

Chapter 1

The Alien and Sedition Crisis

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Less than seven years after the First Amendment was made part of the Constitution, it came under attack. This chapter demonstrates that the challenges to the First Amendment were politically motivated when the nation was perceived to be in serious danger. Facing a war with France and the potential of internal subversion, founders such as Alexander Hamilton and John Adams rationalized extra-constitutional activity on the part of the government. Despite protests from Democratic-Republicans, the Congress approved, and the executive branch carried out, legislation that muzzled freedom of expression. That action forced defenders of the Constitution to come forward and resolve the crisis in favor of the original, broader application of the First Amendment.¹

Hamilton had been instrumental in the writing of the Constitution and in the monumental rhetorical effort to ensure its ratification. His essays in the *Federalist Papers* are among the most powerful. Like John Adams and for a long time James Madison, Hamilton did not believe that a bill of rights should be included in the Constitution. He believed that enumerating specific rights in the Constitution would imply that nonenumerated rights could be taken away from the states and their citizens by the Congress.² Hamilton argued in *Federalist* number 84 that if such a list of rights were included in the Constitution, then any rights left off the list would go unprotected by the Constitution. "Here, in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations." He went on to claim that the clause stating "We the people" guaranteed all natural rights to the people; not listing individual rights in the Constitution implied that these rights were the birthright of mankind. Furthermore, he believed that since the state constitutions that were written prior to the United States Constitution contained bills of rights, no such bill was necessary at the Federal

level. For example, the Pennsylvania “Frame” of 1776 called for protection of free speech and a free press. The Virginia Declaration of Independence called the free press a “bulwark of democracy.” Thus, when Hamilton defended the Constitution in the *Federalist Papers* and in the New York ratification convention, he did so as did most Federalists, without compromise.

This Federalist stratagem failed. By the time New York ratified the Constitution in July of 1788, it had already been ratified by enough states to form a union, New Hampshire providing the crucial 10th ratification in June of 1788, with Virginia following a few days later. The problem was that most states insisted that a bill of rights be added. Massachusetts and Virginia were adamant on the point. From Paris, Thomas Jefferson penned important letters to Madison urging him to support a bill of rights. And when he almost lost his House seat to James Monroe over the issue, Madison declared for a bill of rights. Patrick Henry, in league with George Clinton, Governor of New York, sought a second constitutional convention for the purpose of amending immediately. In order to head this effort off, Madison coaxed the Congress to take up the issue of amendments as soon as it could. By the summer of 1789, Madison had received 200 proposed amendments from the states. By September and led by Madison, the House reduced and consolidated the proposals into 26 amendments. Finally, a House–Senate conference agreed on 12 to submit to the states for ratification.

The nation then went through a second series of ratification debates that lent strength to the position that the Bill of Rights in general and the First Amendment in particular was meant to have broad application and not apply solely to political rhetoric and prior restraint.³ Furthermore, analysis of these debates shows strong support for limiting federal powers and giving every benefit of the doubt to states’ rights.⁴ How then did the federal government come to a point where the Congress at the behest of Hamilton could pass legislation blatantly restricting the First Amendment rights of its citizens? The story is complicated.

This chapter begins by establishing the historical context of the Alien and Sedition crisis since the backdrop of events was used in the rhetorical appeals of both sides to justify their positions. That context reveals the twofold threat that the Federalists faced: national security was jeopardized by a foreign foe and internal agents; party supremacy was jeopardized by the growing ranks of Democratic-Republicans. Once the context is established, the chapter examines first Federalist and then anti-Federalist rhetorical strategies, concluding that even among Enlightenment thinkers, faulty logic, emotional appeals, and sophisms abound. At the outset, we should be clear on a crucial point of analysis for this chapter and those that follow. There is a difference between rhetorical strategies used to suppress the opinions of others, which may be immoral but legal, and legal actions taken by governmental agents,

which may prove unconstitutional. Freedom of expression protects fallacious argument, but does not abide unconstitutional restrictions. That is why the crises that follow are difficult to deconstruct.

The Evolving Crisis

The Federalist Party held the majority in the U.S. Senate and House from 1791 to the end of John Adams' Administration in 1801. Comprised largely of men from the well-established merchant class and property owners of the North, the Federalist Party favored national, governmental protection for trade, strong defenses, and industrial expansion. The party had a wonderful record of nation building led by George Washington, John Adams, and Alexander Hamilton.⁵ However, from the start Hamilton was intolerant of sedition, the criticism the government, in part because it was run by his party.⁶

Freedom of expression, however, was not challenged until a quasi-war developed with France. The royalist government of the Bourbons had made possible the American colonists' defeat of the British. The French Revolution, which began with the fall of the Bastille prison on July 14, 1789, had by 1792 become a bloodbath that even its instigators could not escape. In that year, Spain (ruled by Louis XVI's cousin) and Austria attacked France hoping to restore the monarchy. However, the allies lost a crucial battle at Valmy in September of 1792. Thus, they could not save King Louis XVI and his wife, Marie Antoinette, who were later beheaded. The leader of the radical Jacobin Club, Maximilian Robespierre, inspired a frightful struggle in the Paris Commune that led thousands to the guillotine. The paranoia reached its peak when Robespierre himself was finally put on trial. During his speech of self-defense, he paused to clear his throat and someone in the crowd yelled out, "He chokes on the blood of Danton!" Robespierre was executed the next day.

The victory at Valmy, witnessed and glorified by the romantic Goethe, inspired revolutionary leaders to claim that they would not relent until "all of Europe is ablaze."⁷ The year ended with French forces seizing the Austrian-ruled section of the Netherlands. In February of 1793, the Directory declared war on England. Led by Edmund Burke, conservatives in England and Federalists in America feared that the terror would engulf the whole civilized world. This fear was not without cause given the excesses of the French Revolution. In the summer of 1794, however, Vice Admiral Horatio Nelson captured Corsica and his fleet blockaded French ports.

Britain's allies were less successful on land. By 1795 French successes led to a peace treaty with Spain. The British were alarmed. In that year, John Jay negotiated a treaty between the United States and Britain. France

pointed out that such an agreement violated the U.S.–French treaties of 1778 and launched assaults on American commercial shipping.

Soon after, Napoleon Bonaparte launched a major offensive in the spring of 1796; he defeated the Duke of Savoy and forced the Austrians out of Northern Italy. In response in December of 1796, President Washington warned that his policy of neutrality might be compromised by the French; he recommended strengthening the navy. At the beginning of the next year, Washington warned of the activities of French war ships in the West Indies. In Europe, the British retreated from Corsica to Gibraltar and sued for peace. The Directory refused the offer and Napoleon went on to conquer the Italian peninsula by April of 1797. Austria quickly signed a peace treaty with France, further isolating the British.

John Adams, who had survived a close election, was inaugurated in March of 1797 and indicated his sensitivity to the possibility of war with France. In his rather partisan inaugural address, Adams warned the nation to be suspicious of sophistry and partisan intrigue along with the “pestilence of foreign influence, which is the angel of destruction.”⁸ Sounding warlike, Adams demanded reparations from the French for injuries to American maritime interests. Adams was referring to a practice of the French that had begun after the United States had signed the treaty with Great Britain negotiated by John Jay. The Directory of France resorted to seizing American ships trading with England because the Directory suspected an Anglo-American alliance. Many French leaders believed war with their former ally was imminent.

At the same time, America was having trouble with Ottoman pirates operating around Tripoli in Northern Africa. It became necessary for Adams to bribe these pirates to keep them from interfering with U.S. merchant marine fleets. In June 1797, a treaty with Tripoli was unanimously ratified by the Senate and proclaimed by Adams.⁹

In July of 1797, British Prime Minister William Pitt (the younger) again made peace overtures to the French, offering to recognize their hold over Netherlands. Word soon came that not only were the French not interested in peace, they had recalled Napoleon from Italy to mount an invasion of England. Napoleon soon realized that such a move could not succeed. Instead he recommended attacking the English alliances in the Middle East.

Adams sent a peace mission to France in October of 1797. Unfortunately, it was headed by the bellicose Charles Pinckney. After meeting with the French Foreign Minister, Charles Maurice de Talleyrand-Perigord, the envoys reported to Adams that Talleyrand was writing a report to the Directory on the cold war with America. Talleyrand had begged for more time since he had just been appointed to office, being called to the post from his position as Bishop of Autun. Furthermore, given his royalist past, Talleyrand needed time to build his credibility with the Directory.

Talleyrand was sympathetic to Adams because he had traveled in America from 1794 to 1796, just after he had been expelled from Great Britain where he had sought refuge from the French reign of terror. Nonetheless, the American envoys were suspicious of Talleyrand and believed he was stalling. The negotiations fell apart. Eventually, Talleyrand's report reflected American concerns about the French seizures of American ships. In fact, the report asked the Directory to reprimand French privateers in the West Indies. Nonetheless, in a message to Congress, Adams claimed the French had "inflicted a wound."¹⁰ The Senate responded with a call for action.

At the same time, the United States was experiencing a steady influx of immigrants uprooted by the French Revolution. Most Federalists were alarmed by the arrival of these aliens. Reverend Jedidiah Morse claimed the "Illuminati" among the aliens were secular atheists loyal to Jefferson, even though many of them were actually displaced aristocrats.¹¹ The Federalists suspected that the influx was bringing a host of Jacobin¹² sympathizers to foment revolution and to act as French agents in the anticipated conflict. The President of Yale saw "our wives and daughters victims of legal prostitution; soberly dishonored; speciously polluted; . . . our sons become the disciples of Voltaire, and the dragoons of Marat."¹³

It is important to note that the words "terroriste" and "terrorisme" were first used in reference to the Jacobin Club, the father of the reign of terror. By 1794 the words were carried into the English language in denunciations of the French excesses instigated by Robespierre, who was executed in that year. The English extended the words to the Directory and eventually to Napoleon, even though they had ended the reign of terror and restored order in France. By 1798, even *La Dictionnaire de l'Academie* referred to terrorism as a system or regime of terror.¹⁴

Allegedly, the Jacobin revolutionaries were prepared to spread their brand of anarchy from nation to nation. These fears were given a philosophical justification in many treatises, most notably Burke's *Reflections on the Revolution in France*, which became a primer for those rallying to stem the radical tide. Later Burke wrote about the "Thousands of those Hell-hounds called Terrorists . . ."¹⁵ and included the Directory in this category. In response, Thomas Paine had written his *Rights of Man*, which Jefferson endorsed. Paine's two-part tome was thought to have inspired an uprising in Ireland and discontent in England, which distracted that nation from its problems with the French. At the height of the Alien and Sedition crisis in America, the English faced a revolt in County Wexford in Ireland in May of 1798. The destruction of the rebel force led to another wave of Irish immigration into America, which would eventually strengthen Jefferson's Party's ranks.

In fact, Hamilton was quick to realize that the new immigrants almost unanimously supported his political opponents, the Democratic-Republican

Party of Thomas Jefferson, James Madison, and James Monroe. As ambassador to France from 1784 to 1789, Jefferson made no secret of his admiration for Enlightenment thinking. He was taken with its combination of scientific discovery and reliance on reason. He became a fan of Joseph Priestly, the man who discovered oxygen and invented sparkling water. At times, Jefferson had been an apologist for the French Revolution, especially in its less extreme modes.

Unlike Hamilton, the primary author of the Declaration of Independence had premised his support for the Constitution on the condition that a bill of rights be added. He wrote to David Humphries on March 18, 1789:

I am one of those who think it a defect that the important rights, not placed in security by the frame of the constitution itself, were not explicitly secured by a supplementary declaration. There are rights which it is useless to surrender to the government, and which yet, governments have always been fond to invade. These are the rights of thinking, and publishing our thoughts by speaking or writing.¹⁶

Jefferson's concern for the passage of the Bill of Rights was understandable given his long involvement in its evolution. He had written to Madison on December 20, 1787, "A bill of rights is what the people are entitled to against every government on earth, general or particular."¹⁷ Jefferson also wrote to Washington from Paris on November 4, 1788, "I am in hopes that the annexation of a bill of rights to the constitution will alone draw over so great a proportion of the minorities, as to leave little danger in the opposition of the residue. . . ."¹⁸ On December 21, 1788, he wrote to Francis Hopkins the same sentiment—that those opposed to the ratification so recently would now come over to support it once a bill of rights was passed.

Jefferson urged Madison to serve as his surrogate in the debate over the new constitution. For example, Jefferson wrote "To Madison" from Paris on November 18, 1788, "As to the bill of rights however I still think it should be added." Madison's conversion to this position came in February of 1789 when he almost lost a House race to James Monroe, then a protégé of Patrick Henry.

A month later in another letter to Madison, Jefferson made an important point that has direct bearing on the doctrine of original intent. He said he supported a bill of rights because of the power it gave to the judicial branch. The legislative branch achieved its power through the legislation it passed; the executive branch had wide-ranging powers to enforce laws, draft treaties, and administer the government. However, Jefferson wisely and prophetically noted that the judicial branch's power rested on sand. Thus, a clearly stated

bill of rights was essential if the court system, and particularly the Supreme Court, was to arbitrate the rights of citizens. Even with a bill of rights, it would later take John Marshall's brilliant decision in *Marbury v. Madison* of 1803 to establish the Supreme Court's power to review legislation to determine if it passed constitutional muster. However, that ruling would have to wait until after the Alien and Sedition crisis in which Jefferson's motives would be called into question.

The Federalists perceived a threat to the sovereignty of the United States in the all-but-certain war with France. After all, by June of 1797, the French had seized or sunk more than 300 American ships in the Atlantic and the Gulf of Mexico. It was not difficult for the Federalists to make this case and sell it to the public especially when the French seemed in no mood to compromise. In December 1797, new French decrees against neutral vessels went into effect. In February of 1798, while they rested at anchor, a slew of United States ships were set ablaze in Charleston Harbor by a clandestine French marauder. In March 1798, the president called for zeal in defense of the nation.¹⁹ In April 1798, the French added insult to injury by demanding tribute through their agents X, Y, and Z. The American representative replied, "Millions for defense; not one cent for tribute!" The sentence became a war cry in the American press. Hamilton demanded that the president order an attack on New Orleans, then held by the French. In response and over the objections of Vice President Jefferson, Adams persuaded Congress to approve the building of the frigate *United States*, which could carry up to 44 large guns.

Throughout this period, Federalist leaders met, often in secret, to find ways to enhance the chances of their party retaining control of all branches of the government. They carefully monitored the press and encouraged their friends to publish supportive articles. Unfriendly papers were scrutinized and enemy lists were drawn up. It was a moment in history when freedom of political expression in America could be called into question on theoretical and practical grounds. The value of freedom had, in fact, not been historically tested for it had been only seven years since the First Amendment had been added to the Constitution. During this undeclared war with France, Federalists not unnaturally feared disaffected aliens would try to destabilize the national government, and those aliens seemed certain to swell the ranks of the Democratic-Republican Party—who now called themselves simply "Republicans"—in opposition to Federalist political power. No doubt the Hamiltonians wanted to *preserve* a Federalist America. Thus, an ulterior motive emerged that put the spur to the Federalist propaganda horse: they wanted to keep their party in power.

They began by identifying the threat in vivid terms. Federalists linked internal subversion by Jacobins to weakening America's resolve for an

external war with France. Even Adams became suspect when he countered Hamilton's call for a strike against New Orleans with a call for calm. Then they enhanced the threat with legal, but heavy-handed rhetorical strategies that turned the public in their favor.

For example, *unproven assertions* often enhanced the perception of the foreign threat. Public pronouncements couched in extreme terms proved effective in gathering support to confront it. Jonathan Dayton, Federalist Speaker of the House of Representatives, caused consternation in 1798 by asserting that armies were massing in France, preparing to conquer the United States:

As to the means of invasion, it was known that there were already collected upon the coasts of France, bordering upon the English Channel, a numerous army which, in gasconading style, was called the Army of England. It was known that there were also collected and collecting at various ports in that quarter, ships of war and transports of all descriptions.²⁰

The Speaker described what could be a possible scenario. It was not difficult to imagine particularly in a world of conspiracy and intrigue. Nonetheless, it was simply not true.

Hamiltonians also relied on the stratagem of *false cause* to make their cases. One of the Hamiltonian contentions was that the French Directory, which had taken over in 1794 after the fall of the Jacobins, was sending its army to the United States because the army would overthrow the Directory if left unemployed in France. Given the events of the time, the Federalists had plenty of ammunition to support such an assertion. Armies of Revolutionary France did, in fact, invade neighboring European states to spread the Revolution. French Territory in North America could serve as a launching pad for an invasion of the United States. Those "XYZ" dispatches of April 1798 gave the assertions credibility with the mass of voters.

This context also allowed the Federalist to *exaggerate a minimal threat* so that it assumed the proportions of a significant crisis. For the Hamiltonians, the example of the Republican newspaper *Aurora* "proved" that sedition was rampant throughout the country. The *Aurora* was a Philadelphia paper that supported the Jeffersonians and was highly critical of the Adams Administration. This paper often portrayed President Adams as imperious. It also called the motives of Hamilton into question not only on its editorial page but in regular reporting. In congressional debate Representative Long John Allen remarked that "liberty of the press and of opinion is calculated to destroy all confidence between man and man; it leads to a dissolution of every bond of union."²¹ Other Federalists accused the *Aurora* of sedition

and claimed that the press in general frequently instigated disloyalty toward the government.

Once the rhetorical context was established, some Federalists had little difficulty employing *guilt by association* when replying to challenges during the debate over Alien and Sedition legislation.²² One such attack was watched closely by members of the House and by citizens in a packed gallery. Speaker Dayton rebutted a speech by Albert Gallatin, a Republican leader who had originally come to the United States from Switzerland. Dayton himself was known to be a moderate Federalist so his insinuations concerning Gallatin's foreign origin and his presumed friendliness to European radicalism were all the more striking. Said Dayton:

And why should that gentleman [Gallatin] be under no apprehension? Was it that secure in the perfect coincidence of the principles he avowed with those which actuated the furious hordes of democrats, which threatened the country with subjugation, he felt a confidence of his own safety, even if they should overrun . . . the states? He might indeed contemplate an invasion without alarm . . . he might see with calmness . . . our dwellings burning.²³

When Congressman Jonathan Livingston objected that the new laws required “no indictment; no jury; no trial . . . no statement of accusation,” he was answered with the claim that the insidiousness of French intrigue made these objections irrelevant. Using a tactic that would resurface often in our history, most prominently in the McCarthy era (see chapter 7 of this book), Federalist Congressman H. G. Otis claimed the laws were necessary because the French had “pushed their intrigues into some of the first offices of government.” Once again, a Federalist successfully magnified a perceived threat by casting aspersions on the trustworthiness of objectors.

Using these fallacious but effective rhetorical tactics, the Hamiltonians redoubled their efforts to preserve their party from the growing numbers of Republicans and to mitigate the prospect of losing the White House in the election of 1800. These appeals set off more fears among common citizens. The Federalists increased the sense of danger from infiltration by pointing to the outspoken sedition of certain Republicans, who were growing in number. Federalist Congressman Otis, later to head the ill-fated Hartford Convention of 1812, which called on New England to secede, said in reply to a Republican colleague, “The gentleman . . . vociferates for the evidence of plots and conspiracies against the government. . . . If the gentleman insisted upon evidence of seditious dispositions in our country, *I would refer him to his own speech.*”²⁴ The synergy between the Hamiltonians and the media should not be overlooked. The Federalist press supplied the

accepted facts for the Hamiltonians' faulty logic. Then the Federalist press reported the Hamiltonian claims to the public further reinforcing fears and planting premises that Federalists could use in building persuasive arguments on which to campaign.

Moving Beyond Rhetorical Strategies

These rhetorical attacks gave the Hamiltonians the ability to initiate activities including restrictive and unconstitutional legislation. By 1798 the Federalists had already raised a large standing army and gained control of it by pushing Hamilton to the position of acting commander. With the endorsement of Washington and President Adams in tow, they set up a Department of the Navy and armed merchant ships; eventually 14 American war ships were commissioned and 200 other vessels took out letters of marque for reprisals against the French. The culmination of the Federalist campaign came with the passage of the Alien and Sedition Acts in July of 1798. Debate on the Acts in the House of Representatives was marred by both physical violence and slander.

The Federalist agenda comprised an extreme threat to personal freedoms. Congressman Robert Harper of South Carolina, speaking to this issue, justified a restriction on freedom in the face of internal subversion. As the author of the Sedition Bill and former Chairman of the House Ways and Means Committee, he brought considerable credibility to the debate. He developed a scenario of collapse, which revealed the essence of Federalist fears: philosophers of the French Revolution, who were in every country, were paving the way for Jacobins who followed closely in their wake, bent on seizing power by violent means—means that had been used during the reign of terror in France. Harper put it this way:

Philosophers of [the French] revolution exist in all countries. . . . They advance always in front and prepare the way by preaching infidelity, and weakening the respect of the people for ancient institutions. . . . The Jacobins follow close in the train of philosophers, and profit by their labors. This class is composed of that daring, ambitious, and unprincipled set of men, who possessing much courage, considerable talent, but no character, are unable to obtain power, the object of all their designs, by regular means, and therefore, perpetually attempt to seize it by violence.²⁵

These themes were developed by the press and the pamphleteers so that in a few months the entire country was exposed to expressions of fear of French Jacobins.

The Republicans coaxed a few Federalists to their side of the aisle on a few emendations to the bills. The most important of these was securing March 3, 1801, for an end to the Acts. This date was the day before the next presidential inauguration and Republicans hoped to have a president in place who would allow the acts to sunset. Another modification occurred, which relied on the case of publisher John Peter Zenger, who almost 70 years earlier had used truth as a defense in libel case. The moderates now included language assuring that the truth could be used as a defense in sedition trials. That is, true criticism of the government could not be categorized as sedition. Furthermore, the moderates excluded federal judges from coming under the sedition law so they could not be penalized for issuing opinions that were critical of the government.

After these concessions, the bills were passed usually on straight party votes. The first roll call in the House was on a motion to prevent a second reading; it failed 47–36 with some Republicans throwing in the towel.²⁶ On the important vote, the House passed the bills by only three votes, 44–41. Thomas Tillinghast became the only Republican to vote for the measures.²⁷ The votes in the Senate were more lopsided given the Federalist majority there. President Adams promptly signed the legislation and it became law.

The Acts were clearly violations of the First Amendment, though they were never reviewed by the Supreme Court.²⁸ The “Naturalization Act” extended from 5 to 14 the number of years of residence required before full U.S. citizenship could be granted. The “Act Concerning Alien Enemies” authorized President Adams to order the expulsion of “dangerous” aliens during peace time. The “Act Respecting Alien Enemies” authorized the president to apprehend, restrain, secure, and remove enemy aliens during time of war or *undeclared hostilities*.²⁹ The “Sedition Act” prohibited conspiracy against the U.S. Government and also prohibited writing, printing, uttering, or publishing false, scandalous, and malicious writings against the U.S. Government.³⁰

In no time, the Federalists used the new laws to go after their enemies. Editors and publishers of Republican newspapers, which had ridiculed members of Congress or the administration were arrested, as were several leading figures of the Republican Party. However, the Federalists often found judges to be more moderate than they expected. Of those arrested, only about 15 were ever indicted and only 11 of those were brought to trial.³¹ However, 10 of them were convicted of violating the law.

The poster child for these trials was Congressman Matthew Lyon of Kentucky, who, in October, 1798, was convicted under the provisions of the Sedition Act.³² Not only was he the first member of Congress to be convicted of a crime while in office, he was the first to be put in jail for criticizing the political system and its leaders. His arrest, trial, and conviction set a dangerous

precedent for the new nation. Here was the point at which partisanship overpowered legitimate uses of the government. Lyon's constituents seemed to understand this. They reelected the Congressman while he sat in his jail cell,³³ and when Federalist tried to vote to expel him from the House, the Republicans were successful in blocking the move.

Another law closing down free speech was prompted by a Philadelphia Quaker named George Logan. With no authority or backing from the government, he traveled to Paris to try to end the quasi-war. Though he failed in his idealistic quest, the Federalists rammed a new law through Congress, which the president signed as the Logan Act, and which prohibited private citizens from initiating diplomacy with foreign governments. It is still in force today though often ignored by such unofficial diplomats as Jesse Jackson, Jimmy Carter, and Ramsey Clark.

The Federalists rode rough shod over the helpless Republicans. In 1798 alone they created more than 20 new laws, which Adams signed. The most important abrogated all treaties with France, expanded the army, armed sea vessels, authorized attacks on French vessels on sight, and nominated former President George Washington as Commander of the Army with Hamilton second in command. Washington's acceptance of the command was dramatic because it contradicted some of the recommendations he made in his famous "Farewell Address." Washington did not believe in international neutrality any more than he believed in nonpartisanship. In his acceptance of this latest assignment, the Father of the Country referred to the "insidious hostility" of France and their "agents" in America. He attacked their "disregard for solemn treaties" and our ministers. He took aim at their "war upon our defenseless commerce."³⁴

Adams was losing control over the situation. However, Hamilton's modesty fooled few in Congress; most members understood him to be the real commander with the aging Washington serving only as a figurehead. Party leaders knew that Hamilton had managed to talk Washington into openly supporting the Sedition Law, while Hamilton personally demurred on the issue. The American public was another matter. Because they were less vigilant and less in the know than members of Congress, the public fell for Hamilton's political strategy in the election of 1798; they provided large majorities that kept the Federalists in power. Jeffersonians were identified with the hated French.

The Republican Response

As we have seen, the British were distracted from their war with France due to a rebellion in Ireland; but the French had their troubles, too. Napoleon

had decided to slip past the British fleet of Admiral Nelson and landed in Egypt in July 1798. Napoleon scored an immediate victory over the local rulers only to turn around and see Nelson destroy the French fleet anchored in Abukir Bay. Nonetheless, Napoleon scored several more victories on land, slaughtering the citizens of Jaffa along the way. When the Ottoman allies of the English held Acre, on the Palestinian coast, Napoleon retreated to Cairo and then decided in August 1799 to leave his army behind and return to France proclaiming that he was the hero of the Middle East. In November 1799, he seized power from the Directory. This was not difficult to do because the Directory had attempted to colonize parts of Italy, including the Island of Malta, thereby offending the Russian czar, a member of the Knights of Malta. The czar led a coalition against the French that was successful in chasing them from their Italian enclaves.

This defeat opened the door in the fall of 1799 for Napoleon's rise to power. He cut a deal with two members of the Directory, removed those who opposed him, and then marched to the Council of Five Hundred to make a plea for their support. However, his rhetorical skills suddenly failed him and he fainted, forcing his brother Lucien to save the day with troops who expelled the Council. Just as Edmund Burke had predicted, France collapsed from the inside and turned to a general who became its dictator.³⁵

Although the failure of democracy in France was a disappointment to Jefferson, he realized that it presented an opportunity in the fight to overturn the Alien and Sedition Act. He could portray Hamilton and his party as the men of oppression trying to undo the rights so dearly won in the American Revolution just as Bonaparte was undoing the rights won in the French Revolution. Jefferson was careful not to reveal his correspondence with Talleyrand, still the French Minister of Foreign Affairs. Nor did the vice president admit to writing a series of resolves that were approved by the Virginia and Kentucky legislatures in 1799. The Kentucky Resolutions read as follows:

Resolved, that the several States composing the United States of America are not united on the principle of unlimited submission to their general government; but that by compact under the style and title of a Constitution for the United States and of amendments thereto, they constituted a general government for special purposes, delegating to that government certain definite powers, reserving each State to itself the residuary mass of rights to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force: That to this compact each State acceded as a State, and is an integral party, its co-States forming, as

to itself, the other party: That the government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers; but that as in all other cases of compact among parties having no common Judge, *each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.*

The Virginia Resolves appealed for the preservation of the free marketplace of ideas as well as constitutional freedoms. Adams believed that the resolves were fomenting revolution because they argued that states could resist federal law if they believed it was unconstitutional. He became particularly concerned when Jefferson spoke of the danger of increased presidential power. The vice president also argued for free speech and press, a sure sign as far as Adams was concerned that Jefferson wanted to use popular appeals to bring the federal government to a halt. Much to Adams' distress petitions were arriving from around the country demanding the repeal of the laws. Nonetheless, the House voted 52 to 48 to reinforce the Alien and Sedition Acts early in 1799. Adams also launched a shrewd diplomatic maneuver. He sent Rufus King to London to talk to England and Russia about a potential alliance. Talleyrand signaled that he might be ready to cool things down a bit in the quasi-war. Adams then assembled a new peace delegation, which included Patrick Henry, the former governor of Virginia and known states' rights advocate, to go to France. Henry's archenemy, Hamilton, protested vociferously.³⁶

In the meantime, Madison supported Jefferson's view with a treatise of his own. It, too, supported states' rights and argued that the new laws gave the president too much power.³⁷ "The people not the government possess absolute power. . . . In the United States, the executive magistrates are not held to be infallible, nor the legislature to be omnipotent . . ." Despite the campaign of misinformation propagated by Federalist papers, he concluded that freedom of expression was essential to the workings of democracy: "The security of freedom of the press requires, that it should be exempt, not only from previous restraint by the executive, as in Great Britain, but from legislative restraint also; the Act will make us unfree because the people will be compelled to make their election between competitors, whose pretension they are not permitted, by the Act, equally to examine, to discuss, and to ascertain." Madison's treatise would play an important role during the next administrative challenge to a free press (see conclusion of this chapter). For now we need only note that these three pillars—states' rights, limited presidential power, and free speech—supported the Republican counterattack on the Federalists. It proved effective. In the off-year elections of 1799, the Republicans did well.

Even before political leaders emerged to attack the Hamiltonians, newspapers had laid the groundwork for such an attack. One of the strongest arguments that can be made for a free press can be drawn from the role that opposition papers played in rousing the public against the Alien and Sedition Acts. *Greenleaf's New Daily Advertiser* published an attack on the Sedition Bill while the ink from the president's signature was still wet. On Wednesday, June 13, 1798, it carried these words:

If the constitution of the United States was not considered by the majority of the house of representatives as a mere dead letter, or a piece of musty parchment, they would never have ventured to bring in a bill so directly contravening one of the most essential articles of freedom, and as clearly defined as any other clause in the bill of rights, namely, liberty of speech, printing and writing, all of which will not merely be infringed, but wholly annihilated, should this nefarious bill pass into law.³⁸

On July 3, 1798, the outspoken editor of the *Aurora* wrote, "What is meant by defaming a law is beyond my comprehension. To laugh at the cut of a coat of a member of Congress will soon be treason; as I find it will be to give a Frenchman a dinner or a bed, as soon as this bill passes."

The *Boston Gazette* came to the defense of the *Aurora* a few days later:

The Editor of the *Aurora* was [recently] arrested, on a warrant from Judge Peters of the Federal Circuit Court, on a charge of libeling the President, and the Executive Government in a manner tending to excite Sedition, and opposition to the laws, by sundry publications and re-publications. . . . The period is now at hand when it will be a question difficult to determine *whether there is more safety and liberty to be enjoyed at Constantinople or Philadelphia.*

Southern papers took up the call for repeal. The Norfolk *Herald* of September 1, 1798, not only opposed the bills, but applauded mass action against them:

The real friends to the liberties and happiness of America will rejoice at the decided part which the people of Virginia have taken against the Alien and Sedition bills. In the large and respectable county of Goochland, the people met on Monday last to consult on the present crisis of American affairs, and adopted

by almost an unanimous vote, Resolutions, expressive of their strongest disapprobation of the late acts of Congress and the President. There was a very full meeting consisting of about four hundred, of these not more than twenty or thirty were against the Resolutions. They also voted instructions to their delegates in the state legislature, requesting them to move, in the next session of the Assembly, a Remonstrance to Congress, against the late obnoxious acts of government, or to support any other constitutional measure which may be deemed more effectual, to vindicate the liberties of Speech and the Press, and to restore the trial by jury.—BRAVO!

The leading advocate of the Acts, Congressman Harper, reacted to the protests in South Carolina by introducing legislation to distribute Alien and Sedition Acts nationwide. For Republicans, this action was roughly akin to the Sheriff of Nottingham posting notices on trees that those who aided Robin Hood would be arrested.

Over the past 50 years, Americans have become accustomed to artists protesting against government policies whether they result in wars or infringements on rights. It was no different in 1798, 1799, and 1800. Poets and songwriters knew that the Alien and Sedition Acts could portend of censorship in the near future. They used their crafts to stir the public against the new restrictions. On September 17, 1798, one of the most devastating attacks on the Federalists' repressive policies came in a poem placed in the Boston *Gazette* and attributed to "Americanus." It was followed by the announcement of the resignation of the paper's editor, Benjamin Edes:

Since we are forbid to speak, or write
 A word that may our BETTERS bite,
 I'll sit mum-chance from morn to night;
 But pay it off with THINKING.
 One word they ne'er shall fish from me
 For Master Rawle, or Charley Lee;
 Yet, if they'll let my thoughts be free
 I'll pay them off with THINKING.
 When George began his tyrant tricks,
 And Ropes about our neck would fix,
 We boldly kicked against the Pricks
 Nor sat mum-chance, a THINKING.
 We freely spoke, and freely thought,
 And freely told him what we sought.
 Then freely seiz'd our swords, and fought
 Nor dreamed of silent THINKING.

If Hancock and great Washington,
 Had nothing said, and nothing done,
 His race the tyrant would have run,
 Whilst we were mum a THINKING.
 Had Dickenson not dar'd to write,
 Had common sense not spit his spite,
 Our soldiers had not dar'd to fight,
 But set down mum, a THINKING.
 We swore that thought and swords were free,
 And so the Press should ever be,
 And that we fought for Liberty,
 Not Liberty of THINKING,
 But Liberty to write or speak,
 And vengeance on our foes to wreak;
 And not like mice, in cheese, to squeak,
 Or, sit down mum, a THINKING.
 Again on Constitution Hill,
 We swore the sovereign people's will
 Should never want a press or quill,
 Or tongue to speak as THINKING.
 That still we're sovereign who'll deny?
 For though I dare not speak, Yet I
 ONE SOVEREIGN RIGHT, will still enjoy
 The SOVEREIGN RIGHT OF THINKING.
 AMERICANUS.

In fact, the election of 1800 was the first in which campaign songs were used to ask citizens to vote for a specific candidate. The Federalists had appropriated "Yankee Doodle" as their campaign song. Using the same tune, the Jeffersonians sang of attacking "men in pow'r [who] cry 'sedition.'" Other lyrics praised Jefferson and the action he would take if he were elected:

If you peace and freedom love,
 Act with circumspection,
 Ev'ry foe to these remove,
 At your next election,
 Choose for chief Columbia's son,
 The immortal Jefferson.
 He will ever-ever-ever-ever stand,
 Watching o'er your freedom.

After Jefferson's Inaugural, a lyricist wrote:

Acting in a noble cause,
 He abolished cruel laws,
 Set the mind and body free,
 He's the son of liberty.

The Defeat of Hamilton

The poems, editorials, and resolves had an effect as did the less bellicose nature of the French. In desperation, the hard-core Federalists responded with a counteroffensive. Hamilton expanded the army when the Federalists put Hamilton in command when Washington stepped down.³⁹ Hamilton used his authority the next month to crush John Fries' Rebellion in Pennsylvania.⁴⁰ He then worked to replace the conciliatory Adams with the more hawkish Charles Pinckney as nominee of the party for the elections of 1800. Jefferson could see that the Federalists were disintegrating, but he knew that they were likely to be ever more dangerous in that state.

A measure of the desperation of Hamiltonians can be seen in their attempt to convict Thomas Cooper, an anti-Federalist newspaper publisher, of sedition.⁴¹ Once editor of the Republican leaning *Gazette*, which was distributed in Sunbury and Northumberland, Pennsylvania, Cooper had been outspoken in his opposition to the Sedition Act.⁴² When Cooper was criticized for his views, he responded by printing a handbill for which he was charged with seditious libel. Specifically, Cooper accused President Adams of "a stretch of authority which the Monarch of Great Britain would have shrunk from; and interference without precedent, against law and mercy!"⁴³ At the trial Cooper hoped that his First Amendment rights and the truth he spoke would be an adequate defense. Associate Justice Samuel Chase of the Supreme Court presided over the federal trial. The prosecution tried to overcome Cooper's arguments by claiming that he had made false statements that insulted the president and thereby the citizens of the country.⁴⁴ The prosecution suggested that if such libels were allowed to go unchecked they might foment revolution.

Cooper responded that the political system was based on free and open debate and that the public had a right to know about the conduct of political officials. After all, many of the founders had attacked King George III by revealing his abuses of power and claiming he was insane.⁴⁵ The prosecution responded that Cooper's testimony was damning and that the Sedition Law was written precisely to take care of problems like Cooper. Judge Chase, a Federalist, fined Cooper \$400 and sent him to jail for six months.

Then there was case of James Callendar. He had written for the *Aurora* in Philadelphia, issued the standard Republican arguments and attacked

Adams and Hamilton. When it became clear he was going to be arrested, Callendar moved to Virginia, where he began another series of attacks during the election of 1800.⁴⁶ He put out a pamphlet favoring Jefferson and attacking President Adams, for which he was brought to trial in May of 1800 in Richmond. The most serious claims made by Callendar seem to be that Adams was trying to close the frontier, that he was an “aristocrat” who “proved faithful and serviceable to the British interest.”⁴⁷ Not surprisingly, Associate Justice Chase relished the chance to come to Richmond to hear the case. Callendar was defended by prominent Virginia Republicans including William Wirt and Philip Nicholas, who at the time was the attorney general of Virginia. They argued that what Callendar had written in his pamphlet was true and therefore exempt under the Sedition law. Furthermore, they claimed that the Sedition Law was unconstitutional. When Judge Chase disallowed these arguments, the defense team refused to continue. Following instructions from Chase, the jury found Callendar guilty.

As public outrage grew, many people demanded that their representative in Congress repeal the Acts. The Republicans made a valiant effort but the Federalists held firm in early 1800. However, the growth of the standing army and the direct tax on citizens provided Republicans with more ammunition to attack the Federalists. American naval vessels won victories at sea providing Adams with needed credibility and calming fears of an invasion. When he fired Hamiltonians McHenry and Pickering from the Cabinet, the split with Hamilton was complete. During the election campaign of 1800, Jefferson, Burr, Monroe, and Madison enjoyed watching the internecine fighting in the Federalist Party. Those loyal to Adams claimed that Hamilton had fathered a creole bastard.⁴⁸ In October, Hamilton accused Adams of “vanity without bounds,” “disgusting egotism,” “distempered jealousy,” and “desultriness of mind.”⁴⁹ When Hamilton’s missive somehow got into the hands of Aaron Burr, he passed it on to Republican newspapers. The public began to see in the Alien and Sedition Acts what Congressman Jonathan Livingston had predicted early in the debates over the Sedition Bill: “The President alone is empowered to make the law, to fix in his mind what acts, what words, what thoughts or looks, shall constitute the crime contemplated by the bill. . . . He is not only authorized to make this law for his own conduct, but to vary it at pleasure, as every gust of passion, every cloud of suspicion, shall agitate or darken his mind.”⁵⁰ Luckily for Adams, Napoleon set his sights on other nations. In May 1800, he crossed the Alps into Italy to retake the territories the Directory had lost in their war with the coalition forces headed by the Russians. After taking Milan, Napoleon defeated the Austrians at Marengo, one of his most impressive strategic victories.

The signing of the Franco-American Convention relieved the external pressure and revealed that Hamilton was at best mistaken, for an agreement

could be reached with the French after all. The Jefferson-Burr ticket was elected in 1800, ending Hamilton's dreams of power and striking a blow from which the Federalist Party would not recover. In February of 1801, just days before Jefferson's Inaugural, Adams concluded a treaty with France ending all pretense of a crisis. The Sedition Act expired by its own terms on March 3, 1801, just before Jefferson's inauguration. In the election of 1802, only 39 Federalists survived in the House against 103 Republicans. Only nine Federalists survived in the Senate as against 25 Republicans.

Conclusion

The free press and such articulate writers as Jefferson and Madison defeated the Federalists in part by revealing how their actions, like those of Judge Chase, contradicted their rhetoric and constitutional principles. Federalist suppression of free speech was clearly in conflict with the goals of liberty and internal tranquillity. Worse, their corruption of freedom of expression by using it to advance faulty claims came back to haunt them. Jefferson, in his first Inaugural Address in March 1801, expressed the sentiments of what was by then the majority of the nation and the spirit of later responses to radicalism:

Let us, then, fellow citizens, unite with one heart and one mind. Let us restore to social intercourse that harmony and affection without which liberty and life itself are but dreary things. And let us reflect that, having banished from our land that religious intolerance under which mankind so long bled and suffered, we have yet gained little if we countenance a political intolerance as despotic, as wicked, and capable of as bitter and bloody persecutions. . . . Every difference of opinion is not a difference of principle. We have called by different names brethren of the same principle. We are all Republicans, we are all Federalists. If there be any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.

Jefferson immediately pardoned all who had been convicted or who were awaiting trial under the Acts.⁵¹

And so the first assault on the First Amendment ended with one of its strongest proponents becoming president.⁵² This assault, like those that we examine in the following chapters, was motivated by perceived threats, be