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National Origin as a Retaliatory Weapon in Foreign Policy: The Iranian Students Cases Case

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CASE COMMENT

NATIONAL ORIGIN AS A RETALIATORY WEAPON IN FOREIGN POLICY: *THE IRANIAN STUDENTS CASES*

INTRODUCTION

The United States Supreme Court has long recognized Congress' plenary power in the areas of immigration and naturalization.[1] As such, the Court has restricted its scope of review over federal statutory classification of aliens, noting that it is more the business of the political branches than the judiciary to regulate the conditions of entry and residence of aliens.[2] Congress and the executive, the latter acting under a legislative delegation of authority and a constitutionally-based foreign affairs power,[3] thus have been accorded virtually unfettered discretion in prescribing the conditions and terms upon which aliens may initially enter this country.[4] Once aliens have acquired residence in the United States, however, the courts may accord them greater protection under the due process clause of the fifth amendment.[5] The extent of this protection remains unclear.

By permitting Congress or the executive to draw classifications based on national origin once aliens have lawfully en-

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1. *See* Mathews v. Diaz, 426 U.S. 67 (1976); Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 97 (1903). *See also* 1A C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE §§ 4.2-.3 (1976) [hereinafter cited as GORDON & ROSENFIELD]; Rosberg, *The Protection of Aliens From Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 317.

2. Mathews v. Diaz, 426 U.S. 67, 84 (1976).

3. *Id. See also* Ekiu v. United States, 142 U.S. 651, 659 (1892).

4. *See* 1 GORDON & ROSENFIELD, *supra* note 1, at 1-36, 1-37.

5. *See* C. J. ANTIEAU, MODERN CONSTITUTIONAL LAW: THE INDIVIDUAL AND THE GOVERNMENT § 9.27 (1969).

Such protection may be available where "the due process clause of the fifth amendment incorporates elements of equal protection substantially equivalent to those contained in the fourteenth amendment." Maltz, *The Burger Court and Alienage Classifications*, 31 OKLA. L. REV. 671 (1978). *See also* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954).

tered this country, the United States Circuit Court of Appeals in the *Iranian Students Cases*[6] suggested that the fifth amendment due process protections are very limited. The court of appeals held that a regulation requiring only nonimmigrant alien students from Iran to report to immigration authorities did not deny the students equal protection of the laws under the fifth amendment. In so concluding, the court accorded great deference to presidential discretion in the field of foreign policy.

THE DECISION

In the *Iranian Students Cases,* three nonimmigrant students from the Islamic Republic of Iran filed a class action suit seeking to declare unconstitutional and to enjoin enforcement of an Immigration and Naturalization Service (INS) regulation issued pursuant to presidential directive.[7] Such regulation was promulgated "in response to the international crisis created by the unlawful detainment of American citizens in the American embassy in Tehran."[8] Section 214.5 of the Code of Federal Regulations requires, in part, that all nonimmigrant alien post-secondary students from Iran report to a local INS office or an INS representative on campus to "provide information as to residence and maintenance of nonimmigrant status."[9] Each Iranian student is required to present, at the time of reporting, his or her passport, evidence of enrollment including payment of fees for the current semester, a letter from school authorities attesting to course hours and good standing of that student, current address in the United States, and such additional information that the Service may request

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6. Narenji v. Civiletti (Iranian Students Cases), 617 F.2d 745 (D.C. Cir. 1979), *cert. denied,* 100 S. Ct. 2928 (1980).

7. White House Announcement, 79 DEP'T STATE BULL. 49 (Nov. 10, 1979).

It should be noted that plaintiffs are not contesting the illegality of the deportation where an alien has been determined to be in violation of any immigration requirements. Rather, plaintiffs challenge the particular singling out of Iranian students by the INS in determining whether or not a particular alien is in violation of his or her visa privileges. *Cf.* Yick Wo v. Hopkins, 118 U.S. 356 (1886). Presumably, had the Service merely continued its routine enforcement practices, deportation of any Iranian nationals under such practice would not have provided grounds for this equal protection challenge.

8. Press Release by U.S. Attorney General Benjamin R. Civiletti, Department of Justice, Washington, D.C. (Nov. 13, 1979) (on file at the Santa Clara Law Review).

9. 8 C.F.R. § 214.5 (1980). *See also* 617 F.2d at 746-47.

for verification purposes. Failure to comply with the INS request or willful provision of false information subjects the nonimmigant Iranian student to deportation proceedings under the Immigration and Nationality Act.[10]

In the *Iranian Students Cases,* the challenge was based primarily on the ground that the regulation focussed exclusively on nonimmigrant *Iranian* students, rather than *all* nonimmigrant aliens, which constituted a suspect classification based upon national origin.[11] As such, the regulation would require strict judicial scrutiny and demonstration by defendants of a compelling governmental objective in order for the regulation to pass constitutional muster. The Iranian students also alleged that the regulation constituted an illegal seizure under the fourth amendment since the INS had no reasonable grounds to suspect that a particular Iranian student had violated his or her nonimmigrant status, and a violation of the Iranian students' first amendment rights by punishing Iranian students in the United States for past demonstrations, chilling their future exercise of those rights. In addition, the students challenged the regulation as violating both the Administrative Procedure Act and the Immigration and Nationality Act—the former, on the ground that the notice and comment procedure was improperly waived, and the latter, that the Attorney General had exceeded his powers delegated therein.[12] Defendants responded that the regulation, including the procedural waiver of notice and comment, was properly promulgated by the Attorney General pursuant to broad powers delegated by Congress under section 1184(a) of the Immigration Act.[13] In regard to the constitutional challenges, defendants argued that: 1) judicial review of equal protection challenges was precluded because the matter involved foreign policy determinations by the President; 2) in the event judicial review was warranted, the classification of Iranian nonimmigrant students versus all other aliens was justified by compelling governmental objectives; 3) no "seizure" under the fourth amendment had occurred; and 4) plaintiffs' first amendment

10. 617 F.2d at 746-47.

11. The Iranian Students Cases, 481 F. Supp. 1132, 1136 (D.C. Cir. 1979), *rev'd,* 617 F.2d 745 (1979).

12. *Id.*

13. *Id.*

challenge was not pleaded with sufficient clarity.[14]

In disposing of the procedural challenges, the district court determined that good cause for waiver of the "notice and comment" provisions of the Administrative Procedure Act existed and that the order for production of specific documents and information, assuming that the requests were constitutional, were well within the scope of the executive's authority under section 1184 of the Immigration and Naturalization Act.[15] In examining the due process challenge, however, the district court engaged in an elaborate discussion of the interplay of the established notions of the constitutional guarantee of equal protection in classifications founded upon national origin, the power of Congress over naturalization and immigration with the accompanying enforcement of such statutory policies by executive branch officials, and the vast foreign affairs powers of the executive. The district court first concluded that the regulations were not authorized, either expressly or impliedly, by any "Congressional intent to allow deportation proceedings to be instituted on the basis of a national origin classification."[16] Although recognizing the President's independent authority under his foreign affairs power to act in this case, the district court further concluded that "it is patent that the executive, even in the area of immigration and naturalization, must be subject to applicable principles of the Constitution."[17] Based on the Supreme Court's decision in *Hampton v. Mow Sun Wong*,[18] the district court recognized that the equal protection component of the fifth amendment may require a less demanding standard of review than traditional strict scrutiny since "there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State."[19] But, the court required that when the federal government asserts such an "overriding interest" to justify its discriminatory classification, it must also have a *legitimate basis* for presuming

14. *Id.*
15. *Id.* at 1137-38.
16. *Id.* at 1139-41.
17. *Id.* at 1143.
18. 426 U.S. 88, 100 (1976).
19. 481 F. Supp. at 1144 (quoting Hampton v. Mow Sun Wong, 426 U.S. at 103).

that the rule was actually intended to serve that interest.[20] In examining three possible interests alluded to by defendants, the court concluded that only the interest in protecting the hostages deserved consideration as "overriding."[21] But after assessing the reasons for singling out Iranian students, the district court concluded that such action did not serve that interest since there was "at best a dubious relationship between the presence of Iranian students in this country . . . and the safety and freedom of the hostages."[22] While the court recognized that defendant's regulation was an understandable effort to respond to the hostage crisis, the classification did not support a legitimate national interest and was thus violative of the Iranian students' equal protection guarantee.[23]

The United States Court of Appeals for District of Columbia Circuit, in a brief opinion, reversed the district court on both the delegation and equal protection issues, concluding that section 214.5 must be sustained. A three-judge panel determined that the regulation was a valid exercise of the authority delegated by Congress to the Attorney General under the Immigration and Nationality Act. As such, the regulation could distinguish among nonimmigrant alien students on the basis of national origin provided that they were "reasonably related" to the Attorney General's duties under the Act.[24]

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20. *Id.* While this standard may be less demanding than strict scrutiny, which requires that the classification be supported by a compelling state interest, it also appears to be more rigorous than the traditional rational basis test. *See* United States v. Carolene Products Co., 304 U.S. 144 (1938); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

21. 481 F. Supp. at 1144. The district court rejected outright two possible justifications—the need to express anger over the events in Tehran and the need to identify Iranian students—because other retaliatory actions could be invoked that would accomplish these purposes without disrupting the lives of the Iranian students. In addition, administrative convenience could not be considered sufficiently "overriding." *Id.*

22. *Id.* The court indicated that the regulation could be justified by the fear that violent attacks on Iranians in this country by American citizens could provoke retaliatory action on the American hostages in Tehran. Nevertheless, the regulation failed to address this problem unless it could be assumed that only those Iranian students who were in violation of their visas and could be deported were likely to provoke such violent action by Americans. Alternatively, assuming that the mere presence of Iranian students would provoke violence, the regulation did not address the problem since those Iranian students legally residing in this country would remain targets of hostilities. *Id.* at 1144-45.

23. *Id.* at 1145.

24. 617 F.2d at 747.

In addressing the Iranian students' equal protection argument, the court explained that "[d]istinctions on the basis of nationality may be drawn in the immigration field by Congress or the Executive."[25] So long as the classification is supported by a rational basis, the classification among aliens based upon nationality is consistent with the equal protection requirement of the fifth amendment due process clause. Although the circuit court determined that the Attorney General's regulation met a rational basis test, it asserted that the contrary conclusion of the district court was indicative of an impermissible extension of judicial power in passing on executive acts in the field of foreign affairs. Based on the *United States v. Curtiss-Wright Export Corp.*[26] doctrine of presidential competence in the field of foreign policy, court review of such action is precluded in the absence of abuse of executive authority. The circuit court therefore dismissed the Iranian students' complaints.

Test for Delegating Authority to the Attorney General

In determining whether promulgation of section 214.5 was within the authority conferred upon the Attorney General by the Immigration and Nationality Act, the court of appeals asserted that "[t]he statute need not specifically authorize each and every action taken by the Attorney General, so long as his action is *reasonably related* to the duties imposed upon him."[27] In support of such "reasonable relation" test, the court cited a string of federal decisions that have upheld the Attorney General's discretionary authority in limiting the employment of nonimmigrant students,[28] in determining whether aliens admitted without a visa should be eligible to apply for status as permanent resident aliens,[29] and in permitting extensions of a nonimmigrant's stay in the absence of specific statutory direction.[30] Noting that the broad scope of Title 8,

25. *Id.*

26. 299 U.S. 304 (1936).

27. 617 F.2d at 747 (emphasis added) (citation omitted).

28. Ahmed v. United States, 480 F.2d 531 (2d Cir. 1973); Pilapil v. INS, 424 F.2d 6 (10th Cir. 1970).

29. Fook Hong Mak v. INS, 435 F.2d 728 (2d Cir. 1970).

30. Unification Church v. Attorney General, 581 F.2d 870 (D.C.Cir. 1978). Although the court failed to elaborate further, the court's dicta in *Fook Hong Mak* appears applicable:

We are unable to understand why there should be any general principle

section 1303(a), of the United States Code, authorizes the Attorney General to prescribe special regulations for the registration of aliens and the maintenance of nonimmigrant status, the court of appeals concluded that section 214.5 was "directly and reasonably related to the Attorney General's duties and authority under the Act."[31] In reaching this conclusion, however, the court must have first determined that Congress or the executive may require that deportation proceedings be instituted on the basis of a national origin classification.

National Origin as a Valid Classification in the Immigration Field

In addressing the students' equal protection claim, the court of appeals stated that, in the immigration field, "classifications among aliens based upon *nationality* are consistent with due process and equal protection if supported by a rational basis."[32] While nationality has traditionally been an accepted criterion for admission into the United States,[33] the court of appeals appears to have either not recognized any change in the status of a nonimmigrant alien once that person has become a lawfully admitted resident, or characterized the power to deport as resting on the same constitutional foundation as the power to bar entry.[34]

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forbidding an administrator, vested with discretionary power, to determine by appropriate rulemaking that he will not use it in favor of a particular class on a case-by-case basis, if his determination is founded on considerations rationally related to the statute he is administering.

435 F.2d at 730.

Simply stated, if the administrator determines that certain conduct or a particular characteristic warrants favorable consideration, the legislature's grant of discretion to accord a privilege may be accomplished by identifying groups rather than by requiring a case-by-case determination.

31. 617 F.2d at 747.

32. *Id.* at 748 (emphasis added) (citations omitted).

33. *See* 1 GORDON & ROSENFIELD, *supra* note 1, §§ 1.2c-.4c, 2.1a, & 2.5.

34. *See* 1, 1A *id.* §§ 1.32, 4.2. The latter view finds support in a number of United States Supreme Court decisions. *See, e.g.*, The Chinese Exclusion Case, 130 U.S. 581 (1889); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

In *Fong Yue Ting*, the Supreme Court explained that the federal government has absolute power to exclude all nonresident aliens, or to admit them " 'only in such cases and upon such conditions as it may see fit to prescribe' " 149 U.S. at 705 (quoting Ekiu v. United States, 142 U.S. 651 (1892)), and that the "right of a nation to expel or deport [resident aliens] . . . rests upon the same grounds . . . ." 149 U.S. at 707. *See also* Comment, *Aliens, Deportation and the Equal Protection Clause: A Critical Reappraisal*, 6 GOLDEN GATE U. L. REV. 23, 46-51 (1975).

In adopting the rational basis standard, the court cited two principle cases where the United States Supreme Court upheld, on an extremely relaxed standard of review, federal immigration provisions that classified noncitizens on the basis of duration of residency in the United States,[35] and legitimacy and gender.[36] In *Mathews v. Diaz*,[37] the Court was presented with a federal statute that conditioned an alien's eligibility for Medicare benefits on a five-year residency requirement and on admission for permanent residence. Plaintiffs, who were lawfully admitted resident aliens, argued that the statute, by allowing benefits to some aliens but not to others by virtue of the residency requirements, impermissibly discriminated against the ineligible applicants by denying them due process. In recognizing that the regulation of aliens has been long committed to the political branches of the federal government rather than to the states or the federal courts,[38] the Court noted that "the reasons that preclude judicial review of *political questions* also dictate a *narrow standard of review of decisions* made by the Congress or the President in the area of immigration or naturalization."[39] In holding that the statutory classification did not deprive the alien applicants of liberty or property without due process of law, the Court required only that there be some rational basis for the durational requirement.[40]

While the Court implied that the applicants in *Mathews* might have received protection under the equal protection clause of the fourteenth amendment,[41] the Court expressly

35. Mathews v. Diaz, 426 U.S. 67 (1976).

36. Fiallo v. Bell, 430 U.S. 787 (1977).

37. 426 U.S. 67 (1976).

38. *Id.* at 81.

39. *Id.* at 81-82 (emphasis added) (footnotes omitted).

40. Since it was "unquestionably reasonable for Congress to make an alien's eligibility depend on both the character and the duration of his residence," the Court concluded that the "case essentially involves nothing more than a claim that it would have been more reasonable for Congress to select somewhat different requirements of the same kind." *Id.* at 83.

41. *Id.* at 84. The Court noted that the strongest case in favor of the applicants was *Graham v. Richardson*, 403 U.S. 365 (1970), which held:

> [S]tate statutes that deny welfare benefits to resident aliens, or to aliens not meeting a requirement of durational residence within the United States, violate the Equal Protection Clause of the Fourteenth Amendment and encroach upon the exclusive federal power over the entrance and residence of aliens.

Id.

recognized that equal protection analysis involves significantly different considerations when the issue concerns the relationship between aliens and the *federal* government, rather than between aliens and the *states*.[42] The Supreme Court explained that, to a great extent, states are only concerned with administering programs for the benefit of their own residents; thus, distinctions based on whether a person is a citizen of another state or citizen of another country have no apparent justification.[43] On the other hand, such "classification by the Federal Government is a routine and normally legitimate part of its business,"[44] and such considerations would therefore uphold a broader range of classifications by the federal government. By applying the rational basis test, the court in *Iranian Students Cases* readily acknowledges that the federal government's powers in dealing with aliens are broader than the powers of the states; that is to say, it is likely that a comparable *state* law provision would not have passed scrutiny under the fourteenth amendment.[45]

The second case, *Fiallo v. Bell*,[46] presented a constitutional challenge to section 101 of the Immigration and Nationality Act of 1952,[47] that granted "special preference immigration status to aliens who qualified as the 'children' or 'parents' of United States citizens or lawful permanent residents,"[48] but, by definition, precluded the natural father of an illegitimate child who is either a United States citizen or permanent resident alien from preferential treatment as a "parent."[49]

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42. 426 U.S. at 84-85.

43. *Id.* Other considerations also exist that would disfavor extending fourteenth amendment analysis in state alienage classification cases to federal cases. Unlike state alienage classifications, federal classifications encounter no obstacles under the supremacy clause. *See* Miller, *Immigration and Nationality Law*, 1977 ANN. SURVEY OF AMER. LAW 205, 213.

44. 426 U.S. at 85.

45. Alienage classifications based on state statutes have been subjected to strict judicial scrutiny and have been accordingly struck down by equal protection challenges. *See* Graham v. Richardson, 403 U.S. 365 (1971) (state law denying welfare benefits to all noncitizens and law imposing a residency requirement violated equal protection rights of applicants); Sugarman v. Dougall, 413 U.S. 634 (1973) (state civil law excluding aliens from competitive civil service positions violated equal protection clause of fourteenth amendment); *In re* Griffiths, 413 U.S. 717 (1973) (state law excluding aliens from practice of law violated fourteenth amendment equal protection).

46. 430 U.S. 787 (1977).

47. 66 Stat. 182, *as amended by*, 8 U.S.C. §§ 1101(b)(1)(D), 1101(b)(2)(1976).

48. 430 U.S. at 788.

49. *Id.* at 788-90.

The Court held that the exclusion of the relationship between an illegitimate child and his natural father from the preference accorded by the Act was not unconstitutional. In taking notice of the "long recognized power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control,"[50] the Court emphasized that "it is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision."[51] As such, the minimal standard of review utilized by the Court in *Fiallo* rested more on a concern for avoiding interference with the judgment of the political branches of government, than on a concern for protecting individual rights in areas that have traditionally warranted more enhanced judicial scrutiny. In *Iranian Students Cases,* the same concern of deferring to congressional and executive judgment appears to override the fact that classifications based on national origin have traditionally invoked intensified scrutiny.

A review of *Mathews* and *Fiallo* reveals, however, that the court of appeals was inaccurate in its broad statement that *"classifications among aliens based upon nationality* are consistent with due process and equal protection if supported by a rational basis."[52] While the court correctly recognized that *Mathews* and *Fiallo* concerned aliens from Cuba and the Dominican Republic respectively,[53] national origin did not establish the primary basis for discriminatory classification in either case. Rather, discriminatory treatment was predicated upon duration of residency or legitimacy and gender, factors that necessarily cut across lines of national origin. In *Iranian Students Cases,* the regulation expressly focused on Iranian students to the exclusion of all other nonimmigrant aliens. To conclude that nationality classifications may be validly invoked by the mere fact that aliens were involved requires a strained and perhaps misguided reading of *Mathews* and *Fiallo.*[54]

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50. *Id.* at 792 (quoting Shaughnessy v. Mezei, 345 U.S. 206, 210 (1952)).

51. *Id.* at 799 (footnotes omitted).

52. 617 F.2d at 748 (emphasis added) (citing *Mathews* and *Fiallo*).

53. *Fiallo* also included plaintiffs from the French West Indies and Jamaica. 430 U.S. at 790-91 n.3.

54. Important factors do exist to distinguish *Mathews v. Diaz* and *Fiallo v. Bell* from the present case. The regulation involved in *Mathews* concerned alien eligibility

Executive Competence in Foreign Affairs

Although the court of appeals determined that a rational basis supported the regulation aimed at Iranian students, the

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for participation in a federal medical insurance program. 426 U.S. at 69-70. At stake was the loss of government benefits which, when compared to the risk of deportation from this country, is a relatively small intrusion on an alien's individual rights. The special preference immigration status in *Fiallo* pertained only to the *entry* of aliens to the United States. 430 U.S. at 788-90. While decisions to allow initial entry of aliens into this country are concededly within the broad discretion of the political branches, *Iranian Students Cases* involves the question of the constitutional rights of an alien once that individual has taken up residence in this country.

The court of appeals also referred to two secondary sources relating to constitutional protection in the area of foreign affairs. 617 F.2d at 747. Professor Louis Henkin offers two bases for using the national origin criteria: (1) "[w]hile foreign nationals in the United States are entitled to equal protection, discriminations among aliens of different nationality apparently raise no constitutional difficulties if they *reflect . . . reciprocity* for treatment of Americans in those countries; . . ." and (2) courts could presumably uphold discriminations against aliens of a particular nationality that reflect national foreign policy. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 258 (1972). In taking judicial notice of the American hostage situation in Tehran, the court of appeals noted facts that would support either rationale. First, the court recognized that the actions taken by the Attorney General were "a fundamental element of the President's efforts to resolve the Iranian crisis and to maintain the safety of the American hostages in Tehran." 617 F.2d at 747. Second, in focusing on the imprisonment of embassy personnel under treaty law, the regulation presumably offered a reciprocal response. *Id.*

The court also cited Professor Earl Maltz, who not only confirms the fundamental differences underlying the equal protection guarantees of the fifth and fourteenth amendments, but also distinguishes the *Mathews* rational basis standard from other levels of scrutiny invoked by the Supreme Court to review cases involving discrimination against aliens by the federal government. Maltz, *supra* note 5, at 671. These standards, based upon the nature of the discrimination and the relevant branch of government involved, provide:

> If the discrimination is applicable only to a limited territory, such as the District of Columbia or an insular possession as in *Flores de Otero,* and no "special national interest" is involved, then the same strict scrutiny as applied in *Graham v. Richardson* is appropriate. If the discrimination is nationwide in scope but is the result of agency action, then a middle level of scrutiny is applied; the burden is on the government to demonstrate that the discrimination is justified by reasons which are properly the concern of the relevant branch of government. Finally, if the discrimination is nationwide in scope and the result of congressional action, then something much like the traditional rational basis test is applied; the burden is on the plaintiff at least to identify a "principled basis for prescribing a different standard than the ones that are selected by Congress," and the Court will not impose its judgment regarding the relative reasonableness of competing standards.

Id. at 685.

While *Iranian Students Cases* arguably fall within either the middle level of scrutiny or the minimal scrutiny of the rational basis test, the court of appeals decision indicates that it is clearly the latter that controls under the present facts.

court implies that any contrary conclusion would necessarily implicate the district court in unacceptable judicial conduct. In recognizing the executive's extensive powers, expertise, and resources in dealing with the Iranian hostage situation, the court relied on the general proposition in *United States v. Curtiss-Wright Export Corp.*[55] that "it is not the business of courts to pass judgment on the decisions of the President in the field of foreign policy."[56] Citing dicta from *Harisiades v. Shaughnessy*,[57] the court noted that any policy dealing with aliens necessarily invokes consideration of foreign relations, war powers, and maintenance of a republican form of government.[58] The court concluded that any speculation as to the propriety of the required reporting of the Iranian students was a matter to be decided by the President that would not be disturbed by the courts unless the President acted in excess of his constitutional authority.[59]

ANALYSIS

The curt disposition of *Iranian Students Cases* by the court of appeals leaves several important questions unanswered. Moreover, the decision fails to reveal the court's reasoning in sustaining classifications based on traditionally disfavored criteria. Although the court cites cases indicating that fifth amendment equal protection analysis may entail a less rigorous standard of review than strict scrutiny, the court emphasizes the protection of the political branches from impermissible intrusion by the courts. This concern has, in turn, caused the court to place undue reliance on the power of Congress and the executive in immigration policy in foreign affairs.

Limits on the Scope of the Decision

In according great weight to *Curtiss-Wright* and *Harisiades v. Shaughnessy*, the circuit court leaves undefined the precise limits on legislative and executive discretion in immigration policy. Justice Sutherland's theory in *Curtiss-Wright*,

55. 299 U.S. 304 (1936).
56. 617 F.2d at 748.
57. 342 F.2d 580 (1952).
58. 617 F.2d at 748.
59. *Id.*

that federal foreign relations powers inhere in this country's status as a sovereign nation,[60] "might suggest that [such powers] are not subject to constitutional limitations even to safeguards for individual rights."[61] Under such a view, the court of appeals' decision could be explained on the following basis: since the power to deal with nonimmigrant aliens rests on notions of sovereignty unconstrained by the Constitution, Congress or the executive may draw distinctions on the basis of criteria, such as national origin, that would otherwise elicit great constitutional scrutiny.[62]

While such construction of *Curtiss-Wright* may provide an easy means for disposing of the challenge to the immigration order, this view has been clearly repudiated by subsequent Supreme Court decisions that the plenary power of Congress and the executive remains subject to constitutional limitations.[63] Considering then these limitations, it is plausible that the rather restricted judicial review in the *Iranian Students Cases* rests more on a concern for the principle of the separation of powers noted by the Court in *Mathews v. Diaz:* "Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution."[64]

Nevertheless, if the separation-of-powers doctrine is the basis for the restricted view by the court of appeals, it seems patently unfair that such doctrine should bar further consideration by the court of challenges based on *individual* constitutional rights.[65] Moreover, insulation of the executive to the extent permitted in this case sets a dangerous precedent; as the district court pointed out, it would "open the door to further broad and potentially dangerous assertions of executive power over aliens, exclusive of the protections the Constitu-

60. 299 U.S. at 314-19.

61. L. HENKIN, *supra* note 54, at 252-53.

62. *See* Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

63. *See, e.g.*, Reid v. Covert, 354 U.S. 1 (1957). Justice Sutherland's theory of an extra-constitutional source for the foreign affairs powers of the federal government is not universally accepted. *See* L. HENKIN, *supra* note 54, at 23-28, 252-53.

64. 426 U.S. at 81.

65. Professor Henkin suggests that, "*Curtiss-Wright* itself exempts foreign relations only from the rigors of limitations on delegation inherent in the separation of powers; it did not suggest that other constitutional limitations were also inapplicable . . . ." L. HENKIN, *supra* note 54, at 253.

tion provides."[66]

Accepting the validity of the classification drawn in the *Iranian Students Cases*, the extent to which such distinctions based on national origin may be drawn remains unclear. As an initial measure to commence deportation proceedings, the regulation specifically focused on *nonimmigrants*—those aliens admitted to this country for a fixed period of time and for a specific purpose.[67] Thus, a question arises as to whether *nationality* classifications can be extended to immigrant aliens—those persons "admitted to the United States with the expectation that they will remain [in the United States] . . . indefinitely and will eventually become citizens"[68] without depriving them of equal protection of the laws under the fifth amendment's due process clause. In addressing the residency requirements in *Mathews*, the Court disposed of this problem of distinguishing between immigrant and nonimmigrant plaintiffs by upholding the entire scheme under a standard of minimal review. However, the Supreme Court "did not explain why the immigrant plaintiffs should lose the protection of strict scrutiny merely because the classification also disadvantaged nonimmigrants."[69]

The nationality classification might appropriately be restricted to nonimmigrants. Nonimmigrants are admitted to the United States with the understanding that they will remain only for a limited purpose and for a limited period of time.[70] Thus, their expectations of constitutional protection may be less than those of immigrants desiring permanent residence. Furthermore, unlike *Mathews*, plaintiffs in the *Iranian Students Cases* did not have to obfuscate the line between immigrant and nonimmigrant aliens in framing their complaint since section 214.5 narrowly focussed on nonimmigrant Iranian students. Nevertheless, the treatment of this distinction in *Diaz* seems to indicate that the Court might not hesitate to subject both immigrant and nonimmigrant aliens to

66. 481 F. Supp. at 1145. *Accord*, L. HENKIN, *supra* note 54, at 253.

67. Rosberg, *supra* note 1, at 312.

68. *Id.*

69. *Id.* at 292-93. Because plaintiffs in *Mathews* included nonimmigrant as well as immigrant aliens, the complaint had to be broadly drafted to challenge the denial of benefits to any alien. Had the facts been otherwise, plaintiffs might have encouraged the Court to distinguish between immigrant and nonimmigrant aliens. *Id.*

70. *Id.* at 312.

the national origin classification.

National Origin as Grounds for Deportation

The ramifications of the court of appeals' decision are particularly disturbing. By reaffirming the judicial commitment to a narrow standard of review in the area of immigration, the court has, in essence, subordinated individual constitutional rights to the interest of ensuring the unfettered exercise of foreign policy by the political branches. Since events of international violence and conflict necessarily involve the executive's role in foreign affairs, nonimmigrant aliens from a particular country plagued by such incidents may be selectively singled out, as a retaliatory measure, in the enforcement of deportation laws. Moreover, it is in such situations that the constitutional rights of foreign nationals lawfully residing in this country become particularly sensitive to abuse.

The argument that "this case primarily involves nonimmigrant *aliens* who *are in violation* of our immigration laws"[71] and that "[the court has] never held that aliens who are in this nation in violation of our laws have all the rights of law abiding citizens of the United States"[72] simply begs the question of whether the regulation can be constitutionally applied. The regulation specifically requires that *all* nonimmigrant Iranian students report to INS officials.[73] Although only those nonimmigrant Iranian aliens in violation of their nonimmigrant status, or those who failed to report or willfully provided false information were subject to deportation proceedings, the fact remains that *enforcement of the law* was selectively aimed at a group identified *solely by national origin.*

Such concern was at the heart of the Supreme Court's decision in *Yick Wo v. Hopkins,*[74] where the Court determined that enforcement of a public health ordinance[75] only against Chinese-operated laundries violated plaintiffs' equal protec-

71. 617 F.2d at 750 (MacKinnon, J., concurring) (emphasis in original).

72. *Id.*

73. 8 C.F.R. § 214.5 (1980).

74. 118 U.S. 356 (1886).

75. The ordinance in *Yick Wo* regulated the use of wooden buildings in operating public laundries. *Id.* at 368.

tion guarantees.[76] As in *Iranian Students Cases*, the particular underlying law in *Yick Wo* was not itself unlawful, but the selective enforcement of the ordinance demonstrated such an obvious discrimination by public authorities that it, for all practical purposes, amounted to state action denying plaintiffs equal protection of the law under the fourteenth amendment.[77] In *Iranian Students Cases*, the power to deport aliens in violation of their immigration status was not being attacked; rather, the focus is whether the federal government may selectively enforce its deportation laws against only Iranian students. While the fifth and fourteenth amendment equal protection analysis dichotomy provides substantial grounds for distinguishing *Yick Wo*,[78] it seems questionable whether those factors warrant significantly different treatment by the courts in these situations.

While the court of appeals found a proper delegation of legislative power to the Attorney General in regulating the registration and residence requirements for aliens, the court ignored the more difficult threshold question of whether Congress itself could validly draw classifications on the basis of national origin. It simply implied that such authority was somehow conferred by the Immigration and Nationality Act. Assuming that Congress could legislate using such criteria, the scope of permitted acts by executive branch officials would be at least that broad. By according only minimal judicial scrutiny, however, the court of appeals does not satisfactorily deal with the Supreme Court's long-established view that classifi-

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76. *Id.* at 373-74.

77. In *Yick Wo*, the selective enforcement of the ordinance was directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petititioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Id.

78. *See* text accompanying notes 41-44, *supra*.

cations based on ancestry or national origin are "odious to a free people whose institutions are founded upon the doctrine of equality"[79] and, as such, are subject to strict judicial scrutiny.

Unlike the district court, the court of appeals found no guidance in the Supreme Court decisions dealing with the validity of an executive order that dealt with the exclusion, relocation, and detention of U.S. residents of Japanese descent during World War II.[80] In *Korematsu v. United States*,[81] Mr. Justice Black noted "that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect,"[82] and that, while such restrictions are not per se unconstitutional, they do require "rigid scrutiny" by the court.[83] The Court concluded, in *Korematsu*, that the order excluding both citizens and noncitizens of Japanese ancestry from certain locations on the West Coast was constitutionally justified by the exigencies of "real military dangers" existing at that time.[84] While this conclusion has been heavily criticized,[85] the Court's invocation of enhanced scrutiny of governmental action when it is directed at particular racial groups remains firmly established.[86]

To the extent that the Attorney General's order in the

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79. Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

80. 481 F. Supp. at 1139. *See* Korematsu v. United States, 323 U.S. 214 (1945), *rehearing denied*, 324 U.S. 885 (1945); Hirabayashi v. United States, 320 U.S. 81 (1943); *Ex parte* Endo, 323 U.S. 283 (1944).

Public response to the Attorney General's order that Iranian students report to immigration authorities was mixed. While public approval of the takeover of the American embassy in Tehran was nonexistent, a statement issued by a spokesman for the Japanese American Citizens League urged the use of caution in government action against Iranians in this country particularly with regard to the protection of individual constitutional liberties that might be harmed by policies based solely on ancestry. *See* Pacific Citizen, Nov. 23, 1979, at 1, col. 1 (on file at the Santa Clara Law Review).

81. 323 U.S. 214 (1944), *rehearing denied*, 324 U.S. 885 (1945).

82. *Id.* at 216.

83. *Id.*

84. *Id.* at 223.

85. *See* Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945); Dembitz, *Racial Discrimination and the Military Judgment: the Supreme Court's Korematsu and Endo Decisions*, 45 COLUMB. L. REV. 175 (1945). *See also*, Presidential Proclamation No. 4417 Confirming the Termination of the Executive Order Authorizing Japanese-American Internment During World War II, 3 C.F.R. 8 (1976).

86. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Mathews v. Lucas, 427 U.S. 495 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973).

Iranian Students Cases was directed at noncitizens of Iranian ancestry, the rational basis test applied by the court of appeals seems somewhat misplaced. In addition, it is questionable whether the circumstances under which the immigration regulation was promulgated constituted the sort of "gravest imminent danger to the public safety" that was used to justify the restrictions on persons of Japanese descent in *Korematsu*.[87]

CONCLUSION

The American embassy crisis in Iran has sorely tested the patience and restraint of the United States Government and its citizens in dealing with an outrageous and violent attack on its diplomatic officials. But under such pressure, the courts must not succumb to an expedient or less rigorous review of the actions of the political branches that threaten to infringe upon important individual constitutional rights. While not doubting Congress' plenary power in the immigration field or the executive's authority, either by delegation or under his foreign affairs powers, the fact remains that such authority

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87. 323 U.S. at 218. Three "overriding" interests were offered by defendants to justify the discriminatory regulation:

> 1) the protection of the lives of the hostages held in Iran by quelling potential domestic violence;
> 2) the need to express to the government in Iran this country's displeasure with events in Tehran;
> 3) the need to identify Iranian students to assist in the development of appropriate responses to the crisis in Iran.

481 F. Supp. at 1144.

The district court itself indicated that had traditional equal protection analysis been applied, these interests would not be "sufficiently compelling to meet the standard of strict scrutiny required in examining classifications based on national origin." *Id.* at 1145 n.9.

But see Harisiades v. Shaughnessy, 342 U.S. 580 (1952). In *Harisiades*, the Court suggests that less compelling circumstances may be sufficient.

> War, of course, is the most usual occasion for extensive resort to the power. Though the resident alien may be personally loyal to the United States, if his nation becomes our enemy his allegiance prevails over his personal preference and makes him also our enemy, liable to expulsion or internment, and his property becomes subject to seizure and perhaps confiscation. But it does not require war to bring the power of deportation into existence or to authorize its exercise. Congressional apprehension of foreign or internal dangers short of war may lead to its use. So long as the alien elects to continue the ambiguity of his allegiance his domicile here is held by a precarious tenure.

Id. at 587 (footnotes omitted).

must be subject to constitutional limitations.[88]

Under the rationale of *Iranian Students Cases*, the President and Congress will have wider latitude to use national origin classifications as retaliatory action against nonimmigrant aliens. Recognizing that this decision is unsound, the better view is that "once an alien has taken up residence in the United States, even temporarily, he or she derives substantial protection from the Constitution and laws of this land."[89]

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88. Four justices of the U.S. Court of Appeals for the District of Columbia Circuit, who voted to rehear the cases *en banc*, warned that "[W]hen the rule of law is being compromised by expediency in many places in the world, it is crucial for our courts to make certain that the United States does not retaliate in kind." 617 F.2d at 755 (Wright, Robinson, Wals, and Mikva, JJ., dissenting).

89. *Id.* at 754 (footnotes omitted).