

1949

CONSTITUTIONAL LAW-DUE PROCESS-RIGHT OF ALIEN ENEMY TO JUDICIAL REVIEW OF DEPORTATION PROCEEDING

Robert P. Griffin
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Constitutional Law Commons](#), [Criminal Procedure Commons](#), and the [National Security Law Commons](#)

Recommended Citation

Robert P. Griffin, *CONSTITUTIONAL LAW-DUE PROCESS-RIGHT OF ALIEN ENEMY TO JUDICIAL REVIEW OF DEPORTATION PROCEEDING*, 47 MICH. L. REV. 404 (1949).

Available at: <https://repository.law.umich.edu/mlr/vol47/iss3/10>

This Regular Feature is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

CONSTITUTIONAL LAW—DUE PROCESS—RIGHT OF ALIEN ENEMY TO JUDICIAL REVIEW OF DEPORTATION PROCEEDING—Petitioner, a German alien enemy, had been arrested and interned during the war by virtue of broad summary powers granted the Chief Executive by the Alien Enemy Act of 1798.¹ The act subjects alien enemies to apprehension, detention, and deportation upon order of the President “whenever there is a declared war. . . .” Under authority of the act, the President, on July 14, 1945, ordered the removal of all alien enemies “who shall be deemed by the Attorney General to be dangerous to the public peace. . . .”² Though the act makes no provision for a hearing, the petitioner was heard before alien and repatriation boards, and on January 18, 1946, five months after cessation of actual hostilities, the Attorney General ordered the petitioner’s removal from the country. Petitioner’s application for writ of habeas corpus, wherein he questioned the validity of the act and complained that he had not had a fair hearing, was denied in the district court and the circuit court of appeals.³ On certiorari to the United States Supreme Court, *held*, affirmed. An alien enemy whose deportation is ordered under authority of the act is not

¹ 40 Stat. L. 531 (1918), 50 U.S.C. (1946) § 21.

² Proclamation 2655, 10 FED. REG. 8947 (1945).

³ United States ex rel. Ludecke v. Watkins, (C.C.A. 2d, 1947) 163 F. (2d) 143.

entitled to have any court determine whether he had a fair hearing. Four justices dissented. *Ludecke v. Watkins*, (U.S. 1948) 68 S.Ct. 1429.

It is not surprising that the justices expressed no disagreement on the constitutionality of the Alien Enemy Act, for its validity, never seriously questioned, has been affirmed in an unbroken line of lower court decisions.⁴ However, Justice Douglas, in his dissent, challenged the Court's refusal to review the fairness of the petitioner's hearing as being a denial of due process under the Fifth Amendment.⁵ His reasoning is grounded on the established rights of aliens in peacetime to due process.⁶ In peacetime deportation proceedings, due process requires that aliens be afforded reasonable notice and a fair hearing notwithstanding that the particular governing statute makes no provision to that effect.⁷ While the hearing need not be judicial,⁸ it must be in good faith, and there must be some competent evidence to support an order.⁹ The right of the judiciary to review administrative procedure in such proceedings is well established.¹⁰ However, though due process may require that such protection be accorded all aliens in peacetime, the weight of authority recognizes that during time of war aliens who are members of friendly nations are to be distinguished from aliens who are members of hostile nations.¹¹ At common law, alien enemies had no rights and no privileges except by the king's special favor.¹² Maintaining that the Constitution does not alter the common law in this respect, American courts have steadfastly refused to grant habeas corpus or otherwise interfere with the executive's authority under the Alien Enemy Act, considering it a legitimate exercise of the war power.¹³ While it is clear that in

⁴ Case of Fries, (C.C. Pa. 1799) 9 Fed. Cas. No. 826; United States ex rel. Schleiter v. Watkins, (C.C.A. 2d, 1946) 158 F. (2d) 853.

⁵ Principal case at 1441.

⁶ *Bridges v. Wixon*, 326 U.S. 135, 65 S.Ct. 1443 (1945); Japanese Immigrant Case (*Yamataya v. Fisher*), 189 U.S. 86, 23 S.Ct. 611 (1903). See Oppenheimer, "Constitutional Rights of Aliens," 1 BILL OF RIGHTS REV. 100 (1941); ALEXANDER, RIGHTS OF ALIENS UNDER THE FEDERAL CONSTITUTION 126 (1931).

⁷ *Bridges v. Wixon*, 326 U.S. 135, 65 S.Ct. 1443 (1945); *Tisi v. Tod*, 264 U.S. 131, 44 S.Ct. 260 (1924); Japanese Immigrant Case, 189 U.S. 86, 23 S.Ct. 611 (1903).

⁸ *Low Wah Suey v. Backus*, 225 U.S. 460, 32 S.Ct. 734 (1911); Also, KONVITZ, THE ALIEN AND ASIATIC IN AMERICAN LAW 58 (1946).

⁹ *Bridges v. Wixon*, 326 U.S. 135, 65 S.Ct. 1443 (1945); *Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 47 S.Ct. 302 (1927); *Lewis v. Frick*, 233 U.S. 291, 34 S.Ct. 488 (1914).

¹⁰ *Kwock Jan Fat v. White*, 253 U.S. 454, 40 S.Ct. 566 (1920); Japanese Immigrant Case, 189 U.S. 86, 23 S.Ct. 611 (1903).

¹¹ James Madison, a bitter opponent of the Alien and Sedition Acts, did not question the constitutionality of the Alien Enemy Act. He wrote, ". . . much confusion and fallacy have been thrown into the question by blending the two cases of *aliens, members of a hostile nation*, and *aliens, members of friendly nations*." 6 WRITINGS OF JAMES MADISON, edited by Hunt, 360 (1906). Also, PUTKAMMER, ALIEN ENEMIES AND ALIEN FRIENDS IN THE UNITED STATES 16 (1943).

¹² 1 BLACKST. COMM., Wendell ed., 371, 372 (1854).

¹³ In deciding *Lockington's* case which involved the Alien Enemy Act, Judge Brackenridge said, "Alien enemies remaining in our country after declaration of war are to be treated according to the law of nations." 1 BRIGHTLY (Pa.) 269 at p. 296 (1813). Also, *De Lacey v. United States*, (C.C.A. 9th, 1918) 249 F. 625.

order to wage successful war the President requires a free hand to deal expeditiously with aliens likely to become spies and saboteurs, the justification for such broad summary power would seem to fade when the war is finally won. Considering that the removal of the petitioner in the principal case was ordered after actual hostilities had ceased and Germany had been completely subjugated, the invocation of the act and its consequent denial of a hearing subject to judicial review seems unfair when placed on the technical ground that a "declared war" still exists.¹⁴ It is conceded, however, that to have reached a contrary result the Court would have been compelled to: (1) construe the words "declared war" as connoting only a "shooting war," or (2) judicially declare an end to the war. The first approach was advocated in Justice Black's dissent,¹⁵ but the reasoning of the majority to the effect that the language of the act is clear and not open to such an interpretation is convincing. To seize on the second of the suggested possibilities would require a bold and unprecedented step on the part of the Court. The great weight of authority coincides with the English view¹⁶ that it is peculiarly within the province of the legislative branch, supplemented by the executive, to determine when a state of war has terminated. Such a determination, political in nature, is conclusive and binding on the courts.¹⁷ The conclusion appears inescapable that any remedy for the denial of a fair hearing to persons in the position of the petitioner during a "formal" state of war must come from Congress.

Robert P. Griffin

¹⁴ There is some basis in international law for arguing that the traditional test as to termination of a state of war ought not to be applied in the case of unconditional surrender. See Balling, "Unconditional Surrender and a Unilateral Declaration of Peace," 39 AM. POL. SCI. REV. 474 (1945).

¹⁵ Principal case at 1438.

¹⁶ See *Rex v. Botrill, ex rel. Kuechenmeister*, (Ct. App. 1946) 62 T.L.R. 570, noted 95 UNIV. PA. L. REV. 416 (1947).

¹⁷ COOLEY, CONSTITUTIONAL LAW, 4th ed., 180 (1931); *Bowles v. Ormisher Bros.*, (D.C. Neb. 1946) 65 F. Supp. 791; *Kneeland-Bigelow Co. v. Mich. Cent. R.R. Co.*, 207 Mich. 546, 174 N.W. 605 (1919).