Selective Enforcement of Immigration Laws on the Basis of Nationality as an Instrument of Foreign Policy

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I. Introduction

Until recently, the President of the United States had not attempted to implement foreign policy by regulating aliens in the country through selective enforcement of immigration laws based on nationality. Besides the dubious causal relationship between selectively enforcing immigration laws and achieving foreign policy objectives, such presidential action is vulnerable to challenge on fifth amendment equal protection grounds. The question is: Under what circumstances do the equal protection rights of aliens outweigh the authority over immigration and foreign affairs vested in the federal government? The answer depends upon (1) whether the courts label the presidential action as deriving from the immigration power as well as the foreign affairs power; (2) the degree of judicial scrutiny given the President's justifications for discriminating among aliens in enforcing immigration laws; and (3) the equal protection standard applied to federal discrimination based on national origin. This note will explore the constitutional boundaries of this largely dormant foreign policy instrument. After evaluating the three factors outlined above, the note will conclude by suggesting ways the courts could combine the factors in reviewing the President's use of this foreign policy instrument.

II. The Narenji Decisions

The Supreme Court of the United States has not yet addressed the validity of selective enforcement of immigration laws on the basis of nationality as an instrument of foreign policy. Recently, however, the United States Court of Appeals and the United States District Court for the District of Columbia tackled the issue in Narenji v. Civiletti, a consolidated class action filed on behalf of non-immigrant students of Iranian nationality. This case involved the President's first assertion of his foreign affairs power in the enforcement of immigration laws to regulate aliens of a particular nationality residing in the United States.

On November 4, 1979, a group of Iranians invaded and occupied the United States Embassy in Tehran, Iran, taking approximately sixty-five American citizens as hostages. On November 10, 1979, President Jimmy Carter responded to

1 The Supreme Court in Oyler v. Boles, 368 U.S. 448, 456 (1962), held that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." However, there are grounds for claiming an equal protection violation if the selective enforcement is "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." Id. See also Yick Wo v. Hopkins, 118 U.S. 356 (1886).


this breach of international law by directing the Attorney General to “identify any Iranian students in the United States who are not in compliance with the terms of their entry visas, and to take the necessary steps to commence deportation proceedings against those who have violated applicable immigration laws and regulations.” Three days later, pursuant to his authority under the Immigration and Nationality Act of 1952, the Attorney General issued a regulation immediately effective and applicable only to Iranian students. The regulation required nonimmigrant post-secondary students of Iranian nationality to report to the Immigration and Nationality Service (INS) and present their passports together with evidence of school enrollment, payment of fees, course load, good standing, and their current address. Noncompliance or willfully supplying false information would subject the students to immediate deportation proceedings.

The students brought suit in federal district court for declaratory and injunctive relief, claiming that the regulation violated their fifth amendment rights by discriminating on the basis of national origin. The district court held the regulation unconstitutional, stating that to hold otherwise would create “a precedent of alarming elasticity from which future extreme assertions of executive power could readily springboard.” The appellate court reversed, upholding the constitutionality of the regulation. Because the Naregji trial and appellate courts analyzed the constitutionality of the regulation differently, using differing equal protection standards and levels of scrutiny, their decisions provide grounds for comparison as well as models of potential judicial review.

III. Overview of the Implicated Constitutional Rights and Federal Powers

The constitutionality of a presidential foreign policy directive enforcing immigration laws against aliens of a particular nationality depends upon what rights and powers are implicated by the directive and to whom those rights and powers belong. A President directing the selective enforcement of immigration laws must act pursuant to the foreign affairs power, the immigration power, or both. Unless aliens possess counterbalancing constitutional rights, the propriety of a presidential directive issued pursuant to these federal powers cannot be questioned.

A. Rights of Aliens Within United States Jurisdiction

Unlike aliens seeking admission to the country, aliens within United States territorial jurisdiction enjoy constitutional protection against arbitrary

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5 Announcement on Actions To Be Taken by the Department of Justice, 15 Weekly Comp. of Pres. Doc. 2107, 2107 (Nov. 10, 1979).
8 Id.
9 Id. § 214.5(b).
10 481 F. Supp. at 1134. The students also claimed violations of the fourth amendment (“compelled interrogation” by INS officials constituting an illegal seizure), the first amendment (chilling speech), and the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. § 553 (1976). Id.
11 481 F. Supp. at 1147.
12 A minority of the appellate panel, however, voted to rehear the case, identifying a “grave constitutional issue.” 617 F.2d at 755.
government action. The fifth amendment guarantee that no “person” shall be deprived of life, liberty or property without due process of law protects even those whose presence in the United States is unlawful, involuntary or transitory. The Supreme Court has invalidated state statutes discriminating against aliens in the areas of state welfare benefits, state civil service employment, private employment, admission to the bar, fishing licenses, and land ownership. Although the equal protection guarantee implied in the fifth amendment outlaws invidious discriminatory classifications, it does not forbid every distinction between aliens and citizens. This is particularly true on the federal level. The Supreme Court has approved Congress’s exercise of its broad power over immigration through rules that would be unacceptable if applied to United States citizens by the federal government or to aliens or citizens by state governments. According to the Court, “a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other.” The difference in protection given aliens by the federal and state systems stems not from differences in the fifth and fourteenth amendments’ guarantees, but from the existence of federal powers over immigration and foreign affairs which have no equivalents on the state level.

B. The Foreign Affairs Power

The foreign affairs power is confined to the federal government. It is not vested in a single branch of the federal government, but rather shared by the President and Congress. Congress has a valid constitutional claim of concurrent, if not superior, foreign affairs power because of the grants of legislative power in Article I, section 8. The Constitutional grants Congress the power to regulate commerce with foreign nations, establish a uniform rule of naturalization, define and punish piracies and felonies committed on the high seas and offenses against the law of nations, declare war, and make necessary and proper laws. The legislature’s other constitutional powers have an indirect yet substantial influence on foreign affairs. The powers to tax, to authorize spending

14 Wong Wing v. United States, 163 U.S. 228, 238 (1895); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1885); 1 C. Gordon & H. Rosenfield, supra note 3, at § 1.31.
18 Truax v. Raich, 239 U.S. 33 (1915).
19 In re Griffiths, 413 U.S. 717 (1973).
20 Takahashi v. Fish Comm’n, 334 U.S. 410 (1948).
23 Id. at 77. The Immigration and Nationality Act also creates classifications among aliens. See id. at 77 n.13.
25 U.S. CONST. art. 1, § 8.
26 Id. cl. 3.
27 Id. cl. 4.
28 Id. cl. 10.
29 Id. cl. 11.
30 Id. cl. 18.
31 Id. cl. 1.
to "provide for the common defence and general Welfare of the United States," and to appropriate funds give Congress bargaining power in conducting foreign policy discussions with the President. On the other hand, the Constitution is surprisingly silent on presidential foreign affairs power. Article II of the Constitution grants the President the power to make treaties and appoint ambassadors, other public ministers and consuls, subject to the advice and consent of Senate, the duty of receiving ambassadors and other public ministers, the post of Commander-in-Chief of the Army and Navy, and the duty to insure the laws are faithfully executed.

The President, however, has emerged with the lion's share of the authority in foreign affairs due to the realities of international relations. Foreign policy decisions often require secrecy and dispatch and invariably require specialized expertise, day-to-day monitoring, coordination and continuity. Congress, with its two house network of committees and open debates, is ill equipped to meet these requirements. Therefore, despite the modest constitutional grants, the President and the executive officers have gained broad authority over foreign affairs through judicial decision. The Supreme Court has characterized the presidential foreign affairs power as "very delicate, plenary and exclusive." The Court has adopted John Marshall's characterization of the President as "the sole organ of the nation in its external relations, and its sole representative with foreign nations." Presidential foreign affairs power exists without express constitutional provision or act of Congress and includes the power to formulate foreign policy. Although the power to determine foreign policy is now thought to be vested in the executive branch, attempts have been made to proclaim Congress the source of foreign policy. Today, however, Congress seems content to influence foreign policy by exercising its legislative powers, adopting foreign policy resolutions, and manipulating spending and appropriations bills.

Theoretically, the power to determine foreign policy is vested in the President and principally executed by the thousands of officials in the executive branch who are involved in foreign relations. The President, not Congress, in-

32 Id.
33 Id. § 9, cl. 7.
34 Id. art. 2, § 2, cl. 2.
35 Id. cl. 3.
36 Id. cl. 1.
37 Id. § 3.
41 See text accompanying notes 34-37 supra.
43 L. HENKIN, supra note 24, at 47-48.
structs executive officers on the extent of their foreign affairs power. Because Congress has granted some of these officials the power to enforce immigration laws, they have an opportunity to enforce selectively those laws against aliens of a particular nationality in the guise of implementing foreign policy. If these officials act without express presidential mandate, they might be acting outside the scope of their foreign affairs duties delegated by the President. Such action would likely be invalid. The recent Iranian regulations raised this issue in *Yassini v. Crosland*. The Ninth Circuit questioned whether the INS's revocation of deferred departure dates originally granted to Iranian nationals due to the unrest in Iran was "an independent 'renegade' act of foreign policy, or merely an implementaton of the President's response to the Iranian crisis." Although the court found the INS's action implemented the President's foreign policy, it noted that "serious questions might arise if the INS engaged in foreign policy matters, outside the scope of its usual functions, with disregard of the [Administrative Procedures Act] and concepts of due process."

C. The Immigration Power

1. Congressional Authority

Like the foreign affairs power, the immigration power is confined to the federal government. Unlike the foreign affairs power, however, it has historically been vested in the legislative branch of the federal government. The Supreme Court has consistently recognized Congress's immigration power as "necessarily very broad, touching . . . basic aspects of national sovereignty, more particularly our foreign relations and national security." Repeatedly, the Court has proclaimed that "over no conceivable subject is the legislative power of Congress more complete." Congressional control over immigration has been termed exclusive and plenary in nature and "as firmly imbedded in the legislative and judicial tissues of the body politic as any aspect of our government."

Congress's immigration power extends beyond mere legislative power over traditional immigration concerns—requirements for entry into and remaining within the country—to reach all legislation affecting aliens. If aliens as a group or a subgroup of aliens is affected by legislation, courts will label the matter as

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46 618 F.2d 1356 (9th Cir. 1980).
47 Id. at 1358.
48 Id. at 1360. It was similarly apparent to the *Narenji* district court that the registration of Iranian students was "a coordinated action on the part of those executive branch officials [the President and Attorney General] having primary responsibility in the area of foreign policy and in the regulation of immigration and naturalization." 481 F. Supp. at 1136 n.3.
50 1 C. GORDON & H. ROSENFIELD, supra note 3, at §§ 1.5a, 2.2a.
falling under Congress’s immigration power. Presidential directives which require immigration laws to be selectively enforced may also be deemed the products of the immigration power.

2. Executive Authority

The Constitution grants executive officers no immigration powers; their authority over immigration has historically been confined to that delegated to them by Congress. Executive officers charged by Congress with enforcing immigration laws are often given wide discretion and flexibility, but remain subject to judicial scrutiny for actions beyond the scope of their delegated authority.59

_Narenji v. Civiletti_ may signal a shift in judicial thought on the question whether executive officers have independent, undelgated immigration power.60 The District of Columbia Circuit suggested in _Narenji_ that even in the absence of statutory authorization, a President exercising his foreign affairs power has authority to enforce selectively immigration laws on the basis of national origin.61 This suggestion was mere dictum, since the court held both the President and Attorney General to be acting under express congressional authorization.62 The _Narenji_ district court, however, found the President and Attorney General to be acting outside the immigration powers delegated them by Congress.63 It then employed the analysis articulated by Justice Jackson in _Youngstown Steel & Tube Co. v. Sawyer_.64

Justice Jackson’s analysis of proper delegation of congressional and executive power contains three levels. First, a President acting pursuant to express or implied congressional authorization possesses maximum authority—all of his authority and all Congress can delegate. Only if the “Federal Government as an

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57 1 C. GORDON & H. ROSENFIELD, supra note 3, at § 1.5b.
59 1A C. GORDON & H. ROSENFIELD, supra note 3, at § 4.4.
60 Accord, 1 C. GORDON & H. ROSENFIELD, supra note 3, at 6 (1980 Cum. Supp.).
61 “Distinctions on the basis of nationality may be drawn in the immigration field by the Congress or the Executive.” 617 F.2d at 747 (emphasis added) (citations omitted).
62 The Attorney General was found to be acting within the broad enforcement powers delegated to him in the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101-1503 (1976). Section 1103(a) of the Act charges the Attorney General with “the administration and enforcement” of the Act and directs him to “establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority under the provisions of” the Act. The Attorney General is empowered by section 1351(a)(9) to order the deportation of any nonimmigrant alien who fails to comply with the conditions of such status.
63 The President was found to be acting within the power granted by 22 U.S.C. § 1732 (1976), which provides that wherever “any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government . . . if [his] release is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release.”
64 343 U.S. 579, 635-38 (1952).
undivided whole lacks power"\(^{65}\) will the President’s act be unconstitutional. Second, a President acting without the express or implied approval or disapproval of Congress possesses intermediate authority. In this “zone of twilight in which [the President] and Congress may have concurrent authority,”\(^{66}\) the constitutionality of the Executive’s action will “depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”\(^{67}\) Finally, a President acting incompatibly with Congress’s express or implied will can rely only on his constitutional powers less any constitutional powers Congress has over the matter.\(^{68}\)

Having found no delegated congressional authority, the \textit{Narenji} district court determined the President’s directive was on the second level.\(^{69}\) The court noted that the President and Congress had concurrent, but not equal, responsibility over immigration and therefore tested the directive’s constitutionality by examining the “imperative of events and contemporary imponderables” and applying “certain constitutional precepts.”\(^{70}\) Because the President was acting solely on his own foreign affairs power, the court applied a balancing test.\(^{71}\) The court weighed “the Constitution’s abhorrence of discrimination based on national origin, the need to protect against improper assertions of executive power in those areas where the Constitution has placed with the elected representatives of the Congress the primary responsibility for action, and the executive’s need for freedom of action in international affairs.”\(^{72}\) Without Congress’s sanction, the scale tipped in favor of the Iranian students.\(^{73}\) Before weighing these factors, however, the court appeared to have already decided the issue:

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.\(^{74}\)

The court’s statement suggests it would be impossible for the President’s foreign affairs power alone, or in combination with any independent immigration power derivative from the foreign affairs power, to outweigh an alien’s equal protection claim. By this, the court effectively reduced the balancing of the alien’s equal protection rights against the President’s powers to a determination of whether the equal protection claim is valid. If it is valid, the presidential directive will always be outweighed as long as Congress has not added its weight to the balance by delegating immigration power to the President. Yet, without elaboration, the court states that the Executive has many opportunities in immigration law to “invoke its authority to conduct foreign policy and thereby dele-

\(^{65}\) Id. at 636-37.  
\(^{66}\) Id. at 637.  
\(^{67}\) Id.  
\(^{68}\) Id.  
\(^{69}\) 481 F. Supp. at 1142. Had the court of appeals applied the \textit{Youngstown Steel} analysis, it would have placed the presidential directive on the first level. 617 F.2d at 747.  
\(^{70}\) 481 F. Supp. at 1143.  
\(^{71}\) See text accompanying notes 100-14 infra.  
\(^{72}\) 481 F. Supp. at 1145.  
\(^{73}\) \textit{Id.}, citing \textit{Kent v. Dulles}, 357 U.S. 116, 129 (1958) (law denying United States passports to American citizens who refuse to sign non-communist affidavits held unconstitutional).  
\(^{74}\) 481 F. Supp. at 1143.
gate to itself the authority to assume the role of Congress.\textsuperscript{77}\textsuperscript{5} Evidently, the court did not consider selective enforcement of immigration laws based on national origin one of those many opportunities.

Although selective enforcement of immigration laws was not in issue, Supreme Court dicta in \textit{Hampton v. Mow Sun Wong}\textsuperscript{76} and later lower court decisions in similar cases\textsuperscript{77} provide at least some support for rejecting the district court's insinuation that the President's foreign affairs power alone or in combination with its derivative immigration power can never surpass an alien's valid equal protection claim. The plaintiffs in \textit{Mow Sun Wong} challenged regulations promulgated by the Civil Service Commission which excluded persons other than American citizens and natives of Samoa from employment in most federal service positions. The Supreme Court invalidated the regulations as outside the scope of the Commission's powers. The Court did, however, assume without deciding\textsuperscript{78} that although the Commission lacked the power,\textsuperscript{79} had Congress or the President imposed the regulation, it would be justified as "providing an incentive for aliens to become naturalized, or possibly even as providing the President with an expendable token for treaty negotiating purposes."

The government justified discriminating between citizens and aliens on the ground that such discrimination enabled the President to "offer employment opportunities to citizens of a given country in exchange for reciprocal concessions—an offer he could not make if those aliens were already eligible for federal jobs."\textsuperscript{78}\textsuperscript{1} This suggests allowing executive discrimination among aliens based on nationality to implement foreign policy. While the discrimination at issue in \textit{Mow Sun Wong} was not pure selective enforcement, it stemmed from manipulation of a matter legislated by Congress—eligibility for federal jobs—which falls under Congress's broad immigration power.\textsuperscript{82}

President Ford responded to the Court's decision in \textit{Mow Sun Wong} by issuing an executive order barring aliens from virtually all federal service jobs.\textsuperscript{83} Thereafter, lower federal courts were left with the task of weighing the justifications suggested by the Supreme Court. One court in upholding the executive order treated the Supreme Court dictum as though it were binding.\textsuperscript{84} Another, basing its justification on the incentive to naturalize, also found alien eligibility for federal jobs properly the President's concern because "the foreign affairs powers of the President are interwoven with the general policy of the federal government towards aliens."\textsuperscript{85} These decisions' value in supporting the existence of

\textsuperscript{75} Id. at 1145.
\textsuperscript{76} 426 U.S. 88, 105 (1976).
\textsuperscript{77} E.g., \textit{Mow Sun Wong v. Campbell}, 626 F.2d 739 (9th Cir. 1980); \textit{Vergara v. Hampton}, 581 F.2d 1281 (7th Cir. 1978); \textit{Ramos v. United States Civil Service Comm'n}, 430 F. Supp. 422 (D.P.R. 1977).
\textsuperscript{78} Justices Brennan and Marshall, whose votes were necessary for a majority, joined with the understanding that this constitutional question was reserved. 426 U.S. at 117.
\textsuperscript{79} Id. at 114.
\textsuperscript{80} Id. at 105 (emphasis added).
\textsuperscript{81} Id. at 104.
\textsuperscript{85} \textit{Mow Sun Wong v. Campbell}, 626 F.2d 739, 745 (9th Cir. 1980).
independent presidential immigration power is greatly diminished by the fact that President Ford was acting pursuant to duly delegated congressional authority.86

Recognition of an independent presidential immigration power would strengthen the President's claim of authority to use selective enforcement of immigration laws as an instrument of foreign policy. While not relying on Congress to delegate him the power to enforce selectively immigration laws, the President could assert two separate federal powers—the foreign affairs power and his own independent immigration power—to combat aliens' equal protection claims. The immigration power, now recognized as vested in Congress, is given great deference and minimal judicial review.87 A presidential immigration power would likely be treated similarly, and when combined with the foreign affairs power would create a formidable barrier for aliens' constitutional claims. Absent recognition of an independent presidential immigration power, the Executive's power to enforce selectively immigration laws to implement foreign policy is derived solely from his foreign affairs power and whatever authority Congress delegates to him.

IV. Weighing Aliens' Equal Protection Rights Against the Implicated Federal Powers

After it determines whether the complaining aliens have a facially valid equal protection claim and whether the President acted solely on his foreign affairs power or in combination with the immigration power independently possessed by him or delegated by Congress, a court will determine the constitutionality of the presidential directive. The outcome will be greatly affected by (1) the intensity with which the judiciary scrutinizes the proposed justifications for the discriminatory classification,88 (2) the equal protection standard used for federal discrimination based on nationality, and (3) any presumptions attached in the reviewing process.

A. Judicial Review

1. Judicial Review of Immigration Measures

The intensity of judicial scrutiny given a presidential directive for selective enforcement of immigration laws will depend upon whether the court finds that the directive implicates the immigration power. Since courts have traditionally scrutinized congressional immigration legislation less closely than presidential foreign policy actions,89 the level of judicial scrutiny will be lowered if Congress is viewed as having delegated enforcement power to the Executive or perhaps if the President is viewed as having an independent immigration power.

Aliens may interject equal protection claims against federal laws affecting their rights to work,90 to receive welfare payments,91 and even to espouse certain

87 See text accompanying notes 89-99 infra.
88 For one commentator's explanation of the level of judicial review in Narenji v. Civiletti, see Note, Aliens—Constitutionality of Discrimination Based on National Origin, 21 HARV. INT'L. L.J. 467 (1980).
89 See text accompanying notes 94-103 infra.
political views. The laws challenged will receive minimal judicial scrutiny, however. As the Supreme Court explained in *Harisiades v. Shaughnessy*, "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations . . . [and] exclusively entrusted to the political branches as to be largely immune from judicial inquiry or interference." In *Mathews v. Diaz*, the Court acknowledged that classifications among aliens may "implicate our relations with foreign powers" and "must be defined in light of political and economic circumstances." The Court cautioned against adopting "[a]ny rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions."

The courts have shown Congress great deference in upholding legislation which discriminates against aliens generally or against specific alien groups. The likelihood of a drastic shift in the intensity of judicial scrutiny in "immigration" cases is small. As Justice Frankfurter observed in *Galvan v. Press*, the judiciary is not writing on a clean slate, nor is there merely a page of history written on the extent of Congress's immigration power.

2. Judicial Review of the Conduct of Foreign Affairs

Unless executive conduct of foreign affairs involves a political question and is thus nonjusticiable, such conduct is subject to a balancing test. The courts weigh the foreign affairs interest served by the conduct against the constitutional rights which the conduct jeopardizes. Where it is a United States citizen whose rights are sacrificed, the courts have usually held his constitutional rights to prevail. However, where it is an alien whose rights are sacrificed, the alien's rights prevail less often because Congress's "largely immune" immigration power is considered in combination with the foreign affairs power.

For example, after finding the President's and Attorney General's actions in *Narenji* to be expressly authorized by Congress, the District of Columbia Circuit applied the limited standard of judicial review applicable to cases challenging Congress's immigration power. The trial court, however, had applied the bal-

93 Fiallo v. Bell, 430 U.S. 787, 792 n.5, 796 n.7 (1977).
94 Harisiades v. Shaughnessy, 342 U.S. at 588-89.
95 Mathews v. Diaz, 426 U.S. at 81.
96 Id.
97 Id.
99 347 U.S. at 530.
100 Many foreign affairs matters—for example, recognition of national governments, sovereign immunity, territorial disputes, and certain treaty decisions—are held to involve political questions and are therefore deemed nonjusticiable. Baker v. Carr, 369 U.S. 186, 217 (1962), sets forth the criteria to be applied in determining whether a question is justiciable.
103 Harisiades v. Shaughnessy, 342 U.S. at 588-89.
104 617 F.2d at 747.
ancing test because it believed both executive officers acted solely upon their foreign affairs power.\textsuperscript{105} Application of the balancing test regardless of whether the immigration power is implicated is preferable if aliens’ constitutional rights are ever to be recognized as substantial enough to invalidate directives like the one aimed at Iranian students. With a balancing test, the strength of aliens’ equal protection claims will be compared with the justifications asserted by the government. The mere fact that the selective enforcement has a rational basis is insufficient to render the presidential action constitutional.\textsuperscript{106} Rather, the rational basis must outweigh the discrimination suffered by the aliens. While the right invalidated by the challenged regulation in \textit{Narenji}—the right to be free from discriminatory registration and its accompanying penalties—is not overwhelmingly substantial, the government’s proposed justifications, while rational, were in practice even less substantial than the aliens’ rights.\textsuperscript{107}

Presidential foreign policy actions are presumed to be in the national interest\textsuperscript{108} and the judicial review given them is narrow. Thus, the justifications offered for selective enforcement of immigration laws to implement foreign policy may go largely unquestioned. The judiciary’s recognition that the success of foreign negotiations often depends on secrecy and dispatch\textsuperscript{109} further frees this already loose rein. As the Supreme Court has stated:

It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit \textit{in camera} in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial . . . . They are delicate, complex, and involve large elements of prophecy.\textsuperscript{110}

The judiciary’s acknowledgment of the discretion and secrecy with which the President must conduct foreign affairs, together with the traditionally limited judicial scrutiny of immigration laws and regulations, may render the review process in cases such as \textit{Narenji} entirely “toothless.”\textsuperscript{111} In the name of foreign affairs the government is allowed to “explain or justify its conduct without presenting a complete exposition of the events and considerations giving rise to its actions.”\textsuperscript{112} In fact, the Second Circuit has found the Supreme Court to be “willing to presume the existence of a national interest sufficient to justify the unequal treatment of aliens or a particular class [of aliens] even in the absence of an official government statement on the issue.”\textsuperscript{113} Deference to presidential directives may ultimately result in abdication of judicial review. Once the government establishes that its discriminatory actions fall within the context of immigration legislation and delicate foreign policy, the sacrifice of aliens’ equal protection claims seems inevitable.\textsuperscript{114}

\textsuperscript{105} 481 F. Supp. at 1141, 1145.
\textsuperscript{106} See text accompanying notes 119-22 infra.
\textsuperscript{107} See text accompanying notes 135-40 infra.
\textsuperscript{108} Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976).
\textsuperscript{112} Olegario v. United States, 629 F.2d at 232.
\textsuperscript{113} Id.
\textsuperscript{114} See Fiallo v. Bell, 430 U.S. at 805 (Marshall, J., dissenting).
B. The Equal Protection Standard for Federal Discrimination Based on National Origin

Closely connected with the intensity of judicial scrutiny is the standard by which courts measure discriminatory classifications. The Supreme Court has interpreted the fifth amendment to require the federal government to provide equal protection just as the states are required by the fourteenth amendment.115 The two amendments are not, however, coextensive. Nationality-based distinctions drawn by states merit strict judicial scrutiny to determine whether they further a “compelling government interest.”116 On the other hand, the standard for reviewing similar, federally-drawn distinctions is not so clearly defined.

In 1976, the Hampton v. Mow Sun Wong,117 the Supreme Court held that any nationality-based discrimination which is federal in origin and which has a nationwide impact requires an “overriding national interest.”118 The Court stated: “When the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a state, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest.”119 The Court added that if Congress or the President120 expressly mandated the discrimination, the Court “might presume that any interest which might rationally be served by the rule did in fact give rise to its adoption.”121 Thus, a rational basis approach is warranted when the President or Congress authorizes the discrimination.122

In Matheos v. Diaz,123 decided the same day as Mow Sun Wong, the issue was not whether discrimination between aliens and citizens is permissible, but “whether the statutory discrimination, within a class of aliens—allowing [medical] benefits to some but not to others—is permissible.”124 The Court upheld the requirements of permanent resident status and five year residency without mentioning an “overriding national interest.” The Court instead seemed to revert to a test which would find the law unconstitutional only if the proposed justifications were “wholly irrational.”125

A year later, in Fiallo v. Bell,126 the Supreme Court upheld a statute which discriminated on the basis of gender and legitimacy of birth among aliens seeking admission to the United States. Sections of the Immigration and Nationality Act have the effect of excluding the relationship between an illegitimate child and his natural father, as opposed to his natural mother, from the special preference immigration status accorded a “child” or “parent” of a United States citizen or

117 426 U.S. 88 (1976) (regulation prohibiting employment of aliens in most federal service positions held unconstitutional).
118 Id. at 100.
119 Id. at 103.
120 The Court did not indicate whether the President is acting on his own power or that delegated to him by Congress.
121 426 U.S. at 103.
124 Id. at 80.
125 Id. at 83.
In analyzing the impact of these Supreme Court decisions upon the constitutionality of a foreign policy directive to selectively enforce immigration laws against aliens of a particular nationality, the bases of the discrimination involved in these cases and in Narenji must be distinguished. In Mow Sun Wong, the Court distinguished between United States citizens and aliens, not among aliens. Although the challenged statutes in Diaz and Fiallo divided aliens into two classifications, the division was based not on nationality but on other grounds—permanent resident status and five year residency in Diaz, and gender and illegitimacy in Fiallo. The Court in Diaz and Fiallo did not apply the "overriding national interest" standard of Mow Sun Wong; instead, it relied on the "largely immune" congressional power to legislate matters affecting aliens.

Because no recent Supreme Court cases have involved discrimination among aliens based on nationality, the proper standard of review to be applied in such cases is uncertain. The district court and appellate court in Narenji each profess to apply the "overriding national interest" standard, but interpret this standard differently. The court of appeals applied the rational basis test in finding an "overriding national interest." The court erred, however, in citing Diaz and Fiallo, and not Mow Sun Wong, as authority for applying this test, since neither of these cases distinguished among aliens on the basis of their nationality nor asserted the "overriding national interest" standard.

The Narenji district court ignored Mow Sun Wong's assertion that any rational interest which might justify the action should be presumed to do so if Congress or the President expressly mandate the discrimination. Instead of applying a rational basis test to the government's justification, the court balanced these justifications against the aliens' equal protection claim, but did not find an "overriding national interest." In evaluating the justifications asserted by

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127 408 U.S. 753 (1972).
128 430 U.S. at 794-95, quoting 408 U.S. at 770.
129 The Supreme Court has rejected the distinction drawn between discriminating against all aliens and discriminating among aliens in a state statute context. Nyquist v. Mauclet, 432 U.S. 1, 8-9 (1972).
130 The Supreme Court has, however, decided earlier cases involving nationality-based discrimination among aliens. See, e.g., Oyama v. California, 332 U.S. 633 (1948) (California statute prohibiting Japanese from procuring fishing licenses held unconstitutional); Wing Wo v. United States, 163 U.S. 228 (1896) (procedures for deporting Chinese aliens upheld); Fong Yue Ting v. United States, 149 U.S. 698 (1893) (federal registration of Chinese aliens upheld); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (San Francisco ordinance regarding operation of laundries by Chinese held unconstitutional).
131 617 F.2d at 747.
132 Id. at 748.
133 Perhaps this was because it found the President lacked authority (relying solely on his foreign affairs power) to so mandate.
134 The government argued that three "overriding national interests" justified the discriminatory regulation: (1) the need to protect the hostages held in Iran by quelling potential domestic violence; (2) the need to express to the Iranian government this country's denunciation of the embassy takeover; and (3) the need to identify Iranian students to assist in developing appropriate responses to the crisis in Iran. 481 F. Supp. at 1144.
the government, the court found that only the asserted interest in protecting the
American hostages in Iran deserved consideration for the label "overriding."\textsuperscript{135} The court focused on what it called the "tenuous"\textsuperscript{136} cause and effect relationship between the presence of Iranian students in the United States and protecting the hostages in Iran. The government argued that the Iranian students' presence in the United States might provoke acts of violence against them, and that such acts might cause a "hostile counterreaction" in Iran.\textsuperscript{137} The court rejected this argument, noting that the regulation was designed only to identify and expel Iranian students illegally in the country. There was no assurance that Iranian students legally in the country would not provoke violence.\textsuperscript{138} The court found "only a psychological purpose for the regulation, its intent being one of assuaging the anger of the American people by demonstrating that something was being done in the face of crisis."\textsuperscript{139} The regulation did not support a legitimate rational interest which would "excuse the wholesale nullification of the rights of the students involved."\textsuperscript{140}

V. Ramifications and Recommendations

The judiciary's treatment of selective enforcement of immigration laws as an instrument of foreign policy will depend largely on which federal powers are juxtaposed against the aliens' equal protection claims. If the courts view the President's actions as authorized by a broad congressional delegation of enforcement power, the President's authority will be at its highest and judicial review will be minimal.\textsuperscript{141} Finding an "overriding national interest" will be reduced to a rational basis inquiry. If the President mandates a selective enforcement campaign, the campaign will be presumed to enjoy any rational basis the President asserts as its justification. The already narrow judicial review may be further restricted if the foreign policy assertedly involved requires secrecy and dispatch.

In the face of such limited scrutiny, it is not surprising the Narenji district court feared that under the guise of foreign policy the President could order the selective enforcement of immigration laws against aliens of a particular nationality, even though little correlation exists between the action taken and the national interest asserted. Two factors prevent the exercise of excessive executive power, however. First, the President will not likely view selective enforcement of immigration laws as a useful tool in many foreign affairs situations. Second, the judiciary may characterize the assertion of executive power differently and thereby obtain a different result. For example, a court may find the President to be acting in the immigration field without congressional authorization, and hold his actions to be unconstitutional, absent recognition of an independent presidential immigration power, by balancing only his foreign affairs power against aliens' rights. If the courts recognize an independent presidential immigration

\textsuperscript{135} 481 F. Supp. at 1144.
\textsuperscript{136} Id. at 1145.
\textsuperscript{137} Id. at 1144.
\textsuperscript{138} Id.
\textsuperscript{139} Id. at 1144-45.
\textsuperscript{140} Id. at 1145.
\textsuperscript{141} See text accompanying notes 65-68 and 89-99 supra.
power derived from the foreign affairs power, however, a presidential directive to enforce immigration laws selectively might withstand a constitutional challenge if the court treats this independent immigration power with the same deference and minimal review given Congress's immigration power.

In the Iranian crisis, the President was specifically delegated by statute wide powers for a situation infrequent in our country's history: detention of American citizens by foreign captors. The Immigration and Nationality Act, which could have accorded the President power to demand selective enforcement, delegates the President no such authority. Therefore, the situation most likely to arise in the future would involve the President acting pursuant solely to his foreign affairs power and the Attorney General acting pursuant to both broad delegated congressional authority and the President's foreign affairs directive or general foreign policy guidelines. Because the Attorney General's regulation would rest on delegated immigration power as well as the foreign affairs power, any constitutional challenge of the regulation would likely receive the narrowest judicial review even though only the Attorney General, not the President, acted pursuant to the immigration power.

V. Conclusion

A potential presidential foreign policy instrument emerges from the division of federal powers and the judiciary's deference to foreign relations and immigration. Only once has a President mandated enforcement of immigration laws against aliens of a particular nationality to achieve foreign policy goals. Whether the President will act similarly in the future will depend on international events and on whether the courts recognize a presidential foreign affairs power in immigration that outweighs aliens' equal protection claims.

Nancy J. McDonald

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142 See text accompanying notes 60-87 supra.