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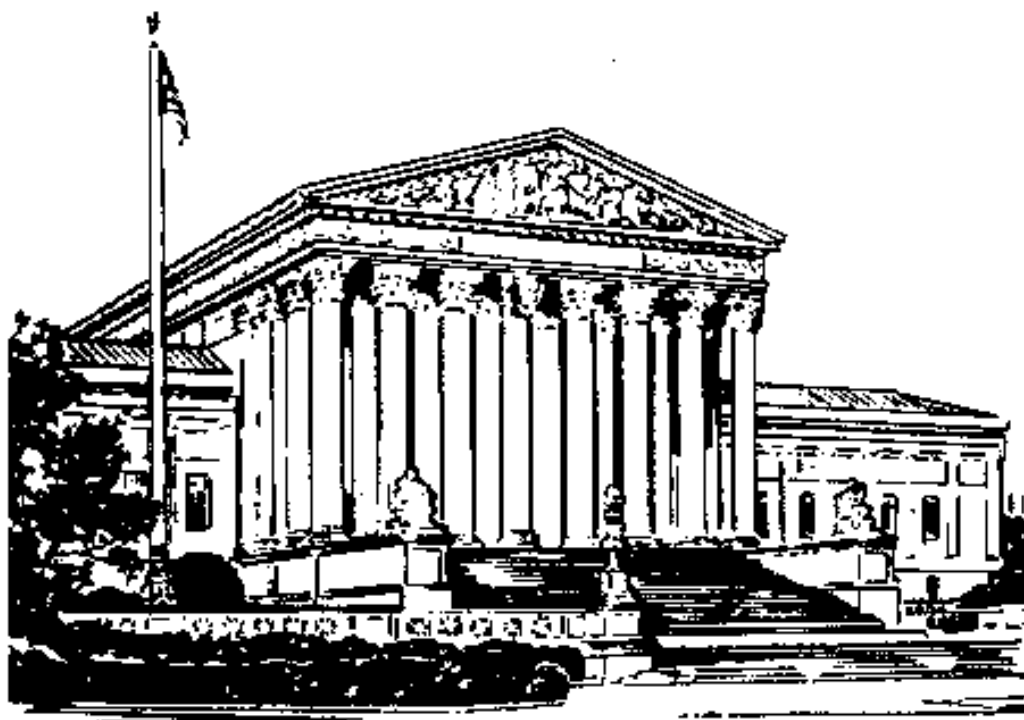
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Seditious Aliens and Native "Seditionists"

by William F. Swindler

The American Revolution, it has frequently been pointed out, was not a revolution so much as a War of Independence, its more nearly official title. From the Declaration and Resolves of the First Continental Congress in 1774 to the completion of the American constitutional rationale in the Bill of Rights in 1791, the Americans insisted that they were the heirs of the British constitution, ultimately compelled to declare their separation from England in order to secure to themselves the rights of Englishmen in the New World.

The French Revolution much more closely followed the dictionary definition of the word: "a sudden political overthrow brought about from within a given system," or "a seizure of state power by the militant vanguard of a subject class." The insurrectionists of 1789 had no well defined constitutional heritage to claim as a birthright. The *philosophes* of the *ancien regime*

Montesquieu, Rousseau and Voltaire — had theoretical views of constitutionalism which appealed to Adams, Jefferson and others of the American Founding Fathers; but they had no intellectual influence upon the events which led to the storming of the Bastille and the Reign of Terror. George III lost a major segment of British North America — but Louis XVI lost his head.

The events in France between 1789 and the end of the century were indeed a challenge to all Western political experience. The exhilarating Declaration of the Rights of Man and of the Citizen seemed, on paper at least, to be even loftier than the Virginia Declaration of Rights of 1776, which had been hailed as the epitome of individuals' constitutional protection against organized government. Jefferson, indeed, had ardently recommended the Virginia Declaration to the French hero of American independence, the Marquis de Lafayette. But the bloodbath of the guillotine, the rapid succession of new constitutions in France (four within ten years), and the proclaimed intention of the French revolutionaries to send forth armies to help overthrow other monarchies, caused many early sym-

pathizers to have second thoughts. Edmund Burke, the eloquent friend of the American rebels a generation earlier, was more apologetic than enthusiastic about the French affair. Jefferson himself, now in Paris, could see in the rapid change of governments the consequences of his suggestion that every generation should have its own revolution.

In the closing decade of the eighteenth century, as the new American experiment in constitutional government was getting under way, the violent outburst in France seemed in time to offer as grave a threat to the new order in the United States as it represented to the established kingdoms of Europe. For the emerging new political parties, the zeal and violence of the French revolutionaries created a profound dilemma. The Jeffersonians — originally known as anti-Federalists and soon to adopt the even more radical name of Republicans — found themselves maneuvered by political circumstances to a position of support for the French extremists, if only because, first, the *philosophes* had been French and second, France had aided the American Revolution. The Federalists, nominally centered around John Adams, claimed to be the heirs of the English tradition and thus committed to opposition to the extremists in France.

Throughout these years, from the eve of the Constitutional Convention to the Jeffersonian "revolution" in the Presidential elections of 1800, there were periodic alarms over movements which threatened to tear the young country apart. In August 1786, western and central Massachusetts erupted into the frustrations of violence bred of the economic depression which followed the Revolution, and the indifference of the state legislature to the plight of the under-portioned citizenry west of Boston and its environs. A war veteran, Daniel Shays, emerged as a leader of the disenfranchised, debt-ridden countrymen, organizing bands of armed men to intimidate the courts hearing foreclosure suits, and talking of seizing supplies held in the "Continental" warehouse at Springfield. General Benjamin



In January, 1787, debtors in Massachusetts broke into open revolt reacting to the government's refusal to print paper money to expand the short supply of currency. Daniel Shays, and a group composed mostly of farmers, attacked the Springfield arsenal but were dispersed by a mercenary militia hired by Boston merchants.

Lincoln, Washington's fellow officer in the recent conflict, led government troops through a snowstorm in February 1787 and captured most of the rebels, ending the insurrection.

Only four years later, in Washington's first administration, a more serious uprising occurred in western Pennsylvania, provoked by a tax levied by the new Federal Congress. Because the tax fell primarily upon spiritous liquors, this became known in history as the Whiskey Rebellion. From July to September 1791, federal tax collectors were harassed throughout the area; then United States troops, marshalled by Secretary of the Treasury Alexander Hamilton with the President's approval, marched into Monongahela and put an end to resistance.

Into this unstable situation, the envoy of the French Revolution now appeared, landing at Charleston, S. C. in April 1793: Edmond Charles Genet, who called himself "Citizen" in the way the Russian revolutionaries of the twentieth century called themselves "Comrade." His first act, even before proceeding to Philadelphia to present his credentials, was to arrange for the outfitting of four French privateers to be dispatched on the high seas to attack British ship-

ping; he claimed authority for doing this under the 1778 treaty of alliance with France, which had given the allies the right to use American ports both for such expeditions and for bringing prizes of war into American admiralty courts. Washington was thoroughly alarmed, and — again in April, and before Genet had reached the capital—issued the famous Neutrality Proclamation of 1793. Already the British minister was enlisting the aid of Hamilton, one cabinet officer, in bringing about the Neutrality Proclamation; Jefferson, whose political preferences were always diametrically opposed to Hamilton's, split the Cabinet by siding with the new French minister.

In the light of Revolutionary France's proclaimed policy of stirring up insurrection generally, buttressed by documentary records which have come to light over the years, there seems little reasonable doubt that "Citizen" Genet was to the French embassy what the disguised KGB officers are in the Russian embassy today. His instructions, indeed, were to probe three areas of the United States where trouble with England could be stirred up, either directly or through collateral adventurism against Spain. Thus the

South Carolina scene was explored to gauge the sentiment for invading Florida, the key coastal area which alternated between British and Spanish control. New separatist movements in Canada were discussed in New York. But the most sensitive — and flagrant — of his operations was the testing of the separatist dispositions of the new Western United States itself, fomented by the settlers' resentment at the Eastern political establishment's lack of support for chronic proposals to open the Mississippi for western exports by seizing the port of New Orleans from the Spanish.

Genet's tactics were so blatant that by late summer Washington's administration had formally asked France to recall him. When the recall came — in the form of a replacement by a more subtle *provocateur*, Charles Fauchet — Genet himself suddenly decided not to return to France. He bought a small farm on Long Island, married the daughter of Governor George Clinton, and eventually became an American citizen. As for Fauchet, his intrigues accounted for the disgrace and resignation of the Secretary of State, Edmund Randolph, and the exacerbation of international relations which led in the Adams administration to the so-called "quasi war" (today it would be called the "cold war") with France.

This was, accordingly, the background of foreign and domestic unrest which led the Adams administration to request legislation which has become notorious in early constitutional history as the Alien and Sedition Acts. The direct chain of events had begun in the closing years of Washington's second administration, when the United States undertook to seek diplomatic means of settling the issues between the Americans and the British on the one hand, and with Spain on the other. Chief Justice John Jay was drafted as the envoy plenipotentiary to negotiate with London, and the treaty which bears his name was concluded in the fall of 1794. The Spanish Treaty of San Lorenzo, bearing the name of the American minister to Madrid, Thomas Pinckney, was concluded in the winter of 1795. Both of these pacts substantially reduced the tensions between the United States and these powers, although Jay's Treaty represented such great concessions to Britain that it was bitterly condemned in the states; the public attacks on both Jay and the treaty were, in fact, the immediate cause of the Senate's failure to confirm the second Chief Justice, John Rutledge, after

his recess appointment to the Supreme Court.

Seeking to settle differences with the principal foreign source of tension, the incoming Adams administration sent a commission in 1797 to Paris (one of the commissioners being a future Chief Justice, John Marshall). The unofficial French negotiators disguised their identities under the letters XYZ, and these became the title for the *cause celebre* which resulted. The French proved bellicose and overdemanding, and negotiations broke off in the winter of 1798; publication of the correspondence involved in this affair provoked even greater public outcry — this time against France — in the United States and led to the "quasi-war" (Ultimately still another Chief Justice, Oliver Ellsworth, was drawn into these international issues, negotiating the settlement of the French question in the so-called Convention of 1800.)

With hostile European colonial powers or revolutionaries chronically interfering with American domestic and foreign policies, and with an already unpopular Federalist administration the target of virulent homegrown attacks, the Adams administration in the summer of 1798 prompted Congress to enact four momentous and controversial pieces of legislation (see box). Of these, the most famous was the Sedition Act of July 14, for it sparked a firestorm of political and constitutional events that led to the virtual annihilation of the Federalist party in the elections of 1800. On the constitutional side, it produced the Kentucky and Virginia Resolutions and a sequence of state trials which have been the subject of apologetic and ambivalent commentary ever since (see box, again).

The immediate legal (as well as political) question precipitated by the law of July 14 (by historic irony, taking effect on Bastille Day) was, of course, the constitutionality of the statute under the guarantees of the First Amendment. Among many evils abolished by the Bill of Rights, it was argued, was the common law of seditious libel. On the other hand, the situation raised the classic argument that the right of self-preservation placed a limit on the uses and abuses of First Amendment freedoms, when — as Justice Oliver Wendell Holmes would put it years later in dissenting on the constitutionality of the so-called Sedition Act of 1917 — there might be a "clear and present danger" that there was an actual threat to the security of the state.

The situation also invoked another principle

which was to be tested by the facts: If freedom of expression was guaranteed by the Constitution, it obviously was not "safe" expression but inflammatory, unpopular expression which required protection. Even Holmes conceded that no one should irresponsibly cry "fire" in a crowded theater; but short of false, or what the French have always called "tendentious," publications, the right of the individual to say or publish what he pleased was the ultimate test of whether the First Amendment meant what it said.

As usual, the defendants in these cases were not models of propriety — indeed, the manifest violence of their utterances, even in a day when political and personal invective was the rule, sorely tried sympathizers who sought to offer their defense. Although none of the prosecutions under the Sedition Act ever reached the Supreme Court on review, the fears of the American public at the time made it highly questionable which side would have won out in the court of public opinion. The statute itself was clearly treated as an emergency measure, with a provision that it should expire at the end of the term of the Congress ending in March 1801.

A total of two dozen prosecutions were attempted under the Sedition Act, and there was also an incident involving the privileges and immunities of a member of Congress. Nine convictions were obtained, but only a few individuals actually were fined or imprisoned. The defendants for the most part were the most scurrilous practitioners of a journalistic calling not yet affected by any canons of professional ethics; among them were such roughneck editors as Benjamin Franklin Bache, James Callendar and William Duane. They also included as separate targets the Congressman from Vermont, Matthew Lyon, and the scholarly South Carolina lawyer and writer, Thomas Cooper. Finally, as a comic footnote, the dragnet turned up a Massachusetts editor who had described the Sedition Act as a product of John Adams' "hinder parts."

In the case of Bache, his unbridled attacks on the Federalists provoked the Adams administration to institute proceedings against him even before the Sedition Act came into effect. That is, the prosecution based its claim to jurisdiction on the common law of seditious libel, thus revealing the theory they intended to advance under the statute. This raised the equally grave question of whether there was a Federal common law of

crime—something which the Marshall Court answered in the negative (*United States v. Hudson & Goodwin*) 1812.

The Philadelphia *Aurora* edited by Bache was a Jeffersonian mouthpiece, which made the Federalists all the more zealous to bring the writer to "condign punishment." The administration majorities in Congress had already barred him from the press section of both Houses; an economic boycott of the newspaper was in progress; and Bache himself was twice physically assaulted — an occupational hazard of journalism which continued well into the nineteenth century. Bache retaliated by obtaining and publishing a State Department copy of a letter from Talleyrand, the French foreign minister — an indication that the "news leak" had already made its appearance. Finally, in June 1798 — still several weeks before the Congressional Act of July 14 — an indictment was brought in the United States District Court in Philadelphia charging the journalist with "libelling the President & the Executive Government, in a manner tending to excite sedition, and opposition to the laws, by sundry publications and republications."

Bache, a grandson of the illustrious Franklin forebear, had founded the *Aurora* just as the new national government was getting under way, and before long was attacking everyone in sight with a fine disregard for fairness or facts. Even the heroic Washington was not immune; in 1796 Bache published, as true, the manifestly forged letters originally issued in London during the early part of the Revolution, in which the American commander in chief allegedly despaired of the patriot cause. Upon the retirement of the first President, Bache rejoiced that "this day ceases to give a currency to political iniquity and to legalize corruption." This was nothing to the contrary he poured upon the second President, which finally provoked the indictment for common law sedition. Bache beat that rap, however, by contracting yellow fever and dying, at the age of twenty-nine, that September.

James Callendar, a Scottish-born polemicist, made Bache seem relatively temperate. Under indictment for sedition in England in 1793, he had fled to the United States where he held himself out to be a martyr to civil liberty. Jefferson and his political cohorts readily accepted Callendar at face value, although they should have been forewarned by his sensational publication of the salacious background to the private



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Thomas Cooper (left) and William Duane (right) were two of the men prosecuted under the Alien and Sedition Acts. Cooper, a one-time Pennsylvania judge, and a former chemistry professor was jailed for six months in 1800 for criticizing the Adams administration in print.

life of Alexander Hamilton. Years later, when he fell out with the Sage of Monticello, he would publicize the affair of Sally Hemings and other peccadilloes which still lurk in the shadowy background of Jefferson's later biographies. Callendar, mindful of the indictment still pending in London, found it prudent to abandon Philadelphia upon the passage of the Sedition Act, and sought new refuge in Richmond. With Jefferson's secret patronage, he resumed writing, for the Richmond *Examiner*, and in 1800 published a manifestly Jeffersonian campaign pamphlet, *The Prospect Before Us*; combining typical campaign criticism of the incumbent administration, the pamphlet indulged in wild excesses of personal attacks on Adams—one of the factors in the long and tragic estrangement of the two Founding Fathers. The attacks were so outrageous that they insured his prosecution and conviction under the Sedition Act. Callendar was fined \$200 and sentenced to nine months imprisonment; and he showed his true character when Jefferson, after taking office, issued a full pardon and ordered the government to remit the fine. When bureaucratic delays held up the repayment of the funds, with interest, Callendar began an abusive attack on his former patron which threatened to exceed anything he had written against the first two Presidents. In 1803

Callendar died of drunken drowning in the James River, and even the Republicans breathed a sigh of relief that he had found a final resting place "in congenial mud."

Thomas Cooper, English born and Oxford educated, had far greater intellectual credentials than any of the other journalistic miscreants of this era. Yet he also managed to alienate even those on his side; the pro-American Burke criticized him in the House of Commons for his attempted justification of the murderous activities of the French Revolution—to which Cooper rejoined with an attack on "privileged orders." Soon thereafter he set sail for America. Possessed of a law degree and a smattering of training in medicine, he practiced both professions around Philadelphia and eventually received an honorary M.D. from the "University of New York." He also taught chemistry and launched a new round of political writings; his volume of *Political Essays* in 1800 brought on an indictment under the Sedition Act and a fine of \$400, repayment for which was finally made to his estate after his death in 1839. Jefferson considered Cooper a true Renaissance man, and secured his appointment to the faculty of the New University of Virginia; but delays in opening the institution caused Cooper to move on to South Carolina, where he maintained a rich corre-

confidence with Jefferson and developed a career in scholarship. His *Lectures on the Elements of Political Economy* became a standard textbook of its day, and his later commentary on the Constitution was one of the most eloquent expressions of the Jeffersonian view to counterbalance Joseph Story's great work of the 1830s.

William Duane presented a clear case of Jefferson's own involvement in the political drive against the Sedition Act and thus against the incumbent Federalist administration. As the election year of 1800 approached, the hysteria over French radicalism and its impact in the United States merged with the alarm of conservatives that the far-left Republicans under Jefferson were a good bet to win both the Executive and Legislative branches of government. The Virginia firebrand, whose great Declaration of 1776 had originally proposed the abolition of slavery, had worried the establishment of the older seaboard centers ever since; and the certainty that the Alien and Sedition Acts would be officially repudiated once he took office, added to the eagerness of the Federalists to denigrate his journalistic spokesman as soon and as drastically as possible. Duane, although born in colonial New York, had returned to his mother's native Ireland in 1774 and had only returned to America after a twenty-year absence; hence he could be lumped with other "seditious aliens" who constituted a threat to the "older" America.

Duane succeeded Bache, upon Bache's death, as editor of the *Aurora*, and promptly gave notice that its anti-Federalist venom had not been diluted. The government equally quickly identified him with the body of "intriguing, mischief-making foreigners," and late in 1798 brought an indictment which was virtually a reissue of the indictment against the late and largely unlamented Bache. The case was badly handled by the government, and the editor was quickly acquitted. A fresh prosecution on a new charge was initiated in 1799, for a statement that Adams was privy to British efforts to bribe various government agents. Duane offered in defense a letter signed by Adams himself, which so strongly suggested the President's knowledge of British machinations that the government dropped its charges. Seeking to reach the increasingly effective critic by another tactic, the Senate then undertook to cite him for contempt; Jefferson, as Vice-President and therefore presiding officer of the Senate, formally signed the Senate com-

plaint. The contempt ploy eventually died, and a third indictment was obtained in 1800; Duane and Jefferson, in collaborative correspondence, simply delayed government action until Jefferson took office as President and the statute expired.

These were typical of the byzantine policies generated by the Alien and Sedition Acts, which offered the first practical challenge to the democratic theories of the Founding Fathers. It was a time of passionate commitments to political positions, in which both sides were equally guilty of excesses beyond the bounds of political and civic good taste. As a recent insightful study by Professor Leonard Levy has shown, the succeeding Jefferson administration had its "dark side" in the area of civil liberties. The invective of political journalism persisted at least until Andrew Jackson's day, with Congressional subsidies of government printing unabashedly improving the chances of administration organs. The youthful United States, until the hysteria of the so-called Burr conspiracy and the War of 1812 had been survived, had no means of demonstrating its ability to control its own future.

Nor is it a sign of the innocence of the eighteenth century, that sweeping generalizations about absolute freedom of expression have had to come to terms with palpable abuses of the freedom. The hysteria of the McCarthy era has been less than a generation before 1984, a clear warning that the overreaction of the Federalist age can occur again.

Appendix

Constitutional Crises: Acts and Resolutions

The four acts passed by Congress in June of 1798 (5th Congress, 2nd Session), though never enforced as to the first three, reflected the xenophobia and the domestic tensions of the time. The first three statutes were aimed at tightening the qualifications for citizenship, creating what amounted to an alien registration system (for all aliens, not official agents as the modern law stipulates) and providing means of interning nationals of hostile powers in the event of war. The fourth and most significant act, dealing with sedition and seditious activities, raised constitutional questions which have never been satisfactorily resolved.

Naturalization Act of June 18, 1798 (1 Stat. 566). This statute, among other things, increased the minimum time of residence for candidates for citizenship from five to fourteen years. The new time period dated back to 1784, when the Treaty of Paris had gone into effect, and thus created a "safety" interval before refugees from the French uprisings of 1789-93 who had come to America could become eligible for naturalization.

Alien Act of June 25, 1798 (1 Stat. 570). This law amounted to a compulsory registration statute for foreign residents, and empowered the Executive branch to expel any undesirables.

Alien Enemies Act of July 6, 1798 (1 Stat. 577). This somewhat extraordinary statute, passed in obvious anticipation of a quasi-war or actual war with one or more foreign powers, embodied familiar provisions of international law for internment residents who were subjects of a hostile power. An "alien friends" act which was advanced as a companion statute failed to pass Congress, and as a result a number of French refugees fled to Congress or went into hiding.

Sedition Act of July 14, 1798 (1 Stat. 596). Because of the serious constitutional problems embodied in it, this statute warrants quoting in detail, viz.:

SEC. 1. *Be it enacted* . . . That if any persons shall unlawfully combine or conspire together, with intent to oppose any measure or measures of the government of the United States, which are or shall be directed by proper authority, or to impede the operation of any law the United States, or to intimidate or prevent any person holding a place or office in or under the government of the United States, from undertaking, performing or executing his trust or duty; and if any person or persons, with intent as aforesaid, shall counsel, advise or attempt to procure any insurrection, riot, unlawful assembly, or combination, whether such conspiracy, threatening, counsel, advice, or attempt shall have the proposed effect or not, he or they shall be deemed guilty of high misdemeanor, and on conviction, before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding five thousand dollars, and by imprisonment during a term not less than six months nor exceeding five years; and further, at the discretion of the court may be bound to find sureties for his good behaviour in such sum, and for such time, as the said court may direct.

SEC. 2. That if any person shall write, print, utter, or publish, or shall cause or procure to be written, printed, uttered or published or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either

house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment, not exceeding two years.

SEC. 3. That if any person shall be prosecuted under this act, for the writing or publishing any libel aforesaid, it shall be lawful for the defendant, upon the trial of the cause, to give in evidence in his defence, the truth of the matter contained in the publication charged as a libel. And the jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court, as in other cases.

SEC. 4. That this act shall continue to be in force until March 3, 1801, and no longer . . .

The Kentucky and Virginia Resolutions, manifestly in protest against the Alien and Sedition Acts, were actually a consummate expression of Thomas Jefferson's theory of constitutional government. Jefferson himself drafted the Kentucky Resolution, and his ardent disciple, James Madison, sponsored the companion Virginia Resolution, each passed by the legislatures of the respective states on the heels of the Congressional enactments. They represented the political egalitarianism dear to Jefferson, and his equally firm conviction that the states were the ultimate reviewers of the constitutionality of acts of the Federal government. His theory that the sovereign states could "interpose" their paramount authority in cases where they determined that the national government was acting unconstitutionally, was rejected by the majority of the nation both at this time and in the early desegregation crisis of the 1950s.

Kentucky Resolution of November 16, 1798. This ninefold Resolution was the more detailed of the two companion legislative expressions. It (I) reiterated the compact theory that the Federal Constitution was created by the states; (II) found that Congress had exceeded its powers in enact-

ing these and a contemporaneous tax statute; (III) expressly declared that the Commonwealth of Kentucky found the Sedition act in violation of the First Amendment; (IV) recited the "alien friends" which Congress had failed to pass and declared — in keeping with specific provisions of a number of state constitutions — that such persons were under the protection of those states; (V) served notice that the states had a right to resist attempted deportation of anyone under the Congressional Act of July 6; (VI) found the Congressional act of June 25 to violate state policy; (VII) found a revenue law (though unrelated to the principal enactments) to exceed Congress'

delegated authority; (VIII) instructed its Congressional delegates to treat the Resolution as a formal Remonstrance to Congress warranting an act of rescission; and (IX) directed the governor formally to dispatch copies of the Resolution to the other states.

Virginia Resolution of December 24, 1798. Since Jefferson's Kentucky Resolution had apparently said all there was to be said on the subject, Madison's Virginia Resolution was much briefer. Its main thrust was that the General Assembly "doth particularly PROTEST against the palpable and alarming infraction of the Constitution."