No. 08-368

IN THE

# Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,

*Petitioner,*

—v.—

COMMANDER DANIEL SPAGONE,
U.S.N., CONSOLIDATED NAVAL BRIG,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF FOR *AMICI CURIAE* FOUNDING-ERA HISTORIANS AND EXPERTS IN AMERICAN LEGAL HISTORY IN SUPPORT OF PETITIONER


DANIEL F. KOLB
*Counsel of Record*
REBECCA WINTERS
JOSHUA D. LISTON
MOLLY SHIMA
450 Lexington Avenue
New York, New York 10017
(212) 450-4394
*Attorneys for Amici Curiae*

*Of Counsel:*

STEPHEN I. VLADECK
4801 Massachusetts Avenue, NW
Washington, D.C. 20016

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

### Cases

**Constitutional Provisions**



**Statutes**

**Other Authorities**

## INTEREST OF *AMICI CURIAE*[1]

This case raises the fundamental question of whether—and, if so, when—a lawful resident alien suspected of planning grave crimes against the United States and captured in the United States may be detained indefinitely by the military, notwithstanding the availability of traditional civilian criminal process. *Amici curiae* listed in Appendix A are Founding-Era historians and experts in American legal history who share a commitment to examining the Founders' views concerning the use of federal military authority in the domestic context and, in particular, the executive branch's use of federal detention authority.

## SUMMARY OF ARGUMENT

In the opinion below, the Fourth Circuit held that the Authorization for Use of Military Force (the "AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001), permitted the President to order the indefinite military imprisonment of individuals lawfully residing in the United States without affording them the protections of the criminal justice system. It concluded that the President has such authority when he has designated such individuals as "enemy

---

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, its members, or its counsel made a monetary contribution to its preparation or submission.

combatants." *Amici* submit that the circuit court's holding is inconsistent with the Founders' understanding that military intrusion into domestic civilian affairs must be limited to preserve the People's liberty.

In this brief, *amici* have reviewed and summarized the applicable history of the Founding Era—the period from the Constitutional Convention through the War of 1812. The review includes examination of influences that shaped the Founders' thinking about the appropriate scope of the military's domestic authority and how that understanding is reflected and enshrined in the architecture of the Constitution, the Bill of Rights, and in the early statutes governing the militia and armed forces. Finally, it explores how the early federal government actually utilized the military in response to challenges to its authority. As summarized, it is evident that the beliefs and practices of the Founders demonstrate a heavy presumption against military detention for citizens and lawful resident aliens captured in the United States, and that such detention would be sanctioned, if ever, only if authorized by the most unambiguous statement from Congress.

*Amici* respectfully submit that the Founders would not have countenanced the indefinite, military detention of a lawful resident alien such as the Petitioner.

## ARGUMENT

### I. THE FOUNDERS REGARDED CIVILIAN CONTROL OVER DOMESTIC LAW ENFORCEMENT AS INDISPENSABLE TO A REPUBLICAN GOVERNMENT AND A BULWARK AGAINST MILITARY ENCROACHMENT.

The Founders' apprehension of military authority is well known and well documented. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 568 (2004) (Scalia, J., dissenting) (noting "the Founders' general mistrust of military power permanently at the Executive's disposal"); *Perpich v. Dep't of Defense*, 496 U.S. 334, 340 (1990) (acknowledging that "there was a widespread fear [at the Constitutional Convention] that a national standing Army posed an intolerable threat to individual liberty"); *Reid v. Covert*, 354 U.S. 1, 23 (1957) (plurality) ("The tradition of keeping the military subordinate to civilian authority may not be so strong in the minds of this generation as it was in the minds of those who wrote the Constitution."); *see also The Federalist* No. 41, at 321 (James Madison) (John C. Hamilton ed., Philadelphia, J.B. Lippincott & Co. 1869) (explaining that while "[a] wise nation . . . does not rashly preclude itself from any resource which may become essential to its safety, [it] will exert all its prudence in diminishing both the necessity and the danger of resorting to [a standing military force] which may be inauspicious to its liberties"). As Madison explained:

> A standing force . . . is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale it has its inconveniences. On an

> extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution. A wise nation will combine all these considerations; and, whilst it does not rashly preclude itself from any resource which may become essential to its safety, will exert all its prudence in diminishing both the necessity and the danger of resorting to one which may be inauspicious to its liberties. The clearest marks of this prudence are stamped on the proposed Constitution. The Union itself, which it cements and secures, destroys every pretext for a military establishment which could be dangerous.

*The Federalist* No. 41 (James Madison), *supra*, at 321.

The Founders' concern—which was rooted in the experience of the revolutionary era—is reflected both in the their early writings on the subject, and in the structure they adopted for the United States government, dividing the war power between the executive and legislative branches and guaranteeing fundamental protection of rights through the Constitution and Bill of Rights.

### A. The Founders' View of the Proper Role of the Military in Domestic Affairs Was Shaped by Their Experiences During the Revolutionary Era.

The Founders believed firmly that in the colonies, no less than in Britain, any military force should be subordinate to civil authority.

In a representative pamphlet published in 1774, Thomas Jefferson protested that "his majesty has no right to land a single armed man on our shores" and, further, "[t]o render these proceedings still more criminal against our laws, instead of subjecting the military to the civil powers, his majesty has expressly made the civil subordinate to the military." Thomas Jefferson, *A Summary View of the Rights of British America* (1774), *reprinted in* 1 *The Papers of Thomas Jefferson* 133-34 (Julian P. Boyd ed., Princeton Univ. Press 1950). Similarly, in the years immediately preceding the American Revolution, the Continental Congress[2] condemned

---

[2] The First Continental Congress convened on September 5, 1774 to address coercive policies adopted by Parliament against the colonies. *See* 1 Journals of the Continental Congress, 1774-1789, *supra*, at 5-6, 13 (Worthington Chauncey Ford ed., 1904). Among the first delegates were John Adams, Samuel Adams, John Jay, Patrick Henry and George Washington. *Id.* at 13-14. The Second Continental Congress, which also included Thomas Jefferson, convened from 1775 to 1789 and formally approved the Declaration of Independence on July 4, 1776, *see* 5 Journals of the Continental Congress, 1774-1789, *supra*, at 510-15, and the Articles of Confederation on November 11, 1777, *see* 9 Journals of the Continental Congress, 1774-1789, *supra*, at 928.

the imposition of military rule in the colonies because it was unlawful under British common law. *See* 1 Journals of the Continental Congress, 1774-1789, at 69 (Worthington Chauncey Ford et al. eds., 1937) (resolving, in 1774, that the people in the colonies had various rights, including the right to trial by jury, which had been illegally denied to them by the British military occupation). The Declaration of Independence likewise renounced the British King expressly because he "render[ed] the Military independent of and superior to the Civil Power." The Declaration of Independence para. 14 (U.S. 1776).

There were many oppressive aspects to the British military occupation of the colonies—particularly in the years just prior to the Revolution—that instilled in the Founders an especially strong aversion both to the domestic use of the military and to the subordination of civilian process to the military. Jonathan Turley, *The Military Pocket Republic*, 97 Nw. U. L. Rev. 1, 16 (2002). It was in Boston, beginning in 1768, that the British famously undertook the practice of quartering soldiers in colonists' homes as a form of intimidation. *See Reid*, 354 U.S. at 27 (plurality); 1 William V. Wells, *The Life and Public Services of Samuel Adams* 220 (Boston, Little Brown & Co. 1865). In reaction, Massachusetts statesman Samuel Adams warned that "where military power is introduced, military maxims are propagated and adopted, which are inconsistent with and must soon eradicate every idea of civil government." Samuel Adams, *Boston Gazette*, Oct. 17, 1768, *reprinted in* 5 *The Founders' Constitution* 215-16 (Philip B. Kurland & Ralph Lerner eds., 1987); *see also* 1 Wells, *supra*, at 221 (citing same).

Then, on March 5, 1770 in the Boston Massacre, five civilians in Boston were killed by British soldiers. Frederic Kidder, *History of the Boston Massacre, March 5, 1770*, at 29-30 (Albany, Joel Munsell 1870). This exhibited vividly the danger inherent in integrating the military into civilian life and outraged the colonists. *See id.* at 3; Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789-1878*, at 3 (1988) ("The image of hated Redcoats shooting down innocent citizens in the Boston Massacre . . . was a vivid one, easily transferable to any soldier employed as an instrument of internal control by a central government.").

Although martial law had not been invoked in the past one hundred years of British history, British colonial governors declared it twice in the year prior to the signing of the Declaration of Independence. *See* J.W. Gordon, *An Argument Against the Jurisdiction of the Military Commissions to Try Citizens of the United States* 32-33 (Indianapolis, Hall & Hutchinson 1865). In June 1775, the Royal Governor of Massachusetts declared martial law in Boston, prompting the Continental Congress to denounce the use of military law as a subversion of the common law.[3] *Declaration on Taking Arms* (Thomas Jefferson's First Draft) *in* 2 Journals of the Continental Congress, *supra*, at 137; *see also Reid*,

---

[3] General Thomas Gage, the Royal Governor of Massachusetts, justified the declaration of martial law by claiming that the popular revolt in Massachusetts had caused the courts to be closed. The colonists, however, maintained that the act was illegal and repugnant. Gordon, *supra*, at 32-33.

354 U.S. at 28 n.49 (plurality). In November of that same year, the Royal Governor of Virginia declared martial law in Norfolk. "The Virginia Assembly denounced this imposition of the 'the most execrable of all systems, the law martial,' as in 'direct violation of the Constitution, and the laws of this country.'" *Reid*, 354 U.S. at 28 n.49 (plurality); *see also* Gordon, *supra*, at 32-34.

The Founders rebelled against these and other British efforts to subjugate civil authority to military force, ultimately declaring independence and embarking on a revolutionary war.

### B. The Founders' Views About the Domestic Use of the Military and the Importance of Civilian Criminal Process Are Embodied in the Constitution and Bill of Rights.

The debates during the drafting and ratification of the 1787 Constitution and the 1791 Bill of Rights, as well as the ultimate structure of those documents themselves, reflect the Founders' view that the military, though necessary for national security, should remain subordinate to civil authority. At the same time, various provisions throughout the Constitution and Bill of Rights reflect the Founders' related conviction that individual liberty had to be stoutly protected against government—and particularly Executive—abuse.

### 1. The Founders Sought to Limit Domestic Use and Executive Control of the Military.

The Founders did not intend that the military should be used in connection with domestic law enforcement. In light of the frustration over the Articles of Confederation, which established a weak federal authority with no military power at all, it did, however, become clear to them that the national government needed to control both an army and the militias. [4] *See The Federalist* Nos. 15, 16, 17 (Alexander Hamilton), Nos. 18, 19, 20 (Alexander Hamilton & James Madison) (on "The Insufficiency of the Present Confederation to Preserve the Union"). Taking recognition of that, during the drafting and ratification of the Constitution, "it was obvious to [Mr. Madison] that when the civil power was sufficient, [military power] would never be put in practice." The Debates in the Convention of the Commonwealth of Virginia, 1788, *reprinted in* 3 *Debates on the Adoption of the Federal Constitution*, 384 (Jonathan Elliot ed., 2d ed., Washington, Printed for the Editor 1836) [hereinafter *Elliot's Debates*]. It would only be in circumstances in which the civil authority proved unable to contend with a domestic disturbance, that the Founders envisioned that an armed force—the militia, not the army—would be

---

[4] Frustration was apparent after Shays' Rebellion in 1786 and 1787, when a group of poorly-armed debtors in Massachusetts were able to overwhelm the local authorities, forcing the closure of the courts. Under the Articles of Confederation, the federal government had no authority to put down the uprising. Coakley, *supra*, at 4-7 (1988).

called on by the federal government. *Id.* Recognizing that the military might be needed, they included explicit controls on the military in the Constitution.

Although the Constitution named the President Commander-in-Chief, it also imposed important limitations on that power: Congress—not the President—has the power to declare war, U.S. Const. art. I, § 8, cl. 11, and to control military appropriations, U.S. Const. art. I, § 8, cl. 12; *see also id.* § 7, cl. 1 (requiring that all appropriations bills originate in the House of Representatives). The President's military power is "dependent upon Congress for both the authority to wage a war and the means by which to do so." Turley, *supra*, at 22. Further, as Justice Jackson observed in *Youngstown Sheet & Tube Co. v. Sawyer*, "[th]ere are indications that the Constitution did not contemplate that the title Commander in Chief of the *Army* and *Navy* will constitute him also Commander in Chief of the country, its industries and its inhabitants." 343 U.S. 579, 643-44 (1952) (Jackson, J., concurring in the judgment and opinion of the Court).

### 2. The Constitution and Bill of Rights Reflect the Founders' Conviction That Ensuring a Robust Civilian Criminal Process Was Essential to Ensuring Individual Liberties.

In drafting the Constitution, the Founders believed that individual liberty would be best secured by the provision of a robust civil, as opposed to military, criminal process. *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 119 (1866) (referring to "the struggle

to preserve liberty and to relieve those in civil life from military trials" and concluding that the Founders, aware of this struggle, "secured in a written constitution every right which the people had wrested from power during a contest of ages"). They secured this protection by establishing a strong and independent Judiciary and numerous procedural safeguards intended to ensure that individuals received fair trials. *See Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946) ("Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued."); *The Federalist* No. 16 (Alexander Hamilton), *supra*, at 150 ("The majesty of the national authority must be manifested through the medium of the courts of justice."); *see also Milligan*, 71 U.S. (4 Wall.) at 121 ("Certainly no part of the judicial power of the country was conferred on [military commissions] . . . ."), *cited in Hamdan v. Rumsfeld*, 548 U.S. 557, 591 (2006).

The right to a trial by jury in criminal cases was one of the most significant protections included in the Constitution. U.S. Const. art. III, § 2 ("The trial of all crimes, except in cases of impeachment, shall be by jury."); *see also The Federalist* No. 83 (Alexander Hamilton), *supra*, at 614 (noting that the only real debate surrounding trial by jury is whether it should be understood more as "defence against the oppressions of an hereditary monarch [or] as a barrier to the tyranny of popular magistrates in a popular government."). Indeed, deprivation of the right to trial by jury was one of the driving forces of the American Revolution. *See supra* Section I.A; *see also Duncan v. Louisiana*, 391 U.S. 145, 152 (1968) (quoting the objections made in the Declaration of

Independence, including those "solemn objections to the King's making 'Judges dependent on his Will alone . . . ,' to his 'depriving us in many cases, of the benefits of Trial by Jury,' and to his 'transporting us beyond Seas to be tried for pretended offenses'").

The right to petition for the writ of habeas corpus likewise reflects the primacy placed by the Founders on the right of an accused to access to civilian courts. U.S. Const. art. I, § 9. In the Federalist Papers, Hamilton quotes Blackstone's discussion of the Great Writ:

> To bereave a man of life (says he) or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore *a more dangerous engine* of arbitrary government.

*The Federalist* No. 84 (Alexander Hamilton), *supra*, at 629 (emphasis in original) (quoting 1 Blackstone's Commentaries 136); see *also Boum ediene v. Bush*, 128 S. Ct. 2229, 2244 (2008) ("The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom.").

The Founders also placed limits on how the crime of treason could be charged and tried, U.S. Const. art. III § 3, largely because of their fear that treasons—"Crimes against the state! and against the officers of the state!"—were "the great sources of danger and persecution, on the part of government, against the citizen." James Wilson, The Debates in the Convention of the State of Pennsylvania, 1787, *reprinted in* 2 *Elliot's Debates*, *supra*, at 469; *see also Cramer v. United States*, 325 U.S. 1, 27-28 (1945).

Numerous provisions in the Bill of Rights similarly reflect the Founders' concerns about the danger of unchecked Executive power, and their commitment to ensuring the rights of the individual in the face of government power—particularly in connection with criminal proceedings. [5] Jefferson expressed to Madison that his support of the Bill of Rights was based largely "on the legal check which it puts into the hands of the judiciary." Letter from

---

[5] A number of amendments reflect the Founders' efforts to curtail oppressive military or other governmental authority over the individual. *See* U.S. Const. amend. III (restricting military's ability to quarter troops); *id.* amend. IV (requiring probable cause for search and seizure); *id.* amend. V (prohibiting double jeopardy, compelled self-incrimination, and the deprivation of life, liberty and property without due process) and—relatedly—to establish fair civilian criminal processes for the accused; *id.* (requiring indictment by grand jury except in cases "arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger"); *id.* amend. VI (ensuring the right to speedy public trial by jury, the right to know accusation, the right to confront witnesses, and the right to counsel).

Thomas Jefferson to James Madison (Mar. 15, 1789) *in* 1 *The Founders' Constitution*, *supra*, at 479; *see also* Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *in* 1 *The Founders' Constitution*, *supra*, at 456-57 (describing the Bill of Rights as "what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference"). As the Court observed in *Duncan v. Kahanamoku*, "We have always been especially concerned about the potential evils of summary criminal trials and have guarded against them by provisions embodied in the Constitution itself. Legislatures and courts are not merely cherished American institutions; they are indispensable to our Government." 327 U.S. at 322 (citations omitted).

## II. THE STATUTES ENACTED BY CONGRESS IN THE PERIOD AFTER RATIFICATION STRICTLY LIMITED MILITARY INVOLVEMENT IN DOMESTIC LAW ENFORCEMENT AND DID NOT AUTHORIZE MILITARY DETENTION.

Shortly after the ratification of the Constitution, Congress enacted a number of statutes to take account of the fact that there would be occasions when the Executive would need to use military force domestically in the absence of event-driven congressional authorization. As described below, whether Congress authorized that force in the form of militias, the nascent volunteer army or a standing federal army, Congress only authorized the Executive's use of military force without further congressional approval if it was to be used against

combinations too powerful to be suppressed by civilian authorities or against imminent invasion. On the single occasion when Congress approved non-military detention of aliens, it did so explicitly and based on set standards, including a requirement that war already be declared by Congress. Finally, and of particular note here, Congress never statutorily authorized the military detention or trial of citizens or resident aliens.

### A. The Militia Acts of 1792 and 1795.

On May 2, 1792, Congress enacted the first Militia Act "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions." Act of May 2, 1792, ch. 28, 1 Stat. 264, 264 (repealed 1795). The Militia Act gave the President power to call up the militia in cases of invasion by a foreign nation or Indian tribe, and also in cases of internal rebellion. *Id.* If the militia of the state where the rebellion was taking place either was unable to suppress it or refused to do so, the first Militia Act gave the President authority to use militia from other states. *Id.*

Its passage in 1792 was induced by a recent defeat at the hands of Indians on the frontier and "the state of things in Western Pennsylvania, where the opposition to the excise laws was very violent, and even threatened to prove too strong for the civil authority." Richard Hildreth, *The History of the United States of America* 312 (New York, Harper & Brothers 1852); Richard H. Kohn, *Eagle and Sword: The Beginnings of the Military Establishment in America* 133-35 (1975).

Congress was explicit as to what circumstances would allow the President to call forth the militia: the nation had to be confronted with "combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act." Act of May 2, 1792, § 2, 1 Stat. at 264. Moreover, there were two congressionally mandated prerequisites for the use of the militia power: First the President had to be notified of the circumstances by an associate justice of the Supreme Court or a district judge, and he then had to issue a "proclamation, command[ing] such insurgents to disperse, and retire peaceably to their respective abodes, within a limited time." *Id.* §§ 2, 3. Further, the Militia Act of 1792 limited the amount of time the President could use the militias of other states to thirty days after the commencement of the ensuing session of Congress, *id.* § 2—suggesting implicitly that further congressional authorization would be necessary for any extension of authority at that point.

The Militia Act of 1795 replaced the 1792 Act, and removed the requirement that the judiciary certify the existence of an insurrection. Act of Feb. 28, 1795, ch. 36, 1 Stat. 424, 424-25 (codified as amended at 10 U.S.C. § 332); *see also Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 28-32 (1827). Importantly, neither the 1792 nor 1795 Act gave the President any authority to declare martial law, detain civilians, or try them in military courts.

### B. The Alien Friends Act and the Alien Enemies Act.

Nine years after the ratification of the Constitution, throughout June and July of 1798, Congress passed four statutes commonly referred to collectively as the Naturalization Act and the Alien and Sedition Acts. These statutes were enacted in the political context of an undeclared United States naval war with France. Although France was an ally of the United States during the American Revolution, tensions between the two countries grew in the wake of a dispute over repayment of the United States' war debt to France and a United States declaration of neutrality in the conflict between the British and French in 1793. *See generally* Gardner W. Allen, *Our Naval War with France* 1-15 (1909). After the French began seizing American ships trading with Great Britain, Congress rescinded treaties with France on July 7, 1798, marking the beginning of the so-called Quasi-War, and two days later authorized the Navy to attack French vessels. *See* J. Gregory Sidak, *The Quasi War Cases—And Their Relevance to Whether "Letters of Marque and Reprisal" Constrain Presidential War Powers*, 28 Harv. J.L. & Pub. Pol'y 465, 481 (2005). *See generally* Allen, *supra*, at 41-86. Along with the Naturalization Act, the Alien and Sedition Acts were enacted in the summer of 1798 in response to growing concern—animated by the conflict with France—over the potential threat that foreign residents posed to the young republic. *See generally* James M. Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (1956) (discussing the legislative history of each statute).

Each statute was intended to protect the nation from the enemy. Of the four, two pertained specifically to the President's authority to deport or detain resident aliens under certain limited circumstances: the Alien Friends Act and the Alien Enemies Act.[6] *See generally id.*

### 1. Alien Friends Act.

The Alien Friends Act (officially, the Alien Act) allowed the President "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 . . . to depart." Alien Act of 1798, ch. 58, § 1, 1 Stat. 570, 571 (expired 1801). In contrast to the Alien Enemies Act, the Alien Friends Act was based on perceived dangerousness rather than national affiliation, and it did not expressly provide that aliens coming under its domain could be "apprehended" or "restrained." *See* Alien Enemies Act of 1798, ch. 66, § 1, 1 Stat. 577, 577 (codified as amended at 50 U.S.C. § 21). If the President granted a permit under the Alien Friends Act, certifying that an alien initially ordered to depart the United States was not a security threat, Congress expressly provided that such a permit could set a durational limit on the alien's stay and designate a place of

---

[6] The other two statutes were the Naturalization Act of 1798, ch. 54, 1 Stat. 566 (repealed 1802), which lengthened the residency requirement for citizenship, and the Sedition Act of 1798, ch. 74, 1 Stat. 5 (expired 1801), which made it a crime, among other things, to "combine or conspire together, with the intent to oppose any measure . . . of the government of the United States" and to publish "false, scandalous, and malicious writing" against the government and its officials.

residence. *See* Alien Act, ch. 58, § 1, 1 Stat. at 571. In the event that an alien who did not receive a permit from the President failed to depart within the time allotted by the order, that alien was subject to conviction and a prison term of up to three years. *See id.*

The Alien Friends Act inspired vigorous opposition on constitutional grounds, as summarized in the Virginia Resolution, authored by James Madison, and the Kentucky Resolution, authored by Thomas Jefferson. Viewed as a Federalist measure designed only for the temporary crisis with France, the Alien Friends Act included a two-year sunset provision and could be exercised in peace or war. *See* Smith, *supra,* at 35. The bill was moderated, in some respects, throughout the drafting process. For example, the first version of the bill authorized the President to remove all aliens who might be judged dangerous to the peace and safety of the United States, including suspected aliens. *Id.* at 51 (emphasis added). This first version of the bill also proposed a national surveillance system, which was omitted from subsequent versions of the bill, and a mandatory permit system for all enemy aliens, which was revised so that only aliens specifically ordered to depart from the country were required to apply for a permit proving harmlessness. *Id.* at 51-54.

Virginia's strong opposition to the Alien Friends Act was led by James Madison, who pointed to the statute's lack of a clear statement as a source of grave concern:

> Details, to a certain degree, are essential to the nature and character

> of a law; and on criminal subjects, it is proper that details should leave as little as possible to the discretion of those who are to apply and execute the law. If nothing more were required, in exercising a legislative trust, than a general conveyance of authority—without laying down any precise rules by which the authority conveyed should be carried into effect—it would follow that the whole power of legislation might be transferred by the legislature from itself, and proclamations might become substitutes for law. A delegation of power in this latitude would not be denied to be a union of different powers.
>
> To determine, then, whether the appropriate powers of the distinct departments are united by the act authorizing the executive to remove aliens, it must be inquired whether it contains such details, definitions, and rules, as appertain to the true character of a law; especially a law by which personal liberty is invaded, property deprived of its value to the owner, and life itself indirectly exposed to danger.

James Madison, Report on the Virginia Resolutions of 1798, *reprinted in* 4 *Elliot's Debates*, *supra*, at 560.

Madison and Jefferson lodged objections to the constitutionality of the Alien Friends Act on the grounds that it was overbroad and that it conferred legislative and judicial power on the President in violation of the separation of powers doctrine: "[I]t violates the judicial system; it confounds legislative, executive, and judicial powers; it punishes without trial; and it bestows upon the President despotic power over a numerous class of men." *Id.* at 531 (Madison). Congressman John Taylor argued that "the President would be the despot" of aliens under the Act. Debate on Virginia Resolutions, *reprinted in The Virginia Report of 1799-1800 Touching the Alien and Sedition Laws; Together with the Virginia Resolutions of December 21, 1798*, at 25 (Richmond, J.W. Randolph 1850) (statement of John Taylor). Jefferson criticized the Alien Friends Act for its attempt to transfer "the power of judging any person, who is under the protection of the laws, from the courts to the President of the United States." Thomas Jefferson, Kentucky Resolutions of 1798 and 1799, *reprinted in* 4 *Elliot's Debates*, *supra*, at 542. Jefferson also urged not only that the statute raised separation of powers problems, but that it seemed to run deeply counter to individual rights protected by the Constitution and Bill of Rights. He argued that because aliens subject to the Act were protected by both, "remov[ing] a person out of the United States . . . on [the President's] own suspicion, without accusation, without jury, without public trial, without confrontation of the witnesses against him, without hearing witnesses in his favor, without defence, without counsel, is contrary to the provision also of the Constitution [and] is therefore not law, but utterly void, and of no force." *Id.*

### 2. Alien Enemies Act.

Unlike the Alien Friends Act, the Alien Enemies Act was drafted not as a temporary measure but as a permanent wartime statute, and it enjoyed broad support from both Federalists and Republicans, neither of whom challenged the statute on constitutional grounds. *See Johnson v. Eisentrager*, 339 U.S. 763, 774-7 & n.6 (1950); Smith, *supra*, at 35. The Alien Enemies Act, first put to use during the War of 1812, remains good law today. It provides that aliens deemed enemies by virtue of a declared war may be "liable to be apprehended, restrained, secured, and removed as enemy aliens." Alien Enemies Act, 50 U.S.C. § 21. The Alien Enemies Act further authorizes the President "to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable." *Id.* Importantly, the Act provides expressly for judicial review to ensure compliance with the statutory elements required for detention and deportation, specifically whether war has been declared, whether the detainee is an alien, and whether the detainee is among natives, citizens, denizens, or subjects of the hostile nation. *Id.* § 23; *Ludecke v. Watkins*, 335 U.S. 160 (1948); *see also* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 992-94 (1998).

That the early Congress would enact such legislation which, by its terms, grants the President authority to detain or deport enemy aliens under certain circumstances reflects the Founding-Era recognition that the President lacked inherent constitutional authority, even in time of war, to

detain aliens within the United States as security threats. Smith, *supra*, at 37 (citing the belief of Congressman Samuel Sitegraves of Pennsylvania that "[m]easures of defense and protection for present exigencies should be the most particular duty of Congress because the president needed wide powers to meet this enemy"); *see also Brown v. United States*, 12 U.S. (8 Cranch) 110, 126 (1814) (observing that the enactment of the Alien Enemies Act implies that powers granted therein are not inherent upon a declaration of war).

Some of the congressional debates around the enactment of the Alien Enemies Act reflect that there were those—primarily Federalists—who believed the President's powers as commander-in-chief might include the power to detain. *See* 5 Annals of Cong. 1791 (1798) (quoting Congressman Harrison Otis as stating that "this could not be looked upon as a dangerous or exorbitant power, since the President would have the power, the moment war was declared, to apprehend the whole of these people as enemies, and make them prisoners of war"). Ultimately, however, the prevailing view was that the Alien Enemies Act conferred power to the President that he did not otherwise possess. As Congressman Samuel Sewall concluded:

> [I]t is necessary to provide for the public safety, and in all countries there is a power lodged somewhere for taking measures of this kind. In this country, this power is not lodged wholly in the Executive; it is in Congress. Perhaps, if war was declared, the President might then, as Commander-in-Chief,

> exercise a military power over these people; but it would be best to settle these regulations by civil process. They would be regulated by treaties as well as by the laws of nations. The intention of this bill is to give the President the power of judging what is proper to be done, and to limit his authority in the way proposed by this bill.

*Id.* at 1790.

Congressman Harrison Gray Otis argued that the Alien Enemies Act was unnecessary because the mere authorization of hostilities against the United States—as opposed to a formal declaration of war—should trigger the President's detention powers. Republicans, and even some Federalists, rejected Otis's position. *See* Smith, *supra*, at 37 ("Formalities and safeguards . . . should not hamper the government. . . . At a time of danger, the United States should not 'boggle about slight forms.'" (quoting 5 Annals of Cong., *supra*, at 1576). Congressman Sewall, the chief defender of the bill, argued successfully that Otis's proposal should be rejected because it would render national policy too indefinite and would give the President an improper power. *See id.* at 39; 5 Annals of Cong., *supra*, at 1574-75 ("[A]s it is an act of Congress to declare war . . . [i]f the words proposed [by Otis] were

introduced, the proposition would be rendered too indefinite . . . .").[7]

Though the scope of the President's inherent war powers may have been debated by the Founders, the Alien Enemies Act reflects the Founders' understanding that any delegation of wartime detention authority from Congress to the President must be made through clear and unambiguous legislation. The text of the statute is explicit in establishing the prerequisites for the arrest, detention and removal of persons deemed to be enemy aliens. *See* 50 U.S.C. § 21. It likewise contains a clear and unambiguous statement from Congress granting the President the authority to apprehend, restrain, secure and remove enemy aliens, so long as the enumerated statutory prerequisites are met.

Taken together, the acts discussed in this section reflect an acknowledgement by the early Congresses of the President's need to use military force and executive detention of aliens under certain, limited circumstances. At the same time, these Congresses circumscribed military involvement in domestic civilian affairs, and while they did authorize executive detention of lawful aliens, they never authorized military detention, even in the case

---

[7] Notably, under the Alien Enemies Act, the Founders gave the United States marshals—not the military—the authority to apprehend and remove aliens pursuant to a warrant from the President or a court. *See* 50 U.S.C. § 24. Nothing in the Act permits the military to detain such aliens.

of enemy aliens found within the United States during time of war.

## III. EARLY DOMESTIC USES OF MILITARY POWER WERE EXPLICITLY AUTHORIZED BY CONGRESS AND USED ONLY TO SUPPORT AND RESTORE CIVILIAN AUTHORITIES.

In the first quarter-century following the ratification of the Constitution, the federal government was confronted with a number of situations in which it used federal military power both to enforce federal law domestically and with its first declared war—the War of 1812—during which it placed restrictions on the freedom of enemy aliens.

Each of our first three Presidents faced a domestic insurrection. In each, the President had explicit authority from Congress. In each, the President determined, consistent with the authority granted by Congress, that civilian processes were not sufficiently robust to deal with the aggression. And most significantly, in each, the President's stated and executed goal was to use military power to reinstate the efficacy of those civilian processes, not to supplant them. Indeed, each incident ended with the military force delivering those detained to a civilian court. The federal government's response to each of these situations was consistent with both the sharp limits on military power and the protections of individual liberty embodied in the Constitution—which is all the more remarkable given the fragility of the young nation and new government at the time. Likewise, these early practices were inconsistent with executive authorization of indefinite military

detention of citizens and legal aliens apprehended within United States borders—particularly in the absence of unambiguous Congressional authority to do so.

### A. The Whiskey Rebellion.

In the early 1790s, the grievances of the residents of western Pennsylvania were many, but their dissatisfaction was most intense when an excise tax was placed on whiskey in 1791. In July 1794, a U.S. marshal sent to enforce the excise law against the distillers faced opposition from a mob of thirty to forty men, and later, by a militia. The ensuing skirmishes left six wounded and one dead. 2 John Bach McMaster, *A History of the People of the United States* 189-91 (1924). During the following days, the insurrection escalated and, on July 30, some 7,000 to 15,000 men assembled to march on Pittsburgh. Coakley, *supra*, at 35.

It was promptly agreed that the Militia Act of 1792, discussed *supra*, Section II.A., had been drafted for just such a contingency, and President George Washington undertook carefully to comply with each particular mandate contained within the Act. First, he submitted evidence of the events in western Pennsylvania to Associate Justice James Wilson, who then issued a certification that tracked the language of what was required to be found by a federal judge under the 1792 Act. *Id.* at 37; 2 McMaster, *supra*, at 196. Once Wilson supplied the certification, the President issued the proclamation required by the Act, commanding the insurgents to disperse and retire peaceably. Coakley, *supra*, at 38. Although not required by the statute, Washington

then dispatched a commission composed of a U.S. Senator from Pennsylvania, an associate justice of the Pennsylvania Supreme Court, and the Attorney General to go to western Pennsylvania to offer amnesty in return for assurances that collection of the tax would not be further obstructed. *Id.* at 38-39. Though none of these actions resulted in the quelling of the insurrection, Washington had complied with the directives of Congress.

Washington then raised a militia of 10-15,000. *Id.* at 39, 41. Although military force was used against the insurrection, Washington's orders "established the vital principle that the purpose of the military was not to supplant but to support civil authority and that there should be no martial law or military trials of offenders." *Id.* at 54; *see also* 6 *The Works of Alexander Hamilton* 446 (Henry Cabot Lodge ed., 1904). The objects of the mission were solely to suppress the combinations which were in opposition to the excise tax, and to cause the law to be executed. Coakley, *supra*, at 54. Those objects were to be effected by military force and by judicial process. *Id.* Any leaders of the rebellion who were captured were to be delivered to civil magistrates; the rank and file were to be admonished, disarmed and sent home. *Id.* Further, once the offenders were delivered to civil authorities, "[t]he President admonished the Commanding General 'that the judge can not be controlled in his functions." *Duncan v. Kahanamoku*, 327 U.S. 304, 320-21 (1946) (quoting Washington's orders).

When the army arrived in the insurgent area in late October 1794, it faced no opposition. Coakley, *supra*, at 58. In accordance with its orders from

Washington, the army neither detained nor tried insurgents. Rather, the commanders delivered the guilty parties to the civilian authorities for indictment and, where appropriate, trial. Eventually twenty men were taken to Philadelphia to stand trial. Only two were ever convicted. *See id.* at 62-63; *United States v. Vigol*, 28 F. Cas. 376 (Paterson, Circuit Justice, C.C.D. Pa. 1795) (No. 16,621); *see also United States v. Mitchell*, 26 F. Cas. 1277 (Paterson, Circuit Justice, C.C.D. Pa. 1795) (No. 15,788).

The Whiskey Rebellion was "[t]he single largest example of armed resistance to a law of the United States between the ratification of the Constitution and the Civil War." Thomas P. Slaughter, *The Whiskey Rebellion: Frontier Epilogue to the American Revolution* 5 (1986). Although the supremacy of the federal government was threatened in a significant armed rebellion, President Washington used military force only in accordance with enacted law, and only then in order to reinstate civilian government control. An important precedent was established: "the military should not in itself perform any police or judicial functions." Coakley, *supra*, at 348.

### B. Fries' Rebellion.

In July 1798, Congress enacted a one-year $2 million direct tax on houses, land, and slaves in order to prepare for a possible war against France. Coakley, *supra*, at 69. The tax proved immensely unpopular, and it inspired considerable resistance. In January 1799, an assessment commissioner sought to subpoena a number of the resisters in order

to determine the cause for their resistance. William W.H. Davis, *The Fries Rebellion, 1798-99*, at 45 (Doylestown, Doylestown Publ'g Co. 1899). When the subpoenas proved ineffective, a U.S. district judge in Philadelphia issued arrest warrants for the resistance leaders, and a U.S. marshal took many of the resistance leaders into custody. Coakley, *supra*, at 70-71; Paul D. Newman, *Fries's Rebellion: The Enduring Struggle for the American Revolution* 123-33 (2004). Before the marshal left town, however, a force of about 140 armed militia demanded the release of the prisoners. Newman, *supra*, at 138-39. The marshal released the prisoners, and there was no violence. *Id.* at 140.

The marshal reported the incident to a federal judge who, in turn, reported the events to President John Adams. In compliance with the terms of the Militia Act, President Adams issued a cease-and-desist order. *Id.* at 143. Throughout April 1999, the army arrested many of the resisters, including Fries himself. Coakley, *supra*, at 74-75. As in the Whiskey Rebellion, the purpose of the arrests was to submit the rebels to civilian processes, which they had previously been able to circumvent. All of those who were arrested were handed over to civilian authorities to begin criminal proceedings. About half of those arrested were charged with treason, and about half were charged with misdemeanors. *Id.* at 75-76. Of the eleven men charged with treason, ten stood trial, and juries acquitted seven. Newman, *supra*, at 180. The three men who were convicted of treason, including Fries, were pardoned by President Adams forty-eight hours before they were to be executed, and the President at the same time issued

a general pardon for all those who had opposed the tax. Coakley, *supra*, at 76; Newman, *supra*, at 183.

As with President Washington's use of force during the Whiskey Rebellion, President Adams' reliance on the military during Fries' Rebellion was narrowly circumscribed. Where civil law enforcement of the federal tax had entirely broken down, the President used the military to restore order, and to deliver the resisters to civilian authorities.

### C. Burr Conspiracy.

Aaron Burr's intrigue against the territory of Spain and the United States likely started during 1804, around the time President Thomas Jefferson dropped him from his ticket in the 1804 election, and one year after the Louisiana Purchase. *See* Walter Flavius McCaleb, *The Aaron Burr Conspiracy* 18-20 (1903). He soon partnered with the commanding general of the U.S. Army, General James Wilkinson. *See* Thomas Perkins Abernathy, *The Burr Conspiracy* 15-16 (1954). Burr traveled all over the West gathering supporters to effect a separation of the western part of the United States from the rest of the country. Coakley, *supra*, at 78-79. He went so far as to approach Britain's minister to the United States for support. Abernathy, *supra*, at 15. As he traveled, however, rumors of his activities spread eastward. *Id.* at 27, 45, 97.

Once President Jefferson grasped the seriousness of the threat, he directed various western governors and district attorneys to monitor Burr and arrest him if he were to commit an overt act of

rebellion against the United States. *Id.* at 185. General Wilkinson, sensing the futility of any alliance with Burr, informed President Jefferson of the scope of Burr's activities. *Id.* at 188-90.

President Jefferson then issued a cease and desist order against any person involved in a conspiracy "to begin a military expedition or enterprise against the dominions of Spain." *Id.* at 190. Once Burr read the President's proclamation, he decided to submit to the civil authority of Mississippi, but the grand jury in the Territory of Mississippi did not indict him. Coakley, *supra*, at 81-82.

Jefferson did not have enough information to call up the militias under the Militia Act of 1795. He and General Wilkinson did, however, have enough information to use the regular army to prevent an expedition against Spanish territory in accord with the Neutrality Act of 1794, ch. 50, §§ 5, 7, 1 Stat. 381.[8] *See* Coakley, *supra*, at 79-80.

---

[8] The Neutrality Act provides:

> That if any person shall within the territory or jurisdiction of the United States begin or set on foot or provide or prepare the means for 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, every such person so offending shall upon conviction be adjudged guilty of a high misdemeanor. . . . [I]t shall be lawful for the President of the United States, or such other person as he shall have empowered for that purpose, to employ

(...continued)

A detachment of federal soldiers arrived to take Burr from the Mississippi authorities, but they refused to release him. Abernathy, *supra*, at 219. Burr then escaped, and the governor offered a reward for his recapture. *Id.* He was eventually captured by federal troops, stood trial in federal court for treason and high misdemeanors, and was ultimately acquitted. Coakley, *supra*, at 77-83.

After the Burr conspiracy, Jefferson called for an act that would allow him to use the army in a domestic insurrection. In March 1807, he signed a law that stated:

> [I]n all cases of insurrection, or obstruction to the laws, either of the United States, or of any individual state or territory, where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the land and naval force of the United

---

(continued...)

> such part of the land or naval forces of the United States or of the militia thereof as shall be judged necessary . . . for the purpose of preventing the carrying on of any such expedition or enterprise."

Ch. 50, §§ 5-7, 1 Stat. 381, 384. Jefferson accepted General Wilkinson's information and placed Burr's guilt "beyond question." 16 Annals of Cong. 39, 40 (1807).

> States, as shall be judged necessary, having first observed all the pre-requisites of the law in that respect.

Act of Mar. 3, 1807, ch. 39, 2 Stat. 443, 443; *see also* Coakley, *supra*, at 83.

As with the previous two crises, the principle that the military should not perform any police or judicial functions was maintained, and civil, not military, judicial authority was employed.

### D. War of 1812.

The nation's next major test came in a war with Great Britain. Following British trade restrictions designed to impede trade between the United States and France and growing anger over impressment of Americans into the Royal Navy, the United States declared war upon Great Britain. *See generally* Carl Benn, *The War of 1812*, at 1-19 (2003). The United States quickly found itself engaged in a war on three fronts: the seas, the coastlines and the Canadian border, and in response, President James Madison issued a proclamation pursuant to the Alien Enemies Act that all "alien enemies, residing or being within forty miles of tide water, were required forthwith to apply to the marshals of the states or territories in which they respectively resided, for passports, to retire to such places, beyond that distance from tide water, as should be designated by the said marshals," subject to certain exceptions. Presidential Proclamation of Feb. 23, 1813, *quoted in Lockington's Case*, Bright. (N.P.) 269, 271 (Pa. 1813); *see also* J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. Rev. 1402, 1412 & n.49 (1992).

As required in the proclamation, the statute was implemented by non-military authorities—U.S. marshals under the supervision of the State Department until April of 1813, when the President appointed a Commissary General for the Prisoners of War to assume sole authority in all matters concerning prisoners, which included the superintendancy of Alien Enemies. *See Lockington's Case*, Bright. (N.P.) at 271; Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Canon*, 9 Green Bag 2d 39, 41-43 (2005); Charles W. Sanders, *While in the Hands of the Enemy: Military Prisons of the Civil War* 16 (2005). The Office of the Commissary General, first established during the Revolution, was a fully institutionalized agency within the State Department during the War of 1812. Sanders, *supra*, at 16. At no time during the war did the Executive use the army to detain or try enemy combatants who were captured.

Thus, even when confronted with the nation's first declared war, the President refrained from imposing military detention or trial on enemy aliens and he acted pursuant to the Alien Enemies Act's clear and unambiguous terms.

## CONCLUSION

For the foregoing reasons, the judgment below that the President has legal authority to detain Petitioner indefinitely and without trial as an "enemy combatant" based on the facts alleged should be reversed and the case remanded with instructions that the petition be granted and the government be directed to release Petitioner from military custody forthwith.

Respectfully submitted,

DANIEL F. KOLB
*Counsel of Record*
REBECCA WINTERS
JOSHUA D. LISTON
MOLLY SHIMA
450 Lexington Avenue
New York, NY 10017
(212) 450-4000

*Attorneys for Amici Curiae*

*Of Counsel:*

STEPHEN I. VLADECK
4801 Massachusetts Avenue, NW
Washington, D.C. 20016

JANUARY 2009

## APPENDIX A LIST OF *AMICI CURIAE* FOUNDING-ERA HISTORIANS AND EXPERTS IN AMERICAN LEGAL HISTORY *

Joyce Appleby
Professor Emerita
Department of History
University of California-Los Angeles

William C. Banks
Director, Institute for National Security and Counterterrorism (INSCT)
Laura J. & L. Douglas Meredith Professor
Syracuse University College of Law
Maxwell School of Citizenship & Public Affairs

James M. Banner, Jr.
Washington, DC

G. Jack Chin
Chester H. Smith Professor of Law
University of Arizona James E. Rogers College of Law

Cornell W. Clayton
Director, Thomas S. Foley Institute
C.O. Johnson Distinguished Professor of Political Science
Washington State University

---

* Affiliations of *amici* are listed for identification purposes only.

David M. Cobin
Professor of Law
Hamline University School of Law

C. Ellen Connally
Retired Judge
Cleveland, OH

Thomas H. Cox
Assistant Professor of History
Sam Houston State University

Paul Finkelman
President William McKinley Distinguished Professor
of Law
Albany Law School

Louis Fisher
Law Library
Library of Congress

Stephen E. Gottlieb
Jay and Ruth Caplan Distinguished Professor
Albany Law School

Paul Halliday
Corcoran Department of History
University of Virginia

Martin J. Hershock
Associate Professor of History and Chair,
Department of Social Sciences
University of Michigan-Dearborn

Brian C. Hosmer
Associate Professor of History
University of Illinois-Chicago

J. Gordon Hylton
Professor of Law
Marquette University Law School

Carlton F.W. Larson
Acting Professor of Law
School of Law
University of California, Davis

Jeff Littlejohn
Assistant Professor of History
Sam Houston State University

Tayyab Mahmud
Professor of Law
Associate Dean for Research & Faculty Development
Seattle University School of Law

Eben Moglen
Professor of Law
Columbia Law School

John W. Quist
Professor
History Department
Shippensburg University

Bradley Skelcher
Associate Provost and Dean of the College of Arts,
Humanities, and Social Sciences
Delaware State University

Thomas P. Slaughter
Arthur Miller Professor of History
University of Rochester

Nancy C. Unger
Associate Professor of History
Santa Clara University

Melvin I. Urofsky
Professor of Law and Public Policy
Virginia Commonwealth University