alien enemies of the respective signatories. These treaties spoke of alien enemy status arising when “war” broke out or arose between the two countries.¹⁴⁶

It was understood by American legal and political elites of the 1790s that a formal, written declaration was not required for war to exist in law.¹⁴⁷ War was never formally declared by either Great Britain or the American colonies during the Revolutionary War,¹⁴⁸ but the U.S. Congress and American states considered British subjects to be alien enemies during the Revolutionary War.¹⁴⁹

While it is clear that full war—whether formally declared or not—triggered alien enemy status, it is somewhat less clear in the reported authorities prior to 1798 whether a more limited or partial state of war did the same. There is no doubt, as a general matter, that international law and U.S. law in the late eighteenth century recognized that a state of armed hostilities could be limited by, for example, issuance of only a partial authorization of hostilities by the sovereign power in the state. Recognition in 1798 of the legality of a state of partial or limited armed war is seen in congressional legislation and the expressed views of Alexander Hamilton, Federalist cabinet officials, and Federalist members of Congress, all discussed below.¹⁵⁰ Supreme Court case law arising from the Quasi-War with France confirms that Congress could by legislation put the United States into a partial and limited state of war.¹⁵¹

146. See, e.g., Treaty of Amity and Commerce, Fr.-U.S., *supra* note 69, at art. 20, 8 Stat. at 24 (“[I]f a war shall break out between the said two nations.”); Treaty of Amity and Commerce, Neth.-U.S., art. 18, Oct. 8, 1782, 8 Stat. 32, 42 (“[I]f a war should break out, between their High Mightinesses the States General of the United Netherlands, and the United States of America.”); Treaty of Amity and Commerce, Swed.-U.S., art. 22, Apr. 3, 1783, 8 Stat. 60, 72 (“[I]n case a war should break out between the said two nations.”); Treaty of Friendship, Limits, and Navigation, Spain-U.S., art. 13, Oct. 27, 1795, 8 Stat. 138, 144 (“[I]f a war shall break out between the said two nations.”).

147. See Ramsey, *supra* note 108, at 1543; Prakash, *Unleashing*, *supra* note 108, at 67–94.

148. Cf. Letter from Mr. Jefferson, Sec’y of State, to Mr. Hammond, Minister Plenipotentiary of Great Britain (May 29, 1792), *reprinted in* 1 ASP: FOREIGN RELATIONS, *supra* note 76, at 202 [hereinafter Jefferson Letter to Hammond] (stating that Great Britain considered the American Revolution an internal rebellion and therefore “did not conduct it according to the rules of war, established by the law of nations, but according to her acts of parliament”).

149. See, e.g., Hamilton v. Eaton, 11 F. Cas. 336, 339–40 (C.C.D.N.C. 1792) (No. 5,980) (opinion of Ellsworth, Circuit Justice) (discussing the status of British subjects as alien enemies to the United States during the American Revolutionary War); *id.* at 338 (opinion of Sitgreaves, J.) (discussing the same); Letter from Thomas Jefferson, Governor of Va., to the County Lieutenants (Mar. 26, 1781), *reprinted by* NAFO, *supra* note 84, <https://founders.archives.gov/documents/Jefferson/01-05-02-0315> [<https://perma.cc/Q2UA-P6E9>] (stating that “deserters from the British army who have taken refuge in this state” are “deemed in law alien enemies”).

150. See *infra* notes 220, 234, 249–52, 254, 257–59, 264–65 and accompanying text.

151. See *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801) (Marshall, C.J.); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40 (1800) (opinion of Washington, J.); *id.* at 39 (opinion of Moore, J.); *id.* at 43 (opinion of Chase, J.).

The core meaning of “war” was simply military conflict occurring with sovereign authorization on both sides,¹⁵² and the sovereign (in the United States, Congress) had the right to authorize unlimited or limited hostilities.¹⁵³ Influential European authorities on the law of nature and law of nations had the same view.¹⁵⁴ Word choice reflected these distinctions, with “war” (unmodified) typically being used for the full-scale event while either “hostilities” or “war”—modified by adjectives such as “partial,” “limited,” “mitigated,” “inferior,” or “imperfect”—were used for lesser states of military conflict.¹⁵⁵

The question of the degree of military conflict, short of war, required for alien enemy status is potentially a complex one, but two circumstances make it more straightforward for this Article. First, whatever the background law and practice, Congress in the Alien Enemies Act specified the triggers for

152. See *Bas*, 4 U.S. at 40 (opinion of Washington, J.) (“It may, I believe, be safely laid down, that every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war.”); *id.* at 43–44 (opinion of Chase, J.) (holding that “hostilities” involving a “species of warfare” between two countries “authorised . . . [by] the public authority” is “war”); JEAN-JACQUES BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW*, vol. 2, pt. IV, ch. 3, § VII, at 468 (Petter Korkman ed., Thomas Nugent trans., Liberty Fund 2006) (1763) (defining “war” as “taking up arms with a view to decide a quarrel” when “carried on between sovereign powers”); VATTTEL, *supra* note 140, bk. III, ch. I, §§ 1–2, at 469 (defining “war” as “that state in which we prosecute our right by force” and “[p]ublic war” as “that which takes place between nations or sovereigns, and which is carried on in the name of the public power”). There were other kinds of war than bilateral publicly authorized armed conflict. For instance, some “war” could be “private” on one side, as in a state’s authorized forces fighting pirates who lacked any sovereign status or authority. See Ramsey, *supra* note 108, at 1612 n.254.

153. See *Talbot*, 5 U.S. at 8 (“Congress have the power of declaring war. They may declare a general war, or a partial war. So it may be a general *maritime* war, or a partial maritime war.”); see also *Bas*, 4 U.S. at 40–41 (opinion of Washington, J.); *id.* at 43 (opinion of Chase, J.).

154. Burlamaqui defined war as a contest of “arms” between sovereign powers and distinguished it between two types: “*perfect* and *imperfect*.” BURLAMAQUI, *supra* note 152, vol. 2, pt. IV, ch. 3, §§ VI–VII, XXX, at 468, 475. Perfect war “entirely interrupts the tranquility of the state, and lays a foundation for all possible acts of hostility,” including the use of “violence” against the “enemy” “*in infinitum*.” *Id.*, vol. 2, pt. IV, ch. 3, § XXX, at 475; *id.*, vol. 2, pt. IV, ch. 5, § VII, at 488. Imperfect war “does not intirely interrupt the peace, but only in certain particulars,” and generally means “those acts of hostility which sovereigns exercise against each other, or, with their consent, their subjects, by seizing the persons or effects of the subjects of a foreign commonwealth.” *Id.*, vol. 2, pt. IV, ch. 3, § XXXI, at 475.

155. In addition to sources cited in *supra* notes 152–54, see also Treaty of Friendship, Limits, and Navigation, Spain-U.S., arts. 5, 13, Oct. 27, 1795, 8 Stat. 138 (making rules in the event that “a war shall break out between the two said Nations” and agreeing that each will “restrain by force all hostilities on the part of the Indian nations living within their boundary” against the other party); *Bas*, 4 U.S. at 40–41 (opinion of Washington, J.) (distinguishing “declared,” “solemn” and “perfect” full-scale “war” from “imperfect war” in which “those who are authorised to commit hostilities, act under special authority, and can go no farther than to the extent of their commission”); *id.* at 43 (opinion of Chase, J.) (stating, as to France, “Congress has not declared war in general terms; but congress has authorised hostilities on the high seas by certain persons in certain cases,” which renders the state one of “limited, partial war”); James Iredell’s *Charge to the Grand Jury of the Circuit Court for the District of South Carolina*, GAZETTE OF THE U.S. (Philadelphia), May 12, 1794, reprinted in 2 DHSC, *supra* note 120, at 455 (“[T]he Constitution of the United States entrusted the Congress alone with the authority of declaring war, or permitting any inferior species of hostility.”).

invoking the statute outside of “declared war,” namely when an “invasion or predatory incursion” was “perpetrated, attempted, or threatened against the territory of the United States, by any foreign nation or government.”¹⁵⁶ Second, there was near-unanimity in 1798 about Congress’s constitutional power (and duty) to control when the United States would go to war or take measures that were only allowable in a state of war.¹⁵⁷ This widespread constitutional agreement meant that Congress in 1798 believed it had to precisely specify when the president could invoke the Alien Enemies Act.¹⁵⁸ Congress was careful not to grant so much discretion that the president could invoke the Act, imposing potentially severe restrictions on a foreign country’s nationals—alien enemy disabilities, understood to be lawful only in wartime—and de facto put the United States in a state of war, without congressional agreement.

B. Alien and Alien Enemy Disabilities

Determining whether a person was an alien or, worse, an alien enemy mattered greatly because of the harsh disabilities attendant to it. Anglo-American law for many centuries allowed rough treatment of aliens, especially alien enemies.

1. British Law and Practice

By the late seventeenth century, the following rules applied in England. When friendly aliens came peacefully into England, they were considered to owe a “local” and “temporary” allegiance to the sovereign; allegiance and protection being reciprocal, this temporary, local allegiance and peaceful conduct put the friendly aliens under the temporary protection of the laws and government while they remained in England, and required their due submission and accountability to local law.¹⁵⁹ The “rights” of friendly aliens under temporary, local allegiances were “much more circumscribed” than those of natural-born subjects.¹⁶⁰ Aliens, even friendly ones, could not purchase or hold real estate for their own use, and thus could not sue over it.¹⁶¹ Friendly aliens were otherwise free to engage in trade, make wills, and

156. 1798 AEA, *supra* note 1, § 1, 1 Stat. at 577. Analysis of the triggering language is found in *infra* Parts IV.D.3, V.

157. See *supra* Part II.C and *infra* Parts IV.C–D.

158. See *infra* Part IV.D.

159. See PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 35, 70–73 (2010); Kent, *Judicial*, *supra* note 137, at 176–77; Hamburger, *supra* note 137, at 1838–40, 1847–49, 1898–1901; Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 603–04 (2008); Kent, *Global Constitution*, *supra* note 137, at 502–04.

160. 1 BLACKSTONE, *supra* note 133, at 238 (*359).

161. *Id.* at 238–39 (*360).

manage their other personal affairs, and they could bring personal civil actions to protect themselves.¹⁶²

Alien enemies were by default¹⁶³ out of the protection of the municipal law¹⁶⁴ and denied the right to affirmatively seek the aid of the courts.¹⁶⁵ This rule was applied in all manner of private party versus private party litigation, whether common law, equity, maritime, or prize.¹⁶⁶ The more complex question of alien enemies seeking judicial protection via the writ of habeas corpus—an action on a prerogative writ rather than a traditional civil “action”—is discussed below.¹⁶⁷

In England, alien enemies could be detained by the crown and have their goods forfeited.¹⁶⁸ Commercial intercourse with alien enemies was unlawful except by license of the crown.¹⁶⁹ Government officials, influential jurists,

162. See *id.* at 239 (*360); see also *Hoppen v. Leppett* (1737), 95 Eng. Rep. 305, 305–06; Andr. 76 (KB) (holding that because alien friends may maintain personal actions, the defendant must plead that the alien is “*inimicus Curiae*,” an enemy of the crown, to bar suit).

163. See *infra* Part III.C.

164. See 1 RICHARD WOODDESON, SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND, Lecture XIV, at *383 (Dublin, 1792) (“[A]n alien enemy cannot in reason be intitled to any privilege or protection from our laws, except perhaps as to atrocious attempts on his life, or in other flagitious cases.”); 2 BLACKSTONE, *supra* note 133, at 271 (*401) (“[S]uch [alien] enemies, not being looked upon as members of our society, are not entitled during their state of enmity to the benefit or protection of the laws.”).

165. See Kent, *Judicial*, *supra* note 137, at 188–90; Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 931 (2012); Hamburger, *supra* note 137, at 1860–64, 1887–93; Kent, *Global Constitution*, *supra* note 137, at 527–28.

166. See, e.g., *The Hoop* (1799), 165 Eng. Rep. 146, 148; 1 C. Rob. 196 (Adm.) (“In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain, in the language of the civilians, a *persona standi in judicio* [capacity to appear in legal proceedings]. The peculiar law of our own country applies this principle with great rigour . . . [Without an enemy] coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the king’s peace *pro hac vice* [for this particular occasion] . . . otherwise he is totally *exlex* [sic] [out of the law]!”); *Brandon v. Nesbitt* (1794), 101 Eng. Rep. 415, 417–18; 6 T.R. 23 (KB) (“[A]n action will not lie either by or in favour of an alien enemy . . . [The judges] had not found a single case, in which the action had been supported in favour of an alien enemy.”); 1 JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 427–28 (Stewart Kyd ed., London, A. Strahan & W. Woodfall, 3d ed. 1792) (“[A]n alien enemy cannot have any action, real, personal, or mixt . . . But, if an alien be within England with a safe conduct, or under the king’s protection, he may have an action, tho’ his king be in enmity.”).

167. See *infra* Part VI.C.

168. See *Sylvester’s Case* (1703), 87 Eng. Rep. 1157, 1157; 7 Mod. 150 (QB) (stating that an alien enemy present in England who was not under the crown’s protection “shall be seized and imprisoned by the law of England, and he shall have no advantage of the law of England, nor for any wrong done to him here”); 2 CHARLES VINER, A GENERAL ABRIDGEMENT OF LAW AND EQUITY 263 (London, 2d ed. 1791) (same); 1 BLACKSTONE, *supra* note 133, at 168 (*252) (stating that an alien enemy—a “subject of a nation at war with us”—is, “by the law of nations,” liable to detention and the seizure of their property unless possessing a safe conduct from the monarch); 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE 164–65 (London, E. Nutt, R. Nutt & R. Gosling 1736) (describing how an alien enemy in England may be “ransomed, and his goods within this realm seised to the use of the king”).

169. See *The Hoop*, 165 Eng. Rep. at 147 (stating that by the law of nations and the laws of Great Britain, “all subjects trading with the public enemy, unless with the permission of the sovereign, is interdicted”); *Potts v. Bell* (1800), 101 Eng. Rep. 1540, 1547; 8 T.R. 548 (KB)

and commentators asserted that the monarch possessed a prerogative power to act without legislation to expel or deny entry to aliens—friendly or enemy.¹⁷⁰ The law of nations recognized these powers as well.¹⁷¹

2. Post-Independence, Pre-1798 American Law and Practice

The basic British legal framework of alien enemy status and its attendant disabilities were part of the law of the United States post-independence.¹⁷² The power to confiscate alien enemy property was upheld in U.S. courts prior to 1798.¹⁷³ Alien enemies were understood to be excludable from U.S. territory and detainable because of their status.¹⁷⁴ Some U.S. state laws authorized detention or expulsion of alien enemies. For instance, a 1785 Virginia law—bearing substantial resemblance to Congress's later Alien Enemies Act—empowered the governor, acting with the advice of the Council of State:

(stating that the rule of the admiralty courts that commercial intercourse with the enemy is illegal is also a general rule of British law).

170. See 1 BLACKSTONE, *supra* note 133, at 168 (*251–52) (stating that under the royal prerogative any alien is “liable to be sent home whenever the king sees occasion,” and he may take “measures about the admission of strangers,” including “granting safe-conducts” to allow travel or residence in the realm); MATTHEW HALE, *THE PREROGATIVES OF THE KING* 270–71 (D.E.C. Yale ed., 1976) (stating that “it was usual in all times of hostility or public danger” for the monarch, acting under the royal prerogative, to issue an “inhibition[]” on aliens crossing the Channel into England, “sometimes” only applying “to men at arms, and sometimes general to all men of all conditions,” and also that the royal prerogative was used by monarchs to issue “[c]ommands to go out of the realm to aliens in time of hostility,” but that Magna Carta provided protections for “merchant aliens in amity”); *The Great Case of Monopolies*, *supra* note 137, at 532 (statement of Attorney-General Sawyer describing “those Powers or Prerogatives wherewith the Common Law entrusts the King for the defence of the Realm, viz. to prohibit and remove aliens”); *id.* at 530 (“The King might inhibit Foreigners from coming into the Realm, and might [detain] them when here . . . [and] command foreigners to depart the Realm.”). In parliamentary debates and executive deliberations about Great Britain’s alien law of 1793, see *infra* notes 476–77 and accompanying text, crown lawyers and ministers in Parliament asserted that the prerogative remained intact, though there was some dissent from that view, holding that Parliament now controlled the topic. See J.R. DINWIDDY, *The Use of the Crown’s Power of Deportation Under the Aliens Act, 1793–1826*, in *RADICALISM AND REFORM IN BRITAIN, 1780–1850*, at 149 (1992); Thomas W. Haycraft, *Alien Legislation and the Prerogative of the Crown*, 13 L.Q. REV. 165, 181–82 (1897).

171. See, e.g., VATTEL, *supra* note 140, bk. II, chs. VII–VIII, X, §§ 94, 100–01, 135, at 309, 312–13, 328.

172. See Hamburger, *supra* note 137, at 1853–56, 1863, 1898–1904; Kent, *Global Constitution*, *supra* note 137, at 527–28.

173. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 222 (1796) (opinion of Chase, J.); *id.* at 254 (opinion of Paterson, J.); *id.* at 281 (opinion of Wilson, J.); *id.* at 263–65 (reprinted circuit court opinion of Iredell, J.).

174. See, e.g., 23 JOURNALS OF THE CONTINENTAL CONGRESS 639 (Gov’t Printing Off. 1914) (1782) [hereinafter J. CONT’L CONG.] (recommending to U.S. states “that no subjects of his Britannic Majesty, coming directly or indirectly from any part of the British dominions, be admitted into any of the United States during the war,” and that “to guard against the secret artifices and machinations of the enemy . . . [states] be vigilant and active in detecting and seizing all British emissaries and spies”).

[T]o apprehend and secure, or cause to be apprehended and secured, or compelled to depart this commonwealth, all suspicious persons, being the subjects of any foreign power or state, who shall have made a declaration of war, or actually commenced hostilities against the said [United States], or from whom the United States in congress, shall apprehend hostile designs against the said [United States].¹⁷⁵

Courts, legislatures, lawyers, and politicians in the United States also understood alien enemies to lack the right to affirmatively seek judicial relief—unless given protection of the sovereign by safe conduct, passport, or license.¹⁷⁶ Case law from the War of 1812 shows the continuation of these legal understandings.¹⁷⁷

*C. Protection of the Law, or Why Did
Republicans Agree in 1798 that the
Constitution Placed No Restraint on
Detention and Removal of Alien Enemies?*

Understanding the divergent legal rules about the protection of the law for alien friends versus alien enemies helps clarify the meaning of the Alien Enemies Act. As noted above, in Anglo-American law and governmental practice, it was understood that an alien coming peaceably into the country owed temporary allegiance to the sovereign while present, and in return was

175. An Act Giving Powers to the Governor and Council in Certain Cases, ch. 15, 1785 Va. Acts, *reprinted in* 12 WILLIAM WALLER HENING, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 47–48 (Richmond, George Cochran 1823). This was reenacted in 1792 and in force when the Alien Enemies Act and Alien Law were being debated in Congress. See An Act for Reducing into One the Several Acts and Parts of Acts Respecting the Powers and Duties of the Executive, ch. 6, § 2, 1792 Va. Acts, *reprinted in* 1 SAMUEL SHEPHERD, THE STATUTES AT LARGE OF VIRGINIA, NEW SERIES 8 (Richmond, Samuel Shepherd 1835).

176. See, e.g., *Hamilton v. Eaton*, 11 F. Cas. 336, 339 (C.C.D.N.C. 1796) (No. 5,980) (opinion of Ellsworth, Circuit Justice) (noting that an alien enemy’s judicial “remedy is suspended while the war lasts”); *Ware v. Hylton*, John Jay’s Circuit Court Opinion, June 7, 1793, *reprinted in* 7 DHSC, *supra* note 120, at 293 (noting the rule that “aliens enemies” are “incapable of maintaining actions in our courts”); *Cruden v. Neale*, 2 N.C. (1 Hayw.) 338, 344 (1796) (“All persons in general, as well foreigners as citizens, may come into this court to recover rights withheld, and to obtain satisfaction for injuries done, unless where they are subject to some disability the law imposes. Foreigners are in general entitled to sue, unless a war exists between our country and theirs.”); *Wilcox v. Henry*, 1 Dall. 69, 71 (Pa. 1782) (“An alien enemy has no right of action whatever during the war.”); Jefferson Letter to Hammond, *supra* note 148, at 211 (noting that an “alien enemy” “cannot maintain an action”); WILLIAM WYCHE, A TREATISE ON THE PRACTICE OF THE SUPREME COURT OF JUDICATURE OF THE STATE OF NEW-YORK IN CIVIL ACTIONS 27 (New York, T. & J. Swords 1794) (“As to the persons who may sue, generally speaking, this is the privilege of every one, who is under no legal disability, viz. not attainted of treason, or felony; outlawed; an alien enemy.”).

177. See *The Adventure*, 12 U.S. (8 Cranch) 221, 228 (1814) (indicating that British subjects cannot make a claim in a U.S. prize court during the war between the United States and Great Britain); *Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. (7 Cranch) 603, 620 (1812) (“During the war, the property of alien enemies is subject to confiscation *jure belli*, and their civil capacity to sue is suspended.”); *Ex parte Newman*, 18 F. Cas. 96, 96 (C.C.D. Mass. 1813) (No. 10,174) (on motion for leave to “file [a] declaration preparatory to naturalization,” Circuit Justice Joseph Story held that “[t]he petitioner is an alien enemy, and therefore has no legal standing in court to acquire even inchoate rights”).

temporarily under the protection of the law.¹⁷⁸ This framework was understood to mean, in Great Britain and the United States post-independence, that alien friends were under the protection of the laws and able to access the courts for their protection in largely the same manner as a natural-born subject or citizen.¹⁷⁹ It appears that in the 1790s, many Americans agreed that alien friends were protected by the Constitution while in the United States under implied protection; but some Federalists argued that all aliens in the United States lacked protection under U.S. municipal law, including the Constitution, and were only protected by the law of nations and any affirmative acts of legislative or executive grace.¹⁸⁰

The question of protection of the laws got more complicated when an alien friend became an alien enemy as a result of war. As noted above, alien enemies residing in a country at war with their home state could remain within protection if they had a license of some kind from the government where they were residing. In the late medieval period, it appears that the most common form of license was a “safe conduct,” a document issued to a named individual by letters patent and under the monarch’s privy seal or the great seal done by the chancellor, and then enrolled in the Chancery.¹⁸¹ But the Magna Carta provided some protection for alien enemy merchants who had resided in England before a war broke out.¹⁸²

By the late seventeenth century, the law of protection for alien enemies resident in England changed in their favor, probably due to increasing international commerce and the presence in England of a large number of French Protestants, who were only technically alien enemies as to the British

178. See *supra* note 159 and accompanying text.

179. See, e.g., An Act Containing an Abstract and Declaration of the Rights and Privileges of the People of this State, and Securing the Same, 1776 Conn. Pub. Acts, *reprinted in* ACTS AND LAWS OF THE STATE OF CONNECTICUT IN AMERICA 2 (New London, Timothy Green 1784) (“[A]ll the free Inhabitants of this or any other of the United States of America, and *Foreigners in Amity with this State*, shall enjoy the same Justice and Law within this State, which is general for the State, in all Cases proper for the Cognizance of the Civil Authority and Court of Judicature within the same.” (emphasis added)).

180. See Kent, *Global Constitution*, *supra* note 137, at 529–31; Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 929 (1991).

181. See 1 BLACKSTONE, *supra* note 133, at 168 (*252) (summarizing 15 Hen. VI c. 3 (Eng.); 18 Hen. VI c. 8 (Eng.); 20 Hen. VI c. 1 (Eng.)). Earlier history is murky, but there is evidence that all aliens, not just alien enemies, may have needed safe conducts to enter England in the later medieval period. See Ilan Wurman, *Jurisdiction and Citizenship*, 49 HARV. J.L. & PUB. POL’Y 315, 339–41 (2026). A fascinating examination of very complex early English law and practice on this subject is found in KEECHANG KIM, *ALIENS IN MEDIEVAL LAW: THE ORIGINS OF MODERN CITIZENSHIP* (2000).

182. The charter was first issued in 1215 and reconfirmed and expanded many times. See J.C. HOLT, *MAGNA CARTA* 33, 39–40 (3d ed. 2015). As Sir Edward Coke describes it, Magna Carta provides that “Merchant strangers, whose Sovereigne is in warre with the King of England” but who were “in the Realme at the beginning of the warre,” have a “priviledge” that they could remain “without harme of body, or goods.” 2 EDWARD COKE, *Second Part of the Institutes*, in *THE SELECTED WRITINGS OF SIR EDWARD COKE* 874 (Steve Sheppard ed., 2003). But there were two important exceptions. The privilege only applied if the enemy king provided like protection to English merchants in his or her country. See *id.* And “for such Merchant strangers as come into the Realme after the warre beginne, they may be dealt withall as open enemies,” that is, they lacked any protection of the laws. *Id.* at 875.

monarchs during their wars with French Catholic kings.¹⁸³ In the 1680s, in an important case about the legality of monopoly trading privileges granted by royal charter to the East India Company, the attorney-general, appearing in a private capacity for the company, reviewed at length the scope of royal prerogative power concerning trade, aliens, and immigration.¹⁸⁴ He asserted that the royal prerogative gave full and seemingly unbridled authority to bar entry or to expel any aliens, but then stated that under “the Laws of this Kingdom,” “all Strangers came hither under safe-conducts, which contained both the King’s license and protection of them.”¹⁸⁵ By this time, safe conducts, under seal and enrolled in Chancery, seem to have rather rarely been issued to named individuals,¹⁸⁶ so the attorney-general is probably using the term in a different way. He apparently means that it is implied in law by the monarch’s forbearance—by the monarch not barring entry and not deporting once the alien is in England—that aliens in England are under license and thus under protection of the laws. But if the monarch decides to, say, deport an alien, an implied protection of this kind would of course evaporate because the implication only arose from the previous sovereign forbearance. Sir Matthew Hale’s widely read treatise, *Historia Placitorum Coronae* (history of the pleas of the crown, i.e., criminal law), which was written late in his life (he died in 1676), reflects the same developments in the law.¹⁸⁷

Reports of English judicial proceedings, starting in the late seventeenth century, reflect the view that implied protection due to peaceful residence in England and forbearance of the monarch lifted the incapacity of one who became an alien enemy to sue. In the leading case of *Wells v. Williams*,¹⁸⁸ an action of debt on a bond, the defendant pleaded that suit was barred because the plaintiff “was an alien enemy born in France of French parents who were alien enemies”—France and England being at war when the suit was brought—“and that he came into England sine salvo conductu,” that is, without receiving a safe conduct.¹⁸⁹ The plaintiff’s counsel responded that he had an implied safe conduct since he is “here” in England “per licentiam et sub protectione domini Regis,” by the king’s license and protection.¹⁹⁰ The court agreed that the plaintiff would be able to sue if he “came here before the war was proclaimed . . . [b]ecause there was no need of a safe conduct in time of peace,” due to an implied license and protection of the king, shown by the fact that “he has continued here by the King’s leave and

183. See 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 100 (1926).

184. See generally The Great Case of Monopolies, *supra* note 137.

185. *Id.* at 530.

186. Safe conducts were still issued, however. See CALENDAR OF STATE PAPERS, DOMESTIC SERIES, MAY 18TH TO SEPTEMBER 30TH, 1672, at 513 (F.H. Blackburne Daniell ed., London, Eyre & Spottiswoode 1899) (noting a “safe-conduct” given by King Charles II to two “merchants and inhabitants of Amsterdam” during an Anglo-Dutch War).

187. 1 HALE, *supra* note 168, at 60, 92–93.

188. (1697), 91 Eng. Rep. 1086; 1 Ld. Raym. 282 (CP).

189. *Id.* at 1086; 1 Ld. Raym. at 282.

190. *Id.*

protection . . . without molesting the Government or being molested by it.”¹⁹¹ It appeared that this French person came after war was proclaimed, however. Fortunately, though, King William III and Queen Mary II had taken French Protestants in England within their “Royal Protection” by a proclamation just before the war,¹⁹² and the monarchs’ declaration of war against France confirmed this protection, extending it to all French subjects who behaved peacefully.¹⁹³ The chief justice of the Court of Common Pleas noted that King William III and Queen Mary II’s actions meant that French Protestants in England, though “alien enem[ies],” were within the monarchs’ “protection.”¹⁹⁴ Hence the court held that the plaintiff could maintain the action.¹⁹⁵

Wells thus shows that an implied license and protection for alien enemies could arise from prewar residence in England, peaceful behavior, and forbearance of the crown—adding another method of protection to those flowing from safe conducts granted by the crown to individuals—and that categorical license and protection could be given to a defined group of alien enemies by treaty, statute, or other public act.¹⁹⁶

The implied or tacit license of protection was defeasible by sovereign act, resting as it did on judicial implication from sovereign forbearance to act against the alien enemy. This is seen in a statute of Parliament from 1793, which was used as a model by the U.S. Congress for the Naturalization Act and Alien Law in 1798. Great Britain’s Aliens Act of 1793¹⁹⁷ gave summary

191. *Id.* at 1086; 1 Ld. Raym. at 283.

192. BY THE KING AND QUEEN, A DECLARATION FOR THE ENCOURAGING OF FRENCH PROTESTANTS TO TRANSPORT THEMSELVES INTO THIS KINGDOM (London, Charles Bill & Thomas Newcomb 1689) (one page broadsheet with declaration dated April 25, 1689).

193. THEIR MAJESTIES DECLARATION AGAINST THE FRENCH KING (London, Charles Bill & Thomas Newcomb 1689) (one page broadsheet with declaration dated May 7, 1689) (“[B]ecause there are remaining in Our Kingdoms many of the Subjects of the French King; We do Declare and give Our Royal Word, that all such of the French Nation as shall demean themselves dutifully towards Us, and not Correspond with Our Enemies, shall be safe in their Persons and Estates, and free from all molestation and trouble of any kind.”).

194. *Wells*, 91 Eng. Rep. at 1086; 1 Ld. Raym. at 283; *see also* Hamburger, *supra* note 137, at 1880 n.191 (reading *Wells* this way). These rules continued to be reflected in reports of private litigation and treatises of the eighteenth century, with the emphasis added that the implied forbearance-based license and protection for alien enemies with prewar residence depended on the alien behaving peaceably and doing nothing to suggest they “adhere[d]” to the king’s enemies or were in fact an “enemy” of the king. *See, e.g.*, Daubigny v. Davallon (1794), 145 Eng. Rep. 936, 937; 2 Anst. 462 (Exch.). Since implied protection could only arise from peaceful local residence and sovereign forbearance, giving rise to a duty of reciprocal allegiance on the alien enemy’s part, pleading that a plaintiff was residing in the foreign country at war with Great Britain and was an alien enemy was sufficient to bar suit. *See, e.g.*, Le Bret v. Papillon (1804), 102 Eng. Rep. 923, 925; 4 East. 502 (KB); Casseres v. Bell (1799), 101 Eng. Rep. 1325, 1325–26; 8 T.R. 166 (KB); Brandon v. Nesbitt (1794), 101 Eng. Rep. 415, 415, 417–18; 6 T.R. 23 (KB).

195. *Wells*, 91 Eng. Rep. at 1086; 1 Ld. Raym. at 283.

196. For more on these issues, *see* Hamburger, *supra* note 137, at 1860–66, 1873–81, 1895–96; Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 871–79 (2006).

197. An Act for Establishing Regulations Respecting Aliens Arriving in this Kingdom, or Resident Therein, in Certain Cases 1793, 33 Geo. 3 c. 4 (Gr. Brit.).

power to crown officials to detain and imprison any alien, summary power to deport any alien, and an extensive system of identity registration and control of the place of residence for all aliens.¹⁹⁸ Application of these principles to the U.S. Alien Enemies Act, which was drafted specifically so that judicial intervention was not required prior to executive detention and removal, is discussed below.¹⁹⁹

IV. CONGRESS AND THE EXECUTIVE: RESPONSES TO FRENCH AGGRESSION

This part situates the Alien Enemies Act in the context of the Fifth Congress and developing views about relations between the United States and France—whether peace, war, or somewhere in between. This overview of the Fifth Congress helps demonstrate that the Alien Enemies Act is designed for wartime—not as a peacetime tool for targeted immigration enforcement against noncitizens deemed dangerous by the president.

In the Fifth Congress, there were about fifty-two representatives in the House who could be classified as Federalists, joined by about forty-five Republicans and three unaligned members.²⁰⁰ Those numbers meant that Federalists often needed to try to accommodate Republican views. The most outspoken Federalists in House debates were Samuel Sewall—a moderate Federalist lawyer from Massachusetts, who would chair the main legislative drafting committee—and three hardliners, Robert Goodloe Harper of South Carolina, Harrison Gray Otis of Massachusetts, and Samuel Sitgreaves of Pennsylvania. The primary Republican House spokesperson was Albert Gallatin of Pennsylvania. Other vocal Republicans in the House during the second session were Edward Livingston of New York, John Nicholas of Virginia, and William Branch Giles of Virginia. In the U.S. Senate, Federalists dominated by a bit more than two to one overall,²⁰¹ and that body's work reflects the party split. There is less to say in this part about the Senate than the House because there were no transcripts made of its debates.²⁰²

A. November 1797 to March 1798

As the legislative session started, the current state of U.S.-French relations was discussed within the executive branch and Congress. France was

198. See *infra* notes 476–77 and accompanying text.

199. See *infra* Part VI.B.

200. See JOHN F. HOADLEY, *ORIGINS OF AMERICAN POLITICAL PARTIES, 1789–1803*, at 145 (1986).

201. *Id.* at 150; see also *Party Division*, U.S. SENATE, <https://www.senate.gov/history/partydiv.htm> [<https://perma.cc/PW2A-Y4ES>] (last visited Aug. 16, 2026) (statistics for the Fifth Congress, 1797–1799). The numbers for both the House and Senate are somewhat inexact because many members did not expressly identify with partisan labels at the time, some members are hard to classify due to mixed voting records, and some members exited Congress and were replaced during the session.

202. Because I quote House debates from the *Annals of Congress* frequently, I will note that I am aware of that source's limitations in terms of accuracy and completeness.

voraciously seizing and confiscating U.S. shipping, often illegally, but Congress had not authorized any military response. The executive branch understood that the Constitution's distribution of war powers allowed it, in this context, to engage in only purely defensive measures, including naval patrols of U.S. territorial waters and authorization to stop any French attacks occurring there.²⁰³

At the beginning of the second session of the Fifth Congress, President Adams reported "increasing depredations" by the French on U.S. commerce and urged Congress to pass the preparatory, defensive legislation he had proposed in the first session.²⁰⁴ In November 1797, the House adopted a resolution that "so much of the President's speech as relates to the protection of commerce and the defence of the country be referred to a committee, with instructions to inquire and report what further provisions on that subject it may be expedient to adopt at this time."²⁰⁵ This committee was chaired by Sewall, and it had four other Federalists and two Republicans.²⁰⁶ It was responsible for all of the important House legislation during the second session of Congress, including the Alien Enemies Act. Republican House opposition to both defensive and offensive measures slowed down the Federalist legislative program.

In early 1798, President Adams asked his cabinet whether he should recommend a declaration of war to Congress.²⁰⁷ As was often the case, the cabinet turned to Hamilton for advice and then communicated this to the president. Hamilton's recommendations, communicated almost verbatim to the president via Secretary of War James McHenry,²⁰⁸ were followed by the administration. Hamilton had advised Secretary McHenry that "[a] formal rupture" (i.e., a declaration of war) would bring little benefit and great danger to the United States, and that the American people would currently not support such a decision.²⁰⁹ Hamilton counseled that the United States should

203. See, e.g., Circular from Sec'y of Treasury to Collectors of the Customs (Apr. 8, 1797), reprinted in *NAVAL DOCUMENTS*, *supra* note 92, at 4–5 (instructing collectors that U.S. merchant vessels were only allowed to arm when heading to the waters of the "East Indies" infested by "Pirates and Sea Rovers," "until otherwise ordained by Congress"); see also Andrew Kent & Julian Davis Mortenson, *Executive Power and National Security Power*, in *THE CAMBRIDGE COMPANION TO THE UNITED STATES CONSTITUTION* 261, 269–71 (Karen Orren & John W. Compton eds., 2018) (reviewing this issue during the Quasi-War).

204. Speech of President John Adams (Nov. 23, 1797), reprinted in 1 ASP: FOREIGN RELATIONS, *supra* note 76, at 44.

205. JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, BEING THE SECOND SESSION OF THE FIFTH CONGRESS 93 (Washington, Gales & Seaton 1826) [hereinafter HOUSE JOURNAL].

206. *Id.*

207. Enclosure from John Adams to James McHenry, Timothy Pickering, Oliver Wolcott, Jr. & Charles Lee (Jan. 24, 1798), reprinted by NAFO, *supra* note 84, <https://founders.archives.gov/documents/Hamilton/01-21-02-0198-0002> [<https://perma.cc/HE5Q-PGFV>].

208. See Letter from James McHenry to John Adams (Feb. 15, 1798), reprinted by NAFO, *supra* note 84, <https://founders.archives.gov/documents/Adams/99-02-02-2341> [<https://perma.cc/497X-2UNP>].

209. Letter from Alexander Hamilton to James McHenry (c. Jan. 27–Feb. 11, 1798), reprinted by NAFO, *supra* note 84, <https://founders.archives.gov/documents/Hamilton/01-21-02-0199> [<https://perma.cc/H4MG-TN64>].

instead pursue “measures of immediate defence to our Commerce and . . . ulterior security in the event of open Rupture.”²¹⁰ This would mean “a truly vigorous defensive plan,” including allowing the arming of merchant vessels, authorizing merchant vessels and U.S. public warships to “attack” French commerce raiders found near the U.S. coast, fortifying ports, and increasing the size of the U.S. Navy.²¹¹ The United States and France would be in “[a] mitigated hostility,” leaving “a door open to negociation” and “avoid[ing] some of the extremities of a formal war.”²¹² Among the “extremities of a formal war” would be the imposition of severe alien enemy disabilities on U.S. citizens in France and French citizens in the United States.²¹³

In the first week of February 1798, President Adams reported that a French privateer had attacked, “plundered, and then burned” “an English merchant ship named the *Oracabissa*” in Charleston, South Carolina’s harbor²¹⁴—a grave breach of U.S. sovereignty and neutrality. The next day, just off the coast of South Carolina, a French privateer captured two American vessels.²¹⁵ Newspapers reported a French privateer landing on the South Carolina coast,²¹⁶ a number of murders and cruelties inflicted by French privateers on American merchant sailors,²¹⁷ and continued depredations on U.S. merchant shipping on the high seas.²¹⁸

In the first week of March 1798, President Adams released an initial dispatch from his peace commissioners in Paris—Marshall, Gerry, and Pinckney—reporting that France was in the process of adopting a law which would make a lawful prize of war any vessel and its cargo if there were found on board any merchandise or commodities manufactured or produced in Great Britain or its colonies—without regard to who owned the products or how many such products were found on the ship.²¹⁹ This would be a clear violation of the neutral rights of commerce under the law of nations and a violation of U.S. treaties with France.

210. *Id.*

211. *Id.*

212. *Id.*

213. *See supra* Part III.B.

214. 2 ASP: FOREIGN RELATIONS, *supra* note 76, at 116.

215. *Id.*

216. *See* 8 ANNALS OF CONG. 1799–1800 (May 23, 1798) (statement of Rep. Harper) (reporting that he learned from newspapers that a French privateer had “landed within fifty miles of Charleston” and “carr[ie]d off . . . property”).

217. *See, e.g., Norfolk, January 20*, GA. GAZETTE (Savannah), Feb. 16, 1798, at 3 (reporting that a Charleston-based merchant vessel “was boarded by a French barge . . . who made the Captain and Mate jump overboard, and put the rest of the crew to death”).

218. *See, e.g., Salem, January 26*, AM. MERCURY (Hartford, Conn.), Feb. 1, 1798, at 3 (reporting that men of the Schooner *Sally*, lately out of Salem, Massachusetts, returned to the port, their vessel having been captured by French privateers, brought into “Nantz” (Nantes), and the men “themselves robbed and plundered by the barbarians of every article of their own personal property”).

219. Communication from John Adams to Congress of Dispatch from Charles C. Pinckney, J. Marshall, and E. Gerry (Mar. 5, 1798), *reprinted in* 2 ASP: FOREIGN RELATIONS, *supra* note 76, at 150. The decree was adopted by France. *See id.* at 151.

Hamilton, both privately and publicly, urged that France was currently engaged in hostilities against the United States and that Congress should authorize “a state of mitigated hostility” to defend the United States and its merchant shipping.²²⁰

Republicans in Congress disagreed that any state of hostility or partial war existed with France, thought that Federalists were trying to rush the country into war for either ignorant or nefarious reasons,²²¹ and resisted defensive measures against France. Federalists in Congress nevertheless advanced a number of bills to increase U.S. naval and land defenses, some of which passed.²²²

B. *The XYZ Dispatches*

In April 1798, President Adams released to Congress—which then released to the public—dispatches from the Gerry-Marshall-Pinckney group, in which the letters X, Y, and Z were substituted for the names of three representatives of French foreign minister Charles Maurice de Talleyrand-Périgord.²²³ The dispatches showed that Talleyrand’s men threatened the American diplomats in Paris and demanded a bribe to French officials and a large “loan” from the United States to the French government—which likely would not be repaid, as evidenced by France’s plundering of its vassal states in Europe—in order to even begin negotiations.²²⁴

As Congress and the American people learned, one of Talleyrand’s agents told Marshall, Gerry, and Pinckney that the United States should pay the demanded bribe and tribute. Otherwise, the French agent argued, President Adams and the three men would be blamed for a failure of the Americans’ mission, due to the “diplomatic skill of France” in molding American public opinion and the assistance France was receiving from “the French party in America,” i.e., Republicans.²²⁵ The implication for Federalists was that “there was a kind of fifth column in the country willing to aid the French.”²²⁶ The dispatches also showed that the French agents had overtly threatened the

220. Letter from Alexander Hamilton to Jonathan Dayton (Mar. 15, 1798), *reprinted by* NAFO, *supra* note 84, <https://founders.archives.gov/documents/Hamilton/01-27-02-0001-0010> [<https://perma.cc/WR88-8V97>]; *see also* Letter from Alexander Hamilton to Timothy Pickering (Mar. 17, 1798), *reprinted by* NAFO, *supra* note 84, <https://founders.archives.gov/documents/Hamilton/01-21-02-0217> [<https://perma.cc/C4QS-JHHF>] (“Tis vain to talk of Peace with a Power with which we are actually in hostility. The election is between a tame surrender of our rights or a state of mitigated hostility.”).

221. WOOD, *supra* note 71, at 242–43; SMITH, *supra* note 78, at 7; HALPERIN, *supra* note 27, at 49–50.

222. *See, e.g.*, Act of Mar. 27, 1798, ch. 23, 1 Stat. 547 (increasing funding for the Navy to complete three powerful frigates already under construction and to purchase armaments).

223. *See* 2 ASP: FOREIGN RELATIONS, *supra* note 76, at 153–82.

224. ELKINS & MCKITRICK, *supra* note 5, at 568–75; DECONDE, *supra* note 23, at 46–52.

225. 2 ASP: FOREIGN RELATIONS, *supra* note 76, at 164. On this claim, *see* SMITH, *supra* note 78, at 14.

226. WOOD, *supra* note 71, at 243.

United States, including with naval raids on the U.S. coast.²²⁷ The American diplomats refused to pay the demanded bribe and tribute, and, finding themselves shut out by Talleyrand, returned to the United States.

The political leadership of the United States was aware that, at the time, France was collecting an enormous army and fleet of transports and warships in its English Channel ports, preparing for an invasion of Great Britain. It was feared by some Federalists that, in the event of a successful conquest by France, or of Great Britain making peace with France, this invasion force might be turned against the United States.²²⁸ But most Federalists probably agreed with former President Washington that an invasion of the United States by France was unlikely.²²⁹

Republicans in Congress still tried to block or at least slow down Federalist legislation aimed at France. They had no chance in the Senate but did in the more closely divided House. In the March to April period, House Republicans, as a delaying tactic, introduced a resolution stating that, “under existing circumstances, it is not expedient for the United States to resort to war against the French Republic.”²³⁰ The resulting debates showed that Republicans believed, or at least argued publicly, that any military measures Congress might authorize that could lead to combat with French vessels—such as arming U.S. merchant vessels, authorizing the Navy to convoy merchantmen, or authorizing the president to employ naval vessels to attack French vessels of war caught preying on U.S. commerce—would be tantamount to a full declaration of war, and that declaring war would be calamitous and must be avoided at nearly any cost.²³¹ Republicans further argued that Congress could not grant any discretion to the president that could lead to armed confrontation between U.S. and French vessels because that would be tantamount to letting the president declare war, a power reserved to Congress by the Constitution.²³² As an important premise of the above arguments, some Republicans—including their House leader, Gallatin—claimed that the law recognized only two states of relations

227. 2 ASP: FOREIGN RELATIONS, *supra* note 76, at 161, 163, 168.

228. See 8 ANNALS OF CONG. 1678 (May 10, 1798) (statement of Speaker of the House Jonathan Dayton, Federalist from New Jersey); see also HALPERIN, *supra* note 27, at 53 (on Federalist fears of a French invasion).

229. See Letter from George Washington to Alexander Hamilton (May 27, 1798), *reprinted* by NAFO, *supra* note 84, <https://founders.archives.gov/documents/Hamilton/01-21-02-0262> [<https://perma.cc/ED5N-NBTW>] (“I cannot make up my mind, yet, for the expectation of open War; or, in other words, for a formidable Invasion, by France. I cannot believe, although I think them capable of any thing bad, that they will attempt to do more than they have done.”).

230. 8 ANNALS OF CONG. 1319 (Mar. 27, 1798) (introduced by Rep. Richard Sprigg, Republican from Maryland).

231. See, e.g., *id.* at 1323–24 (statement of Rep. Giles); *id.* at 1338 (Mar. 28, 1798) (statement of Rep. Giles); *id.* at 1443–44 (Apr. 18, 1798) (statement of Rep. Nicholas); *id.* at 1456 (Apr. 19, 1798) (statement of Rep. Gallatin).

232. *Id.* at 1324 (Mar. 27, 1798) (statement of Rep. Nicholas) (stating that “Congress had the power over the progress of what led to war, as well as the power of declaring war”).

between nations, peace and war, and that the United States was currently at peace with France because it was not at war.²³³

Federalists responded by following Hamilton's reasoning. They denied that the United States and France were currently in a state of peace, contending that France was already pursuing maritime hostilities against the United States.²³⁴ They argued that the law of nations recognized gradations between full peace and full war.²³⁵ The Federalists suggested that Congress could and should protect the country by authorizing calibrated measures of armed "defense" against French commerce raiding, without moving the countries into a state of full-scale war.²³⁶ Federalists also argued that the Republican position that Congress could not authorize military measures of protection, because that would mean full war, was exactly what the French wanted; France would be quite happy to continue plundering U.S. commerce without the United States fighting back.²³⁷

Despite their disagreements about whether to authorize defensive measures against France, House debates show that members of both parties agreed that the president could not, without statutory authority, enter the country into a state of war or even move toward the direction of war. But the president did have discretion to use authority, under the Constitution and statutory delegations, to take actions consistent with the existing state of the country.²³⁸

233. See *id.* at 1323, 1332 (statement of Rep. Giles) (stating that there are only two possible states of relation with France, "a state of neutrality and a state of war; he knew of no mongrel state between them," and that there was no legal difference between offensive and defensive war); *id.* at 1328, 1330 (statement of Rep. Gallatin) (stating that France's actions are a "justifiable ground of war for this country," but not "a declaration of war," and that France and the United States were then "in a state of peace"). After some telling criticism by Federalists, some Republicans were guardedly willing to concede there might in theory be a distinction between lesser forms of hostility and full war. See *id.* at 1510–11, 1514 (Apr. 20, 1798) (statement of Rep. Gallatin); *id.* at 1459 (Apr. 19, 1798) (statement of Rep. Nicholas).

234. See *id.* at 1326 (Mar. 27, 1798) (statement of Rep. Sewall); *id.* at 1341–43 (Mar. 28, 1798) (statement of Rep. Harper); *id.* at 1481 (Apr. 20, 1798) (statement of Rep. Allen); *id.* at 1491 (statement of Rep. Otis).

235. See, e.g., *id.* at 1503–04 (statement of Rep. Samuel Dana, Federalist from Connecticut).

236. See *id.* at 1320, 1323 (Mar. 27, 1798) (statements of Rep. Harper); *id.* at 1325 (statement of Rep. John Rutledge Jr., Federalist from South Carolina); *id.* at 1330 (statement of Rep. Dana); *id.* at 1334–37 (Mar. 28, 1798) (statement of Rep. Thomas Pinckney, Federalist from South Carolina); *id.* at 1445–47 (Apr. 18, 1798) (statement of Rep. Harper); *id.* at 1455 (Apr. 19, 1798) (statement of Rep. Dayton); *id.* at 1457–58 (statement of Rep. Sewall); *id.* at 1493–94 (Apr. 20, 1798) (statement of Rep. Otis).

237. See *id.* at 1342–43 (Mar. 28, 1798) (statement of Rep. Harper); *id.* at 1481 (Apr. 20, 1798) (statement of Rep. Allen).

238. See, e.g., *id.* at 1444 (Apr. 18, 1798) (statement of Rep. Harper) (stating that, if a bill passed authorizing the president to use naval vessels to convoy merchant ships, "when once the force should be provided, the President, under his Constitutional powers, would have a right to employ it in such manner as, in his judgment, the public good, according to the existing state of things, might require. The President, he knew, could not alter the existing state of things"); *id.* at 1454–55 (Apr. 19, 1798) (statement of Rep. Dayton) (opining that under the Commander-in-Chief Clause, naval forces would be "directed and employed by [the president] as should seem best, consistently with the state in which we might happen to be, if in peace, consistently with a state of peace, and if in war, in furtherance of the object of it").

*C. Key Late Session Events: Fears of
Invasion or Predatory Incursion, and
Authorization of Hostilities Against France*

This section addresses events in the House and the country at large during May through July 1798. The three alien bills of 1798—the Alien Enemies Act, the Alien Law (or Alien Friends Act), and the revised Naturalization Act—are discussed separately in Part IV.D.

The House’s main debate on alien enemy legislation in early May 1798 concerned a resolution from the Sewall-led select committee. The Alien Enemies Act became law on July 6. A Senate resolution that turned into the Alien Law was introduced in the last week of April.²³⁹ The bill was signed into law on June 25. A tough new Naturalization Act was signed by President Adams on June 18.

A House debate in late May on a Federalist bill to create a “provisional army” reflected congressional views about the meaning of “invasion” and “predatory incursion.” The final version of the law authorized the president to raise a large army if, “before the next session of Congress,” there is “a declaration of war against the United States, or . . . actual invasion of their territory, by a foreign power, or . . . imminent danger of such invasion discovered in [the president’s] opinion to exist.”²⁴⁰ The Provisional Army Act’s²⁴¹ triggering clause is similar to that in the Alien Enemies Act. As in contemporaneous debates about the proposed Alien Enemies Act, Congress was legislating to give some needed discretion to the president to defend the country because of late eighteenth-century circumstances. At the time, Congress was often out of session and could not assemble rapidly given the available means of transportation. News from abroad—for instance, a French fleet leaving port for a potential U.S. invasion—traveled very slowly across the ocean and along roads by horse and carriage. Congress needed to forearm the president.

The original bill that became the Provisional Army Act did not mention “war” or “invasion” but rather would have allowed the president to raise an army during the recess of Congress “whenever he shall judge the public safety shall require the measure.”²⁴² Republicans opposed this on a variety of grounds, constitutional and policy-based.²⁴³ In supporting the bill, leading Federalists used language and arguments that help us understand what “invasion” and “predatory incursion” meant in the proposed Alien Enemies

239. JOURNAL OF THE SENATE OF THE UNITED STATES OF AMERICA, BEING THE SECOND SESSION OF THE FIFTH CONGRESS 479 (Washington, Gales & Seaton 1820) [hereinafter SENATE JOURNAL].

240. Act of May 28, 1798, ch. 47, § 1, 1 Stat. 558, 558. The statute was soon amended, but this operative language was not changed. See Act of June 22, 1798, ch. 57, 1 Stat. 569.

241. Ch. 47, 1 Stat. 558 (1798) (amended 1798) (repealed 1802).

242. 8 ANNALS OF CONG. 1631 (May 8, 1798).

243. The primary constitutional argument was that the Constitution did not allow Congress to delegate the decision of whether to raise an army to the president: Congress must either decide to raise an army or not. See Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 359–64 (2021) (describing the debate).

Act bill pending at the same time. Sewall, chairman of the House's powerful select committee on defense, defended the original provisional army bill by expressing fear of "predatory attack" or invasion by France:

With respect to the expediency of the measure, there was a variety of opinion. Some gentlemen think the danger of our situation [with respect to France] greater than others; some think it is not only probable that predatory attacks will be made, but that part of our territory may be taken possession of. If we were to discover the fleets of France approaching with an intention of landing men on our shores . . . would it not be desirable that the President should have the power to . . . raise an army . . . ? He believed it would.²⁴⁴

Seeking to meet some of the Republican objections, Sewall moved to narrow the bill so that the president's power to raise an army would be triggered "in the event of a declaration of war against the United States, or of actual invasion of their territory by a foreign Power, or of imminent danger of such invasion"—terms that Sewall defended as describing readily understandable and "ascertainable" triggering events.²⁴⁵ The debate shows that representatives understood "invasion" to refer to a military attack on U.S. territory, specifically by France.²⁴⁶ Harper, like Sewall, worried about a "predatory attack" on U.S. territory by France and argued that the bill needed to meet that threat.²⁴⁷ It is not to say that the terms "invasion" and "predatory incursion" in the Alien Enemies Act *must* be given the same meaning that "invasion" and "predatory attack" had in the provisional army debates and the enacted text. But, given the similarity of purpose and their enactment within a short time of each other, there are grounds to think the words should be read to have the same meaning in both contexts.

During the late stages of the congressional session, Congress authorized maritime hostilities against France. But before that, in mid-May 1798, Secretary of War James McHenry had sought Hamilton's advice on what instructions should be given to the first U.S. naval vessels ready to go to sea. Secretary McHenry was concerned with "preserv[ing] the Executive from any future accusation of having by its orders involved the Country in a war."²⁴⁸ Hamilton responded that unless Congress authorized more, "[the president] is left at the foot of the Constitution," and Hamilton was "not ready to say that [the president] has any other power than merely to employ the Ships as Convoys with authority to *repel* force by *force*, (but not to capture),

244. 8 ANNALS OF CONG. 1528 (Apr. 24, 1798) (statement of Rep. Sewall) (defending the bill as necessary to meet the possibility of a "predatory attack" on the United States by France or a French invasion fleet).

245. *Id.* at 1631, 1635 (May 8, 1798) (statement of Rep. Sewall).

246. *See id.* at 1631–32 (statement of Rep. Gallatin); *id.* at 1638 (statement of Rep. Sewall); *id.* at 1642 (statement of Rep. Otis).

247. *Id.* at 1646–47 (statement of Rep. Harper) (stating that there were Frenchmen in the southern states at vulnerable points along the coast between Charleston and Savannah where French "attacks might be made with facility and success" doing "immense mischief before they could be dislodged," and that regular army troops were necessary because the militia would be too slow and disorganized to meet a "predatory attack" by France).

248. Letter from Sec'y James McHenry to Alexander Hamilton (May 12, 1798), *reprinted* in NAVAL DOCUMENTS, *supra* note 92, at 74–75.

and to repress hostilities within our waters including a marine league from our coasts.”²⁴⁹

Recall that many Federalists, including Hamilton, understood that France was currently engaged in a partial and limited maritime war against the United States. Both the executive branch and a seemingly unanimous Congress (on this point) believed that only congressional authorization could allow the president to act militarily in anything more than a defensive way beyond protecting U.S. territory and its territorial waters. The same understanding of congressional control of war-related measures is seen regarding the Alien Enemies Act.

After consultation with Hamilton, Secretary McHenry sent instructions to a captain of one of the newly ready U.S. naval vessels stating that:

[A]s Congress possess exclusively the Power to declare War, grant Letters of Marque & Reprisal, and make Rules concerning Captures on Land and Water, and as neither has yet been done, your Operations must accordingly be partial & limited. For the present, you will be governed by the following Instructions, which relate to the Prevention of Violations of our jurisdictional Rights and to Self-defence.²⁵⁰

At the end of May, Congress authorized the president to order U.S. naval vessels to seize any armed vessels found hovering near the coast to prey on commerce.²⁵¹ This was a significant event in U.S.-French relations because Congress had clearly authorized the United States to engage in offensive armed hostilities—though limited and only at sea.²⁵²

In mid-June 1798, Congress temporarily suspended “commercial intercourse” between the United States and France and also barred French military and commercial vessels from entering U.S. ports without presidential license.²⁵³ Congress provided that the restrictions could be lifted by the president if France disavowed and refrained from “the aggressions, depredations and hostilities which have been, and are by them encouraged and maintained” against U.S. vessels and property.²⁵⁴ As discussed below, “depredation” was often used as the noun form for a “predatory” action

249. Letter from Alexander Hamilton to Sec’y James McHenry (May 17, 1798), *reprinted in* NAVAL DOCUMENTS, *supra* note 92, at 75.

250. Letter from Sec’y James McHenry to Captain Richard Dale, U.S. Navy (May 22, 1798), *reprinted in* NAVAL DOCUMENTS, *supra* note 92, at 77. Specifically, the instructions were to stop “any armed Vessel” from attacking U.S. shipping, or carrying it away if already captured, within “[t]he Jurisdiction of the United States, on our Coast . . . extend[ing] One Marine League from our Shores,” and “on the high Seas” if “attacked by any armed Vessel whatever . . . to defend Yourself to the Utmost.” *Id.*

251. Act of May 28, 1798, ch. 48, 1 Stat. 561.

252. See Letter from James Madison to Thomas Jefferson (June 10, 1798), *reprinted by* NAFO, *supra* note 84, <https://founders.archives.gov/documents/Madison/01-17-02-0102> [<https://perma.cc/TS5T-P97T>] (“The law for capturing privateers may certainly be deemed a formal commencement of hostilities.”). Federalists thought hostilities had already been started by France in the previous months.

253. Act of June 13, 1798, ch. 53, 1 Stat. 565, *amended by*, Act of July 16, 1798, ch. 88, 1 Stat. 611.

254. *Id.* § 5, 1 Stat. at 566.

against persons or property.²⁵⁵ Congress's use of the term "hostilities" is also notable because that word generally signified military conflict, usually of a lesser species than full-scale war.²⁵⁶

In the last week of June, Congress authorized the president to upgrade armaments on naval cutters "for the purposes of defence, against hostilities near the sea coast,"²⁵⁷ and authorized U.S. merchant vessels to defend themselves "against French depredations," as the act's title puts it.²⁵⁸ Open but limited naval warfare was authorized by a July 9 statute allowing the president to instruct U.S. naval vessels to "subdue, seize and take any armed French vessel" found either within U.S. "jurisdictional limits" or "on the high seas," and to license U.S. privateers to do the same.²⁵⁹

This session of Congress also produced a large mass of additional defense legislation.²⁶⁰ Internal security was addressed not just by the three alien bills, discussed in Part IV.D, but also by the Sedition Act,²⁶¹ which criminalized combinations or conspiracies to oppose the laws or lawful measures of the government, and seditious libel directed at the president or Congress.²⁶²

On the day after President Adams signed the Alien Enemies Act into law in July 1798, Congress declared that the treaties between the United States and France—the 1778 Treaty of Alliance, the 1778 Treaty of Amity and Commerce, and a 1788 convention on consuls—were no longer in force.²⁶³ Congress justified this decision on the grounds that France had repeatedly violated the treaties, "repelled with indignity" the United States' attempt at "amicable adjustment" of the dispute, and "pursued against the United States, a system of predatory violence . . . hostile to the rights of a free and independent nation."²⁶⁴ Note the use of the term "predatory." As a result of these statutes, the secretary of the navy advised his commanders in July 1798 that the United States was "at War," but "only with the armed Vessels of France."²⁶⁵

Also, soon after the end of the legislative session, Attorney General Charles Lee opined that the United States and France had each authorized and were conducting "an actual maritime war," and therefore French citizens

255. See *infra* Parts V.B–C.

256. See *supra* notes 152, 154–55, 175, 212, 220, 249, 252, 254 and accompanying text; *infra* notes 289, 299, 303, 312–13 and accompanying text.

257. Act of June 22, 1798, ch. 55, 1 Stat. 569.

258. Act of June 25, 1798, ch. 60, 1 Stat. 572.

259. Act of July 9, 1798, ch. 68, 1 Stat. 578.

260. See, e.g., Act of Apr. 30, 1798, ch. 35, 1 Stat. 553 (separating the Navy into its own executive department); Act of May 3, 1798, ch. 37, 1 Stat. 554 (appropriating money for defending ports and harbors); Act of May 4, 1798, ch. 39, 1 Stat. 556 (authorizing the president to build or purchase galleys for naval use); Act of July 6, 1798, ch. 65, 1 Stat. 576 (appropriating a large sum to upgrade the arms of the militia); Act of July 16, 1798, ch. 76, 1 Stat. 604 (authorizing a substantial increase in the size of the regular army).

261. Ch. 74, 1 Stat. 596 (1798).

262. *Id.*

263. Act of July 7, 1798, ch. 67, 1 Stat. 578.

264. *Id.*

265. Letter from Sec'y Benjamin Stoddert to Captain Stephen Decatur, U.S. Navy (July 11, 1798), reprinted in NAVAL DOCUMENTS, *supra* note 92, at 192.

attempting to outfit military ships in the United States “should be apprehended,” and if acting for the French government, “be treated as an enemy, and confined as a prisoner of war.”²⁶⁶ He did not state that all French persons should be confined as “alien enemies” under the newly enacted statute. He likely believed, as most or all of the U.S. political leadership seemed to, that the triggers in the Alien Enemies Act had not been met. In any event, the president had not issued a proclamation under the Alien Enemies Act, and so its detention powers were not available.

Congress had, in a statute enacted just before the session ended, directed that “all French persons and others, who shall be found *acting on board* any French armed vessel, which shall be captured” by the U.S. Navy or a U.S.-licensed privateer, be delivered to the custody of a U.S. marshal or U.S. Army or Navy officer “who shall take charge for their safe keeping.”²⁶⁷ In other words, Congress authorized prisoner-of-war detention even in a situation when the triggers for invoking the Alien Enemies Act did not exist.

D. The Three Alien Bills

This section reviews the texts of the three alien bills that advanced into law in 1798 and the legislative debates of the Alien Enemies Act. This review clarifies significantly the limited scope of the Alien Enemies Act, providing compelling evidence that the Act codified rather than departed from background law that defined alien enemies in a categorical manner based on nationality and the presence of war. Debate on the alien enemies bill also demonstrates that the triggering events “invasion” and “predatory incursion” referred to military attacks, not all unwanted intrusions in the United States, as the Trump administration today maintains.

All three alien bills were driven by Federalist fears that, as one House member put it, “we may very shortly be involved in war, [and] there are an immense number of French citizens in our country.”²⁶⁸ But it was not just French citizens in the United States who worried the Federalists. Noncitizens from other countries who might be active French agents, or at least disposed to support France in the event of war, were also a concern.²⁶⁹ The Alien Law and the Naturalization Act addressed the perceived problem of dangerous aliens irrespective of nationality or the existence of war. The Alien Enemies Act, by contrast, was narrow and targeted, for wartime citizens or subjects of

266. Treason, 1 Op. Att’y’s Gen. 84–85 (1798).

267. Act of July 9, 1798, ch. 68, § 8, 1 Stat. 578, 580 (emphasis added).

268. 8 ANNALS OF CONG. 1453 (Apr. 19, 1798) (statement of Rep. Sitgreaves).

269. See, e.g., *id.* at 1574 (May 3, 1798) (statement of Rep. Rutledge) (stating that “intriguing agents and spies . . . are now spread all over the country”); *id.* at 1575–76 (statement of Rep. Otis) (stating that a “crowd of spies and inflammatory agents” from France “overspread the country like locusts of Egypt”); *id.* at 1577–78 (statement of Rep. Sitgreaves) (stating that “factious and bad men, who abuse the liberty allowed to them of residing in this country,” would “be ready to join [the French] by thousands” in the event of a French invasion); *id.* at 1584 (June 19, 1798) (statement of Rep. William Gordon, Federalist from New Hampshire) (noting that “the United States are about to enter upon a war [with France], and the country is filled with the natives of the enemy-country”). On Federalist concerns about immigration, see *supra* notes 89–90 and accompanying text.

an enemy nation, and covered all such persons without regard to their individual dangerousness. The House-drafted Alien Enemies and Naturalization Acts began their legislative journey with a vote to instruct Sewall's select committee on the protection of commerce and defense of the country "to inquire and report whether any, and what, alterations may be necessary" to the 1795 Naturalization Act, "and further, to consider and report upon the expediency of establishing, by law, regulations respecting aliens arriving, or residing within the United States."²⁷⁰

1. The Revised Naturalization Act

On May 1, 1798, the Sewall committee reported resolutions, which were accepted by the House, to "prolong the term of residence within the United States . . . by an alien before he shall be admitted to become a citizen of the United States," and to establish a system for "report and registry of all aliens who shall continue residents, or shall hereafter arrive within the United States."²⁷¹ The revised Naturalization Act became law in mid-June and required a fourteen-year term of residence in the United States prior to seeking citizenship,²⁷² which was an increase from five years under a 1795 law—which had itself increased the residence period from two years under a 1790 statute.²⁷³ The 1798 act also required most aliens currently present or newly arriving in the United States to report themselves to a U.S. district judge or customs officer for registration of detailed demographic and other information.²⁷⁴ This statute partially responded to concerns about potentially dangerous immigrants of any nationality, whether or not war existed.

A standard definition of the legal-political concept of an alien enemy is seen in the Naturalization Act, which barred naturalization of any "alien, who shall be a native, citizen, denizen or subject of any nation or state with whom the United States shall be at war."²⁷⁵ This statute, passed contemporaneously with the Alien Enemies Act, reflects Congress's view about the definition of alien enemy.

2. The Alien Law

Today the Trump administration is trying to use the Alien Enemies Act as a national security deportation tool for allegedly dangerous individuals outside of wartime. In other words, the administration is seeking to use the Alien Enemies Act to do what the Alien Law was designed for.

270. HOUSE JOURNAL, *supra* note 205, at 266.

271. 8 ANNALS OF CONG. 1566–67 (May 1, 1798).

272. Naturalization Act of 1798, ch. 54, § 1, 1 Stat. 566, 566–67. The 1798 act was replaced once Jefferson and his party took over the presidency and Congress. See Act of Apr. 14, 1802, ch. 28, 2 Stat. 153.

273. On the 1790 and 1795 acts of Congress, see James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 393–401, 404–05 (2010).

274. Naturalization Act of 1798, § 4, 1 Stat. at 567–68.

275. See *id.* § 1, 1 Stat. at 566–67.

The Alien Law was a Senate product. The much greater breadth and different focus on the Alien Law compared to the Alien Enemies Act is demonstrated by the first legislative proceedings. The initial Senate proposal was for a committee to examine whether “provision ought to be made by law, for removing from the territory of the United States such aliens . . . as may be dangerous to its peace and safety.”²⁷⁶ The resulting bill—which was clearly based on a British statute concerning aliens passed in 1793, motivated by fears of domestic subversion from French and third-country pro-French aliens in Britain²⁷⁷—was very tough.²⁷⁸ Among other provisions, it criminalized any deviation from an alien’s place of residence imposed by presidential permit, and gave very wide latitude to the president to remove from the country any aliens deemed dangerous.²⁷⁹ It covered all noncitizens and applied at all times—not just during war.

On June 25, 1798, a somewhat diminished Alien Law was enacted, to be in force for two years.²⁸⁰ The system of alien registration imposed by the Naturalization Act—requiring self-reporting—was strengthened by the Alien Law. The latter statute added a reporting duty on the masters and commanders of vessels bringing aliens into the United States, and it was backed by a heavy fine for noncompliance.²⁸¹

In addition, the Alien Law authorized the president 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 out of the territory of the United States,” taking any “goods, chattels, and other property, as he may find convenient,” with any remaining property still under legal title and control of the departed alien.²⁸² Any alien ordered to depart could seek a presidential license to remain, but if that was refused, and the alien was “found at large within the United States,” the executive could initiate a criminal prosecution for violation of the statute and its implementing order.²⁸³

276. SENATE JOURNAL, *supra* note 239, at 479.

277. For discussion of the act of Parliament, see *infra* notes 476–77 and accompanying text.

278. See Senate Bill Respecting Aliens, Fifth Congress, Second Session, *microformed on Microfilm Publ’n M1704*, Unbound Recs. of the U.S. Senate, Fifth Cong., 1797–1799, Roll 1: Recs. of Legis. Procs., Target 1, Bills & Resols. Originating in the Senate, SEN 5A-B1 (Nat’l Archives).

279. *Id.* §§ 3, 9.

280. An Act Concerning Aliens, ch. 58, 1 Stat. 570 (1798) (Alien Law).

281. *Id.* § 3, 1 Stat. at 571–72.

282. *Id.* §§ 1, 5, 1 Stat. at 570–72.

283. *Id.* § 1, 1 Stat. at 571. Like a number of defensive measures passed in the second session of the Fifth Congress, the Alien Law had a sunset provision. See *id.* § 6, 1 Stat. at 572 (“[T]his act shall continue and be in force for and during the term of two years from the passing thereof.”).

3. The Alien Enemies Act

In combination, the Naturalization Act, the Alien Law, and the Sedition Act were the internal security measures enacted by the Fifth Congress for use outside of wartime. They were broad and tough, and very controversial among Republicans. The Alien Enemies Act was a different, much narrower statute for wartime. And unlike the other bills, it had bipartisan support when it was in its final form.

The most important debates on the proposed Alien Enemies Act occurred at the very outset of its legislative progress.²⁸⁴ On May 1, 1798, the House received the following resolution from Sewall's committee:

Resolved, That provision be made by law for the apprehending, securing, or removal, as the case may require, of all aliens, being males, of the age of fourteen years and upwards, who shall continue to reside, or shall arrive within the United States, being natives, citizens, or subjects of any country, the Government whereof shall declare war against the United States, or shall threaten, attempt, or perpetrate any invasion or predatory incursions upon their territory, as soon as may be after the President of the United States shall make proclamation of such event. Providing, in all cases where such aliens are not chargeable with actual hostility, that the period settled by any treaty with such hostile nation, or other reasonable period, according to the usage of nations, and the duties of humanity, shall be allowed for the departure of such aliens, with all their effects, from the territory of the United States; and excepting all cases of such aliens to whom passports or licences of residence may be granted consistently with the public safety.²⁸⁵

In the view of many Federalists, the resolution did not authorize alien enemy detention or removal during a state of limited "hostilities," such as the one that was then occurring at sea with France.²⁸⁶ The triggering language in the resolution was much narrower, and it is very similar to what eventually became law.

The most important question debated in the House, for the purposes of understanding the Alien Enemies Act's triggers, was: outside of war being declared by Congress or a foreign nation, what actions, when taken by a foreign nation, would justify delegating authority to the president to deploy the wartime coercive power of treating noncitizens as alien enemies? The

284. Senators' discussions about the House's proposed Alien Enemies Act are not recorded in the *Annals of Congress* or the Senate's daily journal. Those records recount the readings of the bill, referral to a committee, and the vote on it, occurring on June 26 and 27 and July 2 and 3, 1798. See 7 ANNALS OF CONG. 590 (June 26, 1798); *id.* at 591 (June 27, 1798); *id.* at 596 (July 2, 1798); *id.* at 598 (July 3, 1798); SENATE JOURNAL, *supra* note 239, at 518, 520, 524, 527. Records at the National Archives show that the Senate's proposed amendments to the eventual House bill did not concern any of the language disputed today about "invasion" or "predatory incursion." See Senate Proposed Amendments to Bill Respecting Alien Enemies, Fifth Congress, Second Session, *microformed on* Microfilm Publ'n M1704, Unbound Recs. of the U.S. Senate, Fifth Cong., 1797-1799, Roll 1: Records of Legis. Procs., Target 4, House of Representatives' Bills Considered in the Senate, SEN 5A-C1 (Nat'l Archives).

285. 8 ANNALS OF CONG. 1566-67 (May 1, 1798).

286. See *supra* notes 220, 234, 249 and accompanying text.

records of debate show bipartisan agreement that delegated power to invoke the Act should be restricted so as to maintain congressional control over war and actions that would lead to war. There is no indication, contrary to the suggestion of the U.S. government and the dissenting judge in the recent Fifth Circuit panel decision in *W.M.M. v. Trump*,²⁸⁷ that the House intended to broaden the category of alien enemies beyond the traditional limits found in international law, common law, and Anglo-American government practice prior to 1798. The statute represented continuity, not change.

The first significant House discussion of the resolution concerning alien enemies occurred on May 3, 1798. Several hardline Federalists objected to what they saw as unduly narrow triggering language. They articulated two major problems. First, the triggering language of a foreign nation declaring war meant that “a foreign Government might do an act tantamount to war, without declaring it, yet, according to the wording of the proposition, the citizens of that country could not be removed.”²⁸⁸ Federalist Harrison Gray Otis believed

it would not be proper to wait until predatory incursions were made—until the enemy was landed in our country, or until what shall be considered as threatening or actual invasion appeared—before any steps were taken on the subject now under consideration. He was of opinion that when an enemy authorized hostilities, that was the time to take up that crowd of spies and inflammatory agents which overspread the country like the locusts of Egypt, and who were continually attacking our liberties.²⁸⁹

John Rutledge Jr., a Federalist from South Carolina, made a similar point, stating that “intriguing agents and spies” of the French were “now spread all over the country,” and “if these persons are suffered to remain” until a formal declaration of war by France, “France will never declare war, as she will consider the residence of these men amongst us as of greater consequence than the lining of our seaboard with privateers, or covering our coasts with men.”²⁹⁰

Sitgreaves, too, “believed the business of defence would be very imperfectly done, if they confined their operations of defence to land and naval forces, and neglected to destroy the cankerworm which is corroding in the heart of the country”²⁹¹—French agents in the United States. It would be

287. 154 F.4th 207 (5th Cir.), *vacated and reh’g granted en banc*, 154 F.4th 319 (5th Cir. 2025), *dismissed as moot*, No. 25-10534, 2026 WL 2349473 (5th Cir. Aug. 13, 2026) (en banc). Agreeing with the U.S. government’s position, Judge Andrew S. Oldham reads the statute and the House debates in 1798 to find that “the Alien Enemies Act . . . expanded the traditional concept of ‘alien enemies’ under the law of nations in certain respects.” *Id.* at 245 (Oldham, J., dissenting). In his view, the Act expanded the concept by allowing the president to preemptively invoke it outside of wartime when he determined that an attack was merely threatened, and to act against nonmilitary threats that constituted an “invasion” or “predatory incursion,” such as *Tren de Aragua*. *Id.*

288. 8 ANNALS OF CONG. 1573 (May 3, 1798) (statement of Rep. Nathaniel Smith, Federalist from Connecticut).

289. *Id.* at 1575.

290. *Id.* at 1574.

291. *Id.* at 1577.

too dangerous, Sitgreaves argued, to require, as he read the resolution, that the president “wait till the enemy landed” before detaining and removing dangerous French persons as alien enemies.²⁹²

Second, some Federalists, who wanted a broader, more aggressive approach than the Sewall committee, seemed to think the resolution was defective for allowing action *only against alien enemies*, not aliens from non-enemy countries. This comes across most clearly in recorded statements of John Allen, a Federalist from Connecticut. He declared that there were presently “citizens of several other countries” besides France in the United States who were just “as dangerous” as the French.²⁹³ He referred to the way local “agents of the French nation” had internally aided Napoleon Bonaparte’s subjugation of Venice, Switzerland, and Rome, and moved that the resolution under consideration be amended to allow detention of dangerous foreigners even if they were not alien enemies.²⁹⁴ Allen said he wanted to “move an amendment . . . making the resolution extend to all aliens in this country.”²⁹⁵

This second concern about dangerous aliens who were not citizens or subjects of a wartime enemy country—i.e., not alien enemies—was rebuffed by Sewall, the drafting committee chair. He reminded the House of the difference in how background principles of law treated “alien friends and alien enemies.”²⁹⁶ If alien friends engaged in sedition, there should be criminal laws to handle the particular cases, Sewall said, but otherwise he would not want the United States to make friendly aliens “subject to an arbitrary authority” and have “fear of a dungeon or removal,” as occurred under the French Directory and among “the Turks or Arabs.”²⁹⁷ Ultimately, the perceived problem of dangerous alien “friends” was handled by separate legislation, the Senate-drafted Alien Law and the Sedition Act. The concerns expressed by Allen, and his desired changes in the resolution on alien enemies, did not influence the House-drafted Alien Enemies Act.

The first concern of Federalists with more hardline views—the perceived narrowness of the language triggering detention and removal powers only when war was “declare[d] . . . against the United States”—was directly addressed in the House. What went unsaid in the debates is as important as what was said. The triggering language of “threatened” or “attempted” invasions or predatory incursions was in the Sewall committee resolution from the beginning. But Otis, Smith, Sitgreaves, and other Federalists in the House who wanted a broader bill viewed this language as insufficient to address their expressed concern about a lack of prewar preemptive power over alien enemies. They instead focused their proposed amendments on broadening the “declare war” trigger of the Sewall resolution.

292. *Id.*

293. *Id.* at 1578.

294. *Id.*

295. *Id.*

296. *Id.* at 1579.

297. *Id.* at 1579–80.

Smith moved that the president should be able to act against a foreign country's nationals in the United States as alien enemies if the foreign country "shall be at war" with the United States, replacing the language about a foreign government's declaration of war.²⁹⁸ Otis supported Smith's critique, but in a friendly amendment, suggested amending the Sewall resolution so that the president's power to treat people as alien enemies would arise not only with declared war but also when a foreign country "shall authorize hostilities against the United States."²⁹⁹ Note again, because it is crucial to accurately reading the statute, that these proposed amendments were thought necessary by some Federalists—even though the Sewall resolution already allowed the president to treat people as alien enemies if their home country "threatened" or "attempted" an "invasion" or "predatory incursion" against the United States.

Both Republicans and moderate Federalists—led by Sewall—pushed back against Smith and Otis.³⁰⁰ Under the Otis language, the power to treat people as alien enemies could arise when, for instance, a foreign country authorized commerce raiding at sea against U.S. shipping that, while perhaps claiming to conform to the law of nations, went beyond the rules and therefore invaded the rights of the victim country and its citizens, amounting not to war but to "hostilities." Indeed, as of May 3, 1798, when this House debate occurred, France was widely understood by Federalists to have already authorized and conducted such "hostilities" against the United States. A few weeks later, at the end of May, Congress unequivocally authorized the president to use the Navy to engage in naval hostilities against French commerce raiders found along the American seacoast.³⁰¹ Thus, there were immediate and profoundly serious stakes to the debate between the Smith-Otis camp and the much larger moderate Federalist and Republican side.

Sewall "urged, as an objection to this [Otis] amendment, the Constitutional power of Congress to declare war."³⁰² "France, said he, has now done towards the United States what might be considered as hostility,"³⁰³ in other words, armed conflict sufficient to trigger the president's power under the Otis language. "Too many circumstances of insult and aggression, he allowed, had been experienced by this country from a foreign Power, which might have been understood by other nations as war, and might have been so considered by this country."³⁰⁴ But, Sewall reminded his colleagues that because "it is an act of Congress to declare war, we could not be considered

298. *Id.* at 1573.

299. *Id.*

300. See *id.* (statement of Rep. Joseph McDowell, Republican from North Carolina) ("[I]t might be said [by the president] hostilities were authorized when no war was declared, and these [noncitizens] might be treated as if the nation from which they came was at war with us, when no war existed."); *id.* at 1574 (statement of Rep. Abraham Venable, Republican from Virginia) (stating that "[m]any cases might be deemed hostility by the President which ought not to go" so far as to make all Americans and Frenchmen alien enemies as to each other).

301. See *supra* notes 251–52 and accompanying text.

302. 8 ANNALS OF CONG. 1574 (May 3, 1798).

303. *Id.* at 1575.

304. *Id.* at 1574.

as at war until Congress declared us to be in such a state, except war was declared against us.”³⁰⁵ The resolution was not for a temporary measure during the crisis with France, Sewall is recorded saying, but was intended “as a general provision, which might at any time be called forth by proclamation” and thus “should . . . be as well guarded and definite as possible.”³⁰⁶ If Otis’s language were adopted, Sewall stated, this “indefinite” provision would be dangerous because the president’s decision to treat the French, or subjects of another foreign nation in the future, as alien enemies would bring down like or worse retaliation on Americans abroad—all without Congress having deliberated and decided whether the United States should be at war.³⁰⁷

To attempt to partially meet the concerns of Otis, Sitgreaves, and Smith that the resolution did not give enough preemptive discretion to the president to act prior to a foreign government’s formal declaration of war, Sewall said he was open to an amendment as follows:

Original resolution: “being natives, citizens, or subjects of any country, the Government whereof *shall declare war against* the United States.”³⁰⁸

Sewall motion: “being natives, citizens, or subjects of any country *between which and the United States there shall exist a declared state of war.*”³⁰⁹

But before a vote on this possible change, Otis’s pending “hostilities” motion was rejected decisively, with twenty-seven members voting for it and fifty-five against.³¹⁰ Otis then objected again to the committee’s original language and Sewall’s suggested change, explaining that “[g]entlemen talk about a declaration of war,” but “[n]o such thing scarcely ever precedes war”—a declaration comes at the same time as the attack “like thunder and lightning.”³¹¹ Supporting Otis, Sitgreaves suggested adding to Sewall’s proposed amendment further language triggering the president’s power if a foreign country “shall declare hostility against the United States.”³¹² Gallatin then spoke against Sitgreaves’s suggestion because the term “hostility” was too vague, he said, having an unclear relationship to a “state of war.”³¹³ During a state of war, the law of nations and the U.S. Constitution allowed detention or removal of alien enemies, Gallatin granted, but when there was no state of war, Congress had no constitutional power to detain or remove alien enemies because of the Migration or Importation Clause in Article I, Section 9 of the Constitution and other constitutional limitations on Congress.³¹⁴ Most Federalists disagreed with Gallatin about Congress’s

305. *Id.*

306. *Id.*

307. *Id.* at 1574–75.

308. *Id.* at 1566 (May 1, 1798) (emphasis added).

309. *Id.* at 1580 (May 3, 1798) (emphasis added).

310. *Id.*

311. *Id.* at 1581.

312. *Id.*

313. *Id.* at 1581–82.

314. *Id.*; see also U.S. CONST. art. I, § 9, cl. 1 (“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, but a Tax or duty

constitutional power over alien friends,³¹⁵ but moderate Federalists joined Republicans in beating back the Smith, Otis, and Sitgreaves proposals to broaden the proposed Alien Enemies Act.³¹⁶

Several days later, the committee's resolution, as amended by Sewall's change, was adopted by the House without the need for a roll call vote.³¹⁷ The key language in the resolution now allowed the president to detain or remove males aged fourteen and older, "being natives, citizens, or subjects, of any country between which and the United States there shall exist a state of declared war, or the Government of which shall threaten, attempt, or perpetrate, any invasion or predatory incursions upon their territory."³¹⁸ The triggering language of the Alien Enemies Act was now in place, as of May 8, two months before it became law. Only very minor stylistic changes were made after this date.

There was remarkably little discussion at the time of the language that is now the focus of litigation challenging President Trump's invocation of the Act: "[w]henever . . . any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government."³¹⁹ Unless one cherry-picks phrases out of context, the House debate on the proposed Alien Enemies Act refutes the claim made today that invasions and predatory incursions were understood to mean something broader than a military attack on the United States. If Republicans and moderate Federalists had understood the terms in the way the Trump administration does now, there would have been an uproar in the House and immediate changes made to the bill text. This is not speculation—the Alien Law was incredibly controversial among Republicans, precisely because it acted against aliens who were not within the well-established wartime category of "alien enemies."³²⁰

At one point in the legislative progress of the Alien Enemies Act, Matthew Lyon, a Republican from Vermont, "moved . . . to strike out the words 'or threatened'" from the bill because they were "too vague to authorize the exercise of so great a power as was here given."³²¹ The motion, seconded by Nathaniel Macon, a Republican from North Carolina, was defeated with forty-four opposed and thirty-nine in favor, with no record of individual votes.³²² No leading Republican spoke in favor of the motion, though they

may be imposed on such Importation, not exceeding ten dollars for each Person."'). This clause was widely understood in 1787–1788 and later (but not by Gallatin) to focus specifically on barring congressional regulation of the international slave trade until 1808.

315. See, e.g., 8 ANNALS OF CONG. 1960 (June 16, 1798) (statement of Rep. Otis) (contending that this clause of the Constitution referred to "a species of foreigners held as property in some of the States . . . He meant slaves").

316. See *id.* at 1580 (May 3, 1798) (reporting that Allen withdrew his amendment after Sewall's rebuttal and that Otis's amendment failed by a vote of fifty-five to twenty-seven).

317. *Id.* at 1630–31 (May 8, 1798); HOUSE JOURNAL, *supra* note 205, at 290.

318. 8 ANNALS OF CONG. 1631 (May 8, 1798).

319. 50 U.S.C. § 21.

320. See *supra* notes 127–32 and accompanying text.

321. 8 ANNALS OF CONG. 1786 (May 22, 1798).

322. *Id.*

likely voted for it. Since the moderate Federalist view, as articulated by the floor leader Sewall, was that the proposed Alien Enemies Act should be tied narrowly to Congress's control of war, those who defeated the Lyon amendment almost certainly viewed the language about a "threatened" invasion or predatory incursion as refraining from delegating power to the president for non-wartime use.

The same day as the very broad Alien Law became law, Otis moved to table further consideration of the proposed Alien Enemies Act, thinking it had become unnecessary with "the President having sufficient power over aliens by the bill already passed."³²³ Gallatin opposed the motion on behalf of Republicans, arguing that "if alien enemies are really dangerous, it cannot be supposed that the President can remove them all" under the Alien Law.³²⁴ The proposed Alien Enemies Act, he said, thus "provides in what manner [alien enemies] may be laid under certain restraints by way of security," short of removal.³²⁵ The bill was needed, and it was narrower and more rights-protective than the Alien Law.

In the face of this Republican support for the proposed Alien Enemies Act, Otis withdrew his motion.³²⁶ When the House bill passed, and later when the House agreed to some Senate amendments, no roll call vote was requested,³²⁷ likely suggesting that there was no major controversy about the bill from the Republican side, despite the somewhat broad triggering predicate of "threatened" invasion or predatory incursion.³²⁸ Gallatin also several times voiced his view that Congress had undoubted power to order the detention or removal of alien enemies under its constitutional war powers,³²⁹ showing his view that the proposed bill would be applicable during war and imminently threatened war, but not otherwise.

Harper, a hardline Federalist from South Carolina, moved at one point in the debates on the proposed Alien Enemies Act to strike the words "predatory incursion," saying that the power given by the bill to the president "was a very extensive one, and he did not think it ought to be given except in case of serious attack."³³⁰ He favored narrower presidential discretion than did Otis, Sitgreaves, and Allen, with whom he usually agreed. The *Annals of Congress* indicate that Sewall then spoke "a few words in opposition" to Harper's motion, and Harper immediately withdrew it, "alleging that he had not rightly understood the section."³³¹ Though the *Annals* do not contain

323. *Id.* at 2034 (June 25, 1798).

324. *Id.* at 2035.

325. *Id.*

326. *Id.*

327. *Id.* at 2049 (June 26, 1798); *id.* at 2088 (July 3, 1798); *see also* HOUSE JOURNAL, *supra* note 205, at 354, 367.

328. *See also supra* notes 125–27 and accompanying text (discussing Republican support for the Alien Enemies Act).

329. *See* 8 ANNALS OF CONG. 1581–82 (May 3, 1798); *id.* at 1795 (May 23, 1798); *id.* at 1955 (June 16, 1798); *id.* at 1980 (June 19, 1798).

330. *Id.* at 1786 (May 22, 1798).

331. *Id.* A Republican, Joseph McDowell, spoke in favor of Harper's motion, but his remarks, like Sewall's, were not recorded. *See id.*

more details, it seems quite likely that Sewall managed to assure Harper that a “predatory incursion” did in fact refer to a serious attack by an enemy nation, making it proper for the president to invoke the war power to detain or remove alien enemies.

In current debates about the Alien Enemies Act, the Trump administration and judges who endorse its legal arguments view the Act’s delegated authority as sufficient to invoke it wholly outside wartime when an invasion or predatory incursion, interpreted to be a lesser intrusion than a foreign nation’s military attack, is merely “threatened.”³³² This expansive reading is clearly not how the Fifth Congress viewed things. As noted above when discussing the Provisional Army Act,³³³ the eighteenth-century realities that Congress was often out of session and that people (say, a U.S. Army unit marching to meet an invasion) and news (say, that a French invasion fleet had left Europe heading for the United States) both traveled so slowly, meant that Congress was aware that it needed to delegate a bit of preemptive power to the president. Indeed, Congress in the Alien Enemies Act provided that the president could protect the United States by beginning to detain or remove nationals of a “hostile [foreign] nation or government” some moments before the enemy nation’s military actually landed on U.S. soil—that is, in the language of the statute, when an enemy nation launched an attack “against the territory of the United States.”³³⁴ The Act’s limited delegation of preemptive power on the eve of a “threatened” war that would imminently hit U.S. territory was thus consistent with both 1798 understandings of Congress’s war-making authority and principles of alien enemy status under preexisting law, not a radical departure from them.

V. ADDITIONAL INTERPRETIVE
TOOLS FOR “INVASION”
AND “PREDATORY INCURSION”

All indications point to reading the terms “invasion” and “predatory incursion” in the Alien Enemies Act to refer to military attacks on U.S. territory by a foreign government: the background law of alien enemy status in the common law, law of nations, and Anglo-American governmental practices; surrounding legislation passed by the Fifth Congress, specifically the Naturalization Act, Alien Law, and Provisional Army Act; and House debates about the proposed Alien Enemies Act.

This part confirms that reading of the statute. It examines the meaning of “invasion” in the U.S. Constitution, reviews dictionary definitions of key statutory terms, canvasses the usage of “invasion” and “predatory incursion” in national and state government documents from the Revolutionary War into the 1790s, and applies basic statutory interpretation canons in use during the late eighteenth century.

332. See *supra* note 287.

333. See *supra* notes 240–47 and accompanying text.

334. 1798 AEA, *supra* note 1, § 1, 1 Stat. at 577.

A. *"Invasion" as a National
Security Term of Art*

Though not exactly a *legal* term of art (unlike, say, habeas corpus, bail, ex parte, or ex post facto), the word "invasion" could be called a governmental, national security term of art, used frequently in the seventeenth and eighteenth centuries as a triggering predicate for war powers, duties, and liabilities. The Alien Enemies Act is a statute of this type. In this national security context, "invasion" was very frequently paired with "insurrection" or "rebellion" (or "domestic violence," "seditious violence," or similar terms for violent internal discord), making the paired words a legal collocation or fixed formula with an understood meaning. "Invasion" in this context seems to have always meant an offensive military attack into the territory of a state. In Anglo-American history, the pairing of invasion and rebellion as legal triggers is seen most clearly in the contexts of the suspension of habeas corpus and the use of the militia in emergencies.

1. Suspension of Habeas
Corpus and "Invasion"

In Anglo-American law, actual or threatened "invasion" or "rebellion" (or synonyms) could be addressed by a legislature with a habeas corpus suspension statute enacted during military emergencies. The U.S. Constitution codifies this trigger as a protection of individual rights, providing that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."³³⁵ As discussed below, in the context of habeas suspension, "invasion" referred to a military attack on the state's home territory by foreign armed forces.

As many scholars have detailed, one of the most important developments in seventeenth-century English constitutional history involved limitations on the crown's powers of detention. Parliament and judges of the common law courts together successfully pushed back against monarchs' assertions of prerogative power to either directly, or through privy councilors or other high officers of state, order the detention of subjects suspected of treason or other serious criminality, based on mere assertions of suspicion, rather than evidence on oath, and without the detainee being able to seek review and release in the courts. By the time of the English Glorious Revolution, it had been established through a long chain of legal and political developments that to detain someone on suspected criminal grounds, the crown needed to supply competent evidence rather than mere say-so to justify detention; there was a right to judicial review through the ordinary processes of law, often via the writ of *habeas corpus ad subjiciendum*; and a court dissatisfied with the

335. U.S. CONST. art. I, § 9, cl. 2.

evidence or the legal basis for the detention could order the detainee's bail or release.³³⁶

The judicially created writ of habeas corpus was strengthened by judicial innovation and by statutes of 1628, 1641, and 1679.³³⁷ After these developments, Parliament, during serious security crises, enacted what came to be called suspension statutes, which allowed persons within protection to be temporarily detained on executive say-so of suspected treason or other serious criminal activity, without a sworn statement of reasons given, and barred courts from being able to order release of the detainee.³³⁸ Though the circumstances moving Parliament to pass suspension statutes differed somewhat at different times, there was a common thread in these statutes—they were enacted during times of either actual or threatened internal *rebellion* or foreign military *invasion*, circumstances which necessitated summary powers to arrest and temporarily detain persons within protection without following the ordinary course of law.³³⁹

After independence, some U.S. states also passed suspension acts, again triggered by foreign military invasion or rebellion.³⁴⁰ The U.S. Constitution's Suspension Clause adopted these categories.³⁴¹ Not coincidentally, one of the circumstances justifying suspension of habeas—actual or threatened foreign military “invasion”—is also a trigger to deem noncitizens of the hostile nation as alien enemies under background rules of common law and the law of nations, as well as the Alien Enemies Act.

336. See WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 41–63 (1980); 1 HOLDSWORTH, *supra* note 183, at 226–28; 6 *id.* at 31–40; 9 *id.* at 108–25; Tyler, *supra* note 165, at 923–54; Hamburger, *supra* note 137, at 1905–10; Halliday & White, *supra* note 159, at 623; Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 970–71 (1998).

337. See AMANDA L. TYLER, *HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY* 14–19, 21–22, 28–29 (2017) (discussing the Petition of Right of 1628, 3 Car. 1 c. 1 (Eng.), Habeas Corpus or Star Chamber Act of 1641, 16 Car. 1 c. 10 (Eng.), and the Habeas Corpus Act of 1679, 31 Car. 2 c. 2 (Eng.)).

338. See John Harrison, *The Original Meaning of the Habeas Corpus Suspension Clause, the Right of Natural Liberty, and Executive Discretion*, 29 WM. & MARY BILL RTS. J. 649, 651–52, 653–63 (2021); Tyler, *supra* note 165, at 934–54; Hamburger, *supra* note 137, at 1905–10; Halliday & White, *supra* note 159, at 602–27. There is a modern scholarly debate about the source of detention authority and the precise role played by Parliament's suspension statutes. See, e.g., Lee Kovarsky, *Citizenship, National Security Detention, and the Habeas Remedy*, 107 CALIF. L. REV. 867, 877–95 (2019) (clarifying the debate and staking out a position). For my purposes, nothing turns on resolving this debate.

339. See Tyler, *supra* note 165, at 934–52; Halliday & White, *supra* note 159, at 583, 624–25.

340. See, e.g., An Ordinance to Empower the President or Commander-in-Chief for the Time Being, with the Advice of the Privy Council, to Take Up and Confine All Persons Whose Going at Large May Endanger the Safety of this State, No. 1109, pmb., §§ 1–2, 1778 S.C. Acts, *reprinted in* 4 THE STATUTES AT LARGE OF SOUTH CAROLINA 458 (Thomas Cooper ed., Columbia, A.S. Johnston 1838) (“in this time of public danger, when this State is threatened with an invasion by the enemy”); An Act to Punish Certain Crimes and Misdemeanors, and to Prevent the Growth of Toryism, ch. 20, § 12, 1777 Md. Laws, *reprinted in* LAWS OF MARYLAND MADE AND PASSED AT A SESSION OF ASSEMBLY (Annapolis, Frederick Green 1777) (“in Case this State shall be invaded by the Enemy”).

341. See, e.g., Tyler, *supra* note 165, at 923–75; Halliday & White, *supra* note 159, at 583, 613–24, 630, 670–71.

Instead of *temporarily suspending* certain protections of the laws as to people who by default were within protection, the Alien Enemies Act, triggered by war or imminent threat thereof, allows the U.S. president extraordinary powers over persons (arrest, detention, expulsion) *by proclaiming that there has been a change in their legal status*—once alien friends are now alien enemies. It is therefore likely that “invasion” in the Alien Enemies Act means the same as in the Suspension Clause of the U.S. Constitution and its precedents.³⁴²

2. The Militia and “Invasion”

As with habeas suspension, powers and liabilities regarding the militia and military protection of the state frequently turned on “invasion” and “rebellion” (or a similar phrase). In Anglo-American law prior to 1798, these triggering words determined when men could be forced into the militia at all, when militia could be called out by the government, or when militia could be compelled to serve outside their home counties. “Invasion” seems invariably to have meant foreign military attack into the state’s territory.

During the English civil wars, a constitutional reform proposal written by Levellers opined that Englishmen could not be impressed “to serve in foreign war” or “within the kingdom,” except “in readiness for resisting of foreign invasions, suppressing of sudden insurrections, or for assisting in execution of the laws.”³⁴³ After the Restoration, Parliament’s Militia Act of 1662³⁴⁴ provided that militia may be employed by the monarch, in or out of their home counties, “in case of Insurrection Rebellion or Invasion” for the purpose of “suppressing” the insurrection or rebellion or “repelling” the invasion—clearly meaning military attacks by an external power.³⁴⁵ A century later, Blackstone reported that English militia were still “not compellable to march out of their [home] counties, unless in case of invasion or actual rebellion.”³⁴⁶

Foreign military “invasion” and internal rebellion or insurrection triggered the executive’s ability to deploy militia under the laws of many North

342. See *Lockington’s Case* (Pa. 1813), reprinted in RICHARD BACHE, *THE CASE OF ALIEN ENEMIES, CONSIDERED AND DECIDED UPON A WRIT OF HABEAS CORPUS ALLOWED ON THE PETITION OF CHARLES LOCKINGTON, AN ALIEN ENEMY* 23 (Philadelphia, John Binns 1813), <https://www.loc.gov/item/20016040/> [<https://perma.cc/K3W4-VSER>] (statement of Alexander J. Dallas, U.S. District Attorney for the Eastern District of Pennsylvania, arguing that the Alien Enemies Act can be analogized to a suspension of habeas corpus).

343. *An Agreement of the People* (1649), reprinted in PAUL L. HUGHES & ROBERT F. FRIES, *CROWN AND PARLIAMENT IN TUDOR-STUART ENGLAND: A DOCUMENTARY CONSTITUTIONAL HISTORY, 1485–1714*, at 234 (1959).

344. *An Act for Ordering the Forces in the Several Counties of this Kingdom* 1662, 14 Car. 2 c. 3 (Eng.).

345. *Id.* § 1.

346. 1 BLACKSTONE, *supra* note 133, at 265 (*399); see also *An Act for the Better Ordering of the Militia Forces in the Several Counties of That Part of Great Britain Called England* 1757, 30 Geo. 2 c. 25, §§ 5, 25, 45 (Gr. Brit.) (authorizing the militia to be deployed “in case of actual invasion, or upon imminent danger thereof, or in case of rebellion”).

American colonies³⁴⁷ and U.S. states after independence.³⁴⁸ In line with the meaning accrued by these antecedents, the U.S. Constitution's Calling Forth Clause empowers Congress to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."³⁴⁹ Based on the history and purposes of the constitutional provision, the dictionary meaning of "invasion" discussed in the next section, and statements during ratification, it seems clear that "invasion" in this Article I Calling Forth Clause means an offensive military attack on U.S. territory by a hostile foreign state or Native American tribe.³⁵⁰

In Article IV of the Constitution, the "United States" is given the duty to "protect each of [the U.S. states] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."³⁵¹ Here too "invasion" rather clearly refers to an offensive military attack by a hostile state—or perhaps by a large-scale non-state military group—into the territory of a U.S. state.³⁵² The Second Congress under the new Constitution enacted a statute under the Article I Calling Forth Clause (and perhaps the Article IV Protection Clause too), allowing the president to call out the militia "whenever the United States

347. See, e.g., An Act for Establishing a Militia in this Province, ch. 3, § 8, 1766 N.C. Sess. Laws, *reprinted in* 23 THE STATE RECORDS OF NORTH CAROLINA 762 (Walter Clark ed., 1904) ("[I]n Case of any Insurrection within this Province, or Invasion, it shall and may be lawful for the Governor, or Commander in Chief for the time being, or any field Officer by him directed, to raise all, or so many of the Militia, as shall be thought necessary for opposing such Insurrection or Invasion.").

348. See, e.g., An Ordinance for the Better Defence and Security of this State, No. 1188, § 1, 1783 S.C. Acts, *reprinted in* 4 THE STATUTES AT LARGE OF SOUTH CAROLINA, *supra* note 340, at 567 ("[I]t shall and may be lawful for the Governor or Commander-in-chief of this State . . . with the advice and consent of the Privy Council, on an actual invasion, or on his receiving credible information of a formidable invasion being mediated against the State . . . to embody, array and dispose of any part of the militia and Charlestown battalion of artillery.").

349. U.S. CONST. art. I, § 8, cl. 15.

350. See, e.g., Statement of James Wilson to the Pennsylvania Ratifying Convention (Dec. 11, 1787), *reprinted in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 578 (Merrill Jensen ed., 1976) [hereinafter DHRC] ("The militia formed under [Article I of the Constitution] . . . will be such a bulwark of internal strength as to prevent the attacks of foreign enemies."); Statement of James Madison to the Virginia Ratifying Convention (June 16, 1788), *reprinted in* 10 DHRC, *supra*, at 1311 ("Congress is to call [the militia] forth to suppress insurrections and repel invasions of foreign powers.").

351. U.S. CONST. art. IV, § 4.

352. The drafting history of the clause shows that the terms "foreign violence," "foreign invasion," and "external invasion" were originally used to discuss this measure—all of which clearly suggest an attack from outside the country. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 47–49, 182 (Max Farrand ed., 1911) (Madison's notes of debate); *id.* at 148, 159, 174 (drafts from the Committee of Detail). The Committee of Detail settled on "foreign invasion." *Id.* at 188 (Madison's notes). The term was then shortened to simply "invasion," with Madison's notes recording that this occurred because "foreign" was "superfluous, being implied in the term 'invasion.'" *Id.* at 466. During ratification, Madison explained that under the clause, the states "are to be protected from invasion from other States, as well as from foreign powers." Statement of James Madison to the Virginia Ratifying Convention, *supra* note 350, at 1312; see also Jason Mazzone, *The Security Constitution*, 53 UCLA L. REV. 29, 47–59 (2005) (interpreting "invasion" in this clause to mean a foreign military attack on the territory of the United States).

shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe.”³⁵³

One should not assume that the meaning of “invasion” in the Constitution, the militia acts of Congress in the 1790s, and the background law governing militia and habeas corpus suspension was necessarily carried over into the Alien Enemies Act. But there are reasons to think that the Act did in fact use “invasion” in the same way as these sources. The Constitution’s three uses of “invasion”³⁵⁴ are each a trigger for the federal government’s war powers—just as the Alien Enemies Act is. As with a suspension of habeas corpus, an action triggering alien enemy status imparted significant legal disabilities, such as detention and restrictions on judicial release. It would make sense that these withdrawals of ordinary protection through the due course of law would be triggered by similarly severe circumstances facing the United States.

B. Dictionaries

In the current Alien Enemies Act litigation, judges and lawyers have relied heavily on dictionaries roughly contemporaneous with 1798 to interpret the terms “invasion” and “predatory incursion.” But as scholars have emphasized, eighteenth-century and early-nineteenth-century dictionaries have many defects and limitations, including (but not limited to) that the authors lacked the means to do comprehensive research of usage, and the dictionaries could be prescriptive rather than descriptive and reflect the idiosyncratic views of their authors.³⁵⁵ Anyone reading the early dictionaries will discover that their compilers often shamelessly plagiarized earlier works—so a researcher today who finds that several dictionaries have the same definition has not necessarily discovered anything useful.

This section summarizes the definitions of key terms of the Alien Enemies Act found in dictionaries roughly contemporaneous with the statute, and it checks them against the *Oxford English Dictionary* (OED), a high-quality modern work which carefully reviews linguistic meaning and usage over

353. Act of May 2, 1792, ch. 28, § 1, 1 Stat. 264. After the 1792 statute lapsed, it was replaced by a permanent one in 1795 using similar language. Act of Feb. 28, 1795, ch. 36, 1 Stat. 424.

354. There is a fourth constitutional provision, which I do not discuss. See U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”). In my view, “actually invaded” almost certainly refers to a military attack, but I have not deeply examined the question. For a valuable discussion of “actually invaded” in the Constitution, as well as “invasion” in the Constitution and the Alien Enemies Act, see Ilya Somin, *Immigration Is Not Invasion* (Geo. Mason Univ. Legal Stud. Rsch. Series, No. 25-19, 2026), <https://ssrn.com/abstract=5712442> [<https://perma.cc/M9D2-EFHV>].

355. See Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 283–87 (2019); Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358, 370–71 (2014); Saul Cornell, *The People’s Constitution vs. the Lawyer’s Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J.L. & HUMANS. 295, 298 (2011).

time. I place some reliance on old dictionaries, but am cautious because of their weaknesses. When I use the OED, it is only for definitions that it indicates were current in the late eighteenth century.

The core meaning of “invasion” was the same a few hundred years ago as it is today—a hostile attack or assault by a state or large non-state armed group, launched into a country’s territory.³⁵⁶ Older dictionaries often used the words “hostile” or “hostility” to define an invasion. Not coincidentally, the Alien Enemies Act refers to the country whose citizens or subjects could be treated as alien enemies—due to declared war, or actual, attempted, or threatened invasion or predatory incursion—as “hostile” to the United States, and refers to alien enemies of that country engaging in acts of “actual hostility” in the United States.³⁵⁷ “Hostile” is defined by dictionaries as adverse, warlike, opposite, acting as an enemy.³⁵⁸ “Hostility” is defined as in a state of war or enmity, acting as an enemy in war, or, in a nonmilitary meaning, as hate, enmity, or ill-will.³⁵⁹

356. See *Invasion*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com> (on file with the *Fordham Law Review*) (last visited July 15, 2026) [hereinafter OED] (defining “invasion” as “1.a. The action of invading a country or territory as an enemy; an entrance or incursion with armed force; a hostile inroad”). The OED describes as “figurative” a nonmilitary definition: “A harmful incursion of any kind, e.g., of the sea, of disease, moral evil, etc.” See *id.* For a sampling of “invasion” in dictionaries roughly contemporaneous with the Alien Enemies Act, see *Invasion*, WEBSTER, *supra* note 134, at 164 (“hostile entrance, attack, assault”); *Invasion*, 1 THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London, 3d ed. 1790) (“Hostile entrance upon the rights or possessions of another, hostile encroachments”); *Invasion*, WILLIAM PERRY, THE ROYAL STANDARD ENGLISH DICTIONARY (Worcester, Isaiah Thomas, 1st Am. ed. 1788) (“a hostile entrance, an attack”); *Invasion*, THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (London, 18th ed. 1781) (“the violent, sudden, and illegal entering of an army, &c., into another’s country, and keeping possession, or committing hostilities”). And here are definitions of “to invade”: *To Invade*, 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, 7th ed. 1783) (“1. To attack a country; to make an hostile entrance. 2. To attack; to assail; to assault. 3. To violate with the first act of hostility; to attack”); *Invade*, DYCHE & PARDON, *supra* (“to come violently, illegally, unfairly, unjustly, into the lands, possessions, or country of another; and is commonly understood of the army of one nation’s coming suddenly and unprovoked into another’s kingdom or country, and keeping possession of all or part thereof by violence . . . or doing other acts of hostility”); *Invade*, DANIEL BELLAMY, A NEW, COMPLETE, AND UNIVERSAL ENGLISH DICTIONARY (London, 4th ed. 1764) (“to make a hostile entrance upon another’s possessions or country; to attack, assail, assault; to violate with the first act of hostility”).

357. 1798 AEA, *supra* note 1, § 1, 1 Stat. at 577.

358. *Hostile*, OED, *supra* note 356 (“1.a. Of, pertaining to, or characteristic of an enemy; pertaining to or engaged in actual hostilities. 1.b. Of the nature or disposition of an enemy; unfriendly”); *Hostile*, WEBSTER, *supra* note 134, at 146 (“adverse, opposite, warlike, enraged”); *Hostile*, 1 JOHNSON, *supra* note 356 (“Adverse; opposite; suitable to an enemy”); *Hostile*, 1 SHERIDAN, *supra* note 356 (same); *Hostile*, PERRY, *supra* note 356 (same); *Hostile*, BELLAMY, *supra* note 356 (“adverse; opposite; acting as an enemy”).

359. *Hostility*, OED, *supra* note 356 (“1.a. The state or fact of being hostile; hostile action exercised by one community, state, or power against another; esp. such as involves war”); *Hostility*, WEBSTER, *supra* note 134, at 146 (“a state of war, open war, enmity, hate”); *Hostility*, 1 SHERIDAN, *supra* note 356 (“The practices of an open enemy, open war, opposition in war”); *Hostility*, BELLAMY, *supra* note 356 (“denotes a state of war or enmity between two nations”); *Hostility*, DYCHE & PARDON, *supra* note 356 (“open war, ravage, ruin, desolation, &c.”); *Hostility*, PERRY, *supra* note 356 (“open war, enmity”).

The term “incursion” in late-eighteenth and early-nineteenth-century dictionaries had the same meaning as it does today: a military sense—an invasion, inroad, attack, offensive military operation—and a non-military sense of an unwanted entry.³⁶⁰ A military “incursion” was on the same spectrum of activity as “invasion,” and, as noted, is sometimes identified as a synonym of “invasion.” But according to the dictionaries, “incursion” also referred to an event of a somewhat less significant kind than an invasion—an “inroad,” an “attack,” a “ravage”—against a territory or entity.

The adjective “predatory,” according to the OED and early modern dictionaries, had two meanings. First, with respect to a person, the word meant hungry, preying, ravenous, rapacious, exploitative; living by plunder, marauding, or rapine.³⁶¹ Second, it meant (and still today means) an act characterized by plundering, pillaging, or robbing.³⁶² Coming from the same Latin root as “predatory,” the word “depredation” was often used in eighteenth-century American sources to describe predatory attacks, such as piracy, maritime commerce raiding in war, and land-based attacks involving plunder and pillage, especially against civilians.³⁶³ “Depredation” was (and still is today) defined as “[t]he action of plundering, pillaging, or despoiling.”³⁶⁴

The final Alien Enemies Act empowers the president with respect to the “natives, citizens, denizens, or subjects” of a “hostile nation or government.”³⁶⁵ Earlier in the opening sentence, the Act also refers to a “foreign nation or government” which is in a declared war with the United States, or has launched, attempted, or threatened an invasion or predatory incursion onto U.S. territory.³⁶⁶ This represents a slight change from the

360. *Incursion*, OED, *supra* note 356 (“1. The action of running in or of running against . . . [such as] The cargo was damaged by the incursion of sea-water through a hole in a pipe. 2.a. A hostile inroad or invasion; esp. one of sudden and hasty character; a sudden attack”); *Incursion*, WEBSTER, *supra* note 134, at 155 (“an invasion, inroad, attack, ravage”); *Incursion*, 1 SHERIDAN, *supra* note 356 (“Attack, mischievous occurrence; invasion, inroad, ravage”); *Incursion*, BELLAMY, *supra* note 356 (“inroads of an enemy; hostile invasion”); *Incursion*, 1 JOHNSON, *supra* note 356 (“1. Attack; mischievous occurrence. 2. Invasion without conquest.”); *Incursion*, DYCHE & PARDON, *supra* note 356 (“the inroads of one enemy’s soldiers into the country of another; a wasting, spoiling, &c.”); *Incursion*, PERRY, *supra* note 356 (“an attack, invasion, inroad”).

361. *Predatory*, OED, *supra* note 356 (“1.b. Of a person: given to, or living by, plunder or marauding; ruthlessly exploitative, acquisitive, or rapacious”); *Predatory*, BELLAMY, *supra* note 356 (“hungry, preying, rapacious”); *Predatory*, 2 JOHNSON, *supra* note 356 (“2. Hungry; preying; rapacious; ravenous”); *Predatory*, PERRY, *supra* note 356 (“plundering, rapacious”). The word “rapine” means “1. The act of plundering. 2. Violence, force.” *Rapine*, 2 JOHNSON, *supra* note 356; see also *Rapine*, 2 SHERIDAN, *supra* note 356 (same).

362. *Predatory*, OED, *supra* note 356 (“1.a. Of, relating to, of the nature of, or involving plunder, pillage, or ruthless exploitation”); *Predatory*, WEBSTER, *supra* note 134, at 233 (“plundering, preying, rapacious”); *Predatory*, BELLAMY, *supra* note 356 (“of or belonging to robbing, pillaging, or plundering”); *Predatory*, 2 JOHNSON, *supra* note 356 (“1. Plundering; practicing rapine”); *Predatory*, 2 SHERIDAN, *supra* note 356 (same).

363. See *supra* notes 99, 204, 254, 258 and *infra* notes 375, 381 and accompanying text.

364. *Depredation*, OED, *supra* note 356; see also *Depredation*, DYCHE & PARDON, *supra* note 356 (“the preying upon, robbing, spoiling, or plundering”).

365. 1798 AEA, *supra* note 1, § 1, 1 Stat. at 577.

366. *Id.*

language first proposed in the House, which spoke of “natives, citizens or subjects of any country, the Government whereof” shall declare war and so on.³⁶⁷ The word “denizens” was added to the final bill, and the language about the foreign adversary was shifted from *the government of a country* to *a nation or a government*. It might be the case that these changes were intentional and affect the statute’s meaning.

“Denizen” was a special intermediate type of status in British law between a “subject” and an “alien.” Only Parliament could fully naturalize an alien into a subject, but the monarch by the royal prerogative could make an alien into a denizen, giving somewhat more rights with regard to property possession and conveyance, in particular.³⁶⁸ Denizen may have been added to the draft alien enemies bill in case it were used against Great Britain in the future.

The shift in the bill draft from speaking of the *government of a country* to speaking of *a nation or a government* is somewhat harder to explain. Congressional debates do not provide an answer. Those debates feature speeches using the terms “nation,” “country,” “state,” and “government” without seeming to intend variations in meaning.³⁶⁹ Looking at dictionaries provides little explanation either.

C. Contemporary Linguistic Usage

Examining state and national government records and correspondence from the American Revolutionary War through 1798 illustrates how the terms “invasion,” “incursion,” and “predatory” were used. “Hostile” and “hostility” were used very frequently and with many different meanings, so a comprehensive search and review of sources was not attempted. But, it is quite clear that “hostilities” was often used to refer to warfare and, perhaps more frequently, to military hostilities on a lesser scale than full war, in accordance with dictionary definitions.³⁷⁰

In line with the analysis in Part V.A (on “invasion” as a national security term of art) and Part V.B (on dictionary definitions), “invasion” in government usage from 1775 to 1798 typically referred to a large-scale offensive military attack and penetration or attempted penetration of a country or state. “Incursion” generally meant a somewhat smaller-scale military and often more rapid and brief attack than an “invasion.” “Incursion” was often used to refer to military raids or expeditions. The adjective “predatory” was often used as a term of opprobrium or contempt for the military activities of the enemy, and it generally meant an attack characterized at least in part by plunder and pillage, often on civilians. A vast number of examples are available of these terms being used with these meanings, but the following is a selection.

367. See *supra* note 285 and accompanying text.

368. See *supra* note 136 and accompanying text.

369. See *supra* Part IV.D.3.

370. See *supra* notes 152, 154–55, 175, 212, 220, 249, 252, 254, 289, 299, 303, 312–13 and accompanying text.

Though “invasion” and “incursion” could be synonyms, it seems to have been common that the former described a larger attack and the latter a smaller attack, raid, or expedition. Here are some examples showing or implying this:

- In 1775, the Continental Congress resolved “[t]hat a body of forces not exceeding five thousand, be kept up in the New York department, for the purpose of defending that part of America, and for securing the lakes, and defending the frontiers from invasions or incursions.”³⁷¹
- In July 1776, a committee of Essex County, New Jersey, wrote to General George Washington that, with New Jersey troops gone from the state to protect Manhattan and a British force sitting on Staten Island under General Sir William Howe, “there is great reason to apprehend that he, knowing our naked and defenceless state [and] . . . his troops have no other employment, [will] make incursions at least into, and ravage our country, so near and exposed.”³⁷²
- In spring 1778, northern communities in New York State petitioned Governor George Clinton to send troops to them, writing that they were “[e]xpos’d to the Incursions of the Savages and their more Savage abettors, the British troops and Tories from Canada, that Your Petitioners have Great reason to Expect that the Enemy will Commit depredations on them.”³⁷³ Clinton responded, “[t]he Cont’l Troops & the Companies I have ordered to be raised will be sufficient to guard the Frontiers ag’t small Parties or oppose any sudden Incursion & if the Enemy should come with greater force they must of course move slow, and afford Time for the militia to be collected.”³⁷⁴
- According to the Executive Council of Georgia, in late summer 1779, “[a] considerable part of the State having been in the immediate possession of the enemy ever since its invasion by them, those Counties which have held out against them, have been constantly subject to their incursions and depredations.”³⁷⁵
- In 1783, as the Revolutionary War was reaching its end, General Washington ordered Major General Nathanael Greene, in charge of the Southern department, to prepare to send most of his troops north, as New York City was still occupied by the British. Washington

371. 2 J. CONT’L CONG., *supra* note 174, at 207 (1775).

372. 6 PETER FORCE, AMERICAN ARCHIVES: FOURTH SERIES 1262–63 (Washington, M. St. Clair Clarke & Peter Force 1846) (petition of July 4, 1776).

373. 3 PUBLIC PAPERS OF GEORGE CLINTON, FIRST GOVERNOR OF NEW YORK 209 (1900) (April 1778 petition).

374. *Id.* at 212 (letter of April 24, 1778).

375. 2 THE REVOLUTIONARY RECORDS OF THE STATE OF GEORGIA 155 (Allen D. Candler ed., 1908) (letter of August 18, 1779, from the Executive Council to General Lincoln). The British captured Savannah at the very end of 1778 and held that city and the coastal region for several more years.

explained that even if Greene had a very large force, he would be unable “totally to prevent the desultory & predatory incursions of the Enemy” in the South, and so moving troops out of the department would not hurt the cause overly much.³⁷⁶

- U.S. government and state government communications frequently referred to Native American raids and other smaller-scale military expeditions as “incursions” rather than full “invasions.”³⁷⁷
- Secretary of State Timothy Pickering wrote to Hamilton in June 1798 that the United States must prepare in case of an “actual invasion” by a “powerful [French] army of veterans” from the continental wars, and in the meantime “[s]mall, predatory incursions of the French, tho’ they might occasion great destruction of property,” would not be “dangerous” to the security or survival of the United States.³⁷⁸

As noted, the words “predatory” and “depredation” were commonly used for military “incursions” or attacks aimed at plunder, pillage, and destruction, often of civilian targets. Some examples:

- Charles Lee, commander of the Southern Department for the Continental Army, wrote on June 1, 1776, to Edmund Pendleton, president of the Virginia Convention (which was writing a new constitution and providing some temporary governance for the state). Lee reported that a large British fleet had left Cape Fear, destination unknown. If the fleet were heading for Charleston, South Carolina, Lee thought the British intended a large-scale attack. But “if Virginia is their object, it is possible and probable their operations may be merely predatory and piratical.”³⁷⁹
- In 1777, the Continental Congress provided for defensive measures because “the Ottawas, Chippawas, Wiandots and Mingoes . . . are now actually carrying on a predatory war against the inhabitants of the western frontiers of Virginia and Pensylvania [sic].”³⁸⁰
- In 1781, General Washington wrote to Jefferson, then Governor of Virginia, describing activities of the British, who by boat had landed

376. Letter from George Washington to Nathanael Greene (Jan. 29, 1783), *reprinted by* NAFO, *supra* note 84, <https://founders.archives.gov/documents/Washington/99-01-02-10525> [<https://perma.cc/2NSU-TBVW>].

377. See, e.g., Letter from Representatives of the County of Ohio to Governor Henry Lee of Virginia (c. Dec. 1791), *reprinted in* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 222 (William S. Hein & Co. 1998) (1832) [hereinafter ASP: INDIAN AFFAIRS] (worrying that “incursions and attacks” by Native American tribes “upon our defenceless inhabitants” will increase after the defeat of the U.S. force under General Arthur St. Clair); 7 J. CONT’L CONG., *supra* note 174, at 21 (1777) (“Resolved . . . for the defence of the western frontiers of Virginia against Indian incursions, the forts Pitt and Randolph be each garrisoned at continental expence, with a company of an hundred men.”). The term “invasion” was also used for some attacks by Native American tribes. See, e.g., 12 J. CONT’L CONG., *supra* note 174, at 1006 (1778).

378. Letter from Timothy Pickering to Alexander Hamilton (June 9, 1798), *reprinted by* NAFO, *supra* note 84, <https://founders.archives.gov/documents/Hamilton/01-21-02-0282> [<https://perma.cc/YD75-Y7V9>].

379. FORCE, *supra* note 372, at 721.

380. 9 J. CONT’L CONG., *supra* note 174, at 999 (1777).

troops along the James River. “[T]he enemy’s incursion into your state,” he wrote, had resulted in a large group of British troops “committing . . . extensive depredations with impunity,” which he described to Jefferson as “predatory incursions.”³⁸¹

- In 1785, Algiers declared war on the United States. Algiers was one of the so-called “Barbary” states—North African emirates, loosely under Ottoman control, which frequently captured U.S. and European merchant vessels, stealing the cargo and ship and enslaving the crew and passengers. John Jay, who was Secretary of Foreign Affairs at the time, reported to the Confederation Congress: “[T]his Declaration of War being unprovoked, and made solely with Design to acquire Plunder . . . both the Honor and Interest of the United States demand that decided and vigorous Measures be taken for protecting the american Trade and meeting these predatory Enemies in a proper Manner.”³⁸²
- In 1791, a general deployed in the west wrote to the secretary of war that “[t]he frontiers of this State have . . . been invested by predatory parties of Indians.”³⁸³
- A 1792 report from Secretary of State Jefferson to Congress referred to the “predatory practices” of the Barbary states.³⁸⁴
- President Washington in a 1796 message to Congress referred to attempts to make peace with the Creek tribes and the need to protect “our advanced settlements from the predatory incursions of those unruly individuals who cannot be restrained by the tribes.”³⁸⁵
- As noted above, President Adams warned the Fifth Congress in 1797 that invasion of the United States by France was unlikely, but that Congress needed to provide protections against “predatory incursions” by the French against U.S. ports.³⁸⁶

Usage makes clear that “predatory” attacks could occur by seaborne as well as land-based forces.³⁸⁷

381. Letter from George Washington to Thomas Jefferson (Feb. 6, 1781), *reprinted by* NAFO, *supra* note 84, <https://founders.archives.gov/documents/Washington/03-30-02-0347> [<https://perma.cc/XX5R-HWY7>].

382. Report of John Jay (Oct. 20, 1785), *reprinted in* 2 THE EMERGING NATION: A DOCUMENTARY HISTORY OF THE FOREIGN RELATIONS OF THE UNITED STATES UNDER THE ARTICLES OF CONFEDERATION, 1780–1789, at 868 (Mary A. Giunta ed., 1996).

383. Letter from General St. Clair to Henry Knox, Sec’y of War (May 26, 1791), *reprinted in* 1 ASP: INDIAN AFFAIRS, *supra* note 377, at 177.

384. 1 ASP: FOREIGN RELATIONS, *supra* note 76, at 134.

385. Speech of President Washington (Dec. 7, 1796), *reprinted in* 1 ASP: FOREIGN RELATIONS, *supra* note 76, at 30.

386. *See supra* note 101 and accompanying text.

387. In addition to sources found in *supra* notes 378, 379, 386 and accompanying text, see William Bingham, Draft Resolution in the Confederation Congress (Aug. 6, 1788), *reprinted in* 29 DHRC, *supra* note 350, at 38 (“[T]he Place where Congress resides Should be free from Danger, & not exposed to the predatory naval Incursions of an Enemy, for without Such security the Functions of Government must be Suspended during an Alarm of War.”); 13 J. CONT’L CONG., *supra* note 174, at 12 (1779) (noting that the British had been engaging “in [a] system of harassing and distressing our seacoast and frontiers by a predatory war”).

*D. Summing Up and Adding
Some Basic Interpretive Canons*

This section sets forth my conclusions about the 1798 meaning of the triggering terms of the Alien Enemies Act. It pulls together the settled meaning of “alien enemies” from Part III; the evidence of congressional purposes and congressional understandings of statutory terms from Part IV; and the additional evidence of meaning from the previous sections of Part V. I add here some assistance from statutory interpretation canons—drawing only on those in use at the time the Alien Enemies Act was passed.³⁸⁸

Invasion. Although the word “invasion” had a non-military, figurative meaning—one could speak of an invasion of ants into the kitchen pantry, for instance—the dictionaries show that a primary meaning was the act of a military enemy, paradigmatically a foreign state’s army, attacking and entering a country in a “hostile” fashion—that is, in the manner of a wartime enemy. This military meaning is supported by the Alien Enemies Act’s text. The “invasion” must be “perpetrated, attempted, or threatened . . . by any foreign nation or government,” described later as “hostile”—that is, an enemy in war. The Act refers to an invasion “against the territory of the United States.”³⁸⁹ “Undesired people do not arrive *against* the territory,”³⁹⁰ such as “illegal” immigrants in *Tren de Aragua*.³⁹¹ The term “invasion” is part of a longer clause which includes as a statutory trigger “a declared war.”³⁹² The declared war, or the actual, threatened, or attempted “invasion” or “predatory” incursion, are deemed by the statute to be events that trigger the status of “alien enemies” for the nationals of the “hostile nation or government” who are in the United States. As demonstrated in Part III, under the common law and law of nations, alien enemy status only existed during wartime.³⁹³ Reading all of these closely related statutory words in light of

388. Among the best works on statutory interpretation during the U.S. founding era and early Republic are Saikrishna Bangalore Prakash, *Spirit*, 173 U. PA. L. REV. 937 (2025); Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2 (2020); William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001).

389. 1798 AEA, *supra* note 1, § 1, 1 Stat. at 577.

390. *J.G.G. v. Trump*, No. 25-5067, 2025 WL 914682, at *8 (D.C. Cir. Mar. 26, 2025) (Henderson, J., concurring). It is possible, I should note, to find occasional examples where unwanted immigration is described as an “invasion” in the eighteenth century. See Robert G. Natelson & Andrew T. Hyman, *The Constitution, Invasion, Immigration, and the War Powers of States*, 13 BRIT. J. AM. LEGAL STUD. 1, 23–24 (2024).

391. Proclamation No. 10903, 90 Fed. Reg. 13033, 13033 (Mar. 20, 2025) (“TdA has engaged in and continues to engage in mass illegal migration to the United States to further its objectives of harming United States citizens.”).

392. 1798 AEA, *supra* note 1, § 1, 1 Stat. at 577.

393. See *Miller v. The Ship Resolution*, 2 U.S. (2 Dall.) 1, 4 (Fed. Ct. App. 1781) (reading an ordinance about “prize” seizures to give that term its meaning from the law of nations); 1 BLACKSTONE, *supra* note 133, at 46 (*59) (“[T]erms of art, or technical terms, must be taken according to the acceptance of the learned in each art, trade, and science.”); *Lackey v. Stinnie*, 145 S. Ct. 659, 666 (2025) (on reading statutes with “terms of art in which are accumulated the legal tradition and meaning of centuries of practice” (quoting *United States v. Hansen*, 143 S. Ct. 1932, 1942 (2023))).

the whole text and the specific company they keep (the associated words)³⁹⁴ supports interpreting “invasion” to have a military meaning. A military meaning for “invasion” is also supported by the long use in Anglo-American law of foreign “invasion”—paired with “insurrection,” “rebellion,” and the like—as a national security term of art triggering habeas suspension and the power to call out the militia.

The Alien Enemies Act was passed at a time when Congress had recognized that hostilities at sea were occurring against France, putting the United States into a partial state of war at sea, but Congress specifically rejected authorizing the president to invoke alien enemy detention in that circumstance—it would unconstitutionally allow the president to push the country into or closer to a full state of war, something that Congress controlled. The Alien Enemies Act passed when Congress was considering and enacting numerous measures related to the military defense of the country against France, including a possible invasion—making the military meaning of “invasion” in the Alien Enemies Act more likely to be correct than a broader, nonmilitary definition.³⁹⁵ Congressional debates about the Act reflect bipartisan agreement that the statute’s triggers were narrowly drawn and would apply when either an enemy nation or Congress formally declared war, or when an enemy military attack on U.S. territory was imminently threatened or actually made. Federal judges’ grand jury charges about the Alien Enemies Act reflect this.³⁹⁶ The intense controversy over the Alien Law—due to the Republicans’ view that in peacetime, Congress lacked

394. See *Lambert’s Lessee v. Paine*, 7 U.S. (3 Cranch) 97, 134 (1805) (applying *noscitur a sociis* to read a will); EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* § 728, at 381 (Dublin, 14th ed. 1791) (1628) (“[I]t is the most natural and genuine exposition of a statute to construe one part of the statute by another part of the same statute, for that best expresseth the meaning of the makers.”); *EPA v. Calumet Shreveport Refin., L.L.C.*, 145 S. Ct. 1735, 1747 (2025) (examining a statute as a whole); *Fischer v. United States*, 144 S. Ct. 2176, 2183–84 (2024) (discussing *noscitur a sociis* as a canon of statutory interpretation).

395. See generally *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 7–8 (1801) (Marshall, C.J.) (stating, about interpreting statutes of the Quasi-War with France, that “[t]he court in construing any one of these laws will not confine themselves to the strict letter of that particular law, but will consider the spirit of the times, and the object and intention of the legislature”). My reading of the Alien Enemies Act does not depart from “the strict letter of the text,” but rather conforms to it. I cite *Talbot* for the proposition that context and purposes should be considered when reading statutes. For modern recognitions of this, see *Feliciano v. Department of Transportation*, 145 S. Ct. 1284, 1293 (2025), explaining that “[c]ontext plays a vital role when interpreting statutes,” and *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2261–62 (2024), opining on the purpose Congress “designed” the statute to serve and using Senate and House reports to help interpret the statute.

396. William Cushing’s Charge to the Grand Jury of the Circuit Court for the District of Virginia (Nov. 23, 1798), reprinted in 3 DHSC, *supra* note 120, at 305, 315 (describing the Alien Enemies Act as a lawful measure “in case of the country being invaded, or about to be invaded by a hostile nation, to remove aliens who are subjects or citizens of”); cf. James Iredell’s Charge to the Grand Jury of the Circuit Court for the District of Pennsylvania (Apr. 11, 1799), reprinted in 3 DHSC, *supra* note 120, at 332, 335 (describing international practice consistent with the Alien Law and Alien Enemies Act and stating “[n]othing is more common than to order away, on the eve of a war, all aliens or subjects of the nation with whom the war is to take place”).

power over friendly aliens—supports interpreting the Alien Enemies Act to apply to wartime circumstances, suggesting that “invasion” has a military meaning.³⁹⁷ In sum, the relevant evidence of statutory meaning, read in light of relevant tools of statutory interpretation, refutes the Trump administration’s view of “invasion” and shows that the statutory term, at the time of enactment, meant an enemy nation’s military attack into U.S. territory.

Predatory incursion. The same reasoning shows that “predatory incursion” in the Act meant, in 1798, a military raid or attack on U.S. territory by the armed forces of an enemy nation, smaller in scale and probably more rapid and brief than a full invasion, aimed at least in part at plunder, pillage, devastation, or the like—making the incursion “predatory.” I will not repeat my arguments from context, purpose, *noscitur a sociis*, the background law of “alien enemy” status, and the like. I think it clear that a “predatory incursion” must have been understood as a lesser form of military attack than an “invasion” due to dictionary definitions, patterns of usage, and a canon disfavoring definitions that cause superfluity in statutes,³⁹⁸ which was employed in the founding era.

VI. THE ALIEN ENEMIES ACT’S POWER DELEGATIONS AND LIMITS

This part pulls together the foregoing discussions and closely analyzes the powers delegated by the Alien Enemies Act of 1798, and the limits imposed by Congress on those powers. Some of my conclusions have already been indicated: (1) the Act defined alien enemy status in a way that was understood to be consistent with background principles of law, which tied the status to war; (2) the Act was drafted to limit presidential power in a way consistent with Congress retaining control over the declaration of war and authorization of measures of partial or limited war; and (3) alien enemies were outside the protection of the law and courts, and so, as a general matter, they could be detained and expelled by executive action alone. This part introduces two new topics: (4) the Alien Enemies Act codified important individual rights protections found in the law of nations and existing U.S. treaties; and (5) judicial review would almost certainly have been thought available as of right for someone who plausibly contested their status as an alien enemy.

397. See 1 BLACKSTONE, *supra* note 133, at 46 (*60) (“If words [in a statute] happen to still be dubious, we may establish their meaning from the context . . . [including] the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject.”).

398. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (rejecting a reading of Article III of the Constitution because “[t]he subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction”); *Feliciano*, 145 S. Ct. at 1294 (anti-surplusage canon).

A. “All”

Alien enemy status was categorical, based on nationality and the existence of war.³⁹⁹ This understanding was codified by Congress in the Alien Enemies Act.⁴⁰⁰ Alien enemy status did not turn on questions of individual dangerousness or misbehavior—as the Trump administration is using it. If a state of war existed, *all* citizens of the hostile nation were considered alien enemies, regardless of whether any particular noncitizen actually threatened the country. This proposition is stated with clarity in federal case law from the War of 1812.⁴⁰¹ The principle had existed long before then,⁴⁰² and it clearly informed the drafting of the Alien Enemies Act, as its text makes clear. The Act states that, when the statute’s triggers are met and the president makes a proclamation, “*all* natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upward, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed as alien enemies.”⁴⁰³

In the first invocation of the Alien Enemies Act, during the War of 1812, the executive branch recognized the categorical nature of alien enemy status. After Congress declared war against Britain in mid-June 1812, the U.S. Department of State directed U.S. marshals to both publish the Alien Enemies Act in newspapers and to publish an order that “ALL BRITISH SUBJECTS within the United States” must report to the marshals “their names, their age, the time they have been in the United States, the persons composing their families, the places of their residence, and their occupations or pursuits.”⁴⁰⁴ The executive branch did not order removal from the country or detention of all alien enemies—almost all were peaceful, nonthreatening civilians, and many likely intended to become U.S. citizens.

399. See *supra* Part III.

400. See *supra* Part IV.D.3.

401. See *The Rapid*, 12 U.S. (8 Cranch) 155, 161 (1814) (stating that in a state of public war, “[e]very individual of the one nation must acknowledge every individual of the other nation as his own enemy—because the enemy of his country”); *The Venus*, 12 U.S. (8 Cranch) 253, 290–91 (1814) (“When war breaks out, the subjects of one belligerent in the country of the other are considered as enemies, and have no right to remain there.”); *The Julia*, 14 F. Cas. 27, 30 (C.C.D. Mass. 1813) (No. 7,575) (Story, J.) (“By the war, every subject is placed in hostility to the adverse party.”), *aff’d*, 12 U.S. (8 Cranch) 181 (1814).

402. See, e.g., 2 CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* § 723, at 373 (Joseph H. Drake trans., Clarendon Press 1934) (1764) (“[W]hen war is announced, all the subjects of the one against which it is announced are declared to be enemies of the subjects of the one announcing war, and when there is a resort to arms on either side, the subjects of each are enemies of the subjects of the other.”).

403. 1798 AEA, *supra* note 1, § 1, 1 Stat. at 577 (emphasis added).

404. *Notice to Aliens, Department of State, July 7th, 1812*, CITY GAZETTE & COM. DAILY ADVERTISER (Charleston, S.C.), July 24, 1812, at 3; see also *Untitled Notice by Peter Curtenius, Marshal of the District of New-York*, N.Y. GAZETTE & GEN. ADVERTISER, July 21, 1812, at 2 (“[I]n consequence of the act of congress passed June 18, 1812, which declares that a state of war exists between the United States and Great Britain, all the subjects of his Britannic majesty residing within the United States, have become alien enemies, and fall under the provisions of the acts of Congress which relate to alien enemies.”).

In early 1813, the Department of State ordered all alien enemies “arriving within the limits of the United States, from foreign countries,” to register immediately with the local U.S. marshal, and banned them from traveling outside the federal judicial district without a passport.⁴⁰⁵ A few weeks later, all alien enemies “residing or being within forty miles of tide water,” except those “not engaged in commerce, as were settled [in the United States] previously to the declaration of war,” were ordered to remove themselves inland to a place directed by the marshal.⁴⁰⁶ The executive’s construction of the statute, relatively close in time to enactment, reflects an understanding that the Alien Enemies Act was categorical, based on nationality and wartime.

B. Detention and Removal Powers, and Their Limits

After stating its triggering conditions for the president to invoke the statute, the Alien Enemies Act states generally that “the President . . . shall be, and he is hereby authorized . . . to direct the conduct to be observed, on the part of the United States, towards the aliens who shall become liable” to be “apprehended, restrained, secured and removed, as alien enemies,” thereby granting authority to the president to issue a detention or removal order.⁴⁰⁷

1. Executive-Only Detention and Removal

The Act directs U.S. marshals to execute removal orders issued by either “the President of the United States, or by order of any court, judge or justice.”⁴⁰⁸ In other words, by plain text, a removal order may be purely executive.⁴⁰⁹ The word “or” makes this clear. The earliest judicial holdings about the Alien Enemies Act, arising from the War of 1812, understood the Act to allow purely executive detention and removal.⁴¹⁰

405. Notice from Dep’t of State (Feb. 6, 1813), *reprinted in* BACHE, *supra* note 342, app. at v.

406. Notice from Dep’t of State (Feb. 23, 1813), *reprinted in* BACHE, *supra* note 342, app. at v. These regulations were later amended several times.

407. 1798 AEA, *supra* note 1, § 1, 1 Stat. at 577; *see also* 50 U.S.C. § 22 (current version).

408. 1798 AEA, *supra* note 1, § 3, 1 Stat. at 578 (emphasis added); *see also* 50 U.S.C. § 24 (current version).

409. Modern scholars agree with my reading of the Act. *See* Hamburger, *supra* note 137, at 1894 (“Enemy aliens did not have a right to the protection of the law and its courts, and the [Alien Enemies Act] correspondingly did not require the executive to use any judicial process in its ordinary enforcement of its regulations.”); Neuman, *supra* note 180, at 927 (stating that the Alien Enemies Act “subjected [such aliens] to expulsion on mere suspicion through orders issued ex parte by the President”).

410. *See* Lockington v. Smith, 15 F. Cas. 758, 760–61 (C.C.D. Pa. 1817) (No. 8,448) (holding in a tort suit that presidential power under the Act is “as unlimited as the legislature could make it,” and that the plaintiff’s claim that removal could be accomplished only through a judicial order was “at variance with the spirit as well as with the letter of the law”); Lockington’s Case (Pa. 1813), *reprinted in* BACHE, *supra* note 342, at 40–43 (Chief Justice Tilghman, sitting alone, holding in a habeas proceeding that the Alien Enemies Act authorized executive-only “summary proceedings, against persons, who are declared to be in the situation

In what may seem somewhat confusing to modern readers of the 1798 Act, the statute allows either a *private party* or an executive official to invoke the aid of “the several courts of the United States, and of each state, having criminal jurisdiction,” or any single U.S. Article III judge or justice.⁴¹¹ Judicial authority under the Act is initiated by the filing of a “complaint” alleging that an alien enemy is “at large” in the country in violation of the president’s “proclamation, or other regulations,” and poses “danger [to] the public peace or safety.”⁴¹² The Act allows the court to order that the alien enemy “be duly apprehended and convened before such court,” which, “after a full examination and hearing on such complaint, and sufficient cause therefor appearing,” can order the alien enemy to be removed from the country, required to give security for good behavior, or “imprison[ed]” until the alien enemy will conform to the proclamation or regulations.⁴¹³

One might wonder why the statute would give the president power to act without aid of the court and also provide for acting via judicial order. There are two primary explanations. First, the Alien Enemies Act drew in part upon an Anglo-American legal action, often filed with a justice of the peace, allowing a government officer or private person to obtain a court order requiring that someone provide security for good behavior or to keep the peace, with a penalty of imprisonment for failure to provide such security. In England and the post-independence United States, this obligation to keep the peace, secured by court order and the threat of imprisonment, was called a binding over for good behavior or to keep the peace, or a recognizance, referring to the act of legal record.⁴¹⁴ The wrinkle in the Alien Enemies Act

of Alien Enemies”); *Lockington’s Case* (Pa. 1814), *reprinted in* REPORTS OF CASES DECIDED BY THE JUDGES OF THE SUPREME COURT OF PENNSYLVANIA 269, 284 (Frederick C. Brightly ed., Philadelphia, James Kay, Jr. & Brother 1851) [hereinafter PENNSYLVANIA CASES] (Chief Justice Tilghman reiterating his prior view); *id.* at 289–91 (Justice Jasper Yeates holding that the law allowed detention or removal “by the mere act of the marshal alone, under his instructions” issued via the president); *id.* at 293–96 (Justice Hugh Henry Brackenridge holding that the statute allowed executive-only removal and deprived the “judicial power” of authority to intervene via a habeas petition by an alien enemy).

411. 1798 AEA, *supra* note 1, § 2, 1 Stat. at 577; *see also* 50 U.S.C. § 23 (current version). Alexander J. Dallas, U.S. Attorney for the Eastern District of Pennsylvania, who argued one of the few alien enemy habeas cases during the War of 1812, read section 2 of the Alien Enemies Act to allow a complaint to be filed by a government official or a private citizen informer. *See Lockington’s Case* (Pa. 1813), *reprinted in* BACHE, *supra* note 342, at 26 (argument of Dallas). Justices of the Supreme Court of Pennsylvania before whom Dallas appeared adopted the same reading. *See id.* at 43 (Tilghman, C.J.); *Lockington’s Case* (Pa. 1814), *reprinted in* PENNSYLVANIA CASES, *supra* note 410, at 299–300 (opinion of Brackenridge, J.).

412. 1798 AEA, *supra* note 1, § 2, 1 Stat. at 577–78.

413. *Id.*

414. *See* 1 BLACKSTONE, *supra* note 133, at 224, 227 (*338, 342); 4 *id.* at 165–66 (*248–50); 2 RICHARD BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER 432 (London, Henry Lintot 1755); Kellen R. Funk & Sandra G. Mayson, *Bail at the Founding*, 137 HARV. L. REV. 1816, 1823 (2024); Jacob Schuman, *Revocation at the Founding*, 122 MICH. L. REV. 1381, 1403–04 (2024); Laurent Sacharoff, *Pretrial Commitment and the Fourth Amendment*, 99 NOTRE DAME L. REV. 1021, 1057 (2024). This English law of recognizance crossed the Atlantic and existed in many, and perhaps all, U.S. states at the time of the Alien Enemies Act. *See, e.g.,* 2 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF CONNECTICUT 343–44 (Windham,

is that the statute also allows this to be done by the president or a presidential delegate alone, without judicial involvement.⁴¹⁵ This was lawful because alien enemies were out of the protection of the laws once the U.S. government had acted against them under the statute, thereby revoking any implied license to be within the protection of the laws.⁴¹⁶ The 1798 Naturalization Act⁴¹⁷ and Alien Law⁴¹⁸ also drew upon this old body of recognizance law.

A second reason that the Alien Enemies Act allowed judicial proceedings to be initiated by a government officer or private person filing a complaint, in addition to executive-only detention and removal, is that in 1798, acting via judicial process gave additional powers over alien enemies. Combined, federal and state judicial officers were much more numerous than U.S. marshals. There were no executive departments akin to today's Federal Bureau of Investigation or U.S. Immigration and Customs Enforcement, so section 2 of the Act gave a manpower boost to enforcement. Additional assistance to the federal executive was gained in section 2 of the Act because private persons, possessing their own information, could file complaints against allegedly dangerous alien enemies. But, as the next section shows,

John Byrne 1796) (describing Connecticut law regarding security for keeping the peace or maintaining good behavior, including that a justice of the peace may act “[u]pon proper complaint,” and if security is refused, “the court may commit him to the common goal, there to remain until delivered by due order of law”).

415. The Alien Enemies Act allows the president to decide to bind an alien enemy on recognizance to maintain peaceful good behavior, stating that the president may “direct . . . in what cases, and upon what security [alien enemies’] residence shall be permitted.” See 1798 AEA, *supra* note 1, § 1, 1 Stat. at 577.

416. See *supra* Part III.C.

417. This statute required most aliens arriving or present in the United States to register their personal details—such as place of birth, nationality, occupation, place of registration—with a federal official. Naturalization Act of 1798, ch. 54, § 4, 1 Stat. 566, 567–68 (repealed 1802). Any alien who failed or refused to make such a report could be convicted by a court of a violation and fined, and further could be proceeded against “on complaint” before “any justice of the peace, or other civil magistrate, who has authority to require surety of the peace,” and be required to “give surety of the peace and good behaviour during his residence within the United States,” until the alien completed the required registration. *Id.* § 5, 1 Stat. at 568. An alien in default of registration who could not or would not enter into the required security arrangement “shall and may be committed to the common gaol.” *Id.*

418. This statute used a novel version of the recognizance-surety procedure. The act allowed the president to “order . . . to depart out of the territory of the United States” any aliens of whatever nationality whom the president “shall judge dangerous to the peace and safety of the United States,” or about whom the president “shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government” of the United States. An Act Concerning Aliens, ch. 58, § 1, 1 Stat. 570, 570 (1798) (Alien Law). The act contemplated that the president would designate persons to be administrative evidence-takers under the act who are “for that purpose . . . authorized to administer oaths.” *Id.* An alien ordered to depart could submit “evidence” to the administrative official attempting to show “that no injury or danger to the United States will arise from suffering such alien to reside” in the United States. If the president credited such evidence, the president could allow the alien to remain but require the alien to “enter into a bond to the United States, in such penal sum as he may direct, with one or more sufficient sureties . . . conditioned for the good behavior of such alien.” *Id.*

executive-only detention and removal under the Alien Enemies Act was limited by codified protections drawn from international law.

2. Codification of International Law Protections

As of 1798, the law of nations and U.S. treaties provided some protections to alien enemies, and the Alien Enemies Act codified these rules. Vattel—the law of nations publicist most admired by the American founding generation—taught that while governments or princes may impose conditions on the residence or travel of aliens within their country, they still “ought [to] respect the duties of humanity” and demonstrate “[h]ospitality” in their treatment of all such aliens.⁴¹⁹ Vattel further wrote that, as to peaceful civilian aliens who came into the country prior to a war “under the public faith” and under protection, at the start of a war making them alien enemies, the sovereign “can neither detain the persons nor the property,” but must rather “allow them a reasonable time for withdrawing with their effects.”⁴²⁰ After this reasonable time or the time allowed by treaty has passed, the sovereign “has a right to treat them as enemies,” including by detention.⁴²¹ The true practice of nations—unless restrained by treaty—seems likely to have been harsher than Vattel’s humane exposition, but Congress in the Alien Enemies Act codified Vattel’s position.

Under the Alien Enemies Act, executive-ordered detention, without a judicial order, is allowed.⁴²² As to removal from the United States, the statute is more complicated because of Congress’s desire to comply with international law. The baseline rule in the statute is that a presidential directive to remove an alien enemy from the country, if not supported by an order from a court under section 2 of the Act, can only occur if the alien enemy “shall refuse or neglect to depart” on their own after being ordered to do so.⁴²³ In other words, alien enemies cannot be immediately subject to compelled removal by the executive, but first must be allowed to voluntarily leave. This rule on removal is subject to a qualification drawn from international law, allowing time for peaceful alien enemies to wrap up their affairs before departing the country.

419. VATTEL, *supra* note 140, bk. II, ch. VIII, §§ 100, 104, at 312–14.

420. *Id.*, bk. III, ch. IV, § 63, at 505.

421. *Id.*; see also Hamburger, *supra* note 137, at 1864–66 (discussing Vattel on alien enemies). Other law-of-nations writers conveyed the same message as Vattel. See, e.g., BURLAMAQUI, *supra* note 152, vol. 2, pt. IV, ch. 6, § VI, at 493 (“[S]trangers . . . who settle in the enemy’s country after a war is begun . . . may justly be looked upon as enemies, and treated as such. But in regard to such as went thither before the war, justice and humanity require that we should give them a reasonable time to retire.”); 2 WOLFF, *supra* note 402, § 835, at 434 (“[A] safe departure within a definite time is to be allowed.”).

422. 1798 AEA, *supra* note 1, § 1, 1 Stat. at 577 (providing that on the president’s order alien enemies may “be apprehended, restrained, secured”).

423. *Id.* Justice Bushrod Washington read the Act in this way, stating that the president is authorized “to provide for the removal of those whom he should not permit to remain in the United States, and who should refuse or neglect to depart.” *Lockington v. Smith*, 15 F. Cas. 758, 760 (C.C.D. Pa. 1817) (No. 8,448) (emphasis added).

A proviso in the Act allows alien enemies who are “not chargeable with actual hostility, or other crime against the public safety,” to take actions for “recovery, disposal, and removal of their goods and effects” and to depart the United States within a “reasonable time,” determined “according to the dictates of humanity and national hospitality” and “consistent with public safety.”⁴²⁴ This is a codification of international law, specifically of Vattel’s position.⁴²⁵ Furthermore, the Act provides that if a treaty of the United States provides a different or longer time to alien enemies for wrapping up their affairs and departing on their own, the longer time must be allowed.⁴²⁶

At the time the Alien Enemies Act was adopted, the United States had bilateral treaties with a number of powers which gave alien enemies time to gather their property and depart voluntarily, including a 1778 Treaty of Amity and Commerce with France.⁴²⁷ While considering the bill which became the Alien Enemies Act, Congress was debating a bill to declare the treaties with France void, on the ground that France had repeatedly violated them. That legislation took effect the day after the Alien Enemies Act’s enactment.⁴²⁸ But there were other U.S. treaties in existence providing similar protections to civilian alien enemies.⁴²⁹

The Act indicates, however, that these international law protections can be overridden. Although the drafting of the Act is imperfect, the only sensible reading is that, for an alien enemy determined to be “chargeable with actual hostility, or other crime against the public safety,” the president may order the person detained and removed from the United States without giving an option for the alien enemy to leave voluntarily or time to wrap up their affairs.

424. 1798 AEA, *supra* note 1, § 1, 1 Stat. at 577.

425. See 8 ANNALS OF CONG. 1577 (May 3, 1798) (statement of Rep. Sitgreaves) (stating “there were rights of hospitality” due to alien enemies “by the laws of nations” “which could not be done away in time of war, particularly as it respects alien merchants,” and these rights “were provided for in this resolution”).

426. Alien enemies not “chargeable” must be allowed to voluntarily depart, be protected in their property, and be given “the full time” to leave “which is, or shall be stipulated by any treaty, where any shall have been between the United States and the hostile nation or government.” 1798 AEA, *supra* note 1, § 1, 1 Stat. at 577.

427. Treaty of Amity and Commerce, Fr.-U.S., *supra* note 69, at art. 20, 8 Stat. at 24 (giving merchants who had become alien enemies six months to wrap up their affairs before departing).

428. See *supra* note 263 and accompanying text.

429. See Treaty of Amity, Commerce and Navigation, Gr. Brit.-U.S., *supra* note 75, at art. 26, 8 Stat. at 128 (providing that people in each country who become alien enemies may remain “so long as they behave peaceably,” and if merely “suspected” of bad conduct or intentions they may have twelve months to wrap up their affairs before departure, but if they “act contrary to the established laws” they may be immediately removed); Treaty of Amity and Commerce, Neth.-U.S., *supra* note 146, at art. 18, 8 Stat. at 42 (giving persons who become alien enemies nine months to wrap up their affairs before departing the country).

3. "Chargeable with Actual Hostility"

"Chargeable" was a term of various meanings in the eighteenth century, as it is today.⁴³⁰ By far the most likely meaning of the word in the Act is "accusable" or "liable" to be charged with something, namely a "crime,"⁴³¹ given that the word "crime" is used in the same sentence of the Act ("actual hostility, or other crime").⁴³²

The meaning of the term "chargeable with actual hostility" is clarified by statutory text, context, dictionaries, background law, and common linguistic usage. As noted above, in the eighteenth century, the terms "hostility" or "hostilities" were frequently used to describe military conflict or military attacks.⁴³³ The enemy nation or government whose citizens or subjects are covered by the Alien Enemies Act is referred to as "hostile."⁴³⁴ A military or other warlike *criminal* act committed by an alien enemy would surely count as "actual hostility" under the Act.

I see no reason in the statute or background law why the "chargeable" crime would need to be one cognizable in federal court only. State courts had a myriad of statutory and common law crimes. Federal statutory crimes that seem likely to have counted as "hostility" under the Alien Enemies Act in some circumstances include treason by an alien enemy resident in the United States under temporary, local allegiance;⁴³⁵ concealing or failing to report someone else's treason;⁴³⁶ piracy, murder, or manslaughter on the high seas, or murder or manslaughter on land "within any fort, arsenal, dock-yard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States";⁴³⁷ and aiding, abetting, concealing, or failing to report piracy or murder on the high seas.⁴³⁸ Violations of the Sedition Act, including actions that "aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government," would seem to qualify.⁴³⁹ A number of crimes defined by the Neutrality Act of 1794⁴⁴⁰ seem almost certainly to fall within "hostility" as used in the Alien Enemies Act, including the action by a person

430. One meaning was "[r]esponsible for something" or "answerable" to somebody. *Chargeable*, OED, *supra* note 356 (definition II.4, now obsolete).

431. *Id.* (defining "chargeable" as "II.5.a. Liable to be charged with a fault, obligation, etc.; (now usually) liable to be formally charged with a crime"); *Chargeable*, 1 JOHNSON, *supra* note 356 ("3. Subject to charge; accusable"); *Chargeable*, DYCHE & PARDON, *supra* note 356 ("liable to be taken into the custody of an officer, or . . . accused of some crime or misdemeanour"); *Chargeable*, PERRY, *supra* note 356 ("accusable").

432. 1798 AEA, *supra* note 1, § 1, 1 Stat. at 577 (emphasis added).

433. See, for example, *supra* notes 154–55, 220, 249, 254, 257, 356–59 and accompanying text.

434. 1798 AEA, *supra* note 1, § 1, 1 Stat. at 577.

435. See An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 1, 1 Stat. 112, 112 (1790).

436. *Id.* § 2, 1 Stat. at 112.

437. *Id.* §§ 3, 7–8, 1 Stat. at 113–14.

438. *Id.* § 11, 1 Stat. at 114.

439. Sedition Act, ch. 74, § 2, 1 Stat. 596, 597 (1798).

440. Ch. 50, 1 Stat. 381 (replaced 1818).

within the United States who recruits others or enlists themselves in a foreign state's army or navy.⁴⁴¹ Some statutes passed during the Quasi-War seem to define qualifying crimes. For example, the statute banning commercial intercourse with France was enforceable criminally,⁴⁴² as were alien registration requirements in the Naturalization Act.⁴⁴³

In the 1790s, many American legal and political elites, especially Federalist jurists, believed that the U.S. courts had jurisdiction and authority to try common law crimes against the United States.⁴⁴⁴ The law of nations, which was understood by many in the 1790s to have been assimilated into the U.S. legal order via the common law,⁴⁴⁵ or perhaps in some other manner,⁴⁴⁶ imposed duties on aliens residing in a country other than their own to respect the laws and sovereignty of the host country and not undertake espionage and other hostile acts.⁴⁴⁷

In sum, the Alien Enemies Act thus allowed an alien to be subject to executive-only detention and removal, without the codified international law protection of being given reasonable time to voluntarily depart, only if the alien enemy were deemed “chargeable” with some kind of domestic or international law “crime” against national security or the public safety more generally.

C. The Availability of Habeas Corpus for Persons Detained under the Act

This section discusses whether persons subject to executive-only constraints under the Alien Enemies Act would have been understood in 1798 to have a right to seek judicial review of their detentions via habeas corpus. A full discussion of all aspects of this question would require a separate article, so I focus only on the most important issue—examining whether, as of 1798, a person detained by executive officials as an alleged alien enemy

441. *Id.* § 2, 1 Stat. at 383.

442. Act of June 13, 1798, ch. 53, § 1, 1 Stat. 565, 565.

443. See *supra* note 417 and accompanying text.

444. See ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, *THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION* 157–60 (2017); Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1016, 1039–53 (1985).

445. See BELLIA & CLARK, *supra* note 444, at 159–60, 159 n.42 (understanding the claim in this way).

446. See generally *Henfield's Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6,360) (Chief Justice Jay's grand jury charge: “As to the laws of nations—they are those laws by which nations are bound to regulate their conduct towards each other, both in peace and war. Providence has been pleased to place the United States among the nations of the earth, and therefore, all those duties, as well as rights, which spring from the relation of nation to nation, have devolved upon us.”).

447. See *id.* (explaining crimes cognizable under the law of nations, and stating that “[t]hey who undertake to enlist soldiers in a foreign country, without the sovereign's permission, or alienate the subjects of another, violate one of the most sacred rights both of the prince and the state; it is a crime punished with great severity . . . [f]oreign recruiters are hanged immediately”); VATTTEL, *supra* note 140, bk. III, ch. X, § 179, at 582 (“Spies are generally condemned to capital punishment, and with great justice.”).

under the Act would have been understood to have access to the writ of *habeas corpus ad subjiciendum* to dispute their status.⁴⁴⁸

Voluminous evidence shows that in litigation between private parties, alleged alien enemy status of a plaintiff or petitioner was litigated and decided by courts. In a large mass of reported nonhabeas cases, both English⁴⁴⁹ and American,⁴⁵⁰ as well as in legal treatises discussing common law, equity, maritime, and prize actions,⁴⁵¹ there are discussions of pleadings and of presentation of evidence by affidavit on the threshold issue of whether the plaintiff was actually an alien enemy. If an alien enemy were not present in the country, or were present but not under sovereign license, they would be barred from suit.

But the writ of *habeas corpus ad subjiciendum* was not a traditional civil “action” between private parties in English law,⁴⁵² but rather a proceeding on a judicially created prerogative writ—though one strengthened and codified in part by Parliament⁴⁵³—usually issued out of the “crown” (i.e., criminal) side of King’s Bench.⁴⁵⁴ Since habeas corpus was not a traditional civil “action,” an alien enemy’s disability to bring such actions at common law, as well as bills in equity and libels and other actions in admiralty, would not necessarily apply.

Some scholars assert that in English law, all persons, even those who were admittedly alien enemies, and even alien enemy prisoners of war, were entitled to use the writ of habeas corpus.⁴⁵⁵ This question is quite complicated, and I think the scholars’ conclusion may be wrong, as of the eighteenth century.⁴⁵⁶ But as I said, I will in this Article address only persons who sought to use habeas to dispute that they were detainable alien enemies.

448. As discussed, modern Supreme Court case law establishes that detainees alleged to be alien enemies have a due process right to notice and a reasonable opportunity for judicial review via habeas prior to removal. See *supra* notes 38–43 and accompanying text.

449. See, e.g., *Brandon v. Nesbitt* (1794), 101 Eng. Rep. 415, 415–16; 6 T.R. 23 (KB); *Hoppen v. Leppett* (1737), 95 Eng. Rep. 305, 305–06; *Andr. 76* (KB); *Wells v. Williams* (1697), 91 Eng. Rep. 45, 46; 1 Salk. 46 (CP).

450. See, e.g., *Johnson v. Thirteen Bales*, 13 F. Cas. 836, 837 (C.C.D.N.Y. 1814) (No. 7,415); *Soc’y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 763–66 (C.C.D.N.H. 1814) (No. 13,156) (Story, Circuit Justice); *Mumford v. Mumford*, 17 F. Cas. 982, 982 (C.C.D.R.I. 1812) (No. 9,918) (reporter’s summary); *Levine v. Taylor*, 12 Mass. (1 Tyng) 8, 11 (1815); *Cruden’s Ex’rs v. Neale*, 2 N.C. 338, 344–45 (Super. Cts. L. & Eq. 1796).

451. See, e.g., 1 BACON, *supra* note 134, at 4 (stating in Abatement § (B)(3) that “[a]n Alien Enemy . . . cannot bring any Action either Real, Personal or Mix’d”); 1 WILLIAM TIDD, *THE PRACTICE OF THE COURT OF KING’S BENCH IN PERSONAL ACTIONS* 556 (London, A. Strahan, 2d ed. 1799).

452. See 1 JACOB & TOMLINS, *supra* note 137 (defining in § Action “real,” “personal,” and “mixed” “civil actions”).

453. See *supra* note 337 and accompanying text.

454. 2 HALE, *supra* note 168, at 2 (“The court of king’s bench consists of two kinds of jurisdiction, viz. the civil jurisdiction or the plea-side, and the criminal jurisdiction or the crown-side.”).

455. The most important work reaching this conclusion is HALLIDAY, *supra* note 159, at 27–28, 32–33, 201–08. See also Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 945 & n.22, 966 n.116, 988–90 (2011), reviewing Halliday’s book, adopting his conclusions, and castigating scholars who disagree.

456. See, for example, *infra* note 457.

It seems clear in late eighteenth-century British practice that a prisoner's contested status (e.g., whether alien enemy or prisoner of war, or not) could be and was sometimes adjudicated as a threshold matter before issuance of the writ of habeas corpus. This is seen in two reported decisions of British courts in the eighteenth century.⁴⁵⁷ The mere say-so of the jailer that someone was an alien enemy did not disable habeas courts from inquiring for themselves before issuing the writ.

No scholar has located any American habeas cases concerning alien enemies dating from earlier than the War of 1812. Habeas for detained aliens was discussed in the House during the Fifth Congress in 1798, but almost entirely in the context of alien friends. Republican opponents of the alien friends bill argued that (1) Congress lacked affirmative constitutional power to authorize detention or removal of alien friends; and (2) the bill represented an unconstitutional deprivation of rights—a suspension of habeas corpus and a denial of due process of law—because the only way to lawfully authorize detention and removal was after criminal trial, following ordinary processes of law, including the use of the constitutionally guaranteed jury.⁴⁵⁸ Federalists rejected every aspect of this Republican argument, including the suggestion that someone detained under the aliens bill would be barred from the writ of habeas corpus.⁴⁵⁹

There is essentially no recorded congressional debate about habeas corpus under the proposed Alien Enemies Act.⁴⁶⁰ If a friendly alien could access habeas corpus to dispute their detention, it would seem to follow that a person detained on *accusation* of being an alien enemy could dispute that status on habeas in order to determine whether they were entitled to proceed in habeas as an alien friend. But interestingly, one member of the Fifth Congress who made brief comments on this topic, the Republican leader Gallatin, seemed

457. See *The Case of Three Spanish Sailors* (1779), 96 Eng. Rep. 775, 775–76; 2 Black. W. 1324 (CP); *Rex v. Schiever* (1759), 97 Eng. Rep. 551, 551–52; 2 Burr. 765 (KB). The court concluded in one of the cases that the petitioners, “upon their own shewing” at the initial stage applying for the writ, “are alien enemies and prisoners of war, and therefore not entitled to any of the privileges of Englishmen; much less to be set at liberty upon a habeas corpus.” *The Case of Three Spanish Sailors*, 96 Eng. Rep. at 776.

458. See 8 ANNALS OF CONG. 1956 (June 16, 1798); *id.* at 1980–82 (June 19, 1798) (statements of Rep. Gallatin).

459. See *id.* at 1967 (June 16, 1798) (statement of Rep. James Bayard, Federalist from Delaware) (stating that suspension of habeas corpus “is a definite idea, established by precedent” in England, and that suspension statutes “provide[] by law that the habeas corpus shall not issue at all”; but here under the bill, “it will be competent for every person so arrested to obtain a writ of habeas corpus”); *id.* at 2026 (June 21, 1798) (statement of Rep. Harper) (stating that “[e]very man seized under this [alien friends] law, will have a right to sue out a writ of habeas corpus, and if it appear that he is a citizen, he must be discharged”).

460. In an earlier article, I misread debates in the *Annals of Congress*, mistaking discussion of the proposed Alien Law (or Alien Friends Act) for statements about habeas corpus for alien enemies. I was wrong to write: “During congressional debates, several prominent Federalist supporters of the Alien Enemy bill had opined that habeas review would be available for persons detained pursuant to it.” Kent, *Judicial*, *supra* note 137, at 193 n.180. The representatives were talking about the proposed Alien Law. Some page headings in the *Annals of Congress* are mislabeled, and representatives sometimes discussed both bills at the same time.

to imply that judicial review might not be available in alien enemy detentions.⁴⁶¹

Once the Madison administration began detaining under the Alien Enemies Act in 1813,⁴⁶² some judicial activity was recorded in published reports. One case reported from the federal district court in Louisiana shows that the judge issued a warrant under section 2 of the Alien Enemies Act, on the complaint of the U.S. marshal, and examined the legality of the detention of several persons.⁴⁶³ Judicial review was not initiated by a habeas petition. The prisoners denied that they were alien enemies, claiming citizenship in Louisiana and the United States.⁴⁶⁴ The district judge found facts and decided the law, concluding that the prisoners were citizens and entitled to discharge from custody.⁴⁶⁵ The court also noted that “[i]t is well known, that some of these persons”—persons claiming U.S. and Louisiana citizenship to protest a U.S. marshal’s claim they were alien enemies—“have been discharged by one of the judges of the state,” presumably on habeas corpus.⁴⁶⁶

A second alien enemy decision from the War of 1812, which was unearthed by Professor Gerald Neuman and Charles Hobson, was issued by the U.S. Circuit Court for the District of Virginia, composed of Chief Justice John Marshall and District Judge St. George Tucker.⁴⁶⁷ A habeas petitioner was an *admitted* alien enemy challenging the lawfulness of the specific terms of his detention. Chief Justice Marshall issued the writ, and together the two jurists held that “the Court is of opinion; that the regulations made by the President of the United States respecting alien enemies, do not authorize the confinement of the petitioner in this case; Therefore, It is ordered that he be discharged from the custody of the Jailor.”⁴⁶⁸ This supports, on an a fortiori basis, the view that someone disputing their detention as an alleged enemy alien would have a right to seek review of that question on habeas.

A third reported alien enemy detention decision from the War of 1812 comes from the Supreme Court of Pennsylvania. Two justices held that the writ of habeas corpus could issue, even once it was established indisputably that the petitioner was an alien enemy—a civilian British subject named

461. 8 ANNALS OF CONG. 1795–96 (May 23, 1798) (speaking about the draft alien enemies bill and stating, “[a]s to the removal of [enemy] aliens, he could not see what justices and judges had to do with it; but if they had anything to do with it, Congress ought to say what”).

462. See BACHE, *supra* note 342, at vii–viii (reprinting two U.S. Department of State directives from 1813, the first ordering U.S. marshals to detain for the purposes of removing from coastal areas alien enemies who had refused to do so on their own, and the second ordering detention of persons engaging in acts of hostility against the United States).

463. *United States v. Lavery*, 26 F. Cas. 875, 875 (D. La. 1812) (No. 15,569A).

464. *See id.*

465. *See id.* at 875–77.

466. *Id.* at 876.

467. See Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Canon*, 9 GREEN BAG 2D 39, 41 (2005) (describing the case of *United States v. Williams* from 1813).

468. *Id.* at 42.

Charles Lockington who was seeking to challenge his detention.⁴⁶⁹ But on the merits, the court held that the petitioner was properly detained. One justice agreed with the arguments of Alexander Dallas, U.S. district attorney for Pennsylvania, that (1) state courts had no authority—were prevented by federal supremacy—from entertaining the habeas petition,⁴⁷⁰ and (2) an alien enemy was akin to a prisoner of war—and was surely “a Prisoner, in consequence of the war”—who has “none of the political rights of the Society” and no right to use habeas corpus to challenge his detention, the Alien Enemies Act being “in the nature of a suspension of the writ of Habeas Corpus.”⁴⁷¹ In sum, the earliest judicial activity under the Alien Enemies Act strongly supports the view that a detainee contesting their alien enemy status could raise that claim and have it adjudicated via habeas corpus.

CONCLUSION

Restrictions on aliens were enacted in a wide variety of countries and territories in the 1790s in response to great flows of immigrants from the French Revolution, the failed Irish rebellion, violent unrest in many other places, and the resultant fears of government authorities that the migrants included some whose politics were radical and even revolutionary.⁴⁷² Many countries imposed harsher methods than the United States did in 1798. In the 1790s, France, for example, deployed against aliens the tools of expulsion; entry and exit control; registration by aliens themselves and by owners of property where they lived; confiscation of passports; government-issued identity cards for internal travel; exclusion from certain locales within France; a ban on attending meetings of French political clubs; surveillance, harassment, and arrest by police and citizen committees; detention and property confiscation of alien enemies; and sometimes execution by the guillotine for supposed crimes against the revolution.⁴⁷³

469. Lockington’s Case (Pa. 1814), *reprinted in* PENNSYLVANIA CASES, *supra* note 410, at 283–93.

470. See Lockington’s Case (Pa. 1813), *reprinted in* BACHE, *supra* note 342, at 10–12, 25–26, 30. Much later, the U.S. Supreme Court adopted this view, barring state courts from releasing federal detainees on habeas corpus. See *Tarble’s Case*, 80 U.S. (13 Wall.) 397, 405–10 (1871); *Ableman v. Booth*, 62 U.S. (21 How.) 506, 513–19 (1858).

471. See Lockington’s Case (Pa. 1813), *reprinted in* BACHE, *supra* note 342, at 22–23. For the opinion of Justice Hugh Henry Brackenridge agreeing with Dallas’s position, see Lockington’s Case (Pa. 1814), *reprinted in* PENNSYLVANIA CASES, *supra* note 410, at 296–98.

472. See Jansen, *supra* note 44, at 200–08 (describing measures against aliens in Britain, Canada, Jamaica, France, Spain, Cuba, Mexico, Puerto Rico, Louisiana, Venezuela, Portugal, Brazil, and states of the Holy Roman Empire).

473. See MICHAEL RAPPORT, NATIONALITY AND CITIZENSHIP IN REVOLUTIONARY FRANCE: THE TREATMENT OF FOREIGNERS 1789–1799, at 135–37, 142–44, 146–49, 187, 189–208, 219–23, 234–37, 261–72 (2000); JOHN TORPEY, THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP AND THE STATE 44–55 (2000); Olivier Faron & Cyril Grange, *Paris and Its Foreigners in the Late Eighteenth Century*, in MIGRATION CONTROL IN THE NORTH ATLANTIC WORLD: THE EVOLUTION OF STATE PRACTICES IN EUROPE AND THE UNITED STATES FROM THE FRENCH REVOLUTION TO THE INTER-WAR PERIOD 39, 41–42 (Andreas Fahrmeir, Olivier Faron & Patrick Weil eds., 2003).

Great Britain also imposed much tougher measures on aliens than the United States did in the 1790s. Concerned with French, Irish, and other radicals who were thought to be cooperating with British people and groups for purposes of espionage, propaganda, or even revolution, Great Britain in the 1790s enacted a number of very stringent measures. In 1792, a statute created new justices of the peace in and near London and Westminster with expanded powers to arrest suspicious persons, interrogate them, and summarily convict them for being a “Rogue and Vagabond.”⁴⁷⁴ This was used to surveil and interdict suspicious foreigners.⁴⁷⁵

The next year, Parliament enacted a very tough law applying to all aliens, not just the citizens of wartime enemy nations.⁴⁷⁶ Among the many features of the lengthy act were summary powers for crown officials to detain and imprison any alien; summary power to deport any alien; and an extensive system of identity registration and control of place of residence for all aliens.⁴⁷⁷ Unlike the Alien Enemies Act and Alien Law in the United States—the former was never invoked during the Quasi-War and the latter was barely used—this British statute was deployed extensively for deportations of, in the words of one historian, individuals “whose political views were considered objectionable,” “those who were suspected of being spies or agents of the French government,” and persons “regarded as undesirable” for other reasons.⁴⁷⁸

Also in 1793, Parliament deemed it treason to trade or exchange moneys or a long list of goods with persons in France (including territories annexed to or temporarily governed by France) or to buy lands in France, and made it an ordinary crime to travel to France.⁴⁷⁹ Habeas corpus was suspended and preventive executive-detention for suspected treasons and other crimes was allowed in 1794.⁴⁸⁰ This did not occur in the United States during the Quasi-War. Parliament required in 1794 that all moneys and property of any kind owned by persons residing in France or French-controlled territory, held “by persons residing or being in Great Britain,” had to be reported to special commissioners who had the power to order that such moneys be transferred

474. An Act for the More Effectual Administration of the Office of Justice of the Peace 1792, 32 Geo. 3 c. 53, § 17 (Gr. Brit.).

475. See Elizabeth Sparrow, *The Alien Office, 1792–1806*, 33 HIST. J. 361, 362–63 (1990).

476. See An Act for Establishing Regulations Respecting Aliens Arriving in this Kingdom, or Resident Therein, in Certain Cases 1793, 33 Geo. 3 c. 4 (Gr. Brit.). This act was continued in force several times in the 1790s. See, e.g., Act of June 22, 1797, 37 Geo. 3 c. 92 (Gr. Brit.); Act of June 1, 1798, 38 Geo. 3 c. 50 (Gr. Brit.).

477. See An Act for Establishing Regulations Respecting Aliens Arriving in this Kingdom, or Resident Therein, in Certain Cases, §§ 1, 3, 7, 11, 15, 17.

478. DINWIDDY, *supra* note 170, at 151.

479. See An Act More Effectually to Prevent, During the Present War Between Great Britain and France, All Traitorous Correspondence with, or Aid or Assistance Being Given to, His Majesty's Enemies 1793, 33 Geo. 3 c. 27, §§ 1–2 (Gr. Brit.).

480. See An Act to Empower His Majesty to Secure and Detain Such Persons as His Majesty Shall Suspect Are Conspiring Against His Person and Government 1794, 34 Geo. 3 c. 54 (Gr. Brit.).

to the Bank of England.⁴⁸¹ Nothing like this was done in the United States during the Quasi-War. Prefiguring but going beyond Congress's 1798 Sedition Act, a duo of Parliamentary acts in 1795 criminalized treasonable or seditious assemblies, publications, and speech,⁴⁸² and these were enforced vigorously.

The comparative moderation in the United States surely had many causes. The *Annals of Congress*, executive documents, and private letters reveal that the ranks of the national government were filled with people who took obedience to the Constitution and laws seriously, even as they often disagreed about how to interpret them. Certainly, the United States' geographic distance from the voracious wars in Europe helped moderate measures here. It also helped that the Republican Party especially, but also some moderate Federalists, were committed to avoiding excessively harsh measures against aliens.

Alone among the four well-known congressional statutes of the spring and summer of 1798—the Alien, Naturalization, Sedition, and Alien Enemies Acts—only the last was bipartisan and uncontroversial. The reason the Alien Enemies Act is controversial today is that the Trump administration is misusing the statute to perform functions handled by ordinary immigration and criminal law. If the Act is interpreted correctly, giving it the meaning it had when enacted in 1798, the Trump administration's invocation of the Alien Enemies Act should be found illegal.

481. See An Act for More Effectually Preserving Money or Effects, in the Hands of His Majesty's Subjects, Belonging to, or Disposable by, Persons Resident in France, for the Benefit of the Individual Owners Thereof 1794, 34 Geo. 3 c. 79, §§ 1, 5, 9 (Gr. Brit.).

482. See An Act for the Safety and Preservation of His Majesty's Person and Government Against Treasonable and Seditious Practices and Attempts 1795, 36 Geo. 3 c. 7 (Gr. Brit.); An Act for the More Effectually Preventing Seditious Meetings and Assemblies 1795, 36 Geo. 3 c. 8 (Gr. Brit.).