

DOMESTIC COMMANDER IN CHIEF: EARLY CHECKS BY OTHER BRANCHES

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INTRODUCTION

After the terrorist attacks of 9/11, constitutional rights and procedural safeguards were withdrawn from individuals who seemed to fit certain categories: Muslim, Arab, Arab-American, Middle Eastern, alien, suspected terrorist, or “enemy combatant.” In times of national emergency, fear, anger, and bias swell in power to inflict personal, institutional, and constitutional damage. The customary acceptance or tolerance of a single individual may disappear once the person slides into an abstract, ill-defined, and poorly understood category. Group hate seems easier than individual hate. It is more passionate, more irrational, and less in need of informed personal judgment. Ignorance helps rationalize injustice.

The punishments meted out after 9/11 by federal officials against innocent individuals were not America’s first experience with group prejudice. Discriminatory law enforcement has been practiced before. The president, through his exercise of what he considers to be his commander in chief powers, coupled with the formidable powers of the law enforcement community, is positioned to act quickly and decisively against targeted, disfavored groups. What checks exist? Will lawmakers acquiesce or think independently? How strongly will judges insist on procedural safeguards and the opportunity for self-defense? The first few decades of national government provide many telling examples of executive power used arbitrarily to punish persons who found themselves in an unpopular camp. Individual guilt meant nothing; group blame was everything. In such an atmosphere, constitutional rights disappear.

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I. COMMANDER IN CHIEF CLAUSE

Broad definitions of the President's role as commander in chief in contemporary times would have astonished the framers, particularly when the title is meant to justify and empower the president to take offensive actions against other nations without coming first to Congress for approval. During George W. Bush's administration, the Commander in Chief Clause has regularly been invoked to justify the creation of military commissions and decide their rules and procedures; designate U.S. citizens as "enemy combatants" and hold them indefinitely without being charged, given counsel, or ever tried; engage in "extraordinary rendition" to take a suspect from one country to another for interrogation and likely torture; and authorize the National Security Agency to listen to phone conversations between the United States and a foreign country involving suspected terrorists.¹

Advocates of executive power defend these actions by pointing out that Article II of the Constitution designates the President as Commander in Chief. So it does, but a title alone does not explain the scope of power, its purpose, or its boundaries. Three words in Article II cannot be properly understood without examining the powers given to Congress in Article I, the reasons given by the framers for allocating powers the way they did, and the nature of republican government where ultimate power is placed not in a single executive but with the people.

A. *Democratic Principles*

If the framers wanted an expansive doctrine of the executive operating as commander in chief, left unchecked by other branches, they could have adopted the political models fashioned by John Locke and Sir William Blackstone. In 1690, in his *Second Treatise on Civil Government*, Locke placed the "federative" power (what we call foreign policy) with the executive. The federative power consisted of "the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth."² To Locke, this power was "always almost united" with the executive.³ To separate the executive and federative powers, he warned, would invite

¹ Louis Fisher, *Invoking Inherent Powers: A Primer*, 37 PRESIDENTIAL STUD. Q. 1 (2007); Louis Fisher, *Detention and Military Trial of Suspected Terrorists: Stretching Presidential Power*, 2 J. NAT'L SECURITY L. & POL'Y 1 (2006).

² JOHN LOCKE, *SECOND TREATISE ON CIVIL GOVERNMENT* § 146 (1690).

³ *Id.* § 147.

“disorder and ruin.”⁴

Similarly, in his *Commentaries*, Blackstone defined the king’s prerogative in sweeping terms to include the right to declare war, send and receive ambassadors, make war or peace, make treaties, issue letters of marque and reprisal (authorizing private citizens to undertake military actions), and raise and regulate fleets and armies. Blackstone defined the king’s prerogative as “those rights and capacities which the king enjoys alone.”⁵ The power was therefore not subject to checks from any other political institution (or from the public). Blackstone considered the king “the generalissimo, or the first in military command,” who had “the sole power of raising and regulating fleets and armies.”⁶ Whenever the king exercised his lawful prerogative he “is, and ought to be absolute; that is, so far absolute, that there is no legal authority that can either delay or resist him.”⁷

During the debates at the Philadelphia Convention, the framers vested in Congress many of Locke’s federative powers and Blackstone’s royal prerogatives. The power to go to war was not left to a single executive, but rather to collective decision making through parliamentary deliberations. American democracy placed the sovereign power in the people and entrusted to them the temporary delegation of that power to elected senators, representatives, and presidents. Members of Congress take an oath of office to defend the Constitution, not the president. Their primary allegiance is to the people and to the constitutional principles of checks and balances and separation of power. The breadth of congressional power is evident simply by looking at the text of the Constitution and comparing Article I to Article II. Reading the text underscores the degree to which the framers wholly repudiated the models of Locke and Blackstone. Not a single one of Blackstone’s prerogatives is granted to the president. They are either assigned entirely to Congress (declare war, issue letters of marque and reprisal, raise and regulate fleets and armies)⁸ or shared between the Senate and the president (appointing ambassadors and making treaties).⁹ The rejection of the British and monarchical models could not have been more sweeping.

⁴ *Id.* § 148.

⁵ WILLIAM BLACKSTONE, 2 COMMENTARIES *238 (1803).

⁶ *Id.* at 262.

⁷ *Id.* at 250.

⁸ U.S. CONST. art. I.

⁹ *Id.* art. I & II.

B. *Motivations of the Framers*

The framers gave Congress the power to initiate war because they concluded—based on the history of other nations—that executives, in their quest for fame and personal glory, had too great an appetite for war and too little care for their subjects or the long-term interests of their country.¹⁰ John Jay, whose experience in the Continental Congress and the early years of the Republic was generally in foreign affairs, warned in Federalist No. 4 that

absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people.¹¹

Joseph Story, who served on the Supreme Court from 1811 to 1845, offered similar reasons for vesting in the representative branch the decision to go to war. The power to declare was

in its own nature and effects so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nations. War, in its best estate, never fails to impose upon the people the most burthensome taxes, and personal sufferings. It is always injurious, and sometimes subversive of the great commercial, manufacturing, and agricultural interests.¹²

Story found war as “sometimes fatal to public liberty itself, by introducing a spirit of military glory, which is ready to follow, wherever a successful commander will lead.”¹³

These apprehensions are part of the foundation for the restrictions that operate on the Commander in Chief Clause, domestically and in foreign affairs. True, the concerns of Jay and Story seem directed at absolute monarchs, not elected presidents, but their core concern had to do with human nature, the martial spirit, and political ambition. Human nature has not changed over the years in such a way to justify trust in independent and unchecked presidential decisions on the use of force. The record of two centuries in America, including the Vietnam War and the current Iraq War, supports the conclusion that what Jay said in 1788 and Story in 1833 applies quite well to our contemporary democratic system.

¹⁰ William Michael Treanor, *Fame, The Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1997).

¹¹ THE FEDERALIST NO. 4, at 101 (John Jay) (Benjamin Fletcher Wright ed., 2002).

¹² 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 60 (1833).

¹³ *Id.* at 61.

C. *Offensive and Defensive Wars*

The records of the debates at the Philadelphia Convention highlight the framers' determination to keep offensive wars in the hands of Congress while reserving to the President certain actions of a defensive nature. On June 1, 1787, Charles Pinckney offered his support for "a vigorous Executive but was afraid the Executive powers of <the existing> Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, towit an elective one."¹⁴ John Rutledge wanted the executive power placed in a single person, "tho' he was not for giving him the power of war and peace." James Wilson, also voicing his support for a single executive, "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c."¹⁵

Edmund Randolph worried about executive power, calling it "the foetus of monarchy."¹⁶ The delegates to the Philadelphia Convention, he said, had "no motive to be governed by the British Governmt. as our prototype."¹⁷ Alexander Hamilton, in a lengthy speech on June 18, 1787, strongly supported a vigorous and independent President but plainly jettisoned the British model of executive prerogatives in foreign affairs and the war power. In discarding the Lockean and Blackstonian doctrines of executive power, he proposed giving the Senate the "sole power of declaring war."¹⁸ The president would be authorized to have "the direction of war when authorized or begun."¹⁹ In Federalist No. 69, Hamilton explained the break with English precedents. The power of the king "extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies."²⁰ The delegates decided to place those powers, he said, in Congress.

During the debates, Pinckney objected that legislative proceedings "were too slow" for the safety of the country in an emergency, since he expected Congress to meet but once a year.²¹ James Madison and Elbridge Gerry moved to amend the draft constitution, empowering Congress to "declare war" instead of to "make war."²² The purpose of this change in language was to leave to the President "the power to repel

¹⁴ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 64-65 (Max Farrand ed., 1937) [hereinafter FARRAND].

¹⁵ *Id.* at 65-66.

¹⁶ *Id.* at 66.

¹⁷ *Id.* at 66.

¹⁸ *Id.* at 292.

¹⁹ *Id.*

²⁰ THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 10, at 446.

²¹ 2 FARRAND, *supra* note 13, at 318-19.

²² *Id.* at 318.

sudden attacks.”²³ Their motion carried.

Reactions to the Madison-Gerry amendment reinforce the narrow grant of authority to the commander in chief role. Pierce Butler wanted to give the president the power to make war, arguing that he “will have all the requisite qualities, and will not make war but when the Nation will support it.”²⁴ Not a single delegate supported him. Roger Sherman immediately objected: “The Executive shd. be able to repel and not to commence war.”²⁵ Gerry said he “never expected to hear in a republic a motion to empower the Executive alone to declare war.”²⁶ George Mason spoke “agst giving the power of the war to the Executive, because not <safely> to be trusted with it. . . . He was for clogging rather than facilitating war.”²⁷ At the Pennsylvania ratifying convention, James Wilson expressed the prevailing sentiment that the system of checks and balances:

will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large.²⁸

This distrust of presidential power over the use of military force appears in other statements during this period. In 1793, Madison called war:

the true nurse of executive aggrandizement. . . . In war, the honours and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered; and it is the executive brow they are to encircle. The strongest passions and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honourable or venial love of fame, are all in conspiracy against the desire and duty of peace.²⁹

Five years later, in a letter to Thomas Jefferson, Madison said that the Constitution “supposes, what the History of all Govts demonstrates, that the Ex. is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl.”³⁰

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 319.

²⁸ 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (Jonathan Elliot ed., 1836-45).

²⁹ Letters of Helvidius No. IV (Aug. 1793), in 6 THE WRITINGS OF JAMES MADISON 174 (Gaillard Hunt ed., 1906).

³⁰ *Id.* at 312.

D. *Commander in Chief*

A principal check on the president's power over U.S. forces is the power of the purse. The framers recalled the efforts of English kings who, denied funds from Parliament, decided to rely on outside sources of revenue for their military expeditions. The result was civil war and the loss by Charles I of both his office and his head.³¹ The growth of democratic government is tied directly to legislative control over all expenditures, including those for foreign and military affairs, whether outside the country or inside. The U.S. Constitution was designed to avoid the British history of civil war and bloodshed by vesting the power of the purse wholly in Congress.

Under Article I, Section 9, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."³² In Federalist No. 48, Madison explained that "the legislative department alone has access to the pockets of the people."³³ The president gained the title of commander in chief but Congress retained the power to finance, or not finance, military operations. For Madison, it was a fundamental principle of democratic government that:

[t]hose who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether a *war ought* to be *commenced, continued, or concluded*. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws.³⁴

In recent years, advocates of presidential authority have argued that the Commander in Chief Clause empowers the president to initiate military operations against other countries and to continue them unless Congress cuts off funds, presumably by mustering a two-thirds majority in each house to overcome an expected presidential veto. For example, John Yoo maintains that the delegates to the Philadelphia Convention "sought to modify, rather than transform, the political relationship between the executive and legislative branches in the realm of war powers. The executive would have full command of the military and would play the leading role in initiating and ending war."³⁵ The President, however, "could not wage war without the support of

³¹ PAUL EINZIG, *THE CONTROL OF THE PURSE* 57-62, 100-06 (1959); *see also* Charles Tiefer, *Can Appropriation Riders Speed Our Exit From Iraq?*, 42 STAN. J. INT'L L. 291, 299 (2006); Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1, 29-44 (1998).

³² U.S. CONST. art. I, § 9.

³³ THE FEDERALIST NO. 48 (James Madison), *supra* note 10, at 345.

³⁴ 6 THE WRITINGS OF JAMES MADISON, *supra* note 29, at 148.

³⁵ JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 104 (2005).

Congress, which could employ its appropriations power to express its disagreement and, if necessary, to terminate or curtail unwise, unsuccessful, or unpopular wars.”³⁶ If the president was willing to exercise his veto power, he could start and continue a war so long as he had at least one-third plus one in a single chamber of Congress. Nothing in the writings of the framers, the debates at Philadelphia and the ratifying conventions, or the text of the Constitution supports that definition of presidential power.

Look closely at the Commander in Chief Clause: “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”³⁷ There you see one constitutional check. Congress, not the president, does the calling. The Constitution gives to Congress the power to provide “for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”³⁸ Moreover, Article I empowers Congress to raise and support armies and to provide and maintain a navy; make rules for the government and regulation of the land and naval forces; and provide for organizing, arming, and disciplining the militia.

Although the Constitution does not empower the president as commander in chief to initiate and continue wars, it anticipates that the President will provide unity of command. In Federalist No. 74, Hamilton wrote that the direction of war “most peculiarly demands those qualities which distinguish the exercise of power by a single hand.”³⁹ The power of directing war and emphasizing the common strength “forms a usual and essential part in the definition of the executive authority.”⁴⁰ The president’s authority to bring unity of purpose in military command does not make him a dictator or immune from legislative or public control. Congress at all times retains its constitutional responsibility to monitor war and intervene when it decides it is necessary to restrict or terminate military operations that are contrary to the needs of national security.

A third quality attaches to the Commander in Chief Clause. Giving that title to the president represents an important technique for preserving civilian supremacy over the military. The person leading the armed forces is the civilian president, not a military officer. In 1861, Attorney General Edward Bates explained that the president is commander in chief not because he is “skilled in the art of war and

³⁶ *Id.*

³⁷ U.S. CONST. art. II, § 2, cl. 1.

³⁸ *Id.* art. I, § 8, cl. 15.

³⁹ THE FEDERALIST NO. 74 (Alexander Hamilton), *supra* note 10, at 473.

⁴⁰ *Id.*

qualified to marshal a host in the field of battle.”⁴¹ He is commander in chief for a different reason. Whatever soldier leads U.S. armies to victory against an enemy, “he is subject to the orders of the *civil magistrate*, and he and his army are always ‘subordinate to the civil power.’”⁴² The civil power is a broad constitutional principle, including the representative of the people. Just as military officers are subject to the direction and command of the president, so is the president subject to the direction and command of lawmakers, who preserve the powers of a sovereign people. To allow a president to conduct a war free of legislative constraints, or free of constraints unless both houses muster a two-thirds majority to override a veto, would violate fundamental principles of republican government.

II. GROUP INTOLERANCE

These are some introductory observations about constitutional design and the scope and purpose of the Commander in Chief Clause. The focus now turns to the initial checks supplied by the legislative and judicial branches during the formative first few decades. What happens when a threat to the political system emerges, sometimes from the outside and sometimes from within? What should be done about individuals who join groups that other citizens regard as contrary to the national or local interest? Should the government, acting through the president as commander in chief, intervene to limit and perhaps expel those groups? Those very questions surfaced in the first decade, leading to the Alien and Sedition Acts of 1798. Even earlier, with the Neutrality Proclamation of 1793 and the Whiskey Rebellion in 1794, the country debated what should be done about groups that seemed to endanger political stability.

When government authority is challenged, public officials typically turn against groups that appear to jeopardize social and political order. Those who are foreign-born are easy prey. If a group seems inimical to the national interest, particularly when its members are critical of government policy, why not simply suppress or remove them? Eliminating a noxious element may bring greater harmony and safety to the community. In his famous Federalist No. 10 essay, Madison prepared an exceedingly careful and thoughtful analysis of groups he called “factions.” He concluded that in a democratic society factions are entitled to the full range of constitutional liberties and can be held in check by regular political and legal means.⁴³

⁴¹ 10 Op. Att’y Gen. 74, 79 (1861).

⁴² *Id.*

⁴³ THE FEDERALIST NO. 10 (James Madison), *supra* note 10.

A. *Madison's Factions*

By faction, Madison meant a number of citizens “united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”⁴⁴ He first reviewed the tendency of popular governments “to break and control the violence of faction.”⁴⁵ What cures would work? The “instability, injustice, and confusion introduced into public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished.”⁴⁶ He singled out two methods of dealing with factions: “the one, by removing its causes; the other, by controlling its effects.”⁴⁷ How does one remove the causes? One way is to destroy “the liberty which is essential to its existence.”⁴⁸ The other: give “to every citizen the same opinions, the same passions, and the same interests.”⁴⁹ Simply create a community of like-minded, robotic people.

B. *Causes and Effects*

To Madison, the idea of eliminating factions by destroying liberty “was worse than the disease.”⁵⁰ Liberty is to faction as “air is to fire, an ailment without which it instantly expires.”⁵¹ A democratic community is designed to encourage liberty. To abolish liberty to eliminate factions was akin to abolishing air to eliminate the threat of fire. It simultaneously prevents life. The second method, Madison concluded, is “as impracticable as the first would be unwise.”⁵² As long as individuals are free to exercise their minds, “different opinions will be formed.”⁵³ The first object of government is to protect what he called “the faculties of men, from which the rights of property originate.”⁵⁴ By protecting different and unequal faculties, individuals will have different opinions and produce different interests and political parties. Madison explained the enduring quality of factions:

The latent causes of faction are thus sown in the nature of man; and

⁴⁴ *Id.* at 130.

⁴⁵ *Id.* at 129.

⁴⁶ *Id.* at 130.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 131.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts.⁵⁵

C. *Political Leadership*

Can passions and animosities be brought under effective control by political leaders? Madison saw few grounds for optimism:

It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole.⁵⁶

A democratic republic could not, and should not, hope to eliminate the causes of faction. Whatever relief might be available depended on controlling the effects of factions.

If a faction was less than a majority, it could be controlled by “the republican principle, which enables the majority to defeat its sinister views by regular vote.”⁵⁷ What if the faction was a majority? In a pure democracy with a small number of citizens, there appeared to be no cure to majority abuse. “Hence it is that such democracies have ever been spectacles of turbulence and contention”⁵⁸ Madison looked to two safeguards: the form and size of government. Instead of functioning under a pure democracy, a republic offered some hope because popular passions would be filtered through the elected representatives of a legislative branch. There were these differences between a democracy and a republic: “first, the delegation of the government, in the latter, to a

⁵⁵ *Id.*

⁵⁶ *Id.* at 132.

⁵⁷ *Id.* at 133.

⁵⁸ *Id.*

small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.”⁵⁹

In a republic, the views of the citizens are passed through elected officials, “whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”⁶⁰ Increasing the size of a republic also “renders factious combinations less to be dreaded.”⁶¹ Extend the territory of a republic:

and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.”⁶²

Dividing a large republic into separate states adds further protection. “The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States.”⁶³ A religious sect, having gained preponderant influence in one region, is likely to be checked by other denominations. The greater the number of sects, the greater the chance that harmful designs by one faction will be blocked and neutralized by others.

The result is a system of self-correction that minimizes the risk of one group doing serious damage to the national interest. Madison’s theory would be tested almost immediately in the young republic. Individuals of different persuasions gained political power and pressed their agendas on others. These conflicts regularly pitted individual liberties against government authority, eventually culminating in the repressive Alien and Sedition Acts of 1798. Factions and disfavored groups critical of government were subjected to punishment, suppression, and expulsion. Those issues surfaced early with military actions against Indian tribes, legislation in 1792 on a militia, the Neutrality Proclamation of 1793, and the Whiskey Rebellion a year later.

III. MILITARY ACTION AGAINST INDIANS

The first exercise of the Commander in Chief Clause involved

⁵⁹ *Id.*

⁶⁰ *Id.* at 136.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

actions by President George Washington against certain Indian tribes. Contrary to some contemporary interpretations of the Clause that champion plenary and unchecked powers, Washington understood his duty to act in accordance with legislation passed by Congress. Any decision to mount an offensive operation, whether domestically or abroad, lay with Congress. Independent presidential prerogatives were limited to defensive steps to “repel sudden attacks,” especially when Congress was not in session and therefore unable to respond legislatively.⁶⁴

On September 29, 1789, Congress passed legislation “for the purpose of protecting the inhabitants of the frontiers of the United States from the hostile incursions of the Indians.”⁶⁵ To supply that protection, Congress authorized the president “to call into service from time to time, such part of the militia of the states respectively, as he may judge necessary for the purpose aforesaid.” Washington sought to act in accordance with legislative policy. In 1790 and 1791, Congress passed new authorizations to protect inhabitants in the frontiers.⁶⁶

Each use of military force required Washington to determine whether the purpose was offensive or defensive. Offensive wars, he knew, belonged to Congress. After the 1789 statute, he wrote to Governor St. Clair to provide instructions for implementing the statute. Washington’s first preference was to arrange for a cessation of hostilities and establish the foundation for a peace treaty. If that proved impossible, St. Clair was to call upon the nearest counties of Virginia and Pennsylvania for detachments of militia.⁶⁷ Two years later St. Clair’s troops suffered a disastrous loss to the Indians. Washington promptly notified Congress, promising additional information “of all such matters as shall be necessary to enable the Legislature to judge of the future measures which it may be proper to pursue.”⁶⁸ The policymaking body was Congress and it was the President’s duty to provide materials and documents to permit the legislative branch to fulfill its constitutional duties.

St. Clair’s defeat precipitated the first major congressional investigation.⁶⁹ On March 27, 1792, the House of Representatives debated a resolution to request Washington “to institute an inquiry into the causes of the late defeat of the army under the command of Major

⁶⁴ LOUIS FISHER, *PRESIDENTIAL WAR POWER* 8-10 (2d rev. ed. 2004).

⁶⁵ 1 Stat. 96, § 5 (1789).

⁶⁶ 1 Stat. 121, § 16 (1790); 1 Stat. 222 (1791).

⁶⁷ Letter from George Washington to Arthur St. Clair (Oct. 6, 1789), in 30 *THE WRITINGS OF GEORGE WASHINGTON, 1745-1799*, at 430 (John C. Fitzpatrick ed., 1939).

⁶⁸ Letter from George Washington to the United States Congress (Dec. 12, 1791), in 31 *THE WRITINGS OF GEORGE WASHINGTON, 1745-1799*, *supra* note 67, at 442.

⁶⁹ For earlier congressional investigations, see LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE* 6-10 (2004).

General St. Clair.”⁷⁰ Who should conduct the inquiry: Congress or the executive branch? Congress decided that the investigative task fell to the legislature, as “the grand inquest of the nation.”⁷¹ The executive branch should not be investigating itself. A resolution requesting the President to institute the inquiry fell thirty-five to twenty-one. Congress then authorized that a committee be appointed to inquire “into the causes of the failure of the late expedition under Major General St. Clair; and that the said committee be empowered to call for such persons, papers, and records, as may be necessary to assist their inquiries.”⁷²

According to notes taken by Thomas Jefferson, President Washington convened his cabinet for the purpose of deciding the degree to which the House could call for papers from the executive branch. The Cabinet considered and agreed that the House “was an inquest, and therefore might institute inquiries . . . [and] might call for papers generally.”⁷³ Furthermore, the president “ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently were to exercise a discretion.”⁷⁴ Having provided the foundation for what would later be called executive privilege, the cabinet then agreed that there was not a paper “which might not be properly produced.”⁷⁵ The congressional committee examined the papers submitted by the executive branch, listened to explanations from department heads and other witnesses, and received a written statement from General St. Clair.⁷⁶

President Washington followed a consistent course in using military force against Indian tribes. Military operations were limited to defensive actions. In one message, he referred to military operations “offensive or defensive,” but the full text of his message was designed to avoid any executive initiative in war-making and to limit military actions to defensive measures.⁷⁷ Secretary of War Henry Knox advised Governor William Blount on October 9, 1792: “The Congress which possess the powers of declaring War will assemble on the 5th of next Month—Until their judgments shall be made known it seems essential to confine all your operations to defensive measures.”⁷⁸ A month later

⁷⁰ 3 ANNALS OF CONG. 490 (1792).

⁷¹ *Id.* at 491.

⁷² *Id.* at 493.

⁷³ 1 THE WRITINGS OF THOMAS JEFFERSON 303-05 (Albert Ellery Bergh ed., 1903).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ 3 ANNALS OF CONG. 601-02, 877, 895, 907, 1052-59, 1106-13, 1309-17 (1792-1793).

⁷⁷ 4 AMERICAN STATE PAPERS: INDIAN AFFAIRS 97 (1832).

⁷⁸ Letter from Harry Knox to William Blount (Oct. 9, 1792), in 4 THE TERRITORIAL PAPERS OF THE UNITED STATES, 1790-1796, at 195 (Clarence Edwin Carter ed., 1936).

Blount received this instruction from Knox:

All your letters have been submitted to the President of the United States. Whatever may be his impression relatively to the proper steps to be adopted, he does not conceive himself authorized to direct offensive operations against the Chickamaggas. If such measures are to be pursued they must result from the decisions of Congress who solely are vested with the powers of War.⁷⁹

President Washington did not waver from this deferential policy toward Congress and its prerogatives over war. Writing in 1793, he said that any offensive operations against the Creek Nation must await congressional action: “The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they have deliberated upon the subject, and authorized such a measure.”⁸⁰ Unlike the ambitious interpretations of the Commander in Chief Clause that have circulated in recent years, the president was subordinate to Congress in matters of war other than emergency actions to repel sudden attacks and routine defensive steps when U.S. troops were under attack.

In 1795, then-Secretary of War Timothy Pickering notified Blount that President Washington had waited for the results of congressional deliberations on Indian policy, and that Congress had appropriated \$50,000 for opening trade with the Indians and \$130,000 for defensive protection of the frontiers.⁸¹ “All ideas of offensive operations,” said Pickering, “are therefore to be laid aside and all possible harmony cultivated with the Indian tribes.”⁸² Blount suggested that Congress might order an army to “humble, if not destroy the Creek Nation,” but Pickering insisted that Congress was determined to avoid a direct or indirect war with the Creeks.⁸³ “Congress alone,” he advised Blount, “are competent to decide upon an offensive war, and congress have not thought fit to authorize it.”⁸⁴

IV. MILITIAS AND INDIVIDUAL FREEDOM

In 1792, Congress debated a bill to establish a uniform militia

⁷⁹ Letter from Harry Knox to William Blount (Nov. 26, 1792), in 4 THE TERRITORIAL PAPERS OF THE UNITED STATES, 1790-1796, *supra* note 78, at 220-21.

⁸⁰ 33 THE WRITINGS OF GEORGE WASHINGTON, 1745-1799, *supra* note 67, at 73.

⁸¹ Letter from Thomas Pickering to William Blount (Mar. 23, 1795), in 4 THE TERRITORIAL PAPERS OF THE UNITED STATES, 1790-1796, *supra* note 78, at 387.

⁸² *Id.*

⁸³ *Id.* at 389.

⁸⁴ *Id.* For further details, see FRANCIS PAUL PRUCHA, THE SWORD OF THE REPUBLIC: THE UNITED STATES ARMY ON THE FRONTIER, 1783-1846, at 46-47 (1969); WILEY SWORD, PRESIDENT WASHINGTON'S INDIAN WAR: THE STRUGGLE FOR THE OLD NORTHWEST, 1790-1795 (1985).

drawn from the various states.⁸⁵ Some members of the House expressed concern about the power of a militia to not only suppress insurrections and repel invasions but to turn itself against elements of the community. William Vans Murray warned: “Of all the offices of politics, the most irksome and delicate is that by which a Legislature directs the military forces of the community to its own conservation, as it presupposes situations in which resistance to the Government itself is contemplated. Hence, we see a jealousy even in England of the use of the sword, when drawn against any part of the community.”⁸⁶ Similarly, John Page expressed apprehension about a too ready use of the militia. He thought that citizens would not resist “mild and equitable” laws, but that “if Congress should be so infatuated as to enact those of a contrary nature, I hope they will be repealed, and not enforced by martial law.”⁸⁷

To curb unwarranted and unjustified use of the militia, Abraham Baldwin offered an amendment to provide that information of any insurrection shall be communicated to the president by either a justice of the Supreme Court or by a district judge. The objective was to place a judicial check on executive power. His motion was agreed to.⁸⁸ As enacted, the militia bill provided that whenever the United States shall be invaded, or be “in imminent danger of invasion from any foreign nation or Indian tribe,” the president was authorized to call forth such number of the militia as he may judge necessary to repel the invasion.⁸⁹ In case of an insurrection in any state against the government, the President was authorized, on application of the state legislature or of the governor when the legislature was unable to sit, to call forth the militia to suppress the insurrection.⁹⁰ Whenever the laws of the United States were opposed or the execution of the laws obstructed, “by combinations too powerful to be suppressed by the ordinary course of judicial proceedings,” or by the powers vested in the marshals of the various districts, a Supreme Court justice or district judge must notify the president.⁹¹ Only after the exercise of independent judicial determination could the president order the militia. Moreover, the statute specified that these emergency powers were available to the president only “if the legislature of the United States be not in session.”⁹²

⁸⁵ 3 ANNALS OF CONG. 418-23, 430, 431, 433, 435, 552-55, 574-80, 701-02, 798-811 (1792-1793).

⁸⁶ *Id.* at 554.

⁸⁷ *Id.* at 574.

⁸⁸ *Id.* at 577.

⁸⁹ An Act to Provide for Calling forth the Militia to Execute the Laws of the Union, Suppress Insurrection, and Repel Invasions, 1 Stat. 264 (1792).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* § 2. For further legislation on the militia, see ch. 33, 1 Stat. 271 (1792). The judicial check was removed in 1795. Ch. 36, 1 Stat. 424. For a good analysis of these early militia

A. *Neutrality Proclamation*

In 1793, the Washington administration debated the merits of proclaiming America's neutrality in the war between England and France. In English law, proclamations had been used to give public notice of anything the king thought fit to advertise to his subjects.⁹³ The issue was a delicate one for the Washington administration. Would a proclamation encroach on the power of Congress to decide questions of war and peace? George Washington asked his cabinet whether he should call Congress back in special session, but they advised against it.⁹⁴ Relying for authority on the "law of nations," Washington warned Americans to avoid any involvement in the war and instructed law officers to prosecute all persons who violated his proclamation.⁹⁵

Washington discovered that his effort at unilateral lawmaking had a built-in limitation. Jurors refused to indict and find guilty individuals who did not comply with his proclamation. When Gideon Henfield was prosecuted for violating the proclamation, jurors rebelled against the idea of criminal law being decided by an executive decree. The necessary instrument of law was a statute passed by Congress, and until that was done jurors would acquit.⁹⁶ With no statute to cite, the government dropped other prosecutions.⁹⁷ After Congress returned in December, Washington told the two houses that it rested with "the wisdom of Congress to correct, improve, or enforce" the policy his proclamation had established.⁹⁸ Congress responded by passing the Neutrality Act of 1794, giving the administration the firm legal footing it needed to prosecute violators.⁹⁹

B. *Whiskey Rebellion*

The militia act of 1792 was put to use two years later in response to the Whiskey Rebellion. On March 3, 1791, Congress enacted a federal excise tax on spirits distilled within the United States. Excise

statutes, see Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149 (2004).

⁹³ PHILLIP J. COOPER, *BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION* 5 (2002).

⁹⁴ 32 THE WRITINGS OF GEORGE WASHINGTON, 1745-1799, *supra* note 67, at 420-21 n.14.

⁹⁵ Howard Jones, *Proclamation of Neutrality*, in 3 ENCYCLOPEDIA OF THE AMERICAN PRESIDENCY 1240 (Leonard W. Levy & Louis Fisher eds., 1994).

⁹⁶ FRANCIS WHARTON, *STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS* 84-85, 88 (1849); *Henfield's Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793).

⁹⁷ 2 JOHN MARSHALL, *THE LIFE OF GEORGE WASHINGTON* 273 (1832).

⁹⁸ 4 ANNALS OF CONG. 11 (1793).

⁹⁹ Neutrality Act, ch. 33, 1 Stat. 369-370 (1794).

laws had a long history of inflaming public opposition and generating protests.¹⁰⁰ To American farmers, converting grain into alcohol “was considered to be as clear a national right as to convert grain into flour.”¹⁰¹ Beginning in September 1791, excisemen who attempted to collect revenue were seized, tarred and feathered, and stripped of horse and money.¹⁰² President Washington recognized the checkered history of excise taxes. An excise law was “of odious character with the people; partial in its operation; unproductive unless enforced by arbitrary and vexatious means; and committing the authority of the Government in parts where resistance is most probable, and coercion least practicable.”¹⁰³

In September 1792, Washington learned “of the Inhabitants of the Western Survey of the District of Pennsylvania, in opposing the execution of what is called the Excise Law.”¹⁰⁴ They had insulted federal officers “who have been appointed to collect the duties on distilled spirits agreeably thereto.”¹⁰⁵ Insults quickly escalated to violence, including the exchange of rifle shots between government agents and local militia, several deaths, the capture of a federal marshal, and the destruction of property by fire.¹⁰⁶

Washington understood and accepted the right of citizens to protest government policy, but the fact that the resistance affected money needed for the country was “much to be regretted.”¹⁰⁷ He stood ready to “exert all the legal powers with which the Executive is invested, to check so daring and unwarrantable a spirit.”¹⁰⁸ Concerned that the rebellion might spread to other states, he issued a proclamation on September 15, 1792, warning those who resisted the law that it was his duty “to take care that the laws be faithfully executed.”¹⁰⁹ He directed all courts, magistrates, and officers to see that the laws were obeyed and the public peace preserved.

On August 7, 1794, Washington issued another proclamation,

¹⁰⁰ Townsend Ward, *The Insurrection of the Year 1794, in the Western Counties of Pennsylvania*, in 6 MEMOIRS OF THE HISTORICAL SOCIETY OF PENNSYLVANIA 119, 119-27 (1858).

¹⁰¹ *Id.* at 126.

¹⁰² *Id.* at 130-31.

¹⁰³ Letter from George Washington to Secretary of the Treasury Alexander Hamilton (July 29, 1792), in 32 THE WRITINGS OF GEORGE WASHINGTON, 1745-1799, *supra* note 67, at 96.

¹⁰⁴ Letter from George Washington to Secretary of the Treasury Alexander Hamilton (Sept. 7, 1792), in 32 THE WRITINGS OF GEORGE WASHINGTON, 1745-1799, *supra* note 67, at 143.

¹⁰⁵ *Id.*

¹⁰⁶ THOMAS P. SLAUGHTER, THE WHISKEY REBELLION 179-81 (1986); Ward, *supra* note 100, at 138-39, 166-71.

¹⁰⁷ Letter from George Washington to Secretary of the Treasury Alexander Hamilton (Sept. 7, 1792), *supra* note 104, at 143.

¹⁰⁸ *Id.* at 144.

¹⁰⁹ 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 116-17 (James D. Richardson ed., 1908) [hereinafter RICHARDSON].

itemizing a long list of abuses against federal agents and stating that he had put into effect the procedures of the militia act. He referred to “the said combinations” proceeding in a manner “subversive equally of the just authority of the government and of the rights of individuals,” and holding “certain irregular meetings” for the purpose of opposing the tax.¹¹⁰ He gave Justice James Wilson the evidence needed to verify the rebellion and received from Wilson a certification that ordinary legal means were insufficient to execute national law.¹¹¹ Washington called upon the militias of four states to put down the rebellion.¹¹² District Judge Richard Peters joined Alexander Hamilton and District Attorney William Rawle in accompanying the troops. Hamilton and Rawle conducted hearings before Peters to identify the instigators, who were later tried in Philadelphia.¹¹³

C. “Democratic Societies”

In responding to the Whiskey Rebellion, President Washington had already gone on record in objecting to citizens holding “certain irregular meetings” to express their objections to government policies. What was the proper government response? Political clubs had indeed emerged, supported by opposition newspapers that helped sharpen the rhetoric and crystallize the grievances.¹¹⁴ In a letter of September 25, 1794, Washington concluded that the Whiskey Rebellion “may be considered as the first *ripe fruit* of the Democratic Societies.”¹¹⁵ He directed his scorn at people who joined these groups and participated in their discussions: “[C]an any thing be more absurd, more arrogant, or more pernicious to the peace of Society, than for self created bodies, forming themselves into *permanent* Censors, and under the shade of Night in a conclave,” offering judgments that statutes passed by Congress were mischievous or unconstitutional.¹¹⁶ He emphasized “permanent” to distinguish the activities of these Democratic Societies from “the right of the people to meet occasionally, to petition for, or to remonstrate against, any Act of the Legislature &ca.”¹¹⁷ Washington vigorously objected to the activities of Democratic Societies “endeavouring to destroy all confidence in the administration, by arrainging all its acts,

¹¹⁰ *Id.* at 158.

¹¹¹ *Id.* at 160.

¹¹² *Id.*

¹¹³ HOMER CUMMINGS & CARL MCFARLAND, FEDERAL JUSTICE 43-45 (1937).

¹¹⁴ SLAUGHTER, *supra* note 106, at 163-65, 194-95.

¹¹⁵ Letter from George Washington to Burges Ball (Sept. 25, 1794), in 33 THE WRITINGS OF GEORGE WASHINGTON, 1746-1799 *supra* note 67, at 506.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

without knowing on what ground, or with what information it proceeds and this without regard to decency or truth.”¹¹⁸ He sought to “delegitimize them as participants in the political process.”¹¹⁹

Writing on October 8, Washington again expressed his contempt for citizens who met in private organizations to oppose government policy:

[The] daring and factious spirit which has arisen (to overturn the laws, and to subvert the Constitution), ought to be subdued. If this is not done, there is, an end of and we may bid adieu to all government in this Country, except Mob and Club Govt. from whence nothing but anarchy and confusion can ensue.¹²⁰

He continued:

how can things be otherwise than they are when clubs and Societies have been instituted for the express purpose though clothed in another garb by their diabolical leader [the French diplomat, Edmond Genet] whose object was to sow sedition, to poison the minds of the people of this Country, and to make them discond. with the Government of it, and who have labored indefatigably to effect these purposes.¹²¹

On October 16, Washington again rebuked the Democratic Societies:

I believe the eyes of all the well disposed people of this Country will soon be opened, and that they will clearly see, the tendency if not the design of the leaders of these self created societies. As far as I have heard them spoken of, it is with strong reprobation. I should be extremely sorry therefore if Mr. [Madison] from any cause whatsoever should get entangled with them, or their politics.¹²²

He added: “My mind is so perfectly convinced, that if these self created societies [sic] cannot be discountenanced, that they will destroy the government of this Country”¹²³ To John Jay on November 1 he charged that the “self-created Societies” hoped to “effect some revolution in the government” and “have unfolded views which will, I trust, effectuate their annihilation sooner than it might otherwise have happened.”¹²⁴

Members of his Cabinet urged prompt and decisive action to

¹¹⁸ *Id.* at 507.

¹¹⁹ Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Dissent in the Early Republic*, 82 N.C. L. REV. 1525, 1528 (2004).

¹²⁰ Letter from George Washington to Maj. Gen. Daniel Morgan (Oct. 8, 1794), in 33 THE WRITINGS OF GEORGE WASHINGTON, 1745-1799, *supra* note 67, at 523.

¹²¹ *Id.* at 524.

¹²² Letter from George Washington to Secretary of State Edmund Randolph (Oct. 16, 1794), in 34 THE WRITINGS OF GEORGE WASHINGTON, 1745-1799, at 3 (John C. Fitzpatrick ed., 1940).

¹²³ *Id.*

¹²⁴ Letter from George Washington to John Jay (Nov. 1, 1794), in 34 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 122, at 17.

suppress these political clubs. Secretary of State Edmund Randolph, on October 11, told Washington that he “never did see an opportunity of destroying these self-constituted bodies, until the fruit of their operations was disclosed in the insurrection.”¹²⁵ Randolph offered this counsel: “They may now, I believe be crushed. The prospect ought not to be lost.”¹²⁶

Washington’s private correspondence paved the way for his Sixth Annual Address to Congress, November 19, 1794. He reviewed what he had done to suppress the rebellion in four western counties of Pennsylvania, explaining that the “very forbearance to press prosecutions was misinterpreted into a fear of urging the execution of the laws; and associations of men began to denounce threats against the officers employed.”¹²⁷ Based on a belief that the government’s operation “might be defeated, certain self-created societies assumed the tone of condemnation.”¹²⁸ In the concluding paragraph of his address, Washington seemed to take another slap at the Democratic Societies, urging Congress to unite “to turn the machinations of the wicked to the confirming of our constitution: to enable us at all times to root out internal sedition, and put invasion to flight.”¹²⁹ The subject of sedition would return with full force in 1798.

D. *Lawmakers Respond*

Washington’s pointed critique of the Democratic Societies provoked strong reactions from Congress, both for and against. Thomas Fitzsimons offered a supportive amendment to the House’s prepared response to the Sixth Annual Address:

As part of this subject, we cannot withhold our reprobation of the self-created societies, which have risen up in some parts of the Union, misrepresenting the conduct of the Government, and disturbing the operation of the laws, and which, by deceiving and inflaming the ignorant and the weak, may naturally be supposed to have stimulated and urged the insurrection.¹³⁰

William Smith argued that if members of the House failed to express their views about the Democratic Societies, “their silence would be an

¹²⁵ Letter of Edmund Randolph to George Washington (Oct. 11, 1794), *microfilmed in* GEORGE WASHINGTON PAPERS, SERIES 4, Reel 106, (John C. Fitzpatrick, Ed., U.S. Gov’t Printing Office, 1931).

¹²⁶ *Id.*

¹²⁷ 34 THE WRITINGS OF GEORGE WASHINGTON, 1745-1799, *supra* note 122, at 29.

¹²⁸ *Id.* at 37.

¹²⁹ *Id.* at 37.

¹³⁰ 4 ANNALS OF CONG. 899 (1794).

avowed desertion of the Executive.”¹³¹ Describing himself as a friend of free press, Smith asked: “would any one compare a regular town meeting where deliberations were cool and unruffled, to these societies to the nocturnal meetings of individuals, after they have dined, where they shut their doors, pass votes in secret, and admit no members into their societies, but those of their own choosing?”¹³² To reinforce his point, Smith observed “that this House has never done much business after dinner.”¹³³

As to the House “deserting” President Washington if it failed to rush to his defense, several members insisted they had a right and a need to speak their own minds. Was it expected, asked John Nicholas:

that I am to abandon my independence for the sake of the President? He never intended that we should take any such notice of his reference to these societies; but if the popularity of the President has, in the present case, been committed, let those who have hatched this thing, and who have brought it forward, answer for the consequences.¹³⁴

Josiah Parker spoke in similar fashion. He suspected that Washington, “for whose character and services he felt as much respect and gratitude as any man in America, had been misinformed on this point.”¹³⁵ For all his respect for the president, “he was not to give up his opinions for the sake of any man.”¹³⁶ Parker thought his constituents in Virginia would be repelled by any form of censorship: “They love your Government much, but they love their independence more.”¹³⁷

Objecting to the Fitzsimons language, William Giles said that “when he saw . . . the House of Representatives about to erect itself into an office of censorship, he could not sit silent.”¹³⁸ He trusted that “the fiat of no person in America should ever be taken for truth, implicitly, and without evidence.”¹³⁹ Noting his respect for President Washington, Giles asked what mischief could come from rebuking anything as general as “self-created societies.” There was not an individual in the country, he said, “who might not come under the charge of being a member of some one or other self-created society. Associations of this kind, religious, political, and philosophical, were to be found in every quarter of the Continent.”¹⁴⁰ The Baptists, Methodists, and the Friends might be termed self-created societies. “Every pulpit in the United

¹³¹ *Id.* at 901.

¹³² *Id.* at 902.

¹³³ *Id.*

¹³⁴ *Id.* at 910.

¹³⁵ *Id.* at 913.

¹³⁶ *Id.*

¹³⁷ *Id.* at 914.

¹³⁸ *Id.* at 899.

¹³⁹ *Id.* at 899.

¹⁴⁰ *Id.* at 899-900.

States might be included in this vote of censure, since, from every one of them, upon occasion, instructions had been delivered, not only for the eternal welfare, but likewise for the temporal happiness of the people.”¹⁴¹ If the House felt at liberty to censure the Democratic Societies, it might “do the same by the Cincinnati Society.”¹⁴² Giles pounded home his message:

It is out of the way of the Legislature to attempt checking or restraining public opinion. If the self-created societies act contrary to law, they are unprotected, and let the law pursue them. That a man is a member of one of these societies will not protect him from an accusation of treason, if the charge is well founded. If the charge is not well founded, if the societies, in their proceedings, keep within the verge of the law, . . . what was to be the sequel? If the House undertake to censure particular classes of men, who can tell where they will stop? Perhaps it may be advisable to commence moral philosophers, and compose a new system of ethics for the citizens of America. In that case, there would be many other subjects for censure, as well as the self-created societies. Land-jobbing, for example, has been in various instances brought to such a pass, that it might be defined swindling on a broad scale. Paper money, also, would be a subject of very tolerable fertility for the censure of a moralist.¹⁴³

Giles maintained that members were elected to the House “not for the purpose of passing indiscriminate votes of censure, but to legislate only.”¹⁴⁴ If the House adopted Fitzsimons’ amendment, it “would only produce recrimination on the part of the societies, and raise them into much more importance than they possibly could have acquired if they had not been distinguished by a vote of censure from that House.”¹⁴⁵ Did the House believe that a censure vote, “like the wand of a magician, would lay a spell on these people?”¹⁴⁶ Giles repudiated “all aiming at a restraint on the opinions of private persons.”¹⁴⁷ The public “have a right to censure us,” he said, “and we have *not* a right to censure them.”¹⁴⁸ Later in this lengthy debate, James Madison pulled these various strands together:

Members seem to think that in cases not cognizable by law, there is room for the interposition of the House. He conceived it to be a sound principle, that an action innocent in the eye of the law could not be the object of censure to a Legislative body. When the people

¹⁴¹ *Id.* at 900.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 901.

¹⁴⁸ *Id.* at 917.

have formed a Constitution, they retain those rights which they have not expressly delegated. It is a question whether what is thus retained can be legislated upon. Opinions are not the objects of legislation. You animadvert on the abuse of reserved rights: how far will this go? It may extend to the liberty of speech, and of the press. It is in vain to say that this indiscriminate censure is no punishment. If it falls on classes, or individuals, it will be a severe punishment. . . . If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.¹⁴⁹

Nicholas, trying to head off the damage done by a recorded House vote, offered his view that President Washington “has been apprized of the absurdity of making this a Legislative business.”¹⁵⁰ The president, he said, “knew the business of the House better than to call for any such votes of censure.”¹⁵¹ Nicholas could not “agree to persecution for the sake of opinions.”¹⁵² As to what to do about the Democratic Societies, “it was much better to let them alone. They must stand or fall by the general sentiments of the people of America.”¹⁵³ Gabriel Christie objected to any broad condemnation of Democratic Societies. The one that existed in Baltimore “consists of men whose characters are superior to any censure that might be thrown against them, by the mover of the amendment.”¹⁵⁴ Lawmakers who supported the Fitzsimons amendment agreed that the democratic society in Baltimore deserved “the greatest respect.”¹⁵⁵ Should government, asked Abraham Bedford Venable, “show their imbecility by censuring what we cannot punish? The people have a right to think and a right to speak.”¹⁵⁶

The House had to decide what to do with the Fitzsimons amendment. Instead of rebuking “self-created societies,” as he originally proposed, the House voted 47 to 45 to strike out “self-created.”¹⁵⁷ It rejected an amendment by Giles who wanted the House language to focus on “combinations of men in the four Western counties of Pennsylvania.”¹⁵⁸ Later, on a roll-call vote, the House made some changes to the phrase “self-created societies” (47 to 45) and agreed to a Christie amendment to specify the four western countries of Pennsylvania (a tie vote of 46 to 46, but the Speaker added his vote to

¹⁴⁹ *Id.* at 934.

¹⁵⁰ *Id.* at 904.

¹⁵¹ *Id.* at 905.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 908.

¹⁵⁵ *Id.* at 909 (statement of William Vans Murray). Van Murray expressed support for the Fitzsimons amendment. *Id.* at 906-07.

¹⁵⁶ *Id.* at 910.

¹⁵⁷ *Id.* at 914.

¹⁵⁸ *Id.*

the ayes).¹⁵⁹ The final language placed before the House:

In tracing the origin and progress of the insurrection, we can entertain no doubt that certain self-created societies and combinations of men in the four Western counties of Pennsylvania, and parts adjacent, careless of consequences, and disregarding the truth, by disseminating suspicions, jealousies, and accusations of the Government, have had all the agency you ascribe to them, in fomenting this daring outrage against social order and the authority of the laws.¹⁶⁰

The House rejected this version. Only 19 members supported it.¹⁶¹

The House then debated whether to send the matter back to committee for another try. Members pointed out that the committee consisted of three people: two supporting the President's language and one member (Madison) opposed. As a result, the same sort of amendment would return to the floor. One House member declared himself "heartily tired of the discussion."¹⁶² Another felt "a very mortifying impression at having been, this week, a witness to such trifling as had taken place in the House," where after four days the lawmakers "are now just about where we set out."¹⁶³ A third admitted to being "quite tired, if not ashamed, of the debate."¹⁶⁴ The motion to return the issue to committee was opposed, 43 to 48.¹⁶⁵

The House response to Washington's Sixth Annual Address included language about the Whiskey Rebellion, but omitted any reference to "self-created societies" or to societies. One member (Murray) wanted "societies" inserted, but Nicholas opposed and his amendment "carried by a large majority."¹⁶⁶ The House proceeded to express its concern about "misrepresentations . . . by individuals or combinations of men" that might have fomented the rebellion and lamented that the public order had "suffered so flagrant a violation."¹⁶⁷ Thus ended a misguided effort by the House to single out certain societies for censure and upbraid them for daring to express opinions about political matters.

The Senate's response to the Sixth Annual Message was more sympathetic to Washington's disapproval of private clubs that debated political issues. Senators stated that the resistance to laws in the western counties of Pennsylvania:

¹⁵⁹ *Id.* at 943-44. A William Smith amendment, to insert "countenanced by self-created societies elsewhere," was rejected 42 to 50. *Id.*

¹⁶⁰ *Id.* at 945.

¹⁶¹ *Id.*

¹⁶² *Id.* at 946 (statement of Representative Heath).

¹⁶³ *Id.* (statement of Representative Baldwin).

¹⁶⁴ *Id.* at 947 (statement of Representative Ames).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

has been increased by the proceedings of certain self-created societies relative to the laws and administration of the Government; proceedings, in our apprehension, founded in political error, calculated, if not intended, to disorganize our Government, and which, by inspiring delusive hopes of support, have been influential in misleading our fellow-citizens in the scene of insurrection.¹⁶⁸

V. TRANSITION TO ALIEN AND SEDITION ACTS

President Washington continued to harbor distrust toward private organizations that met to discuss government matters and attempted to influence public policy. He saw them as unhealthy competitors with the elected and legitimate branches of government. In his Farewell Address of September 17, 1796, he counseled: “All obstructions to the execution of the laws, all combinations and associations, under whatever plausible character, with the real design to direct, control, counteract, or awe the regular deliberation and action of the constituted authorities, are destructive of this fundamental principle and of fatal tendency.”¹⁶⁹ Unlike Madison’s acceptance of factions and the belief in self-correcting mechanisms, Washington had no such tolerance. These combinations and associations:

serve to organize faction; to give it an artificial and extraordinary force; to put in the place of the delegated will of the nation the will of a party, often a small but artful and enterprising minority of the community; and, according to the alternate triumphs of different parties, to make the public administration the mirror of the ill-concerted and incongruous projects of faction rather than the organ of consistent and wholesome plans, digested by common counsels and modified by mutual interests.¹⁷⁰

Even if combinations and associations occasionally served useful ends,

they are likely in the course of time and things to become potent engines by which cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people, and to usurp for themselves the reins of government, destroying afterwards the very engines which have lifted them to unjust dominion.¹⁷¹

In order to preserve government “and the permanency of your present happy state,” it was necessary to oppose “irregular oppositions to its

¹⁶⁸ 1 RICHARDSON, *supra* note 109, at 168. For a fine analysis of political clubs forming in the 1790s, see EUGENE PERRY LINK, *DEMOCRATIC-REPUBLICAN SOCIETIES, 1790-1800* (1942).

¹⁶⁹ 1 RICHARDSON *supra* note 109, at 217.

¹⁷⁰ *Id.* at 218.

¹⁷¹ *Id.*

acknowledged authority.”¹⁷² The best guardian of liberty, he said, is government, “with powers properly distributed and adjusted.”¹⁷³

Throughout the debate over the first decade, citizens were divided between those who preferred British law and tradition and those who admired the principles of the French Revolution. That issue would blossom into the Alien and Sedition Acts of 1798, but first consider some remarks in 1794 by lawmakers. William Vans Murray strongly criticized the Democratic Societies and how they endangered America:

The scene of their birth-place was well adapted to the wholesome display of their powers. In France, where a Despotism, impregnable to public opinion, had reigned—where no channel opened a sympathy by Representation with the great body of the nation—those societies were admirably adapted to break down and subvert the old bulwark of habitual authority.¹⁷⁴

All that was missing from these critiques was the specific society most infamous in France: the Jacobins and the resulting bloodshed. Giles attempted to reject this parallel between Democratic Societies and France: “When once the business of denunciation begins, nobody can tell where it will end. Robespierre, its great progenitor, has been its victim, and who can tell what kind of retorts may be attempted in America.”¹⁷⁵ Giles worried that after the House denounced the Democratic Societies, it would later denounce the anti-Democratic Societies.¹⁷⁶ Ames retorted that the House had an obligation to chastise the Democratic Societies, because otherwise it would rekindle “the fire-brands of sedition” and unchain “the demon of anarchy.”¹⁷⁷ He specifically targeted the Jacobins, “who performed well in pulling down the old Government,” and yet ironically acknowledged that the American committees in 1774 and 1775 “were efficient instruments to pull down the British Government.”¹⁷⁸ Passionate rhetoric, on display throughout the 1794 debates, hit full force with the Alien and Sedition Acts.

VI. ALIEN AND SEDITION ACTS

In 1798, with tensions mounting for war against France, the Federalist Party drafted a series of bills to lengthen the time needed to become a citizen, to deport aliens, and to punish individuals who spoke

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ 3 ANNALS OF CONG. 907 (1794).

¹⁷⁵ *Id.* at 917.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 922.

¹⁷⁸ *Id.* at 927.

or wrote what the government interpreted to be seditious statements. The year 1798 shares much in common with the post-9/11 period. On September 20, 2001, in an address to a joint session of Congress, President George W. Bush stated: “Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists.”¹⁷⁹ Political choices in 1798 were similarly stark. The nation’s “number one newspaper for the Federalist Party,” Philadelphia’s *Gazette of the United States*, offered this advice: “He that is not for us, is against us.”¹⁸⁰ Having watched the horrors of the French Revolution, many in the United States saw the issues as “anarchy versus order, licentiousness versus authority, the masses versus the classes, and atheism versus religion.”¹⁸¹ Those who bore the brunt of repression in 1798 were the foreign born or those recently naturalized, both “enemy aliens” and “alien friends.” Acting quickly, Congress passed a series of laws vesting extensive powers and discretionary authority in the president.

A. *Naturalization Bill*

Congress acted first by lengthening the time needed for aliens to become a U.S. citizen. Legislation in 1790 had set the period of residence at two years; that waiting period was increased to five years in 1795.¹⁸² Now, in 1798, the time was stretched to fourteen years. Moreover, the individual would have to declare an intention to become an American citizen at least five years before admission.¹⁸³ The 1798 statute further specified: “no alien, who shall be a native, citizen, denizen or subject of any nation or state with whom the United States shall be at war, at the time of his application, shall be then admitted to become a citizen of the United States.”¹⁸⁴ Loyalty and good standing did not matter. Ties to an enemy country did.

House debate began on May 1, 1798, when the committee instructed to consider changes in the naturalization law reported that a longer residence “is essential, and ought to be required.”¹⁸⁵ It also recommended a procedure for apprehending and removing from the country “all aliens, being males, of the age of fourteen years and

¹⁷⁹ Address Before a Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1142 (Sept. 20, 2001).

¹⁸⁰ JAMES MORTON SMITH, FREEDOM’S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 15 (1956).

¹⁸¹ *Id.* at 11.

¹⁸² Naturalization Act, ch. 3, 1 Stat. 103 (1790); Naturalization Act, ch. 20, 1 Stat. 414 (1795).

¹⁸³ Naturalization Act, ch. 54, 1 Stat. 566 (1798).

¹⁸⁴ *Id.* § 1, at 567.

¹⁸⁵ 8 ANNALS OF CONG. 1566-67 (1798).

upwards,” who lived in the United States and were natives or citizens of a country that declared war on the United States, “or shal [sic] threaten, attempt, or perpetrate any invasion of predatory incursions upon their territory, as soon as may be after the President of the United States shall make proclamation of such event.”¹⁸⁶ The committee recommended lengthening the period of residence from five years to at least ten years, possibly leaving the bill blank on this issue and filling it in later.¹⁸⁷ Robert Harper, objecting that easy citizenship in the past had produced “very great evils” on the country, proposed that “nothing but birth should entitle a man to citizenship in this country.”¹⁸⁸ His effort to amend the committee bill in this manner was ruled out of order, but Harrison Gray Otis offered an amendment to prevent an alien, not yet a U.S. citizen, from holding “any office of honor, trust, or profit, under the United States.”¹⁸⁹ Harper wanted to add these words to the Otis amendment: “or of voting at the election of any member of the Legislature of the United States, or of any State.”¹⁹⁰ Upon learning that his proposal might unconstitutionally interfere with the authority of states to admit citizens, Harper withdrew the amendment.¹⁹¹ The proposal by Otis, regarding public office, was withdrawn with the thought of considering it later in a separate bill.¹⁹²

Otis then offered language to permit the removal of aliens who were citizens of a country that had authorized hostilities against the United States.¹⁹³ After considerable debate, it was rejected fifty-five to twenty-seven.¹⁹⁴ However, the House adopted language to authorize the removal of aliens who were citizens of a country in a state of declared war against the United States.¹⁹⁵ In the part of the bill left blank, regarding the years of residence required to be a citizen, the House narrowly supported (forty-one to forty) a motion to insert the number fourteen.¹⁹⁶

In addition to the forces of nationalism and xenophobia, the naturalization bill had partisan objectives. It was generally believed that immigrants were likely to join the Republican-Jeffersonian Party.¹⁹⁷ In that sense, legislation was “a political maneuver by the Federalists

¹⁸⁶ *Id.* at 1566-67.

¹⁸⁷ *Id.* at 1567.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 1568.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 1569.

¹⁹² *Id.* at 1571, 1573.

¹⁹³ *Id.* at 1573.

¹⁹⁴ *Id.* at 1580.

¹⁹⁵ *Id.* at 1631.

¹⁹⁶ *Id.* at 1776.

¹⁹⁷ DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*, at 254 n. 135 (1997).

designed to cut off an increasingly important source of Republican strength.”¹⁹⁸ Federalist lawmakers spoke out openly against letting into the country “hordes of wild Irishmen,”¹⁹⁹ especially because of their “anti-British attitude and their contempt for the party of conservatism and privilege.”²⁰⁰

B. *Alien Friends*

After action on the naturalization bill, Congress turned to two separate bills on aliens, the first known as the Alien Friends Act. The opening section transferred extraordinary powers to the president, making it lawful for him:

at any time during the continuance of this act, 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 .²⁰¹

The standards are quite vague: whoever he decided was dangerous; merely reasonable grounds to suspect; “secret machinations.” The statute is referred to as “alien friends” to distinguish it from a bill enacted weeks later that focused on aliens from an enemy state.²⁰²

Albert Gallatin challenged the need for the legislation. Existing laws, he said, “will reach alien friends if guilty of seditious or treasonable practices, as well as citizens.”²⁰³ If the laws were not sufficient, they could be amended. Crimes and punishments, he said, needed to be accurately defined rather than delegated wholesale to the president. Persons charged with offenses should “not be left without trial, subject to the arbitrary control of one man only.”²⁰⁴ And why the distinction between aliens and U.S. citizens? For “seditious and turbulent citizens might be as dangerous to the peace of the country, as aliens of a similar description.”²⁰⁵ Gallatin conceded that aliens had fewer rights than citizens, but the right of trial by jury under the Fifth and Sixth Amendments extended to *persons*, not merely citizens.²⁰⁶

Supporters of the bill pointed out that the constitutional right to trial applied only to criminal proceedings, whereas the protection of

¹⁹⁸ SMITH, *supra* note 180, at 23.

¹⁹⁹ *Id.* at 24.

²⁰⁰ *Id.* at 23.

²⁰¹ Alien Friends Act, ch. 58, 1 Stat. 570-71 (1798).

²⁰² Alien Enemies Act, ch. 66, 1 Stat. 577 (1798); *see infra* Section VI.C.

²⁰³ 8 ANNALS OF CONG. 1980 (1798).

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 1981.

²⁰⁶ *Id.*

one's borders concerned the sovereign power of any nation to protect itself. To Robert Harper, the president was the only one who was "possessed of all information which has reference to our foreign relations."²⁰⁷ Edward Livingston rejected the arguments of Federalists who would allow the president to deport aliens on vague grounds: "individual suspicions, our private fears, our over-heated imaginations."²⁰⁸ He opposed the decision to concentrate powers—previously left in separate branches—in a single person. The president "alone is empowered to make the law, to fix in his mind what acts, what words, what thoughts or looks, shall constitute the crime contemplated by the bill."²⁰⁹ The president was "not only authorized to make this law for his own conduct, but to vary it at pleasure, as every gust of passion, every cloud of suspicion, shall agitate or darken his mind."²¹⁰ Packing these powers in the president "comes completely within the definition of despotism—an union of Legislative, Executive, and Judicial powers."²¹¹ The previous safeguard of public trial was now "changed into a secret and worse than inquisitorial tribunal. . . . No indictment; no jury; no trial; no public procedure; no statement of the accusation; no examination of the witnesses in its support; no counsel for defense; all is darkness, silence, mystery, and suspicion."²¹²

Livingston found no merit in the argument that aliens could be sent out of the country without trial because the treatment fell short of a criminal offense: "it is said, the bill does not contemplate the punishment of any crime; and therefore the provisions in the Constitution relative to criminal proceedings and Judiciary powers do not apply."²¹³ And the bill referred to actions "dangerous to the peace and safety of the United States" and to "treasonable or secret machinations against the Government thereof."²¹⁴ How could such conduct be called not a crime? "In order to punish a particular act we are forced to say, that treason is no crime, and plotting against our Government is no offence!"²¹⁵ While the alien waits for the expiration of the period that will allow him to become a U.S. citizen, someone raises a suspicion about him and he is ordered back to the country that he chose to leave, "whose Government, irritated by his renunciation of its authority, will receive only to punish him."²¹⁶

²⁰⁷ *Id.* at 1998.

²⁰⁸ *Id.* at 2007.

²⁰⁹ *Id.* at 2008.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 2010-11.

²¹³ *Id.* at 2011.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 2012.

The Federalists returned fire. John Wilkes Kittera urged action on the alien friends bill and a strong sedition statute, trusting that the combination would “preserve us from the dangers with which we are threatened from internal enemies.”²¹⁷ This “danger did not arise from Government having too much power, but from its want of power.”²¹⁸ France itself, he reminded his colleagues, “removes both alien friends and alien enemies.” Deportation “is a right which every man exercises in his own house, by turning out of it, without ceremony, any person whom he thinks dangerous to the peace and welfare of his family.”²¹⁹ If the alien and sedition bills passed by Congress “be unconstitutional, the Judges will refuse to execute it.”²²⁰ For those who believed that the president would not abuse the power granted him, Livingston objected: “Away . . . with that liberty which hangs upon chance! He would disdain to enjoy the liberty which depended upon the will of *one man*, and he should be ashamed of any man who would consent thus to hold it.”²²¹ The bill passed forty-six to forty.²²²

In addition to the first section of the Alien Friends Act, transferring unchecked power to the president to deport suspicious aliens, the statute provided other procedures. The order to deport “shall be served on such alien by delivering him a copy thereof, or leaving the same at his usual abode, and returned to the office of the Secretary of State, by the marshal or other person to whom the same shall be directed.”²²³ Any alien found within the United States after being ordered to depart would be subject to, “on conviction thereof,” imprisonment for up to three years “and shall never after be admitted to become a citizen of the United States.”²²⁴ To avoid those penalties, an alien could seek from the president a license allowing him to reside in America, “for such time as he shall judge proper, and at such place as he may designate.”²²⁵ The burden of making the case, of course, fell on the alien. In agreeing to a license, the statute empowered the president to require that the alien:

enter into a bond to the United States, in such penal sum as he may direct, with one or more sufficient sureties to the satisfaction of the person authorized by the President to take the same, conditioned for the good behavior of such alien during his residence in the United States, and not violating his license, which license the President may revoke, whenever he shall think proper.²²⁶

²¹⁷ *Id.* at 2016.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 2021.

²²² *Id.* at 2028.

²²³ Alien Enemies Act, ch. 58, 1 Stat. 571, § 1 (1798).

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

This was another blanket delegation.

Section 2 of the statute transferred to President John Adams still other large chunks of discretionary authority. Congress authorized Adams, “whenever he may deem it necessary for the public safety, to order to be removed out of the territory thereof, any alien who may or shall be in prison in pursuance of this act.”²²⁷ The president could take such action whenever, in his opinion, “the public safety requires a speedy removal.”²²⁸ If any alien sent out of the United States chose to return, “unless by permission of the President of the United States, such alien on conviction thereof, shall be imprisoned so long as, in the opinion of the President, the public safety may require.”²²⁹ Here presidential action depended, as with the three-year sentence above, on conviction in a court proceeding.²³⁰

The final section required every master or commander of any ship or vessel that came into any American port to make a report in writing to the collector or other chief officer of the customs of the port of all aliens on board, specifying their names, ages, place of birth, the country from which they came, the nation they belong to and owe allegiance, occupation, and a description of the individuals. Failure to do so resulted in fines, seizure of the ship, and detention of the officers.²³¹ Circuit and district courts had jurisdiction over the crimes and offences under the statute.²³² Aliens ordered to be removed could take their goods with them.²³³ The statute, enacted on June 25, 1798, was made effective for a period of two years.²³⁴

C. *Alien Enemies*

The second alien act had a more limited purpose. It provided that “whenever there shall be a declared war” between the United States and a foreign nation, or “any invasion of predatory incursion shall be perpetrated, attempted, or threatened against the territory” of the United States by a foreign nation, the president may make a “public proclamation of the event.”²³⁵ Upon that determination, “all natives, citizens, denizens, or subjects of the hostile nation . . . being males of the age of fourteen years and upwards, who shall be within the United

²²⁷ *Id.* at § 2.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* at § 3.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ Alien Enemies Act, ch. 66, § 1, 1 Stat. 577 (1798).

States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies.”²³⁶ There was no need to suspect improper activity. Mere identification with an enemy nation was sufficient.

D. *Sedition*

The final shift of power to the president came with the Sedition Act. Unlike the two alien bills, the penalties of seditious activity applied to everyone: aliens and citizens. Fines and imprisonment awaited whoever wrote or said anything about Congress or the president deemed to be “false, scandalous and malicious,” had the intent to “defame” those political institutions or bring them into “contempt or disrepute,” “excite” any hatred against them, or “stir up” sedition or act in combination to oppose or resist federal laws or any presidential act to implement those laws.²³⁷ Consider the breadth and vagueness of the statutory language, which applied to “any person” who:

shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government²³⁸

Persons convicted under this statute were subject to fines not exceeding \$2,000 and imprisonment not exceeding two years. Mercifully, individuals charged under this statute were allowed to give in evidence as part of their defense “the truth of the matter contained in the publication charged as a libel.”²³⁹ English law had rejected truth as a defense. However, as Albert Gallatin asked: “how could the truth of

²³⁶ *Id.*

²³⁷ Sedition Act, ch. 74, § 2, 1 Stat. 596, 596-97 (1798).

²³⁸ *Id.*

²³⁹ *Id.* § 3, at 597.

opinions be proven by evidence?”²⁴⁰ Under the terms of the statute, it continued in force until March 3, 1801, when it would expire unless renewed by Congress. No call for renewal came.

Supporters of the legislation planned to use it to prosecute newspapers critical of Federalist Party policies. John Allen defended the bill:

Let gentlemen look at certain papers printed in this city and elsewhere, and ask themselves whether an unwarrantable and dangerous combination does not exist to overturn and ruin the Government by publishing the most shameless falsehoods against the Representatives of the people of all denominations, that they are hostile to free Governments and genuine liberty, and of course to the welfare of the country; that they ought, therefore, to be displaced, and that the people ought to raise an *insurrection* against the Government.²⁴¹

He quoted a passage from the *Aurora*, an opposition newspaper, concluding that its intention “is to persuade the people that peace with France is in our power; nay, that she is sincerely desirous of it, on proper terms, but that we reject her offers, and proceed to plunge our country into a destructive war.”²⁴² From “The Time-Piece,” a paper printed in New York, he read language describing President John Adams as a person “without patriotism, without philosophy” and a “mock monarch.”²⁴³

John Macon warned that passage of the bill would drive opponents of the government underground, forcing them to meet covertly rather than in full view. Legislation on sedition had the effect of creating sedition, both legally and politically: “[B]y passing a law like the present you will force [critics] to combine together; they will establish corresponding societies throughout the Union, and communications will be made in secret, instead of publicly, as had been the case in other countries.”²⁴⁴ Albert Gallatin responded to Allen’s reading from newspapers: “His idea was to punish men for stating facts which he happened to disbelieve, or for enacting and avowing opinions, not criminal, but perhaps erroneous.”²⁴⁵ As to the dangers of newspapers commenting on public matters, Gallatin estimated that “out of ten presses in the country nine were employed on the side of Administration. . . .”²⁴⁶

In condemning the bill, Gallatin said it “must be considered only as

²⁴⁰ 8 ANNALS OF CONG. 2162 (1798).

²⁴¹ *Id.* at 2093-94.

²⁴² *Id.* at 2094.

²⁴³ *Id.* at 2097.

²⁴⁴ *Id.* at 2105.

²⁴⁵ *Id.* at 2108.

²⁴⁶ *Id.* at 2109.

a weapon used by a party now in power, in order to perpetuate their authority and preserve their present places.”²⁴⁷ In fact, the bill so discredited the Federalist Party that it soon passed out of existence, remembered for its hostility to popular government, public debate, free press, dissent, civil liberties, and immigrants. One of Thomas Jefferson’s first actions as President was to pardon all persons prosecuted and punished under the Sedition Act. He considered the law “to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.”²⁴⁸

VII. JUDICIAL RULINGS

Judicial attitudes during this early period demonstrate a restrictive interpretation of the president’s power as commander in chief and an appreciation of the dominant role of Congress in deciding military commitments, not only abroad but at home. President John Adams never asserted independent authority to take the country to war against France in 1798. He came to Congress, explained why war seemed likely, and awaited specific statutory authorization.²⁴⁹ Alexander Hamilton, always a strong defender of executive power, understood what the president could and could not do in military affairs. After Congress passed legislation on May 28, 1798, authorizing Adams to seize armed French vessels,²⁵⁰ Hamilton was asked what American ship commanders could do before the bill’s enactment. He was “not ready to say that [the President] has any other power than merely to employ” ships with authority “to *repel* force by *force* (but not to capture), and to repress hostilities within our waters including a marine league from our coasts.”²⁵¹ That is, the president could take defensive but not offensive actions. Any steps beyond those measures “must fall under the idea of *reprisals* & requires the sanction of that Department which is to declare or make war.”²⁵² The constitutional authority to issue letters of marque and reprisal is found in Article I, not Article II.

The quasi-war against France prompted several judicial rulings, underscoring the limits placed on the president as commander in chief. In 1800 and 1801, the Supreme Court recognized that Congress could authorize hostilities in two ways: either by a formal declaration of war or by passing statutes that authorized an undeclared war, as was done in

²⁴⁷ *Id.* at 2110.

²⁴⁸ Letter from Thomas Jefferson to Mrs. John Adams (July 22, 1804), in 11 THE WRITINGS OF THOMAS JEFFERSON 43-44 (Bergh ed., 1904).

²⁴⁹ FISHER, *supra* note 63, at 24.

²⁵⁰ Act of May 28, 1798, ch. 48, 1 Stat. 561 (1798).

²⁵¹ 21 THE PAPERS OF ALEXANDER HAMILTON 461-62 (Syrett ed. 1974).

²⁵² *Id.*

the case of France.²⁵³ Military conflicts could be “limited,” “partial,” and “imperfect” without requiring from Congress a formal declaration.²⁵⁴ The judgment was left to Congress, not the president. In the first case, Justice Samuel Chase noted: “Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects and in time. . . . congress has authorised hostilities on the high seas by certain persons in certain cases. There is no authority given to commit hostilities on land.”²⁵⁵ Which branch of government decides the limits on war? Congress and only Congress. In the second case, Chief Justice John Marshall wrote for the Court: “The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry.”²⁵⁶

Part of the legislation passed by Congress in the 1798-1800 period, to authorize war against France, authorized the President to seize vessels sailing *to* French ports.²⁵⁷ President Adams exceeded the statute by issuing a proclamation that directed American ships to capture vessels sailing *to or from* French ports.²⁵⁸ How would the courts rule in a case where a presidential proclamation in time of war conflicted with a congressional statute? Chief Justice Marshall decided that the instructions by Adams “cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass.”²⁵⁹ Presidential orders, even those issued as Commander in Chief in time of war, are subject to restrictions imposed by Congress.

Also during this period, other federal courts highlighted the President’s subservience to congressional statutes with regard to military policy. The Neutrality Act of 1794 prohibited the exportation of any articles of war.²⁶⁰ Property found on board a vessel would be forfeited and vessels could be seized and commanders fined.²⁶¹ Persons within the territory or jurisdiction of the United States were prohibited from providing assistance to “any military expedition or enterprise to be carried on from thence against the territory or dominions of any foreign prince or state with whom the United States are at peace.”²⁶² President Jefferson, in his fourth annual message, recognized the extreme danger of allowing private citizens to decide by themselves to deploy armed

²⁵³ *Talbot v. Seeman*, 5 U.S. 1 (1801).

²⁵⁴ *Bas v. Tingy*, 4 U.S. 37 (1800).

²⁵⁵ *Bas*, 4 U.S. at 43 (1800).

²⁵⁶ *Talbot*, 5 U.S. at 28 (1801).

²⁵⁷ *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 171 (1804).

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 179.

²⁶⁰ Neutrality Act, 1 Stat. 369-70 (1794).

²⁶¹ *Id.*

²⁶² *Id.* § 5, at 384.

forces or provide military assistance to another nation. He referred to complaints that persons residing within the United States had used armed merchant vessels in defiance of the laws of other countries: "That individuals should undertake to wage private war, independently of the authority of their country, can not be permitted in a well-ordered society."²⁶³ The tendency, he said, was "to produce aggression on the laws and rights of other nations and to endanger the peace of our own."²⁶⁴

Violations of the Neutrality Act gave federal courts an opportunity to remark on the limits placed on the president as commander in chief. In 1806, a circuit court reviewed the indictment of Col. William S. Smith, charged with engaging in military actions against Spain.²⁶⁵ In his defense, he claimed that his military enterprise "was begun, prepared, and set on foot with the knowledge and approbation of the executive department of our government."²⁶⁶ The court lost little time in dismissing the argument that a president or an executive official could somehow bless a military adventure that violated congressional policy. The court described the Neutrality Act as "declaratory of the law of nations; and besides, every species of private and unauthorized hostilities is inconsistent with the principles of the social compact, and the very nature, scope, and end of civil government."²⁶⁷

No member of the executive branch, including the president, had any constitutional authority to waive a restriction in the Neutrality Act:

if a private individual, even with the knowledge and approbation of this high and preeminent officer of our government [the President], should set on foot such a military expedition, how can he expect to be exonerated from the obligation of the law? . . . The [P]resident of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids.²⁶⁸

If a president could make the execution of a law "dependent on his will and pleasure," he would be promoting "a doctrine that has not been set up, and will not meet with any supporters in our government. In this particular, the law is paramount. Who has dominion over it? None but the legislature; and even they are not without their limitation in our republic."²⁶⁹

The circuit court concluded that even if the president had known about the expedition and granted his approval, "it would not justify the

²⁶³ 1 RICHARDSON, *supra* note 109, at 358.

²⁶⁴ *Id.*

²⁶⁵ *United States v. Smith*, 27 F. Cas. 1192 (C.C.N.Y. 1806) (No. 16,342).

²⁶⁶ *Id.* at 1229.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 1230.

²⁶⁹ *Id.*

defendant in a court of law, nor discharge him from the binding force of the act of congress.”²⁷⁰ Here the court nailed home the constitutional principle: “Does [the President] possess the power of making war? That power is exclusively vested in congress.”²⁷¹ Note that the court is not merely recognizing the power of Congress to *declare* war. The scope is far broader: *making* war. The power consists of everything other than purely defensive actions and the implied authority of the President to “repel sudden attacks.”²⁷² The court acknowledged that if a nation invaded the United States, the president would have an obligation to resist with force. But there was a “manifest distinction” between going to war with a nation at peace and responding to an actual invasion: “In the former case, it is the exclusive province of congress to change a state of peace into a state of war.”²⁷³

CONCLUSION

These early decades demonstrate the limited reach of the Commander in Chief Clause, invoked for both external and internal operations. The war power lay with Congress. The president was restricted to defensive actions. In the Steel Seizure Case of 1952, Justice Robert Jackson in his concurrence distinguished between the latitude given to the president in military operations and those at home.²⁷⁴ He gave broad support to the president’s use of force “when turned against the outside world for the security of our society,” but when the power of Commander in Chief “is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence.”²⁷⁵ The line between offensive and defensive military action may not always be obvious, but failure to see the difference, or failure to draw the difference, sanctions an interpretation of the Commander in Chief Clause that does violence to constitutional values, representative government, and the system of checks and balances, all at the cost of individual rights and liberties.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J. concurring).

²⁷⁵ *Id.* at 645.