CONSTITUTIONAL LAW—EQUAL PROTECTION—EQUAL PROTECTION DOES NOT PROTECT NONIMMIGRANT IRANIAN STUDENTS FROM SELECTIVE DEPORTATION—*Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 100 S. Ct. 2928 (1980).

On November 4, 1979, militant Iranian students stormed the United States embassy in Tehran, Iran.[1] Sixty-five United States citizens in the embassy compound were taken hostage.[2] The students demanded the return to Iran of the deposed Shah, who was then receiving medical treatment in the United States.[3]

President Carter, responding swiftly to the embassy takeover, directed Attorney General Civiletti to identify Iranian students in this country who were not in compliance with the terms of their entry visas and to commence deportation proceedings against violators.[4] On November 13, 1979, Civiletti issued the Requirements for Maintenance of Status for Nonimmigrant Students from Iran, applicable only to Iranians and effective immediately.[5] The regulation ordered all

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[1] Narenji v. Civiletti, 481 F. Supp. 1132, 1134 (D.D.C. 1979), *rev'd*, 617 F.2d 745 (D.C. Cir.), *cert. denied*, 100 S. Ct. 2928 (1980).

[2] *Id.* at 1135.

[3] N.Y. Times, Nov. 5, 1979, at 1, col. 3.

[4] Narenji v. Civiletti, 481 F. Supp. 1132, 1135 (D.D.C. 1979), *rev'd*, 617 F.2d 745 (D.C. Cir.), *cert. denied*, 100 S. Ct. 2928 (1980). Among the immediate measures President Carter implemented were a ban on imports of Iranian oil, Pres. Proc. No. 4702, 44 Fed. Reg. 65,581 (1979), and a freeze of Iranian assets in United States banks. Exec. Order No. 12,170,44 Fed. Reg. 65,729 (1979).

See Announcement on Actions to be taken by the Department of Justice, 15 WEEKLY COMP. OF PRES. DOC. 2107, 2107 (Nov. 10, 1979).

[5] 8 C.F.R. § 214.5 (1979). The regulation reads:

PART 214—NONIMMIGRANT CLASSES

§ 214.5 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 of nonimmigrant 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 such other 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

Iranian nonimmigrant students to report to the Immigration and Naturalization Service (INS) to verify their student status.[6]

A class action was filed by Narenji and two other Iranian students in the United States challenging the regulation.[7] The class consisted of all Iranian nonimmigrant students in this country who were affected by the regulation.[8] In *Narenji v. Civiletti*,[9] the United States District Court for the District of Columbia held that the regulation impermissibly discriminated against aliens upon the basis of national origin.[10] The Court of Appeals for the District of Columbia Circuit reversed the decision of the district court, ruling that nationality distinctions in matters of immigration must be upheld unless " 'wholly irrational.' "[11] The United States Supreme Court denied certiorari.[12]

The *Narenji* plaintiffs' principal contention was that the regulation violated the guarantee of equal protection of the laws under the fifth amendment due process clause.[13] Since the regulation applied

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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 November 13, 1979. Dated: November 13, 1979. Benjamin R. Civiletti, Attorney General of the United States.

8 C.F.R. § 214.5 (1979).

[6] Narenji v. Civiletti, 481 F. Supp. 1132, 1136 (D.D.C. 1979), *rev'd*, 617 F.2d 745 (D.C. Cir.), *cert. denied*, 100 S. Ct. 2928 (1980).

[7] Narenji v. Civiletti, 481 F. Supp. 1132 (D.D.C. 1979), *rev'd*, 617 F.2d 745 (D.C. Cir.), *cert. denied*, 100 S. Ct. 2928 (1980).

[8] Narenji v. Civiletti, 481 F. Supp. 1132, 1134 n.1 (D.D.C. 1979), *rev'd*, 617 F.2d 745 (D.C. Cir.), *cert. denied*, 100 S. Ct. 2928 (1980).

[9] 481 F. Supp. 1132 (D.D.C. 1979), *rev'd*, 617 F.2d 745 (D.C. Cir.), *cert. denied*, 100 S. Ct. 2928 (1980).

[10] *Id.* at 1145.

[11] Narenji v. Civiletti, 617 F.2d 745, 747 (D.C. Cir.), *cert. denied*, 100 S. Ct. 2928 (1980).

[12] 100 S. Ct. 2928 (1980).

[13] 481 F. Supp. at 1136, 1138.

only to Iranians, plaintiffs argued, it unconstitutionally discriminated on the basis of national origin.[14] In considering plaintiffs' claim, the district court balanced the Iranian students' right to equal protection against the President's "need for freedom of action in international affairs."[15] The court recognized that the equal protection guarantee was applicable to aliens.[16] It also considered what defendants claimed was an "equally well-established precedent" allowing the

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[14] *Id.* at 1136. The regulation was also challenged as invalidly promulgated inasmuch as the defendants failed to provide the public with a period of notice and comment as required by the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1976). Violations of the fourth amendment, because of "compelled interrogation" and of the first amendment, because of infringement upon the rights of free speech, association, and assembly were also alleged. 481 F. Supp. at 1136. Since the regulation was held violative of the fifth amendment, the district court did not reach the first and fourth amendment claims. *Id.* at 1145.

The district court began its analysis with an examination of the alleged nonconstitutional grounds for the regulation's invalidity. First, the court held that the Attorney General acted within the latitude accorded him by Congress in issuing regulations requiring that Iranian students bring documentation to the INS district offices:

> Putting aside the constitutional issues involved in the enforcement of Section 214.5, the Court finds its requirements and conditions to be proper as within the latitude given the executive under Section 1184(a) "to insure that . . . upon failure to maintain status under which he was admitted . . . such alien will depart from the United States.". . . [T]he requirement that failure to report will be considered a violation of status comes within the Attorney General's power to insure that nonimmigrant aliens who are out of status will leave this country.

Id. at 1137-38 (quoting 8 U.S.C. § 1184(a) (1976)). Second, the court found that noncompliance with the notice and comment provision of the APA was permissible under an exception which allows waiver where notice would be "impracticable, unnecessary, or contrary to the public interest." *See* 5 U.S.C. § 553(b)(B) (1976). In this case, the court reasoned, any delay in implementation would weaken the regulation's impact on the Iranian crisis, thus rendering the rule impracticable and against the public interest. 481 F. Supp. at 1137.

[15] 481 F. Supp. at 1145.

[16] *Id.* at 1138. *See generally* Oyama v. California, 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayaski v. United States, 320 U.S. 81 (1943); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

Aliens are "persons" within the meaning of the due process clause of the fifth amendment. This clause contains an equal protection guarantee similar to that of the equal protection clause of the fourteenth amendment which applies to state and local governments. When a classification of the federal government is in question, as in *Narenji,* the equal protection guarantee of the fifth amendment due process clause applies. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 536 (1978).

Traditionally, a "two-tiered" method of analysis was applied in equal protection cases. The first tier, or standard of review, has been labeled the "rational relationship" test. In reviewing legislative classifications under this test, the courts inquire only as to whether the classification has a rational relationship to the purposes of the legislation. Under this test, as long as the government has a legitimate reason for the classification, the courts will sustain the law. *Id.* at 522-27.

The second tier, or standard of review, is the "strict scrutiny" test. Courts apply this test whenever the law is based upon a "suspect" classification such as race or whenever it impinges upon a "fundamental right." Alienage has historically been considered a suspect classification. In recent years, however, the two-tiered analysis has been heavily criticized. Alienage classifica-

political branches of government great latitude in immigration and naturalization affairs.[17] An added factor, and one which weighed against the constitutionality of the regulation, was that President Carter was acting in an area over which Congress has primary responsibility, immigration and naturalization.[18]

As noted by the district court, congressional responsibility for immigration and naturalization policy is founded in article one, section eight, clause four of the Constitution, which gives Congress the power "[t]o establish a uniform Rule of Naturalization."[19] The Supreme Court in *Galvan v. Press*[20] stated that development of "[p]olicies pertaining to the entry of aliens and their right to remain here . . . [are] entrusted exclusively to Congress."[21] Historically, however, members of the executive branch, and especially the Attorney General, have been charged with implementing and enforcing statutory policy once Congress has spoken.[22] Judicial review of such matters, especially when foreign policy concerns are present, is extremely narrow.[23] Thus, the *Narenji* defendants, relying on *Galvan* and several other Supreme Court decisions, argued that the district court was precluded from examining the challenged regulation except to the extent that it was " 'wholly irrational.' "[24]

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tions, among others, are today reviewed under a more relaxed standard. *See id.* For example, in Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976), the Supreme Court recognized that "there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State." *Id.* at 100. The *Narenji* district court opinion applied this "overriding national interest" test. 481 F. Supp. at 1144.

[17] 481 F. Supp. at 1139.

[18] *Id.* at 1145.

[19] U.S. CONST. art. I, § 58, cl. 4.

[20] 347 U.S. 522 (1954).

[21] *Id.* at 531. *Accord,* Fiallo v. Bell, 430 U.S. 787, 792 (1977); Kliendienst v. Mandel, 408 U.S. 753, 766 (1972). *See* Oceanic Stream Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909) ("over no conceivable subject is the legislative power of Congress more complete than it is over [immigration and nationalization]").

Concerning the relationship between Congress and the Executive in immigration matters see Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893):

> The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.

Id.

[22] 481 F. Supp. at 1139-40 (citing Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893)). *See* note 21 *supra.*

[23] *See, e.g.,* Fiallo v. Bell, 430 U.S. 787, 796 (1977); Hampton v. Mow Sun Wong, 426 U.S. 88, 101 & n.12 (1976); Mathews v. Diaz, 426 U.S. 67, 81 (1976).

[24] 481 F. Supp. at 1140.

District Court Judge Green rejected this argument, drawing a "fundamental distinction" between the cases relied upon by defendant and the *Narenji* case.[25] In the former, the challenged regulation was either a specific enactment of Congress,[26] devised directly under congressional authority,[27] or formulated under other than congressional or executive authority over immigration and naturalization.[28] In the latter, while the Attorney General had "broad, general authority"[29] to establish regulations for aliens, this authority was "neutral",[30] and did not permit the Attorney General to make distinctions on the basis of national origin.[31] After an examination of legislative intent,[32] the district court concluded that no statutory basis existed for allowing the discriminatory classification.[33]

The district court then disposed of the argument that the inherent right of the President to act in international affairs[34] gave President Carter the power to selectively enforce the regulation.[35] Defendants argued that the nature of foreign affairs, requiring as it does expeditious action from the executive, demanded that the President act even without congressional assent.[36] The court examined the issue of delegation of congressional and executive authority in light of the "paramount" case in this area, *Youngstown Sheet & Tube Co. v. Sawyer*.[37] The Supreme Court in *Youngstown* held that in the absence of congressional authorization President Truman was not empowered to seize the steel mills in order to prevent a strike, even

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[25] *Id.*

[26] *See* Fiallo v. Bell, 430 U.S. 787, 788-89 (1977); Mathews v. Diaz, 426 U.S. 67, 69-70 (1976); Kliendienst v. Mandel, 408 U.S. 753, 754-56 (1972); Galvan v. Press, 347 U.S. at 529-32; Harisiades v. Shaughnessy, 342 U.S. 580, 583-84 (1952).

[27] United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 540-42 (1950).

[28] Hampton v. Mow Sun Wong, 426 U.S. 88, 114-16 (1976).

[29] 481 F. Supp. at 1140.

[30] *Id.* at 1141.

[31] *Id.*

[32] *Id.*

[33] *Id.* The court stated:

> We, therefore, find no statutory basis for the discriminatory classification established by the reputation such that defendants could cloak their rule's discriminatory effect in the mantle of congressional approval under its power over immigration and naturalization and thereby for practical purposes, exempt the regulation from judicial scrutiny.

Id.

[34] *Id.* Defendants contended that the Executive has an "inherent duty," arising under the Constitution, to act in matters involving foreign relations. This duty, defendants argued, gives the Executive concurrent authority with Congress to act in the sphere of immigration and naturalization. *Id.* at 1141 & n.8.

[35] *Id.*

[36] *Id.*

[37] 343 U.S. 579 (1952).

though the strike would have curtailed steel production which was vitally needed for the Korean War effort.[38]

The *Narenji* court relied on Justice Jackson's concurring opinion in *Youngstown*,[39] which defined three situations in which a President's authority to act may be questioned.[40] In the first situation, when the President acts under the "authorization of Congress, his authority is at its maximum."[41] In the second situation, when a President acts where Congress has not spoken, his power is more limited; "he can only rely on his own independent powers,[42] but there is a 'zone of twilight' " in the second situation where the President and Congress share authority.[43] In the third situation, when the President acts in defiance of Congress, "his power is at its lowest ebb."[44]

Applying this analysis to the challenged regulation, the *Narenji* district court noted that congressional authorization of executive action had been neither granted nor denied.[45] Therefore, this case fell within Justice Jackson's second category.[46] Furthermore, since Congress is principally responsible for immigration and the President is primarily responsible for foreign affairs, the challenged regulation fell within Jackson's "twilight zone."[47] In this zone, any actual " 'test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.' "[48]

Judge Green reasoned that the Iranian crisis presented a strong argument for executive assertions of authority.[49] She quoted the Supreme Court's statement in *Mathews v. Diaz*,[50] 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."[51] At the same time, however, and "above all," the executive must act within the limits of the Constitution.[52] In determining that President Carter

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[38] *Id.* at 587-88.
[39] 481 F. Supp. at 1142.
[40] *Id.* (citing Youngstown, 343 U.S. at 635-38 (Jackson, J., concurring)).
[41] 343 U.S. at 635 (Jackson, J., concurring).
[42] *Id.* at 637 (Jackson, J., concurring).
[43] *Id.* (Jackson, J., concurring).
[44] *Id.* at 637-38 (Jackson, J., concurring).
[45] 481 F. Supp. at 1142-43.
[46] *Id.* at 1143.
[47] *Id.*
[48] *Id.* (quoting Youngstown, 343 U.S. at 637 (Jackson, J., concurring)).
[49] 481 F. Supp. at 1143.
[50] 426 U.S. 67 (1967).
[51] 481 F. Supp. at 1143 (quoting Mathews v. Diaz, 426 U.S. at 81).
[52] 481 F. Supp. at 1143.

had overstepped these limits, Judge Green analogized *Narenji* to *Kent v. Dulles*.[53] In *Kent*, the Supreme Court held that the Secretary of State, purportedly authorized to act under a broad congressional enactment vesting him with authority to issue passports, did not have the right to deny passports to alleged members of the Communist Party.[54] To allow this denial would have been to sanction an infringement of the "liberty" guaranteed to each citizen by the fifth amendment due process clause.[55] In *Narenji*, another constitutional right, that of equal protection, was threatened.[56]

Normally, a classification based upon national origin would trigger strict judicial scrutiny and the use of the compelling governmental interest test in order to ascertain whether it passed constitutional muster under the equal protection doctrine.[57] Given foreign affairs implications, however, the district court in *Narenji* applied the less stringent "overriding national interest"[58] test enunciated in *Hampton v. Mow Sun Wong*.[59] Defendants asserted that three "interests" met this test: protection of the hostages' lives, the diplomatic need to respond to Iranian actions, and the need to identify Iranian students as a means of facilitating future responses to the crisis.[60] Judge Green deemed that only the first interest, protecting the lives of the hostages, was even arguably overriding.[61] Since a "dubious relationship"[62] existed between the pgesence of Iranian students in the United States and the safety of the American hostages in Tehran, the government had failed to show an "overriding national interest" that would justify the discriminatory requirements.[63] Hence, the regulation was declared unconstitutional and deportation proceedings were permanently enjoined.[64]

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[53] 357 U.S. 116 (1958).

[54] *Id.* at 129-30.

[55] *Id.* at 129.

[56] 481 F. Supp. at 1144:

> As in *Kent*, the right here involved—the guarantee of equal protection of the laws implicit in the due process clause of the Fifth Amendment—is one fundamental to the individual freedom of all persons, citizens and aliens alike, and it is one that the action of the executive threatens to totally annul.

Id.

[57] *See* note 16 *supra*. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944).

[58] 481 F. Supp. at 1144.

[59] 426 U.S. 88, 100 (1976).

[60] 481 F. Supp. at 1144.

[61] *Id.*

[62] *Id.* at 1144-45.

[63] *Id.* at 1145. The "overriding national interest" test was articulated by the Supreme Court in Hampton v. Mow Sun Wong, 426 U.S. 88 (1976). *See* notes 57-59 *supra* and accompanying text.

[64] 481 F. Supp. at 1145-46.

This ruling was reversed by the United States Court of Appeals for the District of Columbia.[65] In an opinion by Circuit Judge Robb, the court of appeals criticized the district court for undertaking a policy evaluation of the regulation and determined that it had stepped outside the boundaries of an acceptable judicial role.[66] The circuit court declared that either Congress or the Executive may draw distinctions by national origin in matters of immigration.[67] The regulation was characterized as a "fundamental element" of President Carter's response to the Iranian crisis.[68] Because foreign affairs were implicated and foreign policy determinations were within the President's province,[69] the President enjoyed "direct constitutional authority."[70] The court of appeals held that the Attorney General was authorized by the Immigration and Nationality Act to draw distinctions among nonimmigrant students on the basis of national origin.[71] Such distinctions, the court reasoned, should be sustained unless "wholly irrational."[72] Although the Court used a minimum scrutiny standard, it came close to finding that foreign policy is a "political question" and is outside the scope of any judicial review.

A request for a rehearing *en banc* was denied in a *per curiam* opinion.[73] The *Narenji* plaintiffs requested a rehearing due to the court of appeals' failure to discuss *Kent v. Dulles* which is considered a leading case in the area of congressional delegation of executive authority.[74] Judge MacKinnon, in voting to deny rehearing, stated that *Kent* was "substantially distinguishable" from the case at bar be-

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[65] 617 F.2d at 746.

[66] *Id.* at 748.

[67] *Id.* at 747.

[68] *Id.*

[69] *Id. See* Mathews v. Diaz, 426 U.S. 67, 81-82 (1976); Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). The court of appeals in *Narenji* stated:

> Certainly 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. Judges are not expert in that field and they lack the information necessary for the formation of an opinion. The President on the other hand has the opportunity of knowing the conditions which prevail in foreign countries, he has his confidential sources of information and his agents in the form of diplomatic, consular and other officials.

617 F.2d at 748.

[70] 617 F.2d at 748.

[71] *Id.* at 747.

[72] *Id. See also* Saxbe v. Bustos, 419 U.S. 65 (1974); Mathews v. Diaz, 426 U.S. 67, 81-82 (1976); Fiallo v. Bell, 430 U.S. 787 (1977); L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 258 (1972); Maltz, *Alienage Classifications*, 31 OKLA. L. REV. 671 (1978).

[73] 617 F.2d at 750.

[74] *Id.*

cause it involved "*American citizens* . . . not in violation of the laws . . . denied passports because they refused to sign non-communists affidavits [while] this case primarily involves nonimmigrant *aliens* who are *in violation* of our immigration laws."[75] In a separate opinion four judges set forth their reasons for voting to rehear the case, citing the "novel" and "grave" equal protection questions raised by the "selective . . . enforcement" of the regulation and the dearth of settled law on this issue of "exceptional importance."[76] The minority also indicated that "the fact that the President has taken this action without express authorization from Congress is a significant factor in the Constitutional balance."[77]

The central issues in *Narenji* were whether the constitutional guarantee of equal protection applies to nonimmigrant alien students in deportation matters, and whether the statutes authorizing executive action in immigration matters extend to making discriminatory classifications among aliens to further foreign policy objectives. The Constitution provides that *all* persons within our borders are entitled to equal protection.[78] The Supreme Court has broadened the reach of the equal protection guarantee beyond its original purpose as a deterrent to racial discrimination and has declared alienage to be a suspect classification.[79] It is now well settled that the equal protection guarantee is available to resident aliens in the United States.[80] In the context of entry and stay, however, congressional authority to regulate alien activity is treated with great deference. Consequently, courts will listen only "half-heartedly"[81] to arguments that constitutional guarantees are being infringed when Congress has authorized expulsion.[82]

Since a territorial approach is taken towards the reach of the Constitution,[83] aliens outside the United States are not entitled to its

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[75] *Id.* (MacKinnon, J., responding to the petition for rehearing).

[76] *Id.* at 754-55 (Wright, C.J., Robinson, Wald, Mikva, JJ., joint statement setting forth reasons for voting to grant petition for rehearing *en banc*).

[77] *Id.* at 754 n.4 (Wright, C.J., Robinson, Wald, Mikva, JJ., joint statement setting forth reasons for voting to grant petition for rehearing *en banc*).

[78] The fifth amendment due process clause provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST., amend. V. For an explanation of the fifth amendment equal protection guarantee see note 16 *supra*.

[79] *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1052 (1978). *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); Truax v. Raich, 239 U.S. 33 (1915); Wong Wing v. United States, 163 U.S. 228 (1896); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[80] *See generally* L. TRIBE, *supra* note 79, at 281.

[81] *Id.* at 281-82.

[82] *Id.*

[83] *Id.* at 282 n.30.

protections.[84] The Iranian students in *Narenji* were neither immigrant aliens, to whom at least some constitutional guarantees arguably applied, nor were they foreigners seeking entry to our borders, to whom only the most limited judicial review of congressional action would have been available.[85] Moreover, distinctions between foreign and domestic matters are deeply imbedded in constitutional law.[86] Because foreign governments are not accorded constitutional rights, distinctions among nations in the foreign policy arena do not trigger equal protection analysis.[87]

Yet, since 1886, when *Yick Wo v. Hopkins*[88] was decided, it has been settled law that foreign nationals in the United States are entitled to equal protection.[89] Although Congress undoubtedly has the power to make some discriminatory regulations concerning the admission of aliens,[90] Iranian students, once they entered the United States, should have been guaranteed the same protections that the Constitution affords to other aliens.

The Court of Appeals for the District of Columbia erred in its determination that the controversy surrounding "Iranian students in the United States lies in the field of our country's foreign affairs."[91] The enforcement of a statute against one group of aliens in the United States because of the activity of their homeland's government is just the type of distinction that is "odious to a free people whose institutions are founded upon the doctrine of equality."[92] President Carter's selective application of the law against Iranian students amounts to a denial of equal protection, even under the watered down equal protection standards accorded aliens under *Hampton v. Mow Sun Wong*,[93] and *Mathews v. Diaz*.[94]

The deportation of Iranian students, for which the *Narenji* decision paved the way, conjures up the memory of one of the blackest moments in American constitutional history: the Japanese internment cases. In *Korematsu v. United States*,[95] the Supreme Court held that

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[84] *See* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 255 (1972). *See, e.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950); United States v. Ju Tong, 198 U.S. 253, 263 (1905); Nishimura Ekiu v. United States, 142 U.S. 651 (1892).

[85] *See generally* L. TRIBE, *supra* note 79, at 275-84.

[86] L. HENKIN, *supra* note 84, at 258.

[87] *Id.*

[88] 118 U.S. 356 (1886).

[89] *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971); Truax v. Raich, 239 U.S. 33 (1915).

[90] L. HENKIN, *supra* note 84, at 258.

[91] 617 F.2d at 748.

[92] Hirabayashi v. United States, 320 U.S. 81, 100 (1943) (quoted at 481 F. Supp. at 1139).

[93] 426 U.S. at 88.

[94] 426 U.S. at 67.

[95] 323 U.S. 214 (1944). *See* Hirabayashi v. United States, 320 U.S. 81 (1943).

the incarceration of all persons of Japanese ancestry on the West Coast was constitutionally permissible.[96] Ironically, *Korematsu* was the first case in which the Court applied the compelling state interest test,[97] and one of the few cases in which a challenged regulation was able to withstand strict scrutiny. Open racial discrimination was upheld in *Korematsu*, but only after the Supreme Court emphasized that "[n]othing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify"[98] such restrictions. Only because a state of war existed did the Supreme Court refuse to prevent the flagrant violation of human rights. The *Korematsu* decision is universally condemned today.[99] That use of congressional power appears excessive, even in war-time, and yet the Government in *Narenji* had far less justification for the selective deportation of Iranians. No state of war existed between the United States and Iran. Furthermore, the *Narenji* regulations were not promulgated pursuant to congressional authority, but were passed solely upon executive initiative.[100]

As in *Korematsu*, the challenged regulation in *Narenji* was aimed at a group of people solely on the basis of national origin. Ordinarily, such a classification would have been subject to strict judicial scrutiny.[101] Since a new standard had evolved for federal regulations, and especially since nonimmigrant aliens were affected and foreign policy considerations were involved, the *Narenji* courts applied weaker standards of review.[102]

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[96] 323 U.S. at 218, 223.

[97] *Id.* at 218. *See generally* L. TRIBE, *supra* note 79, at 1013.

[98] 323 U.S. at 218.

[99] *See, e.g.*, L. TRIBE, *supra* note 79, at 1013 ("[T]he Court *upheld* as 'compellingly justified' an overtly racial discrimination") (emphasis in original); Rostow, *The Japanese-American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

[100] 481 F. Supp. at 1143:

> To 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 coexist.

Id.

[101] *See* note 16 *supra*.

[102] *See* 481 F. Supp. at 1144. The district court applied the "overriding national interest" test of Hampton v. Mow Sun Wong, 426 U.S. at 100, noting that " 'there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State.' " 481 F. Supp at 1144 (quoting *Hampton*). The court of appeals used the traditional "rational basis" standard of review. 617 F.2d at 747.

Regardless of what standard of review is usually applied, however, where deportation proceedings are concerned, the constitutional protections afforded citizens have been held not to apply, even to immigrant aliens.[103] Since deportation is not usually considered "punishment," alien "rights" are regularly abrogated in deportation matters.[104] Resident aliens have been deported for engaging in constitutionally protected activity. In *Galvan v. Press*,[105] for instance, Mr. Galvan was deported because he had been affiliated with the Communist Party, even though that Party was legal at the time of his involvement.[106]

Even if the regulation were otherwise unflawed, it could only have been validly promulgated by Congress. Congress enjoys exclusive constitutional authorization to regulate immigration matters.[107] Unless another executive power were implicated, such as that over foreign affairs, the executive branch could act in this arena only upon a proper delegation of authority.[108] In *Narenji*, the argument that the foreign affairs power of the President was at issue is a false premise: the activities of Iranian students in the United States and the activities of the Iranian government in Tehran are two separate issues.[109] Therefore, one must examine whether a proper delegation of Congressional authority existed under the circumstances.

Although Congress has delegated to the Attorney General the authority to promulgate regulations concerning the entry of aliens, this delegation does not give either the Attorney General or the President the authority to discriminate upon the basis of national origin.[110] In many other enactments, Congress has expressed distaste for national origin classifications.[111] In the immigration and naturali-

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[103] *See, e.g.*, Comment, *Due Process and Deportation—Is There a Right to Assigned Counsel?* 8 U.C.D. L. REV. 289. *See generally* L. HENKIN, *supra* note 84, at 255 & 491 n.23.

[104] *See generally* Note, *Deportation as Punishment: Plenary Power Re-Examined*, 52 CHI.-KENT L. REV. 466 (1975).

[105] 347 U.S. 522 (1954).

[106] *Id.* at 523.

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

[108] *See* Youngstown, 343 U.S. at 635-37 (Jackson, J., concurring).

[109] 481 F. Supp. at 1144.

[110] *Cf.* Kent v. Dulles, 357 U.S. at 128 ("We . . . hesitate to impute to Congress . . . a purpose to give [the Secretary of State] unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose").

[111] *See* 481 F. Supp. at 1141 (citing 42 U.S.C. § 2000a (1976) (public accomodations); *id.* § 2000b (public facilities); *id.* § 2000c-6 (public education); *id.* § 2000d (federally assisted programs); *id.* § 2000e-2 (public employment). *See also id.* §§ 1983, 1985 (1976).

zation field, Congress has been explicit when it intended to make national origin distinctions.[112]

The argument that the "inherent duty of the executive" empowered President Carter to direct the Attorney General to issue the regulations is a tenuous one. "Inherent power" does not mean "unlimited" power.[113] In *Kent v. Dulles*, which the court of appeals conspicuously failed to discuss, the foreign affairs power of the President was invoked to justify restrictions on the issuance of passports.[114] The court refused to allow this exercise of executive power, stating, "[i]f that 'liberty' [to travel] is to be regulated, it must be pursuant to the law-making functions of the Congress."[115]

By sustaining an unbridled exercise and abuse of executive power, the circuit court's opinion sets a dangerous precedent. Judge Green aptly stated the danger:

> Constitutional submission to the wash of emotion would eliminate the fair play and equality that is the quintessence of the American way, and it is cardinal that the diminishment of the rights of those most vulnerable diminishes in the end the rights of all others.[116]

Constitutional protections must not yield to the political passions of the moment. As a result of *Narenji*, whenever international crises arise, citizens of other countries who are temporarily in the United States are in jeopardy of "be[ing] singled out, selectively corralled, and required to perform certain actions to develop affirmatively that they individually are blameless despite the action of their government."[117]

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[112] 481 F. Supp. at 1141 (citing 8 U.S.C. §§ 110(b)(5), 1153(a)(7), 1253(g) (1976); 8 U.S.C. § 1182(a)(33) (1976)).

[113] *See generally* L. TRIBE, *supra* note 79, at 182-84. *See also* United States v. United States District Court, 407 U.S. 297 (1972) (no inherent executive authority to engage in warrantless wiretapping in domestic surveillance cases).

[114] 357 U.S. at 124-25.

[115] *Id.* at 129 (quoted at 481 F. Supp. at 1143-44).

[116] 481 F. Supp. at 1147.

[117] *Id.*