
**PRESIDENTIAL POWER AND AMERICAN FEAR:
A HISTORY OF INA § 212(F)**

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ABSTRACT

This Note details the legislative history of § 212(f) of the Immigration and Nationality Act of 1952, which empowers the President to unilaterally restrict entry to the United States by any noncitizen. In 2016, President Trump fully embraced this power in implementing a broad travel ban against citizens of eight nations. In order to better understand the historical meaning of § 212(f) and the travel ban, this Note provides context by comparing the social forces at work in 2016, in 1952, and in 1789, when the Quasi-War with France led American legislators to enact the Alien Friends Act. This latter legislation similarly empowered President Adams to unilaterally deport any noncitizen for any reason. During each of these periods, although the United States was not at war, anti-immigrant hysteria gripped many Americans. This comparison reveals that while the Founders were concerned with the tyrannical nature of such unchecked executive power, in 1952 the Congressional majority ignored the Founders' cautionary approach. This Note concludes by arguing that critics of the travel ban should follow the lead of their predecessors by seeking to amend the law in order to better check the President and return such power to the more democratic legislature.

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INTRODUCTION

Shortly after taking office, President Trump issued Executive Order 13,769, banning entry to the United States for persons from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.¹ This executive order, soon known as the “travel ban,” went into effect immediately on January 27, 2017, leaving travelers from the affected nations in limbo and spawning a wave of protests at airports and litigation in the courts.² Afterwards, the travel ban was halted by restraining orders issued by federal district courts,³ rescinded and replaced,⁴ elapsed, and reissued by the President.⁵ Two circuit courts were called upon to consider the statutory and constitutional questions raised by the travel ban,⁶ and in preliminary proceedings the Supreme Court of the United States had occasion to weigh in.⁷ The third version of the travel ban remained operational while the

¹ Exec. Order No. 13,769, 3 C.F.R. § 273 (2017) (banning entry of refugees from Syria and prohibiting entry of “aliens from countries referred to in section 217(a)(12) of the INA,” which signifies nationals of other nations).

² See, e.g., Peter Baker, *Trump Modifies Ban on Migrants As Outcry Grows*, N.Y. TIMES, Jan. 30, 2017, at A1 (reporting thousands of protestors at White House and in streets of cities across country); Alexander Burns, *Legal Challenges Mount Against Travel Ban Ordered by Trump*, N.Y. TIMES, Jan. 31, 2017, at A18 (reporting on litigation initiated in states of Massachusetts, New York, Virginia, and Washington); Liam Stack, *Yemenis Shut Stores and Hold Rally to Protest Trump Ban*, N.Y. TIMES, Feb. 3, 2017, at A22 (reporting on New York City Yemeni bodega strike).

³ See *Aziz v. Trump*, 234 F. Supp. 3d 724, 739 (E.D. Va. 2017) (enjoining enforcement of provisions of executive order on persons with connections to Virginia); *Washington v. Trump*, No. 2:17-cv-00141, 2017 WL 462040, at *2-3 (W.D. Wash. Feb. 3, 2017) (enjoining nationwide enforcement of multiple provisions of executive order); *Tootkaboni v. Trump*, No. 17-cv-10154, 2017 WL 386550, at *1 (D. Mass. Jan. 29, 2017) (enjoining enforcement of executive order for seven days).

⁴ Exec. Order No. 13,780, 3 C.F.R. § 305 (2017) (revoking Executive Order 13,769 and establishing prohibition of entry for “nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen”).

⁵ Proclamation No. 9645, 3 C.F.R. §§ 140-143 (2017) (indefinitely prohibiting entry of nationals from Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen). It is not clear why the White House chose to issue the third iteration of the travel ban as a proclamation rather than an executive order, as it had done with the previous two versions.

⁶ *Hawaii v. Trump*, 859 F.3d 741, 789 (9th Cir.) (affirming district court’s injunction prohibiting enforcement of provisions of executive order), *vacated*, 138 S. Ct. 377 (2017) (mem.); *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605-06 (4th Cir.) (staying only portion of district court’s injunction as applied to President, otherwise affirming), *vacated*, 138 S. Ct. 353 (2017) (mem.).

⁷ See *Trump v. Int’l Refugee Assistance Project*, 138 S. Ct. 353, 353 (2017) (vacating judgment and remanding case to be dismissed as moot); *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2088-89 (2017) (per curiam) (staying enforcement of injunction except for those with bona fide relationship with person or entity within United States).

Supreme Court considered the matter.⁸ The Court heard oral arguments on April 25, 2018, and issued its decision upholding the ban on June 26, 2018.⁹

Despite all of the litigation surrounding the travel ban and its subsequent iterations, the briefing involved—from the government, the various challengers, and amici curiae—failed to adequately address the legislative history of the statutory provision at the center of the executive order and subsequent litigation.¹⁰ This provision, § 212(f) of the Immigration and Nationality Act (“INA”), states in pertinent part:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.¹¹

There are likely several reasons for this lack of attention. First, the provision appears unambiguous on its face. For some interpreters this is enough, obviating any attempt to pull back the curtain to look at the legislative history behind the text.¹² Indeed, this was determinative in the Supreme Court’s decision in *Trump v. Hawaii*.¹³

A second reason for the lack of attention to the legislative history of § 212(f) may be that the statutory provision has been invoked multiple times, almost

⁸ *Trump v. Hawaii*, 138 S. Ct. 923, 923-24 (2018) (mem.) (granting certiorari); *Trump v. Hawaii*, 138 S. Ct. 542, 542 (2017) (mem.) (staying injunction issued by district court barring implementation of third iteration of travel ban pending appeal in Ninth Circuit).

⁹ *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

¹⁰ This perhaps also explains the Court’s own cursory review of the legislative history of § 212(f) in *Trump v. Hawaii*. *See id.* at 2407 (considering authority granted in Immigration and Nationality Act before proceeding to merits).

¹¹ Immigration and Nationality Act § 212(f), 8 U.S.C. § 1182(f) (2012).

¹² *See, e.g.*, *United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, Kennedy & Thomas, JJ., concurring) (“After all, ‘[a] statute is a statute,’ and no matter how ‘authoritative’ the history may be—even if it is that veritable Rosetta Stone of legislative archaeology, a crystal clear Committee Report—one can never be sure that the legislators who voted for the text of the bill were aware of it. The only thing that was authoritatively adopted *for sure* was the text of the enactment; the rest is *necessarily* speculation.” (alteration in original) (citation omitted) (quoting *id.* at 305 n.5 (plurality opinion))); *United States v. Mo. Pac. R.R. Co.*, 278 U.S. 269, 278 (1929) (“[W]here the language of an enactment is clear . . . the words employed are to be taken as the final expression of the meaning intended.”). However, prior configurations of the Court have been more willing at least to consider the legislative intent, even when the statutory language appears clear on its face. *See, e.g.*, *Garcia v. United States*, 469 U.S. 70, 75 (1984) (“[T]he most extraordinary showing of contrary intentions . . . would justify a limitation on the ‘plain meaning’ of the statutory language.”).

¹³ *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018) (“By its plain language, § 1182(f) grants the President broad discretion to suspend the entry of aliens into the United States.”).

without controversy, by every President since Reagan.¹⁴ The plain-reading understanding of the provision has become an accepted part of the statutory landscape.¹⁵ To the extent that this explains why § 212(f)'s grant of authority to the President has been uninterrogated, it represents a dangerous complacency in the legal-historical community. As this Note will show, the provision was enacted in 1952 and remained unused for nearly thirty years, raising questions about the precise texture of the provision and our historical understanding of the extent of the power granted.¹⁶ Further complicating the picture is the fact that Presidents have invoked the provision with increasing frequency since it was first used by President Reagan, suggesting a tentative exploration of the contours of the provision and an increasing normalization of its use.¹⁷ Significantly, the travel ban is the first invocation of § 212(f) that suggests a broadly-understood invidious and discriminatory purpose, which could have left it vulnerable to an as-applied challenge.¹⁸

¹⁴ See generally, e.g., Proclamation No. 8697, 3 C.F.R. § 94 (2011) (suspending entry of persons involved in human rights abuses—President Obama); Proclamation No. 7750, 3 C.F.R. § 2 (2004) (suspending entry of persons involved in official corruption—President George W. Bush); Proclamation No. 6749, 3 C.F.R. § 132 (1994) (suspending entry of certain Bosnian Serbs—President Clinton); Exec. Order No. 12,807, 3 C.F.R. § 303 (1992) (providing for enforcement of suspension of entry and interdiction of noncitizens without visas arriving by sea—President George H.W. Bush); Proclamation No. 5517, 3 C.F.R. § 102 (1986) (suspending entry of Cuban nationals—President Reagan).

¹⁵ See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187 (1993) (“It is perfectly clear that 8 U.S.C. § 1182(f) grants the President ample power to establish a naval blockade that would simply deny illegal Haitian migrant the ability to disembark on our shores.” (citation omitted)); *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1507 (11th Cir. 1992) (“8 U.S.C. § 1182(f) clearly grants the President broad discretionary authority to control the entry of aliens into the United States.”); *Chan v. Reno*, 916 F. Supp. 1289, 1293 (S.D.N.Y. 1996) (“The President of the United States is expressly authorized . . . to suspend the ‘entry of any aliens or of any class of aliens’” (quoting 8 U.S.C. § 1182(f))).

¹⁶ See *infra* Part I.

¹⁷ See generally KATE M. MANUEL, CONG. RESEARCH SERV., R44743, EXECUTIVE AUTHORITY TO EXCLUDE ALIENS: IN BRIEF (2017) (listing all instances of presidential invocation of § 212(f)).

¹⁸ While the most recent proclamation’s own language is rooted in national security concerns, its challengers noted that there is ample evidence, primarily from speeches given by then-candidate Trump on the campaign trail, that the true underpinnings of the orders have been anti-Muslim animus. Compare Proclamation No. 9645, 3 C.F.R. § 136 (2017) (expressing concern that targeted nations “remain deficient . . . with respect to their identity-management and information-sharing capabilities”), with Second Amended Complaint for Declaratory and Injunctive Relief at 11, *Int’l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570 (D. Md. 2017) (No. 8:17-cv-00361), 2017 WL 4508673, at *11 (“President Trump has repeatedly made clear his intent to enact policies that exclude Muslims from entering the United States and to favor Christians seeking to enter the United States.”). In *Trump v. Hawaii*, the Court accepted the Trump administration’s national security rationale

The government has long relied on the firmly established plenary power doctrine to argue for the dismissal of due process and equal protection challenges to immigration statutes.¹⁹ As traditionally interpreted, the plenary power doctrine relies on the notion that noncitizens outside the borders of the United States are not protected from Congressional or executive action by the United States Constitution.²⁰ However, the cases challenging the travel ban represented an opportunity for the courts to consider just what boundaries are created by the requirements of § 212(f). Under the provision, the President must make a “finding” that the entry of the noncitizen is “detrimental to the interests of the United States.”²¹ Some observers have criticized this language as unconstitutionally vague,²² and a holding that the requirements have no restraint on the President at all could implicate the nondelegation doctrine.²³ The courts

for the ban, and thus found little difference between Trump’s invocation of 8 U.S.C. § 1182(f) and that of previous administrations. *See* 138 S. Ct. 2392, 2421 (2018) (“[B]ecause there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.”).

¹⁹ *See* Kristin A. Collins, *Equality, Sovereignty, and the Family in Morales-Santana*, 131 HARV. L. REV. 170, 174, 190 n.117 (2017) (“[G]overnment lawyers have contended that under what is called the plenary power doctrine, for all persons born outside the United States, the line drawn by Congress between citizen and noncitizen is generated pursuant to the sovereign authority of the United States . . .”).

²⁰ *See* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990) (holding that Fourth Amendment “has no application” in context of searches and seizures of Mexican citizens by U.S. Drug Enforcement Administration officers operating in Mexico); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (stating that aliens who have not yet entered into United States stand “on a different footing” than those who have “once passed through our gates”); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (“As to [noncitizens without ties to, or physical presence in, the United States], the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.”).

²¹ 8 U.S.C. § 1182(f) (2012).

²² *See* Brief of Amicus Curiae Khizr Khan in Support of Plaintiffs-Appellees and Affirmance at 14-15, *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (No. 17-cv-15589), 2017 WL 1521287, at *14-15 (“President Truman’s Commission on the INA warned that Section 1182(f), in the absence of a limiting construction, would be impermissibly ‘vague.’ Although ‘latitude in administrative action is frequently a desirable objective . . . such discretionary authority should not be nebulous and undefined but rather should contain some standards controlling the administrative action.” (quoting PRESIDENT’S COMM’N ON IMMIGRATION & NATURALIZATION, WHOM WE SHALL WELCOME 178 (1953))).

²³ *See* *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472-75 (2001) (reviewing cases in which nondelegation doctrine was implicated, and noting that it has been used to strike down laws only twice); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (establishing “intelligible principle” test to answer nondelegation questions); Lauren Gilbert, *Obama’s Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116

have consistently chosen to interpret statutes in order to avoid such constitutional questions,²⁴ and have been somewhat less willing to defer to executive action than to legislative mandate in the immigration arena.²⁵ A deeper dive into the legislative history thus provides a better foundation for understanding why the legislature chose to divest its responsibility for immigration in this manner, whether such divestment implicates the nondelegation doctrine, and if not, whether a legislative fix is called for.

Finally, a third reason for the lack of attention to the legislative history of § 212(f) may be that it was buried in a complex bill that raised considerable controversy over other provisions. Ostensibly presented as a repudiation of the exclusion of nationals from Asian nations, which had been the practice in American immigration law since 1882,²⁶ the debates over the bill in 1952

W. VA. L. REV. 255, 282-83 (2013) (describing revival of nondelegation arguments in context of Obama's executive orders regarding immigration enforcement discretion); Gary Lawson, *Discretion As Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 236 (2005) (describing nondelegation doctrine as grounded in constitutional principles).

²⁴ See *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (“[I]nterpreting the statute to avoid a serious constitutional threat, we conclude that, once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute.”); *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (“[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’ we are obligated to construe the statute to avoid such problems.” (citation omitted) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))).

²⁵ See *Lloyd Sabaudo Societa Anonima per Azioni v. Elting*, 287 U.S. 329, 335-36 (1932) (“The action of the Secretary is, nevertheless, subject to some judicial review The courts may determine whether his action is within his statutory authority, whether there was any evidence before him to support his determination, and whether the procedure which he adopted in making it satisfies elementary standards of fairness and reasonableness, essential to the due administration of the summary proceeding which Congress has authorized.” (citations omitted)).

²⁶ See Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58 (suspending entry of Chinese immigrants to United States). Subsequent laws after 1882 broadened the application of racism to the immigration framework. See Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (limiting immigration through national origin quotas); Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874 (restricting immigration with literacy tests and categories of inadmissible persons and by banning persons from Asian-Pacific zones). It was this racism that all parties in 1952 agreed was pernicious, but which the opponents of the INA asserted was inherent in the national origins quota system adopted by the INA. See *infra* text accompanying note 106. In his veto message regarding the INA, President Truman wrote, “I cannot take the step I would like to take, and strike down the bars that prejudice has erected against them, without, at the same time, establishing new discriminations against the peoples of Asia.” H.R. DOC. NO. 82-520, at 2 (1952).

centered on the extent to which this was true,²⁷ since the bill maintained national origin quotas that continued to limit immigration from Asia.²⁸ When President Truman vetoed the bill, this was the criticism at the crux of his veto message to the House, a message which did not mention § 212(f) at all.²⁹ As this Note explores in Part I below, this is in stark contrast to President Adams's response to a similar delegation of power over noncitizens at the end of the eighteenth century.

Given this paucity of attention, it is high time for an analysis of the legislative history of this provision that suddenly became salient in 2016. Contextualizing this history with an examination of the analogous historical moment of the Alien Friends Act of 1798, as discussed in Part I, will help to draw out significant lessons for understanding the meaning of INA § 212(f) and suggest paths forward for opponents of the travel ban. In Part II, this Note provides further context by considering Supreme Court precedent regarding the power of the political branches in immigration law, as well as the use of § 212(f) by Presidents since 1952. Here this Note argues that while the Supreme Court has recognized the plenary power of Congress in the immigration context, there are some grounds on which the Court could have limited President Trump's use of the grant of power. Furthermore, the fact that no President called upon § 212(f) until thirty years after its passage, and then only as a foreign policy tool rather than in the name of national security, suggests similar presidential unease with the power granted in § 212(f) as that of President Adams about the Alien Friends Act, at least until President Trump.

With the Alien Friends Act and the implementation of § 212(f) as contextual bookends, this Note then turns in Part III to the legislative history itself. There, it becomes clear that Congress did in fact mean to grant the President wide-ranging, perhaps limitless powers when invoking § 212(f). This history also reveals roads not taken, specifically amendments proffered that would have bounded presidential authority to using the power only in real emergencies. These alternatives suggest pathways forward for a Congress newly concerned about the breadth of presidential power in this area. Then, in Part IV, this Note considers what these three histories tell us about the travel ban, the Supreme Court's decision in *Trump v. Hawaii*, grounds for alternative holdings, paths forward, and the responsibilities of legislators in times of anti-immigrant hysteria.

²⁷ See, e.g., 82 CONG. REC. 5765 (1952) (statements of Sens. Humphrey and McCarran) (“[W]e do not remove racial discrimination in immigration laws when we literally place a premium or a handicap upon an individual because of his ancestral background.”).

²⁸ See Immigration and Nationality Act, Pub. L. No. 82-414, § 202(b), 66 Stat. 163, 175 (1952) (establishing quotas for immigrants from Asia-Pacific region).

²⁹ See H.R. DOC. NO. 82-520, at 2-4.

I. THE ALIEN FRIENDS ACT OF 1798

The lack of executive-driven constitutional analysis of § 212(f) in 1952 and at almost any time afterwards is in stark contrast to a precursor statutory provision introduced in 1798, the Alien Friends Act, passed by Congress as one of the Alien and Sedition Acts.³⁰ The Alien Friends Act's history presents an interesting counterpoint to the treatment of § 212(f) and, given the involvement of many of the Nation's founders, provides some insight into the original understanding of the role of the Constitution with respect to noncitizens.

In 1798, the United States found itself embroiled in the international conflict sparked by the French Revolution. Jeffersonian Republicans supported the revolutionaries, but the Federalists held power and blanched at what they saw as the lawlessness of the revolution, particularly the radicalism of Maximilien de Robespierre and the Reign of Terror.³¹ The Federalists sought a closer relationship with Great Britain and successfully pursued what would become known as the Jay Treaty, which France regarded as a hostile step.³² This conflict led to hostilities on the high seas between American and French vessels, and threatened war at home.³³ At the height of anti-foreigner hysteria brought on by Federalist propaganda and the looming possibility of war with France, the Federalist Congress passed the Alien Friends Act, empowering the President to identify and deport any noncitizen the President suspected was a threat to national security.³⁴ The Federalists' vision for the law was even broader, as they sought presidential power to identify and remove any noncitizen that held political beliefs inimical to their interests.³⁵

³⁰ Alien Friends Act of 1798, ch. 58, 1 Stat. 570, 571.

³¹ See JAMES MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* 11-12 (1956) ("After the French Revolution went through the Terror, conservatives who had supported the American Revolution came to fear revolution as a menace to established order. . . . To the Republicans, on the other hand, the issues involved in the French Revolution pitted liberty against oppression . . .").

³² See William Stinchcombe, *Talleyrand and the American Negotiations of 1797-1798*, 62 J. AM. HIST. 575, 579 (1975) (describing internal reports of France's foreign ministry characterizing developments in Franco-American relations).

³³ See SMITH, *supra* note 31, at 5-6 (describing French naval attacks on American shipping and government efforts to prevent conflict from escalating into open war).

³⁴ Alien Friends Act § 1, 1 Stat. at 570-71 ("[I]t shall be lawful for the President of the United States at any time during the continuance of this act, to *order* all such *aliens* as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States . . ."). As will be discussed below, the statute included a two-year sunset provision in § 6. See *id.* § 6, 1 Stat. at 572.

³⁵ See SMITH, *supra* note 31, at 50 ("Whether or not war came with France, they wanted a statute empowering the government to deal with objectionable immigrants, such as the 'Wild Irish' refugees and English radicals.").

The Alien Friends Act was challenged by Jeffersonian Republicans as unconstitutional on a number of fronts. Significantly, in contradistinction to § 212(f), the Alien Friends Act did not require the President to justify his actions in any way—there was no provision for a “finding”; presidential judgment was enough.³⁶ The Jeffersonian Republicans charged that the law was an unconstitutional “enlargement of the powers of the Chief Executive” and that it represented an unprecedented “sweeping delegation of authority.”³⁷ The law collapsed the separation of powers, and Jeffersonian Republicans accused the Federalists of granting the President despotic powers.³⁸ Although many Federalists argued that noncitizens were not protected by the Constitution, President Adams was careful to limit his use of the grant of power and strictly interpreted the law.³⁹ In practice, this meant that President Adams rejected the blanket application of the law to immigrants generally, as advocated in some quarters.⁴⁰ Instead, President Adams selectively signed orders to be used against a few particular individuals whom he believed to be especially dangerous.⁴¹

The debate on the constitutionality of the Alien Friends Act’s open delegation of power was never resolved by the Supreme Court.⁴² The bill became law on June 25, 1798, with a two-year sunset clause, and despite the anti-immigrant hysteria whipped up in the Federalist press and a handful of removal orders signed by President Adams, not a single alien was deported under the Act before

³⁶ Compare Immigration and Nationality Act § 212(f), 8 U.S.C. § 1182(f) (2012) (requiring president finding that entry would be “detrimental to the interests of the United States”), with Alien Friends Act §1, 1 Stat. at 571 (granting presidential power to remove aliens determined to be dangerous). An alternative reading is that they are actually more alike, rather than different, further suggesting the unconstitutionality of the INA provision. To the extent that the 1798 courts would have required due process in the use of presidential judgment and articulation of reasonable grounds, the courts may have been in a position to judge whether any such determination or grounds were in fact reasonable and not merely the arbitrary use of power.

³⁷ JOHN C. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS* 163 (1952).

³⁸ See SMITH, *supra* note 31, at 85 (“In all free governments . . . these powers are exercised by different men; their union in the same hand ‘is the peculiar characteristic of despotism.’”).

³⁹ *Id.* at 175 (“The chief reason for the record of nonenforcement was the determination of John Adams to give the law a much stricter interpretation than the Federalist extremists desired.”).

⁴⁰ See *id.* at 163 (“Although the president did not question the legality of delegating his powers, he was convinced that the law’s broad powers ought to receive ‘a strict construction.’”).

⁴¹ See *id.* at 164-74 (detailing circumstances in which President Adams signed deportation orders under Alien Friends Act).

⁴² See Gregory Fehlings, *Storm on the Constitution: The First Deportation Law*, 10 *TULSA J. COMP. & INT’L L.* 63, 63-64 (2002).

it lapsed in 1800.⁴³ Thus, there was never occasion to challenge the law in court.⁴⁴ The Supreme Court did not decide many of the constitutional questions regarding Congress's power to regulate immigration until the next period of xenophobic hysteria, in the late nineteenth century.⁴⁵

As will be discussed in further detail in Part IV, the debates over the scope of presidential power sparked by passage of the Alien Friends Act stand in stark contrast to the quality and quantity of debate over the scope of presidential power when Congress passed § 212(f). This can be ascribed to the fact that American society was focused on the question of the appropriate powers of the presidency in the early years of the Republic, and the Alien Friends Act placed the question of that power front and center.

II. THE TRAVEL BAN IN HISTORICAL CONTEXT

Having established the deep historical roots of the controverted executive exercise of plenary power over immigration, this Part considers § 212(f) in the historical contexts of the Supreme Court's plenary power doctrine and executive self-restraint. The Alien Friends Act created controversy over the breadth of the President's power at a time when that power was only loosely defined. While the question itself was not answered by the Court in 1798, in the intervening years, the Court has developed presidential power doctrines largely deferential to congressional will.⁴⁶ However, the specific history of presidential reliance on § 212(f) suggests a history of presidential unease with the constitutionality of such a broad grant of power, similar to the concern President Adams expressed about the Alien Friends Act. In order to explore how these factors might shape an understanding of § 212(f), this Note now considers the legal-historical

⁴³ *Id.* Several warrants for removal were issued by Adams, but none were ever served. *See* SMITH, *supra* note 31, at 164-74. Afterwards, immigration policy, which had been a power reserved for the states until the late nineteenth century, was radically transformed into a national policy over which the judiciary would defer to Congress's plenary power. *See* discussion *supra* notes 19-20 and accompanying text.

⁴⁴ *See* SMITH, *supra* note 31, at 175.

⁴⁵ *See* *Fong Yue Ting v. United States*, 149 U.S. 698, 731 (1893) (“[T]he judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject.”); *Nishimura Ekiu v. United States*, 142 U.S. 651, 664 (1892) (upholding Immigration Act of 1891); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889) (holding that Congress has power to legislate immigration policy).

⁴⁶ This is particularly true in the administrative law arena. *See* *Mistretta v. United States*, 488 U.S. 361, 371-79 (1989) (reviewing history of nondelegation doctrine and concluding that Congress could delegate determination of criminal sentences to independent Sentencing Commission); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (establishing “intelligible principle” test).

context of the travel ban, that is, the contours of § 212(f) provided by case law and historical practice.

President Trump's travel ban offered an opportunity for the Court to reconsider the Founders' varied conceptions of the limits of congressional and presidential power over immigration. However, perhaps it should not be surprising that the Court forbore to do so. Precedent firmly establishes that Congress has plenary power to craft immigration policy, and nationals of other countries have limited claims to rights under the Constitution.⁴⁷ That said, it is less clear to what extent executive discretion ought also to be treated under the plenary power doctrine.

In *United States ex rel. Knauff v. Shaughnessy*,⁴⁸ the Court refused to find a due process violation when the Attorney General, without a hearing, blocked the entry of the wife of a U.S. serviceman on national security grounds.⁴⁹ The Court decided the case, not by applying plenary power directly to the executive, but by considering Congress's authority to empower the executive to make such decisions.⁵⁰ Importantly, the Court outlined the ways in which the Attorney General operated within his statutory power.⁵¹ This is significant, as it suggests that the plenary power doctrine is applied to Congress and that the President must operate within the statutory bounds set by Congress.⁵²

While *Knauff* held that the broadest of delegations is constitutionally permissible, the Court has also ruled that in the immigration arena Congress, and therefore the President, can be subject to constitutional limits.⁵³ Thus, the

⁴⁷ See *The Chinese Exclusion Case*, 130 U.S. at 609 (“The power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States . . .”).

⁴⁸ 338 U.S. 537 (1950).

⁴⁹ *Id.* at 546-47 (holding executive action valid exercise of legislative grant of authority). In *Trump v. Hawaii*, the Government cited *Knauff* to argue that on consular nonreviewability grounds, the Court did not have jurisdiction to consider the matter. The Court assumed without deciding that it had the authority to review the plaintiff's claims. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2407 (2018).

⁵⁰ See *Knauff*, 338 U.S. at 543 (holding that Congress could delegate broad powers over immigration to President because of inherent executive power over foreign affairs, but implying that President still must operate within Congress's grant of power).

⁵¹ See *id.* at 544.

⁵² Justice Thomas, concurring in *Trump v. Hawaii*, overstates the holding in *Knauff*, reading it as a basis for unfettered executive power in immigration with no “judicially enforceable limits” because immigration is “inherently” within the executive's authority. See 138 S. Ct. at 2424 (Thomas, J., concurring). Such a reading must ignore the ways in which *Knauff* analyzed executive conduct as within the legislative grant of power.

⁵³ See *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017) (“We hold that the gender line Congress drew is incompatible with the requirement that the Government accord to all persons ‘the equal protection of the laws.’”); *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (first citing *INS v. Chadha*, 462 U.S. 919, 941-42 (1983); then citing *Chae Chan Ping*

President's power to use § 212(f) is bounded both by the Constitution and by statute. Most of the briefing on legislative history in the travel ban cases focused attention on the statutes, specifically the 1965 amendments to the INA, which prohibit racial and nationality discrimination in immigration enforcement. A primary argument made by the travel ban's challengers was that these 1965 amendments apply to § 212(f).⁵⁴ Hence, though the Court held that they operated in different spheres,⁵⁵ there were grounds on which the Court could have rested a decision that the travel ban breached the limits Congress had set, even if it refused to reconsider the constitutional bounds of the delegation of power in the first place.

Shifting perspective from the judiciary to the executive's exercise of self-restraint reveals a presidential unease, at least initially, with the extraordinary power of § 212(f). While such an open grant of power might make sense during wartime, it is much less clear that it is defensible outside of that context. At least one respondent's brief in the travel ban litigation asserted that the roots of § 212(f) can be found in statutes passed during World War II, empowering the President to create rules and regulations to guide diplomatic and consular officials in denying the issuance of visas to those they suspected of attempting to enter the United States in order to engage in activities that would endanger public safety.⁵⁶ There may be some truth to this. As respondents point out, in 1952 the INA enacted wartime powers to regulate movement of noncitizens at

v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 604 (1889)); Collins, *supra* note 19, at 174-75 (2017) (describing *Morales-Santana* decision in context of plenary power doctrine).

⁵⁴ See, e.g., Reply Brief for the Petitioners at 24-28, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (No. 16-1540), 2017 WL 4457184, at *24-28 (arguing that respondent's argument is "squarely foreclosed by history"); Brief for Respondents at 44-46, *Trump v. Hawaii*, 137 S. Ct. 2080 (2017) (No. 16-1540), 2017 WL 4022033, at *44-46 (arguing that previous practice does not support government's current interpretation).

⁵⁵ See *Trump v. Hawaii*, 138 S. Ct. at 2414 (explaining that while 1965 amendment bars discrimination in allocation of immigration visas, it does not apply to president's power under INA to "set[] the boundaries of admissibility into the United States"); Brief for Respondents, *supra* note 54, at 44-46 ("Congress enacted Section 1152(a)(1)(A) in 1965 to abolish nationality and racial classifications from the admission system.").

⁵⁶ See Brief for Respondents, *supra* note 54, at 31-36 (describing President's broad authority permitted by Act).

§ 215,⁵⁷ while § 212(e) (later moved to § 212(f)) enacted similar presidential power during peacetime.⁵⁸

It is unsurprising that Congress would pass such a statute. Akin to the international political crisis in 1798, the United States found itself in 1952 in a war-like situation, one in which national security threats loomed large, even while war had not been declared. Correspondingly, Congress passed a wartime provision (§ 215) similar to the Alien Enemies Act of 1798, along with a companion peacetime provision similar to the Alien Friends Act of 1798. Consequently, as American society again grappled with how to respond to a perceived foreign threat absent a declaration of war, Congress passed legislation authorizing the President to respond as he or she saw fit.

The significant difference, it turns out, was not so much in the grant of authority but in the failure of the 1952 Congress to include a sunset provision. As mentioned in this Note's Introduction, presidents in the years immediately following 1952 seemed to treat § 212(f) with the same constitutional skepticism with which Adams treated the Alien Friends Act.⁵⁹ However, without the kind of parallel sunset provision present in the Alien Friends Act, § 212(f) took on an alternate role in the tableau of immigration policy. Rather than an emergency measure adopted to provide the President with the means of handling an imminent national security crisis, it became an executive response to complicated foreign policy issues that did not threaten the public safety, but rather seemed beyond Congress's ability to respond efficiently and effectively.⁶⁰ Thus, beginning in 1980, the executive increasingly relied on § 212(f) as an ancillary tool of foreign policy, not as an immigration tool.

⁵⁷ Immigration and Nationality Act, Pub. L. No. 82-414, § 215, 66 Stat. 190, 190-91 (1952) (codified as amended at 8 U.S.C. § 1185 (2012)) (banning both departure from and entry into United States "[w]hen the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof").

⁵⁸ See Mutual Educational and Cultural Exchange Act of 1961, Pub. L. No. 87-256, § 109(c), 75 Stat. 527, 535 (moving § 212(e) to § 212(f)).

⁵⁹ See *supra* note 16 and accompanying text (describing how power granted by INA remained unused for nearly thirty years). It is possible that the provision was merely overlooked, but the failure of Presidents to invoke it more likely suggests skepticism about the use of the provision as a national security tool.

⁶⁰ See *e.g.*, Proclamation No. 5517, 3 C.F.R. § 102 (1986) (describing President Reagan's decision to suspend immigration of Cuban nationals in response to "statement of the Government of Cuba that it had decided 'to suspend all types of procedures regarding the execution' of the December 14, 1984, immigration agreement between the United States and Cuba").

President Trump's re-casting of § 212(f) as a national security hammer has come as a shock,⁶¹ considering that it was not used to protect the nation during the Cold War, and in the sixteen years previous to this administration, neither President George W. Bush in the immediate wake of the terrorist attacks of September 11th,⁶² nor President Obama,⁶³ both of whom relied on § 212(f) for other purposes, saw a national security threat that required its invocation. The fact that President Trump has used it in this manner raises serious concerns about the extent to which this grant of power can be wielded by the executive in order to inflame fears in the populace while projecting an image of defending the nation.⁶⁴ To help understand and address these concerns, this Note will now turn to legislative history to understand the statutory contours of § 212(f) and the limits it places on presidential authority to prohibit entry to the United States.

III. LEGISLATIVE HISTORY

One cannot begin to understand the intent behind § 212(f) without considering the historical context in which it was crafted and enacted. Senator McCarran first proposed the provision in 1950 as § 212(e) of Senate Bill 3455,

⁶¹ See Adam Liptak, *President Trump's Immigration Order, Annotated*, N.Y. TIMES (Jan. 28, 2017), <https://www.nytimes.com/2017/01/28/us/politics/annotating-trump-immigration-refugee-order.html> (quoting Professor Peter J. Spiro as stating "this is by far the most significant use of the [§ 212(f)] power by any president").

⁶² President Bush invoked § 212(f) six times over the course of his eight years in office, five of which were after the terrorist attacks of September 11, 2001. He used the provision to bar entry of (1) "persons responsible for actions that threaten[ed] international stabilization efforts in the Western Balkans, or are responsible for wartime atrocities in that region," (2) "persons responsible for actions that threaten[ed] Zimbabwe's democratic institutions and transition to a multi-party democracy," (3) "persons who have engaged in or benefitted from corruption in specified ways," (4) "persons responsible for policies or actions that threaten the transition to democracy in Belarus," (5) "persons responsible for policies or actions that threaten Lebanon's sovereignty and democracy," and (6) "foreign government officials responsible for failing to combat trafficking in persons." MANUEL, *supra* note 17, at 9.

⁶³ President Obama invoked § 212(f) nineteen times over the course of his eight years in office to bar entry to "aliens" who were determined to have engaged in specified conduct in Burma, Burundi, the Central African Republic, Iran, Libya, North Korea, South Sudan, Syria, and Venezuela, as well as to bar entry for those determined to have engaged in "significant malicious cyber-enabled activities," those who "participate in serious human rights and humanitarian law violations and other abuses," and individuals "subject to U.N. Security Council travel bans and International Emergency Economic Powers Act sanctions." *Id.* at 7.

⁶⁴ See, e.g., Ben Kew, *Judge Roy Moore on NYC Terror Attack: Give Us Donald Trump's Travel Ban*, BREITBART (Dec. 11, 2017), <http://www.breitbart.com/big-government/2017/12/11/roy-moore-nyc-terror-attack-give-trumps-travel-ban/> [<https://perma.cc/NL79-CV4>] ("U.S. Senate candidate Judge Roy Moore released a statement condemning the failed terrorist attack in New York City on Monday, reiterating the need for the proper implementation of President Donald Trump's travel ban.").

his vision for a new immigration framework.⁶⁵ The provision was not moved to § 212(f) until 1961,⁶⁶ so for the remainder of this Part, this Note will refer to the provision as § 212(e).

McCarran led the anti-communist charge in the Senate, having also been responsible for the Red Scare's emblematic legislation, the Internal Security Act of 1950.⁶⁷ This legislative agenda was a reaction to the news of the Soviet Union's successful testing of a nuclear weapon, which sent shockwaves through American society and raised suspicions of Soviet espionage.⁶⁸ Furthermore, American military forces began fighting on the Korean Peninsula to defend South Korea from the Communist North's invasion.⁶⁹ This is the context in which legislators sought to protect the nation from potential enemies at home and abroad.

During both World War I and World War II, Congress had enacted statutes that gave the President personal power to control travel to and from the country similar to the Alien Enemies Act adopted in the late eighteenth century, and McCarran now gave such a provision a permanent home in the proposed law.⁷⁰ However, much like the concerns raised during the quasi-war with France in the 1790s, there was fear that the homeland could be targeted even without an open declaration of war.⁷¹ As Congress had been suspicious of French infiltrators influencing the American public at the end of the nineteenth century, it was now fearful that Soviet agents would operate to destabilize American society.⁷² Consequently, there was a desire for a provision that would allow the President

⁶⁵ S. 3455, 81st Cong. § 212(e) (1950).

⁶⁶ See *supra* note 58 and accompanying text.

⁶⁷ Internal Security Act of 1950, Pub. L. No. 81-831, 64 Stat. 987 (codified as amended at 50 U.S.C. § 781 *et seq.* (2012)).

⁶⁸ See William L. Laurence, *Soviet Achievement Ahead of Predictions by 3 Years*, N.Y. TIMES, Sept. 24, 1949, at 1 ("President Truman's announcement that we have evidence of an 'atomic explosion' in the Soviet Union within recent weeks ranks only next to his original announcement of the explosion of the first atomic bomb . . ."); Anthony Leviero, *President Does Not Say Soviet Union Has an Atom Bomb; Picks Words Carefully; But He Implies Our Absolute Dominance in New Weapons Has Virtually Ended: U.S. Reaction Firm*, N.Y. TIMES, Sept. 24, 1949, at 1.

⁶⁹ See Harold B. Hinton, *Legislators Hail Action by Truman*, N.Y. TIMES, June 28, 1950, at 1.

⁷⁰ See Alien Enemy Act of 1798, ch. 66, 1 Stat. 577. Some of the briefing around the travel ban has pointed to the alien-enemies provisions adopted during the world wars as providing the historical roots of § 212(f). See Brief for Respondents, *supra* note 54, at 44-46. As this Note explains, there is a connection, but it is rather indirect as the direct lineage draws to this other provision.

⁷¹ S. REP. NO. 81-1515, pt. 3, at 781-82 (1950).

⁷² *Id.* ("As an international conspiracy, communism has organized systematic infiltration of our borders for the purpose of overthrowing the democratic Government of the United States by force, violence, and subversion.").

to respond in times of such crisis to prevent the entry of individuals who, while not wartime enemies of the United States, might still threaten the security of the nation.⁷³

A. *The Senate Report*

The parallel between § 212(e) and the Alien Friends Act of 1798 was quite conscious. The Senate had authorized a study of the immigration laws in 1947, and the report, which was submitted along with McCarran's proposal for an overhaul of the immigration framework, referenced the late eighteenth century precursor in its review of American immigration law.⁷⁴ In the Part dealing explicitly with "Subversives," the subcommittee called for statutory power to more adequately address its security concerns.⁷⁵ They noted that "[i]n times of peace, as in times of war, it has been clearly demonstrated that the protection of the public safety requires the exclusion from the United States of those aliens who bring with them their alien ideologies which are subversive to the national security and contrary to our constitutional form of government."⁷⁶ But the subcommittee believed that the heightened threat represented by the Soviet Union and Communism required a much more robust statutory framework.⁷⁷ Therefore, the power granted to the President by § 212(e) is best understood in the context of the subcommittee's desire to grant "wider discretion . . . to those charged with administering the laws relating to the entry of aliens into this country to deny admission to those aliens who . . . would be likely, to engage in any activity subversive to the national security" and other peacetime security measures called for by the committee, such as barring entry to members of groups identified by the Attorney General as subversive organizations.⁷⁸ In other words, the provision should be seen as an emergency measure that fits within this peacetime security framework.

Interestingly, the report only references the presidential power to block entry of noncitizens during peacetime in two sections. One straightforwardly describes the power in an analysis of the proposed law submitted by Senator

⁷³ *Id.* at 796-98 (describing perceived inadequacies of immigration law as of 1951 for dealing with subversives).

⁷⁴ *See id.* at 45.

⁷⁵ *Id.* at 796-98.

⁷⁶ *Id.* at 788.

⁷⁷ *Id.* at 789 ("Those provisions, however, need to be reviewed in the light of the increased threat to our national security from the infiltration of our population by aliens who would seek to overthrow our present form of government by force or violence, or by other unconstitutional means.").

⁷⁸ *Id.* at 800.

McCarran.⁷⁹ The report described that power without directly referencing § 212(e) in an analysis of the Immigration Act of 1917.⁸⁰ Section 3 of the 1917 legislation defined excludable noncitizens and provided for exceptions to the general exclusion rules.⁸¹ Specifically, the sixth proviso of the exceptions granted the President the power to restrict entry in order to protect labor conditions.⁸² The subcommittee advocated for the elimination of this power because it had been superseded by subsequent events and, more to the point, “[a] general provision is being included in the proposed law to permit the President to suspend any and all immigration whenever he finds such action to be desirable in the best interests of the country.”⁸³ This certainly indicates that the subcommittee intended the statutory provision to be understood in the broadest sense. However, the report’s language conflicts somewhat with the statutory language of § 212(e) itself, as a finding that an action was desirable in the best interests of the nation would have required different considerations and inquiries than a finding that a noncitizen’s entry would be detrimental to the interests of the nation. The discrepancy makes the precise intent of the legislature unclear.

One significant difference between the context of the 1798 legislation and the 1952 legislation is the lack of attention to the constitutionality of the legislation of the latter. While the Alien Friends Act of 1798 inspired vigorous debate as to its constitutionality,⁸⁴ the report only notes its unpopularity,⁸⁵ rather than detailing the strenuous debate on the constitutionality of providing the President with such unchecked power. President Adams himself was leery of what he saw as an invitation to despotism, and although he was persuaded by Secretary of State Timothy Pickering, an avid advocate of the Alien and Sedition Acts, to sign several warrants to deport noncitizens suspected of representing a threat to the interests of the United States, he did so hesitantly.⁸⁶

Instead of examining this constitutional history, the report’s constitutional analysis is reserved for the Alien Enemies Act,⁸⁷ which is largely in the same

⁷⁹ *Id.* at 806 (“The President is given the power to suspend or restrict entry of any alien or class of aliens whose admission he finds to be detrimental to the interests of the United States.”).

⁸⁰ *Id.*

⁸¹ Immigration Act of 1917, Pub. L. No. 64-301, § 3, 39 Stat. 874, 875-78.

⁸² S. REP. NO. 81-1515, at 878 (1950).

⁸³ *Id.* at 381.

⁸⁴ See MILLER, *supra* note 37, at 163-64 (describing differing constitutional interpretations of Jeffersonian Republicans and Federalists as applied to Alien Friends Act).

⁸⁵ S. REP. NO. 81-1515, at 45.

⁸⁶ See SMITH, *supra* note 31, at 163 (describing Secretary Pickering’s desire for “vigorous enforcement policy” and Adams’s resistance to Pickering’s request for signatures on blank orders).

⁸⁷ Alien Enemies Act of 1798, ch. 66, 1 Stat. 577, 577 (“That whenever there shall be a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion shall be perpetrated, attempted, or threatened against the territory of

form today as it was originally written in 1798⁸⁸ and which had been regularly affirmed as constitutional by the Supreme Court.⁸⁹ In fact, the constitutionality of the Alien Enemies Act is so long established and so apparently uncontroversial, one wonders why it required such a robust defense in the report. Thus, the failure of the Alien Friends Act to undergo any constitutional analysis represents a missed opportunity for the Senate to grapple with the limits of presidential power and whether the ideals of limited government extended to treatment of noncitizens during peacetime.

The lack of constitutional consideration may be understood in the context of a perceived existential crisis. Beset by undeclared enemies at home and abroad, and engaged in a war on the Korean Peninsula that threatened to spill over into a great power war, Congressional legislators sought to establish secure borders and a framework for identifying and removing threats to the nation. This mentality of a nation under siege continues to influence American immigration policy and is still used to great effect by political forces that find powerful traction in encouraging a siege mentality.⁹⁰

B. *The Hearings*

Senator McCarran reintroduced his proposal to the Senate with the start of the new congressional session in January 1951,⁹¹ and Representative Walter introduced a companion proposal with few differences the week after in the

the United States, by any foreign nation or government, and the President of the United States shall make public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies.”).

⁸⁸ Compare *id.*, with 50 U.S.C. § 21 (2012) (“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.”).

⁸⁹ See, e.g., S. REP. NO. 81-1515, at 401-03 (first citing *Brown v. United States*, 12 U.S. (8 Cranch) 110, 122 (1814); then citing *Lockington v. Smith*, 15 F. Cas. 758, 760 (C.C.D. Pa. 1817) (No. 8448); and then citing *Citizens Protective League v. Clark*, 155 F.2d 290, 293 (D.C. Cir. 1946)); see also *Ludecke v. Watkins*, 335 U.S. 160, 162-65 (1948) (“The 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.”).

⁹⁰ See Ben Schreckinger, *Trump Pumps Siege Mentality in Iowa*, POLITICO (Dec. 5, 2015 6:15 PM), <https://www.politico.com/story/2015/12/trump-iowa-siege-mentality-216455> [<https://perma.cc/G9DH-JUS8>].

⁹¹ S. 716, 82d Cong. (1951).

House.⁹² Generally, legislators agreed on the need for an overhaul of the nation's immigration laws. However, a significant contingent led by Representative Celler sought different objectives.⁹³ Chiefly, these legislators objected that McCarran's proposal failed to adequately remove racial and ethnic considerations from American immigration policy.⁹⁴ However, while this part of the bill received the most focus, they also objected to other aspects of the bill.⁹⁵ Representative Celler proposed his own alternative bill by the end of February 1951, which removed McCarran's proposal to give the President broad discretion to deny entry to noncitizens.⁹⁶ Subsequently, a joint subcommittee held hearings on the three bills between March 6 and April 9, 1951.⁹⁷

As McCarran and Walter noted, a great deal of work had gone into writing their proposed bill, including consultation with hundreds of commentators both inside and outside government.⁹⁸ Now that public hearings were being held, they hoped that they could quickly conclude the proceedings and push the process forward towards passage of the bill.⁹⁹ Given the transformative nature of the legislation, it is not surprising that approximately one hundred commentators sought to provide their perspective both in oral testimony before the subcommittee and in written remarks.¹⁰⁰

Significantly, at the beginning of the hearings, Representative Celler demanded an opportunity to introduce his own bill, which had been neglected by McCarran and Walter.¹⁰¹ Despite McCarran's initial reluctance to allow Representative Celler to provide introductory remarks, Celler eventually convinced McCarran to allow him to speak for three minutes.¹⁰² In that time, he

⁹² H.R. 2379, 82d Cong. (1951).

⁹³ 97 CONG. REC. 1495 (1951).

⁹⁴ See, e.g., H.R. REP. NO. 82-1365, at 327-28 (1952), as reprinted in 1952 U.S.C.C.A.N. 1653, 1751-53.

⁹⁵ *Id.* at 326-27, as reprinted in 1952 U.S.C.C.A.N. 1750-52 (arguing that bill would restrict immigration at time when United States should be growing its population). It is also worth noting here that Celler's critique of the bill begins with a strong broadside against § 212(e), but he mistakenly referred to it as § 212(a). *Id.* at 326, as reprinted in 1952 U.S.C.C.A.N. 1750 ("Section 212 (a) provides that the President may at any time establish an iron curtain against the entry of any and all foreigners into the United States."); see also *infra* notes 122-123 and accompanying text.

⁹⁶ H.R. 2816, 82d Cong. (1951) (proposing alternative immigration policies to House).

⁹⁷ See generally *Revision of Immigration, Naturalization, and Nationality Laws: Joint Hearings on S. 716, H.R. 2379, and H.R. 2816 Before the Subcomms. of the Comms. on the Judiciary*, 82d Cong. 1 (1951) [hereinafter *1951 Immigration Hearings*].

⁹⁸ *Id.* at 2-3.

⁹⁹ *Id.* at 5 (asking for benefit of commentators' expertise without "prolong[ing] the hearings unduly").

¹⁰⁰ See *id.* at III-V.

¹⁰¹ *Id.* at 5-6.

¹⁰² *Id.* at 6.

outlined the differences between his bill and the McCarran-Walter bill but neglected to note his omission of § 212(e).¹⁰³ Instead, he focused on the ways in which the McCarran-Walter bill retained racially restrictive quotas based on the allocation of national origin quotas, as well as on his attempt to avoid what he described as “thought control” implicit in the McCarran-Walter bill, which made even past membership in a Communist organization a ground for removal.¹⁰⁴

The bulk of the commentary following the introductory remarks of the sponsoring legislators similarly focused on the ways in which the proposed legislation did or did not address security needs, civil liberties, and racial and sex discrimination.¹⁰⁵ In particular, McCarran’s proposed changes for the quota system came under fire, with many commentators criticizing its effective preference for European immigrants as a thinly veiled extension of the racist policies that had underpinned U.S. immigration policy since the late nineteenth century.¹⁰⁶

However, a few witnesses did note the extraordinary power provided to the President by § 212(e). On March 16, 1951, Stanley H. Lowell appeared on behalf of Americans for Democratic Action, an organization founded in 1947 to carry on the torch of the New Deal.¹⁰⁷ In over thirty pages of testimony criticizing various aspects of the bill, Lowell addressed § 212(e) in two sentences, noting that in the opinion of Americans for Democratic Action, it would be more appropriate for Congress, except in a national emergency such as war, to determine which classes of people ought to be excluded.¹⁰⁸ Lowell also submitted a written statement detailing the organization’s criticisms of the bill.¹⁰⁹ Running to seven pages, the statement included three sentences on

¹⁰³ *Id.* at 6-8.

¹⁰⁴ *Id.* at 7-8.

¹⁰⁵ *See, e.g., id.* at 9-10 (statement of Omar B. Ketchum, Legislative Director of the Veterans of Foreign Wars of the United States) (“We approve the proposed equality in the treatment of sexes We . . . approve the provisions in this proposed legislation which extend the right of citizenship and the right of admittance to this country to persons of all races.”).

¹⁰⁶ *See, e.g., id.* at 381 (statement of Will Maslow) (“[W]hile you have taken a great step forward in making quotas available to the countries in the Asian-Pacific triangle, I think you have undone your good work by making those quotas available on a racist basis.”). Representative Celler would continue to offer other visions of American immigration policy and would eventually play a central role in the 1965 Amendments that prohibited discrimination in administration of US immigration law. *See infra* note 181 (discussing Representative Celler and Senator Hart’s 1965 Immigration and Nationality Act). It is these 1965 Amendments that, according to opponents of the travel ban, Trump has violated. *Id.*

¹⁰⁷ *See 1951 Immigration Hearings, supra* note 97, at 413; *ADA’s History*, AMERICANS FOR DEMOCRATIC ACTION, <https://adaction.org/ada-history/> [<https://perma.cc/B93W-YDG5>] (last visited Aug. 22, 2019).

¹⁰⁸ *See 1951 Immigration Hearings, supra* note 97, at 431.

¹⁰⁹ *Id.* at 445.

§ 212(e), providing the same criticism that Lowell had made in his oral testimony.¹¹⁰

Five days later, at the penultimate day of hearings, March 21, 1951, Read Lewis, the executive director of the Common Council for American Unity, provided testimony on the proposed legislation.¹¹¹ Lewis submitted an analysis of the bill signed by himself as executive director of the organization and a number of heads of religious nonprofit organizations.¹¹² He also provided oral testimony on his own behalf.¹¹³ Both of these statements addressed § 212(e), providing the same arguments as Lowell had made earlier—that in times of peace, Congress was better situated to address the need to exclude people because of a threat to the public interest.¹¹⁴ Again, these arguments were buried in presentations that largely focused on other aspects of the law—in this case, on the ways in which the legislation remained prejudiced.¹¹⁵

The hearings closed on April 9, 1952, though the record was kept open for an additional two weeks to allow inclusion of written statements.¹¹⁶ Of the many individuals and organizations that submitted such comments, only two addressed § 212(e). The president of the national board of the Young Women's Christian Association, Constance Anderson, described the provision as “unduly harsh” and wondered whether it would “be possible to limit this provision to periods of declared national emergency or war?”¹¹⁷ Carol King, General Counsel of the American Committee for the Protection of the Foreign Born,¹¹⁸ asserted that “entrusting the President in his untrammelled discretion to cut off all immigration or any class of immigrants or impose on the entry of aliens any restrictions he may deem appropriate is dangerous and capable of grave

¹¹⁰ *Id.* at 448.

¹¹¹ *Id.* at 615. The Common Council for American Unity was an organization dedicated to assisting immigrants in the United States and, among other activities, represented many immigrants in court. *See generally* Will Maslow, *The Alien and the Immigration Law—A Study of 1446 Cases Arising Under the Immigration and Naturalization Laws of the United States*, 67 *YALE L.J.* 958 (1958).

¹¹² *See 1951 Immigration Hearings, supra* note 97, at 615.

¹¹³ *Id.*

¹¹⁴ *Id.* at 634.

¹¹⁵ *Id.* at 634-39.

¹¹⁶ *Id.* at 707.

¹¹⁷ *Id.* at 744.

¹¹⁸ The American Committee for the Protection of the Foreign Born was an organization founded in 1933, initiated by Roger Baldwin of the American Civil Liberties Union. *See Guide to the Records of the American Committee for Protection of Foreign Born*, TAMIMENT LIBR. & ROBERT F. WAGNER LAB. ARCHIVES, http://dlib.nyu.edu/findingaids/html/tamwag/tam_086/bioghist.html [<https://perma.cc/PP9B-NPP5>] (last visited Aug. 22, 2019).

abuse.”¹¹⁹ With those last comments, the record closed, leaving treatment of § 212(e) a comparative sideshow in the lengthy congressional hearings.

Thus, in almost eight hundred pages of oral and written testimony on the bill, four comments were made on this particular provision. All four of these questioned the propriety of providing such an emergency power to the President during peacetime. However, it was clear that what had once been the focus of intense controversy and debate over the boundaries of the presidential power in 1798 had been transformed by 1952 into a minor issue that barely was mentioned in the expert testimony and never registered in the public discourse. Perhaps this was due to the shift in public understanding of the role of the President by 1952 and acceptance of the idea that the President properly was entrusted with vast powers.¹²⁰ Alternatively, it may have been due to a shift in public debate from basic political questions over the respective powers of the branches of government to the social questions of race and sex discrimination. Or possibly, it was simply because a short provision got buried in a long and complicated statute. In any case, the hearings concluded and the House and Senate subcommittees returned to fine-tune the legislation.

C. *The Debates*

By October of 1951, Representative Walter reintroduced the legislation in the House, where it was reported to the Committee of the Whole House in February 1952.¹²¹ The Judiciary Committee’s report straightforwardly described the work of § 212(e) in one sentence as “vest[ing] in the President the authority to suspend the entry of all aliens if he finds that their entry would be detrimental to the interests of the United States, for such period as he shall deem necessary.”¹²² The report included a three-page minority statement by Representative Celler which focused a paragraph on § 212(e).¹²³ Representative Celler described the provision as providing the President with the power to “*at any time* establish an iron curtain against the entry of any and all foreigners . . .”¹²⁴ He further characterized it as “a delegation of authority constitut[ing] an abdication by Congress of the control of immigration . . . a dangerous substitution of government by law, by government by man.”¹²⁵

¹¹⁹ See *1951 Immigration Hearings*, *supra* note 97, at 780 (citation omitted).

¹²⁰ See *supra* note 23 (describing administrative law decisions concerning nondelegation doctrine).

¹²¹ See H.R. REP. NO. 82-1365, at 1 (1952), *as reprinted in* 1952 U.S.C.C.A.N. 1653, 1653 (recommending that H.R. 5678 pass with proposed amendments).

¹²² *Id.* at 53, *as reprinted in* 1952 U.S.C.C.A.N. 1707-08.

¹²³ *Id.* at 326, *as reprinted in* 1952 U.S.C.C.A.N. 1751-52. Representative Celler here refers to § 212(a), but he is clearly discussing § 212(e).

¹²⁴ *Id.*

¹²⁵ *Id.*

Meanwhile, the Senate version was reported in January 1952 as Senate Bill 2550, along with a report describing the provisions of the bill in the same terms as the House report would describe them.¹²⁶ The minority report accompanying the bill was not completed until March.¹²⁷ Written by Senator Kefauver, who would be absent from most of the debates as he campaigned for President,¹²⁸ the report only spent a paragraph on § 212(e), out of a total of ten pages.¹²⁹ Referencing that provision, Kefauver accused the drafters of “[a]n apparent dislike of foreign faces and other cultures” and echoed Representative Celler’s description of the President’s power to create an “iron curtain.”¹³⁰ He called for limiting the power to times of war or national emergency, an amendment that would later be offered in the debates in each house of Congress.¹³¹

Debates on the bill in the House were held in April of 1952,¹³² while debates in the Senate took place in May.¹³³ Similar to the hearings and the minority report, criticism of the bill in the debates focused on areas other than § 212(e). The House debated the bill for three days. On the last day of debate, Representative Multer of New York offered an amendment to change the language of provision § 212(e) from “Whenever” to “When the United States is at war or during the existence of a national emergency proclaimed by the President and.”¹³⁴ The amendment also added an additional section that would, under the same circumstances, empower the President to allow entry to the United States when a noncitizen would otherwise be excluded.¹³⁵ Representative Walter rose in opposition to the proposed amendment. In particular, he defended the bare limits provided by “whenever the President finds . . . entry . . . would be detrimental to the interests of the United States” as “absolutely essential” because of the need of quick action should there be an epidemic or a period of great unemployment.¹³⁶ He finished his statement by explaining, “In the judgment of the committee, it is advisable at such times to permit the President to say that *for a certain time* we are not going to aggravate that situation.”¹³⁷ Thus, it appears that the drafters of the legislation intended that the only limits on presidential power under the provision would be the finding of such threats

¹²⁶ See generally S. REP. NO. 82-1137 (1952).

¹²⁷ See *id.*, pt. 2, at 1 (indicating date of report as March 13, 1952).

¹²⁸ 82 CONG. REC. 5318 (1952) (statements of Sens Humphrey and Ferguson).

¹²⁹ S. REP. NO. 82-1137, pt. 2, at 4.

¹³⁰ *Id.*

¹³¹ See *infra* notes 134-141, 150-157, and accompanying text (discussing amendments offered to limit § 212(e)’s reach to times of war or national emergency).

¹³² 82 CONG. REC. 4422 (1952).

¹³³ 98 CONG. REC. 5088 (1952).

¹³⁴ 82 CONG. REC. 4423 (1952).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* (emphasis added).

to the public interest as would necessitate swift presidential action in response, and the “certain time” for which the bar to entry would be in place.

Representative Celler then rose in support of the first part of the amendment, moving to strike out the additional section proposed by the amendment, but noting that the language of the proposed bill as it stood provided the President an “untrammelled right,” without “restriction upon his power,” and that the President “can simply, by fiat . . . say, ‘There shall be no immigration into this land of ours.’”¹³⁸ Celler then recalled the arguments made regarding the Alien Act of 1798, saying, “That is what I call, and our founding fathers have always called, government by man, not government by law.”¹³⁹

Despite these arguments in favor of further limiting the President’s power under § 212(e), the amendment was rejected on a vote of 8-53.¹⁴⁰ After consideration and rejection of other substantive amendments, and the defeat of a motion to recommit, the bill passed on a vote of 206-68.¹⁴¹ With that, attention turned to the Senate.

The Senate held debates on the bill two weeks later. These debates were four times as long, lasting from May 13 until May 22, 1952.¹⁴² The debates began with Senator McCarran introducing the bill and framing the opposition as fundamentally disloyal to the United States. To that end, he made a point to note that the Communist Party’s organ, *The Daily Worker*, had come out against the bill.¹⁴³ Senator Lehman then had the opportunity to respond and provided a vociferous attack on both the substance of the bill and the procedure of writing it, complaining that his own alternative bill, introduced in October 1951, had not even been granted hearings.¹⁴⁴ He characterized McCarran’s bill as being grounded in a “xenophobic,” “racist” philosophy, “a philosophy of fear, suspicion, and distrust . . .”¹⁴⁵

Senator Lehman then went on to attack many aspects of the bill, including the quota system established, the expansive grounds for deportation, and the amount of unchecked power provided to administrators up and down the executive branch.¹⁴⁶ It was in this section that Lehman remarked on § 212(e), which he

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 4427.

¹⁴¹ *Id.* at 4444.

¹⁴² See 98 CONG. REC. 5088, 5603-40 (1952) (showing record of debate spanning from May 19 to May 21).

¹⁴³ *Id.* at 5088, 5095.

¹⁴⁴ 82 CONG. REC. 5102 (1952). Senator Lehman eventually forced consideration of his bill by offering an amendment to strike out all but the enacting clause of S. 2550 and replacing it with his bill. *Id.* at 5428. That amendment was rejected on May 21. *Id.* at 5630.

¹⁴⁵ *Id.* at 5102.

¹⁴⁶ *Id.* at 5114.

described as “unprecedented.”¹⁴⁷ He noted that many in the Senate had been concerned with the dangers of granting unlimited power to the President in other contexts and called for a narrower definition of the President’s powers and specification of the “conditions of emergency” under which such powers could be exercised.¹⁴⁸ Over the course of the next several days, other Senators rose in opposition to the bill, providing their own wide-ranging criticisms; however, no other Senator addressed § 212(e).

The majority leader, Senator McFarland, concerned that the debates were dragging on, sought to get a unanimous consent agreement to dispense with the multitude of amendments that opponents of the bill had offered. He succeeded.¹⁴⁹ To this end, McCarran and the opponents agreed to a group of thirty amendments that would be voted on *en masse*.¹⁵⁰ Surprisingly, among these amendments was a change to § 212(e). Although Senator Humphrey described the amendments as merely technical, the amendment adopted was precisely that suggested by a number of witnesses at the hearings, by Representative Celler in the House Minority Report, and by Representative Multer in the House debates—that the power of § 212(e) be limited to wartime or when the President declared a national emergency.¹⁵¹ It is unclear exactly why the amendment did not raise more of an objection from Senator McCarran; however, he did warn that any of the amendments might not make it through conference committee, so perhaps he was confident after what had happened to Multer’s amendment in the House that it would be disposed of in conference.¹⁵² If so, then he likely thought it a small price to pay to push the bill through what felt like a delay of filibuster proportions.¹⁵³

Senator Morse complained on May 19 that he did not have time to read the whole bill.¹⁵⁴ The debates were fairly one-sided, as proponents mostly stayed out of the Senate chamber, leaving the opponents talking to an empty room and complaining that they had not had a chance to challenge the proponents.¹⁵⁵

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 5442.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 5757-58; *see also supra* notes 131-134 and accompanying text (discussing proposed amendments to § 212(e)).

¹⁵² 82 CONG. REC. 5757 (1952) (“I wish to be frank with the Senator from Minnesota. When the bill goes to conference the conferees may determine that the amendments he offers may not fit into the places where he has them designated. The worth of the amendments will be considered carefully.”).

¹⁵³ *Id.* at 5435.

¹⁵⁴ *Id.* at 5438.

¹⁵⁵ *See id.* at 5434 (“I say there are Americans who are going to be very unhappy when they find out that only a few Senators were on the floor to enter into a discussion of the substitute proposal.”).

Altogether, opponents felt that McCarren, who was responsible for writing the bill in subcommittee, was marshalling the bill through the procedural hurdles and thus ramming the bill through the Senate.¹⁵⁶ However, given the history of the bill presented to this point, it should be clear that the opponents did not have enough political support to mount an effective challenge at any stage in the drafting process, and the conclusion was likely foregone.

As Senator McCarran had intimated, the amendment to § 212(e) that was adopted without controversy by the Senate was not reported out by the conference committee.¹⁵⁷ In fact, the amendment is practically the last word about § 212(e).¹⁵⁸ The conference report was agreed to by the House on June 10, 1952¹⁵⁹ and by the Senate the following day.¹⁶⁰ In both houses, opponents of the bill spoke in general terms about their continued opposition to the bill, but in neither case was § 212(e) mentioned.¹⁶¹ For their part, Senators Lehman and Humphrey warned that they were working to convince President Truman to veto the bill, though he had not decided to do so yet.¹⁶²

On June 25, 1952, President Truman did in fact veto the legislation, submitting his reasons to the House.¹⁶³ Interestingly, Truman did invoke the 1798 controversy over the Alien Act, not in reference to § 212(e) but rather to the deportation power provided to the Attorney General.¹⁶⁴ In some ways this is the more natural parallel to the Alien Friends Act's presidential power to remove noncitizens the President deemed a threat to the public interest.¹⁶⁵ However, Truman's framing fundamentally elided the crux of the 1798 debate, which was about the relative roles and powers of the President and Congress during

¹⁵⁶ *See id.* at 5438 (“I wish to repeat that if we could keep the Senate in session eight full days to debate the question with respect to repealing the embargo on cheese, we can take at least 2 weeks to debate a measure involving the welfare of millions and millions of people the world over.”).

¹⁵⁷ *See* H.R. REP. NO. 82-2096, at 28 (1952) (Conf. Rep.).

¹⁵⁸ Senator Morse made one last attack on § 212(e) as he spoke in support of his own amendment to bring the bill within the scope of the Administrative Procedure Act. 82 CONG. REC. 5788-89 (1952). Morse acknowledged that his attacks on the bill's provisions that removed “congressional and judicial restraints upon executive power” ranged beyond his amendment. *Id.* at 5787. However, he felt that what tied his statements together was the belief that “all persons who come within the purview of the American system of justice should be guaranteed . . . the protection of the guaranties which have been provided in the American Procedure Act.” *Id.* at 5789.

¹⁵⁹ *Id.* at 6991.

¹⁶⁰ *Id.* at 7019.

¹⁶¹ *See id.* at 6989-90, 7017-19 (referring to comments made by Representatives Javits and Yates and Senators Lehman and Humphrey).

¹⁶² *Id.* at 7018-19.

¹⁶³ H.R. DOC. NO. 82-520, at 1 (1952).

¹⁶⁴ *Id.* at 6.

¹⁶⁵ *See supra* notes 34-35 and accompanying text.

peacetime. In any case, the bulk of Truman's criticisms echoed those of the Congressional opponents. He criticized the legislation for retaining the national origins quota system, thereby not going far enough in eliminating the racist underpinnings of the previous legislative scheme, and protested against the lack of procedural safeguards.¹⁶⁶ But the Cold War was on, and America was afraid. As with the Internal Security Act of 1950,¹⁶⁷ the Immigration and Nationality Act of 1952 was passed over the President's veto, first by the House on June 26¹⁶⁸ and then by the Senate on June 27.¹⁶⁹

D. *The Aftermath*

The years immediately following passage of the INA saw scant attention paid to § 212(e), though the bulk of criticism of the bill remained focused on the civil rights and civil liberties issues. President Truman established a Commission on Immigration and Naturalization, which issued a report entitled *Whom We Shall Welcome* in 1953.¹⁷⁰ In its more than 250 pages, the report only referenced § 212(e) in a list of examples of how the statute granted "nebulous and undefined" discretionary authority.¹⁷¹ Moreover, it failed to address the matter in any of its seventeen recommendations for amendment.¹⁷² That same year, John W. Porter wrote an article published in the *Lawyer's Guild Review* rehashing for members of the Lawyer's Guild the same critiques leveled by opponents of the legislation as it worked its way through Congress.¹⁷³ In passing, he noted that § 212(e) recalled the Alien Acts of 1798, and moved on.¹⁷⁴

Also in 1953, Senator Lehman continued his quest to offer an alternative vision of immigration policy and introduced an omnibus bill to replace the INA.¹⁷⁵ This proposal was along the same lines as he had proposed in 1951, though it hewed closer to the INA's framework. Charles Schwartz, a research associate at Harvard Law School, pushed for adoption of Lehman's bill in a 1955

¹⁶⁶ See H.R. DOC. NO. 82-520, at 2-7.

¹⁶⁷ Internal Security Act of 1950, Pub. L. No. 81-831, 64 Stat. 987 (codified as amended at 50 U.S.C. §§ 781-835 (2012)).

¹⁶⁸ 82 CONG. REC. 8225-26 (1952).

¹⁶⁹ *Id.* at 8267-68.

¹⁷⁰ PRESIDENT'S COMM'N ON IMMIGRATION & NATURALIZATION, *supra* note 22, at xi.

¹⁷¹ *Id.* at 178.

¹⁷² See *id.* at 263-66.

¹⁷³ John W. Porter, *The McCarran-Walter Act*, 13 LAW. GUILD REV. 79, 79 (1953). Senator McCarran had red-baited opponents of the bill and asserted in the debates that the Lawyer's Guild was a Communist organization. This article, critical of the INA, likely legitimized the law in the eyes of legislators such as Senator McCarran.

¹⁷⁴ *Id.* at 80 ("Such power had not been granted before in this country except in the Alien Act of 1798.").

¹⁷⁵ S. 2585, 83d Cong. (1953) (noting bill's introduction to Senate on August 3, 1953).

article published by the *Columbia Law Review*.¹⁷⁶ He sought to contrast Lehman's proposal with the INA, in the context of a changing political climate and the upcoming 1956 presidential election.¹⁷⁷ At the time of publication in 1955, both Democratic candidate Adlai Stevenson and incumbent Dwight Eisenhower had already voiced criticisms of the INA.¹⁷⁸ As a result, in Schwartz's thirty-page article, once again § 212(e) took backstage, meriting merely a single paragraph at the tail end of his analysis.¹⁷⁹ Schwartz noted that Lehman's bill would only empower a President to unilaterally "limit immigration during war, unemployment or other national emergency," and he asserted that the Lehman bill's provisions would "help prevent the immigrant from becoming a scapegoat during times of tension."¹⁸⁰

However, the Lehman bill never made it out of committee; the political environment was changing, but not quickly enough. The same forces that had buried Lehman's proposal in 1951 were in control of the Senate machinery in 1953, and the bill died. Lehman would retire from the Senate in 1957, and while others took up the banner of reforming the law's inherent racism,¹⁸¹ the INA had become entrenched as the basic immigration law of the United States. Section 212(e), which, as noted, was moved to § 212(f) in 1961, itself lay buried in the legislation and unused, not to say forgotten, for the next thirty years. It was thus that this Cold War measure became a tool of foreign policy only just as the Cold War was coming to an end.

IV. LESSONS LEARNED

This Note now draws together the threads considered above in order to reflect on what lessons can be gleaned about the meaning of § 212(f), why § 212(f) was written the way it was, what alternatives were available in 1952, and what goals should be pursued today.

First, comparing the historical context and outcome of 1952 with the history of the Alien Friends Act of 1798 elucidates how the shift in societal concern

¹⁷⁶ Charles P. Schwartz, Jr., *American Immigration Policy*, 55 COLUM. L. REV. 311, 316-18 (1955).

¹⁷⁷ *Id.* at 312.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 340.

¹⁸⁰ *Id.*

¹⁸¹ In particular, Representative Celler and Senator Hart's 1965 Immigration and Nationality Act sought to finally undo the racist underpinnings of U.S. immigration law. *See* Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.). Significantly, it is this law that challenges to the travel ban invoked as limiting the President's use of § 212(f). Specifically, opponents argued that § 202(a)(1)(A)'s antidiscrimination provision, which was added by the Hart-Celler Act of 1965, should apply to § 212(f). *See* Brief in Opposition at 28-32, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965), 2018 WL 417995, at *28-32.

from the legitimate powers of the Presidency to that of ensuring equal respect for all people, as well as the growth of omnibus legislation, led critics of the bill to underappreciate the threat that § 212(f) might represent to their very goals in the future. Critics of the INA were most concerned about discrimination they saw as inherent in the quota system.¹⁸² This focus reflected a shift away from fundamental political questions concerning the power and responsibilities of government towards social-political questions of civil liberties and civil rights. Opponents of the bill were most concerned about the way the 1952 legislation maintained national quotas and how the quota system continued to discriminate racially; hence, criticism of the power granted to the President was muted.¹⁸³ Additionally, the nature of the INA, a long and complicated statute, left the provision that most clearly provoked these questions around relative powers buried as a single sentence in a statute that runs to some three hundred pages.¹⁸⁴ Several legislators complained about having lacked sufficient time to read and understand the bill in its entirety, a problem that has come up repeatedly in omnibus legislation, most recently with the Republican tax reform of 2017.¹⁸⁵ This is in stark contrast with the simplicity of the Alien Act of 1798, which put presidential authority before the public quite starkly.¹⁸⁶ This difference reinforces the perception that omnibus legislation is generally bad for democracy, while suggesting a reconsideration of the nature and extent of power to be entrusted to the President.

Second, the debate over the INA also highlights how even in peacetime, or perhaps especially so, societal fears of foreigners secretly infiltrating society can legitimize unchecked presidential power. In the context of the Cold War, legislators had the Soviet Union and the Communist Party in the United States squarely front and center in their minds.¹⁸⁷ There were essentially two approaches: the United States could stay true to its ideals, welcoming immigrants in general while being on the alert for possible saboteurs, or it could be suspicious of any person who dared to enter the nation. Clearly, the latter approach won out. In the debates of 1798, the Alien Act was unpopular and many questioned whether providing such draconian and unfettered power in the

¹⁸² See *supra* Part III.

¹⁸³ See, e.g., *supra* note 179 and accompanying text.

¹⁸⁴ See generally Immigration and Nationality Act of 1952, Pub. L. 82-414, 66 Stat. 163.

¹⁸⁵ See Jim Tankersley & Alan Rappoport, *Urgency in G.O.P. Pushing Tax Bill to the Finish Line*, N.Y. TIMES, Dec. 20, 2017, at A1 (reporting on “accelerated timeline” of Republicans passing tax bill in Fall 2017); Jim Tankersley & Alan Rappoport, *A Hasty, Hand-Scribbled Tax Bill Sets Off an Outcry*, N.Y. TIMES (Dec. 1, 2017), <https://www.nytimes.com/2017/12/01/us/politics/hand-scribbled-tax-bill-outcry.html> (reporting on complaints of Democrats as tax bill passed through Senate).

¹⁸⁶ See *supra* Part I (highlighting attention given to President’s power when Congress passed Alien Act).

¹⁸⁷ See *supra* notes 65-69 and accompanying text.

hands of the President was consistent with democratic ideals.¹⁸⁸ By the early 1950s the fear stoked by Cold War considerations provided the impetus to close down and to prioritize statutory mechanics that allowed for emergent responses without a clearly defined threat.¹⁸⁹ Ironically, although § 212(f) was enacted at the beginning of a period characterized by this looming existential threat to American economics, politics, and culture, it was never used as a Cold War weapon.¹⁹⁰ However, hand in hand with Supreme Court precedent declaring immigration policy a matter of national sovereign power, it did leave the use of presidential power largely unchecked in this arena. Consequently, to some extent the United States has a system of relatively limited government within, but it has a maximal approach to government at the border.

A further consideration is the statute's requirement of a finding that the entry of a person would be detrimental to the interests of the United States. This could be understood against the backdrop of the Cold War, requiring a finding that demonstrates some urgency. In contrast, after the end of the Cold War, while the existential threat lessened, Presidents dusted off § 212(f) for use as a foreign policy tool.¹⁹¹ The slow creep of § 212(f)'s use in this regard, not so much to protect American interests within the United States but to protect American interests abroad, has normalized its use. President Trump's use, ostensibly for security purposes, is arguably more in keeping with the original intent of the framers of the law. However, given the difference between the Cold War's existential threat and Trump's campaign rhetoric, the Court could have held Trump to a higher standard in *Trump v. Hawaii* and required more than the national security gossamer used to rationalize the need for the travel ban.¹⁹² They might have decided, as argued by opponents of the 1798 and 1952 statutes, that if there is no accountability, then the statute is an unbounded delegation of authority and permits the President to act as a tyrant in the immigration

¹⁸⁸ See *supra* Part I (discussing challenges to broad delegation of power to President in context of Alien Act).

¹⁸⁹ See *supra* Part III.

¹⁹⁰ While the first invocations of § 212(f) were by President Reagan at the tail end of the Cold War, it was used more as a foreign policy tool to coerce Latin American nations to adopt policies more friendly to the United States, rather than a national security weapon in defending the United States from potential spies and saboteurs. See, e.g., Proclamation No. 5517, 3 C.F.R. § 102 (1986) (suspending Cuban migration in retaliation for Cuban government's decision to abrogate 1984 agreement to accept return of Marielitos to Cuba).

¹⁹¹ See *supra* notes 62-63 and accompanying text (discussing invocations of § 212(f) for foreign policy purposes beginning in 1981).

¹⁹² See *Trump v. Hawaii*, 138 S. Ct. 2392, 2403 (2018) (restating Trump administration's justification for barring nationals from "countries that do not share adequate information for an informed entry determination").

context.¹⁹³ This history of § 212(f) reminds us that it did not have to be this way, and that there are alternatives that could provide greater checks to tyrannical power wielded in response to xenophobia.

Third, this history suggests that society and Congress should re-examine the grant of authority provided by § 212(f). The travel ban can be considered the incarnation of the fears of the Founders, such as President Adams, who were concerned about the extent to which a President could rightfully exercise unchecked power, as well as the embodiment of the fears of those voices opposed to including § 212(f) in the INA, who recognized that the bare limits imposed on presidential action would be an invitation to unscrupulous men to rationalize actions that would otherwise appear untoward.¹⁹⁴

Similar to the anti-foreigner hysteria whipped up by the quasi-war with France in 1798, today the United States finds itself in a sort of quasi-war that has prompted anti-Muslim hysteria.¹⁹⁵ Though termed the War on Terror, there is no identifiable enemy state with which to treat for peace, and thus, no identifiable end to such a “war.” Unlike President Adams, who was leery of wielding unchecked power in such circumstances and suggested that Congress could better determine the precise acts that should lead to removal, President Trump embraced the delegation of power provided by § 212(f) in issuing the travel ban soon after taking office.¹⁹⁶ Whereas Adams sought to exercise the grant of power quite narrowly, issuing only a handful of orders against individuals, none of which were ever effectuated, Trump has exercised his power quite broadly, banning all nationals from the specified countries.¹⁹⁷ Of course, conceptions of the rightful role of the President in the federal scheme have changed since 1798; still, in this instance the Founders’ fears should cause us to question whether the writers of the INA in 1952 perhaps went too far.

Perhaps the 1952 supporters of today’s § 212(f) believed that the American people were unlikely to elect such an unscrupulous President, or perhaps they just believed that it was worth sacrificing those who would be subjected to such an act in order to safeguard the nation in non-war crises; however, in such a

¹⁹³ See *supra* notes 36-38 and accompanying text (noting Jeffersonian Republicans’ criticism of broad executive power); *supra* notes 138-139 and accompanying text (noting Representative Celler’s apprehension of vast presidential power).

¹⁹⁴ See *supra* notes 39-41 and accompanying text (noting President Adams’s careful use of executive power); *supra* notes 146-148 and accompanying text (discussing concerns about broad power in passing of § 212(e)).

¹⁹⁵ Andrew O’Hehir, *Close the Mosques, Lock Up the Immigrants and Pass the “Liberty Cabbage”*: A Brief History of Our Bigotry and Ignorance, from John Adams to Donald Trump, SALON (Nov. 20, 2015, 12:00 AM), https://www.salon.com/2015/11/20/close_the_mosques_lock_up_the_immigrants_and_pass_the_liberty_cabbage_a_brief_history_of_our_bigotry_and_ignorance_from_john_adams_to_donald_trump/ [<https://perma.cc/PG9M-E9XL>].

¹⁹⁶ See *supra* notes 1-2 and accompanying text.

¹⁹⁷ See *supra* note 8.

circumstance, it is hard to see why Congress itself could not legislate appropriate responses, as suggested by opponents.¹⁹⁸ In any case, the travel ban in its current iteration putatively prevents entry from nations whose governments do not comply with intelligence-sharing requirements. As some have noted, this rationale appears to be invented, as it does not speak to whether any potential traveler is actually a threat or not¹⁹⁹ and regardless is not the same rationale as provided for the first or second iterations of the ban, suggesting a policy in search of a legal rationale.²⁰⁰

The Court has held that the travel ban is legal, but regardless of its legality, it is a warning to future legislators who would discount as a mere quip Lord Acton's warning that "power tends to corrupt and absolute power corrupts absolutely."²⁰¹

CONCLUSION

In the end, an examination of the legislative history of INA § 212(f) reveals that Congress intended it to provide the broadest possible power to the President to block entry of any or all noncitizens to the United States as the President deems necessary. Opponents of the bill worried that such a grant of power could be abused and would be unnecessary in normal circumstances. President Trump's travel ban is precisely the sort of action that opponents feared. But in the context of the legislative debates, it is clear that opponents of the bill had other priorities. Many of the basic questions around the lines of power between the branches had been settled, more or less, in the nineteenth century, and while questions concerning the limitations of presidential power still arise, at the time of the debates over the INA, many opponents of the INA embraced a more expansive presidential power in other areas. The period when the primary question was about the proper allocation of power among the branches was over. It was no longer a question for public consideration but one reserved for the courts.

Even with its very broad terms, § 212(f) does provide some standards. In the debates, Representative Walter, the House bill's shepherd, implied that it was

¹⁹⁸ See *supra* note 114 and accompanying text.

¹⁹⁹ See, e.g., David Bier, Opinion, *The Basic Premise of Trump's Travel Ban is Wrong*, WASH. POST (Sept. 26, 2017), https://www.washingtonpost.com/opinions/the-basic-premise-of-trumps-travel-ban-is-wrong/2017/09/26/7cb868b0-a2d5-11e7-8cfe-d5b912fab99_story.html?utm_term=.c21317ea34ce.

²⁰⁰ See *supra* notes 1-5 and accompanying text (discussing multiple iterations of travel ban starting in January 2017).

²⁰¹ Letter from Lord Acton to Bishop Mandell Creighton (Apr. 3, 1887), in *THE OXFORD DICTIONARY OF QUOTATIONS 1* (Elizabeth Knowles ed., 1999); see also James R. Thompson & Gary L. Starkman, 74 *COLUM. L. REV.* 152, 153 (1974) (book review) ("Implicit within our constitutional system of checks and balances is the notion underlying Lord Acton's dictum that power tends to corrupt.").

threats to the public interest such as epidemics or massive unemployment that would trigger the use of the provision; the power could not be used arbitrarily. Today, the judiciary should raise the standard for what constitutes a sufficient finding of a threat detrimental to the public interest and the nature of evidence required to justify the use of such an extreme measure. Alternatively, they should read the statute to the letter, requiring the President to find something about the class of noncitizens being excluded other than the nation they are coming from; this is, in fact, how the provision has been used in the past.²⁰² As it stands, the rationale for the travel ban the Trump administration propounded centered on the security apparatus of the nation in question, implying that all residents of the nation are suspect because their nation is unable or unwilling to identify who might represent a danger to the United States.²⁰³

However, the Court, in keeping with its long history of deference in immigration cases, decided instead to uphold the travel ban. The judiciary has historically avoided reviewing political questions, and the question of whether the manner in which some public interest is threatened is enough to justify blocking noncitizens from entering is quite clearly the sort of political question with which the judiciary consistently refuses to engage. The Supreme Court has long deferred to the check provided by elections on such policy issues, and it viewed the travel ban in the same manner. Of course, the electoral check presents its own drawbacks—it is a blunt instrument. It is hard to imagine running a campaign on such a narrow issue, and so while the electorate may not favor such policies, other issues are likely to be more salient in an election. But elections are the check society is left with in a democratic republic. Voters can elect the sort of President who does not implement such travel bans, and they can elect the sort of legislators that would amend the law to reduce the scope of § 212(f). Those opposed to the travel ban should pursue both means of change.

²⁰² See *supra* notes 40-41 and accompanying text (discussing President Adams's strict interpretation of Alien Friends Act).

²⁰³ See Proclamation No. 9645, 3 C.F.R. §§ 140-143 (2017).