ESSAY

WAR, LIBERTY, AND ENEMY ALIENS

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Declaring war is a valuable constitutional ritual. Its formality increases the political and moral accountability of political actors to the electorate for their decision to use military force to achieve the foreign policy objectives of the United States. Further, it makes the threat to use military force more credible in the eyes of other nations because it is difficult, legally as well as politically, for Congress to rescind a declaration of war if the President insists on continuing to prosecute the war. To these two arguments, which I have made before,[1] this Essay adds a third: a formal declaration of war forces Congress to acknowledge publicly, and to accept, that one cost of waging war is that individual liberty in the United States might have to suffer if the nation is to triumph or even merely survive.

In Part I of this Essay, I summarize my view of how constitutional formality, including that embodied in a declaration of war, serves individual liberty by discouraging unaccountable political decisions. In Part II, I analyze the Alien Enemy Act of 1798, a harsh statute designed to combat spying and sabotage during wartime by empowering the President, during a declared war, to order summarily the arrest, internment, and removal of enemy aliens.[2] I ask four questions: What triggers the Act's delegation of extraordinary powers to the President? What is their scope? What terminates the delegation? What is the scope of judicial review? I show that there is no significant legal constraint on the President's exercise of these extraordinary powers save the prerequisite of a formal declaration of war.

In Part III, I examine whether the harshness of the Act counsels

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[1] J. Gregory Sidak, To Declare War, 41 Duke L.J. 27 (1991); J. Gregory Sidak, The Inverse Coase Theorem and Declarations of War, 41 Duke L.J. 325 (1991).

[2] Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577 (current version at 50 U.S.C. § 21 (1988)).

Congress not to use a formal declaration of war to authorize the President to wage war. This antipathy toward formal declarations of war, however, really argues for repealing or amending laws like the Alien Enemy Act, not for eschewing the formality (to say nothing of the candor and moral responsibility) of declaring war when we wage war. I suggest that a declaration of war, more than any purported "functional equivalent," serves to acknowledge candidly and collectively that the price of employing military force might be a substantial, and in some respects even permanent, loss of civil and economic liberties.

I

CONSTITUTIONAL FORMALITY, THE INVERSE COASE THEOREM, AND INDIVIDUAL LIBERTY

Shortly after the Persian Gulf War ended, I argued[3] that both national security and individual liberty are served when Congress authorizes war through a formal declaration rather than through legislation such as the resolution of January 12, 1991, which purported to authorize President Bush's prosecution of the war against Iraq.[4] My analysis employed economic reasoning associated with the Coase Theorem[5] to supplement the more conventional textual and historical analysis of the war clause of the Constitution.[6] This Part presents a brief summary of my argument.

Ronald Coase observed that in the absence of transaction costs the ultimate use of a resource will be determined not by the initial assignment of property rights between two parties, but rather by which of two parties can put the resource to its higher-valued use: The one who values the resource more highly will have the means and incentive to induce the other party to exchange his rights to the resource.[7] In jurisprudence, political theory, and economics, voluntary exchange is generally regarded to be a good thing.[8] And so the Coase Theorem, which ranks as one of the great conceptual insights in economic theory in the twentieth century and for which Coase won the Nobel Prize in 1991, has been norma-

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[3] Sidak, To Declare War, supra note 1.

[4] Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991) [hereinafter Iraq Resolution].

[5] Ronald H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960). For a criticism of my predilection toward constitutional formality and my use of economic analysis to inform the separation of powers, see Harold H. Koh, The Coase Theorem and the War Power: A Response, 41 Duke L.J. 122 (1991).

[6] U.S. Const. art. I, § 8, cl. 11.

[7] See Coase, supra note 5, at 15.

[8] See, e.g., Robert Nozick, Anarchy, State, and Utopia 84-87 (1974); Richard A. Posner, The Problems of Jurisprudence 356-58 (1990); Robert B. Wilson, Exchange, in 2 The New Palgrave: A Dictionary of Economics 202 (John Eatwell et al. eds., 1987).

tively interpreted by scholars of law and economics to imply that legal rules should facilitate bargaining between parties by reducing transaction costs.[9]

Suppose that the property right being traded is the right to decide a political question affecting third parties. Another Nobel laureate in economics, James Buchanan, has observed that when the Coase Theorem is extended to a theory of the state,

> new and previously nonexistent "rights of decision" are brought into being, rights that have economic value that is potentially capturable by the subset of the citizenry empowered to make decisions on behalf of all. Such rights may, however, be considered to be inalienable; that is, the holder is not entitled to sell them or to exploit his possession of them through collection of personal rewards, either directly or indirectly.[10]

Buchanan concludes that "the introduction of inalienability in the rights of governmental decision-takers clearly makes [Coase's] theorem of allocational neutrality invalid."[11]

How can these economic propositions illuminate the manner in which we attempt to protect individual liberty during wartime? Constitutional formality, including strict adherence to the separation of powers in matters such as authorizing the President to prosecute a war, enhances political accountability by making the actions of elected and appointed officials more visible to the electorate than if those officials could act informally at all times. By making formality an element of political legitimacy, the Framers raised the costs of deciding political questions through means other than the highly visible processes textually specified in the Constitution.[12] These heightened transaction costs make bargaining between political actors (particularly those in different branches) more difficult and make it more likely that a given political decision will ultimately be made through the process and by the actors originally assigned decisionmaking authority by the Framers. For example, Congress may not give the President the unilateral power to initiate war in return for the right to nominate the next Supreme Court Justice. This impediment to unauthorized bargaining exists because these actors are agents

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[9] See, e.g., Robert Cooter & Thomas Ulen, Law and Economics 101 (1988); Robert Cooter, The Cost of Coase, 11 J. Legal Stud. 1, 14-20 (1982).

[10] James M. Buchanan, The Coase Theorem and the Theory of the State, 13 Nat. Resources J. 579 (1973), reprinted in Explorations into Constitutional Economics 385, 397 (Robert D. Tollison & Viktor J. Vanberg eds., 1989).

[11] Id. at 398.

[12] Professor William Mayton has called this attribute of constitutional design, which he specifically attributes to article I, "circumspection in lawmaking." William T. Mayton, The Possibilities of Collective Choice: Arrow's Theorem, Article I, and the Delegation of Legislative Power to Administrative Agencies, 1986 Duke L.J. 948, 949.

for the electorate. By making rights of decision inalienable among the branches, the constitutional formality inherent in the separation of powers better enables the electorate to determine whether the agreements reached between their political agents are self-serving or faithful to the interests of the electorate. Those interests I assume to be a mixture of collective security and individual liberty, both civil and economic.

This principle of discouraging ad hoc bargains that would alter the Constitution's initial allocation of decisionmaking authority among political actors I call the Inverse Coase Theorem. It warrants that name because it stands purposefully in conflict with the normative interpretation given the Coase Theorem by the scholars who have studied the economics of private law disputes—namely, that legal rules should reduce transaction costs in order to encourage voluntary exchange. The Inverse Coase Theorem embodies what Coase himself, in his Nobel Memorial Lecture, exhorted scholars to do: "[L]et us study the world of positive transaction costs."[13] Few legal documents provide a more magnificent example than the United States Constitution of an institutional structure whose effect, if not also its conscious design, is to create and exploit positive transaction costs.

II

WAR AND LIBERTY IN A MICROCOSM: THE ALIEN ENEMY ACT

The Alien Enemy Act explicitly conditions its sweeping delegation of authority to the President on the formality of Congress having previously declared war or on the existence of an actual or imminent foreign invasion (which as a constitutional matter obviates a declaration of war[14]). Where there has been no formal declaration of war—as in the cases of the wars that the United States fought in Korea, Vietnam, and Iraq—the President cannot use the Act to summarily arrest, intern, and deport enemy aliens. Accordingly, none of the Presidents who served during those recent wars attempted to exercise the extraordinary powers specified in the Act. The formality of declaring war, with its accompanying high transaction costs, provides what may be the only significant

[13] Ronald H. Coase, The Institutional Structure of Production, 82 Am. Econ. Rev. 713, 717 (1992).

[14] See Sidak, To Declare War, supra note 1, at 52-55 (discussing President's duty, arising from textual provisions of the Constitution, to resist a foreign invasion); id. at 77-78 (discussing Alexander Hamilton, The Examination No. 1 (Dec. 17, 1801) (arguing that a declaration of war is unnecessary when another country has already made war on the United States), reprinted in 25 The Papers of Alexander Hamilton 455-56 (Harold C. Syrett ed., 1977)); see also The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force.").

safeguard in the Alien Enemy Act for protecting individual liberty, for the decision to terminate its delegation of powers rests, in practical terms, with the President himself, and the limited judicial review available under the Act does not extend to claims that the President has abused his discretion.

A. History and Text

Any person in this country who is a citizen of the nation with which the United States is at war becomes as a matter of law an enemy alien, presumed to owe his allegiance to an adverse belligerent.[15] The questions then arise whether these enemy aliens pose a threat to national security and, if so, what should be done with them, and how it should be done. The Alien Enemy Act addresses these questions. It affords far less protection of individual liberty than do peacetime statutes, which guarantee that an alien will not be deported without the basic rights of due process.[16] This difference is based on the recognition that, in wartime, the President must be able to act quickly to intern or remove persons who, taken as a class, seem likely to jeopardize the nation's security.

The Alien Enemy Act was enacted on July 6, 1798, eleven days after Congress enacted the notorious Alien Act[17] and eight days before it enacted the even more infamous Sedition Act.[18] The three statutes reflected the tensions that existed between the United States and France during John Adams's Federalist administration, and that eventually erupted into the undeclared Quasi War at sea.[19] Presumably directed at French nationals living in the United States, and at British subjects who were propagandists for radical French ideas, the Alien Act empowered the President to order any alien to leave the country whom he "judge[d] dangerous to the peace and safety of the United States."[20] This Act expired on June 25, 1800, however, never having been enforced.[21] In contrast, the Sedition Act, which prohibited "publishing any false, scandal-

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[15] Lamar v. Browne, 92 U.S. 187, 194 (1874); Ex parte Graber, 247 F. 882, 884 (N.D. Ala. 1918).

> The category of resident enemy aliens includes all persons resident in the United States, but not citizens of the United States, who owe allegiance to a country with which the United States is at war, from the time of declaration of war until the war is terminated by a political act to be effected by a treaty, legislation, or presidential proclamation.

Michael Brandon, Legal Control over Resident Enemy Aliens in Time of War in the United States and in the United Kingdom, 44 Am. J. Int'l L. 382, 382 (1950).

[16] See Bridges v. Wixon, 326 U.S. 135, 152-53 (1945).

[17] Act of June 25, 1798, ch. 58, 1 Stat. 570 (expired 1800).

[18] Act of July 14, 1798, ch. 74, 1 Stat. 596 (expired 1801).

[19] See generally Alexander DeConde, The Quasi War: The Politics and Diplomacy of the Undeclared War with France, 1797-1801 (1966).

[20] 1 Stat. at 571, § 1.

[21] John C. Miller, Crisis in Freedom: The Alien and Sedition Acts 188-93 (1951).

ous and malicious writing . . . against the government of the United States, or either house of the Congress . . . or the President . . . with intent to defame [them] . . . or to bring them . . . into contempt or disrepute,"[22] did produce some politically motivated prosecutions.[23] Reflecting its political motivations, the Act was drafted to expire on the last day of Adams's presidential term, March 3, 1801.[24] The Sedition Act backfired for its Federalist draftsmen, of course, because its enactment prompted the Republican Thomas Jefferson in 1798 to draft the Kentucky Resolutions[25] denouncing it and helped elect him President two years later, whereupon he pardoned those convicted under the Act and remitted their fines.[26] Despite the absence of any judicial review of the Sedition Act in the Supreme Court, the statute was soon regarded to have been a patent violation of the first amendment.[27]

Notwithstanding its consanguinity with the Alien and Sedition Acts, the Alien Enemy Act has survived intact to the present. Its constitutionality was never seriously questioned contemporaneously by Jefferson or Madison, the two prominent critics of the Federalists' ignominious "Friendly Alien Act,"[28] or subsequently by a majority of any court. One of the most sweeping delegations of power to the President to be found anywhere in *Statutes at Large*, the Alien Enemy Act consists in essential part of two sentences that, in the words of Justice Frankfurter, have "remained the law of the land, virtually unchanged since 1798."[29] The first

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[22] 1 Stat. at 596, § 2.

[23] See John E. Nowak & Ronald D. Rotunda, Constitutional Law § 16.5, at 938-39 (4th ed. 1991).

[24] Noble E. Cunningham, In Pursuit of Reason: The Life of Thomas Jefferson 216 (1987).

[25] Drafts of the Kentucky Resolutions of 1798 (Nov. 1798), reprinted in 7 The Writings of Thomas Jefferson 289-309 (Paul L. Ford ed., 1896). James Madison, of course, collaborated with Jefferson on the Kentucky Resolutions, exercising a moderating influence on the final version and drafting his own equally influential Virginia Resolutions concerning the Alien and Sedition Acts. See Resolutions of 1798 (Dec. 21, 1798), reprinted in 6 The Writings of James Madison 326-31 (Gaillard Hunt ed., 1906).

[26] See Letter from Thomas Jefferson to Mrs. Adams (July 22, 1804), in 4 Jefferson's Works 555, 556 (H.A. Washington ed., 1861) (cited in New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964)).

[27] See, e.g., Repeal of the Alien and Sedition Laws, 5th Cong., 3d Sess. (1799) (petition submitted to Congress by citizens of New York, New Jersey, Pennsylvania, and Virginia urging repeal of the Alien and Sedition Acts), reprinted in American State Papers: Documents, Legislative and Executive, of the Congress of the United States, class 10, vol. 1, doc. no 110, at 181 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832); see also James M. Smith, Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties 431 (1956); 3 Joseph Story, Commentaries on the Constitution of the United States §§ 1288-1289 (1833).

[28] Justice Frankfurter observed: "There was never any questioning of the Alien Enemy Act of 1798 by either Jefferson or Madison nor did either ever suggest its repeal." Ludecke v. Watkins, 335 U.S. 160, 171 n.18 (1948) (citing 6 The Writings of James Madison 360-61 (Gaillard Hunt ed., 1906); 8 The Writings of Thomas Jefferson 466 (Paul L. Ford ed., 1905)).

[29] *Ludecke*, 335 U.S. at 162.

of the two sentences, the opening sentence of the statute, reads as follows:

> 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.[30]

By itself, this first sentence of the Alien Enemy Act represents a significant curtailment of the civil liberties of certain persons residing in the United States, albeit of persons who are not citizens. Congress has not narrowed this provision of the Act despite subsequent court rulings that the Constitution does confer certain protections on persons in the United States who are not citizens.[31]

The second sentence of the Act defines in broadest terms the scope of the powers being delegated to the President to effect the purposes set forth in the statute's first sentence:

> The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety.[32]

Thus, the President is authorized by statute to arrest, detain, and deport enemy aliens according to rules of his own making—subject, as we shall see, to virtually no check from the courts through judicial review.

The Alien Enemy Act contains several other provisions that illuminate the mechanics of deporting enemy aliens. To enemy aliens who are "not chargeable with actual hostility . . . or other crime against the public

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[30] 50 U.S.C. § 21 (1988). As originally drafted, this section was restricted to males. Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577. It was amended during World War I to read as quoted here and to apply equally to women. Act of Apr. 16, 1918, ch. 55, 40 Stat. 531 (amending R.S. § 4067).

[31] See, e.g., Hampton v. Mow Sun Wong, 426 U.S. 88, 116 (1976); see also Laurence H. Tribe, American Constitutional Law § 5-16, at 358-59 (2d ed. 1988); T. Alexander Aleinikoff, Federal Regulation of Aliens and the Constitution, 83 Am. J. Int'l L. 862, 864 (1989); Gerald L. Neuman, Whose Constitution?, 100 Yale L.J. 909, 942 (1991); Gerald M. Rosberg, The Protection of Aliens from Discriminatory Treatment by the National Government, 1977 Sup. Ct. Rev. 275, 275.

[32] 50 U.S.C. § 21.

safety," the Act gives a grace period so that they can voluntarily arrange for "the recovery, disposal, and removal of [their] goods and effects, and for [their] departure."[33] The length of this period shall be that "stipulated by any treaty . . . between the United States and the hostile nation or government" of which the alien is a "native, citizen, denizen or subject."[34] In the absence of any such treaty provision stipulating the grace period, "the President may ascertain and declare such reasonable time as may be consistent with the public safety, and according to the dictates of humanity and national hospitality."[35] In the latter case, reviewing courts have considered a thirty-day grace period for voluntary departure to be reasonable on its face or simply not subject to judicial review.[36]

Section 2 of the original Act authorizes all state and federal courts of criminal jurisdiction to hear complaints against enemy aliens and to issue orders accordingly. This jurisdiction is mandatory, for the statute provides that "it shall be the duty" of these courts

> to cause such alien or aliens to be duly apprehended and convened before such court, judge or justice; and after a full examination and hearing on such complaint, and sufficient cause therefor appearing, shall and may order such alien or aliens to be removed out of the territory of the United States, or to give sureties of their good behaviour, or to be otherwise restrained, conformably to the proclamation or regulations which shall and may be established as aforesaid, and may imprison, or otherwise secure such alien or aliens, until the order which shall and may be made, as aforesaid, shall be performed.[37]

This grant of jurisdiction to the courts, however, does not detract from the President's own independent power under section 1 of the Alien Enemy Act to order the removal of enemy aliens.[38] Litigation arising from the War of 1812 established that the Act empowers the President to order a United States Marshal to remove an enemy alien without an antecedent court order.[39] This conclusion follows from a simple reading of section 4 of the Act, which provides that the Marshal of the district in which the enemy alien is apprehended has a duty to execute a removal

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[33] Id. § 22.

[34] Id.

[35] Id. See Hughes v. Techt, 176 N.Y.S. 356 (N.Y. Sup. Ct.), aff'd, 177 N.Y.S. 420 (N.Y. App. Div. 1919), aff'd, 128 N.E. 185 (N.Y.), cert. denied, 254 U.S. 643 (1920) (World War I decision interpreting time allowed for voluntary departure in treaty between United States and Austria).

[36] United States ex rel. Hoehn v. Shaughnessy, 175 F.2d 116, 117 (2d Cir.), cert. denied, 338 U.S. 872 (1949) (prima facie reasonable); United States ex rel. Zeller v. Watkins, 167 F.2d 279, 282 (2d Cir. 1948) (nonreviewable).

[37] 1 Stat. at 577-78, § 2 (codified at 50 U.S.C. § 23 (1988)).

[38] Id. at 577, § 1 (codified at 50 U.S.C. § 21 (1988)).

[39] Lockington's Case, Brightly (N.P.) 269, 279-80 (Pa. 1813); see also United States ex rel. Schlueter v. Watkins, 67 F. Supp. 554, 556 (S.D.N.Y. 1946).

order, whether it is required by "warrant of the President, or of the court, judge, or justice."[40]

B. *The Legal Events That Trigger the Act's Delegation of Extraordinary Powers to the President*

The Alien Enemy Act can be triggered in only two situations. The first is when a "foreign nation or government" attacks, or is about to attack, the United States. An attack on an American port by pirates in the previous century, or the bombing of a commercial airliner by terrorists in this century, would not trigger the Act.[41] Nor presumably would Pancho Villa's raids against Americans in New Mexico in 1913 have justified rounding up Mexican nationals under the Act.[42] An intriguing question that has not yet arisen is whether a court would review the President's determination that a particular hostile act constituted an "invasion or predatory incursion" triggering the Alien Enemy Act. It seems unlikely that a court would do so, as my discussion of judicial review will suggest presently. Similarly, it is an open question whether a court would review the President's determination that an invasion or predatory incursion was actually "threatened." Again, I doubt that, had President Kennedy invoked the Alien Enemy Act during the Cuban Missile Crisis, a court would have been willing to review his determination that a legitimate threat of attack existed. Whether lesser crises would evoke the same judicial abstention is a closer question.

The Act further requires that the "invasion or predatory incursion" be "perpetrated, attempted, or threatened against the *territory* of the United States."[43] A dogfight between American and Libyan fighters over international waters in the Gulf of Sidra could not authorize the President summarily to arrest Libyans in the United States because no attack would have been made on United States territory. In this respect, the Alien Enemy Act is worded more narrowly than the War Powers Reso-

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[40] 50 U.S.C. § 24; see also Lockington v. Smith, 15 F. Cas. 758 (C.C.D. Pa. 1817) (No. 8448); Ex parte Graber, 247 F. 882, 884 (N.D. Ala. 1918).

[41] But see Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979), cert. denied, 446 U.S. 957 (1980) (upholding, against an equal protection challenge, a regulation promulgated during the Iranian Hostage Crisis by the Attorney General at the direction of President Carter requiring all post-secondary students who were natives or citizens of Iran to inform the Immigration and Naturalization Service of their residence and maintenance of nonimmigrant status). During the Persian Gulf War, Senator Thurmond proposed a "Terrorist Alien Removal Act of 1991," which would have empowered the Department of Justice summarily to detain and deport persons it believed to be alien terrorists. 137 Cong. Rec. S1186-89 (daily ed. Jan. 24, 1991) (alien terrorist provisions of S. 265). The legislation did not pass. It would have amended the Immigration and Nationality Act, not the Alien Enemy Act.

[42] See Harley Notter, The Origins of the Foreign Policy of Woodrow Wilson 484, 495 (1937).

[43] 50 U.S.C. § 21 (emphasis added).

lution, which authorizes the President to introduce American forces into hostilities not only when an attack has been made "upon the United States, its territories or possessions," but also when an attack has been made on "its armed forces," wherever they might be.[44]

The other event, of course, that triggers the Alien Enemy Act is a formal declaration of war by the United States, such as the declarations made by Congress in 1812, 1846, 1898, 1917, 1941, and 1942.[45] Less obvious is the possibility that the Act will be triggered by war being declared *on* rather than *by* the United States. However, the condition precedent to the statute's delegation of emergency powers to the President is simply whether "there *is* a declared war between the United States and any foreign nation or government."[46] This first clause of the first sentence of the Act lacks a transitive verb. It does not begin, "Whenever the United States declares war on any foreign nation or government . . . ." So, for example, Thomas Jefferson could have invoked the Act in 1801, when he informed Congress for the first time in his annual message that United States ships had been waging war in the Mediterranean against the Barbary Pirates, whose leader, the Bey of Tripoli, in Jefferson's words "had already declared war" on the United States.[47] Another related question is whether the judiciary could and would review the President's determination that a particular proclamation by a foreign government constituted a declaration of war against the United States sufficient to trigger the Alien Enemy Act. Here too, my subsequent discussion of judicial review will suggest that the answer is almost surely "no."

Either of the two events described above—an actual or imminent foreign attack on the territory of the United States, or a declaration of war by or on the United States—is a necessary, but not sufficient, condition for triggering the Alien Enemy Act. The additional act necessary to trigger the delegation of emergency powers is that the President "make[]

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[44] 50 U.S.C. § 1541(c) (1988).

[45] Act of June 18, 1812, ch. 102, 2 Stat. 755 (United Kingdom of Great Britain and Ireland); Act of May 13, 1846, ch. 16, 9 Stat. 9 (Mexico); Act of Apr. 25, 1898, ch. 189, 30 Stat. 364 (Spain); S.J. Res. 1, 65th Cong., 1st Sess., 40 Stat. 1 (1917) (Germany); H.R.J. Res. 169, 65th Cong., 2d Sess., 40 Stat. 429 (1917) (Austro-Hungarian Empire); S.J. Res. 116, 77th Cong., 1st Sess., 55 Stat. 795 (1941) (Japan); S.J. Res. 119, 77th Cong., 1st Sess., 55 Stat. 796 (1941) (Germany); S.J. Res. 120, 77th Cong., 1st Sess., 55 Stat. 797 (1941) (Italy); H.R.J. Res. 319, 77th Cong., 2d Sess., 56 Stat. 307 (1942) (Bulgaria); H.R.J. Res. 320, 77th Cong., 2d Sess., 56 Stat. 307 (1942) (Hungary); H.R.J. Res. 321, 77th Cong., 2d Sess., 56 Stat. 307 (1942) (Rumania).

[46] 50 U.S.C. § 21 (emphasis added).

[47] First Annual Message to Congress (Dec. 8, 1801), in 1 Messages and Papers of the Presidents 326 (James D. Richardson ed., 1897). I am assuming that the Bey of Tripoli was a legitimate representative of a "foreign nation or government" for purposes of the Alien Enemy Act and not just some Mediterranean gangster. That Jefferson did not invoke the Act is no surprise; presumably few, if any, Barbary Pirates resided in the United States in 1801.

public proclamation of the event."[48] The first such proclamation, by James Madison during the War of 1812, stated that "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 marshals," subject to certain exceptions.[49] In the next two declared foreign wars, the Mexican War and the Spanish American War, Presidents James Polk and William McKinley appear not to have claimed these extraordinary powers at all: None of the reported cases interpreting the Alien Enemy Act arose from the Mexican War or the Spanish American War, and no proclamation concerning enemy aliens can be found in the messages and papers of James Polk or William McKinley.[50] On the other hand, Woodrow Wilson's proclamation the day after the United States declared war on Germany in 1917,[51] and Franklin Roosevelt's proclamation the day after the United States declared war on Japan in 1941,[52] were lengthy documents announcing detailed restrictions on the wartime activities of enemy aliens.

C. *The Scope of the President's Delegated Powers*

The Alien Enemy Act empowers the President to do far more than jail and deport foreigners. The President may vary "the manner and degree of the restraint to which [enemy aliens] shall be subject and in what cases," and he may specify "upon what security their residence shall be permitted."[53] Most generally, the President may "establish any other

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[48] 50 U.S.C. § 21.

[49] Proclamation (Feb. 23, 1813), quoted in Lockington's Case, Brightly (N.P.) 269, 271 (Pa. 1813).

[50] Although it is difficult to prove the negative, no proclamation by either Polk or McKinley can be found in *Messages and Papers of the Presidents*. Polk did issue a proclamation the day that the United States declared that it was in a state of war with Mexico, but the proclamation said nothing about enemy aliens. Proclamation (May 13, 1846), reprinted in 4 Messages and Papers of the Presidents 371, 470 (James D. Richardson ed., 1897). Polk's diary does not refer to any proclamation concerning enemy aliens. James K. Polk, Polk: The Diary of a President, 1845-1849 (Allan Nevins ed., 1929). Nor is any such proclamation mentioned by Polk's biographers. See, e.g., Paul H. Bergeron, The Presidency of James K. Polk (1987); Lucien B. Chase, History of the Polk Administration (1850); Eugene I. McCormac, James K. Polk: A Political Biography (1922). McKinley's biographers and historians of the Spanish American War do not mention a proclamation concerning enemy aliens either. See, e.g., Elbert J. Benton, International Law and Diplomacy of the Spanish American War (1908); Margaret Leech, In the Days of McKinley (1959); Henry C. Lodge, The War with Spain (1902); David F. Trask, The War with Spain in 1898 (1981).

[51] Proclamation (Apr. 6, 1917), reprinted in 17 Messages and Papers of the Presidents 8242 [hereinafter Wilson Proclamation].

[52] Proclamation No. 2525, 6 Fed. Reg. 6321 (1941) [hereinafter Roosevelt Proclamation].

[53] 50 U.S.C. § 21.

regulations which are found necessary"—presumably by himself or his designated subordinate—"in the premises and for the public safety."[54] In effect, the President may set elaborate terms and conditions that must be met before an enemy alien, even one loyal to the United States, can continue residing in the United States.

Woodrow Wilson's proclamation during World War I illustrates this point. He warned non-naturalized Germans in the United States "to refrain from crime against the public safety, . . . to refrain from actual hostility or giving information, aid or comfort to the enemies of the United States, and to comply strictly with the regulations which are hereby or which may be from time to time promulgated by the President."[55] But he also assured them that "so long as they shall conduct themselves in accordance with law, they shall be undisturbed in the peaceful pursuit of their lives and occupations and be accorded the consideration due to all peaceful and law-abiding persons, except so far as restrictions may be necessary for their own protection and for the safety of the United States."[56]

What were these necessary restrictions? Wilson listed twelve conditions or prohibitions.[57] The purpose for most of these was self-evident.

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[54] Id.

[55] Wilson Proclamation, supra note 51, at 8243.

[56] Id.

[57] "And pursuant to the authority vested in me, I hereby declare and establish the following regulations, which I find necessary in the premises and for the public safety:

(1) An alien enemy shall not have in his possession, at any time or place, any firearm, weapon or implement of war, or component part thereof, ammunition, maxim or other silencer, bomb or explosive or material used in the manufacture of explosives;

(2) An alien enemy shall not have in his possession at any time or place, or use or operate any aircraft or wireless apparatus, or any form of signalling device, or any form of cipher code, or any paper, document or book written or printed in cipher or in which there may be invisible writing;

(3) All property found in the possession of an alien enemy in violation of the foregoing regulations shall be subject to seizure by the United States;

(4) An alien enemy shall not approach or be found within one-half of a mile of any Federal or State fort, camp, arsenal, aircraft station, Government or naval vessel, navy yard, factory or workshop for the manufacture of munitions of war or of any products for the use of the army or navy;

(5) An alien enemy shall not write, print, or publish any attack or threats against the Government or Congress of the United States, or either branch thereof, or against the measures or policy of the United States, or against the person or property of any person in the military, naval, or civil service of the United States, or of the States or Territories, or of the District of Columbia, or of the municipal governments therein;

(6) An alien enemy shall not commit or abet any hostile act against the United States, or give information, aid, or comfort to its enemies;

(7) An alien enemy shall not reside in or continue to reside in, to remain in, or enter any locality which the President may from time to time designate by Executive Order as a prohibited area in which residence by an alien enemy shall be found by him to constitute a danger to the public peace and safety of the United States, except by permit from the President and except under such limitations or restrictions as the Presi-

Enemy aliens, for example, could not possess firearms, ammunition, or explosives, and they had to stay at least half a mile away from any military facility or factory producing war material. For some regulations, however, the governmental objective was far less clear, and the means employed to achieve it were potentially overbroad. For example, an alien enemy could not "write, print, or publish any attack or threats against the Government or Congress of the United States, . . . or against the measures or policy of the United States."[58] Although the concern over "threats" is straightforward enough, and the term may not be difficult to define in this context, Wilson's prohibition on any written, printed, or published "attack . . . against the measures or policy of the United States" was so broad that it might have included a letter to the editor criticizing the operation of a local school district, a letter to one's United States Representative opposing a tax increase, or a brief challenging the constitutionality of a statute. Wilson's Proclamation allowed for substantial incursions on freedom of speech and press, as well as on the right to petition government.[59]

Franklin Roosevelt's proclamation on December 8, 1941, concerning Japanese enemy aliens, was accompanied by thirteen paragraphs of

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dent may prescribe;

(8) An alien enemy whom the President shall have reasonable cause to believe to be aiding or about to aid the enemy, or to be at large to the danger of the public peace or safety of the United States, or to have violated or to be about to violate any of these regulations, shall remove to any location designated by the President by Executive Order, and shall not remove therefrom without a permit, or shall depart from the United States if so required by the President;

(9) No alien enemy shall depart from the United States until he shall have received such permit as the President shall prescribe, or except under order of a court, judge, or justice, under Sections 4069 and 4070 of the Revised Statutes;

(10) No alien enemy shall land in or enter the United States, except under such restrictions and at such places as the President may prescribe;

(11) If necessary to prevent violations of these regulations, all alien enemies will be obliged to register;

(12) An alien enemy whom there may be reasonable cause to believe to be aiding or about to aid the enemy, or who may be at large to the danger of the public peace or safety, or who violates or attempts to violate, or of whom there is reasonable ground to believe that he is about to violate, any regulation duly promulgated by the President, or any criminal law of the United States, or of the States or Territories thereof, will be subject to summary arrest by the United States Marshal, or his deputy, or such other officer as the President shall designate, and to confinement in such penitentiary, prison, jail, military camp, or other place of detention as may be directed by the President."

Id. at 8244-45.

[58] Id. at 8244, para. 5.

[59] U.S. Const. amend. I. This infringement of the right of free speech and the right to petition government is made more stark by Professor Neuman's observation that, at the time of Wilson's censorship of speech by enemy aliens, some of those aliens were enfranchised voters in their states of residence, and some were even considered citizens of the state, though not of the United States. See Gerald L. Neuman, "We the People": A German and American Perspective, 13 Mich. J. Int'l L. 259, 291-310 (1992).

regulations, many addressing the same subjects as Wilson's proclamation in 1917.[60] Roosevelt incorporated these regulations by reference to similar proclamations made the next day concerning German and Italian enemy aliens.[61] The regulations imposed extensive travel restrictions on enemy aliens, especially in the Canal Zone, Hawaii, the Philippines, Alaska, Puerto Rico, and the Virgin Islands—locations outside the continental United States and accessible by sea and, therefore, presumably much harder to defend.[62] Several small differences between Roosevelt's proclamation and Wilson's underscore how new products and services that raised living standards between 1917 and 1941 became new objects to be regulated in the name of the war effort: Enemy aliens were now forbidden to possess cameras or to "undertake any air flight."[63] Moreover, the list of industrial or commercial facilities from which an enemy alien, upon penalty of summary apprehension, could be barred if the Attorney General or Secretary of War "deem[ed] it necessary[] for the public safety and protection" had become quite long, presumably curtailing significantly the employment opportunities of enemy aliens.[64] Finally, Roosevelt's regulations gave the Attorney General broad authority to circumscribe the rights of enemy aliens to speak and assemble:

> No alien enemy shall be a member or an officer of, or affiliated with, any organization, group or assembly hereafter designated by the Attorney General, nor shall any alien enemy advocate, defend or subscribe to the acts, principles or policies thereof, attend any meetings, conventions or gatherings thereof or possess or distribute any literature, propaganda or other writings or productions thereof.[65]

If it can be said that World War II more directly threatened the security of the United States than World War I, so also can it be said that Roosevelt's proclamation under the Alien Enemy Act was, relative to Wilson's proclamation twenty-four years earlier, a harsher response to

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[60] Roosevelt Proclamation, supra note 52, at 6322-23.

[61] Proclamation No. 2526, 6 Fed. Reg. 6323 (1941) (German enemy aliens); Proclamation No. 2527, 6 Fed. Reg. 6324 (1941) (Italian enemy aliens).

[62] Roosevelt Proclamation, supra note 52, at 6322-23, paras. 1-4, 11.

[63] Id. at 6322-23, paras. 5-6.

[64] Id. at 6323, para. 9. The list consisted of "any fort, camp, arsenal, airport, landing field, aircraft station, electric or other power plant, hydroelectric dam, government naval vessel, navy yard, pier, dock, dry dock, or any factory, foundry, plant, workshop, storage yard, or warehouse for the manufacture of munitions or implements of war or any thing of any kind, nature or description for the use of the Army, the Navy or any country allied or associated with the United States, or in any wise connected with the national defense of the United States, . . . a designated area surrounding any canal or any wharf, pier, dock or dry dock used by ships or vessels of any designated tonnage engaged in foreign or domestic trade, or of any warehouse, shed, elevator, railroad terminal, depot or yard or other terminal, storage or transfer facility." Id.

[65] Id. at 6323, para. 13.

the wartime dangers of spies and saboteurs.[66]

D. Administration of the Alien Enemy Act During World War II

The text of the Alien Enemy Act and the court decisions interpreting it can convey only a limited picture of how the statute actually operated during the most recent war in which it was invoked. A more complete picture emerges from the wartime volumes of *Annual Report of the Attorney General*. In January 1943, Attorney General Francis Biddle described how arrests were made among the 900,000 persons considered to be enemy aliens when the United States entered the war:

> Immediately after the attack on Pearl Harbor, . . . it was necessary to take every step possible to protect the United States against the possible hostile activities of that small number of enemy aliens who are actively disloyal to the United States. The Department was prepared to take the necessary measures. The Federal Bureau of Investigation had collected a great amount of information concerning possible subversives and had compiled a list of Axis nationals who might prove dangerous to the national security. This information had been carefully analyzed by the Special War Policies Unit and potentially dangerous aliens classified and cataloged. On the night of December 7, 1941, the most dangerous of the persons in this group were taken into custody; in the following weeks a number of others were apprehended. Each arrest was made on the basis of information concerning the specific alien taken into custody. We have used no dragnet techniques and have conducted no indiscriminate, large-scale raids.[67]

The Attorney General further said that, although the Alien Enemy Act did not entitle an enemy alien to a hearing, "I believed that, nevertheless, we should give each enemy alien who had been taken into custody an opportunity for a hearing on the question whether he should be in-

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[66] Although the severity of these prohibitions is startling, it must be recalled that eight Nazi saboteurs landed from submarines off the Long Island and Florida coasts in June 1942. They were apprehended by the FBI, convicted by a military court, and condemned to death. President Roosevelt commuted the sentences of two of the saboteurs who cooperated with the United States Government to 30 years, and life imprisonment, at hard labor, respectively. The others were electrocuted on August 8, 1942, barely two months after infiltrating the United States. See Proclamation No. 2561 (July 2, 1942), reprinted in 11 The Public Papers and Addresses of Franklin D. Roosevelt, 1942, at 296-98 & note (Samuel I. Rosenman ed., 1950).

[67] 1942 Att'y Gen. Ann. Rep. 14. One effect of the Alien Enemy Act, if not its recognized objective, was to authorize presidential hostage-taking that would confer on the United States the leverage to demand proper treatment of Americans held by an enemy during wartime. For a discussion of the strategic use of hostages and credible commitments, see Oliver E. Williamson, The Economic Institutions of Capitalism 163-205 (1985).

The internment of Japanese-Americans during World War II was not ordered pursuant to the Alien Enemy Act. Clearly, however, it constituted an enormous infringement of individual liberty. See Korematsu v. United States, 323 U.S. 214 (1944); Eugene V. Rostow, The Japanese-American Cases—A Disaster, 54 Yale L.J. 489 (1945).

terned."[68] More than 100 Enemy Alien Hearing Boards, composed of community leaders working without pay, were established to make internment recommendations to the Attorney General.[69]

By June 30, 1943, Attorney General Biddle had issued final orders in 9121 cases for which the Enemy Alien Hearing Boards had held hearings and made recommendations.[70] Of those enemy aliens, 4132 were interned, 3716 paroled, and 1273 released.[71] By December 31, 1943, the number of interned enemy aliens had dropped to 3402, and the numbers of those paroled and released had increased to 4411 and 1576, respectively.[72] The Immigration and Naturalization Service took over responsibility from the Army for detention of interned aliens and operated sixteen facilities for this purpose, including one for families.[73] Some internees were "permitted to engage in remunerative employment outside the camp, principally in agriculture and public works."[74]

In his report for the fiscal year ending June 30, 1944, the Attorney General reported that there were 2525 alien enemies interned, 4840 paroled, and 1926 released.[75] The number of detentions, moreover, had decreased from 9341 on June 30, 1943 to 6238 a year later, and four detention centers had closed.[76]

Attorney General Biddle then turned to the looming question of repatriation:

> It may be anticipated that a substantial number of the enemy aliens now interned will be held until the termination of hostilities. At that time we shall face the difficult problem of differentiating between those persons who may properly be released, subject to the normal operation

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[68] 1942 Att'y Gen. Ann. Rep. 14.

[69] Id. at 14-15.

[70] 1943 Att'y Gen. Ann. Rep. 9.

[71] Id. Internments consisted of 1871 Germans, 213 Italians, 2037 Japanese, no Bulgarians, 7 Hungarians, 3 Rumanians, and one other. Parolees consisted of 1597 Germans, 436 Italians, 1665 Japanese, 2 Bulgarians, 10 Hungarians, 3 Rumanians, and 3 others. Releases consisted of 552 Germans, 266 Italians, 436 Japanese, no Bulgarians, 17 Hungarians, 2 Rumanians, and no others. Id. By comparison, in Great Britain alien tribunals examined the cases of 74,233 Germans and Austrians during the first six months of World War II, ordering only 2000 to be interned. Robert M.W. Kempner, The Enemy Alien Problem in the Present War, 34 Am. J. Int'l L. 443, 446 (1940).

[72] 1943 Att'y Gen. Ann. Rep. 9.

[73] Id. at 10.

[74] Id.

[75] 1944 Att'y Gen. Ann. Rep. 6. The Attorney General, however, added this caveat:

> The total number in custody of the Immigration and Naturalization Service in each period has been greater than the figures given above, since the total includes not only resident alien enemies but also a number of members of their families who have requested internment, as well as certain alien enemy seamen and alien enemies held for Central and South American countries.

Id.

[76] Id.

> of the Immigration laws, and those who should be repatriated to the country of their allegiance under the extraordinary powers conferred by Congress by the alien enemy statute which derives from the Act of July 6, 1798.[77]

Indeed, in his report at the end of the following fiscal year, the Attorney General reported that the victory in Europe "and the prospect of an early peace in the Pacific caused the tenor of the alien enemy program to change during the year from that of detention and restriction to that of repatriation."[78] He elaborated:

> As a result of the cessation of hostilities in Europe in May, 1945, the cases of all 950 of the German internees resident in the United States were reviewed in order to determine whether such aliens should be released or paroled from internment or tentatively classified for repatriation to Germany. Hearings were held and reviews made in 155 new cases of resident alien enemies, most of whose names were found on newly discovered authentic lists of Nazi Party members . . . .
>
> At the close of the year, 3,165 resident alien enemies remained in internment, 4,908 were on parole and 2,470 had been unconditionally released. A total of 1,379 alien enemies were repatriated to Europe during the fiscal year.[79]

To effect the transition from detention to repatriation, President Truman issued a proclamation on July 14, 1945, delegating to the Attorney General the authority under the Alien Enemy Act to order the removal of all enemy aliens "who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the . . . governments [of Japan, Germany, Italy, Bulgaria, Hungary, or Rumania] or to the principles of government thereof."[80]

With the end of the war in sight, the Attorney General's final remarks seemed almost wistful, if not also self-congratulatory:

> The success which accompanied the Allied military effort was reflected in the change of attitude exhibited by the internees. A more conciliatory spirit prevailed among them and fewer complaints were received. Anxiety over the fate of relatives in war-torn areas and fear of conditions to be faced after repatriation animated many of them and reports from former internees who had been repatriated did not help to alleviate such fears. Many such repatriates expressed regret that they had chosen to be repatriated and one such writer referred to his former internment camp as a "lost paradise."[81]

The reluctance to return to the rubble of one's defeated homeland, rather

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[77] Id. (citation omitted).

[78] 1945 Att'y Gen. Ann. Rep. 5.

[79] Id. at 5-6 (footnote omitted).

[80] Proclamation No. 2655, 10 Fed. Reg. 8947 (1945).

[81] 1945 Att'y Gen. Ann. Rep. 6-7.

than the continuing desire to subvert the government of the United States, might in fact be the more plausible explanation for why those enemy aliens whom the Attorney General ordered to be removed after the hostilities of World War II ended fought their repatriation so vigorously, if with little success, all the way to the Supreme Court.

E. The Legal Events That Terminate the Act's Delegation of Extraordinary Powers to the President

As a practical matter, it is the President, not Congress or the Supreme Court, who decides whether he continues to have the power under the Alien Enemy Act to arrest, intern, and remove enemy aliens after actual hostilities cease. This issue was central to *Ludecke v. Watkins*,[82] decided in 1948, three years before the war was formally terminated.[83] In *Ludecke*, an alien held pursuant to the Alien Enemy Act argued that the President's powers of summary deportation already had expired when the Attorney General ordered his removal in January 1946, well after the defeat of Nazi Germany.[84] Writing for the Court, Justice Frankfurter rejected this argument, reasoning that "[t]his claim in effect nullifies the power to deport alien enemies," since one hardly could expect the President to attempt the return of German nationals to Nazi Germany while battles continued to rage.[85] In support of this conclusion, Justice Frankfurter produced an insight, more constitutional or jurisprudential in nature than statutory, that transcends the arcane provisions of the Alien Enemy Act:

> War does not cease with a cease-fire order, and power to be exercised by the President such as that conferred by the Act of 1798 is a process which begins when war is declared but is not exhausted when the shooting stops. "The state of war" may be terminated by treaty or legislation or Presidential proclamation. Whatever the mode, its termination is a political act. Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled.[86]

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[82] 335 U.S. 160 (1948).

[83] See note 89 and accompanying text infra.

[84] 335 U.S. at 166.

[85] Id. This reasoning would appear to be in conflict with the Attorney General's own report that 1379 enemy aliens had been repatriated to Europe during the year ending June 30, 1945. See 1945 Att'y Gen. Ann. Rep. 6.

[86] 335 U.S. at 167-69 (citations & footnotes omitted); accord, United States ex rel. Bejeuhr v. Shaughnessy, 177 F.2d 436, 437-38 (2d Cir. 1949), cert. denied, 338 U.S. 948 (1950); United States ex rel. Hoehn v. Shaughnessy, 175 F.2d 116, 117 (2d Cir.), cert. denied, 338 U.S. 872 (1949); United States ex rel. Kessler v. Watkins, 163 F.2d 140, 142 (2d Cir.), cert. denied, 332 U.S. 838 (1947); United States ex rel. Von Heymann v. Watkins, 159 F.2d 650, 652 (2d Cir. 1947); United States ex rel. Hack v. Clark, 159 F.2d 552, 554 (7th Cir. 1947); Citizens Protec-

The upshot of this reasoning is that, save the extraordinary and improbable step of impeachment, the only sure check by another branch on the President's summary deportation of enemy aliens after hostilities have ceased is a two-thirds vote of both houses of Congress: If the President were not ready to proclaim the end of the war or submit a peace treaty to the Senate for ratification, the only formal way to end the war would be through an act or joint resolution of Congress that would survive the President's veto.

The Alien Enemy Act thus exemplifies a more general principle, which I have described elsewhere,[87] of how a formal declaration of war creates a barrier to exit from war, and thus, one would hope, a barrier to entry in the sense of demanding a high degree of circumspection and accountability from members of Congress in their decision to take the nation into war. The Alien Enemy Act provides one clear example of the cost to individual liberty associated with that barrier to exit from war.

For example, four years after it decided *Ludecke*, the Supreme Court granted a writ of habeas corpus to a German citizen, Hubert Jaegeler, who had been interned for ten years under the Alien Enemy Act.[88] Jaegeler petitioned the Court for certiorari after the Third Circuit affirmed the denial of his habeas corpus petition. While the Court was considering Jaegeler's petition in October 1951, Congress enacted, and President Truman approved, a joint resolution formally terminating the state of war between the United States and Germany.[89] The Court thereupon granted certiorari and issued a terse per curiam decision stating: "The statutory power of the Attorney General to remove petitioner as an enemy alien ended when Congress terminated the war with Germany. Thus petitioner is no longer removable under the Alien Enemy Act."[90] The Court thus made clear that the delegation of extraordinary powers to the President under the Alien Enemy Act is terminated only by a legal act that is just as formal as the formal declaration of war needed to trigger the delegation of those powers.

F. The Scope of Judicial Review of the President's Exercise of Extraordinary Powers

The courts have claimed to have only the narrowest power to review

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tive League v. Clark, 155 F.2d 290, 295 (D.C. Cir.), cert. denied, 329 U.S. 787 (1946); Ex parte Zenzo Arakawa, 79 F. Supp. 468, 470-71 (E.D. Pa. 1947); United States ex rel. Von Kleczkowski v. Watkins, 71 F. Supp. 429, 435 (S.D.N.Y. 1947); United States ex rel. Schlueter v. Watkins, 67 F. Supp. 556, 565 (S.D.N.Y.), aff'd, 158 F.2d 853 (2d Cir. 1946); Citizens Protective League v. Byrnes, 64 F. Supp. 233, 234-35 (D.D.C. 1946).

87 Sidak, To Declare War, supra note 1, at 86-89.

88 United States ex rel. Jaegeler v. Carusi, 342 U.S. 347 (1952).

89 H.R.J. Res. 289, 82d Cong., 1st Sess., 65 Stat. 451 (1951).

90 *Jaegeler*, 342 U.S. at 348 (footnote omitted).

the exercise of presidential discretion under the Alien Enemy Act. "Barring questions of interpretation and constitutionality," wrote Justice Frankfurter in *Ludecke*, the statute's "terms, purpose, and construction leave no doubt" that the Act precludes judicial review.[91] Unlike decisions made by administrative agencies pursuant to authority delegated by Congress, which are subject to review by courts to determine whether agency action constituted an abuse of discretion, "[t]he very nature of the President's power to order the removal of all enemy aliens rejects the notion that courts may pass judgment upon the exercise of his discretion."[92]

These remarks about judicial review of the Act are puzzling, however. If the "terms, purpose, and construction" of the Alien Enemy Act "leave no doubt," then what "questions of interpretation" would remain? Notwithstanding Justice Frankfurter's protestations against judicial review of the Act, what was the Court doing in *Ludecke* if not interpreting the Act's "terms, purpose, and construction"? As to judicial review of the Alien Enemy Act on constitutional grounds, Justice Frankfurter again pronounced the Court's role to be virtually nonexistent: "The Act 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."[93] The puzzle of judicial-review-in-fact versus judicial-review-in-theory surfaces here also, because this statement was made in the context of brushing aside Ludecke's claim that he was entitled to, and had been denied, due process of law. In any event, the scope of the judicial review that has been exercised in fact (however one chooses to describe it) leaves individual liberty vulnerable in several respects.

Lawsuits seeking judicial review of the Alien Enemy Act take the form of a petition for a writ of habeas corpus. The alien sits incarcerated, awaiting deportation. His incarceration can last the entire duration of the hostilities because, as Justice Frankfurter observed in *Ludecke*, "deportations are hardly practicable during the pendency of what is colloquially known as the shooting war."[94] Kurt Ludecke, a German who had been active in the Nazi Party, was arrested in the United States on December 8, 1941 and given a hearing before the Alien Enemy Hearing Board on January 16, 1942.[95] On February 9, 1942, the Attorney General, to whom President Roosevelt had delegated the authority to enforce the Alien Enemy Act, ordered Ludecke interned.[96] On July 14, 1945,

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[91] 335 U.S. 160, 163-64 (1948).
[92] Id. at 164 (footnote omitted).
[93] Id. at 171 (footnote omitted).
[94] Id. at 166 (footnote omitted).
[95] Id. at 162-63 & 162 n.3.
[96] Id. at 163.

President Truman ordered the removal of all alien enemies "who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States."[97] On January 18, 1946, or 1502 days after Ludecke's arrest, the Attorney General ordered Ludecke's removal from the United States.[98] The Supreme Court's decision, reviewing a judgment of the Second Circuit affirming the district court's denial of a petition for writ of habeas corpus, was issued on June 21, 1948, or 2022 days after Ludecke's arrest.[99]

It appears that, among those enemy aliens interned during World War II and destined for repatriation, Ludecke's protracted incarceration was typical. For the ten Alien Enemy Act cases from World War II that are reported in the *United States Reports*, *Federal Reports*, or *Federal Supplement*, and for which the published decisions contain discussion of the relevant dates, the average length of time between the alien's arrest and the issuance of his removal order was 1268 days.[100] The actual time ranged from a low of 742 days to a high of 1723 days. Of course, most of these aliens were incarcerated considerably longer, because each of their court decisions was rendered after the Attorney General had issued a removal order for the alien in question, and because an enemy alien found by the Attorney General to be dangerous and ordered to be removed was not entitled to be released on bail pending appeal of his habeas corpus petition.[101] Consequently, the average length of time be-

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[97] Proclamation No. 2655, 10 Fed. Reg. 8947 (1945).

[98] 335 U.S. at 163.

[99] Id. at 160, 162-63.

[100] The cases used for these computations are United States ex rel. Jaegeler v. Carusi, 342 U.S. 347, 347-48 (1952); Ludecke v. Watkins, 335 U.S. 160, 162-63 (1948); United States ex rel. Bejeuhr v. Shaughnessy, 177 F.2d 436, 437 (2d Cir. 1949), cert. denied, 338 U.S. 948 (1950); United States ex rel. Hoehn v. Shaughnessy, 175 F.2d 116, 117 (2d Cir.), cert. denied, 338 U.S. 872 (1949); United States ex rel. Zeller v. Watkins, 167 F.2d 279, 280 (2d Cir. 1948); United States ex rel. Gregoire v. Watkins, 164 F.2d 137, 137-38 (2d Cir. 1947); United States ex rel. Kessler v. Watkins, 163 F.2d 140, 140-41 (2d Cir.), cert. denied, 332 U.S. 838 (1947); United States ex rel. Von Heymann v. Watkins, 159 F.2d 650, 652 (2d Cir. 1947); United States ex rel. Von Kleczkowski v. Watkins, 71 F. Supp. 429, 431 (S.D.N.Y. 1947); United States ex rel. Schlueter v. Watkins, 67 F. Supp. 556, 558 (S.D.N.Y.), aff'd, 158 F.2d 853 (2d Cir. 1946). Of these ten cases, only in *Jaegeler*, 342 U.S. at 348, was the enemy alien released on a writ of habeas corpus.

In one additional case for which data are available, a Jew who was born in Prague and became a naturalized Austrian citizen in 1933 was granted a writ of habeas corpus on the grounds that he was not an enemy alien. United States ex rel. Schwarzkopf v. Uhl, 137 F.2d 898 (2d Cir. 1943). He was incarcerated 340 days between the time of his arrest and the issuance of a removal order, and a total of 617 days by the time the Second Circuit granted his habeas corpus petition. Id. at 899-900.

[101] See United States ex rel. Fitterer v. Watkins, 77 F. Supp. 175, 176 (S.D.N.Y. 1948) (district court lacks authority to review Attorney General's decision not to release the alien on bail). But see United States ex rel. Potash v. District Director of Immigration & Naturalization, 169 F.2d 747, 751 (2d Cir. 1948) (Attorney General's decision can be overturned if it lacked a reasonable foundation).

tween the alien's arrest and the issuance of the highest court order concerning his petition for a writ of habeas corpus was 2095 days, with actual times ranging from a low of 1065 days to a high of 3702 days.[102]

To be sure, Kurt Ludecke did not make a very sympathetic petitioner for relief from removal under the Alien Enemy Act. He returned to Germany from another country in 1933, when Adolph Hitler rose to power, and joined the Nazi Party. Disagreements with party superiors landed Ludecke in a concentration camp, from which he escaped in 1934, and he then came to the United States. In 1939, his petition for naturalization was denied.[103] From the reported decisions, however, it is evident that the Alien Enemy Act also became an incubus for individuals having none of Ludecke's ties to the enemy.

The Alien Enemy Act requires a legal determination of who is a "native" or "citizen" of the hostile nation or government.[104] In cases interpreting the Act, nativity trumps citizenship as a determinant of whether one is an enemy alien. When the boundaries of a hostile nation have changed, for example, an alien is deemed to be a "native" of that hostile government if his birthplace is within the boundaries of a hostile nation at the time that he is arrested for internment, but not if his birthplace, though within the hostile nation's boundaries when he was born, subsequently became part of another nation.[105] Courts describing nativity under the Alien Enemy Act sound fatalistic, other-worldly: "Nativity . . . never can become a matter of choice on the part of an individual, and it is unaffected by anything he himself can or would do."[106]

The distinction between nativity and citizenship has produced curious outcomes. In *Ex parte Gregoire*,[107] the alien was born in Germany but became a citizen of France before World War II; nonetheless, he was held to be subject to internment and eventual removal back to Germany: "A man may be a native of one country and a citizen of another, and if he be a native of a hostile country his citizenship in a friendly country

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[102] For cases decided by the United States Courts of Appeals, the latest date used here is the date of denial of certiorari, if applicable. For cases decided by the Supreme Court, the latest date used is the date of decision, and not the date of any subsequent denial of a petition for rehearing, if applicable.

[103] *Ludecke*, 335 U.S. at 162-63 & 162 n.3.

[104] 50 U.S.C. § 21.

[105] United States ex rel. Gregoire v. Watkins, 164 F.2d 137, 137-38 (2d Cir. 1947) (alien born in Lorraine when it was part of Germany deemed to be a native of France when arrested during World War II); see also United States ex rel. Willumeit v. Watkins, 171 F.2d 773, 775 (2d Cir. 1949), aff'd, 338 U.S. 521 (1950) (defining native in same way); United States ex rel. Umecker v. McCoy, 54 F. Supp. 679, 681 (D.N.D.), appeal dismissed per curiam, 144 F.2d 354 (8th Cir. 1944) (same concerning alien born in Alsace).

[106] *Umecker*, 54 F. Supp. at 682.

[107] 61 F. Supp. 92 (N.D. Cal. 1945).

does not change or efface the fact of his nativity."[108] One must question whether, even against the extraordinary backdrop of war, this classification based on nativity would survive an equal protection challenge today.

The Alien Enemy Act also has penalized persons in the United States who were lawful resident aliens or harmless illegal aliens. Willis Fronklin, for example, was a German who had immigrated to the United States at the age of four but was never naturalized. At the time of his arrest during World War I, he had lived in Mississippi for fifteen years.[109] The district judge hearing Fronklin's habeas corpus petition refused to consider evidence of Fronklin's loyalty to the United States, considering it irrelevant to the only question for which the Act envisioned judicial review—namely, whether or not Fronklin was a "citizen of the United States or [wa]s a German alien enemy."[110]

Fronklin illustrates how the overbreadth of the Alien Enemy Act can be exacerbated by the arrival of immigrants from a nation that subsequently becomes an enemy of the United States. However, given that the Act was drafted only nine years after the Constitution was ratified, when further immigration from Europe was likely, it is possible that the Act's draftsmen intended this overinclusiveness so that the President might have an added margin of safety in combatting spying and sabotage during wartime.

G. Summary

The Alien Enemy Act is a harsh statute aimed at a difficult problem, a statute whose execution by the President has the potential seriously to infringe upon individual liberty in the United States during wartime. The mechanism for controlling that risk to liberty is neither judicial review nor congressional oversight once the delegation of emergency powers to the President has occurred. Rather, the only significant safeguard is presented *ex ante* in the formal requirement that, unless the United States has been or is about to be invaded, the emergency powers of the Alien Enemy Act may be delegated to the President only after Congress has issued a formal declaration of war.

III

A FUNCTION SERVED BY DECLARING WAR

I have tried to demonstrate so far that constitutional formality enhances political accountability and that, as the discussion of the Alien Enemy Act has suggested, nowhere are the stakes of respecting the

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[108] Id. at 93.

[109] Ex parte Fronklin, 253 F. 984, 984 (N.D. Ala. 1918).

[110] Id.

Framers' formal allocation of decisionmaking authority higher than in the implementation of the provision that, short of invasion, Congress shall decide whether or not the nation is ready to accept the consequences of committing itself to war. Consider, however, a contrary argument about individual liberty and the formality of declaring war that might be prompted by concern over the harsh treatment of aliens permitted under the Alien Enemy Act: The fact that the President is given extraordinary powers in wartime is a cost, not a benefit, of a formal declaration of war; to avoid that cost, Congress should never formally declare war when authorizing the President to wage war, but rather should use a "functional equivalent" that does not trigger the Act.

In this Part, I show that this contrary argument fails for two reasons. First, there is a more appropriate way for Congress to address the repressive powers conferred by a statute like the Alien Enemy Act than to refuse to declare war when we wage war. Second, this argument in favor of resorting to undeclared war ignores the fact that a formal declaration of war serves the valuable function of forcing the nation to contemplate more fully the potential costs of going to war.

A. Why Liberty Is Not Served When Congress Avoids a Formal Declaration of War

There are several ways for Congress to declare war by another name. The recent Persian Gulf War provided politicians and law professors an occasion to test the limits of their ingenuity in this regard.[111] One way to declare war by another name is to enact a statute or resolution intentionally styled as something other than a declaration of war, such as a "limited" declaration of war. Congress did so in its Iraq Resolution of January 12, 1991, which purported to authorize the war that President Bush subsequently ordered against Iraq.[112] Nowhere does the Resolution purport to declare war on Iraq.[113] Nonetheless, the Chairman of the House Foreign Affairs Committee called the Resolution "equivalent to a conditional declaration of war."[114] And Speaker of the House Thomas

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[111] See Memorandum Amicus Curiae of Law Professors, Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990) (No. 90-2866), reprinted in 27 Stan. J. Int'l L. 257 (1991); Koh, supra note 5, at 126; Stephen L. Carter, Going to War over War Powers: Congressional Critics of Bush's Gulf Moves Are Looking at the Wrong Constitutional Clause, Wash. Post, Nov. 18, 1990, at C1.

[112] Iraq Resolution, supra note 4.

[113] See Sidak, To Declare War, supra note 1, at 43-48; see also Koohi v. United States, 976 F.2d 1328, 1334 (9th Cir. 1992).

[114] 137 Cong. Rec. H444-45 (daily ed. Jan. 12, 1991) (remarks of Rep. Fascell); see also 137 Cong. Rec. H283 (daily ed. Jan. 11, 1991) (remarks of Rep. Hamilton) ("two of the chief sponsors of the President's resolution in the House have called it the 'functional equivalent of a declaration of war' and the 'practical equivalent' of a declaration of war").

Foley, who opposed the Resolution, called it "unquestionably . . . the virtual declaration of war."[115] Less than a month later, however, Speaker Foley equivocated. Of the Iraq Resolution, he now said: "The declaration of war was not a technical one in the sense that we know it, but it was fully comprehending the power of Article I, section 8, of the Constitution."[116] "The reason we did not declare a formal war," the Speaker explained, "was not because there is any difference, I think, in the action that was taken, and in the formal declaration of war with respect to military operations, but because there is some question about whether we wish to excite or enact some of the domestic consequences of a formal declaration of war—seizure of property, censorship, and so forth—which the President neither sought nor desired."[117]

The attempt to authorize war without declaring war, so as not to trigger ancillary statutes that delegate extraordinary emergency powers to the President, is really an argument against having harsh statutes like the Alien Enemy Act on the books in the first place. Rather than pretend that it is authorizing less than full-scale war when it passes something like the Iraq Resolution, Congress, if it truly is concerned about what Clinton Rossiter has dubbed "constitutional dictatorship,"[118] should revisit each of the statutes conferring domestic emergency powers on the President during time of war. For each statute and provision it would be appropriate to ask: Is this diminution in liberty a necessary complement to the President's war powers as Commander in Chief? To what extent would the President's effective prosecution of a war be impaired if each such encroachment on domestic liberty were not triggered automatically by the declaration of war or by the President's unilateral declaration of a national emergency, but rather by a required separate bicameral vote in Congress subject to the President's signature or veto? We should not jump to the conclusion that the nation would necessarily benefit from repeal of the Alien Enemy Act. However unpleasant may be its side effects, the Act does address a problem brought about by war, albeit one whose magnitude is a question on which reasonable minds can differ. Preventing the Act from ever being triggered, or repealing it entirely, could harm the national security of the United States by diminishing the President's latitude to prosecute a war. If, on balance, Congress

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115 137 Cong. Rec. H442 (daily ed. Jan. 12, 1991).

116 Thomas Foley, Speech to the National Press Club 6-7 (Feb. 7, 1991) (on file with the New York University Law Review).

117 Id. at 7. The war promptly triggered litigation over whether the Defense Department's press restrictions in the war zone violated freedom of the press. See Nation Magazine v. Department of Defense, 762 F. Supp. 1558 (S.D.N.Y. 1991).

118 Clinton L. Rossiter, Constitutional Dictatorship: Crisis Government in the Modern Democracies 5 (1948).

concludes that it is better to dispose of this means for controlling domestic sabotage and spying during wartime, then it should formally repeal or amend the Act so that its members accept responsibility for the consequences of their decision.

The end of the Cold War is a good occasion, happier than most alternatives one can imagine, for Congress to undertake this housecleaning. Unfortunately, the likelihood that Congress will do so seems only slightly greater than the likelihood that it will return to the formality of declaring war the next time a President concludes that it is necessary to the national interest to attack a Panama or an Iraq.[119] Assuming that Congress does not undertake the housecleaning that I propose, in the next American war it should consider issuing a formal declaration of war, but stating in it that certain specific statutes like the Alien Enemy Act shall not thereby be deemed to have taken effect. In essence, this action would effect a temporary repeal of the named statutes.[120] Such an approach finds precedent, by analogy at least, in the joint resolution by which Congress in 1951 declared peace with Germany, a document which contained the proviso that claims concerning Germany under the Trading With the Enemy Act[121] would survive the termination of the state of war "in the same manner and to the same extent as if this resolution had not been adopted."[122] Declarations of war with analogous provisos would be less candid than an explicit repeal or amendment of the unpalatable statutes in question, but in the realm of the second-best they would at least be more candid than was the Iraq Resolution, whose proponents had the resolve to authorize full-scale war but the timorousness to eschew calling their product a declaration of war.

B. Disregarding the Domestic Costs of War

Declaring war reminds us that the by-product of using large-scale military force might be that we so expand the influence of the administrative state over daily life that society and the state will merge, and individual liberty will recede. The British philosopher Michael Oakeshott well

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[119] Congress, after all, has declined even to modify the War Powers Resolution, surely a higher priority in this area. See, e.g., John H. Ely, Suppose Congress Wanted a War Powers Act That Worked, 88 Colum. L. Rev. 1379 (1988).

[120] Another means to achieve this limited repeal by implication would be for Congress to refuse to appropriate funds for the President to execute the Alien Enemy Act. Cf. Carter, supra note 111 (advocating use of the appropriations power as a means for Congress to oversee the Persian Gulf War). However, as I have explained at length elsewhere, this use of Congress's appropriations power raises a number of problems concerning the separation of powers. See Sidak, To Declare War, supra note 1, at 99-108; Sidak, The President's Power of the Purse, 1989 Duke L.J. 1162, 1253. I therefore consider it ill-advised.

[121] 50 U.S.C. app. §§ 1-6, 7-39, 41-44 (1988).

[122] H.R.J. Res. 289, 82d Cong., 1st Sess., 65 Stat. 451, 451 (1951).

expressed this potential for war to swallow individual liberty:

> In war itself, the latent or not so latent ingredient of managerial lordship in the office of the government of a modern state comes decisively to the surface and is magnified, and what had hitherto been no more than contrivances for collecting revenue, for safeguarding the sources of revenue, or for maintaining civil order become devices for controlling the use of resources and for removing substantive choice from the conduct of subjects . . . . Secondly, war and military preparation imposes this character upon a state more or less completely, not in proportion to its destructiveness, but in proportion to the magnitude of the claims it makes upon the attention, the energies, and the resources of subjects; and the wars of modern times have been progressively more demanding in this respect. Hostilities which in the fourteenth century destroyed everything that lay in their path but were otherwise experienced only in the demands of tax-collectors and left to impoverished subjects the management of their own affairs, by the twentieth century have become occasions for the almost total mobilization, management, and direction of their attention, their energies and their resources in pursuit of a single purpose.[123]

A formal declaration of war is a collective recognition and acceptance of this possible cost. It is sobering to compare this passage from Oakeshott with Speaker Foley's remark that the Iraq Resolution, which authorized the subsequent killing of as many as 150,000 persons,[124] was preferable to a declaration of war because Congress did not "wish to excite or enact some of the domestic consequences of war."[125] Perhaps some domestic excitement is justified if it causes the electorate to contemplate the consequences of making war. Instead, the extent of domestic inconvenience during the Persian Gulf War was the suspension of curbside check-in at American airports.[126]

Moreover, the tendency of politicians to avoid discussing the potential domestic consequences of waging war might reflect the disturbing but unstated conceit of these politicians that they can be reasonably confident that the war will not seriously escalate—as the Persian Gulf War surely would have if Saddam Hussein had used chemical, biological, or nuclear weapons against Israel, Saudi Arabia, or the allied forces defending them. From the common (but, in my view, erroneous) belief that

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123 Michael Oakeshott, On Human Conduct 273 (1975); see also Robert Higgs, Crisis and Leviathan: Critical Episodes in the Growth of American Government 220 (1987); Paul Johnson, Modern Times: The World from the Twenties to the Eighties 17 (1983); James M. McPherson, Battle Cry of Freedom: The Civil War Era 859 (1988).

124 See Caryle Murphy, Iraqi Death Toll Remains Clouded; Baghdad Promises Figures, Wash. Post, June 23, 1991, at A1, A17 (reporting Defense Intelligence Agency estimates).

125 Foley, supra note 116, at 7.

126 See Steve Bates, Curbside Check-in Is Coming Back, Other Gulf War Security Measures Remain in Effect at Airports, Wash. Post, Mar. 30, 1991, at A5, A5.

Congress has the constitutional authority under the necessary and proper clause[127] to calibrate through legislation the President's use of military force,[128] there can emerge the dangerous notion that Congress has the power to legislate away the adverse consequences of war itself. The outcome of war, however, cannot be known; and, as Friedrich Hayek powerfully argued in his half-century of writings, what cannot be known cannot be planned.[129] Of course, there must be planning when a nation goes to war. But the designed military order of generals on the battlefield is wholly different from the centralization of domestic decisionmaking that threatens the freedom of an atomistic society during and after war. Congressional attempts to regulate the President's prosecution of war through the War Powers Resolution[130] or *faux* declarations of war like the Iraq Resolution can propound the naïve view that the outcome of war, with its potentially permanent implications for civil and economic liberty, can be precisely predicted and regulated through legislation in the same way a congressional committee marks up a bill concerning interstate banking. The image of war as a controllable human endeavor is an illusion.

If we do not face the potential domestic consequences of a foreign war when we wage it, we conceal one of its expected costs. We thus artificially suppress the relative price of choosing war over diplomacy as a tool for achieving our foreign policy goals. As the relative price of war falls, our demand for it increases. By adhering to the formality of declaring war we call attention to war's full costs. And when war is priced accordingly, we should demand less of it.

What are these potential costs to domestic liberty that politicians seem disinclined to mention to the electorate? Consider first those statutory powers that the President may assert when he unilaterally declares a national emergency under the National Emergencies Act,[131] as President Bush did when Iraq invaded Kuwait.[132] During a national emergency, the President may take possession of fertilizer and power plants within the jurisdiction of the Tennessee Valley Authority,[133] suspend all civil-

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127 U.S. Const. art. I, § 8, cl. 18.

128 I have argued elsewhere that this constitutional premise rests on questionable historical research and legal reasoning. See Sidak, To Declare War, supra note 1, at 56-63 (discussing the nebulous distinction between limited and general wars).

129 See Friedrich A. Hayek, The Fatal Conceit: The Errors of Socialism 85-88 (1988).

130 50 U.S.C. §§ 1541-48 (1988 & Supp. III 1991).

131 50 U.S.C. § 1601 et seq. (1988).

132 Exec. Order No. 12,722, 3 C.F.R. 294, reprinted in 50 U.S.C. § 1701 (Supp. II 1990); Exec. Order No. 12,723, 3 C.F.R. 296, reprinted in 50 U.S.C. § 1701 (Supp. II 1990); see generally David M. Ackerman, The President's Powers in Time of War: A Brief Overview (Cong. Research Serv. Rep. No. 91-95A, Jan. 18, 1991); Jules Lobel, Emergency Power and the Decline of Liberalism, 98 Yale L.J. 1385 (1989).

133 16 U.S.C. § 831s (1988).

works projects of the Army Corps of Engineers that are not essential to the public defense,[134] suspend radio and television transmissions and take control of stations upon payment of just compensation,[135] prohibit economic transactions with a particular country and freeze its assets in the United States,[136] and requisition or purchase any vessel owned by a United States citizen.[137]

The delegation of emergency powers in other statutes takes effect only "in time of war," or, often, "when war is imminent." In either instance, the President may arm any watercraft or aircraft capable of being used for transportation,[138] take and use land needed for military purposes upon filing a condemnation petition,[139] order from any person or industry necessary products to be given precedence over all others and take immediate possession of those facilities not in full compliance,[140] and direct all transportation carriers to give preference and precedence to the movement of troops and material of war.[141] "In time of war," the President may take posession and control of any transportation system to transport troops, war material, and equipment,[142] place orders on a priority basis for ships, aircraft, and other war materials despite existing contracts,[143] take possession of manufacturing plants to produce the needed supplies upon payment of just compensation to the owners,[144] and sequester, hold, and dispose of enemy property, as well as sever all commerce and communications between the United States and the enemy country.[145]

It is striking that, unlike the Alien Enemy Act, none of the foregoing emergency powers requires the formality of declaring war before it is delegated to the President.[146] It would appear, therefore, that Speaker

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134 33 U.S.C. § 2293 (1988).

135 47 U.S.C. § 606 (1988).

136 50 U.S.C. §§ 1701-06 (1988 & Supp. III 1991).

137 46 U.S.C. app. § 1242a (1988).

138 10 U.S.C. § 351 (1988).

139 10 U.S.C. § 2663 (1988).

140 10 U.S.C. §§ 4501, 9501 (1988 & Supp. IV 1992).

141 49 U.S.C. § 11128 (1988).

142 10 U.S.C. §§ 4742, 9742 (1988).

143 50 U.S.C. § 82 (1988 & Supp. III 1991).

144 Id.

145 50 U.S.C. app. §§ 1-6, 7-39, 41-44 (1988).

146 Chief Justice Rehnquist, who clerked for Justice Robert Jackson when Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), was decided, has speculated that "if the steel seizure had taken place during the Second World War, the government probably would have won the case under the constitutional grant to the president of the war power . . . ." William H. Rehnquist, The Supreme Court: How It Was, How It Is 97 (1987). However, he notes, "President Truman and his top advisers deliberately refrained from asking Congress for a declaration of war . . . ." Id. at 96. Given the numerous powers to seize private property that Congress has statutorily delegated to the President upon unilaterally declaring a national

Foley was incorrect in asserting that the Iraq Resolution would preclude the wartime delegation to the President of significant domestic powers that might "excite" the public.[147] To the contrary, the Resolution would not have prevented any of these emergency powers from taking effect, save perhaps the Alien Enemy Act. One can even imagine that, should the war have escalated, the President would have wanted to enforce the Act and would have asserted that the Iraq Resolution, being a "functional equivalent" to a declaration of war, had sufficed to trigger the Act. What the Resolution did preclude was a candid acknowledgement by Congress that a significant diminution in civil and economic liberty in the United States could result if the war against Iraq went awry.

CONCLUSION

Civil libertarians who extol the virtues of legal formality in areas of law such as criminal procedure should recognize that formality is also desirable in matters concerning decisionmaking between the branches of the federal government. In these latter cases, legal formality frequently is criticized by legal scholars as being too inflexible to protect individual liberties in an increasingly complex society. In this Essay, I have attempted to demonstrate that the legal formality of declaring war can help to safeguard individual liberty in the United States when Congress decides to authorize the President to pursue our foreign policy objectives through the use of military force. Unless Congress first observes this formality of declaring war, the President may not exercise his delegated powers under the Alien Enemy Act, powers that enable him to restrict the individual liberty of enemy aliens in the most extreme manner conceivable in a civilized nation.

What is special about the ritual of declaring war? During war, civil and economic liberty are threatened not only by a foreign enemy, but also by an expanding state. The solemn declaration of war is likely to do a better job than its "functional equivalent" of candidly alerting the electorate to the latter danger. To eschew declaring war when we wage war is to encourage the federal government to expand at the expense of individual liberty.

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emergency or "in time of war" (whether or not formally declared), one must ask whether Chief Justice Rehnquist's speculation would be true if *Youngstown* arose today or whether Congress in effect has surrendered through legislation whatever benefit was achieved for individual liberty in *Youngstown* in 1952.

[147] Foley, supra note 116, at 7.