RECENT DEVELOPMENTS

CONSTITUTIONAL LAW—ALIENS—EQUAL PROTECTION CLAUSE DOES NOT REQUIRE EXTENSION OF SPECIAL IMMIGRANT STATUS TO ALIENS FROM NON-CONTIGUOUS COUNTRIES.

Petitioner, a native of the Philippines, entered the United States in September 1968, as an immigrant admitted for permanent residence.[1] Petitioner later returned to the Philippines for 11 months, thereafter reentering the United States for short periods of time each year using her green alien registration card.[2] On November 17, 1973, she attempted to enter the country through Hawaii but was excluded by the immigration inspector for lack of a valid immigration visa[3] or entry document.[4] An immigration judge ordered her deported, finding that she had abandoned her permanent residence in the United States.[5] The Board of Immigration Appeals dismissed petitioner's appeal. She then filed a petition of habeas corpus with the United States District Court for the Central District of California,[6] arguing that the disallowance of her claim for resident status, while allowing such status for similarly situated citizens of nations contiguous to the United States, denied her equal protection under the 14th Amendment. The court held that the petitioner was a special immigrant or alien commuter[7] entitled to enter the country using only a green card.

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[1] 8 U.S.C. § 1101(a)(20) (1970) provides that:

> The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

[2] 8 U.S.C. § 1304(d) (1970) provides that:

> Every alien in the United States who has been registered and fingerprinted under the provisions of the Alien Registration Act 1940, or under the provisions of this chapter shall be issued a certificate of alien registration or an alien registration receipt card in such form and manner and at such time as shall be prescribed under regulations issued by the Attorney General.

[3] 8 U.S.C. § 1181(a) (1970).

[4] *Id.*

[5] Judge Newton T. Jones found that petitioner resided permanently in the Philippines, having abandoned her residence in the United States, *i.e.*, her status of having been accorded the privilege of residing permanently in the United States had changed under the terms of 8 U.S.C. § 1101(a)(20) (1970). *See* note 1 *supra*.

[6] 8 U.S.C. § 1105a(b) (1970) provides that:

> Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of § 1226 of this title or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings and not otherwise.

[7] I. & N. S. Gen. Order No. 86 (1927). This order classified alien commuters as special immigrants lawfully admitted to the United States for permanent residence under the meaning of 8 U.S.C. § 1101(a)(20) (1970). "Residence" was based upon a legal fiction that the

On appeal to the 9th circuit, *held*, reversed. Denial of a special immigrant status to a citizen of the Philippines is not a violation of the equal protection clause when a distinction drawn between contiguity and non-contiguity has a rational basis in policy. *Alvarez v. District Director of United States Immigration and Naturalization Service*, 539 F.2d 1220 (9th Cir. 1976).

Congress has been granted broad powers by the Constitution to control the naturalization and immigration of aliens.[8] In recognition of this authority, the judiciary has deferred to Congress[9] except in those instances where long-renowned enactments appear to exceed constitutional strictures.[10] One result of this judicial deference has been that discrimination among classes of aliens has withstood constitutional attack[11] better than has discrimination between aliens and United States citizens,[12] the former being subject to a mere rational relation test,[13] while the latter is subject to the more stringent strict scrutiny standard.[14]

At issue in the instant case is the unique status accorded aliens residing in nations contiguous to the United States. These aliens have been given a status of special immigrant by the Immigration and Naturalization Service (INS), which is even broader than that provided statutorily.[15] An immigrant in this statutory category is defined as one "lawfully admitted for permanent residence, who is returning from a temporary visit abroad."[16]

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alien resided at his place of employment in the United States and made temporary visits out of the country at night when he returned to his home in a contiguous country.

[8] U.S. CONST. art. I, § 8, cl. 4. "The Congress shall have power . . . [t]o establish a uniform Rule of Naturalization."

[9] *See, e.g.*, Truax v. Raich, 239 U.S. 33 (1915), finding that the federal government has the sole authority to control immigration. *See also* Fong Yue Ting v. United States, 149 U.S. 698, 713 (1892).

[10] *See* Fong Yue Ting v. United States at 713, where the Court postulated that "[t]he power to exclude or expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty and by act of Congress, and to be executed by the executive authority according to regulations so established *except* so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution to intervene." (emphasis added).

[11] *See, e.g.*, Noel v. Chapman, 508 F.2d 1023 (1975).

[12] *See* Graham v. Richardson, 403 U.S. 365 (1971) where the equal protection clause was applied to find state welfare laws which discriminated against aliens unconstitutional. *See also* In re Griffiths, 413 U.S. 717 (1973); Recent Development, 4 GA. J. INT'L & COMP. L. 206 (1974).

[13] Dunn v. Immigration and Naturalization Service, 499 F.2d 856 (9th Cir. 1974); Uribe-Temblador v. Rosenberg 423 F.2d 717 (1970).

[14] *See* United States v. Carolene Products, 304 U.S. 144 (1938), on "discrete and insular minorities" and Sugarman v. Dougall, 413 U.S. 634 (1973), on alienage as a suspect classification. *See also* Recent Development, 7 GA. J. INT'L & COMP. L. 187, 190 (1977).

[15] Gen. Order No. 86, *supra* note 7. This order classified commuters as immigrants and, because they were born in the Western Hemisphere, exempted them from ordinary visa and quota requirements.

[16] 8 U.S.C. § 1101(a)(27)(B) (1970).

Under this definition, many Mexican and Canadian workers cross the border using only their "green cards,"[17] where they would have been denied access had they been from any other country.

The reason for this variance is the INS decision not to challenge many Canadian or Mexican workers' foreign residence, construing their returning home each night to be a mere "temporary visit abroad." Even though this variance has been challenged in several cases,[18] in the leading case, *Gooch v. Clark*,[19] the 9th circuit upheld the validity of the INS practice in the face of an attack by the AFL-CIO. There the court of appeals first determined that the commuters were in fact immigrants, since they did not fall within the defined characteristics for nonimmigrant aliens.[20] The court then interpreted the phrase "lawfully admitted for permanent residence" as a term of art intended to mean the status of having the privilege of residency in the United States, rather than actual residence.[21] Finally, as to the requirement that the immigrant be "returning from a temporary visit abroad" the *Gooch* court concluded that the INS acceptance of a commuter's nightly or seasonal return to his foreign residence was not beyond the scope of the statute.[22]

This view was expressly adopted by the United States Supreme Court in *Saxbe v. Bustos*,[23] where the Court held that the INS scheme applied to seasonal as well as daily commuters.[24] In reaching this decision the Supreme Court expressed what the *Gooch* court had only suggested, namely that the long-standing administrative construction of the statute[25] added a "gloss" or qualification to statutory language which on its face seemed unqualified.[26] In this case the "gloss" was strengthened by the fact

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[17] These commuters carry an alien registration receipt card (form I-151), commonly called a "green card" and use it as a border-crossing card in compliance with the documentation requirements of the Attorney General of the United States. 8 U.S.C. § 1304(d) (1970).

[18] *See, e.g.*, Texas State AFL-CIO v. Kennedy, 330 F.2d 217, *cert. denied* 379 U.S. 826 (1964).

[19] 433 F.2d 74 (1970), *cert. denied sub nom.*, Gooch v. Mitchell, 402 U.S. 995 (1971).

[20] *Id.* at 78. *See* In re H-O-5, I. & N. Dec. 716 (Bd. Imm. App. 1954); Karnuth v. United States *ex rel* Albro, 279 U.S. 231 (1929). *See also* C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 2.19 (2d rev. ed. 1966).

[21] 433 F.2d at 78, 79. 8 U.S.C. § 1101(a) (20). *See* In re F, Bd. Imm. App. A-630567 (1946); In re H-O- 5, I. & N. Dec. 716 (Bd. Imm. App. 1954). In the case of commuters, a legal fiction is used to equate regular employment with domicile. In re Burciaga-Saicedo, 11 I. & N. Dec. 665 (1966); In re Wighton, 13 I. & N. Dec. 683 (1971).

[22] *Id.* at 80. The court based its conclusion upon cases which had upheld such finding under language of a similar import in the predecessor statute to the present statute. *See* Barrese v. Ryan 203 F. Supp. 880 (D. Conn. 1962); Amalgamated Meat Cutters & Butcher Workmen of North America v. Rogers, 186 F. Supp. 114 (D.D.C. 1960), where the references to seasonal workers is only dicta.

[23] 419 U.S. 65 (1974).

[24] *Id.* at 70.

[25] The practice started in 1927; *see* note 7 *supra*.

[26] 419 U.S. at 74. *See also* Massachusetts Trustees v. United States, 377 U.S. 235 (1964); United States v. Midwest Oil Co., 236 U.S. 459 (1915).

that Congress had long been aware of the particular practice and had taken no action to change it.[27]

The practical importance of the less stringent "rational relation" standard of review was emphasized by the court when it noted that the policy behind the INS practice was particularly relevant.[28] Given the high number of inter-country commuters, a drastic change in INS policy would create serious economic difficulties in the border areas,[29] thereby damaging United States political relations with Canada and Mexico.[30]

The court of appeals in the instant case recognized this logic when applied to Canadian and Mexican workers. However, it refused to extend the *Gooch* and *Saxbe* view to permit the green card entry to workers from non-contiguous countries, since different economic and political considerations were involved.[31]

Having defined the scope of the regulatory scheme, the court of appeals next considered petitioner's contention that such an interpretation was unconstitutional, because it deprived her of equal protection of the law. Applying the rational relation test,[32] the court found a rational relation between the policy of maintaining an economic balance in border areas and thus good relations with Mexico and Canada and attempts to achieve that policy. Consequently, this argument also failed.[33]

Petitioner, in the alternative, asserted a putative status as an ordinary special immigrant rather than as a commuter, that is, one admitted without the help of the legal fiction that employment connotes residence.[34] In order to become a special immigrant, one must have an unrelinquished permanent residence within the United States.[35] On the facts of this case, though, the court of appeals found that petitioner failed to satisfy this requirement since she had both her residence and her place of employment in the Philippines for eleven months during the year.[36]

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[27] *See* SENATE COMM. ON THE JUDICIARY, THE IMMIGRATION AND NATURALIZATION SYSTEMS OF THE UNITED STATES, S. REP. No. 1515, 81st Cong., 2d Sess. 616 (1950); SENATE COMM. ON THE JUDICIARY AMENDING IMMIGRATION AND NATIONALITY ACT, S. REP. No. 748, 89th Cong., 1st Sess. 15-16 (1965).

[28] For a detailed examination of the policy issues in this area see Note, *Aliens in the Fields: The "Green-Card Commuter" Under the Immigration and Naturalization Laws*, 21 STAN. L. REV. 1750 (1969) [hereinafter cited as Stanford Note].

[29] SENATE COMM. ON LABOR AND PUBLIC WELFARE, MIGRATORY FARM LABOR PROBLEM IN UNITED STATES, S. REP. No. 83, 91st Cong., 1st Sess. 65 (1969); *Immigration and Nationality Act Amendments, Hearings on H.R. 9112, H.R. 15092, H.R. 17370 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 205-207 (1969).

[30] 419 U.S. at 70. The Court used an affidavit submitted by Secretary of State Rogers to the district court below to bolster its position.

[31] 539 F.2d at 1223-24.

[32] *See* note 13 *supra*.

[33] 539 F.2d at 1224.

[34] *See* note 21 *supra*.

[35] 8 C.F.R. § 211.1(b)(1) (1977); Lesto v. Day, 21 F.2d 307 (1927).

[36] 539 F.2d at 1225.

In view of the decision of the Supreme Court in *Saxbe* v. *Bustos*, the decision in this case is a proper one. In *Saxbe* the Court firmly announced the policy behind the commuter scheme. In order to maintain a political and economic balance in the border areas, only residents of the border countries involved can be commuters. Additionally, commuters come into the United States to work, whereas petitioner had no job. Only very rarely will aliens from noncontiguous countries have the economic tie contemplated for commuters.

The Court's holding on the equal protection issue was also consistent with the policy behind prior case law. This was not a situation where an alien was denied a freedom allowed to an American citizen. It was a situation where an alien was denied a privilege accorded to other aliens. The status of alienage is not the basis for discrimination since both the haves and the have-nots are aliens. Thus, the INS, as a part of the Executive Branch,[37] may set procedures which are rationally related to accomplishing the goal of furthering friendly relations with Canada and Mexico by maintaining any economic balance in the border areas. Since the economic considerations present in dealing with immigrants from contiguous countries do not usually exist with immigrants from noncontiguous countries, there is no justification for equal treatment. However, in view of both of the issues raised by this type of case and the likelihood of further challenge on constitutional discrimination grounds,[38] Congress should, at a minimum, revise the immigration laws to reflect current practice. This revision would have the virtue of clarifying the law for aliens seeking entry, especially in an area which is so heavily litigated.[39]

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[37] The INS is a division of the Justice Department.

[38] Saxbe v. Bustos, 419 U.S. 65 (1974); Gooch v. Clark, 433 F.2d 74 (1970), *cert. denied sub nom.* Gooch v. Mitchell, 402 U.S. 995 (1971). *See also* Stanford Note, *supra* note 28.

[39] For a good discussion of the economic problems and cases see H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 43-90 (2d ed. 1976).