The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?

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Immigration laws and regulations are implemented by United States Immigration and Naturalization Service personnel in accordance with Service promulgated "Operations Instructions." These instructions can be more crucial to the determination of an alien's rights than the terms of the statute itself. Mr. Wildes finds that the courts are slowly beginning to recognize that many such instructions have a substantial impact on aliens' rights and may sometimes convey very tangible substantive benefits. The author contends that the courts should more consistently treat these instructions as rules to be promulgated, implemented, and generally applied in a consistent and fair manner.

Perhaps one of the thorniest issues in administrative law today is the proper evaluation of written or verbal expressions of an administrative agency with regard to past, present, and future conduct. What effect is to be given these expressions? To what extent are they binding upon the agency? When are they precedential in nature? When should they be considered rules? While the litany continues, ultimate resolution of the issue continues to escape us.

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In the area of immigration and nationality law, this issue has been raised from time to time, particularly with reference to the internal directives and instructions of the Immigration and Naturalization Service (INS) as compiled within the *Operations Instructions*.[1] The Immigration and Naturalization Service has steadfastly maintained that these Operations Instructions are merely intra-agency guidelines which create no substantive rights, have no precedential value, and are not binding. Some Operations Instructions have been so construed by the courts.[2] However, that has not always been the case.[3]

It is the purpose of this article to analyze some recent court decisions with regard to the legal effect of various Operations Instructions, particularly those relating to the Nonpriority (Deferred Action) Program of the Immigration and Naturalization Service, a creation of the Operations Instructions,[4] and to suggest what may be the import of these decisions with respect to the Operations Instructions in general.

A Brief History of the Nonpriority Instruction

The Nonpriority (Deferred Action) Program

The Nonpriority Program of the Immigration Service was in existence for many years to defer action in deportation cases in situations in which, because of humanitarian reasons, expulsion of aliens would not be appropriate. A case may be recommended for nonpriority treatment by the District Director at any stage of a deportation proceeding. The Operations Instructions list the criteria used in determining whether a recommendation for deferred action or nonpriority treatment is appropriate: 1) advanced or tender age, 2) long residence in the United States, 3) physical or mental condition requiring care or treatment in the United States, 4) family situation that would be affected by expulsion, and 5) recent conduct.[5] A review and analysis of the cases in which non-

1. Immigration and Naturalization Service, United States Department of Justice, Operations Instructions, Regulations, and Interpretations (1952, as revised 1979) [hereinafter cited as Operations Instructions].
2. *E.g.*, Yan Wo Cheng v. Rinaldi, 389 F. Supp. 583, 588-89 (D.N.J. 1975).
3. *E.g.*, Parco v. Morris, 426 F. Supp. 976, 984-85 (E.D. Pa. 1977).
4. Operations Instructions, *supra* note 1, § 103.1(a)(1)(ii), at 371.
5. The criteria cited are included in Operations Instruction 103.1(a)(1)(ii):

> When determining whether a case should be recommended for deferred action category, consideration should include but not be limited to the following: (1) advanced or tender age; (2) number of years presence in the United States; (3) physical or mental condition requiring care or treatment in the United States; (4) family situation in the United States—effect of expulsion; (5) criminal, immoral or subversive activities or affiliations—recent conduct. If the district director's recommendation is approved by the regional commissioner the alien shall be notified that no action will be

priority classification had been recommended in accordance with the Operations Instructions indicated that nonpriority classification was almost exclusively recommended in order to avoid an unwarranted hardship upon the subject alien or members of his family.[6]

Prior to 1975 the recommendation of the District Director on Form G-312, submitted to the Regional Commissioner, was forwarded to the Commissioner's office in Washington, D.C., for review. This procedure was modified in 1975, eliminating the referral to the Commissioner's office.

The Nonpriority (Deferred Action) Program Goes Public

The existence of the Nonpriority Program was not widely known prior to 1975. The INS considered it an internal administrative device; the relevant Operations Instruction was published in the notorious "blue pages" of the officer's manual, which were not available to the public. Details of this program became available as a result of a Freedom of Information suit filed on behalf of the former Beatle, John Lennon.[7] As a result of that lawsuit, upon the urging of the United States Attorney who recognized that the program was already in the public domain, the Immigration Service issued its revised Operations Instruction in the part of its manual made available to the public on April 30, 1975.

The INS steadfastly maintained that nonpriority status was merely an intra-agency guideline, which conferred no substantive right but which recognized that the District Director needed an administrative convenience in order to exercise what the Service referred to as "prosecutorial discretion." The Immigration Service has steadfastly maintained this position.[8]

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taken by the Service to disturb his immigration status, or that his departure from the United States has been deferred indefinitely, whichever is appropriate.

Id.

6. *See* Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 SAN DIEGO L. REV. 42, 53 n.6 (1976) [hereinafter cited as Wildes, *The Nonpriority Program Goes Public*]. *See also* Wildes, *The Nonpriority Program of the Immigration and Naturalization Service* (pts. 1 & 2), 53 INTERPRETER RELEASES 25, 33 (1976).

7. Lennon v. Richardson, 378 F. Supp. 39 (S.D.N.Y. 1974).

8. *See* Wildes, *The Nonpriority Program Goes Public, supra* note 6, at 72.

The Circuits in Conflict

The Court of Appeals for the Second Circuit in *Lennon v. Immigration and Naturalization Service*[9] was the first circuit court to focus on the nature of this particular Operations Instruction. The court had no need to go into a detailed analysis of this provision because its decision in *Lennon v. Immigration and Naturalization Service* paved the way for granting permanent residence to Lennon and made the Nonpriority Program unnecessary and irrelevant to Lennon. Nevertheless, the footnote reference by the Second Circuit describes the Nonpriority Program as an "informal administrative stay of deportation."[10]

The Fifth Circuit in *Soon Bok Yoon v. Immigration and Naturalization Service*,[11] in reviewing the deportation proceedings initiated against Soon Bok Yoon, held that there was no requirement that an alien respondent be informed during the course of deportation proceedings of the possible applicability of nonpriority status. The court further held that the decision to grant or withhold nonpriority status was within the "particular discretion of the INS"[12] and that an agency such as the INS had the power "to create and employ such a category for its own administrative convenience without standardizing the category and allowing applications for inclusion in it."[13] Differentiating the relief provided in Operations Instruction 103.1(a)(1)(ii) by characterizing nonpriority status as a "voluntary stay of the agency's mandate *pendente lite*, issued in large part for the convenience of the INS,"[14] the Fifth Circuit concluded that such relief was particularly appropriate in cases such as *Lennon* in which "permanent status rights turn on collateral legal issues of great subtlety"[15] but was "inappropriate where, as here, deportability is conceded and only delay is desired."[16]

9. 527 F.2d 187 (2d Cir. 1975).

10. *Id.* at 191 n.7. It is interesting to note, however, that subsequent to the initiation of the Freedom of Information Act suit on behalf of John Lennon, the District Director of the New York office of the INS recommended John Lennon for nonpriority treatment on September 16, 1975, which request was approved by the Regional Commissioner on September 23, 1975. The issue became moot about a week later when the Court of Appeals for the Second Circuit reversed the decision of the Board of Immigration Appeals, which had found Lennon excludable from the United States. *Id.* at 187.

11. 538 F.2d 1211 (5th Cir. 1976).

12. *Id.* at 1213.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

This analysis is most puzzling because in *Lennon*, as in any other deportation case on appeal from the Board of Immigration Appeals to a Circuit Court, a grant of nonpriority would not be necessary to determine collateral issues because all action on the deportation order is automatically stayed by statute.[17] Furthermore, in *Lennon*, the request for nonpriority treatment was initiated by counsel based upon humanitarian considerations in the alien's situation, pursuant to the Operations Instruction, and was in fact granted upon the basis of the humanitarian considerations alleged by counsel.[18] However faulty the analysis, the Fifth Circuit was simply not willing to concede that the Immigration Service, through its Operations Instruction, might very well have promulgated a legislative rule, which created a substantive right for the benefit of aliens.

The Eighth Circuit did not accept the Fifth Circuit approach that nonpriority status existed merely for the administrative convenience of the Immigration Service. The court, in *Vergel v. Immigration and Naturalization Service*,[19] while upholding a deportation order, stayed its mandate for ninety days to afford the alien an opportunity to petition the District Director for a discretionary stay of deportation on humanitarian grounds pursuant to the Operations Instruction. The court found that "deportation [would] cause severe hardship not only to Ms. Vergel but also to the invalid child involved. Thus, there is a substantial basis upon which the District Director could place petitioner in a 'deferred action category' allowing her to remain in this country on humanitarian grounds."[20]

Although the Eighth Circuit neither expands its analysis of the Operations Instruction nor reaches any general conclusions with respect to the nature of the program, it is at odds with the interpretation of the Fifth Circuit in that it recognizes that a humanitarian remedy is available to the alien through the District Director. Moreover, the court impliedly concludes that this relief is in some

17. 8 U.S.C. § 1105a(a)(3) (1976).

18. Form G-312, which was prepared by the District Director and which recommended nonpriority consideration, indicated that the Director based his recommendation on the attached formal presentation made by counsel for Mr. Lennon.

19. 536 F.2d 755 (8th Cir. 1976).

20. *Id.* at 757-58. *See also* David v. INS, 548 F.2d 219 (8th Cir. 1977) (Eighth Circuit again upheld a deportation order denying the petitioner relief but stayed the mandate for 90 days to allow the alien to apply to the District Director for a "deferred action category" (nonpriority status)).

manner a "right" which can be requested of the District Director by an alien.

Nicholas v. Immigration and Naturalization Service—*The Ninth Circuit Squarely Faces the Issue*

The court in *Nicholas v. Immigration and Naturalization Service*[21] squarely faced the District Director's action with reference to a nonpriority claim. Petitioner had asked the court of appeals to overrule the District Director's decision denying nonpriority status to Nicholas. The court of appeals, in reaching its decision, found it necessary to focus upon the appropriate standard of review. As it had in *Lennon*, the INS maintained that nonpriority status should be viewed as comparable to prosecutorial discretion and that accordingly, in order for a reversal to be justified, a showing had to be made that an established pattern of treatment of others similarly situated was departed from without reason *and* that the decision was based upon impermissible considerations such as race or religion.

Petitioner advocated a strict standard,[22] which is the test utilized to review discretionary suspension of deportation under section 244(a) of the Immigration and Nationality Act.[23] This

21. 590 F.2d 802 (9th Cir. 1979).

22. *Id.* at 805-06. The INS argued for a standard allowing greater agency discretion, citing United States v. Swanson, 509 F.2d 1205 (8th Cir. 1975); United States v. Ortega Alvarez, 506 F.2d 455 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); United States v. Bell, 506 F.2d 207 (D.C. Cir. 1974); United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974). *Id.* at 805.

23. Immigration and Nationality Act of 1952, § 244(a), 8 U.S.C. § 1254(a) (1976) provides:

> As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
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> (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceeding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or
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> (2) is deportable under paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 1251(a) of this title; has been physically present in the United States for a continuous period of not less than 10 years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

standard, cited in *Rassano v. Immigration and Naturalization Service*,[24] requires only that the court find the decision "arbitrary or capricious or an abuse of discretion."[25]

The Ninth Circuit, in a carefully reasoned opinion, concluded that this instruction confers a "substantive benefit upon the alien, rather than setting up an administrative convenience."[26] The court distinguished this case from *Yan Wo Cheng v. Rinaldi*[27] in finding that the instruction clearly and directly affects substantive rights and, in fact, very closely parallels the suspension of deportation statute in that "its effect can be final and permanent, with the same force as that of a Congressional statute."[28]

After considering the approaches of the other circuits, the Ninth Circuit clearly held that through the issuance of this Operations Instruction, the INS had created a legislative rule which parallels in effect a Congressional statute and that the agency should be held to the same standard of review.[29] The court found (a) that the sole basis for granting relief under this Operations Instruction is the presence of humanitarian factors; (b) that the Instruction is directive in nature—"the District Director *shall* recommend"; and (c) that the effect of such relief upon a deportation order is to defer it indefinitely.[30] Indeed, a substantive right had been created within the discretion of the District Director pursuant to this Operations Instruction paralleling that established by statute in section 244(a) of the Immigration and Nationality Act.

Unfortunately, the *Nicholas* case was one of those instances in which the operation was a success but the patient died. The court, in holding for the petitioner, said that if a showing could be made that the District Director's decision to deviate from the norm was arbitrary or capricious it must be reversed. However, the court found Nicholas unable to demonstrate the norm with regard to nonpriority decisions and thus unable to prove deviation

24. 492 F.2d 220, 227 (7th Cir. 1974), *cert. denied*, 413 U.S. 1113 (1975). *See also* Wildes, *The Nonpriority Program Goes Public*, *supra* note 6, at 64 n.56.
25. *Id.* at 227.
26. Nicholas v. INS, 590 F.2d 802, 807 (9th Cir. 1979).
27. 389 F. Supp. 583 (D.N.J. 1975).
28. Nicholas v. INS, 590 F.2d 802, 807 (9th Cir. 1979).
29. *Id.* at 808. "It would be curious, to say the least, if, of two procedures with potentially identical impact upon the alien, there was qualitatively more discretion for the one without direct Congressional approval than for the Congressionally approved procedure." *Id.* at 807.
30. *Id.* at 806.

from the norm.[31] Nicholas had submitted only the findings of the study by Wildes[32] based on the data obtained in the *Lennon* district court proceedings.[33] The court rejected the study as an inadequate basis, pointing out that the article digested only the cases in which nonpriority status was approved.[34]

By all standards, the implications of the *Nicholas* decision are far-reaching. The INS has evolved a program conferring a substantial benefit upon aliens, which apparently, at least in the view of two distinguished circuit courts, has the force and impact of a rule and perhaps even that of a statute. All this notwithstanding, the Immigration Service has attempted to play down the impact of this program.

In accordance with a well-established principle of administrative law, a written expression of "policy" may be a rule and have the impact of a rule, regardless of how the agency attempts to designate or describe it.[35] The Operations Instruction thus appears to be a firm rule. As such, it should probably be subject to the notice and publication requirements of the Administrative Procedure Act.[36] This author would suggest that this conclusion is in accordance with present-day administrative law and that the same principle is probably equally applicable to a number of other Operations Instructions.

Operations Instructions as Administrative Rules

The Administrative Law Background

The question of when the pronouncements of an administrative

31. *Id.* at 808.
32. Wildes, *The Nonpriority Program Goes Public, supra* note 6.
33. Nicholas v. INS, 590 F.2d 802, 808 (9th Cir. 1979).
34. *Id.* Ironically, sometime subsequent to the decision in *Nicholas v. INS*, pursuant to an agreement reached between counsel for John Lennon and the Government regarding the ongoing matter of Lennon v. Richardson, 378 F. Supp. 39 (S.D.N.Y. 1974), counsel received the record copies of all G-312s for a six-month period from May, 1976, to November, 1976, in which nonpriority recommendations by the District Director in the Northeastern Region had been rejected. Not a single case had been rejected on its merits. In each case, the Regional Commissioner referred the record back to the District Director, pointing out that nonpriority was not needed, either because deportation had already been stayed or because alternative relief was available. Letter from Thomas H. Belote, Assistant U.S. Attorney for the Southern District of New York (May 1, 1979). It appears that there is absolutely no data available from which one could infer the norm or standard for reaching a nonpriority decision other than the data analyzed and published in the *San Diego Law Review,* Wildes, *The Nonpriority Program Goes Public, supra* note 6, which was presented to the Court of Appeals for the Ninth Circuit. Nonpriority records of denied cases are presumably retained by the Regional Commissioner for only six months.
35. See text accompanying notes 35-43 *infra.*
36. 5 U.S.C. § 553 (1976).

agency take on the effect and impact of rules has defied resolution for decades. Numerous authorities have attempted to craft a workable definition.[37] The Administrative Procedure Act defines a rule as

> the whole or a part of an agency statement of general or particular applicability and future effect, designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures, or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing.[38]

This definition, which focuses on the nature of a rule as being of general or particular applicability, is effectively directed to the "future effect" of the rule. Although the definition is useful in determining the nature of a rule, we must look to past case law to determine what effect will be given to an agency's statement.

It is clear from administrative law history that the format of a statement is not determinative of whether it is in fact a rule. In *Columbia Broadcasting System, Inc. v. United States*,[39] the Supreme Court held that regulations promulgated by the Federal Communications Commission were a reviewable "order," even though they purported to merely announce a policy describing the circumstances in which the Commission would deny licenses. The court stated that "[t]he particular label placed upon it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive."[40] Similarly, in cases in which the Immigration Service might claim that a particular Operations Instruction is merely an intra-agency directive, its conclusion may not necessarily be confirmed in court. We must look to other factors to determine whether it is a rule with legislative effect.[41]

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37. *See* Fuchs, *Procedure in Administrative Rule-Making*, 52 HARV. L. REV. 259, 260-65 (1938). *See also* J. DICKENSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 19-21 (1927).

38. Administrative Procedure Act § 2(c), 5 U.S.C. § 551(4) (1976).

39. 316 U.S. 407 (1942).

40. *Id.* at 416. The historical underpinnings of this principle go as far back as an 1833 decision of the Supreme Court which indicated that "usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits." United States v. Macdaniel, 32 U.S. (7 Pet.) 1, 15 (1833).

41. See the criteria outlined in 5 U.S.C. §§ 553 (b), (d), 552(a)(1) (1976), which distinguish among legislative rules, interpretive rules, general statements of policy, and rules of agency organization. *See also* K. DAVIS, ADMINISTRATIVE LAW OF

There appear to be two dominant considerations involved. Historically, the prevailing law has been that a statement is construed as a legislative rule when the agency has exercised a delegated power to regulate. If the promulgated rule is not within the context of the exercise of the delegated power, it is not a legislative rule.[42] However, a series of cases has developed a different theory which relates to the effect of the agency's pronouncement rather than to the jurisdictional area of the agency's activity.[43] These cases postulate that the critical issue is the so-called "substantial impact" or lack of substantial impact of the rule promulgated. This latter theory, developed through case law in the 1970s, has figured critically in construing Operations Instructions of the Immigration Service.

The determination by a court as to which test to apply to an Operations Instruction can be critical. Once an Operations Instruction is construed to be a legislative rule, and perhaps even an interpretive rule,[44] it will be subject to the advance notice and publication requirements of the Administrative Procedure Act[45] and will be binding upon the agency.[46]

The Lewis-Mota *Decision*

Lewis-Mota v. Secretary of Labor[47] has had considerable influence on this issue, which relates to the application of section 212(a)(14) of the Immigration and Nationality Act,[48] as applied by the Department of Labor through its regulations. *Lewis-Mota* serves as a precedent in construing Operations Instructions of the Immigration Service itself. Under section 212(a)(14) of the Act, aliens seeking to enter the United States to perform skilled or unskilled labor are excludable from the United States unless the Secretary of Labor has certified that there is an insufficient number of workers in the United States who are able, willing, and qualified to perform the job and that the employment of such

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THE SEVENTIES, § 5.03 (1976). Although the distinctions are obscure and difficult to evaluate, it is apparent that when an agency statement is determined to be an administratively created "legislative" rule, it has the effect of and most closely resembles actual legislation in all of its practical effects.

42. *See* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, § 5.03 (1976). *See also* General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

43. *See* Pickus v. United States Bd. of Parole, 507 F.2d 1107 (D.C. Cir. 1974). *See also* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 5.03-1 (1976).

44. K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, § 5.03.4. *See also* Morton v. Ruiz, 415 U.S. 199 (1974).

45. 5 U.S.C. §§ 552-553 (1976).

46. *See* United States v. Nixon, 418 U.S. 683, 694-96 (1974). *See also* Accardi v. Shaughnessy, 347 U.S. 260 (1954).

47. 469 F.2d 478 (2d Cir. 1972).

48. 8 U.S.C. § 1182 (a)(14) (1976).

aliens will not adversely affect the wages or working conditions of American workers.[49] The Secretary of the Department of Labor has issued schedules, among which is Schedule C, which sets forth a "Precertification List" designating occupations in which there is a shortage of labor in a specified geographic area. The schedule was issued after advance public notice in the *Federal Register*, thus permitting public comment. It was occasionally amended thereafter without following this procedure and was finally rescinded in its entirety pursuant to a directive of the Secretary of Labor and without advance public notice.[50]

The issue before the court in *Lewis-Mota* was whether this suspension of Schedule C was valid, considering the notice and publication requirements of section 553 of the Administrative Procedure Act.[51] The district court held that rulemaking was not an issue because the Secretary's statutory power was limited to making a factual determination as to availability of American workers. The Second Circuit disagreed, referring to the rescission "as an agency statement of general or particular applicability and future effect designed to implement . . . law or policy."[52] In reversing the district court, the Second Circuit held that since the directives suspending Schedule C "changed existing rights and obligations" and thus had "substantial impact upon both aliens and employers," notice of opportunity for comment should have been provided through publication.[53] In essence, the Second Circuit Court of Appeals held that given the substantial impact of this directive, it was a rule subject to the advance notice requirements of section 553 of the Administrative Procedure Act. Although the court's decision was widely accepted, at least one au-

49. Immigration and Nationality Act § 212(a)(14), 8 U.S.C. § 1182(a)(14) (1976), excludes from the United States:

> Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. . . .

50. Lewis-Mota v. Secretary of Labor, 469 F.2d 478, 480 (2d Cir. 1972).
51. *Id.* at 481.
52. *Id.* at 480 (quoting language in 5 U.S.C. § 551(4) (1976)).
53. *Id.* at 482.

thority has questioned its rationale.[54]

The Voluntary Departure Cases

Operations Instruction 103.1 was only one of several Instructions, outlining policies or programs of the INS, about which the courts were forced to decide if the Operations Instruction was in fact a rule. Pursuant to Operations Instruction 242.10, provision was made for the District Director to grant extended or indefinite periods of voluntary departure under prescribed circumstances. Historically, this benefit was described only in the Operations Instructions and became the subject of litigation concerning its status as an administrative rule.

In *Buckley v. Gibney*,[55] the petitioner was the beneficiary of an approved sixth preference petition.[56] He maintained that he was entitled to a stay of deportation and a grant of indefinite "voluntary departure" based upon Operations Instructions 242.10(b) and 242.10(a)(6).[57] The court noted that this latter Operations Instruction provided that the beneficiary of an approved sixth preference who also qualified for third preference and who could not obtain a visa solely because a visa number was unavailable could be granted voluntary departure, allowing him to remain in the United States until a visa did become available.[58]

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54. Professor Davis criticized the reasoning of the court, contending that it was not necessary to use the substantial impact test. The analysis, according to Davis, should have been as to whether rulemaking power had been delegated to the Department of Labor and whether the Department, promulgating this directive, had intended to exercise that power. *See* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 5.03-2 (1976).

55. 332 F. Supp. 790 (S.D.N.Y. 1971).

56. Pursuant to 8 U.S.C. § 1153 (1976), immigrant visas are allocated according to a preference system which lists seven preference categories and one nonpreference category. Sixth preference visa numbers are made available to beneficiaries of an approved petition filed on their behalf if they qualify under § 1153(a)(6) which reads:

> Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in section 1151(a)(1) or (2) of this title, to qualified immigrants who are capable of performing specified skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States.

57. Buckley v. Gibney, 332 F. Supp. 790, 794 (S.D.N.Y. 1971).

58. *Id.* Special consideration was given to alien professionals and persons who had exceptional ability in the arts or sciences, encompassed within the third preference classification. Pursuant to 8 U.S.C. § 1153(a)(3) (1976):

> Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in section 1151(a)(ii) of this title, to qualified immigrants who are members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States, and whose services in the professions, sciences or arts are sought by an employer in the United States.

The court, however, found that the petitioner did not qualify for the third preference.[59] Moreover, the court found that even if the petitioner did so qualify, it would not have been an abuse of discretion to deny him the privilege of extended voluntary departure, given petitioner's violation of the immigration laws.[60] The *Buckley* court seems to imply that to some extent the Operations Instruction did establish fixed criteria, and perhaps a rule, with which a District Director was bound to comply. However, in the very same decision, in the course of refuting petitioner's argument that the holders of sixth preference approvals were being discriminated against in violation of the due process clause, the court stated:

> Buckley is not being deported, however, under any Operation Instructions; he is being deported under the statute, 8 U.S.C. § 1251(a)(2), because he is illegally in the country. These Operation Instructions affect Buckley only insofar as they serve as a guide in considering his request for voluntary departure; their only effect is that they fail to recommend the extension of the privilege of voluntary departure to beneficiaries of approved sixth preference petitions.\ The Operation Instructions do not require that requests by such beneficiaries be denied; they simply encourage the granting of requests by beneficiaries of greater preferences.[61]

The Buckley court held that if the Immigration Service has "carved out" a policy of extended voluntary departure through its Operations Instructions for third preference petition holders, the failure to do so for sixth preference petition holders cannot be challenged. Admittedly, the court went further, implying that the Operations Instruction in this instance was only "a guide" in considering a request for voluntary departure. That implication was clearly not the focus of this decision, however; it was dictum unsupported by any careful analysis of the applicability of law regarding the effect of administrative rules.

Not so, however, in *Noel v. Chapman*.[62] At issue in *Noel* was a directive issued under the identical Operations Instruction, advising District Directors to deny extended departure time to Western Hemisphere aliens who have the requisite family status qualifying them for visas unless compelling circumstances warranted this relief.[63]

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59. Buckley v. Gibney, 332 F. Supp. 790, 794 (S.D.N.Y. 1971).

60. *Id.* at 795. Buckley had intered the country as a visitor. He thereafter violated a condition of his visa by accepting employment. *Id.*

61. *Id.* at 796.

62. 508 F.2d 1023 (2d Cir. 1975).

63. *Id.* at 1025. This directive was issued as a result of advice given on June 27,

Again, as in *Buckley*, petitioner's construction of the Operations Instruction was rejected. The Second Circuit held that the requirements of the Administrative Procedure Act mandating publication and notice were not applicable because the Act exempts from its publication requirements "general statements of policy."[64] Admitting that there is much confusion about what is meant by a "statement of policy," the court nevertheless found that this exception was applicable here.[65] The Second Circuit went on to state that because 8 C.F.R. § 244.2—a regulation promulgated in accordance with the publication procedures—indicated that it was within the sole jurisdiction of the District Director to grant voluntary departure, these Operations Instructions could be viewed merely as intra-agency guidelines.[66] The court also purported to distinguish *Lewis-Mota*, stating that application of the "substantial impact" test would also result in the rejection of this Operations Instruction as a rule. The court reasoned that because this particular Operations Instruction did not change the fact that authority to extend voluntary departure was delegated to the District Director's sole discretion, no existing rights had been changed.[67]

This reasoning appears somewhat ingenious as the Second Circuit admits that it was the established policy of the District Director of New York to "routinely" grant extensions of stay in cases of aliens married to lawful resident aliens, such as petitioner in this case. The court appears to ignore the obvious fact that Noel's rights had been most significantly affected as a result of this directive.[68]

1972, by Congressman Peter Rodino, then chairman of the Subcommittee on Immigration of the House Committee on the Judiciary, to the Commissioner of the INS. Rodino reported that hearings of his subcommittee had indicated that the employment of illegal aliens in this country was unfavorably influencing the domestic job market and that it would therefore not be appropriate to routinely permit this class of aliens to remain in the United States to await issuance of their visas. The directive in its final form, issued on April 10th, 1973, established April 10th as a cutoff date. Extensions of voluntary departure would still be permitted for aliens who were present in the United States and who had the requisite family ties prior to April 10th, 1973. *Id.*

64. 5 U.S.C. § 553(b)(A) (1976). *But see id.* § 552(a)(1)(D) (1976).

65. Noel v. Chapman, 508 F.2d 1023, 1030 (2d Cir. 1975).

66. *Id.*

67. *Id.*

68. It is suggested that the court's reasoning was erroneous, even if one were not to apply the "substantial impact" test and determine the status of the Operations Instruction as a rule, based upon whether the agency was delegated authority to make rules in this area and whether the agency, by issuing this directive, intended to exercise its delegated authority. The INS was clearly delegated the authority to administer the departure of aliens from the United States. It is also quite clear from the circumstances of this case that the Service intended to formulate a rule with respect to the issuance of extended voluntary departure, as the

The issue was not resolved with the Second Circuit Court's decision in *Noel v. Chapman.* In *Parco v. Morris*,[69] provisions under this Operations Instruction were recognized for their effect as administrative rules. At issue was the same directive considered in *Noel v. Chapman*; this directive also terminated portions of Operations Instruction 242.10(a)(6), which provided for the routine granting of extended voluntary departure for beneficiaries of approved third preference petitions.

The Pennsylvania District Court declined to follow *Noel* and distinguished the *Noel* decision. In *Parco* the Government stipulated on behalf of the Philadelphia INS Director that the precipitous rescission of the Operations Instruction was the *sole* reason for the denial of Parco's request for an extension of voluntary departure. Therefore, the court held, the District Director was no longer exercising discretion, but was in fact abiding by an inflexible rule issued by the Immigration Service.[70]

Clearly, the distinction is purely formal. Although in *Noel v. Chapman* no stipulation was made on behalf of the government, it appears obvious that the New York District Director's decision to deny Noel's request for an extension of voluntary departure was also based *solely* upon the directive. The Second Circuit Court of Appeal admitted that requests for voluntary departure were routinely granted prior to the directive mandating the change in policy.[71] Furthermore, the *Parco* court applied the "substantial impact" test and concluded, contra to *Noel*, that this directive does in fact have a substantial impact, is not merely a guide to the exercise of discretion, and is therefore subject to the notice and publication requirements of the Administrative Procedure Act.[72]

It is quite clear that the decisions concerning the "extended voluntary departure" provisions of the Operations Instructions have come full circle. Although the courts in earlier decisions were reluctant to apply the administrative law principle of the "substan-

specific purpose of its directive was to cancel a previous policy prevalent in the New York District Office of the INS, and it was adopted as a direct result of criticism by Congressman Rodino.

69. 426 F. Supp. 976 (E.D. Pa. 1977).

70. *Id.* at 984.

71. Noel v. Chapman, 508 F.2d 1023, 1025 (2d Cir. 1975).

72. Parco v. Morris, 462 F. Supp. 976, 984-85 (E.D. Pa. 1977). The court specifically found that it was bound by Texaco, Inc. v. FPC, 412 F.2d 740 (3d Cir. 1969), which applied the "substantial impact" test. *Id.* at 985.

tial impact" test, they did so in later cases. Eventually a federal court was willing to recognize that this Operations Instruction was in fact an administrative rule.[73] This evolution strikingly parallels the series of cases analyzing the nonpriority program of the INS under Operations Instruction 103, concluding with the Ninth Circuit decision in *Nicholas v. Immigration and Naturalization Service*.[74]

The Asylum Cases

The attempts of the Immigration Service to formulate procedures for the assessment of claims for political asylum have followed a similar course in the courts. Here too, the initial court opinions considered the directives of the Service as guides. This position was modified by subsequent decisions which held that the directives were binding as rules upon the Service.

In *Kan Kam Lin v. Rinaldi*[75] and *Yan Wo Cheng v. Rinaldi*,[76] petitioners' claims to asylum, pursuant to an Operations Instruction promulgated by the INS, were rejected. Plaintiffs, natives of the People's Republic of China, allegedly fled from that country because of Communist persecution, going first to Hong Kong and thereafter to the United States. The *Lin* plaintiffs maintained that they were entitled to political asylum pursuant to the terms of the United Nations Protocol Relating to the Status of Refugees.[77] The court rejected the claim, reasoning that the Protocol[78] applied only to aliens lawfully in the country.[79] The *Lin* plaintiffs were unlawfully in the United States.[80]

The *Cheng* plaintiffs claimed that a right to full consideration of their request for political asylum should be recognized pursuant to Operations Instruction 108.1(f).[81] Operations Instruction 108.1 provided for the granting of political asylum if the possibility of persecution was established and, in the alternative, for an in-depth interview by the District Director in order to make a proper assessment of the facts to be forwarded to the State Department's

73. In conformity with the *Parco* decision, § 242.5(a)(2)(D) was published in title 8 of the *Code of Federal Regulations* after it met the appropriate publication and notice requirements. 8 C.F.R. § 242.5(a)(2)(vi)(D) (1979).

74. 590 F.2d 802 (9th Cir. 1979). For an analysis of the *Nicholas* case, see text accompanying notes 21-36 *supra*.

75. 361 F. Supp. 177 (D.N.J. 1973).

76. 389 F. Supp. 583 (D.N.J. 1975).

77. Kan Kam Lin v. Rinaldi, 361 F. Supp. 177, 180 (D.N.J. 1973).

78. Protocol Relating to the Status of Refugees, *opened for accession* Jan. 31, 1968, 19 U.S.T. 6223, T.I.A.S. No. 6577.

79. Kan Kam Lin v. Rinaldi, 361 F. Supp. 177, 183-84 (D.N.J. 1973).

80. *Id.*

81. Yan Wo Cheng v. Rinaldi, 389 F. Supp. 583, 585 (D.N.J. 1975).

Office of Refugee and Migration Affairs.[82] Petitioners claimed that a subsequent directive, dated February 14, 1973, which advised District Directors that the State Department would no longer entertain asylum requests from aliens who had left Communist China and had thereafter resided in Hong Kong for a substantial period of time before arriving in the United States, could not, as the directive indicated, render the Operations Instruction inoperative. Petitioners claimed that a right had been created which could not be abrogated without compliance with proper rulemaking procedures.[83]

The *Cheng* court found that this Operations Instruction merely implemented the right of asylum granted by section 243(h) of the Immigration and Nationality Act.[84] It also found that the subsequent directive merely implemented the State Department's advice, confirming that the Department was making a negative recommendation in any case in which petitioners had remained for a substantial period of time in Hong Kong, regardless of the facts elicited in any in-depth interview conducted by the Immigration Service.[85] Accordingly, neither had a right been created, nor any right subsequently abrogated.

There is no evidence of any attempt by the court in these cases to analyze in terms of administrative law principles the construction placed on the Operations Instruction involved. Moreover, there is an interesting "epilogue" in the *Yan Wo Cheng* decision,[86] in which Judge Lacey castigates the so-called "program of delay"[87] which he believed the petitioners and their representatives had entered into in the course of the proceedings. Although he declares that his decision was based solely upon the facts and the law relative to the case, the implication is clear that he was less than sympathetic to petitioner's claim of right by virtue of the Operations Instruction.

The issue was again raised in several court actions filed on behalf of Haitians seeking refuge in the United States.[88] It was claimed that, in accordance with the Protocol Relating to the Sta-

82. OPERATIONS INSTRUCTIONS, *supra* note 1, § 108.1.
83. Yan Wo Cheng v. Rinaldi, 389 F. Supp. 583, 588 (D.N.J. 1975).
84. *Id.* at 589. *See* Immigration and Nationality Act § 243(h), 8 U.S.C. § 1253(h) (1976).
85. Yan Wo Cheng v. Rinaldi, 389 F. Supp. 583, 588-89 (D.N.J. 1975).
86. *Id.* at 590.
87. *Id.* at 591.
88. Sannon v. United States, 427 F. Supp. 1270 (S.D. Fla. 1977), *vacated and re-*

tus of Refugees,[89] petitioners were entitled to a full formal evidentiary hearing with respect to their claims for political asylum and, accordingly, that the pro-forma interviews conducted by the District Director's representatives pursuant to the Operations Instruction described above were inadequate. The District Court for the Southern District of Florida accepted the claim and found for the petitioners in *Sannon v. United States*.[90] Three weeks after this decision, the Court of Appeals for the Fifth Circuit, in *Pierre v. United States*,[91] found for the Immigration Service and against petitioners on identical claims and facts. A Notice of Appeal was filed by the Immigration Service in *Sannon*, and a petition for a writ of certiorari was filed by the petitioners in *Pierre*.

Subsequently, the Government indicated that it was preparing revised regulations, with respect to the asylum procedure, which would make the contentions of petitioners in *Sannon* and *Pierre* moot. Accordingly, the Supreme Court granted the writ of certiorari on November 28, 1977, and the judgement of the Fifth Circuit in *Pierre* was vacated and remanded to the Fifth Circuit to consider the mootness question.[92]

On September 13, 1978, the new INS regulations concerning applications for parole in connection with exclusion hearings were published in the *Federal Register*.[93] On remand, the *Sannon* court ruled that these regulations were invalid because they were not published in accordance with the notice and publication requirements of the Administrative Procedure Act.[94]

Once the web of litigation is untangled, it becomes clear that the Immigration Service has been constrained, with reference to its procedure in political asylum applications, to give due deference to an alien's claim of right. Significantly, and unlike the voluntary departure policy or the Nonpriority Program, the rights

manded, 566 F.2d 104 (5th Cir. 1978); Pierre v. United States, 547 F.2d 1281 (5th Cir.), *vacated and remanded*, 434 U.S. 962 (1977).

89. Protocol Relating to the Status of Refugees, *opened for accession* Jan. 31, 1968, 19 U.S.T. 6223, T.I.A.S. No. 6577. Article 33 of the Protocol reads in part: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

90. 427 F. Supp. 1270 (S.D. Fla. 1977), *vacated and remanded*, 566 F.2d 104 (5th Cir. 1978).

91. 547 F.2d 1281 (5th Cir.), *vacated and remanded*, 434 U.S. 962 (1977).

92. Pierre v. United States, 434 U.S. 962 (1977).

93. *See* 43 Fed. Reg. 40,802 (1978).

94. Sannon v. United States, 460 F. Supp. 458 (S.D. Fla. 1978). Subsequently the Immigration Service, in compliance with the principles set forth in this court decision, followed the appropriate procedures for notice of publication. Final regulations with respect to asylum applications were eventually published and made effective as of May 10, 1979. *See* 43 Fed. Reg. 48,620 (1978).

developed and expanded were not the creation of the internal policy of the Immigration Service itself, but of another authority. Nevertheless, a situation evolved in which a policy or program of the Immigration Service, deemphasized by the Service itself and described in its Operations Instructions as merely an internal guide, was in fact held to be a rule, binding upon the Service in its treatment of asylum claims.

SOME IMPLICATIONS FROM *PARCO, SANNON,* AND *NICHOLAS* FOR THE FUTURE

Perhaps it is presumptuous to infer any pattern from the lines of cases described above. The federal courts are beginning to recognize, with respect to the policies of the INS, that given the immense enforcement and regulatory power of the Immigration Service over the lives of aliens, the programs and policies that the Service promulgates must be carefully scrutinized in view of their "substantial impact" on the alien community. This is especially true if the exercise of discretion by officials of the INS can have a direct effect upon a person's ability to remain within the borders of the United States as a free person.

The Immigration Service is not insensitive to this issue. In fact, a group of officers was convened under the chairmanship of the Associate Commissioner, Examinations, to study various areas of Service operation in which discretion is exercised under the Immigration and Nationality Act. The committee identified several areas in which it believed criteria for the exercise of discretion should be spelled out more explicitly. It published a series of proposed rules in the *Federal Register*.[95] The proposals are wide-ranging, covering such areas as the criteria for making available evidence used in the adjudication of a petition,[96] the determination of bonds,[97] the revocation of approved petitions,[98] documen-

95. 44 Fed. Reg. 36,187 (1979). The proposal noted: "The service believes that it is necessary that criteria for the exercise of discretion be developed and published in its regulations to assure that all applicants and petitioners receive fair and equal treatment before the Service." The "summary" paragraph of the proposed rules stated: "These amendments are necessary in order to place in our regulations the discretionary criteria we use in making administrative decisions. We desire these criteria to be available to all Service personnel and to all members of the public, attorneys and representatives, applicants and petitioners who come before the Service." *Id.*

96. 44 Fed. Reg. 36,187 (1979).

97. *See id.* at 36,188.

98. *Id.*

tary requirements for admission,[99] discretionary criteria for adjustments of status to that of a person admitted for permanent residence,[100] stays of deportation,[101] and others.[102] Submitted separately on the same date was a proposal setting forth the criteria to be used by District Directors in awarding grants of voluntary departure prior to the commencement of a hearing.[103] Some of these criteria are newly developed or expanded; others are, at least in part, already included in the Operations Instructions.[104]

What is significant about the Committee's commendable work is its recognition of the fact that discretion must be exercised in a consistent and uniform manner and, perhaps most important of all, in a predictable manner. Implicit in this Service de facto recognition that the proper exercise of discretion must be consistent and predictable is an acceptance of the fact that a right has been created entitling the alien to the benefits of consistent and predictable practice and procedures by the Immigration Service. The Immigration Service is apparently willing to concede that these criteria are legislative rules relating to substantive rights.

CONCLUSION

In summary, the importance of the *Nicholas* decision, the earlier cases construing the Operations Instructions of the Immigration Service, and the recently proposed regulations promulgated by the Service cannot be overemphasized.

The courts have long resisted the argument that an alien should be entitled to all of the protections guaranteed to one accused of a criminal offense,[105] although they admit that deportation and banishment can deprive an individual of "all that makes his life worth living."[106]

At least to the extent possible under administrative law, every conceivable attempt should be made to safeguard the rights of an alien who may be subject to expulsion. The Service should right-

99. *See id.* at 36,189.
100. *Id.*
101. *See id.* at 36,191.
102. *See generally id.* at 36,187-91.
103. *See* 44 Fed. Reg. 36,193 (1979). *See also* 8 C.F.R. § 242.5 (1979).
104. With respect to extended voluntary departure and voluntary departure in general, see the provisions outlined in Operations Instruction 242.10. OPERATIONS INSTRUCTIONS, *supra* note 1, § 242.10.
105. *See, e.g.*, Bufalino v. INS, 473 F.2d 728 (3d Cir.), *cert. denied* 412 U.S. 928 (1973) (deportation statutes are not penal in nature); Marcello v. Kennedy, 194 F. Supp. 750, 753 (D.C. Cir. 1961) (deportation not punishment and thus not subject to provisions of eighth amendment).
106. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

fully be constrained by all the safeguards of the Administrative Procedure Act with respect to its policies, whether they be published or promulgated through Operations Instructions, regulations, or other means. With the weight of the entire government against the alien, he should be entitled to rely upon the fact that the government will at least be bound by its own directives. Only by so doing will any petitioner or applicant before the Immigration Service be assured that the Immigration Service's own proposal will be fulfilled: "to assure that all applicants and petitioners receive fair and equal treatment before the Service."[107]

107. 44 Fed. Reg. 36,187 (1979).