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Recommended Citation
Darrell Widen, Judicial Deference to Executive Foreign Policy Authority, 57 Chi.-Kent L. Rev. 345 (1981).
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol57/iss1/14
JUDICIAL DEFERENCE TO EXECUTIVE FOREIGN POLICY AUTHORITY

_Narenji v. Civiletti_

617 F.2d 745 (D.C. Cir. 1979), _cert. denied_, 446 U.S. 957 (1980)

Throughout the crisis in the relations between the United States and Iran, attention was focused on the fate of the Americans held captive in Iran as well as the implications of the situation in regard to strategic United States foreign policy objectives. While these considerations may indeed have represented the most significant aspects of the crisis, important domestic legal issues arose as well. _Narenji v. Civiletti_ is the most obvious example of these potentially complex

1. Technically, the term “crisis” may not be appropriate when referring to the recent conflict between the United States and Iran. The elements of a crisis are an unexpected situation in which fundamental values of at least one protagonist are threatened and in which there is a perceived need for immediate action. While the time element may have existed at the inception of the conflict, the “wait-and-see” attitude adopted by the United States belied the existence of a crisis. Nevertheless, “crisis” became a term of common usage to describe the situation. See NEWSWEEK, Nov. 10, 1980, at 57.

2. Relations between the United States and Iran worsened when the government of Shah Mohammed Reza Pahlevi was overthrown in January, 1979. E.g., N.Y. Times, Jan. 17, 1979, at 1, col. 6. Relations further deteriorated upon the resignation of Prime Minister Shahpur Bakhtiar on February 11, 1979, leaving political power in Iran squarely with the Islamic clerics, most notably the Ayatollah Ruhollah Khomeini. E.g., N.Y. Times, Feb. 12, 1979, at 1, col. 6. A crisis developed on November 4, 1979, when the United States embassy was overrun and American citizens taken captive. E.g., N.Y. Times, Nov. 5, 1979, at 1, col. 6.

3. Initially, sixty Americans were taken captive. On November 18, 1979, the Iranians holding the embassy released blacks and women in the embassy, voicing support for Americans oppressed in the United States. E.g., N.Y. Times, Nov. 19, 1979, at 1, col. 6. The release reduced the number of hostages to fifty-three. Subsequently, United States Councilor-Officer Richard Queen was released because of deteriorating health. E.g., Chicago Tribune, July 11, 1980, at 1, col. 6. The remaining fifty-two hostages were released on January 20, 1981. E.g., Chicago Tribune, Jan. 21, 1981, at 1.

4. The loss of Iran as an ally of the United States represents serious strategic problems for American foreign policy. First, not only is Iran lost as a major exporter of oil to the United States, but its strategic position on the Persian Gulf and bordering the narrow Straits of Hormuz threatens the total supply of oil exported from the Middle East. E.g., N.Y. Times, Feb. 8, 1979, at 3, col. 1. Second, there is the fear that the Iranian revolution will inspire a wave of Islamic fundamentalism which will breed hostility toward the West in many Middle Eastern countries. Id. Finally, the difficulty had by the United States in resolving the conflict may undercut American credibility in dealing with countries other than Iran. The conflict may have fostered the perception that American military power is inadequate and American diplomatic influence is ineffectual.

5. Legal issues other than those discussed in this comment include: the actions by President Carter in freezing Iranian assets in the United States, the right of local officials to limit Iranians' rights to assemble and voice grievances and the right of President Carter to stage a military rescue operation without consulting Congress.

6. This case was consolidated with Confederation of Iranian Students v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979), _cert. denied_, 446 U.S. 957 (1980).
questions of law.

In Narenji, the United States Court of Appeals for the District of Columbia Circuit upheld an executive regulation which required all Iranians living in the United States on student visas to report to the Immigration and Naturalization Service and to prove current student status. Despite the rather precipitate manner in which the District of Columbia Circuit adjudicated the case, Narenji presents complex issues of constitutional law. These issues include the constitutional rights afforded aliens in the United States, the separation of powers in the federal government and the implied or inherent powers of the President in the conduct of foreign policy. These issues provide the focus for this comment.

The comment will analyze the constitutionality of the executive regulation at issue in Narenji. The analysis considers the question of whether the regulation is valid or whether it is an unconstitutional abridgement of the rights of Iranian nationals in the United States; whether the promulgation of the regulation is within the authority of the Attorney General; and, finally, whether the ready deference to the Executive exhibited by the court of appeals was justified.

The comment posits that, although the regulation is discriminatory against a class of aliens, such discrimination does not in itself render the regulation invalid. According to equal protection analysis, the federal government may classify aliens in virtually any manner it desires. Nevertheless, the governmental authority to promulgate such a regulation may not lie within the power of the Executive but, rather, may be an exclusively congressional function. Furthermore, if the executive branch is justified in promulgating the regulation, its authority must be based on the expanded authority of the President in foreign policy. Finally, the comment criticizes the court of appeals for its seemingly unconditional deference to the Executive. While the Executive may have the requisite authority to promulgate the regulation because of the obvious foreign policy implications in this particular situation, the District of Columbia Circuit improperly implies that the Executive

7. 8 C.F.R. § 214.5 (1980).
8. The text of the court’s opinion is a scant two and one-half pages with only limited authority brought to bear.
9. See text and accompanying notes 57-107 infra.
10. See text and accompanying notes 108-48 infra.
11. See text and accompanying notes 127-48 infra.
13. See text and accompanying notes 86-107 infra.
14. See text and accompanying notes 143-48 infra.
15. See text and accompanying notes 198-203 infra.
may practice such discrimination in any situation.16

NARENJI v. CIVILETTI

Facts of the Case

In response to the complicity of the Iranian government17 in the takeover of the United States Embassy and the capture and detention of American citizens therein, President Carter directed the Attorney General to "identify any Iranian students in the United States who [were] not in compliance with the terms of their entry visas and to take the necessary steps to commence deportation proceedings against those who have violated applicable immigration laws and regulations."18 Pursuant to presidential directive and under the authority granted to the Attorney General under the Immigration and Naturalization Act of 1952,19 Attorney General Civiletti issued a regulation20 requiring all Iranian nonimmigrant post-secondary students to report to the Immigration and Naturalization Service by December 14, 1979 with evidence of their resident and student status.21 The regulation specified that failure to comply with its provisions would subject each student not in compliance to immediate deportation proceedings.22 The required notice and comment proceedings of the Administrative Procedure Act23 were waived in the announcement of the regulation as being impractical and contrary to the public interest,24 presumably because the international crisis made speed essential in the implementation of the regulation.

16. See text accompanying notes 203-09 infra.
17. Actually the de jure government of Iran disclaimed responsibility for the attack on the embassy and offered help to the United States in effecting the return of the embassy and the hostages. However, the civilian government of Mehdi Bazargan was unable to fulfill its commitment, and Mr. Bazargan resigned two days after the takeover on November 6, 1979. The de facto regime of Khomeini supported the initial seizure of the embassy as well as the continued detention of the Americans in Iran.
18. 15 WEEKLY COMP. OF PRES. DOC. 2107 (Nov. 10, 1979).
19. 8 U.S.C. § 1103(a) (1976). This section grants the Attorney General the authority to promulgate regulations to administer and enforce all laws relating to immigration and naturalization:
   The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens. . . . He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter. . . .
20. 8 C.F.R. § 214.5 (1980).
21. Id.
22. Id.
Reasoning of the Trial Court

As a result of Mr. Civiletti's actions, Mr. Narenji, an Iranian, and the Iranian Student Association brought suit against the government alleging that the Attorney General failed to comply with the notice requirements of the Administrative Procedure Act; that statutory authorization for the regulation was lacking; and, that the classification contained in the regulation was unconstitutional. The trial court rejected the nonconstitutional challenges, holding that, assuming the regulation to be valid, any delay in its promulgation and date of compliance would weaken any effect it could have on the international situation. Therefore, the court held that the notice and comment requirements were rendered impractical and were contrary to the public interest. The district court also found that the promulgation of a regulation requiring aliens to report to the Immigration and Naturalization Service was within that statutory authority granted to the Attorney General which allows him to ensure the ouster of all nonimmigrant aliens who are "out of status."

Nevertheless, despite the determination by the trial court validating the waiver of notice requirement and the general statutory authority of the Attorney General, the court held that the regulation was invalid. The district court based its holding on the limited authority of the Attorney General to regulate aliens and the equal protection rights afforded aliens under the fifth amendment. The court reasoned that the congressional delegation of authority to the Attorney General did not include the authority to classify aliens by national origin. It found that the classification of aliens by national origin must be subjected to strict judicial scrutiny. In employing the strict judicial scrutiny test, the district court held that the government had failed to show an overriding national interest to justify the regulation. The court reasoned that the goals upon which the government based its regulation had only a tenuous cause-and-effect relationship to the discrimina-

25. See note 6 supra.
27. Id. at 1137.
28. Id. at 1138.
29. Id. at 1146.
30. Technically, the fifth amendment does not have an equal protection clause. Nevertheless, the Supreme Court has interpreted the due process clause of the fifth amendment as necessarily incorporating equal protection comparable to that applied to the states through the fourteenth amendment. E.g., Bolling v. Sharpe, 347 U.S. 497 (1954).
31. 481 F. Supp. at 1141.
32. Id. at 1139. See note 50 infra.
33. 481 F. Supp. at 1145.
Reasoning of the Court of Appeals

On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed the ruling of the district court, finding the regulation not to be violative of constitutional equal protection and its promulgation to be within the authority delegated by Congress to the Attorney General. The court reasoned that, although there was no specific grant of authority to the Attorney General to establish distinctions based on nationality, the general grant was broad enough to allow any distinctions and classifications which are "reasonably related to duties imposed upon him." The court found that such a relationship did exist.

The court then considered the trial court holding that the classification of aliens by national origin was unconstitutional. The District of Columbia Circuit held that, in the area of immigration, classifications based on national origin are permissible unless such distinctions are "wholly irrational." The court thus employed the minimum rationality test, in contrast to the strict scrutiny test utilized by the district court, and held that the government clearly had met its limited burden of proof.

The court rejected the determination by the lower court that the government had not established a legitimate national interest to justify the discriminatory classification. The court of appeals indicated that the district court, in holding that no adequate national interest existed, had overstepped the bounds of the proper role of the judiciary. The District of Columbia Circuit emphasized the political nature of the executive decision, which allowed only a limited examination of the actions of the executive branch. The court reasoned that the promulgation of regulation 214.5 constituted a clear action of foreign

34. Id. at 1144. The government posited that the presence of the Iranian students in the United States could provoke violence, thereby confounding the President's attempts to reach a negotiated settlement of the dispute with Iran. The district court reasoned that because the government had not been able to show that the Iranian students would themselves provoke or instigate trouble, the discriminatory regulation was not justified. Id.
36. Id.
37. Id.
38. Id.
39. Id. See note 80 infra.
40. 617 F.2d at 748.
41. Id.
42. Id. See also notes 111-26 infra and accompanying text.
policy and, therefore, represented a political issue over which the judiciary should decline review.43

In his concurring opinion, Judge MacKinnon added "additional support for the court's ruling."44 He reasoned that the regulation was merely one aspect of the American diplomatic effort45 to alleviate the international crisis and therefore was more readily justified. Furthermore, Judge MacKinnon stressed that the regulation merely provided for the expulsion of any Iranian alien who had violated his or her visa status.46 He concluded that because all aliens out of status were subject to the same penalty, i.e., deportation, the regulation did not represent discrimination against Iranians because of their national origin.47

While the district and appellate courts differed in emphasis in their analyses and differed markedly in their holdings, both courts recognized that the central issue in Narenji is whether the executive branch has the authority to promulgate a regulation directed at a class of aliens because of national origin. The determination of the validity of such a regulation invokes analysis of the equal protection of aliens afforded under the Constitution, especially regarding nationality-based regulations and the extent of executive authority to regulate aliens, either through inherent constitutional authority or through congressional delegation. It is these issues which this comment will now address.

ALIENAGE, NATIONAL ORIGIN AND EQUAL PROTECTION

Narenji involves a regulation based on two separate classifications—alienage and national origin. The national origin classification is clear on the face of the regulation, because the regulation only applies to persons of Iranian nationality.48 Also, the alienage classifica-

43. 617 F.2d at 748.
44. Id. at 749 (MacKinnon, J., concurring).
45. Id. Judge MacKinnon mentioned the presidential order restricting the importation of Iranian oil, the freezing of Iranian assets in the United States and the moving of substantial naval forces into the Persian Gulf region.
46. Id. at 750 (MacKinnon, J., responding to petition for rehearing).
47. Id. Judge MacKinnon seems to miss the point that the respondents did not claim that the government has no right to deport Iranians out of status but, rather, disputed the right of the Attorney General to classify aliens based on national origin.

The District of Columbia Circuit denied a petition for a rehearing en banc in a five-to-four decision. Id. at 750. The judges voting for granting the rehearing, Judges Wright, Robinson, Wald and Mikva, argued that the issues in the case deserved more searching judicial attention.

After the decision of the court of appeals, the plaintiffs filed a writ of certiorari as well as a petition for a stay of execution pending disposition of the writ. The Supreme Court denied the petition to stay the enforcement of the judgment of the court of appeals. 445 U.S. 948 (1980), and later denied the writ of certiorari. 446 U.S. 957 (1980).
48. 8 C.F.R. § 214.5 (1980).
tion is obvious because the regulation only applies to noncitizens in the United States.49

The Supreme Court has been firm in its determination that classifications based on national origin are inherently suspect and will be subjected to strict judicial scrutiny.50 This doctrine was first enunciated in Korematsu v. United States.51 In Korematsu, the Court adjudicated a wartime regulation requiring the exclusion of persons of Japanese descent from a military area on the West Coast.52 While the Court upheld the scheme, it did so only because the Court found that the regulation was required for national security.53 The Court made clear that it would not tolerate nationality-based regulations absent the type of national emergency produced by the war.54

Since the Korematsu decision, the courts apply strict scrutiny55 whenever nationality-based discrimination has been established.56 Therefore, if the regulation at issue in Narenji were construed to be simply a national origin regulation, a court would necessarily demand the showing of a compelling governmental interest supporting the regulation. However, simple nationality-based discrimination analysis seems inappropriate in addressing the issues in Narenji because the plaintiffs in Narenji were not Americans, but Iranian nationals. Nationality-based discrimination refers to discrimination against United

49. Id.
50. The courts view "suspect classifications" with great disfavor. See, e.g., Brown v. Board of Educ., 347 U.S. 483 (1954); United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938). The criteria for determining a suspect class are imprecise, but various factors have been deemed to be relevant: immutability of characteristics of a class, highly visible characteristics of the class, historical disadvantages of the class and a relative lack of political representation of the class. See, e.g., J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK OF CONSTITUTIONAL LAW 524-26 (1978).

Courts will employ strict judicial scrutiny where a suspect classification is shown or where a classification has infringed on a fundamental constitutional right. See, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to interstate travel). The courts will countenance such a classification only upon a two part showing. Initially, the governmental authorities must demonstrate a compelling governmental interest for the legislation, regulation or policy in question. After showing a compelling state interest, a state must show that the legislation, regulation or policy in question is necessary and the least restrictive means of achieving the state purpose. See, e.g., In re Griffiths, 413 U.S. 717 (1973), Sugarman v. Dougall, 413 U.S. 634 (1973). To date, state actions discriminating against aliens have not survived strict judicial scrutiny. See text accompanying notes 71-85 infra.
51. 323 U.S. 214 (1944).
52. Id. at 216-17.
53. The Court found that the government reasonably feared a Japanese attack of the West Coast and that the government could not effectively apply restrictions to disloyal Japanese Americans alone. Id. at 218-19.
54. Id. at 219.
55. See note 50 supra.
56. Whenever discrimination against a suspect class has been established, strict scrutiny is applied. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967) (strict scrutiny applied to classification based on race).
States citizens based on their national origin. Therefore, it is appropriate to outline the rights afforded aliens under the Constitution and to discuss the validity of a nationality-based classification among aliens within that framework.

The Supreme Court has been determining the constitutional rights of aliens in the United States for nearly a century. Nevertheless, the precise nature and scope of the protections afforded aliens remain uncertain. Certainly aliens are afforded many basic constitutional protections embodied in the first, fourth, fifth and sixth amendments. At the same time, however, discrimination against and classification among aliens have been constitutionally sustained while similar regulations concerning citizens have not.

As early as 1886, the Supreme Court held that aliens are sheltered under the aegis of the equal protection clause of the fourteenth amendment. In *Yick Wo v. Hopkins*, the Court invalidated a regulation which, through its application, discriminated against Chinese aliens as well as United States citizens of Chinese descent. The Court held that a discriminatory state regulation could not stand absent a "special public interest" which the regulation was designed to protect.

57. The first case involving the rights of aliens in the United States appears to be *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).
62. See *Foley v. Connellee*, 435 U.S. 291 (1978), where the Court upheld a state restriction prohibiting aliens from employment with the state police force.
65. 118 U.S. 356 (1886).
66. The regulation prescribed the kind of building in which laundries could do business, and required all owners to obtain permits before doing business. Over 200 persons of Chinese descent were denied permits while 80 similarly situated Caucasians were granted permits. Id. at 374.
67. The regulation was facially nondiscriminatory because it did not specifically draw a distinction based on alienage or national origin.
68. The Court held that the discriminatory application of the statute effectively eliminated Chinese individuals from the laundry business, while protecting Caucasian owners. 118 U.S. at 373.
69. The precise definition of special public interest is uncertain, as is its distinction from compelling state interest. See note 50 supra. The special public interest test appears to represent a more lenient standard than does the compelling state interest test, but a stricter standard than the rational basis test. See note 80 infra. A special public interest may refer to a subject which is an
In spite of the pronouncement in *Yick Wo* that aliens in the United States are entitled to constitutional protection, the extent of that protection was unspecified for decades. Although, like *Yick Wo*, most of the early alienage cases dealt with state regulations affecting alien employment, the Court vacillated in its application of the *Yick Wo* doctrine and of the equal protection clause as applied to aliens, failing to establish a clear line of precedent.\(^{70}\)

In 1971, however, the Court, in *Graham v. Richardson*,\(^{71}\) declared alienage to be a suspect classification.\(^{72}\) In *Graham*, the Court invalidated a state welfare scheme which denied benefits to aliens.\(^{73}\) By establishing alienage as a suspect classification, the Court mandated strict scrutiny when adjudicating the validity of state regulations which discriminated against aliens. Under the standard of strict scrutiny, a state must show a compelling state interest before discrimination may be justified.\(^{74}\)

After *Graham*, it was much more difficult for states to justify discriminatory regulations aimed at aliens.\(^{75}\) However, despite the *Graham* directive to employ strict judicial scrutiny when examining regulations discriminatory against aliens, as well as the general unwillingness of the Court to countenance discriminatory regulations, the Court has recently upheld regulations discriminatory on their face apparently without finding it necessary to apply strict scrutiny. In *Foley v.*
Connelie, the Court upheld a New York statute barring aliens from employment in the New York state police. The Court held that strict judicial scrutiny is not required when dealing with matters firmly within constitutional prerogatives of the state. Finding state police officers to be "important nonelective executive, legislative, judicial . . . officers who participate directly in the formulation, execution, or review of broad public policy," the Court held that employment of state police constitutes a matter of state prerogative and, therefore, the Court required only a showing of a rational basis for the discriminatory regulation in order for the ban to be upheld. The Court found such a basis in the supposedly greater affinity of citizens for American traditions—a presumably valuable asset in the execution of official police duties.

Similarly, in Ambach v. Norwick, the Supreme Court upheld a New York education law which restricted employment as public school teachers to citizens or to aliens who had manifested their intent to become citizens. Once again, the Court found public teaching to be a "governmental function" and, therefore, required that the state need show only a rational basis to justify its discrimination against a class of aliens. The Court found this particular discriminatory restriction to be rationally based.

The right of a state to discriminate against aliens has not been delineated precisely by the courts. The Supreme Court appears to be willing to accept state discrimination against aliens only in regard to essential state employment. However, it has shown considerably more tolerance toward federal regulations. While the Court, in Hampton v.

77. Id. at 296.
78. Id. at 296.
79. Id.
80. When a court applies the rational basis test, the governmental authorities need to demonstrate only that the regulation at issue has a rationally-based relationship to a legitimate governmental interest. See, e.g., Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955). The rational basis test is the most lenient standard of judicial review. A court will utilize the rational basis test when it determines that the governmental action in question neither violates a fundamental right nor establishes a suspect classification. Under the rational basis test, the courts will presume the validity of the regulation, and it will be upheld as long as the court can discern a rational relationship between the action and a legitimate state interest. Cf. note 50 supra.
81. 435 U.S. at 299-300.
82. 441 U.S. 68 (1979).
83. Id. at 80.
84. Id. at 80-81.
85. In general, courts will employ the strict scrutiny test in adjudicating a regulation discriminatory against a suspect class, and no state has yet been able to meet this test. Alternatively, the Supreme Court will employ only a rational basis test in adjudicating discrimination in areas of important public employment and has always been able to find a rational basis to uphold discrimination in these cases. See text and accompanying notes 75-84 supra.
Mow Sun Wong\textsuperscript{86} invalidated a Civil Service Commission prohibition denying aliens eligibility in the federal civil service,\textsuperscript{87} many other discriminatory federal regulations have been sustained.\textsuperscript{88}

For example, in Mathews v. Diaz,\textsuperscript{89} the Supreme Court upheld a government regulation which restricted Medicare benefits to citizens and to aliens who had established residency in the United States for at least five years.\textsuperscript{90} The Supreme Court has also accepted certain congressional classifications of aliens based on political affiliation. In Kleindienst v. Mandel,\textsuperscript{91} the Court upheld the restriction of entry into the United States by members of the Communist Party absent specific permission from the Secretary of State.\textsuperscript{92} In Harisiades v. Shaughnessy,\textsuperscript{93} the Court upheld a statute declaring alien membership in groups advocating the overthrow of the United States government to be a deportable offense.\textsuperscript{94}

Finally, in Fiallo v. Bell,\textsuperscript{95} the Supreme Court validated a statutory immigration classification based on legitimacy and sex. The statute in question allowed alien family members of naturalized citizens to enter the United States without complying with statutory quotas.\textsuperscript{96} The controversy arose because the scheme offered the familial benefit to natural\textsuperscript{97} maternal relationships, but denied these benefits to natural paternal relationships. For example, a citizen in the United States could bring her illegitimate child into the country as an immigrant and, thus, avoid any statutory quota. However, a similarly-situated father could not confer this benefit on his illegitimate child. In upholding this statutory scheme, the Supreme Court emphasized the plenary power of the federal government over aliens in the United States.\textsuperscript{98} Because of this predominant federal power over aliens, the Court utilized the rational basis test in determining the validity of the scheme.\textsuperscript{99} The Court found a legitimate interest in the convenient administration of immi-

\textsuperscript{86} 426 U.S. 88 (1976).
\textsuperscript{87} Id. at 116-17.
\textsuperscript{88} See notes 89-107 infra and accompanying text; Rosberg, supra note 64, at 277.
\textsuperscript{89} 426 U.S. 67 (1976).
\textsuperscript{90} Id. at 80.
\textsuperscript{91} 408 U.S. 753 (1972).
\textsuperscript{92} Id. at 770.
\textsuperscript{93} 342 U.S. 580 (1952).
\textsuperscript{94} Id. at 591.
\textsuperscript{95} 430 U.S. 787 (1977).
\textsuperscript{96} Id. at 799-800.
\textsuperscript{97} The term "natural child" means an illegitimate child. BLACK'S LAW DICTIONARY 303 (4th ed. 1968).
\textsuperscript{98} 430 U.S. at 796.
\textsuperscript{99} Id. at 795. See note 80 supra.
Fiallo points out the extremely limited standard of review which the Court has employed in evaluating federal discrimination against aliens. The Court has largely deferred to the political branches of government concerning the treatment of aliens because of its determination that the issues are largely political in nature.

The Court has made this determination because of the implications of the treatment of aliens on the foreign relations of the United States, as well as the basic sovereign right of a government to control its borders. Because of these political overtones, the Court has generally limited itself to a narrow standard of review, i.e., the rational basis test. Therefore, unlike the states, the federal government need not show a compelling interest to justify discrimination against a class of aliens. Federal regulations must be supported only by a legitimate interest.

Addressing the issue of the validity of a nationality-based classification of aliens, state regulations would almost certainly be declared unconstitutional while federal regulations would probably be sustained. The Supreme Court has indicated that it would not tolerate state actions purporting to regulate aliens legitimately, but which, in reality, discriminate against a particular racial or national group. At the same time, while the Supreme Court has never adjudicated a case apposite to Narenji, the Court has upheld the right of the federal government to classify by national origin in the field of immigration.

In sum, the Supreme Court has employed a considerably different standard when reviewing state discrimination, at least when state governmental employment is not involved, than when evaluating federal discrimination. Because of the Court's determination that federal governmental power over aliens is plenary, and that the question of the

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100. 430 U.S. at 798-99.
104. See, e.g., Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948); Yick Wo v. Hopkins, 118 U.S. 356 (1886).
105. Congress limited immigration by national origin in the Chinese Exclusion Act of 1882, 22 Stat. 58. In 1924, Congress established the national origin quota system, 43 Stat. 153. As of 1965, the Congress abandoned the use of race, national origin, sex, place of birth or place of residence to determine eligibility of an alien to immigrate. 8 U.S.C. § 1152(a) (1976) (certain exceptions are enumerated).
treatment of aliens is predominantly political, federal discrimination over aliens has almost always been sustained.\textsuperscript{107}

Despite the implication that under the limited standard of judicial review the federal government can lawfully establish virtually any restriction over aliens, some issues in \textit{Narenji} remain unresolved. Simply because the federal government may have the requisite constitutional authority to classify aliens by nationality does not necessarily mean that the Attorney General may so regulate. Therefore, it is appropriate to analyze the authority of the executive branch of government as it applies to the issues in \textit{Narenji}. Furthermore, because the District of Columbia Circuit applied a minimal standard of review of the executive action, citing the political nature of its decision, it is also appropriate to analyze the authority of the federal judiciary to adjudicate cases with political overtones and the circumstances under which courts will limit their examination of political questions.

\section*{Separation of Powers}

\textit{Power of the Courts}

The power of the judicial branch of government essentially is limited through jurisdiction and deference. Article III of the Constitution grants the federal judiciary jurisdiction only over existing cases or controversies which involve federal questions or residents of different states.\textsuperscript{108} Therefore, the federal courts cannot adjudicate matters which are exclusively of state concern nor cases in which a legal controversy does not actually exist or when the controversy has become effectively settled.\textsuperscript{109} These restrictions serve to limit the power of the federal bench by prohibiting independent formulation of policy or establish-

\textsuperscript{107} \textit{See} Rosberg, \textit{supra} note 64, at 277. Related to the argument posited by Rosberg that the difference in the standard of reviewing state and federal regulations stems from the presumption of the Supreme Court of the political nature of the treatment of aliens, is the theory that federal action has preempted the treatment of aliens. The preemption theory posits that federal legislation in immigration preempts state regulation of aliens because state actions may confound the purpose of the federal legislation. \textit{See} G. \textit{Gunther, Cases and Materials on Constitutional Law} 897 (10th ed. 1979); \textit{Note, The Treatment of Aliens: Preemption or Equal Protection}, \textit{31 Stan. L. Rev.} 1069 (1979).

\textsuperscript{108} U.S. \textit{Const.} art. III, § 2. This section sets out the jurisdiction of the federal judiciary:

The judicial Power shall extend to all Cases in Law and Equity arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consul;—to all Cases of admiralty and maritime jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—[and] between Citizens of different States.

\textsuperscript{109} The Court will only adjudicate cases which are ripe, \textit{e.g.}, Adler v. Board of Educ., 342 U.S. 485 (1952), and which have not become moot, \textit{DeFunis v. Odegaard}, 416 U.S. 312 (1974).
ment of rules of law. Constitutionally, these restrictions are designed to ensure that the federal courts do not become quasi-legislative bodies, fashioning solutions to problems which may not be legal in nature. Other than these constitutional jurisdictional limitations on federal courts, such jurisdiction can and has been limited even further by Congress.110

Aside from the constitutional and statutory limitations on jurisdiction, prudential restraints have developed as well. Under what has been referred to as the political question doctrine,111 courts have restricted their own powers by declining to consider issues which they construe to be political in nature. While the basis of the political question doctrine is the constitutional mandate of separation of powers,112 the application of the doctrine is largely discretionary,113 with courts deferring to the executive and legislative branches of government on issues which the courts deem to be beyond their competence. Therefore, when approaching an issue to which the political question doctrine may be applicable, courts do not ask whether they can exercise jurisdiction, but whether they will assume jurisdiction and adjudicate the issue.

A comparison between two leading cases addressing the political question doctrine—Colegrove v. Green114 and Baker v. Carr115—reveals the distinction. In Colegrove, the Supreme Court refused to grant relief for alleged discriminatory apportionment of congressional districts. In a plurality decision, the plurality stated that the "appellants ask of this Court what is beyond its competence to grant."116 The plurality found that the express grant to Congress to deal with the apportionment of congressional districts precluded judicial intervention.117 The Court in Baker departed from the reasoning in Colegrove by deciding that legislative apportionment was a justiciable issue. The Baker Court noted that "[t]he doctrine of which we treat is one of 'political questions' not of 'political cases.' The courts cannot reject as 'no lawsuit' a bona fide controversy as to whether some action denominated 'political' exceeds

110. The Constitution allows Congress to limit the number of federal courts, U.S. Const. art. III, § 1, as well as their jurisdiction, id. § 2. See also Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1868).
111. See note 118 infra.
114. 328 U.S. 549 (1946).
116. 328 U.S. at 552.
117. Id. at 554-56.
constitutional authority." While *Baker* did not expressly overrule *Colegrove*, *Baker* certainly replaced the earlier case as the definitive statement on the political question doctrine.

The Court in *Baker* applied its version of the political question doctrine to a case involving political actions of a state. Later the Supreme Court reaffirmed the *Baker* doctrine and extended the identical criteria in adjudicating political actions by the federal government in *Powell v. McCormack*. In *Powell*, the Court accepted jurisdiction over Adam Clayton Powell's challenge of his expulsion from Congress. The Court invalidated the expulsion, examining closely the actions of Congress, despite the constitutional provision which provides Congress with the authority to control its membership. The Court, therefore, adjudicated a case, even though a criterion of the political question doctrine, i.e., "a textually demonstrable constitutional commitment of the issue to a political branch" was established.

Therefore, while the political question doctrine is based on the presumption of constitutional separation of powers, it must, at least in application, be viewed as a doctrine of self-imposed judicial deference. The political question doctrine must be considered predominantly discretionary in nature, with the courts able to assume jurisdiction in vir-

118. The Court in *Baker* set out the elements of the political question doctrine:
[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving [the issue]; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial 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 unquestioned adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.


119. While the holdings in *Baker* and *Colegrove* are contradictory, the *Baker* Court did not expressly overrule *Colegrove*. Apparently the *Baker* Court found that action unnecessary because it determined that *Colegrove* did not hold that the Court lacked subject matter jurisdiction. 369 U.S. at 202. The *Baker* Court considered the redefinition of the political question doctrine to be sufficient.

120. *See* Powell v. McCormack, 395 U.S. 486, 517 (1969), where the Court quotes the language of *Baker* on the definition of the political question doctrine. *See also* note 119 *supra*.

121. In both *Colegrove* and *Baker* the Court was dealing with the actions of local authorities in apportioning congressional districts.


124. U.S. Const. art. I, § 5. Section 5 provides: Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members. . . . Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

125. 395 U.S. at 549. *See also* note 118 *supra*. 

tually any controversy regardless of the political nature of the dispute or political overtones of adjudication.\textsuperscript{126}

\textit{Power of the Executive}

There exists a mandatory separation of powers between the legislative and executive branches of government. Although there have been recent stirrings of controversy regarding possible congressional intrusion into executive prerogative,\textsuperscript{127} the precise demarcation of the authority of the President has generated even greater confusion. This confusion appears to stem from the vagueness of the express powers granted to the Executive by the Constitution, in contrast to the more precise authority granted to Congress.\textsuperscript{128} This disparity has led to the implication of presidential powers inherent in the role of the Chief Executive and the concept of sovereignty.

In \textit{Myers v. United States},\textsuperscript{129} the Supreme Court upheld President Hoover's removal of a postmaster from office. In so holding, the Court accepted a broad view of executive authority, concluding that the President, unlike Congress, could exercise authority drawn from sources not enumerated in the Constitution, as long as the authority exercised had not been specifically forbidden.\textsuperscript{130} In spite of this pronouncement that the Executive may exert nonenumerated authority, the extent of the implied powers of the Executive remains extremely unclear.

\textit{Youngstown Sheet & Tube Co. v. Sawyer},\textsuperscript{131} the leading case on the implied powers of the President, epitomizes the confusion in this area of the law. In a plurality decision, the Supreme Court prevented Presi-

\begin{itemize}
\item \textsuperscript{126} See, e.g., United States v. Nixon, 418 U.S. 683 (1974) (Court adjudicating a dispute between the political branches concerning the withholding of recording of presidential conversations); New York Times Co. v. United States, 403 U.S. 713 (1971) (Court reviewing and adjudicating claim of the government that the publication of certain documents would constitute a serious threat to the national security); Powell v. McCormack, 395 U.S. 486 (1969) (Court reviewing congressional action in expelling one of its members).
\item \textsuperscript{127} See, e.g., United States v. Nixon, 418 U.S. 683 (1974), where the judicial branch forced President Nixon to release recordings despite the President's assertion of executive privilege. See also The War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1976), which limits the authority of the Executive to commit United States military forces without congressional approval.
\item \textsuperscript{128} The constitutional grant of power to Congress states that "[a]ll legislative Powers herein granted shall be vested in a Congress. . . ." U.S. Const. art. I, § 1 (emphasis added). However, the grant to the President provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1 (emphasis added). The distinction of these grants has been interpreted to provide inherent executive powers in the President. See 7 J. Hamilton, \textit{Works of Alexander Hamilton} 76 (N.Y. 1851).
\item \textsuperscript{129} 272 U.S. 52 (1926).
\item \textsuperscript{130} Id. at 118.
\item \textsuperscript{131} 343 U.S. 579 (1952).
\end{itemize}
dent Truman’s seizure of steel mills during the Korean War.\textsuperscript{132} The plurality concluded that the President did not have the authority to effectuate the seizure reasoning that the taking of private property for public use was not an executive function, but one which belongs to the legislature.\textsuperscript{133} The plurality found no delegation of this eminent domain authority to the Executive and found significance in the fact that Congress debated the grant of authority, but decided not to include such a delegation in its legislation.\textsuperscript{134}

However, the lack of executive authority to seize the steel mills was the only finding in which a majority of the Court could concur. The decision of the Court, which in effect, was accepted only by its author,\textsuperscript{135} seems to limit the implied powers of the President. However, it also appears that a majority of the Court did, in fact, adhere to the inherent powers theory,\textsuperscript{136} with three Justices asserting that such powers would permit the attempted seizure.\textsuperscript{137}

Basically, \textit{Youngstown} appears to stand for the proposition that, absent effective delegation, the Chief Executive cannot assume a function which had been constitutionally granted to Congress. Besides this fundamental statement of policy, \textit{Youngstown} is probably most noteworthy for the theory of implied presidential power expressed in the concurring opinion of Justice Jackson.

Justice Jackson stated that, although the President has rather broad powers, such powers are constrained by the action—or inaction—of Congress. He reasoned that presidential power is at its zenith when in accord with express congressional authorization and at its nadir when in opposition to the will of Congress.\textsuperscript{138} Justice Jackson concluded that President Truman simply did not have the necessary

\textsuperscript{132} President Truman feared that labor disputes would shut down the operation of the nation’s steel mills and thereby hinder the war effort in Korea. He therefore promulgated Executive Order No. 10340 which authorized governmental seizure and operation of the mills. \textit{Id.} at 583.

\textsuperscript{133} \textit{Id.} at 588.

\textsuperscript{134} \textit{Id.} at 586. The legislation in question was the Taft-Hartley Act (The National Labor Relations Act of 1947). 61 Stat. 136 (1947). The Act dealt with the process of collective bargaining and although the Act did allow for temporary injunctions to forestall impulsive actions by labor or management, the legislation did not provide for seizure of private property. 343 U.S. at 586.

\textsuperscript{135} The Court was split 6-3 with Justice Black delivering the opinion of the Court. However, five Justices—Justices Jackson, Douglas, Frankfurter, Burton and Clark—each wrote a separate concurring opinion.

\textsuperscript{136} The view that the President can exercise nonenumerated powers in an emergency can be attributed to the three dissenting Justices—Justices Vinson, Reed and Minton—as well as to the concurring opinions of Justices Jackson, Frankfurter and Clark.

\textsuperscript{137} The dissent argued that the inherent powers of the President would allow the seizure. 343 U.S. at 700 (Vinson, C.J., dissenting).

\textsuperscript{138} \textit{Id.} at 635-38 (Jackson, J., concurring).
independent authority to seize the mills, because Congress was silent concerning the authorization of executive seizure.\textsuperscript{139}

Justice Jackson applied the same analysis to explain \textit{United States v. Curtiss-Wright Corp.},\textsuperscript{140} a previous Supreme Court decision involving the extent of executive power. In \textit{Curtiss-Wright}, the Court upheld an executive proclamation, issued pursuant to express congressional authorization, which prohibited the shipment of weapons to the Chaco region of South America.\textsuperscript{141} Justice Jackson reasoned that the principal distinction between \textit{Youngstown} and \textit{Curtiss-Wright} was that President Roosevelt had been acting pursuant to express congressional authority in the \textit{Curtiss-Wright} dispute, while President Truman was acting without congressional authorization in the seizure at issue in \textit{Youngstown}.\textsuperscript{142} However, the Court in \textit{Curtiss-Wright} does not appear to have based its decision on the congressional authorization but, rather, on the role of the President as Chief Executive, which vests him with inherent power in foreign affairs greater than those powers he would normally enjoy over domestic policies.\textsuperscript{143}

The Court in \textit{Curtiss-Wright} asserted:

\begin{quote}
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 a 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 . . . an act of Congress. . . .
\end{quote}

Furthermore, the \textit{Curtiss-Wright} Court held that federal power in foreign affairs, unlike domestic affairs, does not consist of enumerated powers but, rather, incorporates the general authority inherent in national sovereignty.\textsuperscript{145}

This view of federal executive power in international affairs was

\begin{itemize}
\item \textsuperscript{139} \textit{Id.} at 640 (Jackson, J., concurring). Justice Jackson reasoned that the silence of Congress represented an intermediate level of executive authority. The President was neither acting against the express will of Congress nor in accordance with express delegation. Because the Court could not infer congressional acquiescence through its silence, the President had to justify his actions through authority independent of legislative delegation.
\item \textsuperscript{140} 299 U.S. 304 (1936).
\item \textsuperscript{141} \textit{Id.} at 329. The Joint Resolution, 48 Stat. 811 (1934), gave the President discretion to prohibit the sale of arms to the countries engaged in the dispute in the Chaco region of South America if he believed that such cessation of arms sales would aid in the reestablishment of peace.
\item \textsuperscript{142} \textit{Youngstown Sheet \\& Tube Co. v. Sawyer}, 343 U.S. 579, 635-36 n.2 (1952).
\item \textsuperscript{143} \textit{United States v. Curtiss-Wright Corp.}, 299 U.S. 304 (1936).
\item \textsuperscript{144} \textit{Id.} at 319-20.
\item \textsuperscript{145} \textit{Id.} at 318. The Court reasoned that the general authority to conduct foreign policy, including making war, concluding peace, making treaties and maintaining diplomatic relations, was inherent in sovereignty. Therefore these powers would be vested in the federal government even absent a constitutional grant of authority, as a necessary concomitant of nationhood. \textit{Id.} The Court further determined that any inherent sovereign authority in foreign affairs which is not
\end{itemize}
later reaffirmed in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*,\(^\text{146}\) in which the Supreme Court cited the plenary executive power over foreign policy as the basis for its refusal to examine an executive order granting an overseas air route.\(^\text{147}\) The Court reasoned that the President exercised not only the commerce authority delegated to him by Congress, but his independent foreign affairs power as well. Faced with this "plenary authority," the Supreme Court applied the political question doctrine and declined to review the executive action.\(^\text{148}\)

Therefore, despite the confusion inherent in the *Youngstown* decision and the soundness of Justice Jackson's analysis, the President does appear to possess inherent powers which are neither expressly delineated in the Constitution nor delegated by Congress and that this inherent authority is greater in foreign affairs than in domestic affairs. At the same time, however, it appears that congressional authorization, or the lack thereof, is relevant in the determination of the limits of presidential authority. It is with the awareness of the general limitation of executive authority, and of the expanded executive authority in foreign policy, that the validity of the regulation in *Narenji* should be analyzed.

**ANALYSIS**

In analyzing *Narenji v. Civiletti*, three basic issues must be considered: whether the regulation is inherently unconstitutional, *i.e.*, whether its promulgation is within the constitutional authority of the United States government; whether, if the regulation is not facially void, it is within the authority of either the Attorney General or the President to promulgate such a regulation; and, whether the court utilized the proper standard of review in determining the validity of the regulation.

Despite the assertion by Judge MacKinnon in *Narenji* that the regulation is not discriminatory because it provides for the deportation of aliens deportable prior to its promulgation,\(^\text{149}\) regulation 214.5 must be considered discriminatory against a class of aliens. First, the regulation classifies aliens by nationality, imposing a particular duty on Iranian nationals not shared by aliens generally. Second, by imposing the duty otherwise provided in the Constitution would be vested in the Executive as the head of State. *Id.* at 319-20.

\(^{146}\) 333 U.S. 103 (1948).
\(^{147}\) *Id.* at 114.
\(^{148}\) *Id.* at 111.
\(^{149}\) 617 F.2d at 750 (MacKinnon, J., concurring).
to report on Iranians and making failure to report a deportable offense, the Executive has, in effect, established a deportable offense applicable exclusively to Iranians. Nevertheless, despite the determination that the regulation is discriminatory, the regulation is probably not violative of the fifth amendment.

The Court of Appeals for the District of Columbia Circuit reached this conclusion, but did so in a rather unconvincing manner. The court in *Narenji* stated that "[d]istinctions on the basis of nationality may be drawn . . . by the Congress or the Executive," citing *Saxbe v. Bustos*, *Mathews v. Diaz*, and *Fiallo v. Bell* as direct authority. While these cases do concern the validity of alienage classifications, not one of them deals with, or even mentions, classifications based on nationality. Therefore, this authority does not directly support the proposition for which it is cited. Despite the failure of the court to support its holding adequately, case law does indicate that federal classifications among aliens by national origin have been sustained.

Although in some cases the Supreme Court has struck down statutes which purported to regulate aliens, but which actually discriminated against them by reason of national origin, these decisions are based on the application of strict judicial scrutiny, a judicial test which has been applied to alien discrimination by states but not by the federal government. In fact, the Court does not appear to have struck down a single federal regulation dealing with the classification of aliens, although many of these regulations would be constitutional violations if applied to citizens. Therefore, the regulation in question would probably be included in the federal plenary power over aliens, and thus not be violative of the equal protection clause, even though it contains a classification based on national origin.

The next issue to be considered is whether the regulation challenged by *Narenji* was promulgated with requisite authority. First, the authority exercised by the Attorney General must be questioned. In

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150. *Id.* at 747.
154. *See* notes 105-06 *supra* and accompanying text.
156. *See* notes 95-107 *supra* and accompanying text.
158. Classifications by national origin are clearly suspect and are subjected to strict judicial scrutiny. *See* notes 50-56 *supra* and accompanying text.
Hampton v. Mow Sun Wong, the Supreme Court held that the Civil Service Commission is not vested with the authority to exclude aliens from the competitive civil service and, therefore, found such a prohibition to be unconstitutional. The Court held that such delegation had not been effectuated through the legislation charging the Commission and implied that the outcome might have been different if there had been an explicit command from either Congress or the President. If Attorney General Civiletti had been empowered exclusively by the grant of authority in the immigration legislation, the regulation may have been struck down even if otherwise valid, because the statute does not authorize the Attorney General to enforce immigration laws through nationality-based classifications. However, in the instant situation, the Attorney General promulgated regulation 214.5 in response to direct orders from President Carter to identify and deport all Iranian students in the United States who were currently out of status. Therefore, the Attorney General was merely the instrumentality of the President, and it could be argued that the President had delegated all his authority regarding aliens to Mr. Civiletti. Thus, the issue becomes that of whether the President himself possessed the requisite authority to promulgate the regulation.

The Narenji court analyzed the situation as if the powers of Congress and those of the President were virtually identical in the area of immigration. Some earlier cases certainly have implied a similar conclusion. Nevertheless, such findings must be considered little more than dicta. In those cases, the Supreme Court was reviewing either a specific act of Congress which classified aliens or executive actions taken under fairly specific congressional acts. For example, in Mathews v. Diaz, the exclusion of a class of aliens from Medicare benefits was upheld based on an explicit congressional enactment. Similarly, in Harisiades v. Shaughnessy, the Court was dealing with

160. Id. at 115-16.
161. Id. at 116.
163. 617 F.2d at 747.
166. E.g., Kleindienst v. Mandel, 408 U.S. 753 (1972) (Congressional delegation to the Secretary of State, granting him the discretion to issue visas to aliens with Communist affiliations).
the enforcement of a statute which declared alien membership in the Communist Party to be a deportable offense.\textsuperscript{170}

The only express constitutional grant of authority regarding immigration is a grant to Congress. While the Constitution is silent regarding the specific area of immigration, the Constitution grants Congress the power "to establish a uniform rule of naturalization."\textsuperscript{171} The President's authority, then, derives from congressional delegation and from the implied authority stemming from his foreign affairs and national executive powers.\textsuperscript{172} Through congressional delegation, the Executive has the authority to enforce immigration laws which Congress establishes.\textsuperscript{173} The Executive certainly has the right and the authority to deport Iranians who are out of status.\textsuperscript{174} However, whether the Executive may order only one class of aliens to report and to establish a specific deportable offense are issues different from the general authority of the Executive to deport aliens out of status.\textsuperscript{175}

The government relied on \textit{United States ex rel. Knauff v. Shaughnessy},\textsuperscript{176} in arguing that the delegation by Congress to the Executive includes the right to promulgate the classification at issue in \textit{Narenji}. In \textit{Knauff}, the Court sanctioned the actions of the Attorney General when he denied entry of an alien war bride\textsuperscript{177} deemed to be a security risk by the Immigration and Naturalization Service.\textsuperscript{178} The Attorney General refused her admittance because her entry would be prejudicial to the national interest.\textsuperscript{179} In upholding the actions of the executive branch, the Supreme Court accepted the validity of a congressional delegation which provided that "the President might, upon finding that the interests of the United States required it, impose additional restrictions and prohibitions on the entry into and departure of persons from

174. Id.
175. The regulation provides that failure to comply would be grounds for immediate deportation proceedings which, in effect, establishes a deportable offense. 8 C.F.R. § 214.5(b) (1980).
177. A war bride is a colloquial expression referring to a foreign woman who marries a serviceman while the latter is stationed overseas. \textsc{Webster's Third New International Dictionary} 2575 (17th ed. 1976).
178. 338 U.S. at 539-40.
179. Id. at 540. The Court did not explain the reasons for the determination by the Immigration and Naturalization Service and the Attorney General that the entry of Mrs. Knauff would be prejudicial to the United States. Indeed, Mrs. Knauff appears to have been a model war bride. She fled Germany after Hitler came to power. She went to England in 1939 where she served in the Royal Air Force, and in 1946 she became a civilian employee of the United States War Department in Germany where her work was described as very good and excellent. Id. at 539.
the United States during the national emergency proclaimed May 27, 1941."180 After this delegation, the President authorized the promulgation of regulations by both the Secretary of State and the Attorney General that "no alien should be permitted to enter the United States if it were found that such entry would be prejudicial to the interests of the United States."181

The district court in *Narenji* disagreed with the government’s contention. Relying on *Kent v. Dulles*,182 the court held that the delegation by Congress to the Executive did not include the power to classify aliens by nationality.183 In *Kent*, the Secretary of State refused to issue a passport to alleged Communists who refused to file affidavits concerning their political philosophies.184 The Supreme Court invalidated the actions of the Secretary of State, reasoning that, although the delegation by Congress to the Executive185 provided the Secretary of State with broad discretion regarding the issuance of passports, the Executive’s power did not allow him to withhold passports for “any substantive reason.”186 The Court found that the broad power of the Secretary of State, which had long been described as discretionary, should be construed strictly and that the Secretary should be allowed to withhold a passport only when the applicant is not a citizen of or a person owing allegiance to the United States or is engaging in criminal or unlawful conduct.187

Clearly neither *Knauff* nor *Kent* are directly apposite to *Narenji*. While *Knauff* may be closer factually—because it deals with the authority of the Executive over aliens—*Kent* may be closer legally, due to similarity in the basic congressional delegation of authority. Certainly the delegation involved in *Knauff* is extremely broad and allows the Executive apparently limitless discretion in determining the admissibility of aliens into the United States. Such broad delegation, however, is not apparent in the current immigration statute which specifically grants executive power only to enforce the provisions of the statute.188

If the Executive were able to rely only on the general delegation of authority contained in the immigration statutes, inferring the authority

180. *Id.* at 540. The statute at issue was 55 Stat. 252 (1941).
183. 481 F. Supp. at 1144-45.
184. 357 U.S. at 117-18. The Secretary of State promulgated 22 C.F.R. § 51.135 (1950) under which the plaintiffs were denied passports.
186. 357 U.S. at 129.
187. *Id.* at 130.
to classify aliens by national origin would be difficult. There is no reason to believe that classification based on national origin is necessary for the Attorney General to carry out his function in the field of immigration.\(^{189}\) In *Narenji*, however, the delegated authority of the President may be strengthened by an extremely obscure statute, enacted in 1868,\(^{190}\) which actually has nothing whatsoever to do with immigrants or aliens.

This statute authorizes the President to demand the release of American citizens who are unjustly deprived of liberty by a foreign government and to "use such means, not amounting to acts of war, as he might think necessary and proper to obtain their release."\(^{191}\) To date, the statute has been used infrequently and apparently only as authority to establish the duty of the Executive to effectuate the release of Americans held captive abroad. As such, it has been employed by Americans who, having been held captive, were suing the government, claiming that the latter had not made sufficient efforts to obtain their freedom.\(^{192}\)

Because the statute has yet to be interpreted judicially as a delegation of any specific authority to the Executive,\(^ {193}\) its effect is unclear. It certainly appears to grant the President great discretion in attempting to effectuate the release of captive American citizens abroad, and, according to the analysis of Justice Jackson in *Youngstown*,\(^ {194}\) the delegation of congressional authority in a particular area should enhance the executive authority to act. Nevertheless, any actual grant of authority is extremely vague and may not include the right to affect aliens in this country.

The statute was most certainly intended to enhance the President's authority in dealing diplomatically with foreign countries and did not envision encompassing presidential actions which would affect persons in the United States. Furthermore, the statute may actually be inter-

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189. The court of appeals in *Narenji* found classification based on national origin to be reasonably related to the duties of the Attorney General in the immigration field. 617 F.2d at 748. Nevertheless, the court did not explain the basis for its finding. Because the duty of the Attorney General in immigration matters is the enforcement of the congressional statutes, 8 U.S.C. § 1103 (1976), the holding in *Narenji* implies that the Attorney General has the power to determine that aliens of a particular national origin are more likely to violate the statutes, or that classification by nationality is required for identifying offending parties.


191. *Id*.


193. The statute was mentioned by Judge MacKinnon in his statement opposing the granting of a rehearing en banc. 617 F.2d at 753.

194. *See* notes 138-42 *supra* and accompanying text.
interpreted as a *limitation* of executive actions, prohibiting such conduct that would amount to "acts of war." While such a proscription would not affect the legality of the actions of the President in *Narenji*, it may have implications in regard to other actions taken or contemplated by the United States government.

If the President does not have sufficient authority to promulgate regulation 214.5 through legislative delegation, he must rely on implied executive authority to justify his actions. President Carter did declare a state of national emergency because of the Iranian crisis, and such a state of emergency does increase the powers of the Executive. Nevertheless, such a precedent is not sufficient for the Executive to assume a power constitutionally delegated to Congress. Instead, the President must vindicate his authority through his extensive foreign affairs powers which have been held to be legitimate elements of authority in immigration actions.

In this regard, the President may be on fairly strong ground legally. Although immigration policy and the treatment of aliens in this country have been characterized as matters affecting foreign policy, *Narenji* involves considerably more foreign policy implications than, in general, do most immigration decisions. In essence, the action ordered by President Carter and implemented by Attorney General Civiletti must be considered to be one of foreign policy. The promulgation of regulation 214.5 was designed to effectuate specific foreign policy objectives, either to obtain release of the captives, or at least to evidence the resolve of the United States government in the crisis. The regulation was not intended to effectuate an immigration policy. As such, the regulation does not actually intrude into immigration areas which belong to Congress, and the President may utilize the implied powers of the Executive in foreign policy. Therefore, the President

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196. Landing troops in Iran, even in an attempt to rescue the Americans held captive, as was the case in the unsuccessful rescue mission of April 25, 1980, may conceivably be considered an act of war. Similarly, the economic measures taken by the United States may be considered an act of war if performed with the intent of destabilizing or toppling the government of Iran.
197. Other nondiplomatic measures contemplated by the United States including a naval blockade, air strike or limited invasion are generally considered to be acts of war and may be limited by the application of § 1732.
200. *Id*.
203. *See* notes 143-48 *supra* and accompanying text.
may have effective authority to promulgate regulation 214.5 under his foreign policy powers, even if the authority delegated by Congress were inadequate.

Finally, it is appropriate to discuss the standard of review under which the District of Columbia Circuit adjudicated Narenji. Obviously, the Narenji court employed an extremely lenient standard of judicial scrutiny. The court stated that any federal classification of aliens would be sustained unless "wholly irrational" and, in effect, applied the political question doctrine, declining to review the rationality of the regulation.

Clearly, the dissenting judges in the denial for rehearing believed that the standard of review utilized by the court in Narenji was inadequate:

It may be that the President, in these troubled days, has the power to decide that our deep aversion to selective law enforcement against a group solely on the basis of their country of origin must give way to some other imperative. . . . Nevertheless, the question requires close scrutiny, and our answer must reflect careful consideration of "fine, and often difficult, questions of values."

The above quotation suggests that the political question doctrine must yield to the protection of constitutional rights, that questions of equal protection must be adjudicated with a greater degree of judicial scrutiny than that shown by the Narenji court. This interpretation can be supported logically. The equal protection mandated by the fifth and fourteenth amendments is a limitation on the powers of the federal and state governments, respectively. The government is constitutionally precluded from enacting laws or regulations which are violations of equal protection. The governmental power to establish unconstitutional regulations simply does not exist. The political question doctrine cannot be invoked until the basis of governmental authority has been established because the doctrine cannot confer power on a political branch of government which is not authorized by the Constitution.

The Supreme Court has not employed the political question doctrine to avoid considering the power of a branch of government. In fact, the Court has shown a willingness to decide whether the actions of one branch have infringed on another. It is inappropriate for courts

204. 617 F.2d at 747.
205. Id. at 748.
206. Id. at 754-55 (Wright, C.J., Robinson, J., Wald, J., and Mikva, J., setting forth their reasons to rehear the case en banc) (emphasis added) (citation omitted).
to employ the political question doctrine to avoid determining whether a branch of government has exceeded its constitutional authority. Because the equal protection clause and the separation of powers doctrine act as limitations on the powers of the branches of government, it may be inappropriate for courts to avoid these issues because of the political nature of the decisions.

The *Narenji* court, however, deferred to the authority of the Executive before it adequately explained the basis of that authority. If the executive authority had been established, the facts of *Narenji* may indicate the efficacy of applying the political question doctrine. The fourth requisite of the doctrine is an "unusual need for the unquestioned adherence to a political decision already made, or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." The international situation and the negotiations by the Executive to secure the release of the Americans held captive fulfill this requirement. A judicial statement nullifying the executive action would have certainly embarrassed President Carter and may have undercut his negotiating position.

**CONCLUSION**

The result in *Narenji* is certainly defensible. The Supreme Court has determined that the federal power over aliens is extremely broad. Nevertheless, *Narenji* is disquieting, not so much for its result as for the manner in which the result was reached. Through its unquestioning deference to the actions of the Executive and its failure to explain the basis for its decision, the District of Columbia Circuit implied that any executive action regarding aliens must be accorded similar deference.

A preferable mode of analysis would have been for the court to explain first the basis of authority of the Executive in this situation and then specifically apply the political question doctrine because of the need not to embarrass the President during delicate international negotiations. Such a holding would have certainly limited the precedential effect of *Narenji* and left open the question of the general validity of executive regulation of aliens based on nationality classifications.

In holding that executive regulation of aliens must be sustained unless "wholly irrational" and then employing the minimum rational-
ity test in upholding a classification as invidious as one based on nationality, the *Narenji* court indicates that virtually any classification would be sustained. While the courts should not interfere in political decisions, if the courts cannot exert a meaningful review of federal actions, potentially the rights of aliens in the United States may be abused. Eventually, those rights may be protected by little more than executive discretion.

**Darrell Widen**