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NARENJI V. CIVILETTI: EXPEDIENCY TRIUMPHS OVER ALIENS' CONSTITUTIONAL RIGHTS

When the rule of law is being compromised by expediency in many places in the world, it is crucial for our courts to make certain that the United States does not retaliate in kind.¹

On November 4, 1979, militant student demonstrators seized the United States Embassy in Teheran, Iran, and took hostage approximately sixty-five American embassy employees. On November 10, 1979, President Carter, in response, 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 [had] violated the applicable immigration laws and regulations."² On November 13, 1979, the Attorney General, acting pursuant to the presidential directive, issued 8 Code of Federal Regulations section 214.5 directing Iranian nonimmigrant post-secondary students to report to the Immigration and Naturalization Service by December 14, 1979, with evidence of their residence and student status, including their passport, a letter of good standing from their school, and evidence of their current address. Failing to comply or willfully supplying false information would subject such students to immediate deportation proceedings.³ The Attorney General took this action under the authority

1. *Narenji v. Civiletti*, 617 F.2d 745, 755 (D.C. Cir. 1979) (Wright, C.J., Robinson, Wald and Mikva, J.J., dissenting to denial of petition for rehearing en banc), cert. denied, 446 U.S. 957 (1980).

2. Announcements on Actions to be Taken by the Department of Justice, 15 WEEKLY COMP. OF PRES. DOC. 2107 (Nov. 10, 1979).

3. 8 C.F.R. § 214.5 (1979) provides:

By virtue of the authority vested in me by 8 U.S.C. § 1103(a) and 1184(a) and 8 U.S.C. 301, Part 214 of Chapter I Title 8, Code of Federal Regulations, is amended by adding a new § 214.5 to read as follows: Requirements for maintenance of status for nonimmigrant students from Iran.

(a) An alien admitted as an F-1 or J-1 nonimmigrant student to attend a post-secondary school, including a vocational school, who is a native or citizen of Iran must report to the INS District Office or suboffice having jurisdiction over his or her school or to an INS representative on campus before December 14, 1979, and provide information as to residence and maintenance status. Each student must have in his or her possession at the time of reporting:

- (1) Passport and Form I-94;
- (2) Evidence from the school of enrollment and payment of fees or waiver of payment of fees for the current semester;
- (3) A letter from school authorities attesting to the course hours in which presently enrolled and the fact that the student is in good standing; and
- (4) Evidence of current address in the United States. Students must provide

that he claimed was accorded him by sections 1103(a) and 1184(a) of the Immigration and Nationality Act of 1952.⁴

The regulation was challenged in United States District Court, District of Columbia, in a class action⁵ brought on behalf of all nonim-

such information as INS may request in order to verify maintenance of status and residence.

(b) Failure by a nonimmigrant student to comply with the provisions of paragraph (a) of this section or willful provision of false information to the INS will be considered a violation of the conditions of the nonimmigrant's stay in the United States and will subject him or her to deportation proceedings under Section 241(a)(9) of the Act.

(c) A condition of the admission and continued stay in the United States of a nonimmigrant covered by paragraph (a) of this section is obedience to all laws of United States jurisdictions which prohibit the commission of crimes of violence and for which a sentence of more than one year imprisonment may be imposed. A nonimmigrant's conviction in a jurisdiction in the United States for a crime of violence for which a sentence of more than one year imprisonment may be imposed (regardless of whether such sentence is in fact imposed) constitutes a failure to maintain status under Section 241(a)(9) of the Act.

The foregoing actions are taken in accordance with the Presidential directive of November 10, 1979, issued in the course of, and in response to, the international crisis created by the unlawful detention of American citizens in the American Embassy in Tehran. Accordingly, the notice and comment and delayed effective date provisions of Section 553 of Title 5 of the United States Code are hereby waived as impracticable and contrary to the public interest.

Effective date. The Amendments contained in this order become effective on November 13, 1979.

Dated: November 13, 1979.

Benjamin R. Civiletti,

Attorney General of the United States

4. 8 U.S.C. § 1103(a) (1970) provides in pertinent part:

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, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however,* That determination and ruling by the Attorney General with respect to all questions of law shall be controlling. He shall have control, direction, and supervision of all employees and of all the files and records of the Service. 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. [Footnote omitted].

8 U.S.C. § 1184(a) (1976) provides:

The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 1258 of this title, such alien will depart from the United States.

5. The cases of *Narenji v. Civiletti*, Civ. No. 79-3189 (D.D.C., filed Nov. 21, 1979), and *Confederation of Iranian Students v. Civiletti*, Civ. No. 79-3210 (D.D.C., filed Nov. 27, 1979), were consolidated on November 27, 1979, under FED. R. CIV. P. 42(a), with a full hearing on the merits held December 4, 1979.

migrant students from the Islamic Republic of Iran.⁶ The plaintiffs sought declaratory relief against Attorney General Benjamin R. Civiletti and Acting Commissioner of Immigration and Naturalization David Crosland on the grounds, *inter alia*, that the regulation, as promulgated by the Attorney General, went beyond the authority over immigration matters given the executive branch by Congress and by the Constitution.⁷ The plaintiffs claimed that the regulation violated the fifth amendment by discriminating against a distinct class on the basis of national origin, that it violated the illegal search and seizure provisions of the fourth amendment, and that it violated the first amendment rights of Iranian students by chilling their rights to free speech and assembly. The plaintiffs further alleged that the Government had failed to comply with the notice and comment provisions of the Administrative Procedure Act,⁸ that there was no statutory authority for the regulation, and that the regulation was in violation of international law.⁹

On December 11, 1979, the district court entered judgment for the plaintiffs and enjoined enforcement of the challenged regulation and use of the information gathered in the course of the proceedings. The district court found that: 1) the Immigration and Nationality Act sections 1103(a) and 1184(a) did not give the Attorney General the broad authority necessary to issue a legislative-type regulation discriminating against a select class of aliens on the basis of their nationality;¹⁰ 2) the regulation was in violation of the equal protection component of the fifth amendment because it created two distinct classes of nonimmigrant students, Iranians and non-Iranians, for purposes of law enforcement;¹¹ and 3) the regulation failed to satisfy the due process test for federal regulations by not legitimately serving an overriding national interest.¹²

6. *Narenji v. Civiletti*, 481 F. Supp. 1132 (D.D.C.), *rev'd*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980).

7. *Id.* at 1134.

8. According to the court, 5 U.S.C. § 553(b)(B) (1977) "requires that notice of a proposed regulation and time for comment on its contents be afforded the public unless there is an agency finding that good cause exists for waiver of the requirement because such a procedure would be 'impracticable, unnecessary, or contrary to the public interest.'" *Id.* at 1137.

9. *Id.* at 1136. The plaintiffs prayed for an injunction against enforcement of the regulation and for an injunction against deportation of any Iranian student who had reported to the Immigration and Naturalization Service in compliance with the regulation. *Id.* at 1134.

10. *Id.* at 1141.

11. *Id.* at 1144.

12. *Id.* The court held that good cause existed for the Government's waiver of the notice and comment provision of the Administrative Procedure Act 5 U.S.C. § 553. *Id.* at 1137. Because the court found 8 C.F.R. § 214.5 (1979) unconstitutional as a violation of the

The District of Columbia Circuit Court of Appeals reversed the judgment of the district court.¹³ The court of appeals held that the Attorney General was impliedly authorized to issue a regulation depriving a distinct class of nonimmigrant aliens of their fifth amendment rights solely on the basis of their nationality because such a regulation was "reasonably related" to his duties under the Immigration and Nationality Act.¹⁴ The court further held that the Attorney General's regulation was not subject to constitutional challenge unless it was "wholly irrational." In so holding, the court applied the test used to assess the constitutionality of *congressional enactments* distinguishing among aliens upon the basis of their nationality rather than the appropriate test used to assess the constitutionality of *federal regulations*. The court, however, declined to subject the regulation even to that narrow standard on the ground that the issue concerned foreign policy judgments of the executive branch, and thus presented a nonjusticiable political question.¹⁵ The court, thereby, assumed that the Attorney General's regulation was not "wholly irrational" and held that it did not violate plaintiffs' right to equal protection of the laws under the due process clause of the fifth amendment.¹⁶

The court of appeals denied plaintiffs' petitions for rehearing and suggestion of rehearing en banc,¹⁷ on January 31, 1980. On May 19, 1980, the Supreme Court denied plaintiffs' petition for writ of certiorari.¹⁸

Narenji raises serious questions: has either Congress or the Constitution given the executive branch power to promulgate legislative-type regulations which abridge the constitutional rights of lawfully ad-

fifth amendment it found it unnecessary to consider its validity under the first and fourth amendments and under international law. *Id.* at 1147.

On December 14, 1979, the District of Columbia Circuit Court of Appeals granted the defendants' motion to stay the district court's order enjoining the defendants from enforcing the regulation or from using the information gathered in the course of its proceedings against the Iranian students and ordered expedited consideration of the appeal. *See also* 8 C.F.R. § 214.5 (1979), as amended, extending the date by which Iranian students must report to the INS to December 31, 1979.

13. *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980).

14. *Id.* at 747.

15. *Id.* at 747-48.

16. *Id.* The court of appeals declined to consider plaintiffs' first and fourth amendment and international law challenges to the regulation's validity.

17. *Id.* at 750. Four of the judges dissented. *Id.* at 753-54. Chief Judge Wright, and Judges Robinson, Wald and Mikva recognized both the seriousness of the equal protection challenge and the significant question of the constitutional balance of powers raised by the President's taking this action without express congressional authorization. *Id.* at 754, n.4.

18. 446 U.S. 957 (1980). Justice Brennan would have granted certiorari.

mitted resident aliens on the basis of foreign policy; and, if that power has been given the Executive, was the constitutionality of regulation 214.5 justiciable under the political question doctrine? In approaching these questions, this note reviews the holding and rationale of both the district and appellate courts and sets forth the rights accorded aliens by the Constitution and the extent of Congress' power to abridge those rights. This note next examines the substantive issues raised by *Narenji*: 1) whether Congress delegated sufficient authority to the Attorney General under the Immigration and Nationality Act to enable him to promulgate regulation 214.5; and, if not, 2) whether the President's power over foreign affairs extends to immigration and, thereby, gives him sufficient constitutional authority to order the regulation; and, finally, 3) whether the constitutionality of the regulation was justiciable under the political question doctrine.

Upon examining these issues, this note concludes that the regulation, as promulgated by the Attorney General, was an unauthorized encroachment by the executive branch over powers reserved exclusively to Congress by the Constitution; and that the court of appeals, in holding that Congress impliedly authorized the Attorney General to issue a regulation discriminating against a group of aliens on the basis of nationality, failed to subject the regulation to the appropriate constitutional analysis.

I. THE DISTRICT COURT'S ANALYSIS

The district court found that the regulation was not authorized by Congress. The court noted that "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."¹⁹ The Immigration and Nationality Act of 1952 has special provisions for aliens from Communist countries,²⁰ denies immigrant visas to aliens from those countries not accepting their own nationals who have been deported from the United States,²¹ and excludes German Nazis from entry into the United States.²² Furthermore, the Act expressly provides that "[n]o person shall . . . be discriminated against in the issuance of an immigrant visa because of his . . . nationality . . . except as specifically provided in . . . this title"²³

19. 481 F. Supp. at 1141.

20. 8 U.S.C. § 1153(a)(7) (1970).

21. 8 U.S.C. § 1253(g) (1970).

22. 8 U.S.C. § 1182(a)(33) (Supp. III 1980).

23. 8 U.S.C. § 1152(a).

The district court further noted that "in numerous other enactments Congress has indicated its disdain for discrimination based on national origin."²⁴ Congress has prohibited discrimination or segregation on the ground of race, color, religion or national origin in permitting access to public accommodations,²⁵ to public facilities,²⁶ to public education,²⁷ to federally assisted programs,²⁸ and to employment opportunities.²⁹ Congress has further sought to secure the individual liberties of "all persons" within the jurisdiction of the United States by providing a basis for a civil action against any person, acting under color of state law, who seeks to deprive another of his constitutional rights.³⁰

In holding that sections 1103(a) and 1184(a) do not authorize the Attorney General to issue a regulation discriminating against a select group of aliens on the basis of their nationality, the district court also pointed to the neutral wording of the statutes, which refer to "aliens" but do not isolate any particular class or give the Attorney General explicit authority to do so. The court cited the well-established principle that immigration and deportation statutes should be strictly construed so as not to "trench on [an alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used."³¹

The court next looked to whether the Executive had any inherent power over immigration. The court noted that although Congress is primarily responsible for the regulation of immigration, "the executive, by reason of the foreign affairs implications of any decision or action

24. 481 F. Supp. at 1141.

25. 42 U.S.C. § 2000a (1976).

26. *Id.* at § 2000b.

27. *Id.* at § 2000c-6.

28. *Id.* at § 2000d.

29. *Id.* at § 2000e-2.

30. *Id.* at § 1983.

31. 481 F. Supp. at 1141 (citing *Fong Han Tan v. Phelan*, 333 U.S. 6, 10 (1948) (holding that 8 U.S.C. § 2155(a) (1970), which provides in part that ". . . any alien . . . who is hereafter sentenced more than once to imprisonment because of conviction in this country of any crime involving moral turpitude, . . . shall, upon the warrant of the Attorney General, be taken into custody and deported . . ." be strictly construed because "deportation is a drastic measure and at times the equivalent of banishment or exile")). *Accord, e.g.*, *Lennon v. INS*, 527 F.2d 187, 193 (2d Cir. 1975) (an alien's conviction for possession of marijuana in violation of British law, under which knowledge of guilt was irrelevant, could not furnish grounds for excluding him under a statute making excludable any alien convicted of any law or regulation relating to the illicit possession of marijuana. In so holding, the court relied upon the well-settled doctrine that "deportation statutes must be construed in favor of the alien.").

affecting aliens, is not without authority in this area.”³² But the court rejected the defendant’s argument that the Executive had inherent authority to issue the regulation *commensurate with that of Congress*, under its foreign affairs power.³³

Because of its doubt as to the *extent* of executive power in the field of immigration, the court proceeded on the assumption that the Executive did have sufficient authority to issue the regulation. The court next considered the constitutionality of regulation 214.5 pursuant to the equal protection component of the fifth amendment. The court examined the Supreme Court’s decision in *Hampton v. Mow Sun Wong*.³⁴ In *Hampton*, the Court held that in order for a federal regulation which discriminates against aliens to be constitutional, there must be a legitimate basis for presuming that the rule was intended to serve an “overriding national interest.”³⁵

The district court in *Narenji* considered the interests which the Government asserted were of sufficient import to justify the discriminatory regulation: 1) the protection of the lives of the hostages held in Iran by quelling potential domestic violence; 2) the need to express to the government in Iran this country’s displeasure with events in Teheran; and 3) the need to identify Iranian students to assist in the development of appropriate responses to the crisis in Iran. The court concluded that the only interest asserted by the Government which could possibly justify the regulation was the need to protect the lives of the hostages in Iran.³⁶ Yet, the court found that there was no legitimate basis for presuming that the rule was actually intended to serve that interest, “there being at best a dubious relationship between the presence of Iranian students in this country, whether legally or otherwise, and the safety and freedom of the hostages.”³⁷

32. 481 F. Supp. at 1142-43.

33. The court weighed the need for Executive expediency in foreign affairs against the constitutional limits of Executive authority and concluded that:

[t]o allow the executive to, in effect, delegate to itself the power to abrogate the important, constitutionally protected right to equal protection of the laws under the statutes governing immigration when Congress, which has primary responsibility for the policy decisions in immigration matters, has not acted, exceeds the proper boundaries within which the three branches of our constitutional government co-exist.

Id. at 1143.

34. 426 U.S. 88 (1976). For further discussion of this case, see notes 131-35 *infra* and accompanying text.

35. 426 U.S. at 103.

36. 481 F. Supp. at 1144.

37. *Id.* The court viewed the need to express American anger and the census-taking interest as unjustifiable excuses for infringing upon the constitutional rights guaranteed

The Government had argued that the round-up of Iranian students would help quell potential domestic violence against Iranians that could lead to retaliatory measures against the hostages in Iran. Yet, as the district court noted, the regulation could not be said to serve that interest unless only those Iranian students who were in the United States illegally would engage in provocative demonstrations.³⁸ Furthermore, the fear that Iranians might provoke domestic violence by their very presence could not justify the regulation because only those Iranians in the United States illegally would be expelled, leaving those here legally as targets of violence.³⁹ The court concluded that the only interest served by the regulation was the psychological "one of assuaging the anger of the American people by demonstrating that something is being done in the face of crisis."⁴⁰ The court found that although the regulation was an understandable effort to reply to the actions taken against the United States in Iran, it did not support "a legitimate national interest and therefore would not excuse the wholesale nullification of the rights of the students involved or save 8 C.F.R. [section] 214.5 from violating the equal protection guarantee of the fifth amendment."⁴¹

II. THE COURT OF APPEALS' ANALYSIS

The court of appeals reversed the district court's ruling. In so doing, it held that Immigration and Nationality Act sections 1103(a), 1184(a) and 1251(a)(9)⁴² plainly gave the Attorney General the author-

aliens. The court stated that the regulation violated the fundamental principles of American fairness because political and economic retaliatory measures were available to the government. *Id.*

38. *Id.* The district court recognized the question of the first amendment right to free speech which this argument raised. Although the court found it unnecessary to rule on this question, the plaintiffs offered a persuasive analysis of the issue, stating that: "[g]overnment is not free to restrict the rights of individuals even to engage in provocative demonstrations because of its fear of the bruised sensibilities or violent reactions of other segments of the population." Brief for Petitioner at 33, *Narenji v. Civiletti*, 617 F.2d 745, 755 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980). See, e.g., *Gregory v. Chicago*, 394 U.S. 111 (1969) (when petitioners were engaged in an orderly demonstration, police could not violate their first amendment rights by ordering them to disperse on grounds that onlookers were becoming violent); *Coates v. Cincinnati*, 402 U.S. 611, 615 (1971) (a city ordinance which violated the constitutional right of free assembly and association could not be upheld on the basis of public intolerance or animosity).

39. 481 F. Supp. at 1144.

40. *Id.* at 1144-45.

41. *Id.* at 1145.

42. 8 U.S.C. § 1251(a)(9) (1970) authorizes the Attorney General to order the deportation of any nonimmigrant alien who fails to maintain his nonimmigrant status or to comply with the conditions of such status.

ity to promulgate regulation 214.5.⁴³ The court reasoned that “[t]he statute need not specifically authorize each and every action taken by the Attorney General, so long as his action is reasonably related to the duties imposed upon him.”⁴⁴ The court continued that because the Act specifically authorizes the Attorney General “to prescribe special regulations and forms for the registration and fingerprinting of . . . (5) aliens of any other class not lawfully admitted to the United States for permanent residence,”⁴⁵ and because the failure to maintain nonimmigrant status or to comply with the conditions of such status is a ground for deportation,⁴⁶ the Attorney General’s promulgation of a regulation distinguishing among aliens on the basis of nationality for the purpose of selective law enforcement was “directly and reasonably related to . . . [his] duties and authority under the Act.”⁴⁷

After finding that regulation 214.5 was authorized by statute, the court of appeals undertook the determination of the constitutionality of the regulations. Instead of relying upon the “legitimate basis” test for measuring the constitutionality of *federal immigration regulations* as set forth in *Hampton v. Mow Sun Wong*,⁴⁸ the court of appeals relied upon two cases dealing with judicial review of *congressional enactments* in the field of immigration.⁴⁹ Under these cases, the federal judiciary can invalidate federal immigration legislation only if it is found to be “wholly irrational.”⁵⁰

The court, however, failed to apply even this “toothless” standard of review to the Attorney General’s regulation. Instead, it concluded that the Iranian student controversy presented a political question.⁵¹ According to the court of appeals, the issues presented involved the field of foreign affairs and implicated matters over which the President has direct constitutional authority. The court cited the Attorney Gen-

43. 617 F.2d at 747.

44. *Id.*

45. 8 U.S.C. § 1303(a) (1970).

46. *Id.* at § 1251(a)(9) (1970).

47. 617 F.2d at 747.

48. 426 U.S. 88 (1976). See notes 34-35 *supra*, notes 131-35 *infra*, and accompanying text for further discussion of the test set forth in *Hampton*.

49. *Mathews v. Diaz*, 426 U.S. 67 (1976); 617 F.2d at 747 (citing *Fiallo v. Bell*, 430 U.S. 787 (1977)). In *Fiallo*, the Court had held constitutional a congressional enactment which excluded fathers of illegitimate children who had since become United States citizens, from qualifying for special preference under the immigration laws. In *Mathews*, the Court had held constitutional a congressional act which conditioned aliens’ eligibility for medicare benefits on the character and duration of their residence within the United States. For further discussion of this case, see notes 84-85, 123-26 *infra* and accompanying text.

50. 426 U.S. at 81-83; 430 U.S. at 791.

51. 617 F.2d at 748.

eral's affidavit which defended the regulation as an "element of the language of diplomacy by which international courtesies are granted or withdrawn," and maintained that "[t]he action implemented by these regulations is therefore a fundamental element of the President's efforts to resolve the Iranian crisis and to maintain the safety of the American hostages in Teheran."⁵² The court further supported its conclusion by noting that the Iranian government's refusal to intercede in the taking of the hostages was in violation of the United States and Iran's Amity Treaty,⁵³ and that the Iranian action had been held to be in violation of international law by the World Court.⁵⁴ Thus, the court did not apply the "wholly irrational" test to the regulation, but concluded that "in a case such as the one presented here it is not the business of courts to pass judgment on the decisions of the President in the field of foreign policy."⁵⁵

III. ANALYSIS

The gravity of the problems presented by the court of appeals' analysis in *Narenji*, can be better appreciated by briefly examining the rights accorded aliens under the Constitution, and the extent of the power given Congress to abridge those rights.

A. *Aliens' Rights Under the Constitution*

The *Narenji* court of appeals did not seem to consider the protections accorded aliens by the Constitution. Yet, the Constitution seldom differentiates between aliens and citizens, extending its protection broadly to all persons within the jurisdiction of the United States. The protections of the fifth amendment (presentment or indictment, double jeopardy, self-incrimination, due process, compensation for taking of property) apply to any "person," as do the guarantees of the fourteenth amendment (due process, equal protection). The fourth amendment (unreasonable search and seizure) applies, as well, to all "persons." The first amendment (freedom of religion, speech and press, right to assemble and to petition the government) guarantees protection to "the people." The sixth amendment secures rights of "the accused" in criminal proceedings. The eighth amendment speaks in general terms extending protection against excessive bail or fines, or cruel or unusual punishments. Finally, the ninth and tenth amendments reserve for

52. *Id.* at 747-48.

53. 284 U.N.T.S. 93 (1957-58); T.I.A.S. No. 3853.

54. 617 F.2d at 748.

55. *Id.*

“the people” rights not enumerated nor specifically delegated in the Constitution.⁵⁶ Furthermore, that the Constitution does differentiate between citizens and aliens in specific instances supports the conclusion that, except in these instances, aliens are entitled to the same constitutional protections as are citizens.⁵⁷

The Supreme Court has affirmed the rights accorded aliens, holding that “all persons” within the territory of the United States or subject to the jurisdiction of the United States are entitled to constitutional protection.⁵⁸ Thus, the Court has acknowledged that aliens are entitled to equal economic opportunity and to equal protection of the laws under the fifth amendment,⁵⁹ to the protection of the fifth and sixth amendments in criminal proceedings,⁶⁰ to the protection of the fifth amendment’s prohibition against the taking of property without just compensation,⁶¹ to invoke the writ of habeas corpus to protect their personal liberty,⁶² to procedural due process of law in deportation proceedings,⁶³ to access to federal⁶⁴ and state courts,⁶⁵ and to equal protection of the laws under the fourteenth amendment.⁶⁶ The federal courts also have held that aliens are afforded the protection against unlawful search and seizure under the fourth amendment.⁶⁷ The court of appeals in *Narenji* failed to recognize the importance of the rights guaran-

56. Gordon, THE ALIEN AND THE CONSTITUTION, 9 CAL. W. L. REV. 1, 2 (1972) [hereinafter cited as Gordon].

57. U.S. CONST. art. II, § 1 requires that the President be a native of the United States; U.S. CONST. art. I, § 2 requires that members of the House of Representatives be citizens; U.S. CONST. art. I, § 3 mandates that any Senator be a citizen. U.S. CONST. amends. XV, XIX and XXVI protect the right of “citizens” to vote; and the privileges and immunities clauses of U.S. CONST. art. IV, § 2 and amend. XIV § 1 extend only to citizens. Gordon, *supra* note 56, at 1.

58. *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922).

59. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (“[t]he Fifth Amendment, as well as the Fourteenth Amendment, protects every [alien] from deprivation of life, liberty, or property without due process of law. . . . Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.”)(citations omitted). See also *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

60. *Wong Wing v. United States*, 163 U.S. 228 (1896).

61. *United States v. Pink*, 315 U.S. 203, 228 (1942); *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931).

62. *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

63. *Id.*

64. *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892).

65. *Ex parte Kawato*, 317 U.S. 69 (1942).

66. *Graham v. Richardson*, 403 U.S. 365 (1971).

67. *Cheung Tin Wong v. INS*, 468 F.2d 1123, 1126-27 (D.C. Cir. 1972); *Yam Sung Kwai v. INS*, 411 F.2d 683, 686 (D.C. Cir.), *cert. denied*, 396 U.S. 877 (1969). See also Gordon, *supra* note 56, at 13-20; 1 C. ANTIEAU, MODERN CONSTITUTIONAL LAW § 9:25, at 713-20, 725-26 (1969).

teed aliens by the Constitution and focused, instead, on the constitutional power accorded Congress to abridge these rights.

B. Power of Congress Over Immigration

The Constitution states that "the Congress shall have Power to . . . establish a Uniform Rule of Naturalization."⁶⁸ While recognizing that the Constitution does extend to aliens many of the same protections accorded to citizens,⁶⁹ the Supreme Court has also recognized the extensive power of Congress over matters concerning immigration. The Court has upheld many statutes which would be unconstitutional if applied to citizens.⁷⁰ Examples of the broad extent of congressional power over immigration can be seen in the Supreme Court's decisions holding that Congress has the power to prohibit a distinct national group from entering the United States,⁷¹ to deport alien residents of long standing on the basis of their past membership in the Communist Party,⁷² to exclude an avowed Marxist from temporary entry into the United States even where the abridgement of citizens' first amendment rights is at issue,⁷³ and to condition aliens' eligibility for benefits extended to citizens on the duration of their residency within the United

68. U.S. CONST. art. I, § 8, cl. 4.

69. See notes 56-67 *supra* and accompanying text.

70. *Mathews v. Diaz*, 426 U.S. 67, 80 (1976).

71. *Chae Chang Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 1581 (1888). In this early decision, the Court upheld the validity of the Chinese Exclusion laws which excluded Chinese nationals from entry, or from reentry with a certificate of permission to return, into the United States. These laws were finally repealed by Congress in 1943. (Act of Dec. 17, 1943, ch. 344, 57 Stat. 600-01.) For another example of the discriminatory laws enacted by Congress and upheld by the Court during this unfortunate phase of American history, see *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), in which the Court held that Congress' right to exclude or expel aliens is absolute and vested in it by the Constitution.

72. Congress enacted the Internal Security Act of 1950, Section 22, 50 U.S.C. §§ 781, 785 (1951), to provide for the deportation of any alien within the United States who was, or ever had been, a member of the Communist party. In *Galvan v. Press*, 347 U.S. 522 (1954), the Court sustained the constitutionality of the statute and allowed the INS to deport an alien who had been a past member of the Communist party and who had resided in the United States for thirty-six years. See also *Harisiades v. Shaughnessy*, 342 U.S. 580 (1951), in which the Court upheld the deportation of alien residents of long standing for their past membership in the Communist Party. Their deportation was based on a provision of the Alien Registration Act, 8 U.S.C. § 137 (1940), which required deportation of any alien who was either at the time of entering the United States, or "at any time thereafter," a member of an organization advocating the unlawful overthrow of the United States government.

73. *Kleindienst v. Mandel*, 408 U.S. 753 (1972). In *Kleindienst*, the Court held that Congress' power to exclude classes of aliens with particular political beliefs was so great that it could not be challenged by United States citizens who claimed a first amendment right to associate with and to receive thoughts and ideas from an alien.

States.⁷⁴

Judicial review of congressional enactments in the area of immigration is indeed limited. The most recent test for determining whether a federal statute unconstitutionally infringes upon an alien's rights was enunciated in *Mathews v. Diaz*.⁷⁵ In *Mathews*, the Supreme Court found that a statute conditioning an alien's eligibility for medicare benefits upon duration of residency within the United States was not "wholly irrational" and was, therefore, constitutional.⁷⁶ The Court found that the policy considerations underlying the statute were "reasonable,"⁷⁷ and stated that if it were to find otherwise, it would merely be supplanting its own judgment for that of Congress. Such a determination, the Court held, would exceed the proper role of the federal judiciary.⁷⁸

Congress, alone, acting under the authority over immigration vested in it by the Constitution, has the power to restrict aliens' rights.⁷⁹ However, despite the fact that it possesses the power to create alienage classifications based upon nationality, Congress has seen fit to do so only in a few instances.⁸⁰ Congress, like the Court, has recognized that distinctions based on national origin are "odious to a free people whose institutions are founded upon the doctrine of equality."⁸¹ It is for this

74. *Mathews v. Diaz*, 426 U.S. 67 (1976). See notes 75-78 *infra* and accompanying text.

75. 426 U.S. 67 (1976).

76. *Id.* at 83. It should be noted that *Mathews* involved the question of whether "benefits" afforded a class of citizens should also be afforded a respective class of aliens. The Court made clear that the issue was not a deprivation of *substantive constitutional rights*, but, rather, whether all aliens were entitled to the same *benefits* under government programs as were citizens. *Id.* at 80, 82-83. It is uncertain, therefore, whether the Court would limit its analysis to the narrow "wholly irrational" test if confronted with a statute abridging substantive rights conferred upon aliens by the Constitution.

77. The *Mathews* Court stated that "it is unquestionably reasonable for Congress to make an alien's eligibility [for medicare benefits] depend on both the character and duration of his residence." The Court reasoned that a line separating those who receive benefits and those who do not must be drawn somewhere, and it is Congress, not the courts, who must make this determination. *Id.* at 83.

78. *Id.* at 84.

79. *Galvan v. Press*, 347 U.S. 522, 531 (1953). See also *Harisiades v. Shaughnessy*, 342 U.S. at 586-87, discussed *supra* at note 72.

80. See note 19-23 *supra* and accompanying text. Evidence of Congress' distaste for distinctions drawn on the basis of nationality is also found in its abandonment of the national origin and quota system of immigration. See notes 92-93 *infra* and accompanying text.

81. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (upholding the constitutionality of war-time Executive orders, ratified by Congress, imposing curfew for American citizens of Japanese descent). See also *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (sustaining a war-time order given by the Commanding General of the Western Command, United States Army, which directed that all persons of Japanese ancestry should be ex-

reason that classifications based on nationality are generally considered suspect and are subject to close judicial scrutiny. They rarely support even a legitimate, much less the requisite "compelling," governmental interest.⁸² None of the cases on which the court of appeals in *Narenji* relied upon to support Congress' power to discriminate against Iranian nationals involved classifications based upon nationality.⁸³ For example, in *Mathews*,⁸⁴ the Supreme Court recognized that while the federal law denying Medicare benefits to *all* aliens who had not lived in the United States for at least five years could have a particularly adverse impact on refugees from Cuba, who were at that time immigrating to the United States in large numbers, the law at least did not have the undesirable characteristic of facially distinguishing between aliens on the basis of nationality.⁸⁵ As shown in the ensuing section, congressional reticence to enact laws on this basis makes untenable the court of appeals' conclusion that Congress impliedly delegated to the Attorney General authority to promulgate a regulation discriminating against a select group of aliens on the basis of nationality.

C. *Congressional Delegation of Power to the Attorney General:
Immigration and Nationality Act of 1952*

Recognizing that the federal government's power to abridge the constitutional rights of lawfully admitted resident aliens rests exclusively with Congress, the Attorney General based his authority to promulgate regulation 214.5 on sections 1103(a) and 1184(a) of the Immigration and Nationality Act of 1952, rather than on the directive issued by the President.⁸⁶ There is serious doubt, however, as to whether the Act in fact gave the Attorney General the power to promulgate the regulation in question.

cluded from a military area). In both cases, the Court looked to the inherently suspect character of any legal restrictions based on national origin, but held that *in time of war*, pressing public necessity could sometimes justify the existence of such restrictions. *But see* notes 92-93 *infra* and accompanying text.

82. 320 U.S. at 100.

83. In *Fiallo v. Bell*, 430 U.S. 787 (1977), the Court upheld a congressional enactment which excluded fathers of illegitimate children who had since become United States citizens from qualifying for special preference under the immigration laws; in *Harisiades v. Shaughnessy*, 342 U.S. 580 (1951), the Court sustained the constitutionality of a statute distinguishing between aliens on the basis of their affiliation with the Communist Party.

84. 426 U.S. 67 (1976).

85. *Id.* at 77-84.

86. 8 C.F.R. § 214.5 (1979) reads in pertinent part: "By virtue of the authority vested in me by 8 U.S.C. § 1103(a) and 1184(a) and 8 U.S.C. 301, Part 214 of Title 8, Code of Federal Regulations, is amended by adding a new § 214.5"

In *Kent v. Dulles*,⁸⁷ the Supreme Court established the principle that administrative powers should not be construed to give the administering authority the power to infringe upon individual rights in the absence of a *clear indication* that Congress intended to confer such authority. Application of this test to sections 1103(a) and 1184(a) confirms the conclusion that Congress intended to retain sole responsibility for substantive legislation in the area of immigration.

Section 1103(a) of the Immigration and Nationality Act of 1952 charges the Attorney General with the administration and enforcement of the Act and all other immigration laws. This section does allow the Attorney General discretion, but solely in procedural matters.⁸⁸

Section 1184(a) provides that the Attorney General may establish the "conditions" for the *admission* of aliens to the United States.⁸⁹ Accordingly, the Attorney General's authority under this section has been limited to such procedural conditions as the time for which an immigrant initially may be admitted, extensions of stay, filing fees, and the form and content of applications and papers.⁹⁰

Neither of these statutes implies, much less clearly indicates, that

87. 357 U.S. 116 (1958). In *Kent*, the Secretary of State refused to issue passports to the two plaintiffs because of their refusal to sign an affidavit concerning their membership in the Communist Party. The Secretary of State based his authority to deny issuance of the passports on section 215 of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1185 (1970), and on section 1 of the Act of Congress of 1926, 22 U.S.C. § 211(a) (1979). In determining the scope of authority given the Secretary of State by the Act of 1952 the Court looked to congressional intent. The Court found that Congress had considered the prior policy of limited restraints in issuing passports before enacting the statute which gave the Secretary of State this discretionary power, and declined to impute to Congress the purpose of giving the Secretary of State unbridled authority to grant or withhold a passport. *Id.* at 127-28. The Court held that an explicit statement by Congress is required to curtail a citizen's constitutional rights. *Id.* at 130. There is no basis for assuming that the Court would adopt any lesser standard for construing statutes affecting aliens. See notes 56-67 *supra* and accompanying text.

88. Section 1103(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1103(a) (1970), provides in pertinent part:

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 . . . (footnote deleted).

(emphasis added).

89. Section 1184(a) of the Act, 8 U.S.C. § 1184(a) (1970) provides in pertinent part:

The *admission* to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe

(emphasis added).

90. See regulations *passim* at 8 C.F.R. § 214 (1979).

the Attorney General has the power to draw substantive classifications infringing upon individual rights. The court of appeals' ruling both ignores the Supreme Court's "clear statement" requirement and enables the Attorney General to assume a legislative function on the basis of neutrally worded statutes which merely give him authority to administer a federal agency in accordance with federal law.

It is also true that the court of appeals' holding undermines Congress' recent efforts to eliminate such nationality-based classifications. In the 1965 amendments to the Immigration and Nationality Act, Congress eliminated the national origin and quota system of immigration⁹¹ and replaced it with a new system of selection based on classifications other than nationality.⁹² Congress' stated purpose in repealing the national origin and quota system was to replace it with a new system of selection which would be "fair, rational, humane, and in the national interest."⁹³

In light of Congress' intentional abandonment of a system of classification based on national origin, the Attorney General's claim that sections 1103(a) and 1184(a) impliedly give him power to authorize special regulations on this disfavored basis is highly tenuous. If Congress has given the Attorney General this broad authority, it has *a fortiori* authorized him to re-create the very national origin and quota system which it has chosen to eliminate.⁹⁴ Such a construction of the statute, is contrary to clear congressional intent, and clearly improper.⁹⁵

91. S. REP. NO. 748, 89th Cong., 1st Sess. 2, reprinted in [1965] U.S. CODE CONG. & AD. NEWS 3328-29.

92. *Id.* at 3331. The national origin and quota system established quotas for each quota area based upon a percentage of the alien population in the United States attributable to each quota area. Quota areas embraced all areas of the world, other than the independent countries of the Western Hemisphere. Each area had assigned quotas to which natives of those areas had access regardless of race, with the exception of the Asia-Pacific triangle.

[T]he formula for establishing the quota of each quota area was reduced to a fixed mathematical ratio of one-sixth of 1 percent of the inhabitants of the United States in 1920 attributable by national origin to each area, with a guarantee of a minimum of 100 to each quota area.

Id.

93. *Id.* at 3332.

94. Brief for Petitioner at 8-9, *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980).

95. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1951), a case dealing with a presidential enactment which was promulgated without congressional approval and without regard to specific congressional legislation directed toward the same contingency. Justice Frankfurter commented:

It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did . . . [here], to

The court of appeals attempted to bolster its holding that Immigration and Nationality Act sections 1103(a) and 1184(a) “plainly encompass authority to promulgate regulation 214.5”⁹⁶ by citing section 1393(a) of the same statute. This section authorizes the Attorney General “to prescribe special regulations and forms for the *registration* and *fingerprinting* of . . . (5) aliens of any other class not lawfully admitted to the United States for permanent residence.”⁹⁷ The court also relied on section 1251(a)(9), which authorizes the Attorney General to order the deportation of any nonimmigrant alien who fails to maintain his nonimmigrant status or to comply with the conditions of such status.⁹⁸ This argument, however, fails in light of the Supreme Court’s earlier ruling that any immigration statute which carries the penalty of deportation must be construed in favor of the alien.⁹⁹

It is quite clear that Congress did not give the Attorney General authority to abridge aliens’ rights through classifications based upon nationality; the court of appeals’ contrary conclusion is simply unpersuasive. The only other source from which the Attorney General might possibly have derived power to issue the regulation is from the Executive, himself. An analysis of *Narenji*, therefore, requires a determination of whether the Executive’s power over foreign affairs extends to matters of immigration and gives him authority commensurate with that of Congress to promulgate legislation which discriminates against aliens on the basis of nationality.

D. Limitations on Executive Power Over Foreign Affairs

There is no doubt that the Executive has extraordinary power over this country’s foreign affairs. The President alone has the power to speak or to listen as a representative of the nation. The President is the sole organ of the nation in its external relations, and is its sole representative with foreign nations.¹⁰⁰

The court of appeals in *Narenji* cited *United States v. Curtiss-Wright Export Corp.*,¹⁰¹ to illustrate both the extent of this power and

find secreted in the interstices of legislation the very grant of power which Congress consciously withheld.

Id. at 609 (Frankfurter, J., concurring).

96. 617 F.2d at 747.

97. 8 U.S.C. § 1303(a) (1976) (emphasis added).

98. 8 U.S.C. § 1251(a)(9) (1976).

99. See note 31 *supra* and accompanying text.

100. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936).

101. 617 F.2d at 748 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. at 320).

the degree of flexibility required by the President in its use. In *Curtiss-Wright*, the Supreme Court considered whether a joint resolution of Congress, specifically delegating to the President legislative-type power to curtail the sale of weapons by private munitions dealers within the United States to a war zone in the Chaco, amounted to an unconstitutional delegation of legislative power. In upholding the resolution, the Court discussed the scope of the President's power in the field of foreign affairs, and stated that "*congressional legislation* which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom" ¹⁰² In the presidential proclamation at issue in *Curtiss-Wright*, the President himself had acknowledged that, although his constitutional power over foreign affairs was great, *legislative action* was required in order to curtail the rights of those subject to the jurisdiction of the United States. ¹⁰³

The Supreme Court has also recognized this limitation on the Executive's power over foreign affairs, and has been adamant in refusing to uphold presidential enactments when their effect will be to violate substantive constitutional rights. This has been true even when the President was acting to further national security interests. ¹⁰⁴ As the Court warned in *Curtiss-Wright*, the President's authority over foreign affairs must be "exercised in subordination to the applicable provisions of the Constitution." ¹⁰⁵ A number of cases illustrate the Court's serious appraisal of the conflict between the need for executive expediency in foreign affairs and the need to protect individual rights.

In *Youngstown Sheet & Tube Co. v. United States*, ¹⁰⁶ the Court recognized both the power of the Executive as Commander in Chief of the armed forces during wartime and the seriousness of the national security interests at stake. Yet the Court held that the Executive's

102. 299 U.S. at 320 (emphasis added).

103. The President's proclamation stated: "Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, *acting under and by virtue of the authority conferred in me by the said joint resolution of Congress . . .*" *Id.* at 312 (emphasis added).

104. See notes 106-14 *infra* and accompanying text.

105. 299 U.S. at 320. *Accord*, *Reid v. Covert*, 354 U.S. 1, 17-19 (1957) (the Executive could not nullify the right of the American wife of an American military officer stationed overseas to a trial by jury).

106. 343 U.S. 579 (1951). In *Youngstown*, the Court considered the validity of an Executive order, given without Congressional authorization, directing the Secretary of Commerce to take possession of and to operate steel mills throughout the United States during a nationwide steel industry strike. The President contended that his action was necessary to avert a national catastrophe because a work stoppage would immediately imperil the national defense when the American armed forces were fighting in Korea.

power over foreign affairs did not give him the power temporarily to seize private property within the United States. Four of the concurring justices, however, limited their concurrence to instances wherein the President had attempted to use his emergency powers to override existing congressional legislation designed to deal with the same emergency.¹⁰⁷ It was on this basis that Justices Frankfurter, Jackson, Burton and Clark determined that President Truman had stepped beyond the proper bounds of the constitutionally mandated balance of powers separating the executive and legislative branches of government. Yet, Justice Jackson went beyond this limited fact situation and stated that “[w]here the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”¹⁰⁸ Thus, *Narenji* falls within the ambit of cases wherein presidential authority is weakest due to the recent congressional measures designed to eliminate nationality-based classifications in the area of immigration.¹⁰⁹

In *Youngstown*, the encroachment by the executive branch upon legislative authority was clear because there was existing legislation designed to meet the very emergency confronting the President.¹¹⁰ Congress had thus expressly rejected the idea of giving the President the very power he claimed. However, the majority opinion, and two of the concurring opinions, took the position that the President, even when national security interests are at stake, and even when Congress

107. *Id.* at 609 (Frankfurter, J., concurring), 637-38 (Jackson, J., concurring), 660 (Burton, J., concurring). See also the concurring opinion of Justice Clark which states “that in the absence of such action by Congress, the President’s independent power to act depends upon the gravity of the situation confronting the nation.” *Id.* at 662 (Clark, J., concurring).

108. *Id.* at 637 (emphasis added).

109. See notes 93-94 *supra* and accompanying text. Justice Jackson also suggested that the President could never use his emergency powers or his powers as Commander in Chief of the armed forces to assume a legislative function. 343 U.S. at 644-50 (Jackson, J., concurring). Justice Jackson noted that the Constitution had limited its express grant of presidential emergency authority to the suspension of the writ of habeas corpus in time of rebellion or invasion and concluded that the Constitution could not be amended by the courts to confer upon the President inherent powers to meet an emergency. *Id.* at 650. Justice Jackson reasoned that Congress’ power to enact legislation to deal with emergencies precluded the Executive from investing himself with undefined emergency powers. His conclusion seems particularly apt to *Narenji*:

The Executive, except for recommendation and veto, has no legislative power. The executive action we have here originates in the individual will of the President and represents an exercise of authority without law. No one, perhaps not even the President, knows the limits of the power he may seek to assert in this instance and the parties affected cannot learn the limits of their rights.

Id. at 655.

110. *Id.* at 585-86.

has not yet acted upon the issue in question, is still without the power to make laws on his own.¹¹¹

In *New York Times Co. v. United States*,¹¹² the Court reaffirmed the principle that the Executive's authority over foreign affairs must be exercised in subordination to the applicable provisions of the Constitution. In *New York Times*, the President sought a federal court injunction against publication of a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy," popularly known as the *Pentagon Papers*. The President based his authority to seek such an injunction on the power given him by the Constitution over foreign affairs and on his power as Commander in Chief of the armed forces. Although the court was aware of the serious impact release of the classified study might have on national security, it held that the President's action was prohibited by the first amendment's rule against prior restraints, especially in the absence of any congressional authorization for the President to seek such a restraint.¹¹³

The Court's decisions in these cases rest upon the acknowledgment that presidential power to act in foreign affairs without congressional authorization exists only where constitutional rights are in no way abridged. Furthermore, the Court is very reticent to construe statutes to give the executive branch power to infringe upon individual liberties, even when the Executive's foreign affairs power is implicated.¹¹⁴

The court of appeals in *Narenji* suggested an exception to this general limitation on the power of the Executive over foreign affairs:¹¹⁵ though the President is barred from using his foreign affairs power to curtail the constitutional rights of *citizens*,¹¹⁶ he nonetheless shares power with Congress to curtail the constitutional rights of *aliens*. The ensuing discussion will demonstrate that this exception does not exist.

111. *Id.* at 644-51 (Jackson, J., concurring). See also the concurring opinion of Justice Douglas which states: "If we sanctioned the present exercise of power by the President, we would be expanding Article II of the Constitution and rewriting it to suit the political conveniences of the present emergency." *Id.* at 632 (Douglas, J., concurring).

112. 403 U.S. 713 (1971) (per curiam).

113. *Id.* at 714, 732-33 (White, J., concurring), 742-46 (Marshall, J., concurring).

114. See *Kent v. Dulles*, 357 U.S. 116 (1958), discussed at note 85 *supra*. In *Kent*, the Court held that without a clear congressional delegation of authority, the Secretary of State did not have the power to restrict individual liberties guaranteed by the fifth amendment, even though the foreign affairs power of the executive branch was implicated in his decision to deny issuance of a passport.

115. "Distinctions on the basis of nationality may be drawn in the immigration field by the Congress or the Executive." 617 F.2d at 747.

116. See notes 106-14 *supra* and accompanying text.

E. Extent of Presidential Power Over Immigration

The broadest language used by the Supreme Court in defining the respective powers of the legislative and executive branches over immigration is found in *Knauff v. Shaughnessy*.¹¹⁷ In *Knauff*, the Court considered whether an act of Congress, giving the executive branch authority to exclude an alien from entry into the United States without a hearing during wartime, was an unconstitutional delegation of legislative power.¹¹⁸ In upholding the constitutionality of the legislative delegation, the Court stated:

The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.

Thus the decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General. The action of the executive officer under such authority is final and conclusive.¹¹⁹

While the Court recognized the exclusion of aliens as a power inherent in the Executive, it stated that this power "may be lawfully placed with the President,"¹²⁰ thereby implying that however inherent the executive power over immigration, it must first be authorized by Congress.

Fortunately, determination of this issue does not rest upon interpretation of the preceding passages. Three years after *Knauff*, the Court clarified its position in *Galvin v. Press*:¹²¹

Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the *enforcement* of these policies, the Exec-

117. 338 U.S. 537 (1950).

118. 22 U.S.C. § 223 (1979) (this citation is to the Act as it then existed).

119. 338 U.S. at 542-43 (citations omitted).

120. *Id.* at 543.

121. 347 U.S. 522 (1954). In *Galvin*, the Court upheld the validity of § 22 of the Internal Security Act of 1950, 50 U.S.C. §§ 781, 785 (1951), which required that the plaintiff, an alien resident of long standing, be deported because of his past membership in the Communist Party.

utive Branch of the Government must respect the procedural safeguards of due process. *But that the formulation of these policies is entrusted exclusively to Congress* has become about as firmly imbedded in the legislative and judicial issues of our body politic as any aspect of our government.¹²²

The court of appeals in *Narenji* cited *Mathews v. Diaz*¹²³ to support its proposition that “[d]istinctions on the basis of nationality may be drawn in the immigration field by the Congress or the Executive.”¹²⁴ In *Mathews*, as well as in the cases which followed it,¹²⁵ the Court used broad language when denoting the power of the legislative and executive branches to draw distinctions between classes of aliens based on nationality. It is important to note, however, that in each of these cases the Court was speaking of executive power within the context of either a *legislative enactment*, or a *delegation of legislative power* to the executive branch.

In *Mathews*, the Court recognized that decisions in the area of immigration necessarily affect foreign relations and are, therefore, more appropriately left to the legislature or to the Executive than to the judiciary. It was for this reason that the Court observed that “[a]ny rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution.”¹²⁶ The *Mathews* Court was considering a congressional enactment. Nowhere did the Court state or imply that the Executive, acting without congressional authorization, could act in the area of immigration under his foreign affairs power.

The court of appeals in *Narenji* also cited *Fiallo v. Bell*¹²⁷ to support this proposition. In *Fiallo*, the Supreme Court considered the constitutionality of a congressional enactment which had the effect of excluding illegitimate children or the natural fathers of illegitimate children from the “special preference” immigration status accorded to alien “children” or “parents” of United States citizens or lawful perma-

122. *Id.* at 531 (citations omitted) (emphasis added). *Accord*, *Harisiades v. Shaughnessy*, 342 U.S. 580, 586-87 (1952); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893).

123. 426 U.S. 67 (1976).

124. 617 F.2d at 747.

125. *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976). *See also Fiallo v. Bell*, 430 U.S. 787 (1977). For further discussion of these cases, *see* notes 127-30 and 131-34 *infra* and accompanying text.

126. 426 U.S. at 81.

127. 430 U.S. 787 (1977).

ment residents.¹²⁸ The *Fiallo* Court cited *Mathews* in support of the policy of limited judicial scrutiny of congressional enactments in the field of immigration.¹²⁹ It was in this context that the Court in *Fiallo* quoted *Mathews* for the proposition that decisions in the area of immigration are more appropriately left to the legislative or executive branches than to the judiciary.¹³⁰

The language of *Mathews* and *Fiallo* is admittedly broad, and somewhat vague, when read with the hope of cementing the delineation between the respective powers of Congress and the Executive over immigration. A fair reading of these cases in light of their facts, however, limits the application of this language to instances where Congress has enacted specific legislation curtailing the rights of aliens, or where it has delegated the authority to do so to the Executive. Further support for this conclusion is found in the recent case of *Hampton v. Mow Sun Wong*.¹³¹ In *Hampton*, the Supreme Court held that a regulation promulgated by the Civil Service Commission which discriminated between aliens and citizens exceeded the Commission's authority. While the Court found that Congress had delegated to the Executive its authority to issue the regulation,¹³² and the Executive had, in turn, delegated his authority to the Commission, it ruled that there was no legitimate basis for presuming that the rule was intended to serve any "overriding national interest" promoted by the Commission.¹³³ The Court did imply, however, that the Executive, *pursuant to the authority vested in him by Congress*, could issue the same regulation based on "overriding national interests" protected by the Executive.¹³⁴

128. 8 U.S.C. §§ 1101(b)(1)(D), 1101(b)(2) (1976).

129. 430 U.S. at 796.

130. *Id.*

131. 426 U.S. 88 (1976).

132. For a detailed discussion of the Court's opinion, see *Hampton* on remand, 435 F. Supp. 37, 42 (N.D. Cal. 1977). For purpose of comparison with the immigration statutes at issue, note the language of the statutes which the Court interpreted as delegating to the President sufficient authority to exclude aliens from the civil service.

5 U.S.C. § 3301 (1976) provides, in its entirety, as follows: The President may—

(1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;

(2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and

(3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

5 U.S.C. § 3302 (1976) provides in part as follows:

The President may prescribe rules governing the competitive service. The rules shall provide, as nearly as conditions of good administration warrant, for—

(1) necessary exceptions of positions from the competitive service

133. 426 U.S. at 114-17.

134. Pursuant to the Court's dicta in *Hampton*, President Ford, on September 2, 1976,

There is language in *Hampton* which might support the argument that the Executive's power to promulgate the regulation is commensurate with that of Congress. Thus, the Court stated that "[w]e proceed to a consideration of [whether the Commission's regulation is valid], assuming, without deciding, that the Congress and the President have the constitutional power to impose the requirement that the Commission has adopted."¹³⁵ In looking at the context in which this language arose, however, it is apparent that the Court was again dealing with a statute which specifically delegated to the President the requisite authority to promulgate the regulation. Pursuant to this statute, both Congress and the President could be assumed to have commensurate constitutional authority to issue the regulation.

In light of the Court's watchdog policy over attempts by the executive branch to step beyond its constitutional boundaries,¹³⁶ and the Court's firm delineation of those boundaries in the field of immigration,¹³⁷ it is highly questionable that the Court would overturn its own precedent and hold that the Constitution has given the Executive power to act unilaterally in immigration matters without expressly so stating. Because neither Congress nor the Constitution has conferred upon the executive branch power to promulgate a rule discriminating against aliens on the basis of nationality, regulation 214.5 was invalid as an unauthorized encroachment by the executive branch over powers reserved exclusively to Congress by the Constitution.

F. *Justiciability of Narenji Under the Political Question Doctrine*

After finding that Congress had delegated to the Attorney General sufficient power to promulgate regulation 214.5, the court of appeals refused to subject the regulation to judicial scrutiny due to the Execu-

under the authority vested in him by 5 U.S.C. §§ 3301 and 3302, ordered that the same regulation be added to the Civil Service Code. Executive Order 11,935, 41 Fed. Reg. 37,301 (1976). It is important to note that the President relied upon the authority vested in him by Congress in issuing the regulation (not upon his own inherent power) and stated as justification for his order the same national interests which the *Hampton* Court indicated would be adequate justification for a presidential order. On *Hampton's* remand to the district court, the President's order was held to be constitutional. *Mow Sun Wong v. Hampton*, 435 F. Supp. 37 (N.D. Cal. 1977). The Ninth Circuit has recently affirmed the district court's ruling, *Mow Sun Wong v. Campbell*, 626 F.2d 739 (9th Cir. 1980). The Seventh Circuit has also held that the Presidential order is constitutional. *Vergara v. Hampton*, 581 F.2d 1281 (7th Cir. 1978).

135. 426 U.S. at 114.

136. See notes 106-14 *supra* and accompanying text.

137. See notes 121-22 *supra* and accompanying text.

tive's power over foreign affairs.¹³⁸ It is now necessary to consider whether the regulation's constitutionality was, in fact, justiciable.

In *Baker v. Carr*,¹³⁹ the Supreme Court set forth the test for determining whether a case involving a political question was outside the realm of inquiry by the federal courts.¹⁴⁰ Factors which the Court considered important were: 1) whether the Constitution had committed the issue to a coordinate political branch, 2) whether there were judicial standards for resolving the issue, 3) whether resolution of the issue required an initial policy determination inappropriate to the judiciary, 4) whether the court's independent resolution of the issue would infringe on the powers accorded coordinate branches of the government, 5) whether there is an unusual need for unquestioning adherence to the government's decision, and 6) whether embarrassment might result from the judiciary's independent resolution of the issue.¹⁴¹

Matters concerning immigration have been confined explicitly to the legislative branch by the Constitution.¹⁴² However, due to the need to protect rights accorded to aliens by the Constitution, the Court has set forth "judicially discoverable and manageable standards for resolving" the constitutionality of legislative enactments and federal regulations in the field of immigration.¹⁴³ Moreover, *Narenji* was a case which could have been decided "without an initial policy determination of a kind clearly for nonjudicial discretion."¹⁴⁴ *Narenji* did not call for a determination of whether the President's foreign policy toward Iran was appropriate. It called, rather, for a determination of whether

138. 617 F.2d at 748.

139. 369 U.S. 186 (1962). In *Baker*, the Court held that a challenge to a state statute which apportioned the seats in the Tennessee General Assembly among the state's ninety-five counties presented a justiciable constitutional issue.

140. In introducing its discussion of the political question doctrine the Court explained:

The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

Id. at 210-11.

141. *Id.* at 217.

142. U.S. CONST. art. I, § 8, cl. 4.

143. 369 U.S. at 217. Thus, legislative enactments regarding immigration are subject to judicial scrutiny under the "wholly irrational" test set forth in *Mathews v. Diaz*, 426 U.S. 67 (1976). See notes 56-68 *supra* and accompanying text. Federal regulations issued under a congressional delegation of authority are subject to judicial scrutiny under the "legitimate basis" test as set forth in *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976). See notes 131-34 *supra* and accompanying text.

144. 369 U.S. at 217.

the presidential directive unconstitutionally abridged the rights of Iranian nonimmigrant students within the United States. The Court has not avoided considering the constitutionality of presidential directives based on foreign affairs concerns in the past.¹⁴⁵ As the Court stated in *Baker*: "[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."¹⁴⁶

The Supreme Court has recognized both the extraordinary power of the President over foreign affairs and of Congress over immigration. However, it has not considered scrutinizing presidential and legislative enactments in these areas to constitute disrespect for the coordinate branches of government, when upholding its own mandate to protect individuals against the abridgment of their constitutional rights.¹⁴⁷ Furthermore, presidential policy decisions taken in time of war or national emergency frequently give rise to the need for unquestioning adherence to presidential decisions. Yet, however great this need may seem, it has not kept the Court from examining presidential directives which have abridged constitutionally guaranteed rights in the past.¹⁴⁸ It is also true that whenever the courts question a presidential decision there exists the potential for embarrassment. Again, this has not kept the Court from examining presidential decisions which pose serious constitutional questions.¹⁴⁹

The District of Columbia Circuit Court of Appeals itself has recognized the responsibility of the federal judiciary to protect aliens' fifth amendment rights against encroachment by the political branches of government.¹⁵⁰ It is with this same recognition that the court should

145. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); notes 106-11 *supra* and accompanying text. See also *New York Times v. United States*, 403 U.S. 713 (1971); notes 112-13 *supra* and accompanying text.

146. 369 U.S. at 211.

147. See note 145 *supra*.

148. *Id.*

149. *Id.*

150. *Han-Lee Mao v. Brownell*, 207 F.2d 142 (D.C. Cir. 1953). In *Brownell*, the court held that an executive officer cannot detain in this country an alien lawfully resident herein without first giving him a chance to be heard on the questions involving his right to leave. The court considered the issue of justiciability and stated:

Courts ordinarily regard it as beyond their province to interfere with the exercise of what has been aptly called the 'peculiarly political' sovereign power of the United States to deal with aliens. . . . But, as the Court [has been] careful to imply, governmental policy toward aliens is not wholly immune from judicial power. The political branches of government cannot deny the protection of the Fifth Amendment to an alien who is entitled to invoke it.

Id. at 145-46 (footnotes omitted).

Although the plaintiff in *Brownell* was a lawful resident alien, it should be noted that the fifth amendment protection extends to "[e]ven one whose presence in this country is

have approached *Narenji*.¹⁵¹

Had the *Narenji* court found that Congress had not delegated sufficient authority to the Attorney General to issue regulation 214.5, it would have been necessary for it to determine whether the regulation constituted an unconstitutional encroachment by the executive branch upon legislative powers. This question, like that of the regulation's constitutionality under the fifth amendment, is justiciable.

In *Buckley v. Valeo*,¹⁵² the Supreme Court determined that the legislature had stepped outside the bounds of its own constitutional powers and into those reserved to the executive branch of government. The Court noted that it had never hesitated, in the past, "to enforce the principle of separation of powers embodied in the Constitution when its application [had] prove[n] necessary for the decisions of cases or controversies properly before it."¹⁵³ It is, therefore, apparent that the court of appeals in *Narenji* could have determined the regulation's constitutionality had it so chosen.

unlawful, involuntary, or transitory." *Mathews v. Diaz*, 426 U.S. at 77, *see notes 56-67 supra* and accompanying text.

151. *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979), which the Supreme Court held to be nonjusticiable, due to the need to consider the President's conduct in foreign affairs and the extent to which Congress may negate such conduct, is distinguishable from *Narenji*. In *Goldwater*, the Court was asked to determine whether the President had power to terminate a mutual defense treaty with Taiwan without express congressional ratification. For a more detailed report of the facts in *Goldwater*, *see* the court of appeals opinion at 617 F.2d 697 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979). The Court based its finding of nonjusticiability on the "purely external" impact of the President's action. The Court distinguished *Goldwater* from *Youngstown*, noting that *Youngstown* involved a presidential decision which would have drastic internal, not merely external, impact. The Court also noted that *Goldwater* involved "a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum." 444 U.S. at 1004 (Rehnquist, J., concurring) (footnote omitted). Thus, the grounds upon which the *Goldwater* Court based its finding of nonjusticiability cannot be found in *Narenji*, due to the domestic impact of the President's order and the lack of alternative resources available to plaintiffs outside the judicial forum.

152. 424 U.S. 1 (1976) (per curiam). In *Buckley*, the Court considered the constitutionality of the Federal Election Campaign Act of 1971, as amended in 1974. The Court held that Congress did not have sufficient constitutional power to authorize the Commission (which it had appointed to carry out the provisions of the Act) to exercise broad administrative and enforcement powers. *Id.* at 137-41. The Court considered these powers and stated that, "none of them operates merely in aid of congressional authority to legislate or is sufficiently removed from the administration and enforcement of public law to allow it to be performed by the present Commission." *Id.* at 141.

153. *Id.* at 123 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-88 (1952); *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1852); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792)).

IV. CONCLUSION

In order for the executive branch of government to abrogate the constitutional rights afforded to aliens, it must first possess the authority to do so. Neither Congress nor the Constitution has conferred such power upon the President or the Attorney General. That Congress has reserved for itself substantive policy decisions in the area of immigration refutes the contention that it would delegate such authority to the Attorney General without expressly so stating. Furthermore, the President, in exercising his foreign affairs power, is subject to constitutional restraints. The Supreme Court has seriously appraised the conflict between the need for executive expediency in foreign affairs and the need to protect individual rights, and has concluded that the foreign affairs power cannot be used to justify presidential orders which abridge constitutional rights.

The federal judiciary has been ever diligent in upholding its constitutional mandate to protect individual rights. In so doing, it has had to remain aloof from the storm of public emotion in the greater interest of preserving public freedom. That the court of appeals has failed to do so here leaves the tenure and constitutional protections afforded to aliens dubious at best, and disrupts the balance of power between the three branches of our democratic government.

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