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Executive Power under the Hostage Act: New Life for an Old Law

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EXECUTIVE POWER UNDER THE HOSTAGE ACT: NEW LIFE FOR AN OLD LAW

The Act of July 27, 1868,[1] concerning the Rights of American Citizens in Foreign States (Hostage Act), grants the President broad authority to obtain the release of American citizens unjustly imprisoned "by or under authority of any foreign government . . . ."[2] More than a century after its adoption, the President invoked the Hostage Act as authority for executive action taken in response to the seizure of Americans at the United States Embassy in Tehran, Iran.[3] Recent judicial opinions suggest the Hostage Act applies to the events in Iran.[4]

The Note first discusses the current Executive and judicial interest in the Hostage Act aroused by the American Embassy seizure and similar incidents in other countries. Anticipating a courtroom challenge to Presidential action under the Hostage Act, the Note analyzes the exercise of the Executive's power. The Note first analyzes the statutory language to identify the conditions that must be met before the President may properly invoke the Hostage Act. Next, the Note identifies actions the President may take to obtain the release of captive Americans. Finally, the Note discusses the degree to which the judiciary may constitutionally review the Executive's actions and the standards the courts must apply. The Note concludes that the President enjoys broad discretion under the Hostage Act, and that the scope of judicial review is limited.

I

RECENT INTEREST IN THE ACT

A. Seizure of U.S. Embassy in Iran

On November 4, 1979, armed Moslem students invaded the United States Embassy in Tehran, seized control of the compound, and took sixty-six United States diplomatic and consular personnel hostage.[5] Over fourteen months passed before the last group of

1. Act of July 27, 1868, 22 U.S.C. § 1732 (1976), quoted in text accompanying note 21 *infra*.

2. *Id.*

3. *See* note 7 *infra* and accompanying text.

4. *See* notes 9 & 113 *infra* and accompanying text.

5. N.Y. Times, Nov. 5, 1979, at A1, col. 6.

Americans left Iran.[6] President Carter's response to the Embassy takeover included a delegation to the Secretary of State of his powers under the Hostage Act.[7] Specifically, the President authorized the Secretary of State to restrict the use of United States passports for travel "to, in or through Iran" and otherwise to regulate travel to Iran by U.S. citizens and permanent residents.[8]

B. Judicial Comment on the Act

No one has challenged the propriety of the President's use of the Hostage Act to support the restrictions on travel to Iran by United States nationals. However, a thoughtful dissent in *Agee v. Muskie*,[9] argues the validity of the action.

The Secretary of State revoked Agee's passport, claiming that his activities abroad threatened the national security of the United

6 *Id.* Nov. 19, 1979, at A1, col. 6; *id.* Nov. 20, 1979, at A1, col. 4; *id.* July 11, 1980, at A1, col 6; *id.* Jan 21, 1981, at A1, col. 1.

7 Exec Order No. 12,211, 45 Fed. Reg. 26,685 (1980). In addition to the travel ban, *see* note 8 *infra*, the President imposed other political and economic sanctions designed to isolate Iran and to secure the release of the American hostages. On November 14, 1979 President Carter ordered a freeze on Iranian government property in the United States. Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979); N.Y. Times, Nov. 15, 1979, at A1, col. 6. The President tightened visa controls for resident Iranian nationals and virtually banned the issuance of new entry visas to Iranians. N.Y. Times, Apr. 8, 1980, at A1, col. 5. *See also* Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 100 S. Ct. 2928 (1980). In April 1980, the United States formally severed all diplomatic relations with Iran. N.Y. Times, Apr. 8, 1980, at A1, col. 6; *id.* at A6, col. 2. The President suspended all oil imports from Iran soon after the takeover and later ordered a more comprehensive prohibition on all trade with Iran. Exec. Order No. 12,205, 45 Fed. Reg. 24,099 (1980); Exec. Order No. 12,211, 45 Fed. Reg. 26,685 (1980); N Y Times, Nov. 13, 1979, at A1, col. 6; *id.*, Apr. 8, 1980, at A1, col. 6; *id.* at A6, col. 2.

The President issued the Executive orders to freeze Iranian assets and to restrict U.S. trade with Iran pursuant to his authority under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (Supp. II 1978), and the National Emergencies Act, 50 U.S.C. § 1631 (1976).

8. Exec. Order No. 12,211, § 1-106, 45 Fed. Reg. 26,685 (1980). The Order also relied for authority on § 1 of the Act of July 3, 1926, 22 U.S.C. § 211a (1976) (authorizing the Secretary of State to grant, issue, and verify passports pursuant to Presidential direction) and on § 215 of the Immigration and Nationality Act, 8 U.S.C. § 1185 (1976) (empowering the President to control travel of citizens and aliens during war or national emergency).

The Secretary of State promulgated Department of State Public Notices implementing Executive Order No. 12,211. Public Notice 711, effective April 23, 1980, invalidated United States passports for travel to, in, or through Iran. The action was required by "the increasingly unstable situation in Iran and the concomitant increase in the threat of hostile acts against Americans." Pub. Notice No. 711, 45 Fed. Reg. 27,600 (1980). In the companion Public Notice No. 712, also effective April 23, 1980, the Secretary of State prohibited the travel by permanent resident aliens "to, in or through Iran . . . unless an exception to this prohibition is granted under the authority of the Secretary of State." Pub. Notice No. 712, 45 Fed. Reg. 27,600 (1980).

9. 629 F.2d 80 (D.C. Cir. 1980), *aff'g* Agee v. Vance, 483 F. Supp. 729 (D.D.C. 1980).

States.[10] Agee brought an action for declaratory and injunctive relief in United States District Court. The District Court granted Agee summary judgment, and ordered the restoration of his passport.[11] The Court of Appeals affirmed. Although the Secretary of State did not rely on the Hostage Act to support the revocation of Agee's passport,[12] the District Court and the panoramic dissent by Judge MacKinnon on appeal both recognized that the Hostage Act would have justified the government's action if rumors of Agee's ties to the Iranian embassy captors were true.[13] Judge MacKinnon remarked:

> When the facts of this case are taken by their four corners it is obvious that the Secretary of State, acting as the President's lawful delegate, has determined that the revocation of Agee's passport is one of the means 'necessary and proper to . . . effectuate the release' of the American hostages held captive in Iran. The Hostage Statute fits the present situation in Iran like a glove and . . . supports the Secretary's denial (or revocation) of a passport.[14]

In dictum the trial court, although not as enthusiastic as Judge MacKinnon, made the same observation.[15] Judge MacKinnon's expansive construction of the statute is noteworthy. Now that Iran has released the American hostages, Judge MacKinnon's opinion will be of little help to government attorneys pursuing Agee's passport revocation before the Supreme Court.[16] However, his argument

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10. Philip Agee, a former agent of the Central Intelligence Agency residing in West Germany, deliberately exposed the identities of covert CIA operatives. The government revoked his passport, relying on a provision of the passport regulations that authorized the Secretary of State to refuse a passport when "[t]he Secretary determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." 22 C.F.R. § 51.70(b)(4) (1980).

11. The court found the challenged regulation invalid as unauthorized by Congress. 483 F. Supp. at 732. When the Secretary issued the regulation in 1968 he relied upon § 1 of the Act of July 3, 1926, 22 U.S.C. § 211a (1976). The Passport Act did not expressly authorize the denial or revocation of passports on national security grounds. The Act of July 3, 1926, § 1, 22 U.S.C. § 211a (1976). The Secretary could not point to any subsequent legislation that expressly delegated such authority. The Secretary also failed to prove that Congress had impliedly authorized his action.

12. Brief for Appellant at iv, Agee v. Muskie, 629 F.2d 80 (D.C. Cir. 1980).

13. An article in the New York Post reported that Agee had been invited by the Iranian government to participate in a "Tribunal" to judge the American hostages. The government did not argue this fact as a justification for the revocation of Agee's passport, but Judge MacKinnon thought it significant. 629 F.2d at 90 (MacKinnon, J., dissenting).

14. *Id.* at 96 (MacKinnon, J., dissenting).

15. "If [Agee's] activities are detrimental to the hostages in Iran, a special statute exists, 22 U.S.C. § 1732 (1976), which appears to give the President extraordinary authority to act." Agee v. Vance, 483 F. Supp. at 732.

16. The Supreme Court reversed Haig v. Agee, 49 U.S.L.W. 4869 (1981). It upheld the State Department revocation of Agee's passport, but failed to rely on the Hostage Act in its decision. Chief Justice Burger's opinion for the Court contains several references to the allegations that Agee had friendly contact with the Iranian captors:

> Government affidavits show that Agee made contact with the captors, urged them to demand certain CIA documents, and offered to travel to Iran to analyze the documents. App. to Pet. for Cert. 117a; N.Y. Times, Dec. 24, 1979, p. 6, col.

may provide the government with a basis for the prosecution of other Americans who visited Iran in violation of the travel ban.[17]

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5. A Government affidavit also mentions, but does not vouch for the accuracy of, an earlier report that Agee had been invited to travel to Iran in order to participate in a "Revolutionary Tribunal" to pass judgment on those hostages. App. to Pet. for Cert. 116a-117a.

Id. at 4871 n.8.

Despite these direct allusions to Agee's possible involvement with the captors in Iran, the Supreme Court upheld the revocation by reading into the Passport Act an authorization for the Secretary of State to revoke passports in the interests of national security. *Id.* The opinion relies on the potential damage to the nation's security that Agee's anti-CIA activities caused. It expressly declines to rely on the events in Iran, or the Executive orders restricting travel:

> On November 14, 1979, in response to the seizure of the American Embassy in Iran (*supra*, n.8), President Carter declared a national emergency. Exec. Order No. 12170, 44 Fed. Reg. 65729. The President's Order contains an express finding, pursuant to the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (1976 ed., Supp. II), "that the situation in Iran constitutes an unusual and extraordinary threat to the national security, foreign policy and economy of the United States." The Government has never relied upon that Order to justify the passport revocation in the present case. General restrictions on travel to Iran under American passports apparently did not go into effect until several months after Agee's passport was revoked. See Exec. Order No. 12211, 45 Fed. Reg. 26685 (April 17, 1980). Accordingly, our decision in this case does not depend on the declaration of national emergency.

Id. at 4871 n.14.

The Court may have been reluctant to ground its decision on the allegations of Agee's involvement with the Iranian captors because those reports were unsubstantiated. In any event, the government failed to argue that the Hostage Act had any application to the case. The government's interest in retaining maximum Executive discretion is served better by the Supreme Court's opinion, which finds general authority for passport revocation on national security grounds, than by a more narrow holding based on the Hostage Act, which only applies in rare circumstances.

17. The Justice Department instructed the Treasury Department to determine whether the trip by former Attorney General Ramsey Clark and nine other Americans to Iran in defiance of the travel ban violated the law. N.Y. Times, June 8, 1980, at A1, col. 5. If convicted of violating the travel regulations, the group would have been subject to a fine not exceeding $2,000 or imprisonment for not more than five years, or both. 18 U.S.C. § 1544 (1976). The Department of Justice later announced that it would not file criminal charges against Mr. Clark, but reserved the right to proceed in a civil action for the violation of the International Emergency Economic Powers Act (50 U.S.C. §§ 1701-1706 (Supp. II 1978)). N.Y. Times, Jan. 8, 1981, at A6, col. 1. The maximum civil penalty for violation of the Act is $10,000. 50 U.S.C. § 1705(a) (Supp. II 1978).

Mrs. Barbara Timm, mother of hostage Kevin Hermening, visited Tehran in April 1980. N.Y. Times, Apr. 22, 1980, at A1, col. 4. The Carter administration decided she did not violate the travel ban because she left the United States after the President announced the ban but before the promulgation of the implementing regulations.

Congressman George Hansen (R-Idaho) visited the American hostages on a self-appointed "mercy mission" to Iran in November 1979. *Id.*, Nov. 26, 1979, at A1, col. 5. Rep. Hansen's visit, though controversial, preceded promulgation of the travel ban regulations. By making the unofficial trip, however, the Congressman may have violated the Logan Act, which forbids certain private contact with foreign governments and their leaders. *See* note 122 *infra*.

C. The Significance of the President's Reliance on the Hostage Act

The reintroduction of the Hostage Act as a source of Executive power has broad implications. In a world marked by volatile relations among nations and a meteoric increase in incidents of international terrorism, the prospect of more hostage incidents is frighteningly real.[18] Recent attacks on other United States Embassies and diplomatic personnel demonstrate that the Iranian seizure was part of a larger problem.[19]

The Act's loose textual limits on executive action appear to vest the President with "extraordinary authority."[20] President Carter's use of the Hostage Act presents the first opportunity to examine the scope of executive authority under the statute. Future chief executives and courts necessarily will seek guidance from an analysis of the Hostage Act in the context of the Iranian hostage crisis.

II

TESTING EXECUTIVE USE OF THE HOSTAGE ACT

This Note anticipates a challenge to executive action taken under authority of the Hostage Act. The century-old statute provides:

> Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen,

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18. *See generally* LEGAL ASPECTS OF INTERNATIONAL TERRORISM (A. Evans & J. Murphy ed. 1978); INTERNATIONAL TERRORISM AND POLITICAL CRIMES (M.C. Bassiouni ed. 1975).

19. On November 21, 1979, an angry crowd stormed the United States Embassy in Islamabad, Pakistan, killing one Marine guard, and holding 100 people hostage for five hours. N.Y. Times, Nov. 22, 1979, at A1, col. 3. On December 2, 1979, Khomeini sympathizers attacked and set fire to the United States Embassy in Tripoli, Libya. American Embassy personnel escaped safely. *Id.*, Dec. 3, 1979, at A1, col. 3. On the same day an anonymous caller threatened to bomb the United States Embassy in Bangkok, Thailand. *Id.* at A14, col. 4.

During the same period leftist guerrillas shot their way into the Organization of American States offices in San Salvador, El Salvador, wounding five persons and taking six others hostage. *Id.*, Sept. 18, 1979, at A10, col. 1. Also in El Salvador, militants seized the Panamanian Embassy, taking five persons hostage including the Panamanian and Costa Rican Ambassadors to El Salvador. *Id.*, Jan. 12, 1980, at A5, col. 1. Other incidents are listed in E. DENZA, DIPLOMATIC LAW 139 (1976). *See generally* C. BAUMANN, THE DIPLOMATIC KIDNAPPINGS (1973); L. BLOOMFIELD & G. FITZGERALD, CRIMES AGAINST INTERNATIONALLY PROTECTED PERSONS: PREVENTION AND PUNISHMENT (1975).

20. Agee v. Vance, 483 F. Supp. at 732.

> and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.[21]

The plaintiff will likely be an American national and will contest the President's action on several grounds.[22] The plaintiff may allege that the President's reliance upon the Hostage Act was misplaced because the statute, by its terms, did not apply to the particular factual situation.[23] Even in cases where the statute applies, the plaintiff may challenge the President's action as overbroad, alleging that he exceeded the scope of his delegated powers.[24] If the plaintiff concedes or loses the first two arguments, he may argue that the President's action, though contemplated by Congress, was unconstitutional.[25] The Note examines these objections in turn.

A. Jurisdictional Requirements and Justiciability

Before a court can reach the merits of a challenge to executive action under the Hostage Act, the court must dispose of two substantial, constitutionally compelled barriers to judicial review: the standing requirement and the political question doctrine.[26]

As a threshold matter, to satisfy the jurisdictional requirements of Article III, an individual plaintiff must have standing to bring suit in a federal court. The individual plaintiff must show that the President's actions caused him to suffer an injury in fact, and that the relief sought will redress his claimed injury.[27] Congressmen[28] and watchful citizens[29] also must satisfy rigorous standing requirements.

Even in a case where all of the normal prerequisites for jurisdiction exist, the court may invoke the political question doctrine and refuse to render a decision on the substantive issue presented.[30]

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21. Act of July 27, 1868, 22 U.S.C. § 1732 (1976) [hereinafter cited as Hostage Act].

22. The analysis of this Note does not extend to challenges maintained in foreign courts or before international tribunals; proceedings brought to protect the interests of a foreign government are not considered.

23. *See* notes 46-72 *infra* and accompanying text.

24. *See* notes 73-97 *infra* and accompanying text.

25. *See* notes 98-125 *infra* and accompanying text.

26. This abbreviated discussion draws heavily from L. Henkin, Foreign Affairs and the Constitution 205-24 (1972) [hereinafter cited as Henkin] and Firmage, *The War Powers and the Political Question Doctrine*, 49 U. Colo. L. Rev. 65 (1977).

27. Duke Power Co. v. Carolina Environmental Study Group Inc., 438 U.S. 59, 78-79 (1978); *see* C. Wright, Law of Federal Courts § 13 (1976).

28. Goldwater v. Carter, 100 S. Ct. 533 (1979) (mem.). The lower court outlined the requirements for congressional standing in the federal courts. Goldwater v. Carter, 481 F. Supp. 949, 951 (D.D.C. 1979).

29. *See* Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974); Sierra Club v. Morton, 405 U.S. 727 (1972).

30. *See* C. Wright, Law of Federal Courts § 14 (1976).

Courts will not decide issues that they consider appropriate for resolution within the political branches.[31]

The separation of powers principle forms the basis for the political question doctrine. The nature of majoritarian democracy demands that some answers come from the branches of government most subject to popular opinion. Other, more pragmatic reasons for judicial abstention exist. A court will defer to the Congress and Executive on politically sensitive questions,[32] or when the consequences of misjudgment would be severe. The court may also recognize that crisis resolution demands an unchallenged national response, or fast action, both of which are incompatible with relatively formal judicial decisionmaking. In other instances, a court may feel less able than the political branches to draw upon the information, expertise, or experience necessary to resolve the controversy.[33] The leading case on political question doctrine identifies the important factors relevant to the decision.[34]

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31. In fact, the same case gave birth to both judicial review and political question nonjusticiability. In Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), Chief Justice Marshall, in a significant dictum, announced that the Court would not exercise its newfound review power willy-nilly:

> The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

Id. at 170.

32. However, the courts have not hestitated to review some extremely "political" cases: United States v. Nixon, 418 U.S. 683 (1974); Baker v. Carr, 369 U.S. 186 (1962) (reapportionment decision); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (steel seizure case).

33. Such is the foundation, in both intellect and instinct, of the political question doctrine: the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ("in a mature democracy"), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.

A. BICKEL, THE LEAST DANGEROUS BRANCH 184 (1962).

34. It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962).

Despite the various constitutional grants of federal court jurisdiction over matters that concern foreign affairs,[35] the court's most emphatic exercise of political question nonjusticiability has occurred in cases dealing with foreign relations.[36] Courts are quick to dismiss a suit when an interbranch disagreement will embarass our government overseas, or imperil sensitive foreign relations.[37] But courts will not refuse judicial review merely because a case concerns foreign affairs. Supreme Court dictum suggests that the Justices will undertake an examination of the specific issues involved to determine if judicial review is proper.[38]

Many of the issues presented in Hostage Act litigation before the federal courts will be nonjusticiable political questions. Plaintiffs will challenge the President's sensitive, political decisions that have a significant foreign impact. A decision by the President that detention of Americans is "by or under authority of a foreign govern-

35. U.S. CONST. art. III, § 2 provides: "The judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and *Treaties* made . . . to all Cases affecting *Ambassadors, other public Ministers and Consuls* . . . and between a State, or the Citizens thereof, and *foreign States,* Citizens or Subjects." (Emphasis added.)

36. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

"The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918). *See* Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415 (1839); Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829); United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818).

37. Baker v. Carr, 369 U.S. at 217.

38. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.

Id. at 211-12.

Despite common impressions and numerous citations, there are in fact few cases, and apparently no foreign affairs case, in which the Supreme Court ordained or approved such judicial abstention from constitutional review or from deciding some other question that might have led to a different result in the case. In the foreign affairs cases commonly cited the courts did not refrain from judging political actions by constitutional standards; they judged them but found them constitutionally not wanting.

HENKIN, *supra* note 26, at 213-14 (footnote omitted).

ment,"[39] presents a political question.[40] So does a decision regarding deployment of troops or the validity of an undeclared war.[41] In the cases arising under the Hostage Act the need for a single national reaction to crisis will be clear. The potential for international embarrassment from internal disagreement will be high. The time required to organize the issues and assemble sometimes sensitive facts for judicial review may take too long when the lives of hostages are at stake.

A court will be more willing to reach the merits of the case when the challenged Presidential action causes domestic, rather than foreign injury. In those cases the fact that an international event triggered the Hostage Act will not necessarily insulate the President

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39. Hostage Act, note 21 *supra*.

40. *See* note 34 *supra* and accompanying text. Foreign government recognition and determination regarding sovereignty of a foreign territory lie in the discretion of the political branches (usually the Executive) and the courts will not intervene, even if international law dictates a contrary decision.

In Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415 (1839), the insurance company challenged the President's decision that Argentina did not exercise sovereignty over the Falkland Islands. The Court invoked the political question doctrine:

> And can there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the Court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he had decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union.

Id. at 420. *See also* Oetjen v. Cent. Leather Co., 246 U.S. 297 (1918); Jones v. United States, 137 U.S. 202, 212 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges . . . .").

Nothing in the *Baker v. Carr* analysis, *see* note 34 *supra*, indicates that the Court will abandon this line of precedent concerning recognition and sovereignty decisions.

41. Much litigation in this area arose out of the Vietnam conflict. In Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973), the court held that the district court properly dismissed the suit, and refused to guage the constitutionality of the Vietnam War in the absence of a showing of clear Presidential abuse, amounting to bad faith. *See, e.g.*, Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972) (three-judge court), *aff'd sub nom.* Atlee v. Richardson, 411 U.S. 911 (1973).

One commentator approves the result in the early Vietnam War cases only because they arose at a time when the Congress supported, or ratified, the Executive's prosecution of the war. However, when the two branches openly disagree over the Executive's use of the war powers, the *Baker v. Carr* analysis, *see* note 34 *supra*, would clearly indicate the propriety of independent judicial review. Congress' passage, over Presidential veto, of the War Powers Resolution, note 91 *infra*, is a firm statement of the legislature's position on Presidential exercise of the war power, and frees the judiciary from the restraint of the political question doctrine to review the constitutionality of the executive's future exercise of the war powers. *See* Firmage, *The War Powers and the Political Question Doctrine*, 49 U. COLO. L. REV. 65, 89-99 (1977). *See also* notes 86-97 *infra* and accompanying text.

from judicial review. This is particularly true when the domestic exercise of executive power infringes on individual rights.[42]

Having appropriately disposed of the threshold issues, the court will proceed to the merits of the questions presented. In addition to the difficult substantive issues, the courts and the litigants will encounter troublesome evidentiary problems.[43] While difficulties of proof need not necessarily oust a court of jurisdiction, they argue for a more limited scope of review.[44] When the problems of proof derive from the separate role of the Executive, they bring the case closer to the border of nonjusticiability.[45]

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42 "The Supreme Court has never invoked the political question doctrine to dismiss an individual's claim that a foreign relations action deprived him of constitutional rights." HENKIN, *supra* note 26, at 485 n.6. The lower courts have come close to doing so, however. Holmes v. Laird, 459 F.2d 1211 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972), was an action American servicemen brought to prevent the United States from returning them to West Germany to serve prison sentences a German court rendered. The soldiers alleged that the German trial denied them rights guaranteed under the United States Constitution, including the right to confront witnesses against them, the right to effective counsel, and the right to a full and accurate transcript on appeal. Because the surrender complied with the applicable NATO multilateral agreement, however, the court refused to reach the merits of the plaintiff's constitutional claims. It held that the matter presented a nonjusticiable political question. In an oblique reference to the Hostage Act, the court suggested that courts will not decide at least some of the issues under the statute: "Nor do we pass upon appellants' contention that their sentences unjustly deprive them of their liberty, but simply note that such a claim has long been addressable to the President." *Id.* at 1225 (citing 22 U.S.C. § 1732 (1964)).

43. Many of the problems of proof arise because most of the determinative facts occur abroad. Subpoenas will not reach essential witnesses—either captives or captors. The U.S. court might be forced to apply and interpret foreign law to resolve what otherwise would be a purely domestic suit. The foreign law might be in a state of turmoil, particularly if governments changed or clashed for recognition.

A related problem arises when the President refuses to make available information which forms an important part of the challenger's case. The court would be in the difficult position of having to order the President to disclose sensitive and confidential information. There is authority to suggest that the President may refuse to obey such an order. *See, e.g.*, United States v. Nixon, 418 U.S. 683 (1974), where the Court stated "*[a]bsent a claim of need to protect military, diplomatic, or sensitive national security secrets*, we find it difficult to accept the argument that even the very important interest in confidentiality of presidential communications is significantly diminished by production of such material for *in camera* inspection." *Id.* at 706 (emphasis added). The circumstances surrounding the President's use of the Hostage Act may justify his exercise of a privilege to refuse disclosure of information to a litigant. To illustrate, if a plaintiff had requested disclosure of information regarding the captivity of the American hostages in Iran in early 1980, President Carter would probably have vigorously refused the request in order to safeguard the security and secrecy of the rescue mission undertaken on April 25, 1980. N.Y. Times, Apr. 25, 1980, at A1, col. 6. *See also* N.Y. Times, May 17, 1981, § 6 (Magazine), at 103.

44. The court's competence to decide the issues is called into question when neither the parties nor the court is able to produce evidence on critical issues. "Prominent on the surface of any case held to involve a political question is found . . . a lack of judicially discoverable and manageable standards for resolving it . . . ." Baker v. Carr, 369 U.S. at 217.

45. The *Nixon* Court quoted with approval Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948):

B. STATUTORY CHALLENGES

1. Defining Unjust Deprivation of Liberty

The Hostage Act imposes conditions on the President's authority to take extraordinary action.[46] The statute is implicated when it is "made known"[47] to the President that an American has been "unjustly deprived of his liberty."[48] The absence of specific standards defining an unjust deprivation of liberty may lead to dispute.

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.

418 U.S. at 710 (quoting 333 U.S. at 111). *See generally* THE CONSTITUTION AND THE CONDUCT OF FOREIGN POLICY 6-57 (F. Wilcox & R. Frank ed. 1976).

46. In addition to the procedural prerequisites discussed at length in the text, the Hostage Act requires the President to demand of the foreign government the release of the citizen before taking any extraordinary action.

The President normally communicates with foreign governments through diplomatic channels. However, in the situation contemplated by the statute, conventions of diplomacy would support severance of diplomatic relations as a sign of national displeasure. L. OPPENHEIM, INTERNATIONAL LAW § 409 (8th ed. H. Lauterpacht 1955). The enacting Congress, while not withdrawing this measure from the "means" available to the President to effectuate the release of citizens, strongly disapproved of hasty severance of diplomatic representation. The Senate defeated an amendment to the Hostage Act which would have required the President to promptly break diplomatic correspondence with the offending government. CONG. GLOBE, 40th Cong., 2d. Sess. 4359 (1868). The drafters thought it advisable to have diplomatic representatives available to negotiate the release of captive Americans abroad.

President Carter severed diplomatic relations with the government of Iran in April 1980. N.Y. Times, Apr. 8, 1980, at A1, col. 6. Early severance was reasonable in view of the diplomatic status of the hostages and the total interference with the diplomatic mission to Iran. In the absence of formal relations between the United States and Tehran, the Swiss government agreed to represent American interests in Iran. *Id.*, Apr. 25, 1980, at A12, col. 2.

As a further condition of the President's authority to act, the statute's grant of executive power only becomes effective when the imprisoning state unreasonably delays or refuses to release the detained citizens. Hostage Act, note 21 *supra*. The question may arise whether the words or acts of the foreign state do in fact constitute a refusal. The aggrieved plaintiff in Hostage Act litigation may assert that the foreign state had reason to delay and that the President should have waited before acting. For various reasons, the President's determination of what constitutes refusal or that a reasonable amount of time has elapsed deserves great judicial respect. *See* note 84 *infra* and accompanying text. Fairness does suggest, however, that the President issue a statement indicating that he has complied with the procedural requirements of demand and delay or refusal before relying on the Hostage Act for extraordinary authority. This will forestall a contention that the President failed to observe these conditions precedent.

The Hostage Act also insists on the President's prompt communication to Congress of all relevant "facts and proceedings." *See* Hostage Act, note 21 *supra*.

47. The statute fails to specify the quality or quantum of information on which the Executive may properly rely; no standard distinguishes between rumor and confirmed observation. The courts generally accord great respect to the President's assessment of overseas situations: "He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials." United States v. Curtiss-Wright Co., 299 U.S. 304, 320 (1936).

48. Hostage Act, note 21 *supra*.

The language of the Hostage Act thus appears to make the President the judge of the propriety of foreign detentions.[49] This delegation comports with the substantial authority which suggests that the judiciary is ill-advised to make such a determination.[50] Even if a court agrees to reach the merits, the judicially developed act of state doctrine compels the court to give great respect to a determination by the foreign state that it considers the detention just and proper under its law.[51] When a hostage taking represents more than just the

49. CONG. GLOBE, 40th Cong., 2d Sess. 4330 (1868) (remarks of Sen. Williams).

50. For a discussion of the justiciability of this and related issues, see notes 30-45 *supra* and accompanying text.

51. The classic formulation of the act of state doctrine appears in Underhill v. Hernandez, 168 U.S. 250 (1897). In that case the plaintiff sought to recover damages for his detention in Venezuela and for alleged assaults by the Venezuelan soldiers. The Court refused to inquire into the validity of these alleged acts:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through means open to be availed of by sovereign powers as between themselves.

Id. at 252.

As applied, the doctrine does not remove a case from the court's jurisdiction, but only forecloses judicial inquiry into the merits of the alleged act of state. Ricaud v. American Metal Co., 246 U.S. 304 (1918). The acts of a foreign state are presumptively valid, even when the act complained of is contrary to forum state law or state public policy. United States v. Pink, 315 U.S. 203 (1942). Commentators and courts have debated extensively the constitutional and theoretical rationale for the doctrine. Authorities have discussed the doctrine in relation to principles of public international law (Comment, *The Act of State Doctrine—Its Relation to Private and Public International Law*, 62 COLUM. L. REV. 1278 (1962)), the separation of powers doctrine (Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805 (1964)), notions of comity (Note, *Acts of State and the Conflict of Laws*, 35 N.Y.U.L. REV. 234 (1960)), and the doctrine of sovereign immunity (Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 HARV. L. REV. 1607 (1962)). In operation it resembles a conflict of law rule, but because the doctrine gives effect to the foreign nation's law even if it violates United States public policy, it goes much further than the traditional conflicts rule. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 41, Comment c (1965); Williams, *The Act of State Doctrine: Alfred Dunhill of London, Inc. v. Republic of Cuba*, 9 VAND. J. TRANSNAT'L L. 735 (1976).

In the course of the development of the act of state doctrine, the so-called *Bernstein* exception emerged. In a series of cases involving actions of the Nazi government ordering the conversion of stock of a certain company, the courts developed an exception to the traditional rule of judicial abstention. Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947); Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954). Following *Bernstein* the courts are free to examine the merits of an act of state when the executive branch either expressly or impliedly invites judicial scrutiny. Commentators have severely criticized this absolute deference to Executive suggestion (Miller, *Transitional Transnational Law*, 65 COLUM. L. REV. 836 (1965)).

The modern expression of the act of state doctrine is found in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964):

> Therefore, rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of the

protests of a fringe group of militants—when it becomes an action

suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

Id. at 428.

This case has generated volumes of commentary and criticism in the literature (*See, e.g.*, R. FALK, THE AFTERMATH OF SABBATINO 35 (1965); Henkin, *The Foreign Affairs Powers of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805 (1964); Metzger, *Act-of-State Doctrine Refined: The Sabbatino Case*, 1964 SUP. CT. REV. 223 (1964); Reeves, *The Act of State Doctrine—Foreign Decisions Cited In the Sabbatino Case: A Rebuttal and Memorandum of Law*, 33 FORDHAM L. REV. 599 (1965)). Congress, outraged that the *Sabbatino* Court spared Fidel Castro's government judicial examination at the expense of American victims of expropriation, quickly passed an amendment to reverse, in part, the decision. Act of Oct. 7, 1964, Pub. L. No. 88-633, § 301(d)(4), 78 Stat. 1013 (codified in 22 U.S.C. § 2370(e)(2) (1976)). The "Sabbatino" amendment reverses the presumption in favor of foreign act validity by instructing the courts to adjudicate the lawfulness of a foreign act which is in violation of international law, unless the President indicates otherwise. This amendment only applies to situations involving a foreign seizure of property which violates international law. Commentators and academicians have criticized the amendment because it politicizes the court by granting to the Executive a power to tell the courts what matters they may adjudicate. *See* Domke & Henkin, *Act of State: Sabbatino in the Courts and in Congress*, 3 COLUM. J. TRANSNAT'L L. 99 (1965); Mazaroff, *An Evaluation of the Sabbatino Amendment as a Legislative Guardian of American Private Investment Abroad*, 37 GEO. WASH. L. REV. 788 (1969).

Since the *Sabbatino* decision the case law emanating from the lower courts defining the contours and the content of the doctrine has been both confused and confusing. The Supreme Court has issued two opinions on the subject, neither of which garnered the support of a majority of the Justices. Writing for the three justice plurality in First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972), Justice Rehnquist did not apply the act of state doctrine, but permitted the American bank to litigate a counterclaim on the merits. Justice Rehnquist seemed to revive the *Bernstein* exception, although the vitality of the exception is certainly in question because of the issuance of four other opinions soundly criticizing his view.

Justice White wrote the plurality opinion in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976). An analysis of the opinion suggests that the Court has created a commercial law exception to the doctrine, but this interpretation of the doctrine, which commanded the support of only three Justices, is not authoritative. Note, *The Nonviable Act of State Doctrine: A Change In The Perception of the Foreign Act of State*, 38 U. PITT. L. REV. 725 (1977); Note, *Alfred Dunhill of London, Inc. v. Republic of Cuba: The Act of State Doctrine—Altering the Sovereign's New Cloak*, 7 CAL. W. INT'L L.J. 662 (1977).

Rigid application of the act of state doctrine in Hostage Act litigation would cause serious problems. Observance of the *Sabbatino* formulation will create, not prevent, an interbranch controversy. In domestic Hostage Act cases challenging executive authority, the President must assert the *invalidity* of the foreign detention in order to make the Act applicable. Blind acceptance of the validity of the foreign detention by the reviewing court on act of state grounds would put the court in direct conflict with the President. Such a course of action would put the court in the paradoxical posture of having to disagree with the Executive in order to avoid interbranch controversy. The doctrine does not leave the court free to *abstain* on the issue of foreign act validity; it requires the court to accept as given the validity of the detention. This may insure harmonious separation of powers when the political branches deal with the foreign act extrajudicially, but in Hostage Act litigation, where the Executive is forced to argue in court against the propriety of the foreign detention, the act of state doctrine is counterproductive.

The better approach would be to merge the act of state doctrine into a political question analysis. Goldbert & Bradford, *The Act of State Doctrine: Dunhill and Other Sabbatino Progeny*, 9 SW. U.L. REV. 1 (1977). Rather than having two categories of judicial abstention, the courts should analyze the question of the validity of foreign detention as a

adopted by a foreign government as its own—a court may treat the event as an act of state, and refuse to inquire into the validity of the incident.

The Hostage Act instructs the President to determine the propriety of the foreign detention, but does not tell the Executive whether to consult the law of the imprisoning state, American law, or international law.[52] Although the President is not required to accept foreign standards of justice, prudence counsels that he abide by foreign decisions in most cases.[53] If a court of law in the foreign state has held the detention valid, the Executive's refusal to respect that determination could contribute to the deterioration of relations between the nations and increase the chance of hostilities. Moreover, a Presidential decision to ignore the foreign court's judgment would greatly

political question best suited to resolution by the Executive. When the Executive has expressed an opinion on the issue, as in the case where the government is forced to defend its exercise of Hostage Act powers in a civil suit, the court should accept the President's characterization. Failure to do so violates the spirit of the constitutional theory enunciated in *Sabbatino*. The courts are unlikely to confront a case of the sort discussed in this Note where the Executive has not adopted the position that the foreign detention is invalid. *See* notes 30-45 *supra* and accompanying text for a discussion of political question non-justiciability.

See generally Note, *The Status Of The Act Of State Doctrine—Application To Litigation Arising From Confiscations Of American Owned Property in Iran*, 4 SUFFOLK TRANSNAT'L L.J. 89 (1980) (an exhaustive collection of cases and survey of the literature); Note, *Rehabilitation and Exoneration of the Act of State Doctrine*, 12 N.Y.U.J. INT'L L. & POL. 599 (1980). Note, *An Analysis of the Act of State Doctrine*, 22 N.Y.L. SCH. L. REV. 995 (1977).

52. The legislative history of the Hostage Act makes clear the effort of Congress to articulate, if not to resolve, this important issue. Motivation for the Hostage Act came from imprisonment in Britain of American citizens associated with the Fenian Movement in support of Irish rights. British law did not recognize the right of an individual to renounce the obligations of British citizenship by acquiring citizenship elsewhere. Britain detained naturalized American Fenians of British birth for failure to satisfy obligations due the Crown. To encourage and support immigration, the American Congress endorsed the right to liberal expatriation in the same bill as the Hostage Act. *See* 15 Stat. 224 (1868). This set up the clash of laws issue for the Fortieth Congress: Britain, asserting the propriety of the Fenian detentions under its doctrine of no expatriation; the U.S., equally certain that assumption of her citizenship relieved the immigrant of any duties to his native country. HOUSE COMM. ON FOREIGN AFFAIRS, REPORT ON THE RIGHTS OF AMERICAN CITIZENS IN FOREIGN STATES, 40th Cong., 1st Sess. (1868), *reprinted in* CONG. GLOBE, 40th Cong., 2d Sess. app., at 100 (1868). The report acknowledged the difficult position of the United States: "It is not our province to examine laws of England under which these prosecutions have been conducted. . . . There are no rules of universal authority by which Governments are guided in regulating the rights of subjects." *Id.* at 95.

53. In the case of the recent hostage crisis, an Iranian official, Mr. Bani-Sadr, asserted the legitimacy of the Embassy takeover after he found out "it was not a real embassy" but a spy operation. N.Y. Times, Nov. 12, 1979, at A1, col. 6. *See also* note 71 *infra*.

One writer disagrees sharply with this position: "The seizure and continued detention of the detainees are in violation of Islamic law, Islamic international law, and conventional international law. Their detention also constitutes a crime under Islamic criminal law because there is no legal justification for it . . . ." Bassiouni, *Protection of Diplomats Under Islamic Law*, 74 AM. J. INT'L L. 609, 631 (1980).

diminish the value of foreign judgments.[54]

Undoubtedly Congress did not intend the President to use our domestic law to gauge the foreign state's treatment of our citizens. But neither did the Congress intend to force him to accept the determination of the imprisoning forum, no matter how savage and unfair.[55] There is some indication in the legislative history that the President should turn to international law for guidance.[56]

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54. Judgments of foreign courts do not qualify as "acts of state." *See* Note, *The Status of the Act of State Doctrine—Application to Litigation Arising From Confiscations of American Owned Property in Iran,* 4 SUFFOLK TRANSNAT'L L.J. 89, 100 (1980). Nevertheless, American courts greatly respect the judgments of a foreign tribunal. In Neely v. Henkel (No. 1), 180 U.S. 109 (1901), the Court upheld an extradition order sending a U.S. citizen to face criminal charges abroad. The citizen argued that the Constitution prevented extradition to a jurisdiction which did not recognize and accord American defendants the full range of constitutional guarantees.

> In connection with the above proposition, we are reminded of the fact that the appellant is a citizen of the United States. But such citizenship does not give him an immunity to commit crime in other countries, nor entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled. When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States.

Id. at 123.

The plaintiff in Cooley v. Weinberger, 518 F.2d 1151 (10th Cir. 1975), challenged the government's position that her Iranian homicide conviction for the murder of her husband in Iran disqualified her from receiving his social security benefits. The plaintiff claimed that a number of procedures inconsistent with United States constitutional provisions and privileges, including the use of torture, inadequate legal representation, inability to confront witnesses, and the absence of a reasonable doubt standard, rendered the Iranian conviction invalid in the social security case. The court disagreed: "The fact that Iranian procedures may not be consistent with due process protections guaranteed in United States criminal proceedings will not in itself prevent effect being given a judgment rendered in Iran in accord with Iranian law." *Id.* at 1155.

"A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction." Wilson v. Girard, 354 U.S. 524, 529 (1957). *See also* Reid v. Covert, 354 U.S. 1, 15 n.29 (1957).

55. CONG. GLOBE, 40th Cong., 2d Sess. 970 (1868) (remarks of Rep. Judd). *See also* HOUSE COMM. ON FOREIGN AFFAIRS, REPORT ON THE RIGHTS OF AMERICAN CITIZENS IN FOREIGN STATES, 40th Cong., 1st Sess. (1868), *reprinted in* CONG. GLOBE, 40th Cong., 2d Sess. app., at 100 (1868).

56. During a discussion of a preliminary draft of the bill on the Senate floor, the following exchange occurred:

> Mr. Henricks. I wish to ask the Senator from Michigan a question. In the amendment proposed by him he uses the word "unlawful." In judging whether the arrest and confinement are unlawful will that be decided by the laws of this country or by the laws of the country where the arrest is made? If an arrest should be unjust and oppressive, and yet be according to the finding of some grand jury or other proceeding in court, would it be unlawful in the sense in which the Senator uses the word?
>
> Mr. Howard. I suppose that the only practical construction to be given to that word "unlawful" would be this: that the arrest and detention must be contrary to the laws of nations, contrary to the rights of

The exhaustion of local remedies doctrine in international law, however, requires an alien to exhaust all remedies available under the municipal law of the defendant state before his state may seek relief before an international tribunal.[57] This rule, requiring an alien to seek local redress, flows from a basic respect for the sovereignty of nations.[58] The rule guards against individuals drawing an unfounded conclusion that the offending state is incapable of doing justice.[59] The local courts have the initial opportunity to investigate, assess, and resolve the dispute. This doctrine recognizes the advantages of quietly resolving disputes on a local level; immediate resort to an international tribunal may offend the defendant state and aggravate international relations.[60] While the recent Iranian hostage crisis does seem a clear instance of unjust detention, and in fact constitutes a violation of international law because of the diplomatic status of the victims,[61] the next case may not be equally clear. A

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an American citizen under the laws of nations. That is the construction which I give to it, and the idea which I had in my mind.

CONG. GLOBE, 40th Cong., 2d Sess. 4359 (1868). Judging from the transcript of Congressional debate, the drafters used the terms "unlawful" and "unjust" interchangeably.

57 Interhandel Case, [1959] I.C.J. 6, 27; C. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 169-269 (1967); C. LAW, THE LOCAL REMEDIES RULE IN INTERNATIONAL LAW (1961). *See generally* Note, *The Exhaustion of Local Remedies Rule and Forum Non Conveniens in International Litigation in U.S. Courts*, 13 CORNELL INT'L L.J. 351, 357-64 (1980).

The rule will not necessarily apply to international disputes involving hostages. In such a case the court may waive the rule if the plaintiff proves a lack of effective local remedies. *Id.* at 360-61. However, the rule is premised on an initial respect for the local tribunal's view of an international dispute, and thus should remind a President to scrutinize thoroughly the imprisoning state's position before creating an international incident or exercising extraordinary authority in reliance on the statute.

58 C. LAW, *supra* note 57, at 15; Mummery, *The Content of the Duty to Exhaust Local Judicial Remedies*, 58 AM. J. INT'L L. 389, 391 (1964).

59. C. LAW, *supra* note 57, at 16.

60. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 206, Comment a (1965); Mummery, *supra* note 58, at 391.

61. C. BAUMANN, THE DIPLOMATIC KIDNAPPINGS 32 (1973); C. FENWICK, INTERNATIONAL LAW 467-69 (3d ed. rev. 1948); 1 L. OPPENHEIM, INTERNATIONAL LAW §§ 386-388 (8th ed. H. Lauterpacht 1955). Iran is a signatory to the 1961 Vienna Convention on Diplomatic Relations, *done* 18 April 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95. Article 22 provides:

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

Article 29 states:

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

In his commentary on this well-settled principle of international relations one author notes:

Presidential decision to disregard a foreign court's determination of propriety could reduce certainty in international transactions and sacrifice the international prestige of the United States.[62]

Because the Hostage Act does not refer the President to a particular body of law, it is reasonable to infer that Congress intended that he apply a subjective standard of "unjust deprivation of liberty" to evaluate the unique circumstances surrounding the imprisonment. Many members of the Fortieth Congress pointed to the bill's imprecise language on this question and the problems it posed, but the standardless version of the Act passed over their strenuous objections to this defect. The discretion given the President makes sense. The unjust capture of American citizens abroad creates an emergency situation—a time when the nation needs decisive executive action. Limits on Presidential action exist; the President must communicate promptly with Congress.[63] But the initial determination of

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> The inviolability of the diplomatic agent is certainly the oldest established and the most fundamental rule of diplomatic law. . . . By the end of the sixteenth century therefore . . . the inviolability of the ambassador was firmly established as a rule of customary international law. If . . . the envoy became involved in conspiracies against the sovereign of the receiving State, State practice confined itself to his expulsion. He could on no account be tried or punished.

E. DENZA, DIPLOMATIC LAW 135 (1976) (footnotes omitted). *See also* L. BLOOMFIELD & G. FITZGERALD, CRIMES AGAINST INTERNATIONALLY PROTECTED PERSONS: PREVENTION AND PUNISHMENT 28 (1975).

The application of the United States to the International Court of Justice concerning the Embassy seizure in Tehran alleged that Iran violated articles 22, 24, 25, 27, 29, 31, and 47 of the Vienna Convention on Diplomatic Relations, *done* 18 April 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95; articles 28, 31, 33, 34, 36, and 40 of the Vienna Convention on Consular Relations, *done* 24 April 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261; articles 4 and 7 of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, *opened for signature* 14 December 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532; articles II(4), XIII, XVIII, and XIX of the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, 8 U.S.T. 899, T.I.A.S. No. 3853, 284 U.N.T.S. 93; and articles 2 and 33 of the Charter of the United Nations. *Case Concerning United States Diplomatic and Consular Staff in Tehran*, 74 AM. J. INT'L L. 258 (official documents supp.) (1980).

The International Court of Justice found that the Islamic Republic of Iran violated these treaty provisions and the formulations of international law they embodied. *Case Concerning United States Diplomatic and Consular Staff in Tehran*, [1980] I.C.J. Rep. 3 §§ 62-80, 84-92 & 95, *reprinted in* 74 AM. J. INT'L L. 746, 769-81 (1980).

62. The President may utilize a reciprocity standard. He could decide to honor the foreign determination regarding the propriety of detention only if he is confident that the foreign state would honor a United States determination involving the detention by American officials of a citizen of the foreign state. This proposal, patterned after the general federal rule governing the validity of foreign civil judgments, ignores the fact that a foreign country may willingly abide by the relatively fair decisions of United States courts. *See* note 54 *supra* and accompanying text. *But see* Sangiovanni Hernandez v. Dominicana de Aviacion C. for A., 556 F.2d 611 (1st Cir. 1977); Somportex, Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3rd Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972).

63. Congress may, of course, intervene in the decisionmaking process. The Hostage Act requires prompt communication to Congress of facts relative to the detention. Con-

unjust deprivation of liberty rests with the President.

2. *The Foreign Government Requirement*

The Hostage Act vests the Executive with authority to act only when the unjust deprivation of liberty takes place "by or under the authority of any foreign government."[64] Thus the statute invites the litigant to challenge the President's characterization of the foreign captors. The President has no authority to act under the statute if Americans are held hostage abroad by a terrorist group operating independently of any foreign government.[65] To justify his reliance upon the Hostage Act, the Executive must show some nexus between the captors and a foreign government.

The President's task of accurately determining the foreign captor's relationship to a foreign government is made difficult in a hostage situation arising out of civil insurrection, when *de jure* and *de facto* governments may co-exist. In a situation when more than one governmental entity exists, the United States' policy favoring recognition[66] of the government that is in control of the territory and pop-

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gress could by law pass judgment on the propriety of a particular hostage situation and approve or limit executive responses. That, however, is a cumbersome process, unsuited to the prompt action frequently required in hostage situations. A better alternative is for Congress to amend the statute, provide standards to govern its applicability, and provide a list of possible proper executive actions. Provisions could be included to require the President to seek congressional approval within several weeks of all executive actions undertaken to secure the release of the captured Americans. *Cf.* The War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1976), *see* notes 91-94 *infra* and accompanying text (recent legislation incorporating similar provisions).

64. Hostage Act, note 21 *supra*.

65. Most terrorist groups act without pretense of political legitimacy; they do not claim to be organized or ordained as a government. Current examples include the Red Brigade in Italy and the Baader Meinhof Gang in West Germany. When these independent groups hold Americans the President may not invoke the Hostage Act. A terrorist group may, however, assert the status of a government: The Palestine Liberation Organization (P.L.O.) is an example. This raises problems of recognition. *See* notes 66-67 *infra* and accompanying text.

At least one sympathetic writer concludes that the P.L.O. functions "as a territorial public body":

> The PLO . . . has established an unprecedented level of authority and representation. It is exercising typical governmental powers, including taxation, extradition, obtaining loans, granting governmental guarantees, signing international treaties and cease-fire arrangements, enjoying diplomatic immunities, and establishing an undisputed claim of status under public international law.

Kassim, *The Palestine Liberation Organization's Claim to Status*, 9 DEN. J. INT'L L. 1, 32 (1980).

The article concludes: "The characterization of the PLO as a territorial public body confers upon it the status of a participant in international law. Having a status, the P.L.O. necessarily possesses certain *rights and obligations under international law*." *Id.* at 33 (emphasis added).

66. "Recognition is indisputably the President's sole responsibility, and for many it is an 'enumerated' power implied in the President's express powers to appoint and receive

ulation[67] may clarify the foreign government's role in the detention, but difficulties still abound. A competing government, not recognized by the United States, may take American hostages. The President might withhold recognition of the offending government, but still wish to rely on the Hostage Act to secure the release of the captives. If a United States court hearing a challenge to the President's action held the Hostage Act inapplicable because of the nonrecognition of the foreign government, it might frustrate the drafters' intent.[68]

On the other hand, the President might recognize a government not otherwise entitled to recognition merely because he wished to invoke the Hostage Act in order to secure the release of hostages held by that government. A challenge to Presidential action on the ground that recognition was improper, and that no true government was involved in the detention, would embroil the court in a foreign affairs controversy concerning an area traditionally left to executive discretion.[69] The best approach is to respect the recognition decision of the President, absent a clear showing of abuse of discretion.[70]

Ambassadors." HENKIN, *supra* note 26, at 178. *See generally* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 94-98 (1965).

67. The general policy of the United States since Washington's time has been to recognize any government "which is formed by the will of the nation, substantially declared." 1 J. MOORE, DIGEST OF INTERNATIONAL LAW § 43 (1906) (quoting Thomas Jefferson).

> We maintain diplomatic relations with many governments of which we do not necessarily approve. The reality is that, in this day and age, coups and other unscheduled changes of government are not exceptional developments. Withholding diplomatic relations from these regimes, after they have obtained effective control, penalizes us. It means that we forsake much of the chance to influence the attitudes and conduct of a new regime. Without relations, we forfeit opportunities to transmit our values and communicate our policies. Isolation may well bring out the worst in the new government.

Address by Deputy Secretary of State Warren Christopher delivered at Occidental College (June 11, 1977), *reprinted in* L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW 185 (1980). *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 100-103 (1965). The President will refuse recognition, however, if unconvinced that a revolutionary regime "is willing to carry out the obligations of the state under international law and applicable international agreements." *Id.* § 103.

68. It is clear from the legislative debate that the drafters wanted to give the President broad authority to rescue captive Americans wherever they might be detained:

> We should have an act not only declaring to the nations of the world our determination to maintain in all instances and in all countries the rights and immunities of American citizens, home born and foreign born alike, but a legislative injunction laying upon the Executive the command of Congress that all the powers, every prerogative that he can wield under the Constitution and laws of the country, should be exerted in the case of the humblest citizen who might be detained anywhere upon any pretext.

CONG. GLOBE, 40th Cong., 2d Sess. 4355 (1868) (remarks of Sen. Conkling).

69. For a discussion of the political question doctrine, see notes 30-45 *supra* and accompanying text.

70. *See* note 84 *infra* and accompanying text.

Another troublesome situation may arise if the correctly identified and recognized foreign government insists that it did not authorize the detention of the American citizens and assures the President that it is attempting to secure their release. If the President invoked the Act in these circumstances he would, in effect, be rejecting the foreign government's disclaimer of responsibility.[71] Where an individual challenges Presidential action under the Act, the court should require the Executive to produce some evidence of foreign government involvement. Failure to impose such a burden places the American courts in the difficult position of relying solely on the Executive's allegations that the foreign government had falsely disclaimed responsibility. While the President retains primary responsibility for the conduct of foreign affairs, he must exercise caution before he asks the judiciary to find bad faith on the part of a foreign

71 State responsibility law will hold the state accountable in cases where the government fails to show the degree of diligence in the protection of foreigners that circumstances warrant. Public status of the foreigner may force the host to exercise a greater degree of care. Failure to detect and punish the responsible private individuals will also make the state responsible F. GARCIA-AMADOR, L. SOHN & R. BAXTER, RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 29 (1974).

These standards attach responsibility to a state's failure to act. These formulations differ from the test of the Hostage Act because they do not require proof that the state controlled or endorsed wrongful conduct against foreigners by private individuals. This principle is codified in article 29 of the Vienna Convention on Diplomatic Relations, *done* 18 April 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95, which require the receiving state to take "all appropriate steps" to protect diplomats.

The International Court of Justice held the Government of Iran accountable for its failure to protect and assist the American delegation before and during the armed takeover of the embassy.

> The facts set out . . . establish to the satisfaction of the Court that on 4 November 1979 the Iranian Government failed altogether to take any "appropriate steps" to protect the premises, staff and archives of the United States' mission against attack by the militants, and to take any steps either to prevent this attack, or to stop it before it reached its completion. . . . [T]he failure of the Iranian Government to take such steps was due to more than mere negligence or lack of appropriate means.

Case Concerning United States Diplomatic and Consular Staff in Tehran, [1980] I.C.J. Rep. 3 § 63, *reprinted in* 74 AM. J. INT'L L. 746, 769 (1980).

The United States did not suggest to the court that the militants "when they executed their attack on the Embassy, had any form of official status as recognized 'agents' or organs of the Iranian State." *Id.* § 58. But the court blamed the Iranian government for its subsequent failure to seek a prompt end to the seizure and its open endorsement of the militants' conduct. *Id.* § 70.

> The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated the continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible.

Id. § 74.

See generally Lillich & Paxman, *State Responsibility For Injuries To Aliens Occasioned by Terrorist Activities*, 26 AM. U.L.R. 217 (1977).

government.[72]

B. Challenging the Nature of Presidential Action Under the Act

1. Permissible Actions

Assuming *arguendo* that the President properly relied on the Hostage Act, a plaintiff may challenge the Executive's action under the Act as overbroad. The Hostage Act authorizes the President to "use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release [of United States citizens]."[73] Strictly construed, the Hostage Act only authorizes the President to take direct action against the offending nation. This is a reasonable construction because Congress and the courts have left the President unfettered in matters of foreign affairs.[74] The President's discretion in the field of foreign affairs does not, however, limit his ability to employ domestic measures to secure the release of captured Americans.[75] The language of the statute invites a broad construction, and the legislative history shows that the Fortieth Congress contemplated domestic-oriented executive action when it

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72. *See also* note 51 *supra*.

73. Hostage Act, note 21 *supra*.

74. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936):

> In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." Annals, 6th Cong., col. 613.
>
> . . . .
>
> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the Federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.

Id. at 319-20.

See also HENKIN, *supra* note 26, at 37-65: "Students of American government, and citizens generally know that American foreign relations are in the charge of the President. Foreign governments believe that it is principally he who determines American policy towards them." *Id.* at 37; E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1948, at 273-74 (1948).

75. To protect other Americans, and to bring pressure to bear on the Iranian government, President Carter relied on the Hostage Act to limit travel to Iran by American citizens by restricting the use of United States passports. Exec. Order No. 12,211, Fed. Reg. 26,685 (1980). The Attorney General's regulation imposing special visa requirements on Iranian nonimmigrant students also had a significant domestic impact. 8 C.F.R. § 214.5 (1980). *See* notes 113-16 *infra* and accompanying text.

debated the Act.[76]

The President expressly relied on the Hostage Act during the Iranian crisis when he imposed a ban on travel to Iran by American nationals.[77] Although no case has squarely presented the issues, the weight of judicial authority suggests that the President acted within the scope of his delegated authority, and that a challenge to the Iranian travel ban (or one imposed under similar circumstances) will fail. Courts have most frequently discussed the Hostage Act in the context of a President's attempt to restrict international travel by United States citizens.[78] In those cases the courts recognized that the Hostage Act would impose an obligation on the President to rescue Americans who might be captured while travelling abroad. Therefore, the courts reasoned that the Executive had the authority to refuse passports for travel to any country where hostages might be taken. On these and other grounds, the Supreme Court upheld the Department of State restriction on travel to Castro's Cuba.[79]

76 As reported out of the House Committee on Foreign Affairs, the bill empowered the President "to order the arrest and to detain in custody any subject or citizen of such foreign Government who may be found within the jurisdiction of the United States . . ." HOUSE COMM. ON FOREIGN AFFAIRS, REPORT ON THE RIGHTS OF AMERICAN CITIZENS IN FOREIGN STATES, 40th Cong., 1st Sess. (1868), *reprinted in* CONG. GLOBE, 40th Cong., 2d Sess., app., at 100 (1868). The House bill included identical language. CONG. GLOBE, 40th Cong., 2d Sess. 2318 (1868). A Senate amendment substituted the "necessary and proper" clause for the more specific arrest power. *Id.* at 4359 (1868). Though members of both houses severely criticized giving the President a reprisal power, *see* note 109 *infra*, nowhere does it appear that Congress objected to the arrest power because it was a domestic rather than an international exercise of Presidential authority. Nothing in the legislative history challenges the conclusion that Congress intended the Executive to act both at home and abroad to secure the release of captive Americans.

77. *See* note 8 *supra*.

78. Zemel v. Rusk, 381 U.S. 1 (1965); Worthy v. Herter, 270 F.2d 905 (D.C. Cir.), *cert. denied*, 361 U.S. 918 (1959); Briehl v. Dulles, 248 F.2d 561 (D.C. Cir. 1957), *rev'd sub nom.* Kent v. Dulles, 357 U.S. 116 (1958); Shachtman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955); Agee v. Vance, 483 F. Supp. 729 (D.D.C.), *aff'd sub nom.* Agee v. Muskie, 629 F.2d 80 (D.C. Cir. 1980), *rev'd sub nom.* Haig v. Agee, 49 U.S.L.W. 4869 (1981); Narenji v. Civiletti, 481 F. Supp. 1132 (D.D.C. 1979), *rev'd*, 617 F.2d 745 (D.C. Cir.), *cert. denied*, 100 S. Ct. 2928 (1980); Redpath v. Kissinger, 415 F. Supp. 566 (W.D. Tex.), *aff'd*, 545 F.2d 167 (5th Cir. 1976); MacEwan v. Rusk, 228 F. Supp. 306 (E.D. Pa. 1964), *aff'd*, 344 F.2d 963 (3d Cir. 1965).

79 It also cannot be forgotten that in the early days of the Castro regime, United States citizens were arrested and imprisoned without charges. We think, particularly in view of the President's statutory obligation to "use such means, not amounting to acts of war, as he may think necessary and proper" to secure the release of an American citizen unjustly deprived of his liberty by a foreign government, that the Secretary has justifiably concluded that travel to Cuba by American citizens might involve the Nation in dangerous international incidents, and that the Constitution does not require him to validate passports for such travel.

Zemel v. Rusk, 381 U.S. at 15 (1965) (footnote omitted). Similar logic pervades other cases permitting the President to restrict travel to Communist countries. In Worthy v. Herter, 270 F.2d 905 (D.C. Cir. 1959), the court noted the President's powers and responsibility under the Hostage Act and concluded that, "his power in respect to foreign affairs

The courts also have had the opportunity to test the breadth of Presidential power under the Hostage Act in litigation arising out of the executive agreement that resulted in the release of the hostages from Iran. A number of the Executive's responses to the Iranian takeover were grounded on the more specific provisions of other laws.[80] President Carter did, however, rely in part on the Hostage Act for authority to reach agreement with Iran.[81] Although the Pres-

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includes power to refuse to sanction the travel of American citizens in that [dangerous] area." *Id.* at 911

In Briehl v. Dulles, 248 F.2d 561 (D.C. Cir. 1957) *rev'd sub nom.* Kent v. Dulles, 357 U.S. 116 (1958), the challenged regulations prohibited issuance of passports to Communist Party members. In upholding the regulation, the court observed that, "while a passport as such does not bestow rights of protection which a citizen does not otherwise have, it does, as a permit to travel abroad, allow him to put himself in a position where he may invoke the protective power of this government." *Id.* at 568.

80. Exec. Order No. 12,205, 45 Fed. Reg. 24,099 (1980); Exec. Order No. 12,211, 45 Fed. Reg. 26,685 (1980). *See* note 7 *supra*.

81. In that controversial settlement, the President agreed to release the frozen Iranian assets and transfer the funds into escrow accounts held in the name of the Algerian Central Bank. The President also agreed to terminate all litigation against Iran then pending in American courts, and to promote the settlement of those claims. Exec. Order Nos. 12,279-85, 46 Fed. Reg. 7913-32 (1981). Upon taking office, President Reagan ratified the Agreement. Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981). *See generally* Note, *Presidential Authority to Terminate Domestic Suits Against Foreign Governments: An Analysis of the Hostage Agreement*, 15 CORNELL INT'L L.J. — (1981).

In Dames & Moore v. Regan, 49 U.S.L.W. 4969 (1981), the Supreme Court upheld Presidential suspension of the claims. In doing so, it provided the most comprehensive judicial discussion of the Hostage Act to date.

The Court's opinion, written by Justice Rehnquist, concludes that the Hostage Act did not specifically authorize the President's actions. It interprets very narrowly the Act's legislative intent and history, and concluded that

> the Act was passed in response to a situation unlike the recent Iranian crisis. Congress in 1868 was concerned with the activity of certain countries refusing to recognize the citizenship of naturalized Americans traveling abroad, and repatriating such citizens against their will . . . . These countries were not interested in returning the citizens in exchange for any sort of ransom. This also explains the reference in the Act to imprisonment "in violation of the rights of American citizenship." Although the Iranian hostage-taking violated international law and common decency, the hostages were not seized out of any refusal to recognize their American citizenship—they were seized precisely *because of* their American citizenship.

Id. at 4975 (citations omitted, emphasis in original).

This slim distinction is unworthy of the congressional purpose underlying the Act. While the immediate impetus for its adoption was certainly to protect naturalized Americans visiting their native countries, *see* note 52 *supra*, the Congress chose not to limit the language of the Act to foreign born Americans; its protection extends to "any citizen of the United States." 22 U.S.C. § 1732. Cases which recognize that the Hostage Act gives the President extra authority to limit international travel have never restricted the Hostage Act's coverage to protection of naturalized Americans. *See* note 78 *supra*.

The *Dames & Moore* opinion does, however, read expansively both the Hostage Act and the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (Supp. II 1978):

> We think both statutes highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action . . . . The Hostage Act . . . indicates congressional willingness that the President have broad discretion when responding to the hostile acts of foreign sovereigns.

ident is made arbiter of the appropriateness of action under the Act ("as he may think necessary and proper"),[82] it is unlikely that he will be able to act entirely without judicial supervision.[83] As an initial requirement, the President would have to show a link between his action and the goal of the Hostage Act: the release of hostages. A challenge to action under the Hostage Act will succeed if the President can not prove that the action in question bore some *rational relation* to the goal of obtaining the release of the hostages. The fortuity of Americans captured abroad will not give the President carte blanche to evade the legislative process by simply claiming that what he did was necessary and proper to secure the hostages' release. The President's choice of action is entitled to great respect; the "rational basis" test is easily satisfied.[84] Such a test does not require

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. . [W]e cannot ignore the general tenor of Congress' legislation in this area in trying to determine whether the President is acting alone or at least with the acceptance of Congress. As we have noted, Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, "especially . . . in the areas of foreign policy and national security," imply "congressional disapproval" of action taken by the Executive.

49 U.S.L.W. at 4975 (citing Haig v. Agee, 49 U.S.L.W. 4869 (1981)).

82. Hostage Act, note 21 *supra*.

83. For a discussion of the political question and justiciability doctrines, see notes 26-45 *supra* and accompanying text.

84. In general, the rational basis test resolves in favor of the challenged action. It respects the exercise of discretion by the administrative or executive decisionmaker by preventing a substitution of the court's judgment in most cases. *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT §§ 30.04-.06 (1972). In this respect, it is similar to the abuse of discretion standard suggested to review the President's unjust deprivation conclusion and foreign government characterization. *See* notes 46-71 *supra* and accompanying text. Both tests place heavy burdens on the challenger. This is entirely appropriate, however, given the strong arguments which favor executive preeminence in these type of questions. *See* notes 30-45 *supra* and accompanying text.

In such areas as foreign policy and military activity, some issues seem clearly inappropriate for judicial determination. But even in such areas, reviewability may depend upon what administrative failure is asserted, for courts are normally *less reluctant* to decide constitutionality, statutory interpretaton, or fairness of procedure than they are to decide whether the action is arbitrary or capricious or an *abuse of discretion*. . . . [T]he disqualification of judges on issues of military and foreign policy may be so strongly felt that judges will decline even to pass upon constitutional issues. . . . Even so, if the President and Congress are exceeding their constitutional power and depriving the plaintiff of his liberty, might not the courts have the responsibility to decide no matter how difficult the constitutional question might be?

K. DAVIS, ADMINISTRATIVE LAW TEXT, § 28.05 (1972) (emphasis added).

The two tests (rational relation and abuse of discretion) are likely to yield similar results and are well-suited to the issues and decisions being reviewed. The rational basis test is easier to apply in testing whether the President has taken extraordinary action that could not possibly lead to the release of the hostages. It is easier to apply because it focuses the analysis on the ultimate cause and effect relation: could the challenged action in any rational way be considered "necessary and proper" to obtain or effectuate the release? A decision by the President allegedly under the Hostage Act, to raise taxes without congressional approval, for example, would likely fail this rational relation test.

the court to satisfy itself that the challenged executive action was in fact necessary and proper to effectuate the release. The court must only conclude that the President had a rational basis for so deciding. This is the most appropriate test to accomodate, yet still control, Congress' broad delegation of Presidential power under the Act.[85]

2. *The Acts of War Prohibition*

The one explicit limit to Presidential action under the Hostage Act forbids the use of means "amounting to acts of war."[86] The statute does not define "acts of war" and the legislative history of the Hostage Act reflects considerable controversy about the kinds of executive action that fall within the prohibition.[87] International law authorities prominent in the nineteenth century defined "acts of war" narrowly.[88] Modern writers are in accord: "War must not be confused with certain acts of force used by States in difficult diplo-

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Conversely, the question whether the President has properly characterized the imprisonment as "by or under the authority of any foreign government" does not lend itself to causal analysis. Foreign government decisions (when they are reviewable, *see* note 40 *supra*) lie in the discretion of the President. Thus, the appropriate consideration is whether he has abused that discretion.

85. "He is to do all he can under the Constitution and laws in every way to secure the release of a citizen . . . ." CONG. GLOBE, 40th Cong., 2d Sess. 4333 (1868) (remarks of Sen. Williams); *id.* at 4208 (remarks of Sen. Conness).

86. Hostage Act, note 21 *supra*.

87. It is quite clear that the Fortieth Congress never intended to yield to the President its constitutional power to declare war. "The Constitution provides that Congress alone shall declare war, and Congress cannot, if it would, delegate this power." CONG. GLOBE, 40th Cong., 2d Sess. 967 (1868) (remarks of Rep. Bailey).

> I am not in favor of lodging the war power in the hands of any President, least of all in the hands of the man now discharging the duties of that office [Andrew Johnson]. . . . Congress is clothed by the Constitution with the war-making power of the nation, and if it becomes necessary to vindicate the rights of American citizens and maintain the honor of the Government by a declaration of war I am sure Congress will not shrink from its duty. The rights of American citizens, native-born or naturalized, and the honor of the American Government, are far safer in the keeping of Congress than in the keeping of any President.

Id. at 1102 (remarks of Rep. Ashley).

Many members, however, understood the law of nations to permit a wide variety of measures *short of war* to resolve international disputes. The sponsors of the bill in both houses expressed the opinion that many unfriendly acts did not rise to the level of "acts of war." They specifically mentioned reprisals against resident aliens, suspension of diplomatic and commercial intercourse between the nations, blockade, and embargo. *Id.* at 2314 (remarks of Rep. Banks); *id.* at 4207 (remarks of Sen. Conness); *id.* at 4359 (remarks of Sen. Howard); *id.* at 4354 (remarks of Sen. Ferry). But other members argued forcefully that these strong measures were "acts of war." *Id.* at 4205 (remarks of Sen. Sumner).

88. Among the various modes of terminating the differences between nations, by forcible means short of actual war, are the following:

> 1. By laying an embargo or sequestration on the ships and goods, or other property of the offending nation, found within the territory of the injured State.
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> 2. By taking forcible possession of the thing in controversy, by securing to yourself by force, and refusing to the other nation, the enjoyment of the right drawn in question.

matic negotiations in order to bring pressure to bear on the other party and to make it accept its demands more rapidly; for example, reprisals, seizures, temporary occupation of territory, peaceful blockade, embargo."[89] This category includes many of the actions ordered by the President to effectuate the release of the Americans held in Iran.[90]

The limitation on "acts of war" must, however, be read in light of the War Powers Resolution.[91] That Resolution, enacted over veto in 1973, represents a congressional effort to reassert control over the use of American armed forces.[92] The law requires the President "in every possible instance" to consult with Congress before introducing troops into hostilities,[93] and to report promptly to Congress the details of the use of armed forces.[94] The Hostage Act, to the extent it permits use of the armed forces, does not relax these requirements of

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3 By exercising the right of vindictive retaliation (*retorsio facti*) or of amicable retaliation (*retorsion de droit*); by which last, the one nation applies, in its transactions with the other, the same rule of conduct by which that other is governed under similar circumstances.

4 By making reprisals upon the persons and things belonging to the offending nation, until a satisfactory reparation is made for the alleged injury.

H WHEATON, ELEMENTS OF INTERNATIONAL LAW 505-06 (2d ann. ed. W. Lawrence 1863) (footnote omitted); E. VATTEL, THE LAW OF NATIONS 282-89 (4th Am. ed. J. Chitty 1835). The legislators referred to the work and principles of Vattel and Wheaton during the debate on the Hostage Act. CONG. GLOBE, 40th Cong., 2d Sess. 4206 (1868) (remarks of Sen. Sumner). 8 J. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 37-48 (1976) contains supportive historical examples.

89. 1 EPPSTEIN, CODE OF INTERNATIONAL ETHICS 114 (1953), *reprinted in* L. ORFIELD & E. RE, CASES AND MATERIALS ON INTERNATIONAL LAW 898 (rev. ed. 1965). *See also* 2 L. OPPENHEIM, INTERNATIONAL LAW 132 (7th ed. H. Lauterpacht 1952) (retorsion, reprisals (including embargo), pacific blockade, and intervention); 2 C.C. HYDE, INTERNATIONAL LAW 1654-78 (2d rev. ed. 1945) (withdrawal of diplomatic relations, retorsion, retaliation, reprisals, pacific blockade, embargo, nonintercourse, increases, or decreases in national armaments).

90. The President placed severe restrictions on the exchange of goods with Iran (excepting food, clothing and medical supplies), and on other terms of trade with enterprises controlled by the Iranian government. Exec. Order No. 12,205, 45 Fed. Reg. 24,099 (1980); Exec. Order No. 12,211, 45 Fed. Reg. 26,685 (1980). Several politicians advocated the use of a blockade or harbor-mining operation to pressure Iran. N.Y. Times, March 20, 1980, at A8, col. 1; *id.*, Apr. 24, 1980, at A25, col. 1.

91. 50 U.S.C. §§ 1541-1548 (1976).

Emerson, *The War Powers Resolution Tested: The President's Independent Defense Power*, 51 NOTRE DAME LAW. 187 (1975), provides an exhaustive analysis of the War Powers Resolution and argues for broad executive defense powers.

92. The announced purpose of the War Powers Resolution is to

> fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

50 U.S.C. § 1541(a) (1976).

93. *Id.* § 1542.

94. *Id.* § 1543.

the Resolution. More fundamentally, though, the Resolution declares the President incapable of involving troops in actual or imminent hostilities absent a declaration of war, an attack on the United States, or a specific statutory authorization.[95] Moreover, the Resolution contains language that restricts reliance upon existing statutes as grounds for the use of armed forces. The earlier statute must "specifically authorize" the introduction of troops;[96] the Hostage Act contains no such authorization. Reading the Hostage Act and War Powers Resolution together, a court will reasonably conclude that the President may not rely upon the Hostage Act to support introduction of armed forces into hostilities.[97]

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95. *Id.* § 1541(c).

At least one writer makes the argument that § 1541(c) is not a legally binding codification of the President's constitutional power in situations involving hostilities. One may view it as merely a congressional policy statement without frustrating the primary legislative purpose of the Resolution: to establish a process of collective judgment between the Congress and the Executive in time of crisis. Emerson, *The War Powers Resolution Tested: The President's Independent Defense Power*, 51 NOTRE DAME LAW. 187, 191-92 (1975).

96. Interpretation of joint resolution—Inferences from any law or treaty

(a) Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—

(1) from any provision of law (whether or not in effect before November 7, 1973), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this chapter. . . .

50 U.S.C. § 1547 (1976).

97. In the wake of the aborted attempt to rescue the American hostages in Iran, some Congressmen questioned whether the President violated the War Powers Resolution by failing to consult with Congress before undertaking the mission. N.Y. Times, Apr. 25, 1980, at A1, col. 6; *id.*, Apr. 26, 1980, at A11, col. 1.

The President may justify the use of troops to rescue captured Americans. In the specific circumstances surrounding the Iranian crisis, the President might successfully argue that the War Powers Resolution authorized the rescue mission because the militants' attack on the American Embassy was an attack on a "possession" of the United States within the meaning of § 1541(c). *See* 1 L. OPPENHEIM, INTERNATIONAL LAW 461, 794-95 (8th ed. H. Lauterpacht 1955).

The President may also find support in the views of some commentators who read much into the few textual grants of authority in the Constitution: the "Commander in Chief" clause, U.S. CONST. art. II, § 2; the "take care" clause, *id.* art. II, § 3; the treaty power, *id.* art. II, § 2, and the power to receive Ambassadors, *id.* art. II, § 3. These writers assume that the President possesses a deep reservoir of necessary but unarticulated executive powers: "[t]he Executive power shall be vested in a President of the United States of America." *Id.* art. II. This is particularly true in matters of war and relations with other nations. Alexander Hamilton wrote:

> While, therefore, the legislature can alone declare war, can alone actually transfer the nation from a state of peace to a state of hostility, it belongs to the "executive power" to do whatever else the law of nations, cooperating with the

C. CHALLENGING THE CONSTITUTIONALITY OF THE EXECUTIVE ACTION

Even assuming the broadest possible delegation of authority by Congress to the President, a litigant may challenge the constitutionality of the President's actions under the Hostage Act. The Constitution remains the ultimate check to which a court may resort to protect individual rights from majoritarian fervor.

Courts will continue to safeguard individual rights even though the government asserts a countervailing need to conduct foreign relations.[98] Andrew Hamilton's vision of unrestricted national power in foreign affairs has never become law.[99] But, as Professor Henkin's analysis reveals, invocation of the foreign relations power has tended to make the judiciary especially sympathetic to the constitutional and statutory propriety of executive action.[100]

Cases of national emergency compel even greater deference by the judicial branch. For, while emergency does not permit deviation from the Constitution, it certainly provides justification for pressing the document to its limits. This view is well illustrated in *Home Building & Loan Association v. Blaisdell.*[101] To determine the consti-

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treaties of the country, enjoin in the intercourse of the United States with foreign powers.

A. HAMILTON & J. MADISON, LETTERS OF PACIFICUS AND HELVIDIUS ON THE PROCLAMATION OF NEUTRALITY OF 1793 14 (1845). *See, e.g.*, A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 1-6 (1976). Adopting this view of executive power, the President may argue that he possesses authority to deploy troops as a matter of constitutional right. The language of the War Powers Resolution lends this argument considerable force: "Nothing in this chapter (1) is intended to alter the constitutional authority of the Congress or of the President . . . ." 50 U.S.C. § 1547(d) (1976). This theory is most persuasive when U.S. armed forces act to rescue endangered Americans, rather than to attack foreign troops. Emerson, *The War Powers Resolution Tested: The President's Independent Defense Power*, 51 NOTRE DAME LAW. 187, 192 (1975). *But see* Berger, *Protection of Americans Abroad*, 44 U. CIN. L. REV. 741, 744 (1975), which interprets narrowly the President's "implied" constitutional authority to commit troops unilaterally and construes his Hostage Act powers restrictively.

98. In Afroyim v. Rush, 387 U.S. 253, 267-68 (1967), the Court struck down a provision of the immigration statute which provided that a naturalized American citizen would lose his citizenship if he voted in a foreign election. The Court held that the fourteenth amendment controlled the status of citizenship and that Congress had no power to cancel citizenship. The Court in Reid v. Covert, 354 U.S. 1, 6-7, 16-17 (1957), reversed court martial convictions of armed forces' dependents living abroad because of the failure to provide trial by jury. The Court recognized the supremacy of the Constitution over a treaty. *See generally* HENKIN, *supra* note 26, at 251-70.

99. As the duties of superintending the national defense and of securing the public peace against foreign or domestic violence involve a provision for casualties and dangers to which no possible limits can be assigned, the power of making that provision ought to know no other bounds than the exigencies of the nation and the resources of the community.

THE FEDERALIST, No. 31. (A. Hamilton) (Heirloom Edition at 194-95).

100. HENKIN, *supra* note 26, at 205-24.

101. 290 U.S 398 (1934).

tutionality of a state statute passed as an emergency economic measure during the Great Depression, the Court held that the textually specific provisions of the Constitution cannot be set aside to meet exigencies. However, the constitutional provisions that are written loosely, in general language, are more elastic; they can be "stretched" to justify questionable emergency action.[102] The framers of the Constitution were confident that the document would serve the nation well in times of both peace and conflict.[103] One writer, dissatisfied with this view, argues a most difficult case—that certain situations justify laying aside the Constitution, even its specific and immutable provisions, to permit the President to exercise his prerogative to save the nation.[104] He argues that when the ultimate purpose of the Constitution—preservation of the nation—is threatened,

102. Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.

While emergency does not create power, emergency may furnish the occasion for the exercise of power. . . . The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. Thus, the war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties. When the provisions of the Constitution, in grant or restriction, are specific, so particularlized as not to admit of construction, no question is presented. Thus, emergency would not permit a State to have more than two Senators in the Congress, or permit the election of President by a general popular vote without regard to the number of electors to which the States are respectively entitled, or permit the States to "coin money" or to "make anything but gold and silver coin a tender in payment of debts." But where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details.

Id. at 425-26 (footnote omitted).

103. THE FEDERALIST NOS. 23, 26, 28, 71 (A. Hamilton), 41 (J. Madison).

104. *See* Hurtgen, *The Case for Presidential Prerogative,* 7 U. TOL. L. REV. 59 (1975). Hurtgen also suggests that the framers might have felt that they had drafted, in effect, two constitutions: one for times of war, and another for times of peace. Under this view, any Presidential action taken in time of emergency would be constitutional; even if it violated the terms of the peacetime document, the action could pass muster under the wartime Constitution. *Id.* at 64 n.17. The behavior of past Presidents provides some support for this view. Lincoln, for example, enlarged the Army and Navy, ordered private appropriations, proclaimed a naval blockade of Southern ports, and suspended habeas corpus, all without congressional approval. E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1948, at 277-78 (1948). The Court upheld the blockade action in the Prize Cases, 67 U.S. (2 Black) 635 (1863); the habeas corpus suspension, condemned by the Court in *Ex parte* Milligan, 71 U.S. (4 Wall.) 1 (1866), still resulted in pragmatic victory for Lincoln's broad conception of his wartime authority.

the Constitution itself must yield.[105]

As a practical matter, however, the kinds of incidents that bring the Hostage Act into operation will rarely, if ever, rise to a level of emergency which threatens the continued existence of the nation, especially since the direct harm will take place abroad.[106]

No Hostage Act power may be exerted so as to violate rights the Constitution guarantees. It is far better to adhere to the approach employed in *Blaisdell*,[107] than to suspend the Constitution; it is wiser to err on the side of constitutionality, giving the President the benefit of judicial doubt, than to assert that an action is unconstitutional but still permissible. This means that a reviewing court cannot approve executive action which contravenes some "specific," "particularized"[108] provision of the Constitution, no matter how clear the case of the President that what he has done is "necessary and proper" within the meaning of the Hostage Act. Congress may not by statute amend or abridge clear constitutional rights.

Some cases will involve violations of textually secured rights and will require invalidation of the challenged action. No court would ignore the "cruel and unusual punishment" clause of the eighth amendment and refuse to vindicate the rights of someone tortured (at the President's request) to acquire information necessary to secure the release of Americans imprisoned abroad. The sponsor of the Hostage Act in the House argued the soundness of his bill, which passed and went to the Senate containing express authorization for the President to arrest citizens of the imprisoning nation passing through the United States.[109] That language was omitted when the

105. There are many practical reasons for giving total authority to a President: one man acts faster and with greater precision; the Executive possesses the most reliable information necessary for decision; the President is most easily held accountable; the Congress can later impeach him. Hurtgen, *supra* note 104, at 75. This theory is dangerous. Once the President lays aside the Constitution, no standard remains to tell him where to stop.

106 Notwithstanding that the Executive orders issued during the Iranian hostage crisis contained explicit declarations of a state of emergency. *See* notes 7-8 *supra*. The term "emergency" is thus often used as shorthand expression to refer generally to circumstances where a strong national interest demands swift and decisive action. Seizure of the American Embassy in Tehran did not jeopardize the polity, or even seriously impair the quality of life led by the American people. Yet the episode opened an extraordinary chapter in the Nation's history. The seizure was a central topic in national and international journalism. It profoundly affected the foreign relations of the United States, and increased the chance of hostilities. No court could fail to recognize the strong national interest in resolving the standoff.

107. 290 U.S. 398 (1934).

108. *Id.* at 426.

109. The sponsor, Rep. Banks, attempted to repel a number of constitutional assaults. Critics thought the measure a violation of the fourth, fifth, and thirteenth amendments, and the privilege of habeas corpus. Mr. Banks thought those principles inapplicable: "[W]hatever individual is arrested under this statute will not be arrested because of any

Senate inserted the "necessary and proper" language now in the law.[110] This deletion shows that Congress did not include the reprisal arrest power in its otherwise generous delegation. But even if Congress had enacted the Hostage Act in the form in which it passed the House, the reprisal power would not have been valid.[111]

When, however, "constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline,"[112] the judiciary may adopt a policy of greater flexibility responsive to the exigencies of the hostage detention. The standard of review should change to reflect the emergency and extraordinary state interest. This is especially true in due process and equal protection balancing controversies. A recent case growing out of the Iranian seizure provides a useful illustration. In *Narenji v. Civiletti,*[113] a group of Iranians in the United States brought suit to enjoin the government from discriminatory visa enforcement on the basis of nationality. The district court enjoined the procedure, finding it a denial of the students' right to equal protection of the laws. The trial court's opinion considered the Hostage Act, recognized that it applied on the facts, but held that the Hostage Act could not grant the President any authority to infringe individual rights.[114] The court of appeals reversed.

offense committed by him. It is the assertion of the sovereign power of this Government to enforce the rights of its citizens against other Governments." CONG. GLOBE, 40th Cong., 2d Sess. 2314 (1868) (remarks of Rep. Banks).

> There is no connection between the rights of persons under the criminal law or the provisions of the Constitution relating to criminal law and the powers of a Government in a case of this kind. The question is broader, more extended than anything relating to the rights of persons under the Constitution, whether citizens or aliens. It is the question whether the Government of the United States has the power to take any action whatever to compel the Government of other countries to consider the rights of our citizens and to bring the matter to negotiation and settlement.

Id. at 2315.

110. *See* note 76 *supra*.

111. The reprisal arrest power ran afoul of too many explicit constitutional provisions to survive. This explains Rep. Banks' attempts to justify the measure by resort to a theory of extra-constitutional sovereignty. It is difficult to imagine a scenario of foreign detention so threatening to the Constitution that it would justify the exercise of power at odds with the Constitution. *But see* notes 105-07 *supra* and accompanying text.

112. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. at 426.

113. 481 F. Supp. 1132 (D.D.C.), *rev'd,* 617 F.2d 745 (D.C. Cir. 1979), *cert. denied,* 100 S.Ct. 2928 (1980).

114. Recognizing that discrimination among aliens on the basis of national origin is not per se unconstitutional, the court conceded that Congress could make such a classification or authorize the President to do so. 481 F. Supp. at 1141. But, noting that "throughout the statutory scheme governing immigration and naturalization, Congress has been very explicit in those instances when it desired that a particular group of aliens be treated in a manner different from others," the opinion concluded it could "find no statutory basis for the discriminatory classification established by the regulation such that defendants could cloak their rule's discriminatory effect in the mantle of congressional approval under its power over immigration and naturalization and thereby for practical purposes, exempt the regulation from judicial scrutiny." *Id.* (footnote omitted).

Although the court of appeals did not ground its opinion on the Hostage Act, it did recognize that the emergency shifted the equal protection balance in favor of the propriety of the discriminatory visa procedure. The court accepted without challenge the government's affidavit that the regulations in question were part of the President's plan to secure release of the hostages.[115] The court was wrong not to have placed definite reliance on the Hostage Act. In a concurring opinion, Judge MacKinnon correctly read the congressional delegation made in the Hostage Act to include the visa procedure under examination.[116]

The court failed, however, to balance properly the equal protection claim of the plaintiffs with the overwhelming interest of the country in obtaining release of the American diplomats held in Iran:

> In essence, although defendants' regulation is an understandable effort designed to somehow reply to the Iranian attack upon this nation's sovereignty and the seizure of its citizens, it is one that does not support a legitimate national interest and therefore would not excuse the wholesale nullification of the rights of the students involved or save [the regulation] from violating the equal protection guarantee of the fifth amendment.

Id. at 1145 (footnote omitted).

In its search for statutory authorization for the classification, the court focused narrowly on the immigration statutes, giving the clear mandate of the Hostage Act short shrift

> We note that Congress has not been totally silent on the subject of the President's duty to free any American citizen unjustly imprisoned overseas, for it has declared that "the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release . . . ." 22 U.S.C. § 1732 (1976). While the defendants have made a passing reference to this enactment, they do not rely upon it as a congressional endorsement of their actions, apparently believing, as does the Court, that while it may give the President some extra latitude to deal militarily or economically with a foreign nation holding American citizens, it does not act to authorize the Chief Executive to abrogate individual rights guaranteed by the Constitution.

Id. at 1141 n.7.

The quoted section highlights the error committed by the district court in dismissing out of hand the applicability of the Hostage Act. It is plain that the Act does not and cannot "authorize the Chief Executive to abrogate individual rights guaranteed by the Constitution." *See* note 107 *supra* and accompanying text. However, when the rights asserted are not clearly delimited by the express text of the Constitution, the extent of the protection afforded must depend on the surrounding circumstances and conflicting interests. Equal protection is such a variable right; its scope is set by reasoned balancing of opposing interests. The district court failed to weigh in the balance the strong national interest in allowing the President to devise a variety of responses to the Iranian seizure.

115. This court is not in a position to say what effect the required reporting by several thousand Iranian students, who may be in this country illegally, will have on the attitude and conduct of the Iranian government. That is a judgment to be made by the President and it is not for us to overrule him, in the absence of acts that are clearly in excess of his authority.

Narenji v. Civiletti, 617 F.2d at 748.

116. It is also incorrect to say "that the President has taken this action without express authorization from Congress." . . . In the situation with which we are here dealing, the President's power is at its zenith—right up to the brink of war

Travel restrictions are also subject to constitutional scrutiny. In a case where the Executive refuses to issue a passport to an individual, or when he imposes an area travel ban, the court hearing a challenge to the action must balance the individual's fifth amendment liberty interest against the security interest of the nation.[117] In *Zemel v. Rusk*,[118] the Court held that the Secretary of State was statutorily and constitutionally authorized under the Passport Act of 1926[119] to restrict travel to Castro's Cuba. The President's authority under the Hostage Act to restrict area travel will be a question of first impression.[120] The President can make a convincing argument that he may exercise his broad foreign affairs power to protect the safety of American travellers.[121]

The courts must similarly balance competing interests when they hear a first amendment objection to Presidential action under the Hostage Act.[122] Assertions of foreign relations and war powers

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and he does act pursuant to the "express authorization" of Congress [citing the Act]

> . This direction to the President by Congress is unequivocal. It completely supports every act and order that he has taken to free the United States hostages. No further scrutiny of his acts is required or necessary.

Id at 753 (MacKinnon, J., concurring).

117. Kent v. Dulles, 357 U.S. 116 (1958). The Court held that the right to travel is a fifth amendment liberty of which the individual can be deprived only by due process of law, and which can only be regulated pursuant to the law-making functions of Congress. *Id.* at 129. *See also* Aptheker v. Secretary of State, 378 U.S. 500 (1964).

In Haig v. Agee, 49 U.S.L.W. 4869 (1981), the Supreme Court rejected Agee's argument "that the revocation of his passport impermissibly burdens his freedoms to travel . . ." *Id.* at 4876.

> Revocation of a passport undeniably curtails travel, but the freedom to travel abroad with a "letter of introduction" in the form of a passport issued by the sovereign is subordinate to national security and foreign policy considerations; as such, it is subject to reasonable governmental regulation.

Id. *See* note 16 *supra*.

118. 381 U.S. 1 (1965).

119. *As amended in* 22 U.S.C. § 211a (Supp. II 1978).

120. The President relied on the Passport Act, in addition to the Hostage Act and § 215 of the Immigration and Nationality Act (8 U.S.C. § 1185 (1976)) when he authorized the Secretary of State to restrict the use of United States passports for travel to Iran. Exec. Order No. 12,211, 45 Fed. Reg. 26,685 (1980). *See also* notes 9-17 *supra* and accompanying text.

121. *See* Worthy v. Herter, 270 F.2d 905 (D.C. Cir.), *cert. denied*, 361 U.S. 918 (1959). *But see* United States v. Laub, 385 U.S. 475 (1967). *See generally* Note, *The Right to Travel and the Loyalty Oath*, 12 COLUM. J. TRANSNAT'L L. 387 (1973).

122. Ramsey Clark, threatened with civil and criminal prosecution for violation of the travel ban, advanced his right to meet and speak with Iranian officials as protected under the first amendment. N.Y. Times, June 9, 1980, at A1, col. 5. He asserted this right as superior to any contrary exercise of power by the President under the Hostage Act.

Another act of Congress, the Logan Act of 1799 (codified in 18 U.S.C. § 953 (1976)), forbids private contact with foreign governments and their leaders, with intent to influence the government's conduct in relation to a dispute or controversy with the United States. One recent examination of the law concludes it may be unconstitutional and urges its repeal, noting possible violations of the first and fifth amendments. The fifth amendment criticism rests upon the vague language and desuetudinous status of the stat-

will never dispose automatically of free press claims.[123] In a number of cases, however, free speech rights have given way to more compelling state interests.[124] The rescue of Americans imprisoned abroad may certainly qualify as a compelling state interest; the Hostage Act retains vitality even in the face of first amendment assertions.[125]

CONCLUSION

The Hostage Act vests the President with broad discretion. The limited reliance he placed upon the Act in response to the Iranian embassy seizure represents an important precedent for use of the Hostage Act to deal with the detention of U.S. citizens abroad.

ute, which imposes criminal sanctions of not more than $5000, or imprisonment for not more than three years, or both. The Comment's first amendment analysis suggests that, absent a grave threat to governmental security, no compelling state interest exists to require suppression of free speech. The Comment also stresses the availability of "alternative means" for the government to ensure its security. Comment, *The Logan Act of 1799 May it Rest in Peace*, 10 CAL. W. INT'L L.J. 365 (1980).

123 *See, e.g.*, New York Times Co. v. United States, 403 U.S 713 (1971) (the "Pentagon Papers" case).

124 Cases cited in HENKIN are illustrative:

> The First Amendment has not precluded punishment for violation—by speech or publication—of military censorship or other security regulations, of laws against interfering with the administration of justice, against individual or group libel, public obscenity, inciting to crime, unlawful picketing, or disrupting the Selective Service System by "symbolic speech" like burning a draft card in protest against the Vietnam War. See Schenck v. United States, 249 U.S. 47 (1919); Beauharnais v. Illinois, 343 U.S. 250 (1952); Roth v. United States, 354 U.S. 476 (1957); Gibney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); United States v. O'Brien, 391 U.S. 367 (1968). Compare Dennis v. United States, 341 U.S. 494 (1951) . . . .

HENKIN, *supra* note 26, at 489 n.16.

125 Mr. Clark's trip, though certainly an exercise of free speech and political expression, did compete with the government's interest in obtaining release through the unitary efforts of the Chief Executive. Unless Mr. Clark can demonstrate valid alternative means to accomplish that Presidential goal, his first amendment claims will fail. On January 7, 1981, the Justice Department announced that it would not file criminal charges against Mr. Clark, but reserved the right to proceed with a civil action. N.Y. Times, Jan. 8, 1981, at A6, col. 1.

Presently pending in the United States Court of Appeals for the District of Columbia is Jackalone v. Andrus, (No. 80-1687). In November 1979, the plaintiffs, Iranian sympathizers, planned a demonstration in Lafayette Park. The local police initially granted, then withdrew a parade permit. The District Court granted plaintiffs' request for declaratory and injunctive relief holding that "[w]ithout a very substantial showing of inevitable direct and irreparable harm to those held hostage in Iran" the plaintiffs' first amendment rights would be substantially infringed. Jackalone v. Andrus, No. 79-3140 (D.D.C. Nov. 16, 1979). On emergency appeal the circuit court, in an oral decision from the bench, reversed. The "demonstration at Lafayette Park has an unacceptable potential for danger to the hostages now being held in the American Embassy in Tehran." Jackalone v. Andrus, No. 79-2359 (D.C. Cir. Nov. 19, 1979). Bound by the Court of Appeal's decision, the District Court then granted the defendants' motion to dismiss. Jackalone v. Andrus, No. 79-3140 (Apr. 25, 1980). Plaintiffs appealed. Oral argument is scheduled for June 1981.

Congress intended a flexible range of powers for the Executive in cases arising under the Hostage Act. Courts should respect that intention when asked to limit Presidential action by declining to hear the challenge if the political question doctrine applies, or by invoking a narrow standard of review. Criticism that the Act's powers are unduly broad or vague may merit legislative attention, but should not move a court to interfere unless the President clearly has transgressed the Constitution.

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