

12-1-1983

## Foreword: Immigration & Nationality

James J. Orlow

Follow this and additional works at: <https://digital.sandiego.edu/sdlr>



Part of the [Immigration Law Commons](#)

---

### Recommended Citation

James J. Orlow, *Foreword: Immigration & Nationality*, 21 SAN DIEGO L. REV. 1 (1983).

Available at: <https://digital.sandiego.edu/sdlr/vol21/iss1/2>

This Article is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in *San Diego Law Review* by an authorized editor of Digital USD. For more information, please contact [digital@sandiego.edu](mailto:digital@sandiego.edu).

# Foreword

JAMES J. ORLOW\*

A foreword to a collection of scholarly articles about American immigration law may be likened to the prologue of a farce; no matter how scholarly the analysis, one is of the suspicion that the final play goes down best with salt or with spirits. Immigration law should not be confused with jurisprudence any more than farce should be confused with drama. Immigration laws attempt to legalize and legitimate what is essentially a wholly political process as if it were an orderly judicial process. The process is clothed with the procedural trappings of fairness, notice, and the opportunity to be heard, yet the basic premise is "No aliens shall be admitted, except . . ." It is a premise which resists ratiocination.

Prior to 1921<sup>1</sup> the immigration policy of the United States was "All aliens, except . . ." Apart from the anti-oriental bias, these exceptions were well-accepted categories of social and political undesirables. With the imposition of the national origins quota in 1921, as institutionalized in 1924<sup>2</sup> and 1952,<sup>3</sup> the essential law of the United States became "No aliens, except . . ." The exceptions to this precept and the obtaining of such an exception became the central theme of immigration legislation and adjudication. Removal of the national origins quotas did little to render immigration policy rational.

---

\* Admitted to the Bar in District of Columbia, Pennsylvania, and New York. B.S., University of Pennsylvania, 1956; J.D., Harvard Law School, 1959. Mr. Orlow is a member of the law firm of Orlow, Fuller, Rubin & Steel, which has offices in Philadelphia, Pittsburgh, New York, and Newark. He is a Director and Past President of the American Immigration Lawyers Association (AILA). The views expressed here do not necessarily represent the views of Orlow, Fuller, Rubin & Steel or of the AILA.

1. Quota Act of 1921, ch. 8, 42 Stat. 5.
2. Immigration Act of 1924, 43 Stat. 153.
3. Immigration and Nationality Act of 1952, 66 Stat. 163.

In classic democratic theory, a population debates its own future and, from the will of its majority, a policy is established governing that population. In immigration, however, the regulated population is not part of the democratic process; aliens neither vote, nor are they represented in Congress. Their interests are considered only in a secondary sense; that is, through their relatives' interests in having them here, employers' interests in their services, and the United States' political interests in being perceived as a country of fairness. In practice, however, we appear to be politically unwilling and perhaps economically less able to accept larger numbers of immigrants. There appears to be growing opposition in Congress to accepting even small numbers of immigrants.

In classic American political theory, once the political policy is determined by the Congress, the administration is given the directive, by statute, to administer that policy. Immigration laws, however, indicate only the broadest level of policy direction. Development of substantive law is delegated to the Attorney General,<sup>4</sup> who further delegates authority to the Immigration and Naturalization Service,<sup>5</sup> and to the Secretary of State,<sup>6</sup> who distribute actual authorization to enter and to remain. The definition of membership in classes, access to exceptions, waivers, discretion in the grant of non-immigrant visas, unreviewability of denial of immigrant visas by consuls, and a seemingly endless chain of like processes and procedures place access to the United States essentially within the relatively unreviewable authority of the very officers who enforce the law. As Max Weber indicated in his approach to bureaucracy, officers of government tend to become more involved with the agency as an institution than with the policies they are administering. The system becomes an entity in and of itself. Authority seeks to become legitimated, almost irrespective of the results it achieves. Until a major renovation takes place, the system of administration is the dominant factor in the distribution of its policy rather than the underlying policy itself.

American immigration practice has become more and more intricate as lawyers for the government and for private parties seek to invent finer and finer differences for legitimating what are effectively impossible distinctions. It is easy to say that only 270,000 "quota" immigrants may enter, but determining that 270,000 is a "fair" number or that the number is allocated in an "appropriate" fashion, when millions seek to enter, raises problems in decision-making far in excess of the capacity of a Paul or a Solomon.

---

4. 8 U.S.C. § 1103(a) (1982).

5. 8 U.S.C. § 1103(b) (1982); 8 C.F.R. § 2.1 (1983).

6. 8 U.S.C. § 1104 (1982).

One traditional solution for this decision-making problem is the use of a so-called expert panel. This solution is sometimes proposed, using the Board of Immigration Appeals as an example of an expert panel. However, as the Board itself demonstrated, it may not have the expertise or capability required to undertake such an enterprise. The Dominican divorce cases are an example.

*In re Zorrilla*<sup>7</sup> is the latest chapter in the "struggle" to comprehend the divorce law of the Dominican Republic. That decision, in its terms, modified *In re Hann*<sup>8</sup> which, in turn, had "modified" *In re Valerio*,<sup>9</sup> *In re Gonzalez*,<sup>10</sup> and *In re Lucero*.<sup>11</sup> *Lucero* had, however,

---

7. I.D. 2937 (BIA 1983). Held, that the two-month period for pronouncement of a Dominican divorce for cause began to run on the expiration of the two-month period for filing an appeal, which runs from the time the defendant is notified of the judgment of divorce. The Board cited the Dominican law in translation and interpreted it *without* specific reference to expert opinion of foreign law. This is an exercise of fact finding for which the Board bases its authority on 8 C.F.R. § 3.1(d)(1). Nevertheless, *Valerio*, *infra* note 10; *Gonzales*, *infra* note 11; *Lucero*, *infra* note 12; and *Hann*, *infra* note 9, all rested on solemn acceptance of an Opinion from the Hispanic Law Division of the Library of Congress.

8. I.D. 2867 (BIA 1981). Held, that the two-month period within which Dominican divorce for cause must be pronounced *and* registered does not begin to run until after the two-month time allowed for appeal was expired. That opinion had noted a discrepancy between the translation of Dominican law submitted and another translation of the same statute also from the same source, the Hispanic Law Division of the Library of Congress. The statute related to a critical or potentially critical issue, the need for the client's personal appearance to complete the "pronouncement." The opinion also modified *Valerio*, *Gonzales* and *Lucero*.

9. 15 I. & N. Dec. 659 (1976). Held, that Dominican law required that the judgment of divorce would not be final or valid unless the spouse who obtained it appeared personally before the Office of Civil Registry within two months of judgment to have it pronounced and registered. Reliance was based on a Library of Congress memorandum. The question of whether the divorce was by consent or for cause was not discussed. *Darwish*, discussed *infra* note 14, then the leading case, was neither discussed nor distinguished.

10. 16 I. & N. Dec. 178 (1977). Held, that in a divorce for cause the successful spouse could appear within two months of judgment even though pronouncement and registration were beyond the two-month period. The Board held that the language of the Dominican law was ambiguous and accepted counsel's argument as to its construction. No expert opinion was discussed as a basis for that argument. It appeared, however, that by the time the issue was argued and decided, the point at issue had become moot. In light of the confusion caused by actual "cases and controversies" it is difficult to understand the selection of such a case as this for precedent. This case held *Tagle* and *Valerio* to have been dictum on the point.

11. 16 I. & N. Dec. 674 (1979). Held, that *Gonzales* was in error insofar as it criticized *Valerio* and *Tagle* and that *Gonzales* was itself "incorrect." *Lucero* recognized the distinction between divorces for cause and those by mutual consent, remanding for consideration on the point, since the formalities of pronouncement and registration differ based on whether the divorce is consensual or for cause. Significantly, counsel was the Dominican Council but, prime reliance was placed on a Visa Office Operations Memorandum and a *New York Law Journal* article.

overruled *Gonzalez* in part. Additionally, nothing was mentioned in *Zorrilla* as to *In re Tagle*<sup>12</sup> and its conclusion that the key translation of a different article of the Dominican code on which *In re Darwish*<sup>13</sup> rested was, itself, erroneous.

The case of *In re Annang*<sup>14</sup> properly holds that the law of a foreign country is a question of fact to be proven by a petitioner in visa petition proceedings. These Dominican divorce cases illustrate the problems created by the substitution of "expertise" for orderly law development. The Board's courage in recognizing its errors is appreciated; however, its processes are not perceived as "due" and its opinions on this issue are not "expert."

As every practitioner knows, the adequacy of staffing is the more important factor. The inability of the government to engage sufficient numbers of clerks destroys an effective deportation hearing system. Hearings are often deferred because of clerical failure to organize dockets and records. These "windfall" delays render the system ineffective. While some who deserve relief are granted it, the deportation of others is artificially blocked by the very government which professes to seek deportation. It is a practice more likely conceived by Lewis Carroll than by Daniel Carroll.

In practice, the actual distribution of benefits to aliens, the subject of immigration law, is becoming increasingly dependent upon an intense and knowledgeable pursuit of Consular and Immigration and Naturalization Service procedures. This is as much a part of immigration practice as is the art of the advocate in marshalling evidence and argument to demonstrate that the marginal case is marginally within rather than beyond a given exception.

Nevertheless, I advocate review of immigration decisions in the general courts and the use of general legal principles in review. Bringing immigration practice into greater accord with the rationality of the corpus of the law as a whole may render some elements of the immigration decision making process less arbitrary and more reliable. Clients and counsel will be able to plan with improved or increased assurance.

For example, the Board could well have avoided its problems with Dominican divorces had it followed the suggestions of Board Mem-

---

12. 15 I. & N. Dec. 595 (1976). Held, that there was no waiting period in divorce by consent for pronouncement and registration and that the holding in *Darwish* was based on an erroneous translation produced by the Library of Congress. *Tagle* may have been omitted from discussion in *Zorrilla* since *Zorrilla* involved a divorce for cause.

13. 14 I. & N. Dec. 307 (1973). Held, that pronouncement was required for validating of Dominican divorce. Inferentially, but not explicitly, the divorce in question was by consent and not for cause. Reliance was placed on an *ex parte* Library of Congress memorandum.

14. 14 I. & N. Dec. 502 (1973).

ber Appleman, concurring in *In re Hassan*<sup>15</sup> and dissenting in *In re Lee*.<sup>16</sup> When questions of foreign law are met in a case, no reason exists to deviate from the general legal standard that foreign law is a fact to be proven. Opposing sides ought to be given as free and equal an opportunity to rebut or comment upon that fact as with any fact, whether adduced by an opposite party or by the tribunal itself. The Immigration and Naturalization Service regulations<sup>17</sup> adopt this theory. Similarly, where an appellate adjudicator intends to make a decision based upon a particular reading of a documentary record in which one or more parties may have an interest, expeditious resolution of the issue in litigation could best be achieved through a process now utilized by the Immigration and Naturalization Service and the Labor Department. A notice of proposed disposition and the points on which it is to be based should be given, coupled with a limited period within which the party must respond.<sup>18</sup> The essence of any adjudication is that both parties perceive the decision as, at least, "fair." Notice of an adjudicator's proposed finding gives the parties the opportunity to comment on or rebut the dispositive issues rather than have them remain unbriefed or unargued for irrelevant or incorrect reasons.

Finally, I should like to renew a proposition originally advanced at the University of Miami in 1982 with respect to improving the premises of the political decision.<sup>19</sup> A policy research institution including agency, academic, and private participation could provide better bases for policy formulation than the present process of crisis response and *ad hoc* patches on the law. Such an Immigration Policy Research Institute could draw on advanced knowledge and techniques of demography, labor force economics, sending state politics, and administrative cost analysis in the development of policy alternatives. This is a technocratic proposal but it is calculated to provide more substantive law elaboration for the Congress than is now advanced by the enforcement agencies. The Congress would or could be given more sound choices than are currently possible in this complex area.

In sum, my thesis is that, if the disposition of benefits is to be dependent upon a procedural system, then efforts must be taken to

---

15. 16 I. & N. Dec. 16, 23 (1976).

16. 16 I. & N. Dec. 305, 307 (1977).

17. See 8 C.F.R. § 103.2(b)(2) (1983).

18. See 20 C.F.R. § 656.25(c) (1983).

19. For an edited version of this author's lecture at the symposium, see Orlow, *America's Incoherent Immigration Policy: Some Problems and Solutions*, 36 U. MIAMI L. REV. 931 (1982).

make that procedural system as fair as possible, although it is essentially irrelevant to do political work with judicial means when the substantive lawmaking has been delegated to the law enforcement agencies themselves. The remedy to that fault may lie in the now reorganized Executive Office of Immigration Review.