

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 4: The Early National Era – Democratic Rights/Citizenship

The Alien Friends Act (1825)¹

Federalists in the late 1790s proposed giving the president the power to deport any alien whom the president suspected “of being dangerous to the peace and safety of the United States.” The president could act unilaterally. Aliens had no right to a trial or even a hearing. Jeffersonians claimed that the president did not have the power to deport alien friends, subjects of foreign countries not at war with the United States. They also insisted that the proposed Alien Friends Act of 1798 violated constitutional rights to due process and a jury trial. Federalists responded that the measure was a constitutional exercise of the war power and that only citizens had constitutional rights. Federalists and Jeffersonians also disputed whether deportation was a criminal punishment, subject to the constitutional rules for criminal procedure. After a short debate, the measure passed by a 46–40 vote. No alien was ever deported under the Alien Friends Act, but many probably muted their criticisms of Federalist policies.

The Alien Friends Act raised questions about whether the Bill of Rights was limited to American citizens. Why did Federalists believe aliens did not have a right to trial by jury? Why did Jeffersonians think aliens had a right to trial by jury? Were Jeffersonians and Federalists reasoning from different constitutional premises or did they merely reach different conclusions from common premises? Most aliens were more sympathetic toward Jeffersonian positions. To what extent to you believe partisanship rather than principle underlay the debate over the Alien Friends Act?

REPRESENTATIVE ALBERT GALLATIN (Jeffersonian, Pennsylvania)

...
... [T]he question is not whether the measure is expedient, but whether this Government has any power, under the Constitution, to remove alien friends out of the United States, or whether the power over aliens does not belong exclusively to the individual States. He himself clearly and decidedly of opinion that no such authority was vested in the General Government, and that this bill, if passed, will be a gross violation of the Constitution. ...

...
... He knew the rights of aliens are limited; but if we can dispense with the law towards them, we may also do it with respect to citizens. The trial by jury does not speak of citizens but of persons. ...

And, with respect to the writ of habeas corpus, what do gentlemen say? They say it is only to prevent any man from being imprisoned in an arbitrary manner: and that, as the present bill describes the cases in which a man is liable to arrest and imprisonment; it cannot be a suspension of that law; that is to say the writ of habeas corpus is designed to prevent arbitrary imprisonment, or what the gentleman calls illegal imprisonment; but according to this doctrine, if you give, by law, the power to the President of arbitrary imprisonment, that power being thus given by law, is on that account no longer illegal nor arbitrary. That was the kind of security which citizens might expect to derive from the clause of the Constitution which related to the writ of habeas corpus. That privilege was to be done away by a legal distinction.

¹ *Annals of Congress*, 5th Cong., 2nd Sess. (1798), 1974–85, 2010–12, 2018–19, 2025–26.

By the [fifth] amendment to our Constitution, it is provided that “no person shall be deprived of life, liberty, or property, without due process of law.” According to the doctrine of the gentleman, Congress may give, by law, the power to the President, or anyone else, to deprive a citizen of his liberty or property, and the act of giving that power by law, will be called the due process of law contemplated by the Constitution.

...
... [T]he States and the State Judiciary . . . must, consider the law as a mere nullity, they must declare it to be unconstitutional. . . .

REPRESENTATIVE WILLIAM GORDON (Federalist, New Hampshire)

...
... [T]he right of Congress to regulate this business, arises from the power of making war, and providing for the general welfare. . . .

But [Mr. Gallatin] says, that this bill is a violation of the rights of aliens, as it takes from them the right of a trial by jury, secured by the Constitution. . . . This bill . . . does not contemplate a crime, but directs that aliens shall be apprehended on suspicion, and sent out of the country. It is only when they refuse to obey the order, that a crime is committed, and then they are tried by a jury equally with citizens of this country.

...
It had been said that this bill would be a violation of the habeas corpus act. . . . There is nothing in this bill to prevent a person from being brought before a Judge.

REPRESENTATIVE EDWARD LIVINGSTON (Jeffersonian, New York)

...
... [Mr. Livingston read the fifth and sixth amendments] Now, sir, what minute article in these several provisions is there that is not violated by this bill? All the bulwarks which it opposed to encroachments, fall before personal liberty, fall before this engine of oppression.

Judiciary power is taken from the courts, and given to the Executive, the previous safeguard of a presentment by a grand inquest is removed; the trial by jury is abolished; the “public trial” required by the Constitution is changed into a secret and worse than inquisitorial tribunal; instead of giving “information on the nature and cause of the accusation,” the criminal, ignorant of his offense and the danger to which he is exposed, never hears of either until the judgment is passed and the sentence is executed; instead of being “confronted with his accusers,” he is kept alike ignorant of their names and their existence; and even the forms of a trial being dispensed with, it would be a mockery to talk of “proofs for witnesses,” or the “assistance of counsel for defense”—thus are all the barriers which the wisdom and humanity of our country had placed between accused innocence and oppressed power, at once forced and broken down. Not a vestige even of their form remains. 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. . . .

... First, 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. But, have the gentlemen who reason thus, read the bill. . . . Not only the offence of being “suspected of being dangerous to the peace and safety of the United States,” but also that of being “concerned in any treasonable or secret machinations against the Government thereof.” And this, we are told, is no crime.” . . . [W]e invite strangers to come among us; we declare solemnly that Government will not prevent them; we entice them over by the delusive prospect of advantage; in many parts of the Union we permit them to hold lands, and give them other advantages, while they are waiting for the period at which we have promised a full participation of all our rights. An unfortunate stranger, disgusted with tyranny at home, thinks he shall find freedom here; he accepts our conditions; he puts faith in our promises; he vests his whole property in our hands; he has dissolved his former connections, and made your country his own.

But, while he is patiently waiting the expiration of the period that is to crown the work, and entitle him to all the rights of a citizen, the tale of a domestic spy, or the calumny of a secret enemy, draws on him the suspicions of the President, and, unheard, he is ordered to quite the spot which he has selected for his retreat, the country which he had chosen for his own, perhaps the family which was his only consolation in life, he is ordered to retire to a country whose Government, irritated by his renunciation of its authority, will receive him only to punish him; and all this, we are told, is no punishment.

Again, we are told that the Constitutional compact was made between citizens only, and that, therefore, its provisions were not intended to extend to aliens, and that this acting only on them, is, therefore, not forbidden by the Constitution. But, unfortunately, neither common law, common justice, nor the practice of any civilized nation, will permit this distinction. It is an acknowledged principle of the common law, the authority of which is established here, that alien friends . . . residing among us, are entitled to the protection of our laws, and that during their residence they owe a temporary allegiance to our Government. If they are accused of violating this allegiance, the same laws which interpose in the case of a citizen must determine the truth of the accusation, and if found guilty they are liable to the same punishment. . . . [T]he Constitution expressly excludes any idea of this distinction; it speaks of all “judicial power,” “all trials for crimes,” all “criminal prosecutions,” all “persons accused.” No distinction between citizen and alien, between high or low, friends or opposers to Executive power, republican and royalist. All are entitled to the same equal distribution of justice, to the same human provision to protect their innocence; all are liable to the same punishment that awaits their guilt. How comes it, too, if these Constitutional provisions were intended for the safety of the citizen only, that our courts uniformly extend them all, and that we never hear it inquired whether the accused is a citizen, before we give him a public trial by jury.

REPRESENTATIVE HARRISON GRAY OTIS (Federalist, Massachusetts)

. . .
. . . [Mr. Livingston] proceeds upon the very erroneous hypothesis, that aliens are parties to our Constitution, that it was made for their benefit as well as our own and that they may claim equal rights and privileges with our own citizens. But upon reading the Constitution, he found that “we, the people of the United States,” were the only parties concerned in making that instrument. He found nothing in it which bound us to fraternize with the whole world. On the contrary, the power was expressly given to Congress to decide on what terms foreigners should become entitled to the immunities of citizens; until they are thus entitled they cannot complain of any breach of our Constitution. . . . [T]he citizens have rights paramount to the Constitution and the laws; but foreigners enjoy no rights except those which are derived from the Constitution and the laws. The sovereign authority of a nation may, undoubtedly, forbid the entrance of foreigners, and, consequently prescribe their conditions of admission. . . .

. . .
It had been earnestly contended that the right of trial by jury had been extended by the Constitution to all persons without distinction, to aliens as well as citizens. To this he might reply, that the persons contemplated in that instrument were those only who were concerned in making that compact—the people of the United States; and that it was through mere courtesy and humanity that this, as well as other advantages, were made common to aliens. . . .

REPRESENTATIVE ROBERT GOODLOE HARPER (Federalist, South Carolina)

. . .
The gentleman from New York [Livingston] has said that this bill will lay prostrate the rights of citizens. . . . But what . . . would prevent a similar bill being brought in with respect to citizens? A sense of right—the Constitution and the laws of the country. What, said he, prevents me from cutting the throat of the gentleman from New York? The laws of God and of my country. In the same way should I be prevented from bringing in a bill of this kind against citizens.

. . . Every man seized under this law, will have a right to sue out a writ of habeas corpus, and if it appear that he is a citizen, he must be discharged. . . .



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