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The Meaning of Nationality in the Recent Immigration Acts

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text-writers have attributed to the treaty-making power,²⁴ and the action of Congress in asserting its ultimate intention of giving independence to the Philippines,²⁵ indicates that territory outside of the States may be alienated. Certainly no authority can be found denying the competence of the treaty-making power to relinquish inchoate title to territory such as that to the Isle of Pines. Numerous treaties have done just that thing. Every boundary adjustment has meant the relinquishment of an inchoate claim. The Spanish treaty of 1819 relinquished a claim to Texas in exchange for Florida, and the British treaty of 1846 relinquished a claim to Oregon up to fifty-four forty. The Samoan treaty of 1899 (Article 2 paragraph 3) relinquished a claim to half of those islands, and the mandate treaties of 1922-23 relinquished a claim to a fifth share in mandated areas.²⁶ A treaty approved by the Senate on February 10, 1925, may result in relinquishing to the Netherlands a claim to the Island of Palmas south of the Philippines, a *modus vivendi* of 1859 temporarily relinquished to Great Britain a claim to part of San Juan Island in Vancouver Sound,²⁷ and a declaration attached to the Danish treaty of 1916 relinquished any possible claim to Greenland. Many of these claims have been of no legal value. The writer is not aware of any grounds for claiming any part of Greenland, except those relied on by one of the speakers at the Paris dinner party eloquently described by John Fiske.²⁸ Some of them, however, were certainly as sound legally as our claim to the Isle of Pines. In fact San Juan Island was eventually held to be American territory by the arbitration of 1872; nevertheless the courts had supported its temporary relinquishment by executive agreement.²⁹

QUINCY WRIGHT.

THE MEANING OF NATIONALITY IN THE RECENT IMMIGRATION ACTS

The regulation of immigration by determining a quota for each nationality and excluding applicants for admission in excess of such quota was first attempted in the Immigration Act of 1921,¹ which expired by limitation

that it should become a colony to some foreign state. There is no power in the Constitution to cede any part of the territories of the United States. The whole number of Congress, being unanimous, have no power to suspend or cede territorial rights. But this amendment admits, in the fullest latitude, that Congress have a right to dismember the empire." Elliott, Debates, Vol. 3, pp. 602, 660. The context indicates that territorial claims of the States was in Randolph's mind and the debate was on this question, *Ibid.*, pp. 499-504.

²⁴ *Geofroy v. Riggs*, 133 U. S. 258, 267, 1890; Kent, Commentaries, Vol. 1, pp. 166, 176; Wright, Control of American Foreign Relations, pp. 57, 121, 247-248; this JOURNAL, Vol. 13, pp. 248-251.

²⁵ Act of August 29, 1916, 39 U. S. Stat. 545.

²⁶ This JOURNAL, Vol. 13, p. 736.

²⁷ Crandall, Treaties, their making and Enforcement, p. 107; Wright, Control of American Foreign Relations, p. 239.

²⁸ Fiske, "Manifest Destiny," American Political Ideas, p. 101.

²⁹ *Watts v. U. S.*, 1 Wash. Terr. 282, 294, 1870.

¹ 42 Statutes at Large, 5.

last year, and has been continued in the more recent Immigration Act of 1924,² now in effect. Until the more recent enactment the meaning of nationality was obscured in a curious ambiguity.

The Act of 1921, Section 2, provided in part as follows:

(a) That the number of aliens of any nationality who may be admitted under the immigration laws to the United States in any fiscal year shall be limited to 3 per centum of the number of foreign-born persons of such nationality resident in the United States as determined by the United States census of 1910. . . .

(b) For the purposes of this Act nationality shall be determined by country of birth, treating as separate countries the colonies or dependencies for which separate enumeration was made in the United States census of 1910.

(c) The Secretary of State, the Secretary of Commerce, and the Secretary of Labor, jointly, shall, as soon as feasible after the enactment of this Act, prepare a statement showing the number of persons of the various nationalities resident in the United States as determined by the United States census of 1910, which statement shall be the population basis for the purposes of this Act.

Thus the Act of 1921 made nationality the basis of the quota plan. The number of admissible aliens "of any nationality" was to be limited in each fiscal year to a per centum of the foreign born persons "of such nationality" resident in the United States according to the census of 1910. The statement prepared to serve as the population basis was to show the number of resident foreign-born persons "of the various nationalities" as determined by the same census. Similar phraseology was used elsewhere in the statute. Nationality was the basis, it would seem, upon which the statute was intended to function.

Whether nationality was used in the scientific sense, however, meaning the character created by allegiance to a recognized nation or state, or whether its significance was arbitrary, referring only to such groupings as might be arranged by census makers or other administrative officials, remained to be determined by judicial construction. Such construction became essential as soon as it was attempted to apply the Act to immigration from certain of the smaller countries.

The census of 1910 made no separate enumeration for several of the smaller countries, but lumped their nationals together under the heading "other Europe" or "other Asia." The nationals of San Marino, for example, were included under the heading "other Europe." It resulted that no separate immigration quota could be allotted to the nationals of such countries. The Act of 1921 had to be taken either to have authorized one quota for "other Europe" and another for "other Asia," notwithstanding the very express provisions which placed the whole plan upon a nationality basis, or to have left immigration from such countries unrestricted by the quota scheme.

² Federal Statutes Annotated, Pamphlet Supplement No. 38, July 1924, p. 34.

Administrative authorities proceeded upon the assumption that there should be one quota for "other Europe" and another for "other Asia." This interpretation was approved by the Circuit Court of Appeals for the Ninth Circuit in the case of *Pera v. White*, 284 Fed. 699, and also by the Circuit Court of Appeals for the Second Circuit in *United States v. Curran*, 297 Fed. 219. In the former case, referring to the argument that nationality was to be taken in the scientific sense, Judge Hunt remarked:

To adopt such a construction would be to overlook the larger and expressed purpose of the legislation, which is to establish a limitation upon the immigration aliens of any nationality, and in practical effect would permit of unrestricted immigration of aliens from many countries where the census of 1910 made group enumerations.

In the latter case, it was said:

it makes no difference whether the census of 1910 is accurate or inaccurate, philosophical or unphilosophical, in its allocation of nationalities; for the purposes of this statute what is here called "nationality" shall be determined according to the views of the persons who compiled the census referred to.

The interpretation rejected in the above cases appears to have been approved, however, in *Ex parte Haralampopoulos*, 286 Fed. 432, decided by the Federal District Court for the Massachusetts District, and it has been accepted as the correct interpretation by the Circuit Court of Appeals for the Third Circuit in the recent case of *Hughes v. United States*, 1 Fed. (2d) 417. In the latter case immigration authorities had ordered deported some nationals of San Marino upon the ground that the "other Europe" quota had been exhausted. There had been, in fact, no immigrants from San Marino during the month, but the quota had been used up by the admission of immigrants from Gibraltar. The Circuit Court of Appeals affirmed orders which operated in effect to admit the petitioners to the United States.

Delivering the opinion of the court, Judge Morris said:

nowhere does the act provide for or permit an omnibus allotment for separate and distinct countries. The act left the political status of the countries of the world as it found it. The act created no new country or nation. Nor did the census for 1910 do so. The grouping in that census of the nationals, here resident, of several separate and distinct countries under the caption "other Europe" served to create neither a *de jure* nor a *de facto* country by that name.

Although the general purpose of the act was to limit immigration, yet it made such purpose effective only as to the nationalities for which a quota could be made and allotted under the terms of the act. The immigration authorities were not empowered to supply intentional or unintentional statutory omissions. Consequently . . . we think that if San Marino is a separate and distinct political entity, and not a colony or dependency of another nation, there was no legal ground for the exclusion of the appellees, who were natives of that country. But if, perchance, San Marino is not an wholly separate and independent

political entity, it is an *imperium in imperio*, and in this sense a dependency of Italy, by which it is completely surrounded. . . . And as the Italian quota had not been exhausted for the month of September at the time of the arrival of the appellees there was upon this hypothesis, as upon the former, no legal ground for the exclusion of the appellees who were born in San Marino.

It resulted from this diversity of interpretation of the Immigration Act of 1921 that immigrants from several of the smaller countries of Europe and Asia might enter the United States free from quota restrictions in Massachusetts, New Jersey, Pennsylvania, and Delaware, but not in New York, Connecticut, or any of the states of the Pacific coast. Prospective immigrants, if well advised, probably selected their port of entry with due regard to the effect of the decisions reviewed above. An interesting question might have been raised with respect to the possible liability to deportation of an immigrant from San Marino, for example, who had entered lawfully in Pennsylvania and later migrated to New York or California where he would have been excluded.³

The intolerable situation thus created was amended by the Immigration Act of 1924. The new Act provides, with respect to countries for which no separate census enumeration has been made, that in preparing a statement to serve as the population basis the three Secretaries shall jointly estimate, for each of such countries, the number of their nationals who were resident in continental United States when the census was taken and that the number thus estimated shall be considered "as having been determined by the United States census."⁴ In fixing quotas under the new "national origins" plan, which is to become effective July 1, 1927, these countries will be included in the list of those for which new data essential to the application of a new principle are to be prepared.⁵ Thus the Act of 1924 brings the small countries excluded by the interpretation adopted in *Hughes v. United States*, *supra*, expressly within the operation of the quota plan and at the same time avoids attributing to nationality a meaning which is utterly arbitrary.⁶

EDWIN D. DICKINSON.

³ It would appear that this is still a question of practical importance for immigrants who entered under the earlier Act, for the Act of 1924, in Section 30, provides: "Any alien who prior to July 1, 1924, may have entered the United States in violation of such Act [Immigration Act of 1921] or regulations made thereunder may be deported in the same manner as if such Act had not expired."

⁴ See Section 12 (b).

⁵ See Section 11 (c).

⁶ See a valuable commentary upon the principal features of the new statute in articles by A. Warner Parker in this JOURNAL, Vol. XVIII, No. 4, pp. 737-754, and Vol. XIX, No. 1, pp. 23-47.