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# Constitutional Law -- Statutory Construction -- Judicial Determination of End of War

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sible; and (2) these prejudices with their fearful effects on our society must be supplanted by an understanding tolerance.<sup>62</sup>

O. MAX GARDNER, JR.

### Constitutional Law—Statutory Construction—Judicial Determination of End of War

Last June, in *Ludecke v. Watkins*,<sup>1</sup> the United States Supreme Court interpreted the Alien Enemy Act.<sup>2</sup> In 1946 the Attorney Gen-

<sup>62</sup> "A minority [including Dr. Frank P. Graham, President of the University of North Carolina] of the Committee favors the elimination of segregation as an ultimate goal but . . . opposes the imposition of a federal sanction. It believes that federal aid to states for education, health, research and other public benefits should be granted provided that the states do not discriminate in the distribution of the funds. It dissents, however, from the majority's recommendation that the abolition of segregation be made a requirement, until the people of the states involved have themselves abolished the provisions in their state constitutions and laws which now require segregation. Some members are against the non-segregation requirement in educational grants on the ground that it represents federal control over education. They feel, moreover, that the best way to ultimately end segregation is to raise the educational level of the people in the states affected; and to inculcate both the teachings of religion regarding human brotherhood and the ideals of our democracy regarding freedom and equality as a more solid basis for genuine and lasting acceptance by the peoples of the states." THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 166-167 (Washington, 1947). "While it is recognized that all barriers against the race cannot be eradicated overnight by executive fiat, court decree, or legislative action, the Negro people of America believe that it is the obligation of the government, of the labor movement, and of all true progressives to take a clear, consistent, and unequivocal line against racial discrimination and segregation. They believe that the objective of national policy should be full equality for all citizens. And they have been encouraged in this conviction by the report of the President's Committee on Civil Rights." HENRY LEE MOON ("The Ultimate Objective"), BALANCE OF POWER—THE NEGRO VOTE, p. 218 (1948).

One can only begin to grasp the scope of the issue raised by the Supreme Court of the United States in the *Racial Restrictive Agreement Cases* when these two statements are compared with excerpts from a speech made by Governor J. Strom Thurmond (S. C.) at the Dixiecrat Convention in Jackson, Miss., during the month of May, 1948: "All the laws of Washington and the bayonets of the Army cannot force the Negro into their (Southern) homes, their schools, their churches and their places of recreation and amusement." Quoted in Editorial, Charlotte (N. C.) News, May 11, 1948, p. 4-A, col. 1; or with the following statement from DAVID L. COHN, WHERE I WAS BORN AND RAISED 294 (1948): "Since the deep-seated mores of a people cannot be changed by law, and since segregation is the most deep-seated and pervasive of the Southern white mores, it is evident that he who attempts to abolish it by law runs risks of incalculable gravity. There are nonetheless whites and Negroes who would break down segregation by Federal fiat. Let them beware. I have little doubt that in such a case the country would find itself nearing civil war." And further, at page 294: "Yet whatever may be the disabilities worked upon Negroes and whites by segregation; whether the fears that provoke it are reasonable or unreasonable; whether it is anti-democratic, anti-constitutional or anti-Christian, there is little chance, in my opinion, that it will be obliterated in a foreseeable time. He who evades, beclouds, or challenges the issue may do great harm to the whole American society."

<sup>1</sup> 68 Sup. Ct. 1429 (1948).

<sup>2</sup> REV. STAT. §40617 (1875), 40 STAT. 531 (1918), 50 U. S. C. §21 (1946) ("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

eral, under authority from the President, ordered the removal of Ludecke, a German alien enemy. This accorded with the supposed power granted by the Alien Enemy Act. The Supreme Court, through Mr. Justice Frankfurter, in affirming a denial of a petition for a writ of habeas corpus *held*: the Alien Enemy Act bars judicial review of an executive order commanding the removal of an alien enemy; this power is properly exercised through the Attorney General; the statute is not offensive to the bill of rights; the President's summary power does not cease with the cessation of actual hostilities. In a dissenting opinion Mr. Justice Black opined that we are no longer at war with Germany "in the sense contemplated by the statute."<sup>3</sup>

The Alien Enemy Act clearly specifies that the President's power thereunder becomes available after he proclaims a Congressionally declared war,<sup>4</sup> but the Act does not indicate as clearly as do many other emergency statutes, when the war power thus conferred is to terminate.<sup>5</sup>

We can discover the Congressional intent<sup>6</sup> underlying this Act by nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens or subjects of the hostile nation or government . . . who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States toward the aliens who become so liable . . . and to establish any other regulations which are found necessary in the premises and for the public safety."<sup>7</sup>

<sup>3</sup> Joined by Douglas, Murphy and Rutledge. In a separate dissent Mr. Justice Douglas, joined by Murphy and Rutledge, argued that summary removal orders are offensive to the bill of rights during war or peace.

<sup>4</sup> U. S. CONST. Art. I, §16; *see*, Prize Cases, 2 Black 635, 668 (U. S. 1863) (constitutionally Congress alone can declare war. President cannot initiate or declare war, but he can recognize existence of a state of war and resist force by force.); Eagleton, *The Formal Function of the Declaration of War*, 32 AM. J. INT'L L. 19 (1938); *Savage v. Sun Life Assurance Co. of Canada*, 57 F. Supp. 620 (W. D. La. 1944) (plaintiff's death in Japanese attack on Pearl Harbor did not result from war. At that time there had been no declaration of war.); *Verano v. Dougelis Coal Co.*, 41 F. Supp. 954 (M. D. Pa. 1941) (there can be a condition of war, but no war in fact without a declaration thereof).

<sup>5</sup> *See*, *Ludecke v. Watkins*, 68 Sup. Ct. 1429, 1437 (1948) (in his dissent Black states that this "statute, unlike statutes passed in later years, did not expressly prescribe the events which would for statutory purposes mark the termination of the 'declared war.'"); Report of Subcommittee No. 4, H. R. committee on the Judiciary, 79th Cong., 1st Sess. (1945), *War and Emergency Statutes Classified by Termination Provisions* (termination provisions include, cessation of hostilities, termination of the war, some period after termination of the war, the end of the emergency, specified dates).

<sup>6</sup> 2 SUTHERLAND, STATUTORY CONSTRUCTION 315 (3rd ed., Horack, 1943) (the law must be applied according to the spirit of the legislative body); *Heydon's Case*, 3 Co. Rep. 72, 76 Eng. Repr. 637 (1584) (Lord Coke formulated the rules for the "sure and true interpretation" of statutes. "[1] What was the common law before the making of the act; [2] What was the mischief and defect for which the common law did not provide; [3] What was the remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth; [4] The true reason of the remedy."). *See*, *United States v. City of San Francisco*, 310 U. S. 16, 20 (1939); *Federal Trade Commission v. Ralodam Co.*, 283 U. S. 643, 650 (1930); *Standard Oil Co. of N. J. v. United States*, 221 U. S. 1, 50 (1911); *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 20 (1904); *American Net and Twine Co. v. Worthington*, 141 U. S. 468, 474 (1891).

referring to the debates which preceded its passage in July 1798.<sup>7</sup> Mr. Otis, the chief Federalist sponsor of the bill, stated that the Act was necessary unless Congress was "disposed to suffer a band of spies to be spread through the country . . . who, in case of the introduction of any enemy into our country, may join them in their attack upon us, and in their plunder of our property."<sup>8</sup> He later said, "in time of tranquility, he should not desire to put power like this into the hands of the executive."<sup>9</sup> Mr. Gallatin, the leading Republican opponent, finally supported the bill as a security measure.<sup>10</sup> The Act, as passed, specifically grants the President summary powers to remove alien enemies only in times of immediate danger. It states that the President's power shall be effective when "any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States. . . ."<sup>11</sup> This verbiage aims precisely at protection against direct or indirect attack on the United States.

We next consider the public policy background, since any interpretation of the Act must be made within its confines.<sup>12</sup> It is necessary that nothing impair the power to wage war successfully.<sup>13</sup> It is quite clear that during a war the President must have authority to act quickly without technical hindrances.<sup>14</sup> In 1799, commenting on the Alien Acts and enemy aliens generally, Justice Iredell declared that on the eve of war it was common to order alien enemies away<sup>15</sup> as protection against the eighteenth-century equivalent of a potential fifth column. The Chief Executive is in the most advantageous position to know who will endanger us. Disclosure of this information to the public during crucial

<sup>7</sup> BASSETT, *THE FEDERALIST SYSTEM* (1906); 2 McMASTER, *A HISTORY OF THE PEOPLE OF THE UNITED STATES* (1885); 1 SCHOULER, *HISTORY OF THE UNITED STATES OF AMERICA* (1880); BASSETT, *A SHORT HISTORY OF THE UNITED STATES* (3rd ed. 1939).

<sup>8</sup> 8 ANNALS OF CONG. 1791 (1798).

<sup>9</sup> *Ibid.*

<sup>10</sup> *Id.* at 2035 (1798).

<sup>11</sup> REV. STAT. 40617 (1875), 40 STAT. 531 (1918), 50 U. S. C. §21 (1948).

<sup>12</sup> Cf. *Walton v. Cotton*, 19 How. 355 (U. S. 1856); *Church of the Holy Trinity v. United States*, 143 U. S. 457 (1891); *Feitler v. United States*, 34 F. 2d 30 (C. C. A. 3d 1929) *aff'd*, 281 U. S. 389 (1929); *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209 (1911).

<sup>13</sup> See, *Citizens Protective League v. Clark*, 155 F. 2d 290, 294 (App. D. C. 1946) (Alien Enemy Act constitutional and effective until the state of war has ended).

<sup>14</sup> See, *Ex parte Graber*, 247 Fed. 882, 885 (N. D. Ala. 1918) (application of Alien Enemy Act in time of hostilities); 3 HYDE, *INTERNATIONAL LAW* 1721 (2d ed. 1945) (a government at war is subject to few restrictions in dealing with alien enemies. The sovereign may take any action against them which it deems necessary for national security).

<sup>15</sup> *Case of Fries*, 9 Fed. Cas. 831, No. 5, 126 (C. C. Pa. 1799) ("Why is it done, but that it is deemed unsafe to retain in the country, men whose prepossessions are naturally so strong in favor of the enemy that it may be apprehended that they will either join in arms, or that they will do mischief in his favor?").

hours through judicial record is inconceivable,<sup>16</sup> therefore the statute gives the President the *summary* powers of removal.<sup>17</sup>

The act is not criminal. The alien enemy is being removed in order to prevent him from committing a crime.<sup>18</sup> The removal is not punishment, yet it has been said that removal, like deportation may result in the loss "of all that makes life worth living."<sup>19</sup> "This possibility approaches probability when removal is to Germany, a country ravaged by war and occupied by four conquering armies."<sup>20</sup>

During peacetime, aliens get the "same protection and the same redress for injury" we give our citizens.<sup>21</sup> No alien may be deported without the right to have counsel, to hear charges against him, and to examine witnesses.<sup>22</sup> This guarantee of due process must be limited in wartime. The Alien Enemy Act not only limits these protections but entirely eliminates many of them. As it is necessary that nothing impair the power to wage war successfully it is also necessary that emergency powers granted constitutionally in wartime<sup>23</sup> do not impair the safeguards of freedom and liberty erected by the Constitution for times of peace.<sup>24</sup> Mr. Justice Frankfurter in the principal case cites *Woods v. Miller*,<sup>25</sup> which deals with the Housing and Rent Control Act of 1947, as authority for continuing the President's power under the Alien Enemy Act. Since greater weight should be assigned to personal liberty than

<sup>16</sup> See, *Citizens Protective League v. Clark*, 155 F. 2d 290, 294 (App. D. C. 1946).

<sup>17</sup> See, *Lockington v. Smith*, 15 Fed. Cas. 760, No. 8,448 (C. C. Pa. 1817) (object of act "was to provide for the public safety, by imposing such restraints upon alien enemies, as the chief executive magistrate of the United States might think necessary, and of which his particular situation enabled him best to judge." [italics supplied]).

<sup>18</sup> Case of Fries, 9 Fed. Cas. 831, No. 5, 126 (C. C. Pa. 1799) ("... it is ridiculous to talk of a crime, because perhaps the only crime . . . is . . . being born in another country, and having a strong attachment to it. . . . [The alien enemy] is not punished for a crime that he has committed, but deprived of the power of committing one hereafter to which even a sense of patriotism may tempt a warm and misguided mind. . .").

<sup>19</sup> See, *Ng Fung Ho v. White*, 259 U. S. 276, 284 (1921).

<sup>20</sup> See, *United States ex rel. Schlueter v. Watkins*, 67 F. Supp. 556, 562 (S. D. N. Y. 1946).

<sup>21</sup> IV PROCEEDINGS, American Society of International Law 20 (1910) (so said Elihu Root, Secretary of State under Theodore Roosevelt).

<sup>22</sup> See, *Bridges v. Wixon*, 326 U. S. 135, 153 (1944) (relies on the rules of the specific agency trying an alien for deportation. "These rules are designed as safeguards against essentially unfair procedures.").

<sup>23</sup> John Quincy Adams as quoted in *United States v. Macintosh*, 283 U. S. 605, 622 (1930) ("This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life.").

<sup>24</sup> 3 SUTHERLAND, STATUTORY CONSTRUCTION 318 (3rd ed., Horack, 1943) (where a statute tends to interfere or disrupt long established personal rights the courts have been inclined to employ a restricted interpretation thereof); *id.* at 326 (statutes permitting summary proceedings sometimes operate harshly on the party adversely affected. Thus the courts have been inclined to a narrow construction of such legislation).

<sup>25</sup> 333 U. S. 140 (1948).

to economic interests<sup>26</sup> that decision, and others of the same ilk, cannot be controlling here.

Therefore, it is important to determine whether we were at war or peace within the contemplation of this act when the President's summary powers were exercised. Mr. Justice Frankfurter, like Lord Macnaughten in 1902,<sup>27</sup> refused to recognize any period of time which is neither wholly war nor wholly peace. It is submitted that, for the purposes of the Alien Enemy Act, there is an interval period between actual hostilities and the "peace of Peace" during which the Act is not effective. Recently the Commonwealth Arbitration Court drew a bedevilled analogy concerning the period immediately following actual hostilities. "I believe that Christmas dinner will end with the grace said at the conclusion of the meal. And even if the subsequent coffee and post-prandial cigar can by tradition be included, I have never heard that the washing up of the dishes used is regarded as forming part of the meal."<sup>28</sup> After the Spanish American War the Supreme Court insisted that a state of war did not cease until the ratification of a peace treaty,<sup>29</sup> but a federal court refused to impose a death penalty on a soldier who deserted during the interval between actual hostilities and the signing of the treaty of peace.<sup>30</sup> On August 18, 1945, President Truman issued an executive order in which he prescribed policies "arising out of the transition from war to peace."<sup>31</sup> In his message to Congress on September 6, 1945, the President said, "The end of the war has come more swiftly than most of us anticipated . . . the time has not yet arrived, however, for the proclamation of the cessation of hostilities, much less the termination of the war."<sup>32</sup> The President envisioned an interval period which was neither wholly war, nor wholly peace.

President Wilson, on November 11, 1918, speaking to the two Houses of Congress concerning the acceptance by Germany of the Armistice said, "The war thus comes to an end." The "state of war" did not terminate until 1921 when Congress passed a joint resolution to that effect.<sup>33</sup> In *United States v. Hicks*<sup>34</sup> the court refused to

<sup>26</sup> Note, *Judicial Determination of the End of War*, 47 COL. L. REV. 255 (1947) (assignment of greater weight to personal liberty than to economic interests has become a thoroughly embedded principle of constitutional law); the majority opinion also cites *Fleming v. Mohawk Co.*, 331 U. S. 111 (1946) (deals with the Office of Price Administration); *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146 (1919) (war-time Prohibition Act).

<sup>27</sup> See, *Janson v. Driefontein Consolidated Mines, Ltd.*, [1902] A. C. 484, 497.

<sup>28</sup> As quoted: E. A. D., *Has World War II Ended?*, 20 AUST. L. J. 2 (1946).

<sup>29</sup> *Hijo v. United States*, 194 U. S. 315 (1904) (damages for ship detained after hostilities but before peace treaty).

<sup>30</sup> *In re Cadwallar*, 127 Fed. 881 (Mo. 1904) (the treaty of peace had not been arranged, but the war would not be further prosecuted. Among other indications the United States commenced to disband its army).

<sup>31</sup> Exec. Order No. 9599, 10 FED. REG. 10155 (1945).

<sup>32</sup> H. R. Doc. No. 282, 79th Cong., 1st Sess. (1945).

<sup>33</sup> 42 STAT. 105 (1921).

<sup>34</sup> 256 Fed. 707 (W. D. Ky. 1919).

penalize the defendant for violating a federal statute which was to be effective "during the present war." The violation took place twenty days after President Wilson's communication. *Held*: The acts of the defendant were not committed within the true meaning of "during the present war." Although a treaty of peace usually terminates war, "history shows many instances in which wars were terminated without any treaty at all . . . a treaty is not essential to the actual ending of a war . . . for reasons more or less publicly known no treaty of peace has been made." The President's communication to the entire nation showed "the fact of the actual termination of real war." The phrase "during the present war . . . does not appear to be a case for technicalities but for facts."<sup>35</sup>

Generally an act of Congress or an executive proclamation is necessary to end a war for the purposes of applying a particular statute, unless otherwise specifically stated in the statute being considered.<sup>36</sup> But the type of statute and the right affected have an influence on the court's reaction to a war measure.<sup>37</sup> Many statutes speak in terms of specific termination dates but the Alien Enemy Act does not.

Further, Mr. Justice Frankfurter claims that if the powers of removal are not applicable after the "shooting war," since the act is not a criminal statute, its effects would be completely nullified because deportation of alien enemies is impractical during the "shooting war." Although deportation today contemplates sending the alien back to the country from whence he came, the statute uses the word *removal*. In 1798, when the statute was passed, there were many parts of the world to which the alien enemy could be removed during the "shooting war." Therefore, merely because it is no longer practical to remove alien enemies during a "shooting war," we cannot allow the power to remove to become a power to punish. It becomes so when the removal is made after the alien enemy is no longer dangerous.

It is submitted that the powers given by the Act cease when there is no longer any danger of attack from the enemy. Generally that would be after the actual cessation of hostilities, when the "shooting stops"; when peace in fact, if not technically, exists. That interval between the actual hostilities and the "peace of Peace" is peace in fact.

JOHN DAVID ROEDER.

<sup>35</sup> *United States v. Switzer*, 6 Alaska 223 (1920) (uses *U. S. v. Hicks* as authority).

<sup>36</sup> *Kahn v. Anderson*, 255 U. S. 1 (1920); *Hijo v. United States*, 194 U. S. 315 (1903); *The Protector*, 12 Wall. 700 (U. S. 1871).

<sup>37</sup> *Hamilton v. Kentucky Distilleries and Warehouse Co.*, 251 U. S. 146 (1919) (cited by the majority in the principal case to uphold its decision that the act of 1798 shall remain in effect until the "peace of Peace." Indicates that a statute might be held invalid because the emergency which called it into being had ended, despite the fact that a technical state of war continues).