POLICY REPORT

BRENNAN CENTER FOR JUSTICE

The Alien Enemies Act

Unjust, Unnecessary, and Unconstitutional

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Brennan Center for Justice at New York University School of Law

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Introduction

In wartime, the United States must protect its people and territory. Doing so may require actions that might not pass legal or political muster in peacetime, such as the preventive detention of enemy combatants for the duration of the war. But the Alien Enemies Act, an authority that permits summarily detaining and deporting *civilians* merely on the basis of their ancestry, goes too far and must be reconsidered. Passed in 1798 as a part of the notorious Alien and Sedition Acts, the Alien Enemies Act is a deeply flawed authority with a sordid history.

The law was last invoked in World War II as the legal authority for interning noncitizens of Japanese, German, and Italian descent. Those internments — along with internments during previous wars — were shameful episodes in our nation's past. The Alien Enemies Act and complementing authorities have allowed presidents to target people on the basis of their identity, not their conduct or the threat they pose to national security.[1] In 1988, when Congress apologized and provided reparations for Japanese internment, it acknowledged that the policy was rooted in "racial prejudice" and "wartime hysteria," not valid security concerns.[2] Congress would later describe Italian internment as a "fundamental injustice,"[3] and the Department of Justice would recognize that German noncitizens had been targeted "based on their ancestry."[4]

Notwithstanding this widespread condemnation, the Alien Enemies Act was not repealed or amended after the war. Indeed, the law has not been substantially modified since its adoption. If the United States were to declare war in the future, the president would be able to invoke the Alien Enemies Act's vast detention and deportation power. Worse still, the language of the law is broad enough that a president might be able to wield the authority in peacetime as an end run around the requirements of criminal and immigration law.

This is precisely what politicians and groups who want to restrict immigration propose doing.[5] Most notably, former President Donald Trump has promised to invoke the Alien Enemies Act and wield it as a super-charged deportation authority.[6] Anti-immigration advocates believe that the law allows the president to bypass the substantive and procedural protections for noncitizens, such as the right to seek asylum.[7] And they have sought to weaponize the Alien Enemies Act against immigrants from countries they dislike, particularly Mexico.[8]

It is unclear whether the courts would intervene to stop such an abuse. In general, the courts are loath to second-guess presidents' decisions on sensitive foreign policy and national security matters, such as the appropriate application of wartime authorities. The last time the Alien Enemies Act was challenged, in *Ludecke v. Watkins* in 1948, the Supreme Court upheld President Harry S. Truman's extended reliance on the law three years after the end of World War II.[9] The Court reasoned that the question of when a war terminates and wartime authorities expire is too "political" for judicial resolution.

There may, however, be another way for courts to exercise a check on Alien Enemies Act invocations. Summary detentions and deportations under the law conflict with contemporary understandings of equal protection and due process. These understandings developed as a part of the civil rights revolution that remade the Fifth and Fourteenth Amendments — well after the law was last invoked. Reconceived, equal protection and due process led courts and the public to reject *Korematsu v. United States*, the 1944 case that upheld Japanese internment, as well as other judicial precedents upholding discrimination against noncitizens based on their ancestry.[10] Because equal protection and due process challenges would be legal, not political, in nature, the courts would have to resolve these challenges on the merits instead of categorically deferring to the president.

Of course, the surest way to prevent abuse of the Alien Enemies Act — and to address its problematic reliance on ancestry — is through preemptive repeal. For decades, lawmakers on Capitol Hill have proposed measures to repeal or reconsider the Alien Enemies Act as a symbolic reparation for the internment of Japanese, German, and Italian noncitizens during World War II.[11] Repealing the law would no longer be merely symbolic, given recent proposals to use it for mass deportations in peacetime. Indeed, repeal is crucial to preventing presidential overreach and safeguarding civil liberties.

This report offers a framework for overturning or substantially modifying the Alien Enemies Act, through either litigation or legislation. Part I examines the Alien Enemies Act's text, history, and potential for abuse. Part II explores possible equal protection and due process challenges to the law's constitutionality. Part III provides an overview of existing alternatives to the Alien Enemies Act that can more appropriately safeguard the nation against espionage, sabotage, and other malign activities in wartime.

I. The Alien Enemies Act: An Overview

In 1798, the United States was embroiled in an undeclared war with France. Concerned about the survival of the fledgling country, Congress and President John Adams adopted four laws to suppress perceived internal threats. Collectively, these laws are known as the Alien and Sedition Acts.

Even in their own time, the Alien and Sedition Acts were controversial.[12] One of the laws, the Sedition Act, which criminalized making false or malicious statements about the federal government, was widely criticized for violating the First Amendment's guarantees of free speech and press. Another, the Alien Friends Act, which permitted the summary deportation of "dangerous" noncitizens in peacetime, was charged with subverting the separation of powers and due process rights of noncitizens. Shortly after their enactment in 1798, three of the four laws were repealed or allowed to lapse pursuant to an expiration date, or sunset clause, in their text.[13] Only the Alien Enemies Act, which had no sunset clause, remained.

The Alien Enemies Act has been invoked only three times, each time in connection with a major military conflict: the War of 1812, World War I, and World War II. Congress amended the law once, in 1918, expanding it to cover women in addition to men.[14] Otherwise, the law's language is the same as it was in 1798. Its key provisions are codified at 50 U.S.C. § 21:

> Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies.

This language identifies three prerequisites for using the law's detention and deportation authority. First, there must be a declared war, a threatened or ongoing invasion, or a threatened or ongoing predatory incursion. Second, the war, invasion, or predatory incursion must be perpetrated or threatened by a foreign nation or government. Third, the president must issue a proclamation invoking the law and directing how noncitizens will be regulated.

Section 21 also indicates how the law may be used. It allows the president to target "all natives, citizens, denizens, or subjects" of a foreign belligerent who are 14 or older and who have not naturalized as U.S. citizens. These noncitizens may be "apprehended, restrained, secured, and removed." Through an initial proclamation and subsequent regulations, the president may decide when and how noncitizens are detained or deported. Section 21 does not articulate any substantive or procedural protections for noncitizens.

A later section of the Alien Enemies Act, codified at 50 U.S.C. § 23, identifies another means of using the law: private enforcement. Section 23 creates a procedure for private actors to submit complaints about noncitizens who are a "danger" to public safety and have run afoul of the president's proclamation or regulations. The courts are tasked with reviewing these complaints and are empowered to order noncitizens' detention or deportation, even without executive branch action.

Each of these elements of the Alien Enemies Act — the requirements for using the law, the presidential power unlocked by invoking the law, and the private enforcement regime — is subject to abuse, as discussed below.

Prerequisites: A Wartime Authority

Congress adopted the Alien Enemies Act pursuant to its constitutional war powers.[15] Presidents have invoked the law only in times of war. And the law is explicitly predicated on the existence of a declared war, invasion, or predatory incursion.

Nevertheless, certain politicians and groups now contest whether the Alien Enemies Act is truly a wartime authority. They contend that the law can be used to address unlawful migration and drug trafficking — acts that they frame as a rhetorical, nonmilitary invasion or predatory incursion.

Anti-immigration politicians and groups have long urged a rhetorical reading of the term *invasion*, as it appears in the Constitution. In the 1990s, they brought court cases challenging the constitutionality of federal immigration policy, which they claimed had permitted an invasion of migrants across the southern border.[16] More recently, they have asserted that border states are being invaded by migrants and thus have a constitutional right to "engage in War" by conducting their own

immigration enforcement, over the objection of the federal government.[17]

These rhetorical readings of the Constitution have never been adopted by the courts. But that has not stopped anti-immigration politicians and groups from urging a similar reading of the Alien Enemies Act.[18] Unlike the law's reference to declared war, which mirrors the Constitution's Declare War Clause and necessitates a congressional declaration of war,[19] neither *invasion* nor *predatory incursion* has a neatly delimited meaning. The Supreme Court has never passed judgment on how these terms should be interpreted.

Nonetheless, there is ample evidence for how these terms, and the Alien Enemies Act more generally, should be understood. This evidence shows that the law is a wartime authority — and forecloses any argument that the president can invoke it outside of an armed conflict.

Historical Context

The Alien Enemies Act was adopted during the Quasi-War with France, a naval conflict that began in 1798 over France's seizure of U.S. merchant ships. The Quasi-War, as its name might suggest, was not a "perfect war" supported by a congressional declaration of war.[20] It involved only seaborne hostilities, conducted pursuant to limited statutory authorizations passed by Congress.

President Adams never invoked the Alien Enemies Act during the Quasi-War. Instead, he relied on the contemporaneously passed Alien Friends Act, which could be invoked in the absence of war.[21] He did so even though the Alien Friends Act, unlike the Alien Enemies Act, could not be used as a detention authority and had been widely criticized as unconstitutional.

President Adams relied on the lesser authority because he understood that the Alien Enemies Act was inapplicable. The law could be invoked only if the naval conflict with France escalated to involve armed attacks on U.S. territory or if Congress otherwise declared war. Indeed, the Alien Friends Act was adopted to give Adams authority in relative peacetime, in advance of the kind of escalation that would allow the invocation of the Alien Enemies Act.[22]

The peacetime authority of the Alien Friends Act was constantly juxtaposed against the wartime authority of the Alien Enemies Act. Until the Alien Friends Act expired in 1801, critics faulted the law for including insufficient procedural protections and for granting the president powers belonging to Congress and the judiciary.[23] These same critics, however, justified the Alien Enemies Act as an implementation of the law of war as it stood in the late 1700s. In the words of a member of the Fifth Congress, "alien enemies [were] liable to be treated as prisoners of war."[24]

More than a century later, the Alien Enemies Act continued to be understood as a strictly wartime authority. Before the United States formally entered World War I, Germany perpetrated a series of attacks against U.S. citizens and vessels on the high seas. Most notoriously, a German U-boat sank the *Lusitania* in 1915, killing more than 100 U.S. citizens aboard the ocean liner. Despite these seaborne hostilities, President Wilson waited until Congress declared war in 1917 to invoke the Alien Enemies Act. He issued his first Alien Enemies Act proclamation the same day that Congress approved its war declaration.[25] In subsequent litigation challenging wartime detentions under the Alien Enemies Act, the Wilson administration argued that the law "affected only those to whom the rules of war under the laws of nations applied, and to whom no protection was due from the United States."[26]

As recently as 1980, the Department of Justice reaffirmed that the Alien Enemies Act applies only in wartime.[27] The year prior, Iranian radicals had stormed the U.S. embassy in Tehran and taken 53 American hostages. Several members of Congress then proposed amending the Alien Enemies Act to allow President Jimmy Carter to invoke the law and summarily deport Iranians.[28] The Department of Justice assessed that this amendment was legally dubious, as the law's exceptional detention and deportation powers were constitutionally cognizable only in times of war.[29]

Even the lawmakers who proposed expanding the Alien Enemies Act acknowledged that it was a wartime authority. Unlike the Department of Justice, they felt that the requirement that an "invasion or predatory incursion [take place] against the *territory* of the United States" was unduly restrictive; they believed that storming an embassy abroad would "de facto amount to the conduct of war."[30] They did not argue that the Alien Enemies Act could be used in peacetime.

This history flatly contradicts contemporary efforts to use the Alien Enemies Act in the absence of an armed conflict. Across centuries of debate and practice, the Alien Enemies Act has been understood as an implementation of the law of war, enacted incident to Congress's power to declare war. Nothing suggests that the law could be used to respond to a rhetorical invasion or predatory incursion. To the contrary, the controversy surrounding the Alien Friends Act and the Department of Justice's 1980 analysis both gesture toward the unconstitutionality of summary detentions and deportations in peacetime.

Defining Invasion and Predatory Incursion

The text and history of the Alien Enemies Act similarly indicate that *invasion* and *predatory incursion* refer to acts of war, specifically armed attacks on U.S. soil. There is no plausible basis for saying that migration or narcotics trafficking constitutes an invasion or predatory incursion.

Although the Alien Enemies Act does not define *invasion* or *predatory incursion*, a well-established rule for interpreting legal texts helps clarify their meaning. To avoid giving unintended breadth to a law, the courts interpret ambiguous terms by referencing better-defined terms in

the same legislative text.[31] For the Alien Enemies Act, this means interpreting *invasion* and *predatory incursion* in light of the law's reference to *declared war*.[32] The threshold for invoking the law on the basis of an invasion or predatory incursion cannot be far lower than and discordant with the threshold for doing so on the basis of a declared war. It follows that an invasion or predatory incursion, like a declared war, must involve armed conflict. The terms must be read in the literal sense, not the rhetorical one.

Other parts of the Alien Enemies Act confirm the literal reading of *invasion* and *predatory incursion*. By its text, the law requires the invasion or predatory incursion to take place "against the territory of the United States."[33] This forecloses arguments regarding a metaphorical invasion or incursion.[34] The law also requires the invasion or predatory incursion to take place at the behest of a "foreign nation or government." As such, criminal activity — or even acts of terror — perpetrated by a nonstate group cannot serve as a predicate for invoking the Alien Enemies Act. The law requires state-to-state conflict. Finally, the law repeatedly refers to the nation or government adversary as "hostile" and distinguishes between noncitizens who have and have not taken part in "actual hostility." This language refers to a state of war and acts of war, not migration or criminal activity.

The historical usage of *invasion* and *predatory incursion* bolsters these textual arguments. In an 1800 analysis of the Alien Friends Act and Alien Enemies Act, James Madison wrote that "invasion is an operation of war."[35] And a comprehensive review of late-1700s and early-1800s dictionaries, as well as letters and writings from the founders, shows that an invasion had two crucial elements: entry and hostility.[36] The element of hostility, or the intent to deliberately overthrow the state, distinguished *invasion* from mere *trespass* — the term used in the founding era to describe entry without hostility, such as the construction of unlawful settlements.

Likewise, the term *predatory incursion* referred to acts of war, specifically raids on U.S. territory. A predatory incursion was generally understood to be a more circumscribed attack than an invasion, but these smaller attacks were still known to cause "great destruction."[37] During the Revolutionary War, for instance, George Washington referred to the Raid on Richmond as a predatory incursion; the British had razed much of Virginia's capital and destroyed the military infrastructure in the surrounding area before withdrawing.[38] During the Northwest Indian War, a late-1700s conflict over the Northwest Territory, lawmakers and other officials referred to the Wabash tribes' cross-border attacks as "hostile" and "predatory incursions."[39]

There is no indication that subsequent generations read *invasion* and *predatory incursion* more broadly for purposes of the Alien Enemies Act. Since 1798, the law has been invoked only once on the basis of an actual or threatened invasion or predatory incursion. That invocation took place during World War II: in the wake of Japan's attack on Pearl Harbor, President Franklin D. Roosevelt proclaimed that Japan had perpetrated an invasion and that its allies Germany and Italy were threatening an invasion or predatory incursion.[40] When Roosevelt requested that Congress declare war against Japan, Germany, and Italy, he characterized Japan's invasion as "hostilities" ushering in a "state of war,"[41] and he noted that Germany and Italy had recently issued their own declarations of war against the United States.[42]

The word *invasion* is now used more liberally than it was in 1798. Meanwhile, *predatory incursion* has fallen into disuse. Neither change affects the purpose, meaning, or applicability of the Alien Enemies Act.[43] The historical record shows that Congress enacted the Alien Enemies Act as a wartime authority and that the terms *invasion* and *predatory incursion*, as used in the law, refer to acts of war.

The "Political Question" Problem

It may be clear that the Alien Enemies Act is a wartime authority, but that is no guarantee the courts would intercede to prevent a president from invoking the law outside of an armed conflict. The courts have a long-standing practice of deferring to Congress and the president on sensitive foreign policy and national security matters. It is possible that the courts would treat a president's pretextual identification of an invasion or predatory incursion as final and unreviewable, pursuant to the "political question" doctrine.

In its 1962 *Baker v. Carr* opinion, the Supreme Court sketched out the framework for the political question doctrine. *Baker* holds that political questions are nonjusticiable, or not subject to judicial review.[44] To identify a political question, *Baker* instructs courts to consider whether the issues in a case are constitutionally committed to Congress or the president — the political branches — and whether their decision-making on those issues commands the respect, or even the "unquestioning adherence," of the judiciary. The courts must also consider whether there are "judicially discoverable and manageable standards" for resolving the issues or if, instead, judges would be forced to rely on their own policy preferences.

Taking stock of past case law, *Baker* offers as a paradigmatic political question the issue of when a war starts or ends. *Baker* roots the courts' historical refusal to review whether a state of war exists in "the need for finality" and "prompt and unhesitating obedience" in times of emergency.[45] Since *Baker*, courts have repeatedly relied on the political question doctrine to dismiss claims that the president is conducting unlawful hostilities abroad in violation of the War Powers Resolution.[46] The courts have refused to assess whether hostilities are actually underway, instead emphasizing the importance of the U.S. government speaking with one voice on matters of war.

Even more relevant, courts since *Baker* have relied on the political question doctrine to avoid resolving disputes over the presence or absence of an invasion. In the 1990s,

a series of individuals and states sued the Clinton administration under Article IV of the Constitution, which requires the federal government to protect the states against invasion.[47] They argued that by failing to prevent foreign economic influence and unlawful migration, the administration was permitting an invasion. Instead of rejecting this expansive reading of Article IV, the courts determined that the cases presented a political question with no judicially manageable standards for resolution. One court went so far as to say that addressing the invasion claim would "disregard the constitutional duties that are the specific responsibility of other branches of government."[48]

In recent litigation, courts have again been asked to resolve whether unlawful migration is an invasion. In late 2023 and early 2024, the Biden administration sued Texas to stop the state from usurping federal prerogatives for immigration enforcement and border management. In defense of its conduct, Texas invoked Article I, Section 10, of the Constitution, which permits the states to "engage in War" when "actually Invaded." Unlawful migration, Texas argued, can constitute an invasion and unlock exceptional powers for the state. The Texas litigation is still pending, but several judges have already opined that the political question doctrine "bars consideration" of Texas's theory.[49]

The political question doctrine thus creates a real risk that the courts would allow a president's pretextual proclamation of an invasion or predatory incursion to stand.

The same doctrine could also deter the courts from reviewing a president's pretextual determination that a foreign government is behind the supposed invasion or predatory incursion. *Baker* states that the "recognition of foreign governments" is another issue that "strongly defies judicial treatment."[50] A reflexive application of this principle could allow a president to ignore the prerequisites for invoking the Alien Enemies Act. For instance, a president could recognize a cartel as the de facto government of Mexican territory over which it exercises effective control.[51] The president could then proclaim a migrant "invasion" perpetrated by the cartel "government."[52]

There is, however, a backstop to the political question doctrine. Although the courts have rarely cited this language in *Baker*, the opinion acknowledges that the judiciary "is not at liberty to shut its eyes to an obvious mistake" by Congress or the president. *Baker* promises that the courts "will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power."[53]

This language dovetails with the Supreme Court's analysis of the executive branch's obligation to faithfully execute the law.[54] In its 1932 *Sterling v. Constantin* opinion, the Court struck down the Texas governor's imposition of martial law based on a proclaimed insurrection. Earlier in the case, the trial court had found that there was "never any actual riot, tumult, or insurrection" and that any "threats of violence or breaches of the peace" could have been handled by civil law enforcement. The Supreme Court endorsed this finding and determined that the Texas governor had failed to "cause the laws to be faithfully executed," as required by the state constitution. The Court held that this duty requires the executive branch to act in good faith and make decisions within a "permitted range of honest judgment." Because the Texas governor had acted in bad faith, outside the bounds of his discretion, the judiciary could second-guess and ultimately reject his decision-making on a sensitive political matter.

The president, like the Texas governor, is constitutionally bound to "take Care that the Laws be faithfully executed."[55] Courts accordingly have applied the rule in *Sterling* to federal action, if only on rare occasions. Citing *Sterling*'s holding on the limits of military discretion, courts have reviewed and overturned federal decisions regarding the summary detention of supposed enemy combatants, the reduction in force at a missile command center, and the promulgation of a wartime exclusion order.[56] The courts have done so over political-question objections.[57]

The courts' power to look past the political question doctrine should be at its apex in addressing a pretextual invocation of the Alien Enemies Act. As the Supreme Court held in *Hamdi v. Rumsfeld*, a case brought early in the war on terror, the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake."[58] Any invocation of the Alien Enemies Act's vast detention and deportation authority would have a profound bearing on individual liberties.

Even so, the *Baker* backstop has never been applied, and the rule in *Sterling* is a rare exception to a norm of judicial reticence when it comes to war powers. It is possible that the courts would stick to the sidelines as a president all but wrote out of the Alien Enemies Act the prerequisites of an invasion or foreign government. Without judicial review, the law would then be transformed from a wartime authority into the kind of overbroad peacetime authority that founders like Madison criticized as unconstitutional.

Scope of the Authority: An Improper Power

When Congress debated the Alien Enemies Act in 1798, lawmakers warned that setting too low a bar for invoking the authority would bestow upon the president "an improper power."[59] One lawmaker, calling for a narrower authority, cautioned that the Alien Enemies Act would allow the president "to do by proclamation what ought only to be done by law."[60]

The Alien Enemies Act is, indeed, extremely broad in what it allows the president to do and whom it allows the president to target. It includes few substantive or procedural safeguards to narrow the president's authority.

This breadth is, to some extent, evident on the face of the law, which renders "all natives, citizens, denizens, or

subjects" of a foreign belligerent "liable to be apprehended, restrained, secured, and removed." But much of the breadth is supplied by judicial opinions and past invocations of the Alien Enemies Act. These precedents extend the president's authority to not only detaining and deporting noncitizens but also controlling their speech, movements, and livelihoods. This power may be deployed on the basis of noncitizens' ancestry rather than the threat they pose to national security.

Broad Regulatory Power

By its text, the Alien Enemies Act permits the apprehension, restraint, securing, and removal of noncitizens. It also explicitly grants the president the power to determine when and how to do so. To quote *Lockington v. Smith*, one of the first judicial opinions interpreting the Alien Enemies Act, the law confers upon the president a detention and deportation authority "as unlimited as the legislature could make it."[61]

Paradoxically, some of the Alien Enemies Act's breadth stems from the president's power to narrow who can be targeted and why. The law permits the president to decide "the manner and degree of the restraint to which [noncitizens] shall be subject and in what cases."[62] Thus, instead of targeting all eligible noncitizens, presidents can target certain subgroups based on criteria of their choosing. Without Congress enacting new criminal or immigration laws, presidents can promulgate regulations to control noncitizens' conduct, on penalty of detention or deportation.

Historically, these regulations have been draconian, substantially burdening noncitizens' constitutional rights. Across all three invocations of the Alien Enemies Act, presidents restricted where certain noncitizens could live or travel and required them to register with and report to government offices. In the War of 1812, for instance, British immigrants could not be present within 40 miles of the coast.[63] During World War I, German and Austro-Hungarian immigrants were barred from entering or residing in Washington, DC.[64] Presidents have even barred noncitizens from reading and writing certain literature; holding particular jobs; traveling by airplane; and owning cameras, radios, or firearms.[65]

As far-reaching as these regulations appeared on paper, they were even broader in application. Noncitizens were detained for unpatriotic speech and writings, including private letters.[66] Their identity, or status as so-called "enemy aliens," served as sufficient cause for warrantless house raids in search of contraband.[67] In some instances, they were monitored by federal agents, who read their mail, investigated their finances, and pressured their employers to turn over any evidence of potential disloyalty to the United States.[68]

No court has ever questioned the Alien Enemies Act's tremendous delegation of authority. Instead, courts have endorsed giving the president power "in the most comprehensive terms," reasoning that in times of war, "the hands of the executive . . . must be made strong, or the safety of the nation will be endangered."[69] And while the courts, including the Supreme Court, have acknowledged that the Alien Enemies Act is "subject to great abuse," they have blithely stated that "*that* was a matter for the consideration of those, who made the law, and must have no weight, with the Judge, who expounds it."[70]

Nor have courts ever struck down specific regulations promulgated under the Alien Enemies Act, even when they conflict with noncitizens' constitutional rights. In 1945, for instance, the Supreme Court affirmed that "freedom of speech and of press is accorded aliens residing in this country."[71] Three years later, the Court upheld regulations that, in the words of the dissent, gave "new life to the long repudiated anti-free speech and anti-free press philosophy of the 1798 Alien and Sedition Acts."[72] The majority of the Court refused to pass judgment on the regulations because they exercised the Alien Enemies Act's detention and deportation power "within narrower limits than Congress authorized."[73]

Finally, there is only one recorded instance of a court overturning the implementation of Alien Enemies Act regulations against a noncitizen from a foreign belligerent. In *United States v. Thomas Williams*, a case brought during the War of 1812, the court ordered the release of British subject Thomas Williams because he had not actually violated any rule.[74] Under the relevant regulations, British subjects could be detained if they refused to relocate to a residence at least 40 miles from the coast, as designated by a U.S. marshal. But a U.S. marshal detained Williams without designating a permissible residence and allowing him to relocate. The courts stepped in to address this clear excess.

World Wars I and II offered far less space for the kind of judicial intervention seen in *Thomas Williams*. The regulations promulgated by Presidents Wilson and Roosevelt had many grounds for targeting noncitizens, including a catch-all provision that precluded any such judicial intervention: noncitizens could be detained if the executive branch deemed them to be "dangerous."[75] Echoing the Alien Friends Act, this sweeping power placed full discretion in the hands of executive branch officials.[76]

Identity-Based Targeting

The Alien Enemies Act allows the president to target "all" noncitizens, aged 14 and over, who are the "natives, citizens, denizens, or subjects" of a foreign belligerent. This language has been interpreted broadly and without exception.

According to the courts, the "obvious purpose" of the Alien Enemies Act is to cover noncitizens who, because of their biographical or legal connections to a foreign belligerent, "might be likely to favor" the belligerent over the United States.[77] The law's reference to "natives, citizens, denizens, or subjects" must therefore be viewed as an "inclusive description," with each word bearing "a significant and different meaning."[78]

Courts have parsed the differences among these terms, often to uphold aggressive applications of the Alien Enemies Act. Starting with *Minotto v. Bradley* in World War I, judges have held that "nativity is determined by the place of . . . birth." In *Minotto*, this allowed the Wilson administration to detain an Italian citizen who was born in Germany to a German mother. Although he had naturalized as an Italian, abandoning his legal connection and any allegiance owed to Germany, he could not change his place of birth. This immutable fact rendered him the native of a foreign belligerent, subject to detention or deportation.[79]

The term *citizens* has its usual meaning: individuals with full status under a foreign belligerent's laws. As straightforward as this may seem, past administrations and the courts have investigated citizens of states not involved in a particular conflict to determine whether they may in fact have dual citizenship — unbeknownst to them or over their objection — with a nation covered by an Alien Enemies Act proclamation. *Ex parte Risse*, for instance, considered the detention of a Mexican citizen during World War I.[80] Because he had been born to a German father and could not clearly show that his father had expatriated from Germany, the Wilson administration and the courts determined that he plausibly had German citizenship and could be detained.

Denizens, as opposed to natives and citizens, have a sub-citizenship legal status with the foreign belligerent. Cases from World Wars I and II suggest that this status may encompass lawful residence or some other set of "rights and privileges" within the foreign belligerent.[81]

Finally, *subjects* refers to individuals who owe allegiance to a state and are entitled to that state's protection, even if they lack the political rights associated with citizenship.[82] The term encompasses citizens, and at times courts have used *subjects* and *citizens* interchangeably. *Subjects* had particular relevance in describing the people of a kingdom or empire. In the modern era, this relevance is substantially diminished, though *subjects* may still have unique applicability in the context of noncitizen nationals — a status that is rare but that several states (including the United States) maintain.[83]

Under the Alien Enemies Act, any noncitizen falling into one of these categories could be detained, deported, or otherwise regulated. The Alien Enemies Act includes no explicit exceptions, and the courts have refused to read exceptions into the law. The law offers no opportunity for individuals to prove their loyalty to the United States. It has been used against noncitizens who had immigrated to the United States as children, people who were in the process of naturalizing, and people who had served or volunteered to serve in the U.S. military.[84]

Even refugees and asylum seekers have been detained or deported under the Alien Enemies Act. During World War II, Department of Justice officials opposed exempting the predominantly Jewish "refugees from Hitler's reign of terror" from enforcement under the law, on the theory that dangerous individuals could use their refugee status as "protective cloaks for their activities."[85]

The Alien Enemies Act's breadth and severity explain its appeal to anti-immigration politicians and groups. Unlike conventional immigration law, the wartime authority allows the president to target noncitizens on the basis of their identity and without regard to their immigration status. Supporters of mass deportation have hailed the Alien Enemies Act as a workaround for expelling *hundreds of thousands* of Chinese, Iranian, Lebanese, and Mexican noncitizens, including asylum seekers and others who are lawfully in the United States.[86]

Summary Procedures

In 1798, the law of war allowed states to treat "alien enemies" as prisoners of war.[87] Because these noncitizens had "no rights and no privileges, unless by special favor," the Fifth Congress included few procedural protections in the Alien Enemies Act. [88]

The law does not guarantee people individualized notice or a hearing before they are detained or deported. Nor does it allow them to appeal their detention or deportation. There is no burden of proof that the federal government must satisfy.[89]

Only one section of the Alien Enemies Act provides any sort of procedural protection when the president targets a noncitizen. That section, now codified at 50 U.S.C. § 22, guarantees noncitizens a "reasonable" amount of time to settle their affairs and leave the country after the president invokes the law. Unless a treaty dictates how much time the United States must give them, the president may determine how long is reasonable.[90]

Section 22 provides no protection for noncitizens who wish to remain in the United States. Even those who are willing to leave may not benefit from § 22 if the president declares that public safety demands near-immediate deportations.

Nor does § 22 provide protection against detention. During World War II, the Roosevelt administration began detaining Japanese, German, and Italian noncitizens immediately after the Alien Enemies Act was invoked. They were not given time to settle their affairs before they were interned. Only after the war, when President Harry Truman moved to deport detainees, were they released on parole and given their § 22 "reasonable" time — 30 days — to pack up and leave.[91]

In the absence of procedural rights under the Alien Enemies Act, detainees have petitioned the courts for the writ of habeas corpus, the Constitution's ultimate safeguard against extralegal detention.[92] The courts have entertained these petitions, releasing those who were mistakenly targeted — who held U.S. citizenship or were not the "natives, citizens, denizens, or subjects" of a foreign belligerent — or who were scheduled for deportation but denied time to settle their affairs under § 22.[93]

The courts have also entertained habeas petitions challenging the constitutionality of the Alien Enemies Act and the continued applicability of the law after the end of hostilities. But they have never granted a petition on these grounds.[94]

A Misunderstood Provision: Private Enforcement

There *is* another section of the Alien Enemies Act, now codified at 50 U.S.C. § 23, that offers procedural protections to noncitizens. But contrary to the assumption of some academics, § 23 does not contain generally applicable safeguards against detention and deportation.[95] This often misunderstood section of the law reads:

> After any [Alien Enemies Act] proclamation has been made, the several courts of the United States . . . are authorized . . . upon complaint against any alien enemy resident . . . to the danger of the public peace or safety, and contrary to the tenor or intent of such proclamation, or other regulations which the President may have established, to cause such alien to be duly apprehended . . . and after a full examination and hearing on such complaint, and sufficient cause appearing, to order such alien to be removed . . . or to be otherwise restrained.

According to the courts, this language does not narrow the president's power under the Alien Enemies Act.[96] It does not prevent summary detentions or deportations. To the contrary, § 23 expands the power of the law by establishing a private enforcement mechanism. As *U.S. ex rel. Schlueter v. Watkins* explains, "Court jurisdiction, conferred solely by Sec. 23, arises only when a 'complaint' is filed by a citizen. When the procedure is through executive action, the statute calls for no hearing in a court or elsewhere."[97]

Although a private enforcement mechanism exists, no reported cases have been brought under § 23. It is conceivable that past administrations have mooted all cases brought by private citizens, proceeding directly and summarily against the subjects of their § 23 complaints. Alternatively, it is possible that private citizens have not brought cases or that their cases have been lost to history. Whatever the explanation, there is no clear precedent for how courts would implement § 23.

By its text, § 23 suggests that private complaints would be handled differently from § 21 detentions and deportations — not only as a matter of procedure but also as a matter of substance. Section 23 requires complaints to allege that noncitizens pose a "danger" to public safety. This is a higher standard than what is required under § 21, insofar as noncitizens cannot be targeted on identity alone.

In other ways, however, § 23 is broader than § 21. Complaints must allege that noncitizens have acted "contrary to the tenor or intent" of an Alien Enemies Act proclamation or regulation. Under § 21, there must be a violation of the proclamation or regulation itself. Moreover, "tenor or intent" is a remarkably vague standard. It is unclear what test the courts would use to identify conduct that violates the spirit but not the letter of the president's proclamation and regulations. If they were to adopt a permissive test, they would substantially increase the scope of such proclamations and regulations without further congressional or presidential action.

Anti-immigration politicians and groups have yet to trumpet the possibility of § 23 private enforcement. But if the president were to pretextually invoke the Alien Enemies Act to unlock the law's vast deportation power, § 23 would make noncitizens vulnerable to questionable challenges from neighbors, colleagues, and classmates.

II. Challenging the Alien Enemies Act

In 1948, when the Alien Enemies Act was last challenged, a narrow majority of the Supreme Court opined that the law "is almost as old as the Constitution, and it would savor of doctrinaire audacity now to find the statute offensive to some emanation of the Bill of Rights."[98] Four justices dissented, identifying serious First Amendment concerns with the way the law had been applied and even graver concerns with the law's due process implications.

Were the law to be challenged again, more than 75 years later, the dissenters could be vindicated — not unlike the justices who dissented in *Korematsu*, decrying Japanese internment as a "clear violation of Constitutional rights" and a descent into "the ugly abyss of racism."[99]

In the decades following World War II, there was a seismic shift in the prevailing understanding of constitutional rights. Spurred on by the civil rights movement, the Supreme Court established frameworks for identifying unlawful discrimination, substantive rights, and procedural rights. In turn, courts across the country struck down long-standing regimes that subjugated minority groups and noncitizens. At the same time, Congress overhauled the discriminatory and under-protective immigration system that it had created in the wake of the 1882 Chinese Exclusion Act. Congress also provided reparations for Japanese internment and issued a formal apology for World War II–era uses of the Alien Enemies Act.

The Alien Enemies Act does not accord with these postwar understandings of equal protection and due process. The courts have not revisited the law's constitutionality since it was last invoked in World War II. But if a president were to invoke the Alien Enemies Act again, the courts would have an opportunity to overturn it.

Equal Protection

The Alien Enemies Act has never faced an equal protection challenge. While this basis for challenging the law may seem intuitive now,[100] it would have been a long shot in 1948: the Supreme Court had just upheld Japanese internment, and it had yet to decide seminal antidiscrimination cases like *Brown v. Board of Education*.[101]

At that time, it was not even clear whether the Constitution's equal protection guarantee applied to the federal government. The Fourteenth Amendment, which includes the Equal Protection Clause, regulated only the states. Not until 1954, in *Bolling v. Sharpe*, did the Supreme Court establish that the Bill of Rights, specifically the Fifth Amendment, incorporates equal protection principles.[102]

Today, of course, plaintiffs have prevailed on many equal protection challenges to federal action. Any federal action based on a "suspect classification" — in other words, one that discriminates against a protected minority — is subject to heightened scrutiny by the courts. It can be upheld only if it furthers compelling governmental interests and is narrowly tailored to achieving those interests.

The Alien Enemies Act fails this test. The law covers noncitizens on the basis of their ancestry and is an overbroad and inefficient means of preventing espionage and sabotage in wartime.

Suspect Classifications

A law or policy that discriminates on the basis of race, nationality, or gender involves a suspect or quasi-suspect classification. According to the Supreme Court, these factors are "so seldom relevant to the achievement of any legitimate state interest" that laws and policies that distribute benefits or burdens based on them "very likely reflect outmoded notions" or "prejudice and antipathy."[103]

In practice, however, courts have treated nationality — the classification most obviously implicated by the Alien Enemies Act — inconsistently. Since the civil rights movement, courts have readily struck down *state* laws and policies that discriminate against noncitizens on the basis of their country of citizenship. But they have resisted applying the same approach to federal laws and policies, despite asserting that "equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."[104]

The Supreme Court has relied on creative legal arguments to avoid resolving equal protection challenges to federal laws and policies based on country of citizenship.[105] It has provided little clarity on how nationality-based antidiscrimination principles constrain the federal government's authority, particularly its broad power over immigration.[106] Immigration law necessarily discriminates on the basis of citizenship, and in various ways it discriminates among noncitizens on the basis of their nationality. It cannot be the case that all immigration classifications are suspect.

Without guidance from the Supreme Court, the lower courts have upheld immigration laws and policies that discriminate on the basis of nationality.[107] Instead of treat-

ing nationality distinctions as suspect classifications subject to heightened scrutiny, the lower courts have analyzed them under a deferential standard known as rational basis review.[108] Although rational basis review is not a rubber stamp,[109] it allows the courts to uphold laws and policies that discriminate among groups on the basis of "rational speculation" about their benefits.[110] Thus, the courts upheld the Carter administration's registration requirement for Iranian visa holders, promulgated under the Immigration and Nationality Act in the wake of the Iran hostage crisis.[111]

It is unclear how the Alien Enemies Act would fare under the framework for nationality-based discrimination. The law is not an immigration authority, and it does not address the "central immigration concerns" — such as managing cross-border population flows or processing asylum applications — that have historically justified exempting such discrimination from heightened scrutiny.[112] Principally, the law is a wartime detention authority. For decades, the courts have recognized equal protection's potential for curbing war's worst excesses.[113] By contrast, it was not until 2017 that the courts struck down an immigration statute for unlawful discrimination.[114] In light of these differences, it is possible that the Alien Enemies Act's nationality-based discrimination would be analyzed under heightened scrutiny.

The challenges of pursuing a nationality-based equal protection claim elevate the importance of understanding the full scope and purpose of the Alien Enemies Act. The law discriminates on the basis of more than country of citizenship. Its sweeping language about which noncitizens can be targeted creates a rough proxy for ancestry. And the history of the law shows that it was intended to be used, and has in fact been used, to implement ancestry-based discrimination. The courts have long treated ancestry-based discrimination, or discrimination on the basis of a person's ethnic background, on a par with race-based discrimination — which is suspect regardless of whether it is undertaken by the states or by the federal government.[115]

On its face, the Alien Enemies Act covers a foreign belligerent's *natives*, not just its citizens and subjects.[116] Natives of a country can renaturalize, abandoning their formal allegiance to their country of birth and becoming citizens elsewhere. For more than 150 years, Congress has recognized this ability to renaturalize and shed past allegiances as a "natural and inherent right of all people."[117] But even as renaturalization severs the bond of allegiance between natives and their country of birth, it does not change natives' parentage and ethnic identity. By covering natives who owe no formal allegiance to a foreign belligerent, the Alien Enemies Act reveals its focus on ancestral ties and its equation of such ties with disloyalty.

History confirms the Alien Enemies Act's focus on ancestry and its conflation of ancestry with disloyalty. During World War I, the Wilson administration petitioned Congress to expand the Alien Enemies Act — which until 1918 applied only to men — to cover "the activities of German-*born* women."[118] Within days of Congress amending the law to be gender-neutral,[119] President Wilson extended his earlier Alien Enemies Act proclamations to cover all unnaturalized "women *of German birth* or citizenship."[120] The Wilson administration also investigated ethnically German citizens of nonbelligerent countries, detaining them if they were born in Germany or could plausibly have German dual citizenship based on their parentage.[121]

In World War II, the Alien Enemies Act continued to serve as a tool for ancestral discrimination and ethnoracial stereotyping. Although the law was enforced against Italians, President Roosevelt generally dismissed them as "a lot of opera singers."[122] He directed his administration to focus its enforcement on noncitizens of Japanese descent, whom he considered "not capable of assimilation,"[123] and those of German descent, whom he believed to be dangerous. Roosevelt even proposed using the Alien Enemies Act to intern all noncitizens of German descent — an estimated 600,000 individuals — before his advisers cautioned that doing so would be politically and practically infeasible.[124]

Decades later, the country recognized the injustice and discriminatory nature of wartime internment. Congress provided reparations to "permanent resident aliens of Japanese ancestry" interned under the Alien Enemies Act, as well as U.S. citizens of Japanese descent interned under other laws.[125] Congress also passed the Wartime Violation of Italian American Civil Liberties Act and debated further legislation apologizing for the detention of "aliens of Italian ancestry [and] German ancestry."[126] In 2001, President George W. Bush's attorney general issued a report declaring that "Italian, Japanese, and German aliens were subjected to restrictions based on their ancestry" during World War II.[127] The report specifically names and discusses the Alien Enemies Act as one of the "most prominent" authorities behind the ancestry-based restrictions.[128]

Congress's condemnation of Japanese internment led the courts to overturn *Korematsu*.[129] In the future, Congress's and the executive branch's condemnation of interning noncitizens under the Alien Enemies Act should lead the courts to view the law's classifications as ancestry based and suspect.

Judicial Scrutiny

Because the Alien Enemies Act draws suspect classifications, the law should be assessed under a form of heightened scrutiny known as strict scrutiny. Strict scrutiny requires classifications to further compelling governmental interests and be narrowly tailored to achieve those interests.

Today, the Supreme Court recognizes just two compelling interests that can support race- or ancestry-based discrimination: remediating past instances of government-backed discrimination and managing acute tensions

in prisons.[130] Neither of these tightly defined interests is predicated on animus or stereotyping. And neither is implicated by the Alien Enemies Act.

It is, of course, possible that the courts would identify a third, national security–related interest to support the Alien Enemies Act. But in doing so, they would have to tread carefully.

Although it predated modern equal protection analysis, *Korematsu* identified the "prevention of espionage and sabotage" as the overriding purpose for Japanese internment.[131] Subsequent cases, however, have rejected this justification for racial or ancestral discrimination as grounded in stereotyping and animus.[132] Courts have emphasized that ancestry-based distinctions "do not constitute an accurate or reasonable method for distinguishing between loyal and disloyal persons."[133]

Even if the courts did identify a compelling national security–related interest for the Alien Enemies Act, they still would have to contend with the law's most glaring defect: its staggering overbreadth. In no way is the Alien Enemies Act narrowly tailored to achieve legitimate security aims.

The Alien Enemies Act permits the president to impose grave consequences on "all natives, citizens, denizens, or subjects" of a foreign belligerent who are unnaturalized and older than 14. Permanent residents, U.S. veterans, teenagers, and the elderly are treated with the same default suspicion. Refugees who abandoned their country of origin because they were subject to persecution may fall within the scope of the law. There is simply no logical, let alone empirical, basis for applying wartime regulations to these groups but not to U.S. citizens or noncitizens of a different background. Even President Donald Trump's controversial "Muslim ban" exempted permanent residents and refugees. In *Trump v. Hawai'i*, these exemptions persuaded the Supreme Court that the ban was rooted in legitimate national security interests, not animus.[134]

Moreover, the empirical basis for applying the Alien Enemies Act to detain or deport *any* class of noncitizens is weak. Historians now assess that World War I–era internment was predicated on a "gross overestimation of the security threat."[135] Many detainees had run afoul of mundane registration and reporting regulations, such as the requirement that noncitizens of German descent notify the authorities when changing residence. There was little evidence of espionage or sabotage perpetrated by German noncitizens.

Similarly, in World War II, President Roosevelt's attorney general admitted that he conflated ethnic affiliation with disloyalty when deciding whom to detain.[136] Months after Roosevelt's Alien Enemies Act proclamations — and the internment of thousands of Japanese, German, and Italian noncitizens — the FBI reported that it had "no substantial evidence of planned sabotage by any alien."[137] No internee ever would be convicted of espionage, sabotage, or other such malign activities.[138]

Furthermore, narrow tailoring examines not only whether a law is under- or over-inclusive but also whether there are workable nondiscriminatory alternatives.[139] In that regard, a contemporary use of the Alien Enemies Act to detain or deport noncitizens would be even less justifiable. Since World War II, law enforcement and immigration alternatives have proliferated, as discussed later in this report.

Reliance on such alternatives is now the international standard. In 1949, the United States and other countries negotiated the Fourth Geneva Convention, which reins in wartime internments and expulsions to "put an end to an abuse which occurred during the Second World War."[140] Today, the law of war prohibits internment and deportation based on noncitizens' nationality, as opposed to their conduct or qualifications.[141]

In view of all this, detention and deportation under the Alien Enemies Act would struggle to survive even a rational basis review — which would apply if the law contained no suspect classification. Unlike heightened scrutiny, rational basis review requires only a legitimate governmental purpose to which the challenged classification is "rationally related."[142] Although this is a low bar, the courts nonetheless strike down arbitrary classifications and classifications that reflect animus.[143] Unsubstantiated fears about a disfavored group cannot support a law, particularly one that imposes "a broad and undifferentiated disability."[144] These concerns map onto the Alien Enemies Act, with its application to permanent residents and history of unwarranted mass internment.

Due Process

When the Alien Enemies Act was last challenged, in *Ludecke v. Watkins*, the petitioner claimed that his detention and pending deportation violated Fifth Amendment due process. Although a narrow majority of the Supreme Court rejected this claim, the dissenting justices latched onto it. In their dissents, they pioneered a theory of what due process demands, both substantively and procedurally. Eighty years later, these dissents provide a road map for challenging detentions and deportations under the Alien Enemies Act.

Like equal protection, due process has come a long way since 1948. During the civil rights movement, the Supreme Court revived substantive due process, an early-1900s doctrine inferring specific rights from the Fifth and Fourteenth Amendments' guarantee of "life, liberty, [and] property."[145] Initially, courts relied on substantive due process to advance economic rights such as the right to contract, but after World War II, they used it to protect civil and social rights, ranging from the right to privacy to the freedom to marry.

In tandem, the Supreme Court built out its procedural due process jurisprudence, establishing a framework for

determining when individuals are entitled to notice, hearings, and other protections before the government takes their property or impinges on their liberty interests. Through this framework, the courts have expanded noncitizens' ability to contest unwarranted criminal penalties and immigration actions.

These developments call into question core aspects of the Alien Enemies Act. In safeguarding individual liberty against arbitrary action, contemporary due process doctrines have the power to correct *Ludecke*'s missteps.

Substantive Due Process

As the Supreme Court has explained, substantive due process "provides heightened protection against government interference with certain fundamental rights" that are not specified in the Constitution's text.[146] The Alien Enemies Act implicates at least one such right: the right to be free from indefinite detention. In addition, the courts could find that the law violates substantive due process by authorizing deportations based on noncitizens' identity rather than their conduct.

Freedom from Indefinite Detention

In its 2001 *Zadvydas v. Davis* opinion, the Supreme Court wrote that the right to be free from indefinite civil detention "lies at the heart" of Fifth Amendment liberty.[147] Years earlier, the federal government had ordered the deportation of the two noncitizen petitioners, both of whom had committed serious crimes while living in the United States. Because of their criminal histories, the petitioners were held in custody as they awaited removal. Political upheaval in their countries of origin, however, meant that no foreign government would accept them.

By the time the case reached the Supreme Court, one of the petitioners had been in "post-removal-period" detention for seven years, with no end in sight. This, the Court held, was unacceptable. The Court emphasized that detention violates due process unless ordered in a criminal proceeding or in limited nonpunitive circumstances, in which "a special justification" outweighs the individual's liberty interest. To justify indefinite civil detention, the federal government would have had to show that the petitioners were "particularly dangerous individuals," such as suspected terrorists. The petitioners were released.[148]

Detention under the Alien Enemies Act conflicts with the rule in *Zadvydas*. Wartime detention is necessarily indefinite. Countries do not negotiate a conflict's duration before the onset of hostilities, and the length of different conflicts varies tremendously: whereas World War I lasted four years, the war on terror has been ongoing for more than 23.[149] Sampling 10 Alien Enemies Act cases from World War II, one scholar found that the average length of detention was 2,095 days, or 5.74 years.[150] The longest detention was 3,702 days, or 10.14 years — substantially longer than either *Zadvydas* petitioner had spent in post-removal-period detention.

The Alien Enemies Act authorizes this indefinite detention irrespective of whether a noncitizen is particularly dangerous. It requires no individualized review of whether a noncitizen is conspiring with a foreign belligerent or is otherwise disloyal. As history shows, the vast majority of people covered by the Alien Enemies Act do not pose a security threat. And as Justice William O. Douglas wrote in his *Ludecke* dissent, their due process liberty "does not perish when war comes."[151] To the contrary, their liberty interests should invalidate the Alien Enemies Act's detention regime.

Right to Be Judged on Conduct, Not Identity

In his *Ludecke* dissent, Justice Hugo Black expressed incredulity that the Alien Enemies Act could properly authorize the detention and deportation of "any unnaturalized person, good or bad, loyal or disloyal to this country, if he was a citizen of Germany before coming here."[152] In his view, joined by his three colleagues in dissent, this interpretation of the law made individual liberty "less secure." At bottom, Justice Black was making a substantive due process argument, gesturing toward noncitizens' right to be treated on the basis of their conduct, not targeted for their identity.

A through line of U.S. jurisprudence is that people must be seen as individuals in the eyes of the law.[153] This is, of course, a core function of equal protection. Beyond a handful of suspect classes, however, equal protection jurisprudence often fails to protect members of disfavored groups. Substantive due process can fill the gaps in equal protection law.[154]

Justice Black's demand for individualized treatment could form the basis for a substantive due process right that bears on deportations.[155] Granted, the courts are cautious in identifying substantive due process rights, lest judges substitute their policy preferences for the liberties secured by the Constitution.[156] The Supreme Court thus has set a high bar for new rights. In its 1997 *Washington v. Glucksberg* opinion, the Court explained that prospective rights must be "deeply rooted in our history and traditions" and "fundamental to our concept of constitutionally ordered liberty."[157]

A narrow right for noncitizens to be judged on their conduct, rather than their identity, in deportation proceedings would meet *Glucksberg*'s standard. Such a right would be consistent with the vast majority of U.S. immigration practice across history. With two notable exceptions — Chinese exclusion and the Alien Enemies Act — U.S. deportation laws have always required individual conduct, such as unlawful entry, reliance on government benefits, or criminal activity.[158] Indeed, much of the controversy over the Alien Friends Act, the peacetime complement to the Alien Enemies Act, stemmed from its lack of specificity about the "offensive conduct" that could warrant deportation.[159]

The right would also be consistent with enduring congressional and executive branch pronouncements that

have supported treating noncitizens as individuals in immigration practice. In the 1860s, for instance, U.S. treaty law and contemporaneous legislation proclaimed the "inherent and inalienable right of man to change his home and allegiance" or his citizenship and loyalties.[160] A century later, Attorney General Robert F. Kennedy advocated for ending the country-by-country immigration quota system. In a speech before Congress, he said the system "contradicts our basic national philosophy and basic values" by denying "recognition to the individual."[161] Reform legislation, the Hart-Celler Act, passed within the year. At its signing, President Lyndon B. Johnson declared that Hart-Celler abolished a system that "violated the basic principle of American democracy — the principle that values and rewards each man on the basis of his merit."[162]

The strongest support, however, for the right to be judged on conduct, not identity, for deportation purposes comes from the two exceptions to this practice.

In the late 1800s, Congress passed the Chinese Exclusion Act and Geary Act. These laws prohibited Chinese laborers from entering the United States and authorized the deportation of any "person of Chinese descent" who lacked a certificate of residence.[163] Both laws were upheld, in *Ping v. United States* and *Fong Yue Ting v. United States*, respectively.[164] But *Fong Yue Ting* produced heated dissents over the constitutionality of the Geary Act. The dissenters argued that while "the expulsion of a race may be within the inherent powers of a despotism," the Constitution could not countenance the deportation of noncitizens "for no crime but that of their race and birthplace."[165]

In recent years, Congress and the president have apologized for Chinese exclusion.[166] In addition to decrying its blatant racism, the House faulted the Geary Act for failing to provide due process.[167] The Senate disavowed the legislation as "incompatible with the basic founding principles" of the nation.[168] And while *Ping* and *Fong Yue Ting* continue to be cited for certain legal principles, their holdings regarding identity-based immigration action — particularly identity-based deportation — have been widely criticized by academics and the courts.[169]

Finally, the Alien Enemies Act's own history cuts against the constitutionality of identity-based deportations. Past uses of the law have resulted in congressional apologies and a reparations program. The Alien Enemies Act's primary legal justification, that noncitizens from a foreign belligerent have "no rights," has been rejected by the international community, political branches, and courts.[170]

If the courts were to recognize a substantive due process right to be judged on conduct, not identity, in deportation proceedings, the Alien Enemies Act would be in clear conflict with it. The Alien Enemies Act's deportation regime would have to be struck down or reinterpreted to make deportations contingent on noncitizens' demonstrable dangerousness or disloyalty.

Procedural Due Process

According to Supreme Court precedent, noncitizens "who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness."[171] Although deportation is not technically a criminal punishment, the Court has recognized that it imposes "great hardship" and can be a "most serious" penalty.[172] As a result, the Fifth Amendment generally guarantees notice, a full and fair hearing, and judicial review to those facing deportation.[173]

The Alien Enemies Act is thus remarkable not only for its authorization of identity-based deportations but also for its near-total absence of procedural protections. None of the rights typically accorded to noncitizens, including some who have entered the United States illegally, are accorded even to permanent residents who fall within the scope of the law.

In the postwar period, the Supreme Court substantially clarified its procedural due process jurisprudence, formulating the *Mathews v. Eldridge* framework for assessing when important interests deserve additional procedural protection.[174] This framework has helped expand the rights of noncitizens facing deportation, defining when notice is sufficient and when noncitizens must be allowed to retain legal counsel. But it is unclear whether this framework can address the shortcomings of the Alien Enemies Act, as historically interpreted.

Under *Mathews*, the courts balance individuals' interests, the risk that the interests will be erroneously deprived, and the government's capacity to provide additional process. For purposes of deportation proceedings, the courts have recognized noncitizens' interest in staying stateside, particularly with immediate family, as "a weighty one."[175] And as Justice Douglas noted in his *Ludecke* dissent, the government's interest in effecting summary deportations is marginal; once a noncitizen is detained under the Alien Enemies Act, any "danger has passed."[176]

The problem, however, is the law's regime of identity-based deportations, rather than conduct-based deportations. If noncitizens can be deported on the basis of identity alone, the risk of erroneous deprivation is low and the value of a hearing limited.[177]

As the dissenters in *Ludecke* intuited, a procedural due process challenge to the Alien Enemies Act would be strongest if complemented by substantive change to the law. If the law required deportable noncitizens to be demonstrably dangerous or disloyal, the only basis for depriving them notice and a hearing would be the outmoded notion that noncitizens have no rights in wartime. *Mathews* would secure noncitizens' right to contest their supposed dangerousness or disloyalty.

III. The Legislative Landscape

The Alien Enemies Act's equal protection and due process shortfalls are not matters solely of judicial concern. Indeed, Congress is better positioned to right the wrongs and prevent future abuses of the law.

Already, Congress has issued formal apologies to World War II–era internees of Japanese and Italian descent. Bipartisan legislation, most notably the Wartime Treatment Study Act, has proposed extending these apologies to internees of German descent. Congress should act on this legislation without delay.

But apologies are not enough. To prevent ancestry-based internment and expulsion in the future, Congress must repeal the Alien Enemies Act. To that end, Representative Ilhan Omar and Senator Mazie Hirono have introduced the Neighbors Not Enemies Act in the House and Senate. Congress should pass this bill with urgency, before the Alien Enemies Act can be abused by politicians and groups to target immigrant communities in peacetime.

Of course, the United States has the right and obligation to protect itself in wartime. Repealing the Alien Enemies Act, however, would not adversely affect national security. Today, unlike in 1798, a panoply of criminal and immigration statutes address conduct in support of a foreign belligerent. Chapters 37 and 105 of the criminal code cover all manner of espionage and sabotage, from sketching defense installations to tampering with defense materiel. Other parts of the criminal code authorize the imprisonment of unregistered agents of a foreign government, trespassers on military property, and conspirators who plot attacks on U.S. servicepeople.[178] These provisions, which were codified after World War II, are not bounded by the ethnicity or immigration status of the perpetrator. They apply to citizens and noncitizens alike.

Similarly, Congress overhauled U.S. immigration law in the postwar period. It created a robust bureaucracy with hundreds of thousands of federal officers who manage entries, deportations, and homeland security. Immigration law now includes processes for deporting noncitizens on "security and related grounds," including for engaging in espionage, sabotage, or "any activity" to oppose the U.S. government by force.[179] These authorities are based on noncitizens' conduct, not their ancestry.

The federal government's ability to enforce these criminal and immigration provisions is substantially enhanced by recent developments in surveillance capabilities and authorities. Although surveillance tools can present civil liberties concerns in their own right,[180] with proper safeguards, they can help the federal government identify individuals of any ethnicity or nationality who conspire with a foreign belligerent.[181] The blunt tool of ancestry-based discrimination has no place in national security decision-making if the intelligence community can wield a scalpel.

Finally, repealing the Alien Enemies Act would not preclude Congress from enacting additional wartime authorities in the future, should existing criminal and immigration authorities prove insufficient. During an actual war, invasion, or predatory incursion — rather than a pretextual, rhetorical one — Congress would be quick to fill any gaps in the president's authorities. Any such future authority, however, should be drafted in accordance with contemporary understandings of equal protection and due process, to avoid repeating the rights violations of the past.

Conclusion

The Alien Enemies Act is an outdated and dangerous wartime authority. It amplifies and gives legal effect to ethno-racial prejudice and wartime hysteria. It has served as the basis for mass internment, expulsions, and the suppression of speech. And the law is broad enough to invite abuse, with anti-immigration politicians and groups now seeking to use it in peacetime for mass deportations.

As this report has shown, the Alien Enemies Act is inconsistent with modern interpretations of equal protection and due process. There are additional avenues for challenging the law that are worth exploring. For instance, the law's summary deportations could be incompatible with postwar treaties like the 1967 Refugee Protocol and the Convention Against Torture, as well as their implementing legislation and regulations. It is unclear how the law's private enforcement mechanism confers standing on complainants and whether its standard for judicial enforcement is void for vagueness. The law also raises serious questions under the Supreme Court's more recent separation-of-powers jurisprudence, particularly regarding the nondelegation doctrine.[182]

But fixing the Alien Enemies Act should not be the work of the courts alone. Congress, which drafted and passed the law two centuries ago, must take action to repeal it. Newer and more appropriate national security authorities already exist to protect the country during wartime. Repealing the Alien Enemies Act would honor constitutional principles and prevent abuse while simultaneously ensuring public safety.

Endnotes

1 The Alien Enemies Act does not apply to U.S. citizens, irrespective of whether they are the natives or dual citizens of a foreign belligerent. Japanese internment, however, targeted both U.S. citizens and noncitizens of Japanese descent. Insofar as the Roosevelt administration interned U.S. citizens of Japanese descent, it relied on World War II–era executive orders, military orders, and legislation — specifically the Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving, or Committing Any Act in Military Areas or Zones. Pub. L. 77-503, 56 Stat. 173 (1942), https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/56/STATUTE-56-Pg173b.pdf. These World War II–era authorities are no longer on the books.

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48 California v. United States, 104 F.3d 1086 (9th Cir. 1997).

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170 See, e.g., Tineo v. Attorney General, 937 F.3d 200, 217 (3d Cir. 2019). Accord Kim, "Rights Retrenchment," 1353. See also Parker to Kennedy, Re: S. 2437, a bill to amend the Alien Enemy Act ("It would not be supposed that persons not charged with offenses against the law of war . . . could be deprived of due process of law."). The rights of civilians thus established, the legal question now confronting the courts is whether enemy combatants detained abroad are entitled to due process. See, e.g., Al-Hela v. Biden, 66 F.4th 217, 266 (D.C. Cir. 2023) (Randolph, J., concurring).

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