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Divider Title: _____

Federal Advisory Committee Act

American Association of Physicians & Surgeons, et al. v. Hillary Rodham Clinton, No. 93-399 (D.D.C)

1. ISSUE STATEMENT

Shortly after taking office, President Clinton established a cabinet level Task Force, headed by the First Lady, to advise him with respect to submitting legislation to Congress to reform health care. An intergovernmental working group under White House Adviser Ira Magaziner was set up to gather information and develop options for the Task Force.

Plaintiffs contend that both groups are "advisory committees" within the meaning of the Federal Advisory Committee Act (FACA), and therefore required to issue a charter, hold public meetings after notice in the Federal Register, have a balanced membership, and otherwise comply with the procedural provisions of the Act.

2. STATUS

On appeal of a district court order holding the Task Force to be an advisory committee, the D.C. Circuit reversed. It found the First Lady to be an official of the federal government, thereby qualifying the Task Force for FACA's exemption for committees composed of full time officers or employees of the U.S. The Court of Appeals, however, remanded for further proceedings on whether the working group came within the Act. That question is now pending before the district court on cross motions for summary judgment. Also pending before that court are Motions by plaintiffs for sanctions and to hold Ira Magaziner in contempt for allegedly lying in his declaration. No hearing has yet been scheduled.

3. DEPARTMENT POSITION

Defendants have argued that the working group is not a FACA committee because it lacked the structure, purpose and formality that the Court of Appeals held characterize "advisory committees" under the Act. The group had a shifting membership, a purpose that was not contemplated by Congress in enacting FACA, and operated by the President to deal with what he considered an urgent national crisis.

Plaintiffs' sanctions motion is groundless; they claim that the government shifted litigation positions to their detriment. Plaintiffs simply assumed that we would brief the case a certain way and were caught unaware by our change in emphasis. Ira Magaziner's declaration was accurate. Plaintiffs are elevating a legal dispute over "membership" on the working group into allegations of perjury.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

No known interest.

5. REFERENCE MATERIALS

There are numerous briefs, available from the Federal Programs Branch, in which defendants' positions are detailed.

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Divider Title: _____

Armstrong v. Executive Office of the President
Civ. No. 89-0142 (D.D.C.) (Richey, J.)

1. ISSUE STATEMENT

The Armstrong suit involves a challenge under the Federal Records Act (FRA) to the "e-mail" recordkeeping practices in the Executive Office of the President (EOP), coupled with a FOIA suit to obtain Reagan-era PROFS notes from the National Security Council (NSC) currently on backup tapes. In an August 1993 opinion affirming the holding of the district court, the Court of Appeals held that the prior practice in the Reagan and Bush Administrations of printing hard copies of e-mail, which among other things lacked certain "transmission" information, was insufficient to comply with the government's overall obligations under the FRA to manage e-mail communications as they exist in electronic form. The Court of Appeals remanded the case for further proceedings in light of outstanding injunctive orders entered by the district court which have resulted in the preservation of thousands of Reagan, Bush, and Clinton Administration backup tapes. Pursuant to a cross-appeal filed by plaintiffs, the Court of Appeals also remanded on the specific issue of resolving the legal status of whether the NSC is an "agency" under the FOIA. The Solicitor General declined seeking rehearing en banc or petitioning for certiorari.

The main issues currently present in the litigation are (a) resolution of the legal status of the NSC; and (b) how EOP components expect to comply with the mandate of the Court of Appeals, both prospectively for their respective "e-mail" systems, as well as retroactively in terms of restoring federal records from preserved backup tapes. Since the appellate panel's remand, the parties, with the approval of the district court, have been engaging in settlement negotiations on the issues involved in the lawsuit.

In connection with this settlement process, the Administration sought and obtained $13,125,000 in the Emergency Supplemental Appropriations Act (H.R. 3759) for necessary expenses in compliance with and towards resolution of the lawsuit. These funds will be applied both to efforts at restoring federal records off of the preserved backup tapes, as well as to the development of new "electronic recordkeeping systems" for the long-term maintenance of e-mail in electronic form.

2. STATUS

On March 25, 1994, defendant NSC filed a motion to dismiss or in the alternative for summary judgment on the issue of its legal status, arguing that NSC solely exists to advise and assist the President, and thus its records are exempt from the FRA and FOIA (but are covered instead under the Presidential Records Act). However, pursuant to Presidential Memorandum, the NSC will

undertake to put into effect a policy of voluntary disclosure of NSC records consistent with past practice under the FOIA. Briefing on defendants' motion, including time for discovery, currently runs through July 1994.

As a result of the Armstrong lawsuit, on March 24, 1994, the Archivist issued in the Federal Register a notice of proposed rulemaking specifically on government-wide "e-mail" recordkeeping standards and practices. The comment period closes June 22, 1994.

The parties also have entered into a Stipulation, endorsed by the Court and filed January 27, 1994, which provides for resolution of plaintiffs' original FOIA request for Reagan-era materials. On other matters, the parties are continuing their settlement negotiations.

3. DEPARTMENT POSITION

This Administration has committed itself to developing appropriate electronic recordkeeping systems for the long-term maintenance of "e-mail" communications constituting federal records, at least within components of the EOP. Assistant to the President John Podesta stated in his declaration dated May 28, 1993, filed in Armstrong, that "[i]t is our goal to develop a technologically advanced computer system in the Executive Office of the President which will permit a significantly larger amount of electronic material to be permanently stored and segregated, in retrievable form, than has ever been preserved in the past."

President Clinton addressed the matter of NSC's legal status in a memorandum to National Security Adviser Anthony Lake and NSC Executive Secretary William Itoh dated March 24, 1994, which stated that the President "understand[s] our position is that the NSC is an entity within the Executive Office of the President that exists solely to advise and assist me in the discharge of my constitutionally based responsibilities over the national security affairs of the United States." The President went on to state that "[n]otwithstanding this legal conclusion, I strongly support the policy of past Administrations of permitting public access to certain NSC records, and of leaving certain NSC records to the incoming Administration in order to ensure a smooth transition on national security matters."

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

Unknown

5. REFERENCE MATERIALS

o H.R. 3759 (Emergency Supplemental Appropriations Bill): "For necessary expenses for electronic communications records management activities for compliance with and resolution of

Armstrong v. Executive Office of the President, $13,125,000, to remain available until expended."

- Armstrong v. EOP, 1 F.3d 1274 (D.C. Cir. 1993)
- Federal Records Act, 44 U.S.C. §§ 2901, 3101, 3301
- Presidential Records Act, 44 U.S.C. § 2201

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Divider Title: _____

FBI SEXUAL HARASSMENT CASE
Doucette v. Reno, No. 93-1198 (D. Ariz.)

1. ISSUE STATEMENT

Suzane Doucette, an FBI Special Agent formerly employed in the Tucson, AZ, office, alleges that she was subject to discrimination, retaliation, and sexual harassment, including a "sexual assault" in December 1988. In 1993, she filed a lawsuit in the District of Arizona. In February 1994, she resigned from the Bureau, claiming that she had been constructively discharged.

Ms. Doucette testified before the Senate Governmental Affairs Committee in May 1993, and before a House Committee in March 1994. She has sought media attention for her lawsuit: she traveled to Washington in October 1993 to "turn in her badge," called a press conference, appeared in numerous television interviews (e.g., Nightline, Court TV, The Joan Rivers Show), and has been the subject of a number of magazine articles. She has recently retained Los Angeles attorney Gloria Allred, who is known for handling high-profile cases.

2. STATUS

A partial motion to dismiss based on the statute of limitations has been pending since December, 1993. Both parties have propounded written discovery, and the government is seeking compliance by Ms. Doucette with requests to produce her medical and psychiatric records, which relate to issues she has raised in the case. Plaintiff has scheduled depositions of two FBI employees for May 27 and June 16.

3. DEPARTMENT POSITION

The government's position (formulated after several internal investigations) is that Ms. Doucette's allegations are without foundation, and additionally that many are also time-barred.

The Department has declined comment on the pending litigation. Director Freeh has stated generally that he learned as a judge that "there are two sides to every story," and that the government's side of this story would come out in the course of the litigation.

The FBI has recently settled another well-publicized case, Power-Anderson et al. v. Reno (C.D.Cal.), in which two agents alleged sexual harassment in the FBI's Santa Ana, CA office. The Director has recently issued a message to all FBI field offices reiterating the seriousness with which the Bureau views sexual harassment, and plans to make a public statement to this effect in the near future. (Although this cannot be made public, the difference between Power-Anderson and Doucette is that in the former, the FBI determined that the plaintiffs had a valid claim, and proposed the removal of the harasser. But in Doucette, after

several internal investigations as well as the litigators' interviews of all the witnesses, the FBI had determined that Ms. Doucette's allegations are not valid.)

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

When Ms. Doucette testified in May 1993, her home-state Senator, Dennis DeConcini, introduced her with supportive remarks.

5. REFERENCE MATERIALS

The government's pending Motion to Dismiss, available from the Federal Programs Branch, is the most comprehensive statement of the government's position in the case so far, though it only addresses the statute of limitations issues.

Ms. Doucette's May 1993 Senate testimony has been published and is available from Congressional Affairs.

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Divider Title: _____

FREEDOM OF INFORMATION ACT

Tax Analysts v. Department of Justice and West Publishing Co., No. 94-0043 (D.D.C.)

1. ISSUE STATEMENT

JURIS is the computerized legal research system of the Department of Justice. A substantial portion of JURIS, including most of the federal case law, was procured commercially from West pursuant to a series of contracts and licensing agreements. This contractual arrangement continued until the most recent contract between West and the Department expired on December 31, 1993.

In addition to the legal research data provided by West, JURIS also contains databases and files that were provided by components of the Department and other agencies. These government-provided materials include statutory law, administrative law, government manuals, brief banks, and limited access files containing case-specific resource materials and attorney work files.

Plaintiff seeks disclosure of the JURIS database, including the portions of the database provide under license by West Publishing Co. Plaintiff requests a copy of the JURIS database in computer tape format.

2. STATUS

Judge Charles R. Richey allowed West to intervene as defendants. On January 27, 1994, the court held a status conference and established a briefing schedule for the defendants' dispositive motions to dismiss the complaint to the extent it seeks release of data that was provided by West pursuant to contracts entered into with the Department. The Court instructed the Department to continue processing the portion of plaintiff's FOIA request seeking data contributed to JURIS by Departmental components and other agencies.

Pursuant to the court's instructions, the Department and West filed 12(b)(1) motions to dismiss plaintiff's complaint to the extent it seeks disclosure of the West provided portions of the JURIS database. The motion is pending.

On April 5, 1994, the Department informed plaintiff that it would release several JURIS files that were contributed to JURIS by various Departmental components and other agencies. Subsequently, the Department denied plaintiff's request to the extent it seeks Shepard's data, which was licensed to the Department by McGraw-Hill. Plaintiff's counsel informed the Department that plaintiff's FOIA request does not encompass Shepard's.

The Department continues to process plaintiff's request for the remaining portions of the JURIS database.

Although the West contract required the Department to remove from the JURIS system all data received from West, and either return it to West or destroy it, West has authorized the Department to retain one tape copy of the West database until the conclusion of plaintiff's FOIA lawsuit.

3. DEPARTMENT POSITION

Both West and the Department argue that the database licensed by West to the Department is not an "agency record" under the FOIA, and therefore the court does not have subject matter jurisdiction to compel its disclosure. Should the court deny defendants' motions to dismiss, the Department and West will file motions for summary judgment on the basis that, even if the data provided by West is covered by the FOIA, the data is confidential commercial information exempt from disclosure under 5 U.S.C. § 552(b)(4).

Much of the remaining data on JURIS is not subject to the FOIA. Nevertheless, the Department intends to release as much non-West data on JURIS as is feasible and consistent with Attorney General Reno's announced FOIA policy, regardless whether release would be required under the FOIA.

The Department and other contributing agencies anticipate denying the FOIA request to the extent it seeks disclosure of limited access files containing attorney work product and other privileged and exempt materials. Furthermore, the Air Force, which contributed the FLITE database to JURIS, anticipates denying plaintiff's FOIA request to the extent it seeks FLITE data. FLITE is a legal research database developed by the Air Force as a result of its own commercial procurement arrangements with West and other publishers.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

No known interest.

5. REFERENCE MATERIALS

There are numerous briefs, available form the Federal Programs Branch, in which defendants' positions are detailed.

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Divider Title: _____

OVETT, MISSISSIPPI LITIGATION
Hendry v. Reno, No. 2:94-CV-78PS (S.D. MS)

1. ISSUE STATEMENT

The Henson sisters established Camp Sister Spirit, a lesbian cultural and educational retreat center in Ovett, Mississippi, which encountered hostility from elements of the community. When the sisters were threatened with violence, the Attorney General dispatched Community Relations Service personnel to offer to mediate the dispute. Plaintiffs, two community leaders who claim they oppose Camp Sister Spirit on religious grounds, filed suit alleging that the Attorney General violated their First, Fifth, Ninth and Tenth Amendment rights and acted in excess of statutory authority. They seek injunctive relief and damages.

2. STATUS

Plaintiffs moved for a preliminary injunction to prohibit CRS from mediating and the Attorney General filed a motion to dismiss. On May 9, 1994, with the agreement of the parties, the district court entered an order of dismissal.

3. DEPARTMENT POSITION

The Attorney General's motion challenged plaintiffs' standing because they have suffered no injury, and also argued that none of the plaintiffs' statutory or constitutional claims has any merit. The dismissal is on standing grounds, the court observing that the Department recognizes it cannot compel mediation and that any participation by plaintiffs in such a process would be voluntary.

While mediation without community participation is impossible, if at a future date the Attorney General attempted to send the Community Relations Service personnel back to Ovett to mediate, the plaintiffs could refile their lawsuit. Nothing in the settlement, however, prohibits the Attorney General from doing this in the future should she so desire.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

No known interest.

5. RESOURCE MATERIALS

The Attorney General's motion to dismiss, available from the Federal Programs Branch, is a comprehensive discussion of our position.

Office of the Attorney General
Washington, D. C. 20530

DELEGATION OF AUTHORITY TO THE
COMMUNITY RELATIONS SERVICE

ORDER NO. 1850-94

By virtue of the authority vested in me as Attorney General of the United States, including 28 U.S.C. §§ 509 and 510, I hereby authorize the Community Relations Service to intervene in the matter arising from the establishment of Camp Sister Spirit in Ovett, Mississippi. The Community Relations Service shall provide conciliation and technical assistance to the community and the persons therein.

6/7/94
Date

Janet Reno
Attorney General

INTERNAL ORDER/NOT PUBLISHED
IN F.R.

7 Anniversary
NATIONAL
NGLTF
GAY & LESBIAN
TASK FORCE
Policy Institute

December 7, 1993

The Honorable Janet Reno
U.S. Attorney General
Department of Justice

VIA FAX: 202-514-4371

Dear Attorney General Reno,

I am writing to request your immediate assistance in ending a violent situation in Ovett, Mississippi between some members of the community and two lesbians who own land in Jones County and run a feminist educational center. The women's lives are in danger.

On December 6, 250 people attended a meeting at the Ovett Community Center to condemn the two women, Brenda and Wanda Henson, because the women are lesbians. At the meeting, residents discussed ways to force the women and Camp Sister Spirit to leave the land. Private citizens and public officials (including the attorney for the Board of Supervisors in neighboring Perry County) vowed to research state and county laws, including the state anti-sodomy law, to discover means to force the women to leave the area. The women did not attend the meeting because they fear for their safety. A second community meeting is scheduled for January 4, 1994.

This meeting follows nearly two months of harassment, intimidation and violence directed at the women. The women receive constant harassing and threatening phone calls; a school bus filled with children drove by and shouted "faggots" at the women following media attention about the existence of the feminist camp; a dead dog was hung from their mailbox; the

1734 14th Street NW
Washington DC 20009
(202) 332-6483
(202) 332-0207 (fax)
(202) 332-6219 (tty)

mailbox has also been shot at and stuffed with sanitary napkins; and several unknown men (some of them armed) have been found wandering on the 120 acres of Camp Sister Spirit.

The National Gay and Lesbian Task Force asks that you and the Department of Justice move immediately to support the lesbians' right to purchase property and live free of violence and harassment. Any delay by the Department of Justice in intervening in this explosive situation could result in harm to the two women.

We request the following actions of you and divisions of the Department of Justice:

—The Community Relations Service should perform mediation in the community to immediately alleviate the potential for violence.

—The Federal Bureau of Investigations should monitor the on-going situation.

—The Department of Justice Civil Rights Division should investigate the attempts to violate the civil rights of the Hensons.

—A representative of the Attorney General's office should attend the January 4 Ovett community meeting.

Finally, we request that you meet with us and one of the women from Camp Sister Spirit in order to work together to alleviate the violent situation and to insure that these women may live free of violence in their community.

I look forward to your immediate attention to this matter.

Sincerely,

Peri Jude Radecic
Executive Director

cc: Jeffrey Weiss, acting director of the Community Relations Service
Louis Freeh, director of the Federal Bureau of Investigations
James P. Turner, acting director of the Department of Justice,
Civil Rights Division

Attachment
PJR/rak

Office of the Attorney General
Washington, D. C. 20530

February 17, 1994

Peri Jude Radecic
Executive Director
National Gay and Lesbian Task Force
1734 14th St. NW
Washington DC 20009

Dear Ms. Radecic:

Thank you for your December 7, 1993 letter concerning the situation in Ovett, Mississippi. As are you, I am deeply troubled by the harassment and intimidation of Brenda and Wanda Henson, the lesbian owners of Camp Sister Spirit. The intolerance and bigotry demonstrated by some of the people of Ovett has no place in this country.

I have carefully considered your requests on behalf of the Hensons for assistance from the Department of Justice. As you are aware, Department officials met with representatives of the National Gay and Lesbian Task Force (NGLTF) on January 12 to talk about the Department's ability to respond to the situation in Ovett.

As was discussed at the January 12 meeting, federal jurisdiction is currently restricted by statute. At this time, sexual orientation is not a protected status under the federal civil rights law. Accordingly, we are unable to assist the Hensons through the enforcement of existing federal criminal civil rights laws concerning housing or federally-protected activities.

However, we recently learned from an NGLTF staff member that some federal criminal laws may have been violated through use of the federal postal system. The NGLTF staff member reported that an envelope addressed to the Hensons containing a threatening letter was postmarked January 9, 1994 and mailed from Gulfport, Mississippi. Based on this development, the Federal Bureau of Investigation has been asked to conduct an investigation into this matter. If the evidence shows that there was a violation of federal criminal statutes, appropriate action will be taken.

In addition to initiating the FBI investigation, I have signed a tasking order pursuant to my authority under 28 U.S.C. §§509-510 asking the Community Relations Service (CRS) to intervene in the matter and to help mediate the dispute. While

CRS is statutorily limited to assist only in conflicts arising from race, color and national origin issues, I consider the threat of violence in Ovett to be real and believe CRS's involvement is both appropriate and necessary to restore calm to the community.

Finally, I have asked my staff to schedule your requested meeting. Since the Ovett case is a pending criminal investigation, it would be inappropriate for me to discuss the specifics of the case at this time. However, I look forward to the opportunity to talk with you about the general issues that the situation highlights.

I intend to keep fully apprised of the situation and ask that you continue to provide information to the Department. Thank you again for sharing your concerns with me. Together we can and will fight the discrimination faced by the Hensons and others like them.

Sincerely,

Janet Reno

U.S. Department of Justice

Office of Policy Development

Office of the Assistant Attorney General

Washington, D.C. 20530

February 15, 1994

TO: **The Attorney General**

FROM **Susan Liss** SML
Senior Counsel

RE: **Proposed CRS Tasking Order re Ovett, Miss.**

You have asked for information regarding situations in the past where the Community Relations Service may have been directed to intervene, either formally or informally, by the leadership of the Department of Justice.

There does not appear to be any written record of tasking orders or directions to CRS, but current CRS personnel report several instances in the past where CRS has been directed to intervene in matters beyond its clearly defined statutory mandate. These are listed below:

1. In the late 1970's, CRS was asked to provide conciliation services to defuse demonstrations by environmental activists around nuclear power plants.

2. In the early 1980's, on the tenth anniversary of the shootings on the campus of Kent State University, CRS was asked to conciliate demonstrations that were occurring over the building of a gym on the site of the shootings.

3. In 1985, Attorney General Ed Meese asked CRS to mediate conflicts between several federal agencies and the Church of Scientology. These apparently concerned tax-related matters.

4. In 1991, CRS received an oral directive from the Office of Policy Development to expand its "Hate Hotline" (an 800 number) to include collection of information on hate crimes based on sexual orientation or religion. This followed passage of the Hate Crimes Statistics Act, which permitted voluntary collection and reporting of hate crime statistics by local law enforcement agencies to the FBI. CRS had put its Hotline in place prior to the passage of the Act and independent of the Act. The directive made clear that CRS should collect information regarding hate crimes, whatever the basis, and even though the CRS mandate did not

-explicitly cover sexual orientation or religion.

In addition, there is reference in an article in Current Biography on Burke Marshall, former AAG for Civil Rights, to his personal efforts to mediate in Birmingham, Alabama in 1963 during the race riots there.

We have asked CRS to search their records for documentation of the incidents listed above, but no documentation has been found.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

JAMES HENDRY AND JOHN ALLEN — PLAINTIFFS

VERSUS — CIVIL ACTION NO. 2:94-CV-78PS

JANET RENO, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA — DEFENDANT

CONSENT ORDER

This matter is before the Court on Plaintiffs' Complaint and Petition to enjoin Defendant from further action in regard to dispatching the CRS (Community Relations Service), an entity within the Department of Justice, to intervene in a dispute between a group identified as Sister Spirit Incorporated, who seek to locate a lesbian cultural and educational retreat center in Ovett, Mississippi, and certain citizens of Ovett who oppose the location of this camp in their community. Plaintiffs seek various other relief. The CRS was created by Act of Congress with the following mandate:

> It shall be the function of the service to provide assistance to communities and persons therein in resolving disputes, disagreements or differences relating to discriminatory practices based upon race, color, or national origin which impair the rights of persons in such communities under the Constitution or laws of the United States. . . .

42 U.S.C. §2000(g-1).

Complainants-Petitioners allege they oppose the location of a lesbian cultural camp in their community on religious grounds.

They contend that the Bible condemns homosexuality as it does adultery and other acts of immorality. They claim constitutional rights under freedom of religion and free speech to oppose bringing this type culture into their community. Defendant does not deny that Complainants-Petitioners have these constitutional rights, nor does she deny Complainants-Petitioners' right to the free exercise thereof.

Complainants-Petitioners contend that sexual orientation is not protected under the Civil Rights Act and that consequently Defendant had no right to dispatch the CRS to Ovett. Defendant does not contend that sexual orientation is covered by 42 U.S.C. §2000(g-1). However, Defendant contends that as the chief law enforcement officer of the nation, she has general powers to keep the peace, including the right to dispatch mediators into a situation she considers volatile.

Defendant further points out that there is no law that compels Complainants-Petitioners or any other citizens of Ovett to talk to the mediators or participate in any mediation efforts and the citizens of Ovett are free to participate or not participate in mediation. Complainants-Petitioners have made it clear they do not wish to participate in mediation under the facts of this case. Defendant states that as the situation now stands there is no basis for mediation efforts.

The power of this Court to second guess actions of any governmental agency is limited. See Laird v. Tatum, 408 U.S. 1 (1972); Allen v. Wright, 468 U.S. 737 (1975). Aside from that general proposition, this Court finds that since the Attorney

General has no authority to compel mediation, has no authority to restrict Complainants-Petitioners from the free exercise of religion and speech, and since Defendant is not attempting to compel mediation nor to interfere with Complainants-Petitioners' right to freedom of religion or free speech, Complainants-Petitioners are not threatened by any immediate "injury." See Allen v. Wright, supra; O'Shea v. Littleton, 414 U.S. 488 (1974); United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973). Consequently they have no standing to bring this action.

Accordingly, this action shall be and the same is hereby dismissed.

This the 19th day of May, 1994.

CHARLES W. PICKERING, SR.
UNITED STATES DISTRICT JUDGE

AGREED TO:

PLAINTIFFS:

DEFENDANT:

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BRADY ACT LITIGATION

1. ISSUE STATEMENT

Six suits have been filed in district courts by local law enforcement officers seeking to invalidate part of the Brady Act on the grounds that it violates the 5th and 10th Amendments, and Art. I Sec. 8 of the Constitution. Four of the plaintiffs are represented by counsel retained by the National Rifle Association, and the complaints and legal memoranda in those cases are identical. The remaining two plaintiffs do not appear to be receiving financial support from the NRA, but they have filed the same complaint and legal memoranda as the NRA-supported plaintiffs.

The Brady Act imposes a 5-day waiting period before federally licensed firearms dealers may transfer possession of a handgun to a potential purchaser. The Act also requires that licensed dealers notify the chief law enforcement officer ("CLEO") in their respective jurisdictions of the proposed transfer, and directs that the CLEO then undertake a "reasonable investigation" of the purchaser's criminal history. If the CLEO determines that a purchaser is barred by state or federal law from obtaining a handgun, the CLEO is obliged to notify the licensee of that fact. The Act further directs CLEOs to destroy within twenty days all records received or created by the CLEO in connection with a Brady Act background check for those purchasers who are not barred from obtaining handguns, and obliges the CLEO to provide a statement of the reasons for disapproving a transfer to any disappointed purchaser who requests an explanation.

In New York v. U.S., 112 S.Ct. 2408 (1992), the Supreme Court held that the 10th Amendment prohibits Congress from enacting legislation which compels a state to enact or administer a federal program without affording the state an opportunity to opt out of the program. As each of the plaintiffs in the Brady Act suits are CLEOs, their primary contention is that the Brady Act is unconstitutional because it directly requires CLEOs to undertake a reasonable investigation of a prospective handgun purchaser's criminal background. Had the Act simply conditioned federal funding on such a requirement, it would not have run afoul of the 10th Amendment. Plaintiffs make the same argument with respect to the ancillary requirements concerning the destruction of Brady Act documents and the provisions for letters to disappointed purchasers.

The Administration has consistently championed the Brady Act as part of its overall anti-crime program, and Congress considered the Act, or its predecessors, for a number of years before it was finally enacted.

2. STATUS

Briefing has been completed in five of the cases. One case was not filed until May 9, and our brief opposing plaintiff's motion for summary judgment in that case is not due until June 1, 1994. A hearing on the preliminary injunction motion in that case will be held on June 2. Trial briefs are due to be filed in one case on June 1.

Hearings have been held in three of the cases during which the parties agreed to consolidate the motions for preliminary injunctions with decisions on the merits pursuant to Fed. R. Civ. P. 65. The last case is set for a hearing May 31 on plaintiff's preliminary injunction motion. Plaintiff has yet to move for consolidation of the preliminary injunction with the merits in that case, although we expect he will do so.

On May 16, 1994, a decision was issued in the first case in which a hearing was held. Judge Charles Lovell declared unconstitutional the provision in the Brady Act which requires CLEOs to undertake reasonable background investigations of potential handgun purchasers, but rejected all of plaintiff's other challenges to the Act. Printz v. U.S. (D. Mont.). The court also enjoined defendant from enforcing that provision as to plaintiff "or any other law enforcement officer." While a final determination on appealing the merits of the decision has yet to be made, we will shortly be filing a motion for reconsideration pursuant to Fed. R. Civ. P. 59(e) which will ask the court to modify the injunction to make it applicable solely to Sheriff Printz, the only named plaintiff.

3. DEPARTMENT POSITION

In light of New York v. United States, we have recognized from the outset that defense of the Brady Act is a difficult fight. To this end, the Office of Legal Counsel has interpreted the requirement in the Act that CLEO's undertake a reasonable investigation of the criminal histories of handgun purchasers to mean that the CLEO's only obligation is to decide whether, in light of his or her other enforcement priorities it is reasonable to divert his or her resources to Brady Act background checks, instead of employing them for some other purpose. We also explicitly concede that the result of this balance may be that in a given case, it will not be a reasonable use of a CLEO's resources to conduct Brady Act checks. Further, we argue that the government will not be in the business of second-guessing the CLEO's reasonableness determination. Obviously, our concerns about the difficulties we faced in defending the brady Act were confirmed by the Printz decision.

4. COMMITTEE MEMBERS INTEREST/POSITIONS

Sen. Kennedy is a strong supporter of the Brady Act.

5. REFERENCE MATERIALS

The key documents are the complaints, the papers supporting the motions for preliminary injunctions, our opposing memoranda, the recent decision in Printz and the OLC opinion interpreting the Brady Act provision at issue.

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Divider Title: _____

NIXON PAPERS LITIGATION
Nixon v. U.S. (D.D.C.)

1. ISSUE STATEMENT

Summary. The remaining issue in this case is how much compensation the United States must pay to the estate of former President Richard M. Nixon for the statutory "taking" of his presidential materials in 1974.

Background. Shortly after former President Nixon resigned from the presidency in 1974, he entered into an agreement with the Administrator of General Services, Arthur Sampson [the "Nixon-Sampson Agreement"], which dealt with the disposition of Mr. Nixon's presidential materials. These materials encompassed 42 million documents and 950 tape recordings, including the infamous "Watergate" tapes. Under the Nixon-Sampson Agreement, the materials were supposed to be shipped to California and temporarily stored in a government facility. Controlled access was to be granted to government prosecutors. The tapes were to be destroyed upon Mr. Nixon's death or September, 1984, whichever came first. The Agreement stipulated that title to all the materials was vested in Mr. Nixon.

The Nixon-Sampson Agreement provoked a tremendous public outcry, which led to the enactment in December, 1974, of the Presidential Recordings and Materials Preservation Act of 1974 [the "1974 Act"]. The 1974 Act effectively nullified the Nixon-Sampson Agreement, and directed the Administrator of General Services to take custody and control of the Nixon presidential materials and store them in the Washington, D.C. area. The Act also assured government prosecutors of unrestricted access to the materials, and granted public access to all materials except those deemed private and personal. The 1974 Act expressly mandated the payment of just compensation to any person held to have been deprived by its provisions of private property.

After unsuccessfully challenging the constitutionality of the 1974 Act, Mr. Nixon brought suit in 1980 against the United States for just compensation under the Fifth Amendment. We defended the suit on the grounds that the Nixon presidential materials were not Mr. Nixon's "private property," and that, even if they were, they had not been "taken" within the meaning of the Fifth Amendment under the 1974 Act. We prevailed in the district court, but a unanimous panel of the United States Court of Appeals for the District of Columbia Circuit reversed. The court of appeals held, on the basis of a tradition dating back to George Washington, that Mr. Nixon had a compensable property interest in his presidential materials, and that the 1974 Act effected a per se taking of those materials. It remanded the case to the district court for a determination of how much compensation was due. The Solicitor General declined to seek review in the Supreme Court of the court of appeals' decision.

Areas of Controversy and Sensitivity. There is the potential for a multi-million dollar compensation award against the United States in this case. While the remand process of evaluation is in its earliest stages, the record contains a 1968 appraisal of the materials of former President Lyndon B. Johnson, made at the request of a former Archivist of the United States, which estimates the value of the documentary portion of the Johnson materials at $54 million. The Nixon presidential materials, including the "Watergate" tapes, likely will have a significantly higher fair market value than the value of the Johnson presidential materials. A multi-million dollar award to the Nixon estate as compensation for the "taking" of materials (which many people regard as public property) probably would generate considerable adverse media and public reaction.

2. STATUS

The parties have hired experts to develop a methodology for placing a dollar value on the Nixon presidential materials. A status conference is scheduled for June 20, 1994, at which the parties are supposed to inform the presiding judge whether they have reached agreement on the methodological approach, or whether that must be litigated.

[**CONFIDENTIAL:** Counsel for Mr. Nixon's estate recently forwarded to us the general outline of a proposed settlement of this case. We are reviewing it internally, and if the White House and the National Archives and Records Administration concur, we plan to pursue settlement negotiations.]

3. DEPARTMENT POSITION

Our position on remand is that any compensation award must be reasonable and not excessive. We may argue that certain categories of materials (e.g., copies of government memoranda) have no economic value.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

Unknown.

5. REFERENCE MATERIALS

- Public Law 93-526, "Presidential Recordings And Materials Preservation Act."
- Nixon v. U.S., 978 F.2d 1269 (D.C. Cir. 1992)

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18

Divider Title: _____

GAYS IN THE MILITARY

1. ISSUE STATEMENT

Whether the military's homosexual policy, which bars service by persons who, by their conduct or statements, reveal a propensity to engage in homosexual acts, violates the Constitution.

Since 1981, the military had a policy that: (1) asked persons at accession whether they were homosexuals, and barred entry if they responded in the affirmative; and (2) mandated separation for members who, through their acts or statements, revealed that they committed or had a propensity to commit homosexual acts.

In January 1993, the President established an interim policy whereby the military no longer asked persons about their sexual orientation during the accession process. In July 1993, the President announced a new homosexual policy that was later embodied in legislation enacted in November 1993 as part of the Defense Authorization Act of FY 1994. See Pub. L. No. 1033-160, 107 Stat. 15647 (1993) (to be codified at 10 U.S.C. § 654). The Department of Defense issued regulations pursuant to this legislation on December 22, 1993. The new policy differs from the old policy in that it: (1) expressly states that a person's sexual orientation is a personal and private matter, and that only homosexual acts, marriages, and statements that reveal a propensity (or likelihood) to engage in homosexual acts are grounds for separation; (2) eliminates questions regarding sexual orientation during the accession process; (3) clarifies that the regulatory term "homosexual" is conduct-directed by eliminating references to homosexual "desires"; (4) specifies the circumstances in which investigations will be commenced; and (5) spells out the procedures by which a member who states that he is a homosexual may rebut the presumption that he engages in or is likely to engage in homosexual acts.

2. STATUS

Approximately twelve lawsuits are pending that involve challenges -- primarily under the First and Fifth Amendments -- to the military's former and interim policies governing service by homosexuals. Previously, appellate decisions that have reached these issues have upheld the military's former policy. However, in Steffan v. DOD, 8 F.3d 57 (D.C. Cir. 1993), a panel held that the former policy violated equal protection, and it ordered the Navy to award plaintiff a Naval

Academy diploma and an officer's commission. In January 1994, the full court vacated the Steffan decision and directed that the entire case be reheard en banc. The en banc court heard oral argument on May 11, 1994.

In other recent cases challenging the former policy, two district courts issued adverse decisions from which the Government has appealed. In Meinhold v. Navy, 808 F. Supp. 1455 (C.D. Cal. 1993), the court held that the policy violated equal protection, and it issued a broad injunction that would effectively have barred the military from applying the former, interim, or new policy against any service member. After being denied relief by the Ninth Circuit, in October 1993 the Supreme Court granted the Government's application to stay the injunctive order pending appeal insofar as it granted relief to persons other than plaintiff. In December 1993 the Ninth Circuit heard oral argument. In Dahl v. Navy, 830 F. Supp. 1319 (E.D. Cal. 1993), the district court held that the policy violated equal protection and enjoined the Navy from applying that policy to plaintiff. The Ninth Circuit granted the Government's motion to stay proceedings pending a decision in Meinhold.

In significant cases challenging the interim policy, a district court in the D.C. Circuit issued a preliminary injunction barring the military from placing the named plaintiff in the standby reserve. See Elzie v. Aspin (D.D.C.). The Government did not appeal this interlocutory order, but instead will oppose plaintiff's request for a permanent injunction. The en banc proceedings in Steffan may determine the outcome of this case.

In Able v. Perry, (E.D.N.Y.), six homosexual service members challenge the new policy on First and Fifth Amendment grounds. On April 4, 1994, the district court issued a preliminary injunction enjoining the Government, pending resolution of the case, from investigating or taking other adverse action against plaintiffs "based on their self-identification as [homosexuals] in connection with legal proceedings challenging the [new policy]." We are considering whether to appeal from this order.

3. CIVIL DIVISION'S POSITION

The Department vigorously defends challenges to the military's old, interim, and new policy. Regarding equal protection challenges, we argue that the pertinent classification is homosexual conduct, and that this classification is subject to rational basis

review, with great deference to the military's considered professional judgment. The policy is rationally related to preventing the commission of prohibited acts, promoting unit cohesion, and accommodating privacy concerns. Regarding First Amendment challenges, we argue that the First Amendment is not even implicated, because the policy is directed at identifying persons who engage, or will likely engage, in behavior that the military can legitimately proscribe.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

It is not known whether any members of the Judiciary Committee have particular interest in this issue.

5. REFERENCE MATERIALS

A statement of the Department's legal positions may be found in our en banc brief in Steffan v. DOD (D.C. Cir.). Appellate decisions that have accepted our arguments include: Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir.1989), cert. denied, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); Dronenburg v. Zech, 741 F.2d 1388 (1984).

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Divider Title: _____

NATIONAL SECURITY FORMS LITIGATION
National Treasury Employees Union v. Department of Treasury, Customs Service, and Office of Personnel Management (D.C. Cir.)

1. ISSUE STATEMENT

This case challenges questions on the standard form 85-P, a questionnaire used for reinvestigation of federal employees who occupy positions of trust.

A related case, fully briefed and argued in October, 1993, is pending in the Fifth Circuit. Another related case, fully briefed and awaiting decision in the district court, challenges the same questions on the DD 398 and 398-2, forms used by the Department of Defense for reinvestigation of employees who hold security clearances.

The challenged questions seek information about financial responsibility, prior arrests, problems stemming from emotional or mental condition(s) and treatment related to mental or emotional conditions, problems stemming from excessive alcohol or drug use and use of or other activity involving illegal drugs. These same questions were enjoined in a previous action, NFFE v. Greenberg (involving the DD 398-2), and the court of appeals reversed, 983 F.2d 286 (D.C. Cir. 1993).

The questions in all litigation to date have been challenged on constitutional grounds, i.e., that they violate employees' constitutionally protected privacy interests, and that the illegal drug use question violates the self-incrimination protection in the Fifth Amendment.

The present framework for the personnel security system is prescribed by Executive Order 10450, which establishes a substantive standard for access to classified information and describes the scope of the inquiry required to determine whether particular employees should receive clearance. The continuing importance of personnel security in the post-Cold War era has recently been stressed in a report by the Joint Security Commission to the Secretary of Defense and the Director of Central Intelligence.[1]

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[1] "Because the government is so completely dependent on cleared personnel to safeguard classified information, the personnel security system is at the very heart of the government's security mission. Without adequate personnel screening, the rest of the security mission would be a worthless

(continued...)

Although not involving access to classified information, employees who hold positions of public trust have access to sensitive information involving their agencies' missions, e.g., many of the Customs Service employee positions at issue in the pending appeal involve access to computer databases and the handling of large amounts of cash, making these employees targets of bribery or other corruption, including blackmail.

It should be noted that, independently of the lawsuits, OPM and DoD at the urging of OMB have been attempting to revise several of the standard forms into a single form. At the same time, a separate initiative is ongoing within the Department of Justice to revise the questionnaires, particularly the mental health and drug use questions. In the course of this latter initiative, the Civil Rights Division has taken the position that asking questions concerning mental health and drug or alcohol abuse, even in the context of a security clearance investigation, violates the Americans with Disabilities Act as applied to the federal government through the Rehabilitation Act. The Civil Division has disagreed with that legal position.

2. STATUS

The Solicitor General authorized appeal in the Treasury/Customs Service case and we intend to move for expedition (the case is entitled to expedition by statute and local rule).

The question concerning the applicability of the Rehabilitation Act to these questionnaires has been referred to the Office of Legal Counsel.

3. DEPARTMENT POSITION

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[1](...continued)
facade and a waste of resources. Recent history is regrettably all too rich in proof of the damage that a single cleared person, such as John Walker, can cause.

"The Commission believes that the personnel security program will remain the centerpiece of the Federal security system in the post Cold War era, particularly as we move to a new classification system in which more information is moved out of compartments and made available to greater numbers of people."

Joint Security Commission, Redefining Security, A Report to the Secretary of Defense and the Director of Central Intelligence (February 28, 1994), at p. 45.

The government's position in the pending appeal involving the SF 85-P is that the questions do not violate any constitutionally protected privacy interests of the Customs Service employees who occupy positions of public trust. In the Greenberg case, and in the pending actions in district court that involve the DD 398 and 398-2, the government's position is that seeking this kind of information from employees who have access to classified information is not a violation of any constitutional right to privacy. The government's position in all of the cases that challenge the illegal drug use question is that the Fifth Amendment does not bar the government from asking this question.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

It is not known whether any members of the Judiciary Committee have particular interest in this litigation.

5. REFERENCE MATERIALS

The opinion in Greenberg, 983 F.2d 286 (D.C. Cir. 1993), and the briefs filed therein and in the pending Fifth Circuit action, address these issues.

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Divider Title: _____

Specter in Role Reversal Before High Court

Customary Senate Questioner Is Grilled Himself on Military Base Closing Argument

By Joan Biskupic
Washington Post Staff Writer

A Supreme Court hearing yesterday over military base closings was, in one respect, a quintessential inside-the-Beltway drama: a U.S. senator arguing against the administration's top lawyer while a Who's Who of past and present government officials looked on.

Sen. Arlen Specter (R-Pa.), who argued that courts should be able to stop base closings, usually gets to ask the questions and sit in judgment of court nominees as a member of the Senate Judiciary Committee. In a turnabout, he was in the hot seat with a skeptical audience.

At one point, Chief Justice William H. Rehnquist told Specter his reliance on a prior court ruling was "rather strained." Specter responded, "I respectfully disagree with you categorically."

Yet, for all the Washington players, yesterday's arguments over the validity of the base closing law eventually will determine the fate of numerous local economies far outside Washington. It also will affect whether the federal government continues its decade-long plan to phase out hundreds of military facilities, saving billions of dollars but eliminating more than 200,000 civilian jobs.

Specifically at stake is the 192-year-old Philadelphia Naval Shipyard that Specter and other local officials are trying to keep open. An independent base-closing commission in 1991 recommended the Philadelphia yard and 81 other military bases be shut down. Congress and then-President George Bush endorsed the list.

The question before the Supreme Court is whether local residents can challenge a closure in court. The 1990 Defense Base Closure and Realignment Act, written to try rid the process of politics, dictates that the independent commission makes a list after taking recommendations from the defense secretary and holding public hearings. The president then accepts or rejects the entire list and Congress has 45 days to veto it.

Because neither Congress nor the president may remove an individual base from the list, it theoretically ensures that elected officials are not pressured to pick off and save a hometown base — "cherry-picking" as Solicitor General Drew S. Days III explained to the justices.

While the government said the 1990 law set up a politically sensitive scheme that could not be reviewed by the courts, Specter argued that courts must be allowed to intervene to assure fairness in the process. Specter's underlying complaint is that Department of Defense officials concealed compelling evidence for keeping the shipyard open and that the commission held improperly closed meetings in preparing its list.

A federal district court dismissed the Specter case, saying the law forbids judicial review. But the 3rd U.S. Circuit Court of Appeals reinstated it, saying courts could review charges about procedural fairness.

In the government's appeal, Days told the justices, "All the bases either stand or fall together." In response to questions, particularly from Justice David H. Souter, about the consequences of allowing a judge to review the plight of a particular base, Days said, "This lawsuit represents one of potentially 82 other lawsuits," stemming from the 1991 list.

While Souter obviously was concerned about the politics of closing bases — calling the law a "modus vivendi between two branches" — other justices focused on how unfairness in the process would be redressed.

Anthony M. Kennedy asked whether any commission irregularities would be "so gross" that they would warrant judicial review. Days said none, but later added that members of Congress have authority to oversee the work of the commission and could hold hearings on its procedures.

Overall, Days stressed two points: the 1990 law, sensitive to the executive's authority over military policy, gave the president the final word on base closings and, separately, that under a 1992 Supreme Court ruling, courts are ed from reviewing agency determinations that are not "final." Because the commission prepared "non-binding" recommendations that the p dent may accept or reject, Days asserted, the commission's recommendations do not constitute final agency action.

Specter told the justices he only was "asking that we have our day in court."

Some of the justices, clearly dubious of court intervention, asked why the president could not pursue allegations of unfairness. Specter said the president is not equipped to review the facts of allegations, as judges are. He stressed the president has about two weeks to make a decision on numerous bases: "There is a legal duty and there is a realistic process that he can follow."

Specter emphasized the integrity of the recommendation process is at the core of the law. He also distinguished his case from the 1992 court precedent on which Days relied, saying the commission's recommendations were effectively final actions.

The last time a U.S. senator argued at the high court was 1972. Specter was last at the court in 1970 as Philadelphia district attorney.

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Divider Title: _____

FBI AIDS DISCRIMINATION CASE
DOE v. ATTORNEY GENERAL (9th Cir.)

1. ISSUE STATEMENT

The FBI requires agents to receive mandatory physicals from doctors that it designates. In 1988, it received information that one such doctor in San Francisco had been diagnosed with an AIDS-related disease. The FBI pursued inquiries with the doctor and the facility at which he worked. When the facility and the doctor refused to confirm whether he had been diagnosed with the disease and was otherwise conclusory in dealing with the FBI's concerns, the FBI ceased sending agents to the facility for mandatory physicals. Plaintiff then brought this suit under the Rehabilitation Act arguing that he had been discriminated against on the basis of his handicap.

2. STATUS

The case was originally dismissed by the district court on threshold issues of sovereign immunity. The Ninth Circuit reversed this judgment, but affirmed the dismissal of a damage action against individual FBI agents. On remand, the district court held, on the basis of trial testimony, that the FBI did not discriminate against plaintiff on the basis of his handicap. The court found that the Bureau's inquires had been frustrated by the failure of the doctor and the facility to respond to the Bureau's concerns. Plaintiff's appeal from that decision was argued to the Ninth Circuit on May 10, 1994.

3. CIVIL DIVISION'S POSITION

We defended the district court's decision on the narrow ground that, given the state of knowledge in 1988, it was lawful for the FBI to inquire as to whether plaintiff had an AIDS-related disease and that the hospital should have been more forthcoming in explaining the risks posed by the disease, the procedures used to limit that risk, and plaintiff's own state of knowledge regarding those procedures. We take no position as to the appropriate course of conduct at present, and acknowledge that, if proper procedures are followed, an AIDs-infected physician poses no risk to patients during non-invasive procedures.

The Center for Disease Controls 1991 Guidelines state that a physician infected with the AIDS virus presents no risk to patients during non-invasive procedures so long as recommended procedures are followed.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

It is not known whether any members of the Judiciary Committee have particular interest in this litigation.

5. REFERENCE MATERIALS

The government's position is set forth in the brief it filed in the Ninth Circuit.

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Divider Title: _____

NATIONAL ENDOWMENT FOR THE ARTS LITIGATION
FINLEY v. NEA (9th Cir.).

1. ISSUE STATEMENT

Funding by the National Endowment for the Arts of several controversial performance artists whose work contains strong sexual or homosexual themes provoked strong congressional reaction. Congress was strongly divided on whether to enact content restrictions upon the NEA's funding. The enacted compromise requires the NEA to take into consideration general standards of decency when establishing regulations ensuring that grant applications are judged by their artistic excellence and artistic merit. However, the NEA construed the statute as leaving much to its discretion, and it decided to do no more in implementing the statute than ensure that there was diversity of membership on the panels that made recommendations about funding, so that decency is not a criterion by which grant applications are judged.

The issue is whether the statute is, on its face, violative of the First Amendment or void for vagueness.

A sensitive area in this appeal is the relation of the principles governing this case to those announced in Rust v. Sullivan, 111 S. Ct. 1759 (1991), which held that the government could place conditions on the use of federal funds by Title X family planning projects so as to forbid them from counseling clients about issues relating to abortion.

2. STATUS

The case has been briefed and argued before the court of appeals.

3. CIVIL DIVISION'S POSITION

We argue that a facial challenge to a statute cannot succeed unless there are no constitutionally acceptable ways in which the statute can be implemented, and that there are several ways in which the NEA can constitutionally implement this statute. First, we argue that the NEA has correctly construed this statute as not necessarily requiring the NEA to make decency standards a part of the grant awarding process. Rather, the statute requires only that the NEA Chairperson take into

consideration the issue of decency in arts grants and take appropriate action. In implementing the statute, the NEA determined that increased diversity in panels making recommendations would satisfy decency concerns as long as the panels made decisions based upon artistic merit and excellence. Under this construction of the statute, no serious constitutional issues are raised. Moreover, even if the statute is construed to require the NEA to introduce express decency standards into the grant making process, we argue that standards can be crafted that clearly meet constitutional requirements. For example, the NEA could limit the extent to which it supports grants that intend to present indecent or obscene material to audiences containing children under twelve years of age.

We have argued that the issue of how this case relates to Rust is premature, and we have taken no position on what if any conditions the government may impose on NEA-grant recipients.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

It is not known whether any members of the Judiciary Committee have particular interest in this litigation.

5. REFERENCE MATERIALS

The briefs filed by the government in the court of appeals address the issues on the appeal.

Religious Groups Fight U.S. in Bankruptcy Case

By Laurie Goodstein
Washington Post Staff Writer

A dispute between the Justice Department and numerous religious organizations has broken out over the right of creditors and the courts to seize money donated to a church by a bankrupt couple in Minnesota.

The couple, Bruce and Nancy Young, faithfully tithed—contributing 10 percent of their income to their church—even as their electrical contracting business slipped into bankruptcy. Now, their evangelical church is under court order to turn over the Youngs' $13,450 in donations to their creditors, creating a furor among religious organizations because the Justice Department has sided with the creditors.

Baptists, Catholics, Mormons, Lutherans and evangelical groups argue fiercely against the creditors in briefs prepared for filing today in the U.S. Court of Appeals in St. Paul. The groups insist that the Religious Freedom Restoration Act (RFRA), which President Clinton signed with much fanfare last November, protects churches from government interference.

But in the first test of the new law, the Clinton administration has supported the creditors in a move

See RELIGION, A8, Col. 1

that has prompted cries of betrayal from religious groups. To the government, the issue is a "straight application of the bankruptcy code," said White House spokesman Arthur Jones. "Because the code applies to both religious and nonreligious organizations, we don't think there's an implication for the RFRA."

The bankruptcy code says it is not illegal for debtors to spend their money as long as they get something of "value" for it, but creditors can seize any money that debtors have given away.

"The court is declaring there is no value in ministry to the soul," said the Rev. Stephen Goold, senior pastor of the Crystal Evangelical Free Church, where the Youngs are members. "Where is our country when the court can declare that that which is of most value has no value?"

Crystal Evangelical, a congregation of 2,200 active members in the Minneapolis suburb of New Hope, has spent more than $150,000 in legal fees to retain the Youngs' $13,450 donation, Goold said. "The church cannot sit idly by" while courts violate "a biblical injunction . . . to put God first in the area of one's finances," he said.

"The court is declaring there is no value in ministry to the soul."

— the Rev. Stephen Goold, Crystal Evangelical Free Church

The Religious Freedom Restoration Act was designed to protect religious activity by requiring the government to show that it has a "compelling state interest," such as public health or safety, before interfering with religious practices.

The Senate approved the bill 97 to 3, and the House passed it by voice vote. Clinton signed it into law in a celebratory Rose Garden ceremony attended by leaders of many of the 68 groups spanning the religious and political spectrum that had pushed for the act.

At that ceremony six months ago, Clinton said, "we can never, never be too vigilant in this work" of preserving the free exercise of religion.

"We all went out of there thinking we've got an administration that's going to take this legislation seriously," said Steven T. McFarland, director of the Center for Law and Religious Freedom, the advocacy arm of the Christian Legal Society. "Then the president's highest legal arm in the government relegates [the act] to window dressing, a political exercise to placate rather than protect the religious community."

Bruce and Nancy Young have been members of Crystal Evangelical for nearly two decades. The couple, in their fifties, are "chagrined and weary" from the church's fight and refuse all requests for interviews, their pastor said. They had been tithing to the church for eight years, he added, and they continued tithing as they slid toward bankruptcy, selling their home and household goods to stay afloat.

"Tithing," said J. Brent Walker, general counsel for the Baptist Joint Committee, "is not simply a financial transaction or a way to keep the lights in the church house on, but it runs to the very core of what religious worship is about. For the government to reach back and try to undo that act of worship is the most egregious violation of religious liberty."

The groups joining the Christian Legal Society's brief scheduled to be filed in support of Crystal Evangelical represent Baptists, Catholics, Mormons, Lutherans and the National Association of Evangelicals. Douglas Laycock, a constitutional scholar at the University of Texas whose scholarship often is cited by the Supreme Court in church-state cases, is writing the brief.

Sen. Orrin G. Hatch (R-Utah), who sponsored the RFRA with Sen. Edward M. Kennedy (D-Mass.), took to the Senate floor May 3 to ask Clinton to direct the Justice Department to "back off . . . and allow the Religious Freedom Restoration Act to have the widespread, broad coverage that we intended here in Congress in the first place."

Hatch represents a state where many Mormons tithe to their church. He plans to file a friend of the court brief today, said Victor Cabral, counsel to Hatch on the Senate Judiciary Committee. Kennedy typically waits to take positions until such cases reach the Supreme Court, a Kennedy staff member said. Not all groups that supported the RFRA see reason for outrage in the Justice Department's move. "I don't think it's the kind of case that spells either gloom or doom for RFRA," said Elliot Mincberg, legal director of People for the American Way, a liberal advocacy group. The government is acting within the confines of the act by arguing that it does have a compelling interest, he said.

Said David Saperstein, of the Religious Action Center for Reform Judaism, "It's not an absolutely clear call, but we would hope that this administration would err on the side of protecting religious freedom."

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Divider Title: _____

CHRISTIANS v. CRYSTAL EVANGELICAL FREE CHURCH (8th Cir.).

1. ISSUE STATEMENT

Bruce and Nancy Young filed a Chapter 7 bankruptcy petition on February 3, 1992. In the preceding year, during which time they were insolvent, the Youngs contributed $13,500 to Crystal Evangelical Church. The Youngs made the gifts out of their own sincere religious conscience and in accordance with the Church's teachings, which are that people should make regular financial contributions to the Church.

The bankruptcy trustee assigned to the Youngs' Chapter 7 petition filed this proceeding to recover the $13,500 contribution under Section 548(a)(2) of the Bankruptcy Code, 11 U.S.C. 548(a)(2). That Section authorizes the trustee to avoid (or, recover) any transfer of an interest of the debtor that was made or incurred within one year of when the Chapter 7 petition was filed if the debtor "received less than a reasonably equivalent value in exchange for such transfer" and "was insolvent on the date that such transfer was made * * * or became insolvent as a result of such transfer." 11 U.S.C. 548(a)(2)(A), (B)(i).

The United States Bankruptcy Court for the District of Minnesota granted summary judgment for the trustee. It held that Section 548(a)(2) authorized recoupment of the Youngs' gifts because the religious services, theological programs, and access to the premises that the Church provided to the Youngs were not "property" under that Section and were not provided "in exchange for" the transfer. On appeal, the United States District Court for the District of Minnesota affirmed. It held that the Bankruptcy Court correctly interpreted the Code and that Section 548 does not violate the Free Exercise, Establishment, or Free Speech Clauses as applied to the Church.

2. STATUS

The Church appealed to the Eighth Circuit. On February 9, 1994, the Eighth Circuit certified to the Attorney General that the case draws into question the constitutionality of an Act of Congress (Section 548) affecting the public interest, and notified the Attorney General that the United States would be permitted to intervene. The United States filed its brief as intervenor on April 22, 1994. Any responding briefs to the United States' brief would be due May 31, 1994. Assuming no extensions of time, briefing would then be completed and the case could be restored to the oral argument calendar.

3. CIVIL DIVISION'S POSITION

For the reasons stated in the opinions below, we argue that the Bankruptcy Court and the District Court correctly ruled that Section 548(a)(2) of the Code authorizes the trustee to recoup the $13,500 the Youngs gave the Church at a time when they were insolvent and during the year before they filed their Chapter 7 petition. We also argue that those courts were right to hold that applying Section 548(a)(2) to the Church does not violate the Constitution. Section 548(a)(2) does not violate the Free Exercise Clause because it is a law of general applicability that does not single out religion or religious groups for adverse treatment. Thus, if the Youngs had given the $13,500 to the Red Cross or any other secular group, the trustee would have had to recoup the money as well. Section 548(a)(2) does not violate the Establishment Clause because it's primary purpose and effect -- to return to the Youngs' estate money that should be used to pay the debts they owe their creditors -- is secular and because the Section does not impermissibly entangle government with religion. Section 548(a)(2) does not violate the Free Speech Clause because the Section operates, at most, as a marginal restriction on the Youngs' free speech rights and because the Section is designed to achieve a compelling government interest (returning to the Youngs' creditors money that should be used to pay the Youngs' debts). Finally, we argue that applying Section 548(a)(2) to the Church does not violate the Religious Freedom Restoration Act ("RFRA"). 42 U.S.C. 2000bb (1993). RFRA provides that "[g]overnment may not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government shows that application of the burden to the person "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." We argue that recouping the Youngs' contributions to their Church does not "substantially burden" their religion because they have no First Amendment right to give away money that the law deems as rightfully owned by another (i.e., their creditors). We also argue that the trustee has a compelling interest in protecting the property rights of those to whom the Youngs owned money.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

On May 3, 1994, Senator Hatch criticized the Department's Brief in statements on the Senate floor. Cong. Rec. S5014-5015. Senator Hatch expressed the view that the government's interest in protecting the property rights of the Youngs' creditors is not a "compelling governmental interest" under the RFRA.

5. REFERENCE MATERIALS

The Department's brief addresses the issues in the appeal.

Clinton Presidential Records
Digital Records Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

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CHINESE ASYLUM SEEKERS LITIGATION

1. ISSUE STATEMENT

Under 8 U.S.C. §208, an alien is entitled to asylum only if he has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Chinese, some of whom were smuggled to this country by criminal syndicates, have claimed asylum based upon China's birth control practices; many claim that they or their spouse have been threatened with forced sterilization or abortion. In 1989, the Board of Immigration Appeals ruled in Matter of Chang that the application of China's birth control practices did not constitute persecution on account of one of the five bases for asylum, unless birth control policies were discriminatorily applied based on the person's religion or political opinion, for example. Thereafter, in 1990, President Bush issued an Executive Order directing that the Attorney General provide for "enhanced consideration" of such claims, and confusion arose concerning the state of the law.

Last year, the BIA certified two Chinese cases to the Attorney General to clear up the confusion. In December, the Attorney General declined to rule on the cases, finding that they were controlled by the fact that the aliens did not present credible testimony. Afterwards, the BIA ruled that the Executive Order did not overrule Matter of Chang, and the BIA has continued to deny Chinese birth control asylum claims. In turn, Chinese aliens have filed habeas petitions in various District Courts to challenge these decisions.

In order to deal with the problem of criminal syndicates smuggling aliens into the U.S., in the summer of 1993 an interagency group made a policy decision that immigration hearings of aliens smuggled by criminal syndicates (including Golden Venture passengers) would be expedited, while preserving the due process rights of the Chinese aliens. In the Middle District of Pennsylvania, lawyers for Chinese aliens are claiming that there was improper Department of Justice and White House influence in Chinese asylum hearings. In discovery, it has been established that an NSC staffer, Eric Schwartz, called an EOIR (the DOJ segment that includes the BIA) staff member to request that the hearings be expedited; however, depositions also establish that EOIR did nothing in response to the call and that the hearings were already being expedited pursuant to the interagency decision. There is no evidence that anyone attempted to influence Immigration Judges in their asylum determinations.

2. STATUS.

Four District Court decisions have addressed the merits of Chinese asylum claims, all in the Eastern District of Virginia. Two District Judges have upheld Matter of Chang and rejected asylum claims. One District Judge has refused to follow Matter of Chang

and has held that the general application of Chinese birth control practices can form the basis for asylum; in another case, the same District Judge rejected an asylum claim because the claimant was fleeing possible criminal prosecution arising out of a fight with a birth control official.

In the Middle District of Pennsylvania, the District Court denied a nationwide class action, and the Third Circuit affirmed that decision. Discovery is continuing into the petitioners' claim of improper Executive Branch influence, and the petitioners' attorneys are making inflamatory statements in the press, based in part on the Eric Schwartz phone call.

3. DEPARTMENT POSITION

The Department, as it normally does, is defending the BIA's decisions in the various habeas actions and thus is defending Matter of Chang as a reasonable interpretation of the asylum law statute. The one adverse decision from the Eastern District of Virginia is on appeal to the Fourth Circuit. We are also defending the discovery in the Pennsylvania litigation into alleged improper Executive Branch influence.

Meanwhile, there is pending interagency policy consideration of the appropriate administrative response to Chinese with claims of birth control persecution. For example, it is possible to provide administratively that certain categories of credible Chinese claimants not be deported, outside the context of asylum. No final policy decision has been made, however.

4. JUDICIARY COMMITTEE MEMBERS INTEREST

Sens. Kennedy and Simpson take a leading role in immigration matters. Earlier this session, when Sen. Helms introduced an amendment to grant Chinese birth control claimants asylum, Sen. Simpson (or his staff) helped convince Sen. Helms to delete references to asylum and convert his amendment to a withholding of deportation provision. Ultimately, the provision was dropped in conference with the House. At one time, Sen. Feinstein wrote the Department opposing asylum for Chinese birth control claimants. Sen. Specter is from Pennsylvania, and members of the Pennsylvania Bar have been representing Chinese claimants pro bono.

5. REFERENCE MATERIALS

Attached is Matter of Chang; a more recent BIA decision addressing the Executive Order; and a decision from the Eastern District of Virginia upholding the BIA's position.

Interim Decision #3107

MATTER OF CHANG

In Deportation Proceedings

A-27202715

Decided by Board May 12, 1989

(1) Implementation of the one couple, one child policy of the Chinese Government is not on its face persecutive and does not create a well-founded fear of persecution on account of one of the five reasons enumerated in section 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (1982), even to the extent that involuntary sterilizations may occur.

(2) An individual claiming asylum for reasons related to the one couple, one child policy must establish that the application of the policy to him was in fact persecutive or that he had a well-founded fear that it would be persecutive because the policy was being selectively applied against members of a particular religious group or was being used to punish individuals for their political opinions or for other reasons enumerated under section 101(a)(42)(A) of the Act.

(3) A person who shows that he opposed the one couple, one child policy but was subjected to it nevertheless has not demonstrated that he was being punished for his opinion as a member of a particular social group (persons opposed to the policy), but rather, there must be evidence that the governmental action arose for a reason other than general population control (for instance, evidence of disparate, more severe treatment for those who publicly oppose the policy).

(4) If the applicant claims that action occurred at the hands of local officials, he must normally show that redress from higher officials was unavailable or that he has a well-founded fear that it would be unavailable.

(5) The policy guidelines announced by Attorney General Meese on August 5, 1988, regarding the one couple, one child policy do not apply to decisions by immigration judges and the Board of Immigration Appeals.

CHARGE:

Order: Act of 1952 - Sec. 241(a)(2) [8 U.S.C. § 1251(a)(2)] - Entered without inspection

ON BEHALF OF RESPONDENT:
Lebenkoff & Coven
505 Fifth Avenue
New York, New York 10017

ON BEHALF OF SERVICE:
Jill H. Dufresne
Deputy Chief Legal Officer

BY: Milhollan, Chairman; Dunne, Morris, Vacca, and Heilman, Board Members

In a decision dated December 18, 1986, the immigration judge found the respondent deportable on the charge set forth above and denied his applications for asylum, withholding of deportation, and voluntary departure. The respondent has appealed from the denial of those applications. The appeal will be dismissed, except insofar as it concerns the denial of voluntary departure. The request for oral argument is denied.

With respect to his applications for asylum and withholding of deportation under sections 208(a) and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a) and 1253(h) (1982), the respondent, a 33-year-old native and citizen of the People's Republic of China, made the following assertions. In his application for asylum, the respondent indicated that he was an anti-Communist who fled his homeland "because of Communist domination of China"; that he did not base his asylum claim on conditions in China that affected his freedom more than the rest of the country's population; and that neither he nor any member

of his immediate family had "ever been mistreated by the authorities of his home country." His asylum application did not reference any claim to asylum based on his country's population control measures and he did not allege any mistreatment arising from such policies.

At his deportation hearing, the respondent testified that he was afraid of persecution in China; that people there were "mobilized" and "forced to do the bidding of the government"; that he and his wife were not given any work to do; that he and his wife were forced to flee from their commune because they had two children and did not agree to stop having more children; and, that they disagreed with China's family planning policies because "in the countryside, especially in the farming areas, we need more children." He indicated that the "government" wanted him to go to a clinic to be sterilized, that he thought the operation would "harm" his body, that he did not want to be sterilized, and that if he returned to China he would be forced to submit to the operation. He testified that his wife was supposed to go to the clinic but did not do so because she was ill. He testified that he did not know what would have happened if his wife had gone to the clinic. He further testified that he did not mention his opposition to China's birth control policies on his asylum application because "nobody had asked [him]" and because he was not very "conversant" in expressing himself and did not understand English.

On appeal, the respondent, through counsel, states that the facts of the case are that he and his wife were ordered by their commune to submit to sterilization operations after the birth of their second child, that his wife was able to "postpone" the operation due to illness, but that he fled China because he had no choice other than to submit to the surgery.

In conjunction with the appeal, the respondent also submitted a letter from the Library of Congress dated November 23, 1987, transmitting to the Immigration and Naturalization Service a report entitled "Population Control in the People's Republic of China." The report was apparently requested by the Service in

connection with another matter. 1/ According to the report, the People's Republic of China ("PRC") has no national law on population control per se. The constitution provides that the state shall carry out family planning to control the size of the population and that spouses have the duty to carry out family planning. The Marriage Law of 1980 sets minimum marriage ages and places responsibility for birth control on both partners. The provinces and the cities governed directly by the state have enacted their own regulations on population control, but the population control program is guided by a joint directive of the Chinese Communist Party and the state entitled "On the Further Implementation of Family Planning Work" of February 1982. The policy provides that state cadres and urban residents are allowed one child per couple, with exceptions when special permission is granted. In rural areas generally the one-child rule is applied, except that where there are special difficulties, such as the birth of a handicapped child who cannot work, application to have a second child can be made. In no case is a third birth to be permitted. The rules are more leniently applied to families of non-Han ethnic minority groups. Late in 1985, it was announced that the one-child rule would be relaxed, and that in some areas a second child would be permitted if the first was a girl and in other special circumstances. The mechanics of the implementation of the program are by and large locally determined. Economic sanctions, peer pressure, and propaganda are used to insure

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1/ Counsel for the respondent states that the Service is aware of this report. The sources cited in the report were not furnished to the Board in connection with this appeal and it is not known whether they were furnished to the Service by the Library of Congress. The Service, however, has not objected to consideration of this report. On appeal, respondent has also referenced newspaper articles and various other non-legal sources which were not offered into evidence at the hearing and whose texts have not been made available to this Board. These latter sources will not be considered.

compliance. Single child families receive health and educational benefits for the child. Couples who continue pregnancies which are not allowed may suffer the suspension of wages, fines, loss of seniority for promotion, and so forth. Couples are urged to undergo birth control operations (sterilization). Wages are sometimes paid during a rest period after sterilization, and cash rewards have been used to encourage sterilization. The Chinese Government has consistently denied supporting any use of force to obtain compliance with birth quotas. The transmittal letter forwarding the report states that punishment in the form of a sterilization operation is not provided for in Chinese law, though local officials may have used the one-child campaign to carry out a private vendetta.

Counsel also relies on the 1985 and 1987 Country Reports on Human Rights Practices, Joint Committee of the Senate and the House of Representatives, 99th Congress, 2d Session (1986), and 100th Congress, 2d Session (1988) ("Country Reports"), respectively. The 1985 Country Report on the PRC indicates that "[r]eported instances of family planning malpractice occur mostly in rural areas, where local officials have sometimes translated the policy into rigid quotas. Chinese authorities say they take measures against local officials who violate the Government's policy in this regard, but there have been few reports of punishment of such offenders." 1985 Country Reports at 741. According to the 1987 report, provinces are allowed to make their own regulations regarding implementation of the one-child policy as long as overall birthrates match the state-imposed goals. In the past, local officials coerced significant numbers of women into having abortions. In 1987 the Chinese Government stressed repeatedly that it does not condone forced abortions or sterilizations. Chinese authorities have said that they take measures against local officials who violate the Government's policy. Despite central government efforts to prevent the imposition of rigid quotas, local government officials and peers reportedly continue to exert pressure on some persons seeking to have second children. Economic pressure on families with more than two

children can be severe and can include loss of party membership, loss of job, difficulty in purchasing state-supplied seed, fertilizer, and fuel and other sanctions. 1987 Country Reports at 666. 2/

2/ In addition to the excerpts quoted by the respondent, we note the following relevant excerpts from the Country Reports on the PRC:

> Implementation [of the family planning program] has varied widely from place to place. Although coercive family planning is contrary to official Chinese policy, there have been numerous reliable reports of coercive birth control practices, including forced abortions and sterilization. . . .

1985 Country Reports at 738.

> Extensive regulation of individual and family life is one of the distinctive features of the Chinese sociopolitical system. For most Chinese (particularly urban residents), life revolves around the work unit, which provides not only employment, but also housing, ration coupons, permission to marry and have a child, and other aspects of ordinary life. . . .
>
> Faced with one-fifth of the world's population squeezed onto 7 percent of the world's arable land, China's leaders have made family planning a top national priority. They believe that economic modernization goals will be unattainable without a low birth rate, particularly given the current high number of females of childbearing age, traditionally high Chinese birth rates, and recent medical advances

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An applicant for asylum must establish that he was persecuted, or that a reasonable person in his circumstances would fear persecution on account of race, religion, nationality, membership

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> leading to longer life expectancies. To achieve its goal of limiting China's population to 1.2 billion in the year 2000, the Government is discouraging early marriage and promoting as an ideal a norm of one child per family, backed by a massive, grassroots institutional effort involving education, contraceptive counseling, free contraceptive devices, and economic and social incentives and disincentives.

1985 Country Reports at 740-41 (emphasis added).

> The effect of the economic reforms and the central policy of relaxing social controls in the rural areas has influenced the implementation of the birth-planning policy. In February the State Statistical Bureau published the results of a population sampling which indicated that 3.12 million more babies were born in 1986 than in 1985, 1.6 million more than the number planned for 1986. The increase was attributed to the rise in the number of multiple births and to the increased number of people of marriageable and childbearing age. According to the survey, in 1986 the crude birth rate rose to 20.7 per thousand compared to 17.8 per thousand in 1985. There was a slight decrease in the rate of abortions. The number of first births in 1986 was 51.2 percent of the total, second births were 31.5 percent of the total, and third or more were 17.3 percent. Only 15 percent of all couples of childbearing age have signed a one-child pledge.

(Cont'd)

in a particular social group, or political opinion. See sections 101(a)(42)(A), 208(a) of the Act, 8 U.S.C. §§ 1101(a)(42)(A), 1158(a) (1982); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); Carcamo-Flores v. INS, 805 F.2d 60 (2d Cir. 1986); Guevara Flores v. INS, 786 F.2d 1242 (5th Cir. 1986), cert. denied, 480 U.S. 930 (1987); Matter of Vigil, Interim Decision 3050 (BIA 1988); Matter of Mogharrabi, Interim Decision 3028 (BIA 1987). The respondent bears the evidentiary burdens of proof and persuasion in any application for asylum under section 208(a) or withholding of deportation under section 243(h) of the Act. 8 C.F.R. §§ 208.5, 242.17(e) (1988); Rebollo-Jovel v. INS, 794 F.2d 441 (9th Cir. 1986); Matter of Maldonado-Cruz, Interim Decision 3041 (BIA 1988); Matter of Acosta, Interim Decision 2986 (BIA 1985), modified on other grounds, Matter of Mogharrabi, supra; see also Young v. United States Dept. of Justice, INS, 759 F.2d 450 (5th Cir.), cert. denied, 474 U.S. 996 (1985). We recognize, as have

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> After years of resisting the view held widely outside China that the PRC had to take steps to limit the growth of its population, now at 1.08 billion, the post-Mao reform leadership decided to institute family planning programs. During 1986-1987, China's leaders reiterated that family planning is a top national priority and expressed concern that the Government's policy has not been uniformly implemented in the past 12 months. The Government cited particular concern over the current unusually high number of females of childbearing age, increasing birth rates, and recent medical advances leading to longer life expectancies as reasons for renewed efforts to achieve its goal of limiting China's population to around 1.2 billion in the year 2000. Early in 1986, authorities began a massive campaign to extend education, contraceptive counseling, free contraceptive devices, and economic and social incentives down to the grassroots level.

1987 Country Reports at 665 (emphasis added).

the courts, the difficulties faced by many aliens in obtaining documentary or other corroborative evidence to support their claims of persecution. Although every effort should be made to obtain such evidence, the lack of such evidence will not necessarily be fatal to the application. The alien's own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear. Matter of Mogharrabi, supra; see also, e.g., Blanco-Comarribas v. INS, 830 F.2d 1039 (9th Cir. 1987).

In support of his appeal from the denial of his applications for asylum and withholding of deportation, the respondent makes a number of arguments to which we shall respond in turn.

The respondent initially submits that the Board should apply to this case certain "policy guidelines" announced by Attorney General Meese on August 5, 1988. These guidelines, however, were directed to the Immigration and Naturalization Service, rather than the immigration judges and this Board. See 8 C.F.R. §§ 2.1, 3.1, 236.1, 236.3, 242.2(d), 242.8(a) (1988); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954). The Service's apparent position is that the case before us on its facts does not come within the scope of the guidelines the Attorney General has directed "will be used by the Immigration and Naturalization Service in considering asylum requests from [individuals who cite a fear of persecution upon return to the PRC for having violated that country's 'one couple, one child' planning policy]."

The respondent's position on appeal is that he has a well-founded fear of persecution based on the likelihood he would face mandatory sterilization, that he has a reasonable fear of persecution as a member of a "particular social group" (namely, persons who actually oppose the government policy of "one child per family"), and that he is eligible for withholding of deportation under section 243(h) of the Act because he has demonstrated a clear probability of being sterilized if returned to China.

We do not find that the "one couple, one child" policy of the Chinese Government is on its face persecutive. China has adopted a policy whose stated objective is to discourage births through economic incentives, economic sanctions, peer pressure, education, availability of sterilization and other birth control measures, and use of propaganda. Chinese policymakers are faced with the difficulty of providing for China's vast population in good years and in bad. The Government is concerned not only with the ability of its citizens to survive, but also with their housing, education, medical services, and the other benefits of life that persons in many other societies take for granted. For China to fail to take steps to prevent births might well mean that many millions of people would be condemned to, at best, the most marginal existence. The record reflects that China was in fact encouraged by world opinion to take measures to control its population.

There is no evidence that the goal of China's policy is other than as stated, or that it is a subterfuge for persecuting any portion of the Chinese citizenry on account of one of the reasons enumerated in section 101(a)(42)(A) of the Act. The policy does not prevent couples from having children but strives to limit the size of the family. It appears that exceptions are made so that couples facing certain hardships may have another child. The policy applies to everyone but expressly protects, and indeed is more leniently applied to, minority (non-Han) peoples within China. It appears to impose stricter requirements on Party members (state cadres) than on some non-Party members. The Chinese Government has stated that it does not condone forced sterilizations and that its policy is to take action against local officials who violate this policy.

The population problem arising in China poses a profound dilemma. We cannot find that implementation of the "one couple, one child" policy in and of itself, even to the extent that involuntary sterilizations may occur, is persecution or creates a

well-founded fear of persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion." This is not to say that such a policy could not be implemented in such a way as to individuals or categories of persons so as to be persecution on account of a ground protected by the Act. To the extent, however, that such a policy is solely tied to controlling population, rather than as a guise for acting against people for reasons protected by the Act, we cannot find that persons who do not wish to have the policy applied to them are victims of persecution or have a well-founded fear of persecution within the present scope of the Act.

Thus, an asylum claim based solely on the fact that the applicant is subject to this policy must fail. An individual claiming asylum for reasons related to this policy must establish, based on additional facts present in his case, that the application of the policy to him was in fact persecutive or that he had a well-founded fear that it would be persecutive on account of one of the five reasons enumerated in section 101(a)(42)(A). For example, this might include evidence that the policy was being selectively applied against members of particular religious groups or was in fact being used to punish individuals for their political opinions. This does not mean that all who show that they opposed the policy, but were subjected to it anyway, have demonstrated that they are being "punished" for their opinions. Rather, there must be evidence that the governmental action arises for a reason other than general population control (e.g., evidence of disparate, more severe treatment for those who publicly oppose the policy). Finally, if the applicant claims that the punishment occurred at the hands of local officials, he must normally show that redress from higher officials was unavailable or that he has a well-founded fear that it would be unavailable.

We note that the respondent has not shown that mandatory sterilization is or was authorized under regulations or programs in effect in Fukien province, whence he came, or that forced

sterilization has in fact occurred in his locality. The Country Report for 1987 reflects that 48.8% of the births in China in 1986 were second, third, or later births, which indicates that millions of persons in China were allowed or chose to have more than one child in that year. It also is support for the Chinese claim that the one-child policy is not routinely enforced by mandatory sterilization and abortion. The sole evidence at the hearing regarding this respondent's claim was his asylum application itself and his testimony. His testimony was simply not sufficiently detailed to provide a plausible and coherent account of the basis of his asylum claim and was contradicted by other information in the record. His asylum application undermines his testimony as it disclaims any mistreatment by the Government and does not refer to any fear stemming from China's population control measures. However, even if we accept the characterization of the evidence as set forth by the respondent on appeal (i.e., that he and his wife wished to have more than two children and he would be forced to undergo mandatory sterilization if returned to China), we would not find that evidence sufficient in itself to support a well-founded fear of persecution on account of a reason enumerated in section 101(a)(42)(a) of the Act. The respondent has not asserted or established that he was treated differently from other Chinese with respect to application of the "one couple, one child" policy, or that its application in his case was in reality a guise to achieve a governmental goal other than general population control.

Such a showing cannot be made by arguing that there is a "particular social group" made up of those persons who "actually" oppose the policy of "one couple, one child," and that the evidence that this "group" is persecuted is simply the fact that the policy is applied to them despite their opposition to it. If a law or policy is not inherently persecutive (as would be, for example, a law enacted to punish individuals because of their religious beliefs), one cannot demonstrate that it is a persecutive measure simply with evidence that it is applied to all persons, including those who do not agree with it. This is

true even where questions of conscience or religion may be involved. In the United States, there are numerous cases upholding the imposition of religiously neutral laws against persons whose religious beliefs conflicted with them. See, e.g., United States v. Lee, 455 U.S. 252 (1982) (imposition of Social Security taxes against Amish persons whose religious beliefs forbade payment of the taxes or receipt of the benefits did not interfere with the free exercise of their religion); United States v. Merkt, 794 F.2d 950, 954-57 (5th Cir. 1986), cert. denied, 480 U.S. 946 (1987) (conviction for illegally transporting aliens not barred by first amendment although defendants contended they were religiously motivated in conducting "sanctuary" activities), and cases cited therein.

The respondent submits that the freedom to have children is an absolute right under the 14th amendment to the United States Constitution and, for that reason, countries that abridge this right must be found to be engaging in acts of persecution. The resolution of the constitutional issues that could arise if the population problems underlying the implementation of the "one couple, one child" policy in China were to occur in the United States is a matter of speculation that it is hoped this country need never address. However, the fact that a citizen of another country may not enjoy the same constitutional protections as a citizen of the United States does not mean that he is therefore persecuted on account of one of the five grounds enumerated in section 101(a)(42)(A) of the Act.

The respondent points out that Congress has chosen to provide financial aid only to countries that employ voluntary family planning techniques. It has prohibited the use of such aid to coerce or provide any financial incentive to any person to undergo sterilization, or for the performance of involuntary sterilizations as a method of family planning, or for biomedical research relating to methods of performing abortions or involuntary sterilization as a means of family planning. However, the fact that Congress may strongly disapprove of a foreign

country's policy does not mean that Congress has found that the policy involves "persecution on account of race, religion, nationality, membership in a particular social group or political opinion." 3/

The respondent submits that involuntary sterilization is both a violation of fundamental human rights and a denial of the "right to life, liberty, and . . . security" within the meaning of 22 U.S.C. § 2151n(a) (1982), which restricts the use of international development funds in countries which engage in a consistent pattern of gross violations of internationally recognized human rights. However, even if involuntary sterilization was demonstrated to be a violation of internationally recognized human rights, 4/ that fact in itself would not establish that an individual subjected to such an act was a victim of persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion." We are satisfied that if an individual demonstrated a well-founded fear that such an act would occur "on account of" a reason protected by the Act, the "refugee" definition in section 101(a)(42) of the Act would be met.

3/ The respondent also states that on July 11, 1985, the House of Representatives "passed legislation" accusing China of coercive sterilization and abortion programs. While the House passed a bill on that date with such a provision, it was dropped from the final legislation. See H.R. Rep. No. 237, 99th Cong., 1st Sess. 101, 105, 118, reprinted in 1985 U.S. Code Cong. & Ad. News 210, 214, 227.

4/ The State Department is required to make reports on human rights violations under 22 U.S.C. § 2151n(d)(1) (1982), which was amended in 1987 to require in addition a report on "practices regarding coercion in population control, including coerced abortion and involuntary sterilization." Pub. L. No. 100-204, Title I, § 127(1), 101 Stat. 1342 (1987).

The issue before us is not whether China's population control policies, in whole or in part, should be encouraged or discouraged to the fullest extent possible by the United States and the world community. The issue is whether the respondent demonstrates persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion simply with evidence that he and his wife desire to have more than two children and that, because of China's population control measures, he may be subjected to mandatory sterilization. Where there is no evidence that the application of the policy is a subterfuge for some other persecutive purpose, we do not find that he demonstrates eligibility for asylum by this evidence alone. Whether these policies are such that the immigration laws should be amended to provide temporary or permanent relief from deportation to all individuals who face the possibility of forced sterilization as part of a country's population control program is a matter for Congress to resolve legislatively.

On the record before us we find that the respondent's claims are insufficient to establish that he has a well-founded fear of persecution on account of one of the five grounds enumerated in section 101(a)(42)(A) of the Act. Because the respondent has failed to demonstrate a well-founded fear of persecution, he has necessarily failed to demonstrate a clear probability of it. See, e.g., INS v. Cardoza-Fonseca, supra; Carcamo-Flores v. INS, supra; Guevara Flores v. INS, supra. Therefore, the respondent has failed to show that he qualifies for withholding of deportation.

The immigration judge denied the respondent's application for voluntary departure as a matter of discretion solely because the respondent made no reference to a lawful permanent resident sister on his request for asylum and mentioned a citizen "cousin" on the application, who appeared "to be a pure fabrication." However, the Service does not challenge the respondent's testimony at the hearing regarding his relatives or the fact that he has a lawful permanent resident sister. We are not satisfied that the

reference to a "cousin" on the asylum application was not simply caused by error, particularly as the closer, and more significant, familial relationship was not referenced. As this was the sole basis underlying the immigration judge's discretionary denial of voluntary departure and as the respondent does have a relative in the United States who at least potentially could file a preference visa petition on his behalf, considering the record in its entirety we will grant the respondent the privilege of voluntary departure in the exercise of discretion.

Accordingly, the appeal will be dismissed except insofar as it pertains to the denial of voluntary departure.

ORDER: The appeal is dismissed except insofar as it concerns the denial of voluntary departure.

FURTHER ORDER: The outstanding order of deportation is withdrawn, and in lieu of an order of deportation the respondent is allowed to depart voluntarily, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director and under such conditions as he may direct. In the event of the respondent's failure so to depart, the order of deportation will be reinstated and executed.

MATTER OF G-

In Exclusion Proceedings

A-72761974

Decided by Board December 8, 1993

(1) An alien with no colorable claim to lawful permanent resident status is properly in exclusion proceedings where he fails to satisfy his burden of proof that he has effected an "entry" into the United States. Matter of Z-, Interim Decision 3208 (BIA 1993), followed.

(2) The determination of whether an alien has effected an entry into the United States is a matter appropriately litigated in exclusion proceedings.

(3) For purposes of section 101(a)(13) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(13) (1988), an "entry" into the United States requires: (1) a crossing into the territorial limits of the United States, i.e., physical presence; (2) (a) inspection and admission by an immigration officer, or (b) actual and intentional evasion of inspection at the nearest inspection point; and (3) freedom from official restraint. Matter of Z, Interim Decision 3208 (BIA 1993), followed.

(4) The mere crossing into the territorial waters of the United States, whether detected or undetected, has never been held to constitute "physical presence" in this country "free from official restraint."

(5) The grounding of a vessel 100 or more yards off shore with its passengers facing a hazardous journey to land does not of itself constitute an entry into the United States.

(6) In the case of the Golden Venture, an alien will be found to have been "free from official restraint" if he establishes that he was among the first of the ship's occupants to reach the shore, that he landed on a deserted beach, or that he managed to flee into a neighboring community.

(7) In contrast, an alien who was escorted off the Golden Venture, pulled from the water by rescue personnel, or who landed in the cordoned-off area of the beach after it was secured will not be found to have been "free from official restraint," as his movements were restricted to the immediate vicinity of the beach that was cordoned-off and controlled by the enforcement officers of the various governmental organizations present at the site to prevent the ship's occupants from absconding.

(8) In a case where there is no clear evidence of the facts determinative of the entry issue, the case ultimately must be resolved on where the burden of proof lies.

(9) Where there is no evidence that an alien, who arrives at other than the nearest inspection point, deliberately surrenders himself to the authorities for immigration processing, or that, once ashore, he seeks them out, voluntarily awaits their arrival, or otherwise acts consistently with a desire to submit himself for immigration inspection, actual and intentional evasion of inspection at the nearest inspection point may be found.

(10) Pending a decision of the Attorney General on asylum and withholding of deportation claims premised on coercive family planning policies of another country, the Board will continue to follow Matter of Chang, Interim Decision 3107 (BIA 1988), as precedent in all proceedings involving the same issues.

(11) To prevail on a claim that "extrajudicial" sources compromised the impartial and unbiased nature of an exclusion proceeding, an alien must show how the immigration judge's decision was affected or how he was prejudiced by these "outside influences."

EXCLUDABLE: Act of 1952 - Sec. 212(a)(7)(A)(i)(I) [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - No valid immigrant visa

Sec. 212(a)(7)(B)(i)(I) [8 U.S.C. § 1182(a)(7)(B)(i)(I)] - Nonimmigrant without valid passport

Sec. 212(a)(7)(B)(i)(II) [8 U.S.C. § 1182(a)(7)(B)(i)(II)] - No valid nonimmigrant visa or border crossing card

ON BEHALF OF APPLICANT:
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ON BEHALF OF SERVICE:
Jack Penca
Regional Counsel

BY: Milhollan, Chairman; Dunne, Morris, Vacca, and Heilman, Board Members

On August 17, 1993, an immigration judge denied the applicant's motion to terminate the instant exclusion proceedings, found him excludable as charged on the basis of his admissions, and denied his applications for asylum and withholding of deportation. The applicant has appealed. The appeal will be dismissed and the request for oral argument before this Board is denied. 8 C.F.R. § 3.1(e) (1993).

The applicant is a 29-year-old married, male native and citizen of the People's Republic of China, who attempted to enter the United States on June 6, 1993. The applicant was taken into custody by the Immigration and Naturalization Service and detained for exclusion proceedings. He was charged as an excludable alien under sections 212(a)(7)(A)(i)(I), (B)(i)(I), and (B)(i)(II) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(7)(A)(i)(I), (B)(i)(I), and (B)(i)(II) (Supp. IV 1992).

At the ensuing hearing, the applicant moved for termination of the exclusion proceedings. Arguing that an entry into the United States had been made within the meaning of section 101(a)(13) of the Act, 8 U.S.C. § 1101(a)(13) (1988), he provided a testimonial account of his arrival into the United States and several newspaper articles describing the events of the early morning hours of June 6, 1993. The Service objected to the motion and countered with its own evidence of the events of that morning in the form of a Service examiner's "Memo to File" and an affidavit of its Special Agent, Sal Alosi. The immigration judge denied the applicant's motion and proceeded to hear testimony on his applications for asylum and withholding of deportation. Ultimately, the immigration judge found the applicant excludable as charged on the basis of his concessions and denied his applications for the requested forms of relief. This appeal followed.

The applicant's first challenge on appeal concerns the propriety of these exclusion proceedings.

To determine whether the instant proceedings brought under section 236 of the Act, 8 U.S.C. § 1226 (1988 & Supp. IV 1992), are proper, we must first resolve the issue of whether the applicant "entered" the United States within the meaning of section 101(a)(13) of the Act, for if an "entry" occurred, the question of the applicant's continued presence here may only be adjudicated in deportation proceedings commenced under section 242(b) of the Act, 8 U.S.C. § 1252(b) (Supp. IV 1992). 1/

1/ Deportation and exclusion proceedings are mutually exclusive methods of removing an alien from the United States. Sections 236 and 242(b) of the Act; Leng May Ma v. Barber, 357 U.S. 185, 187 (1958). However, the question of whether an alien has effected an entry is appropriately litigated in exclusion proceedings. Landon v. Plasencia, 459 U.S. 21, 31 (1982).

GENERAL FACTS OF SHIP'S ARRIVAL

The record reflects the applicant arrived in the United States on Sunday, June 6, 1993, aboard a cargo freighter named the Golden Venture. The applicant was one of a cargo of some 300 passengers when the vessel, piloted by a crew of 13 Indonesian nationals, ran aground on a sandbar off the coast of New York. The grounding took place 100 to 200 yards offshore of the Fort Tilden military reservation located on the Rockaway Peninsula in the Gateway National Recreation Area of Queens, New York.

According to the record, at about 1:45 a.m. on that Sunday, two officers of the United States Department of Interior Park Police were patrolling the Gateway National Recreation Area when they observed the distressed ship and a number of its passengers swimming in the water or running on the beach. The officers spotted life preservers bobbing in the water and heard people yelling. 2/ At 1:58 a.m., the officers placed an emergency call for help to the New York City Police Department and other authorities and then proceeded to assist several of the ship's passengers out of the water.

The Coast Guard dispatched boats and helicopters to the scene of the reported shipwreck to observe and rescue persons aboard the disabled vessel.

At 2:19 a.m., officers from the New York City Police Department arrived on the beach at Fort Tilden; 2 minutes later, the New York City Fire Department was alerted. Police canine units and New York State police helicopters equipped with searchlights also were deployed to search for passengers on shore or still in the water. Officers from the various law enforcement agencies involved -- the New York City Police Department, the Park Police, the Jacob Riis Park Police, and the Coast Guard -- waded into the harbor to assist people to shore.

2/ The record indicates the Coast Guard had been monitoring the ship the previous night as it neared the coast. When vessels were dispatched to intercept it, however, the ship disappeared.

During these early morning hours, a portion of the Fort Tilden beach--about 1/4- to 1/2-mile-long and extending 600 yards inland from the water line--was ultimately cordoned off and controlled by enforcement officers of these various organizations to prevent passengers who reached shore from leaving the area.

According to newspaper accounts of several passengers interviewed, pandemonium erupted on board when the ship grounded. Passengers began spewing out of the cargo hold of the ship, where they had been forced to stay during their 3-month-long voyage. They crowded the ship's deck, only to be told by the ship's crew to jump overboard.

Over the next several hours as rescue personnel assembled in the area, about 200 passengers fled the ship by leaping blindly into the surf or descending a ladder on the side of the boat. Ignoring police and Coast Guard pleas to remain on the vessel, many swam and waded to shore clutching plastic bags of belongings while others used plastic jugs as makeshift floats.

An armada of small vessels, rafts, and cutters fished many of these 200 out of the 53-degree waters and brought them to shore. 3/ Other passengers managed to reach dry land on their own only to be apprehended on the beach or within the perimeter of the cordoned-off area. Many of the ship's occupants who swam to shore suffered from hypothermia and simply collapsed on reaching the beach. A few, however, eluded capture by fleeing through the thick-brushed dunes into the surrounding neighborhoods. Several of these survivors were reported seen knocking on the doors of homes in several nearby communities, offering money in exchange for the use of a telephone. Three men, for example, were found in a construction site in the neighboring town of Breezy Point after having offered a resident $100 to use his telephone. Local police later apprehended

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3/ The Coast Guard recovered the bodies of four passengers who had drowned in the choppy waters. Three other passengers plucked from the 53-degree waters died later.

26 other men near a shopping center in the town of Huntington Beach after receiving an anonymous telephone call that several Asian men were seen leaving a tan van.

More than 100 passengers, however, remained on board and awaited the arrival of rescue personnel.

In an effort to detain those passengers apprehended, a building in the Fort Tilden military reservation was used to house passengers not in need of medical treatment; these individuals were subsequently transferred to detention facilities for immigration processing. Police escorted about 30 other passengers to local hospitals for treatment; these passengers were later released to the immigration authorities.

By 3:30 a.m., when the first immigration officials arrived, 200 to 300 rescue personnel were at the scene. Swimmers were still being pulled from the water and passengers were still being rescued from the boat.

Understandably under the circumstances, no attempt was made to differentiate and keep track of those persons rescued from the deck of the Golden Venture, plucked from the water, intercepted within the cordoned-off area, or taken to medical facilities. Immigration officials processed all detainees as one large group.

By the evening of June 6, 1993, 273 of the 300 passengers reported to have been aboard the vessel had been accounted for while some 30 remained at large. Law enforcement authorities took the captain of the freighter and his crew of 12 off the ship and arrested them pending criminal prosecution on smuggling charges. 4/

4/ According to newspaper accounts, the Golden Venture sailed from Thailand with its cargo of illegal Chinese immigrants as part of an elaborate multimillion-dollar smuggling operation. Many passengers paid more than $20,000 or agreed to pay off a portion of the fee by agreeing to be indentured servants in this country.

THE ISSUE OF ENTRY

In relevant part, an "entry" for immigration purposes is defined as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntary or otherwise." Section 101(a)(13) of the Act. Over time, caselaw has led to the formulation of a more precise definition of that term, requiring: (1) a crossing into the territorial limits of the United States, i.e., physical presence; (2) (a) inspection and admission by an immigration officer, or (b) actual and intentional evasion of inspection at the nearest inspection point; and (3) freedom from official restraint. Matter of Patel, Interim Decision 3157 (BIA 1991), and cases cited therein; see also Correa v. Thornburgh, 901 F.2d 1166, 1171 (2d Cir. 1990).

The definitional "entry" requirements at issue in this case are those of evasion of inspection and freedom from official restraint. It is this latter requirement, however, which is the principal focus of the parties on appeal.

Regarding the requirement of freedom from official restraint, we note at the outset that, in circumstances such as those now before us, there can be no certainty as to when and under what precise circumstances during those few critical hours immediately following the Golden Venture's grounding each and every individual alien landed on shore. Viewing the situation in its totality, however, it is clear that some passengers of the Golden Venture arrived in the United States free from official restraint, while others did not. See United States v. Vasilatos, 209 F.2d 195, 197 (3d Cir. 1954); United States v. Lazarescu, 104 F. Supp. 771, 777 (D. Md. 1952), aff'd, 199 F.2d 898, 900 (4th Cir. 1952); In re Dubbiosi, 191 F. Supp. 65, 66 (E.D. Va. 1961).

For example, although the exact number may never be known, several of the ship's occupants, presumably the first to jump ship, did reach dry land before the vessel was spotted by the two Park Police officers who first observed the disabled ship at 1:45 a.m. According to the record, the officers witnessed "numerous" individuals running "to avoid detection." These passengers were clearly free from any official restraint. Similarly, other evidence in the record suggests that several passengers were found, possibly hours later, in neighboring communities. These aliens were not only free from any restraint, but were in fact mixing with the general population. See, e.g., United States v. Martin-Plasencia, 532 F.2d 1316 (9th Cir.), cert. denied, 429 U.S. 894 (1976) (finding that an alien at a port of entry effected an entry when he evaded inspectors and fled 50 yards into San Ysidro, California); Cheng v. INS, 534 F.2d 1018, 1019 (2d Cir. 1976); Matter of Z-, Interim Decision 3208 (BIA 1993) (finding that an alien who debarks from his vessel at a place not designated as a port of entry effected an entry when he fled into the interior undetected with every apparent intention of evading immigration inspection).

In contrast, for those 100 or more passengers who were escorted off the ship -- as well as the many others who were pulled from the water by rescue personnel or who landed in the cordoned-off area after it was secured -- we would not find that their physical presence here was coupled with "freedom from official restraint." The movements of these aliens were restricted to the immediate vicinity of the beach cordoned-off by the scores of law enforcement personnel at the scene. These aliens were never free to leave the area. They were never at liberty in the United States, and, under these circumstances, clearly lacked the freedom to go at large and mix with the general population. See Correa v. Thornburgh, supra, at 1172 (defining "freedom from official restraint" as freedom from constraint emanating from the government that would otherwise prevent the alien from physically

passing on); Matter of Pierre, 14 I&N Dec. 467, 469 (BIA 1973) (quoting Ex parte Chow Chok, 161 F. 627, 629-30, 632 (C.C.N.D.N.Y.), aff'd, 163 F. 1021 (C.C.A. 2 1908)); Edmond v. Nelson, 575 F. Supp. 532, 535 (E.D. La. 1983); Matter of Yam, 16 I&N Dec. 535, 536-37 (BIA 1978) (finding no entry to have been effected where alien found at border and taken under police guard to a medical facility). 5/

Thus, some passengers of the Golden Venture were clearly in this country free from official restraint, while others were not. However, in circumstances such as those which occurred on the morning of June 6, 1993, the facts of each individual case may never be clearly determinable for various reasons. For one, it could never be definitively established at what precise point the cordoned-off area of the beach at Fort Tilden was finally secured. Secondly, even if that time theoretically could be established, e.g. at 3:49 a.m., many aliens -- even if testifying fully and truthfully -- would not know exactly when they reached shore. Finally, particularly where saving lives was the primary concern of the government officials on the scene, one would not expect those officials to be recording specific data on the identities of each passenger or on the times when and circumstances under which each was taken into custody. Indeed,

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5/ Similar cases can be found involving Haitians who arrived by private or makeshift boats at uncontrolled beaches having no immigration inspection facilities in southern Florida, made their way on land, and, shortly thereafter, were taken into official custody and ultimately processed in exclusion proceedings. See, e.g., Bertrand v. Sava, 684 F.2d 204 (2d Cir. 1982). We also note that it has never been held that the mere crossing into the territorial waters of the United States, whether detected or undetected, constitutes "physical presence" in this country "free from restraint." Nor would we find that the grounding of a vessel 100 or more yards off shore with passengers facing a hazardous (indeed, fatal for some) journey to land in itself constitutes an entry into this country.

in many cases, particularly those involving aliens who managed to swim to shore, there likely will never be any certainty as to exactly when and under what circumstances they made it onto the beach.

If aliens can establish the specific circumstances of their arrivals, their cases can be resolved on the facts. For example, if an alien can show that he was one of the first passengers to disembark the ship and reach shore, or that he managed to arrive at a neighboring town, freedom from official restraint would be found.

On the other hand, in cases where there is no clear evidence of the facts determinative of the entry issue, those cases ultimately must be resolved on where the burden of proof lies. Accordingly, since it is the alien, with a limited exception not relevant here, 6/ who bears the burden of showing that exclusion proceedings are improper, it is he who must prove that his arrival on land constituted an "entry" into the United States within the scope of section 101(a)(13) of the Act. Section 291 of the Act, 8 U.S.C. § 1361; Matter of Z-, supra, at 4; Matter of Matelot, 18 I&N Dec. 334, 335 (BIA 1982); Matter of De La Nues, 18 I&N Dec. 140, 144 (BIA 1981); Matter of Healy and Goodchild, 17 I&N Dec. 22, 26 (BIA 1979); Matter of Pierre, supra, at 468. 7/

6/ In exclusion proceedings involving an alien having a colorable claim to lawful permanent resident status, it is the Service who bears the burden of proving that the alien should be deprived of that status. Matter of Z-, supra, at 4; Matter of Salazar, 17 I&N Dec. 167, 169 (BIA 1979); Matter of Kane, 15 I&N Dec. 258, 264 (BIA 1975).

7/ In In re Phelisna, 551 F. Supp. 960 (E.D.N.Y. 1982), appeal dismissed, 729 F.2d 1444 (2d Cir. 1983), the United States District Court for the Eastern District of New York held that the burden of establishing that an alien had no intent to evade inspection and thus made no "entry" rested with the

(Cont'd)

Turning to the case at hand, we note that, in support of his motion to terminate proceedings, the applicant testified that he was in (what appears to have been) the cargo hold of the ship when the vessel ran aground. According to the applicant, he made his way to the deck of the ship and was told by those in the front to jump. He did so and swam to shore clutching a plastic bag containing his personal belongings. He admittedly did not know how long he was in the water, but found himself cold and dizzy as he reached the shore.

Once on the beach, he quickly changed his clothes and went searching for a road in the dark. He did not recall being chased. He recounted having passed two roadways, but could not explain how far from the beach he had walked or in what direction he was walking when apprehended. He did not testify with any clarity as to any of the time frames involved. All he was certain of was that he was in New York. As he entered what he described as a "forest," he encountered two police officers who escorted him back to the beach and instructed him to lie on his stomach. 8/ Eventually, the Service took the applicant into custody and detained him for exclusion proceedings. The applicant paid a down payment of 3,000 yuan for this voyage to the United States.

Government. That holding has never been adopted by a higher court, is not controlling authority in this circuit, and is not binding precedent on this Board. See State of Ga. Dept. of Medical Assistance v. Bowen, 846 F.2d 708, 710 (11th Cir. 1988); Starbuck v. City & Cty. of San Francisco, 556 F.2d 450, 457 (9th Cir. 1977); Matter of K-S-, Interim Decision 3209 (BIA 1993); Matter of Cerna, Interim Decision 3161 (BIA 1991).

8/ This testimony varies somewhat from the applicant's written account of that morning. In a statement attached to his motion to terminate, the applicant wrote that he crossed a road and a grassy field, and then came upon a second road, when he was spotted by two policemen and apprehended.

On appeal, the applicant argues that his testimony coupled with the circumstances surrounding his landing far from any inspection facility conclusively demonstrate that he had no intention of submitting himself to the immigration authorities for inspection, thus proving that he actually and intentionally evaded inspection at the nearest inspection point.

We observe that nowhere in the record is there evidence suggesting that the applicant deliberately surrendered himself to the authorities for immigration processing, or that, once ashore, he sought them out, voluntarily awaited their arrival, or otherwise acted consistently with a desire to submit himself for immigration inspection. In fact, given the circumstances under which the Golden Venture landed, 9/ the applicant's payment of money to a smuggling operation for passage to the United States, his lack of travel documents entitling him to enter this country, and his conduct once he came ashore, we find that the requisite intent to evade can be sufficiently gleaned from the record. See Cheng v. INS, supra, at 1019 (crossing the border from Canada in a smuggler's van at night without headlights, and turning away from the nearest inspection station, provided "overwhelming" evidence of actual and intentional evasion of inspection); Matter of Estrada-Betancourt, 12 I&N Dec. 191, 194 (BIA 1967) (finding evasion where aliens arriving at other than a designated port proceed 10 miles inland with intention of presenting themselves

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9/ The vessel did not arrive at an inspection station, nor did the captain and crew restrict the passengers to the ship pending immigration clearance once the ship grounded. As the evidence reflects, the crew unlocked the cargo hold and apparently encouraged the 300 or so passengers to jump and flee. Although it is unclear on this record whether the grounding was an accident or a deliberate act calculated to lessen the odds of the illegal off-loading being detected, the captain placed no distress call when the boat ran aground and many immigrants carried their belongings in plastic bags as if prepared for a swim.

for inspection at other than the nearest inspection point); see also United States ex rel. Giacone v. Corsi, 64 F.2d 18 (2d Cir. 1933). See generally Thack v. Zurbrick, 51 F.2d 634, 635-36 (6th Cir. 1931); but cf. Pierre v. Rivkind, 643 F. Supp. 669 (S.D. Fla. 1986), rev'd on other grounds, 825 F.2d 1501 (11th Cir. 1987) (finding no evasion where alien arriving by boat walks away from the vessel and hides in a heavily-wooded mangrove area but later surrenders herself to the authorities). 10/

As to the second requirement -- freedom from official restraint -- the applicant points out on appeal that some passengers did manage to make their way into neighboring towns, thereby proving he too was "free from official restraint."

As noted above, the applicant is correct in his assertion that several passengers from the Golden Venture were found in nearby communities. However, the applicant does not allege nor can we find any evidence to suggest that he was one of those passengers. In this regard, it is incumbent upon the applicant to prove that his physical presence in the United States was coupled with "freedom from official restraint." Section 101(a)(13) of the Act; Matter of Z-, supra. From the applicant's testimony, however, it is not clear where in the continuum of events on the morning of June 6, 1993, he actually reached shore. No evidence was presented suggesting that he was one of the first passengers to reach dry land or that the beach was deserted when he landed, from which one might conclude that he was free from official restraint. We note that he did not have a watch and could not explain how long he was in the water or how many minutes passed before he was caught. He admittedly did not know where he was when he was apprehended, in what direction he was walking, or how far from the beach he had travelled. Consequently, we do not find that the applicant has presented clear evidence that he was ever free from official restraint. As

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10/ In Matter of Z-, supra, at 5, this Board recently held that an alien's intent in this context may be established absent a statement by the alien and even in the face of his contrary testimony.

such, we do not find that he has met the burden, which he alone must bear, of demonstrating that he made an entry into the United States. Accordingly, we find that these exclusion proceedings are proper. 11/

ASYLUM AND WITHHOLDING OF DEPORTATION

The applicant has requested relief from exclusion by way of asylum and withholding of deportation. In support of his applications, the applicant testified that he fled China because he violated that country's mandatory family planning policies -- with which he disagrees -- by having more than one child. He claims that he fled China to escape persecution stemming from these policies and fears that he would be jailed, fined, and sterilized upon his return.

11/ Counsel for the applicant represents in his appeal brief that an ongoing human salvage operation was underway both in the water and on the beach when the applicant was swimming to shore. These assertions, however, are not based on counsel's personal knowledge and have never been corroborated personally by the applicant. See Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 505 (BIA 1980).

The applicant also advances the claim that the humanitarian efforts of the governmental authorities on June 6, 1993, should not be construed as "official restraint." No legal authority has been cited in support of this contention; nor are we inclined to agree with the applicant in the face of clear evidence in the record of the efforts undertaken by these officials to prevent the passengers of the Golden Venture from leaving the Fort Tilden area. See Correa v. Thornburgh, supra, at 1172; Edmond v. Nelson, supra, at 535; Matter of Yam, supra, at 536-67 (BIA 1978) (involving alien found at border and taken under guard by local police to a medical facility).

The record reveals the applicant is a stone cutter by profession and a father of two from the city of Fuzhou, Fujian province, China. The applicant's problems with the Chinese Government began in October 1990 when the local family planning authorities fitted his wife with an intrauterine device after the birth of their first child (a son). To monitor the couple's use of contraception, the authorities conducted monthly physical examinations of the applicant's wife and furnished the applicant and his wife with a record book in which the province's mandatory birth control policies and related penalties were set forth.

Around March 1992, the applicant's wife became pregnant with their second child. To conceal the pregnancy from the authorities, the applicant and his family left their house and resided in other parts of the city. 12/ In their absence, the authorities appropriated their possessions and interrogated the applicant's parents. When his parents feigned ignorance about the applicant's whereabouts, the authorities threatened his parents with imprisonment and destroyed their home, thereby forcing them to flee the city. Fearful of further retribution for having more than one child, the applicant left China in February 1993, leaving behind his wife and two children.

To prove that his fears of punishment are well founded, the applicant recounted that his underage cousin suffered a forced abortion when she was 7 months pregnant with her second child. In addition, his sister incurred heavy fines after the births of three of her four children, and her house was destroyed when she was unable to pay the fines in full.

In a letter the applicant recently received from China, his wife wrote that the birth control authorities have fined him RMB 11,300 and are requiring her to undergo sterilization. She went on to explain that, until these demands are met, the authorities will not allow her to register the birth of their second child

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12/ The applicant's wife moved to an aunt's home; the applicant frequently relocated until he was able to leave China 11 months later.

with the civil registrar. His wife included with her letter a photograph of herself and their two children; a copy of the family's household registration book; and a notice purportedly issued by the In-Shih Village Committee informing the applicant that he was being fined for violating China's family planning policies. 13/

The applicant also furnished for the record voluminous background material about China's coercive family planning policies, including a "Master Exhibit" prepared by the Nationalities Service Center on behalf of the applicant and other former passengers of the Golden Venture. 14/

As required by 8 C.F.R. § 208.11 (1993), a copy of the applicant's Request for Asylum in the United States (Form I-589) was forwarded for comment to the Bureau of Human Rights and Humanitarian Affairs of the Department of State ("BHRHA"). The BHRHA responded in August 1993 with a report entitled "Asylum Claims Relating to Family Planning in Fujian Province, China."

Based on this evidence and our precedent decision in Matter of Chang, Interim Decision 3107 (BIA 1988), the immigration judge determined that the applicant was not eligible for asylum or withholding of deportation. In denying the applicant relief, the immigration judge found that the applicant had failed to demonstrate that China's one couple, one child policy was applied to him for persecutory motives as required by Chang.

13/ Although not an issue on appeal, this Board notes that the notice from the In-Shih Village Committee was not certified in accordance with 8 C.F.R. § 287.6 (1993). See Matter of Bader, 17 I&N Dec. 525, 526 (BIA 1980).

14/ The "Master Exhibit" was admitted into evidence by the immigration court sitting in Baltimore, Maryland, but not included in the record of proceedings as a matter of convenience for the parties.

On appeal, the applicant has raised several challenges to this denial of discretionary relief. The Center for Reproductive Law & Policy has likewise filed an amicus curiae brief in support of the appeal.

First, the applicant complains that the immigration judge wrongfully decided his case under Matter of Chang, supra. He argues that the holding in Chang has been implicitly overruled by the following: (1) an August 5, 1988, memorandum of the Attorney General to the Commissioner of the Service directing all "INS asylum adjudicators" to give "careful consideration" to applications from Chinese nationals who refused to abort a pregnancy or resisted sterilization as an "act of conscience"; (2) interim regulations that were promulgated by the Attorney General on January 29, 1990; (3) Executive Order No. 12,711, 55 Fed. Reg. 13,897-98 (1990); and (4) a November 7, 1991, memorandum of the General Counsel of the Service subscribing to the view that China's coercive family planning policies constitute persecution on account of political opinion.

We have carefully considered the applicant's present challenges, the background materials contained in the Master Exhibit, and the amicus brief submitted in support of this appeal. Nevertheless, we remain of the opinion that our interpretation of the law regarding China's one couple, one child policy articulated in Matter of Chang, supra, is legally correct and consistent with INS v. Elias-Zacarias, ___ U.S. ___, 112 S. Ct. 812 (1992). 15/

15/ The arguments advanced in the amicus brief neither compel us to disturb our holding in Chang nor persuade us to modify it in any way. For example, although it is argued that the United States is obligated under various international human rights instruments to recognize coercive interference with a person's right to reproductive self-determination as persecution, these instruments do not provide potential avenues of relief to aliens in exclusion proceedings beyond those provided for in the Immigration and Nationality Act and implementing regulations. See Matter of Medina, 19 I&N Dec. 734 (BIA 1988).

First, the "policy guidelines" announced by Attorney General Meese on August 5, 1988, regarding the one couple, one child policy do not apply to decisions by the immigration judges and this Board. Matter of Chang, supra, at 9; see also United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954); 8 C.F.R. §§ 2.1, 3.1, 3.10, 208.2(b), 236.1, 236.3, 242.8(a) (1993). 16/

Second, the interim regulations cited by the applicant were never finalized. 55 Fed. Reg. 2804 (1990). 17/ On July 27, 1990, the Attorney General issued final regulations governing the adjudication of asylum and withholding of deportation applications which superseded these interim regulations. See 55 Fed. Reg. 30,680 (1990) (codified at 8 C.F.R. Parts 3, 103, 208, 236, 242, and 253 (1991)). The final regulations, which are currently in effect, did not incorporate any of the provisions of the interim regulations concerning asylum and withholding claims premised on coercive family planning policies of another country, and, in fact, make no reference to such policies. 18/

16/ In Matter of Chang, supra, the respondent urged this Board to apply these "policy guidelines" to his case. It was the Service's apparent position, however, that the case did not fall within the reach of the guidelines. Id. at 9.

17/ These regulations, which were to be codified at 8 C.F.R. §§ 208.5 and 242.17(c), provided that aliens fleeing their country's family planning policies of forced abortions or sterilization may be considered to have a well-founded fear or a clear probability of persecution on account of political opinion. See 55 Fed. Reg. 2804, 2805 (1990).

18/ The applicant's reliance upon an April 2, 1990, memorandum of the Commissioner of the Service is misplaced. This memorandum was written in response to the interim regulations and was intended as a policy guideline to Service adjudicators in the implementation of those regulations.

Third, while Executive Order No. 12,711 directs the Secretary of State and the Attorney General to give enhanced consideration to the asylum and withholding claims of individuals who express a fear of persecution related to a policy of forced abortion or coerced sterilization, the Attorney General has never directed this Board to evaluate these claims other than in accordance with the standard enunciated in the July 27, 1990, regulations. See 8 C.F.R. Part 208 (1993). 19/ These regulations represent the most recent directive by the Attorney General in this area and are binding on both this Board and the immigration judges. See Matter of Fede, Interim Decision 3106 (BIA 1989); Matter of Anselmo, Interim Decision 3105 (BIA 1989).

Lastly, we note that in his November 7, 1991, memorandum, the former General Counsel of the Service expressed a view of the law with respect to persecution claims based upon coercive birth control policies contrary to that found in Matter of Chang, supra. 20/ This memorandum, however, has no binding effect on the decisions of this Board and the immigration judges. Moreover, where the opinion expressed relies for its support on authority that predates the Attorney General's final regulations and appears to be inconsistent with INS v. Elias-Zacarias, supra, at 816-17 (holding that since the Immigration and Nationality Act makes motive critical, persecution on account of political opinion requires evidence that the alien has a political opinion

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19/ President George Bush issued Executive Order No. 12,711 on April 11, 1990.

20/ In the memorandum, it was stated that "Department of Justice and INS policy with respect to aliens claiming asylum or withholding of deportation based upon coercive family planning policies is that the application of such coercive policies does constitute persecution on account of political opinion." According to this view, aliens whose claims were based on birth control measures involving forced abortion or coerced sterilization were not required to demonstrate that the coercive measures were tied to a governmental purpose other than to control the population.

and that the persecution feared would be "on account of" that opinion), we find it to be of little, if any, persuasive authority on the present issue. See Lee v. INS, 685 F.2d 343 (9th Cir. 1982); Matter of Chang, supra, at 9; Matter of M/V Saru Meru, Interim Decision 3190 (BIA 1992); Matter of Salim, 18 I&N Dec. 311, 315 (BIA 1982); Matter of Cavazos, 17 I&N Dec. 215 (BIA 1980).

On June 7, 1993, we referred two of our decisions involving these issues to the Attorney General for review under the provisions of 8 C.F.R. § 3.1(h) (1993). Pending the decision of the Attorney General on these referred cases, we will continue to follow Matter of Chang, supra, as precedent in all proceedings involving the same issues, including the case now before us. See 8 C.F.R. § 3.1(g) (1993). Accordingly, we will deny the applicant's request for a stay of these appellate proceedings pending the Attorney General's review of the two referred cases.

Turning to the particulars of this case, we do not find that the applicant was persecuted in the past or that he possesses a "well-founded fear" of persecution on account of his race, religion, nationality, membership in a particular social group, or political opinion. Sections 101(a)(42)(A) and 208(a) of the Act, 8 U.S.C. §§ 1101(a)(42)(A) and 1158(a) (1988); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (holding that a "well-founded fear of persecution" standard applicable to asylum requests is significantly different from, and, in fact, requires a lesser degree of proof than the "clear probability" of persecution standard applicable to withholding requests); Janusiak v. United States INS, 947 F.2d 46, 47 (3d Cir. 1991); Matter of Mogharrabi, 19 I&N Dec. 439, 445 (BIA 1987) (finding that an applicant for asylum has established a well-founded fear if a reasonable person in his circumstances would fear persecution on account of one of the grounds enumerated in section 101(a)(42) of the Act); Matter of Chen, Interim Decision 3104 (BIA 1989) (stating that an applicant for asylum may establish his claim by presenting evidence of past persecution in lieu of evidence of a well-founded fear of persecution); Matter of Chang, supra; 8 C.F.R. § 208.13 (1993).

The applicant contends that he was persecuted by the Chinese Government when it confiscated his property in accordance with their general population control policies. He further claims that he will face future persecution there in the form of sterilization, imprisonment, and a fine should he return. However, as we held in Matter of Chang, supra, at 10, the Chinese Government's implementation of its family planning policies is not on its face persecutive and does not by itself create a well-founded fear of persecution on account of one of the five grounds delineated in the Act, even to the extent that involuntary sterilization may occur. Thus, it is not enough for the applicant to show that such acts may have occurred or that there is a reasonable possibility that they would occur upon his return to China. To prevail on a claim premised on China's one couple, one child policy, it is incumbent upon the applicant to come forward with facts that establish that the policy was being selectively applied against him as a member of a particular religious or other social group, or being used as a means to punish him because of his race, nationality, or political opinion. Id. at 11.

To this end, we note that however strongly the applicant may believe his violation of China's one couple, one child policies was an expression of a political opinion, he has provided no evidence even suggesting that the actions taken against him and his family were intended to punish him for that reason. The applicant never openly disagreed with the local family planning officials, or made known to them his opinion of their policies or his reasons, if any, for choosing to have another child. Nor is there any evidence indicating that his treatment was disparate or in some way more severe than the treatment of others who, like himself, violated the policy.

On appeal, the applicant relies on Desir v. Ilchert, 840 F.2d 723 (9th Cir. 1988), a case involving a Haitian national who, because of his financial inability, refused to pay bribes to certain government officials. In that case, the United States Court of Appeals for the Ninth Circuit found that Desir had been persecuted, reasoning that the Government of Haiti perceived Desir to be a political subversive because of his refusal to pay.

To the extent Desir v. Ilchert, supra, has been cited for the proposition that asylum could be granted on the basis of a perceived or "imputed political opinion," it lends little support to the applicant's present claim to relief. Nowhere in the record is there evidence suggesting that the Chinese authorities have ascribed a political opinion to the applicant contrary to their own or revealing a motivation on their part to penalize the applicant apart from his failure to observe that country's birth control policies. 21/

Abortion and sterilization may be untenable to the applicant's political beliefs. Coerced abortions and sterilization are certainly horrible acts. However, as the applicant has failed to show that the one couple, one child policy was applied to him for reasons protected under the Act, he has not demonstrated his eligibility for asylum under section 208(a) of the Act, and,

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21/ In a January 19, 1993, legal opinion addressing the issue of the continuing viability of the imputed political opinion doctrine in light of the decision in INS v. Elias-Zacarias, supra, the General Counsel of the Service stated that a "final rule" was signed by Attorney General Barr on January 15, 1993, essentially finalizing the January 1990 interim rules that had been previously superseded. This rule provided that "an applicant who establishes a well-founded fear that he or she will be forced to undergo abortion or sterilization pursuant to the implementation of a coercive family planning policy, or will be persecuted for failure to do so, shall be regarded as having established a well-founded fear of persecution on account of political opinion." The rule further provided that an applicant "is not required to make a separate showing that the persecutor will impute a political opinion to him or her." This rule, however, was never promulgated. Moreover, this legal opinion, like the November 7, 1991, memorandum of the former General Counsel of the Service, does not appear consistent with the decision of the Supreme Court of the United States in INS v. Elias-Zacarias, supra.

accordingly, has failed to satisfy the more rigorous "clear probability" standard of eligibility required for withholding of deportation. See INS v. Elias-Zacarias, supra, at 816-17; Matter of Chang, supra; section 243(h) of the Act, 8 U.S.C. § 1253(h) (1988 & Supp. IV 1992); INS v. Stevic, 467 U.S. 407, 429-30 (1984). The evidence presented does not demonstrate that it is more likely than not the applicant would be subject to persecution on account of one of the five grounds specified in section 243(h) of the Act. See 8 C.F.R. § 208.16 (1993).

Nor are we persuaded to grant the applicant asylum or withholding of deportation because he claims to have violated his country's travel laws. First, the applicant has not shown that he violated any law related to his exit from China. Moreover, even assuming that he did, he has not demonstrated that the prosecution he fears is on account of his political opinion or any other ground enumerated in the Act. See Janusiak v. United States INS, supra; Blazina v. Bouchard, 286 F.2d 507 (3d Cir.), cert. denied, 366 U.S. 950 (1961); Coriolan v. INS, 559 F.2d 993, 1000 (5th Cir. 1977); Matter of Sibrun, 18 I&N Dec. 354 (BIA 1983); Matter of Matelot, supra, at 337; Matter of Nagy, 11 I&N Dec. 888 (BIA 1966); see also Rodriguez-Rivera v. INS, 848 F.2d 998, 1005 (9th Cir. 1988); Zupicich v. Esperdy, 319 F.2d 773 (2d Cir. 1963), cert. denied, 376 U.S. 933 (1964).

THE FAIRNESS OF THE HEARING

The applicant's final challenge concerns the fairness of the hearing that he was afforded before the immigration judge. It is the applicant's position that "extrajudicial" sources prevented the immigration judge from rendering an independent determination and compromised the impartial and unbiased nature of the proceedings below.

The applicant submits that an attorney representing another passenger on the Golden Venture contacted the Immigration Court in Baltimore, Maryland, to request a continuance of the hearing, only to learn that the Court was explicitly directed by the White House not to grant such requests. 22/

The applicant also references two newspaper articles in which officials from the United States Department of State and United States Department of Justice "confirmed" the administration's interest in expediting the cases of Golden Venture as a deterrent against future smuggling operations. See Chinese Immigrants Refuse to Eat, Philadelphia Inquirer, August 21, 1993, at A10; U.S. Tightens Asylum Rules For Chinese, New York Times, September 5, 1993, at 45. The applicant further references a quote in one of the articles in which an unidentified employee of the Service described 99% of the Golden Venture immigrants' claims as "bogus." See Chinese Immigrants Refuse to Eat, supra, at A10.

The applicant contends that this direct interference by the White House coupled with the administration's expressed desire to "send a signal" to future Chinese immigrants and smugglers have tainted these proceedings and those of other Golden Venture aliens. He argues that the disparity between the approval rates of the asylum requests of aliens from the Golden Venture and other Chinese aliens whose applications were adjudicated in 1992 prove that the Clinton administration is seeking to "steer" the immigration judges to a specific political result.

Administrative proceedings must conform to the basic notions of fundamental fairness. See Harisiades v. Shaughnessy, 342 U.S. 580 (1952). However, we fail to see in what manner the applicant here has been denied a constitutionally fair hearing. For example, he does not explain how he himself was prejudiced by

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22/ In an affidavit submitted for the first time on appeal, the attorney who was apprised of this communication admitted that she did not know the identity of the person to whom she had spoken.

these "outside" influences or how the immigration judge's finding with respect to the entry issue and her denial of his applications for asylum and withholding of deportation stemmed from these "extrajudicial" sources. See generally Garcia-Jaramillo v. INS, 604 F.2d 1236, 1238-39 (9th Cir. 1979), cert. denied, 449 U.S. 828 (1980); Matter of Santos, 19 I&N Dec. 105 (BIA 1984). He cites no specific examples of misconduct on the part of the immigration judge to support the notion that her decision was decided on some basis other than her understanding and knowledge of the applicable laws and regulations and what she adduced from her participation in the case, and we can find none here. See Matter of Exame, 18 I&N Dec. 303 (BIA 1982); Matter of Bader, 17 I&N Dec. 525, 527 (BIA 1980); Matter of Carrillo, 17 I&N Dec. 30 (BIA 1979); Matter of Lennon, 15 I&N Dec. 9 (BIA 1974); Matter of De Lucia, 11 I&N Dec. 565 (BIA 1966), aff'd, 370 F.2d 305 (7th Cir. 1966); Matter of Bufalino, 11 I&N Dec. 351 (BIA 1965).

As for the statistical disparity between the approval rates of the Golden Venture cases and those of other Chinese nationals, it is largely, if not entirely, attributable to the difference between this Board's interpretation of the law regarding coercive family planning policies, as enunciated in Matter of Chang, supra, and the view adopted by the previous General Counsel of the Service. Thus, we do not find this empirical data persuasive to the applicant's present claim.

The applicant submits that the Clinton administration has made it known for some time that cases involving aliens smuggled into the United States, including those passengers on the Golden Venture, would receive expedited treatment to discourage illegal smuggling into this country. However, there is no evidence that the immigration judge was biased in her handling of the applicant's case or that the hearing afforded the applicant was unfair. Moreover, the attention given the applicant's case is no different than the priority attention given to other cases of aliens detained at government expense.

With regard to the alleged ex parte communication between the Clinton administration and the Office of the Immigration Judge, we are at a loss as to its relevance here. Aside from the fact that there is no evidence that such a communication occurred, the applicant never requested a continuance of the hearing on the merits of his applications and does not now allege that he was denied the opportunity to obtain legal representation or to prepare his asylum or withholding case. See generally Saballo-Cortez v. INS, 749 F.2d 1354 (9th Cir. 1984); Matter of Carrillo, supra, at 31. For these reasons, we do not find that the immigration judge erred in her handling of the proceedings below or in any way denied the applicant due process of law. Accordingly, the following orders will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: The applicant's motion for a stay of these appellate proceedings before this Board is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

CHEN ZHOU CHAI,

Petitioner,

v. CIVIL ACTION NO. 94-0037-A

WILLIAM J. CARROLL, District Director, Immigration and Naturalization Service (Washington District), and DAVID L. MILHOLLEN, Director of the Executive Office of Immigration Review and Chairman of the Board of Immigration Appeals,

Respondents.

Memorandum Opinion

This matter came before the Court on Petitioner's petition for a Writ of Habeas Corpus. Petitioner Chen Zhou Chai seeks a reversal of the asylum ruling of the Board of Immigration Appeals ("Board") in his case by attacking a precedent decision of the Board concerning asylum claims based on the family planning policies of the Peoples Republic of China ("PRC"). Petitioner contends that he suffered past persecution and harbors a well-founded fear of persecution "on account of" political opinion, as defined in the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101 et seq., and asserts that the Board's decision in Matter of Chang, Int. Dec. 3107 (BIA 1989), has been either superseded by

subsequent case law or certain interim regulations on the issue.[1]

The Board has ruled that the PRC's family planning policies do not constitute persecution "on account of" political opinion under the circumstances of petitioner's case. The Board found that persecution "on account of" political opinion requires more than a generalized political motive, and a petitioner must show that government officials were motivated to persecute him because of political opinion. INS v. Elias-Zacarias, 112 S. Ct. 812, 816-17 (1992).

Petitioner is a native and citizen of PRC. On June 6, 1993, he arrived in the United States by paying to be smuggled aboard a vessel called the "Golden Venture," which ran aground in New York.

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[1] An interim rule was published in January 1990. The interim rule "clarifie[d] the burden of proof for applicants of refugee status, withholding of deportation and asylum by establishing that an alien fleeing coerced population control policies of forced abortions or sterilization may be considered to have a clear probability (for withholding of deportation) or well-founded fear (for asylum) of persecution on account of political opinion." 55 F.ed Reg. 2804 (January 29, 1990). This interim rule was to amend the regulations for withholding of deportation, 8 C.F.R. § 242, and for asylum, 8 C.F.R. § 208. However, a comprehensive revision of these regulations published in July 1990 superseded the language of the interim rule. 55 Fed. Reg. 30674.

On January 15, 1993, the out-going Attorney General signed a "final rule," which would have amended 8 C.F.R. §§ 208.13 and 208.16 (1992) to specifically address asylum claims based upon coercive population control policies. However, the January 1993 rule was never published in the Federal Register. Rather, the Director of the Office of Management and Budget, on January 22, 1993, directed agencies to withdraw from the Federal Register for approval all regulations not yet published in the Federal Register. 58 Fed. Reg. 6074 (January 25, 1993). In accordance with this directive, the Acting Assistant Attorney General of the Office of Legal Counsel instructed the office of the Federal Register, on January 22, 1993, not to publish the January 1993 rule. Accordingly, the rule was not published, and it did not take effect.

On June 7, 1993, the Immigration and Naturalization Service ("INS") charged petitioner with excludability for failing to possess a valid entry document under Sections 212(a)(7)(A)(i) and 212(a)(7)(B)(i)(I & II) of the INA, 8 U.S.C. §§ 1182(a)(7)(A)(i) and 1182(a)(7)(B)(i)(I & II). Petitioner sought relief by applying for asylum pursuant to Section 208 of the INA, 8 U.S.C. § 1158, and for withholding of deportation pursuant to Section 243(h) of the Act, 8 U.S.C. § 1253(h). At a hearing on June 24, 1993, the Immigration Judge ("IJ") found petitioner subject to exclusion and deportation for attempting to enter the United States without a valid visa.

On July 22, 1993, petitioner's applications for asylum and withholding of deportation were heard at an evidentiary hearing before the Immigration Judge ("IJ"). At that hearing, petitioner testified that he is 41 years old and that, until he came to the United States, he worked at a government food distribution cooperative or commune near the city of Fouzou. Petitioner testified that in January 1992, after he had disagreed with the head of the commune's decision to fine him a nominal amount of 5 yuan for missing two meetings of the commune, government population control officials took his wife to the regional hospital and coerced her to undergo an abortion against her will. Also, previously in 1988 or 1989, the head of the commune asked Chen to become a member of the Communist Party, but Chen testified that he did not want to become a member.

Petitioner testified that his persecution by the head of the

commune continued thereafter when he was coerced by government officials to undergo surgical sterilization. Petitioner also testified that, after his coerced sterilization, the head of the government's commune required petitioner to pay for five years between two and three times petitioner's annual salary as a fine for having a second child who is now 12 years old, and against whom the government had not taken any prior action under population control policy. After the operation, in October 1992, the head of the commune told petitioner that he would have to pay the 20,000 yuan fine off in five years or else his wife would be sterilized. As Chen continued to disobey commune orders that he pay 5 yuan for missing cooperative meetings or 20,000 yuan for his second child, he testified that he was ultimately barred from working and fled to the United States.

On August 31, 1993, the IJ issued his decision denying petitioner asylum and withholding of deportation relief. The IJ based his decision on the grounds that petitioner's opposition and disagreement with coercive population control policies applied to him by the PRC is excluded from the scope of political opinion protected by the INA, citing Matter of Chang. The IJ first found that petitioner did not make an entry into the United States because he was not free from official restraint. Essentially, the IJ found that Chen was not credible in claiming that political nonconformity was the motive for the family planning enforcement against his family. The IJ pointed out that the limitation on children is applicable to all inhabitants of the PRC. Moreover,

the IJ found no evidence that family planning policies are used as a means to punish political dissent. Finally, the IJ held that the "most incongruous aspect" of petitioner's testimony was his claim that he is a "recalcitrant political dissident," and that he suffered no punishment by the government until his wife became pregnant in 1992.

As for his asylum claim, the IJ found that Chen failed to establish by a preponderance of credible evidence that the proximate cause of his alleged persecution in the PRC was his political dissidence rather than his failure to comply with the birth control policy. The IJ emphasized that the sequence of events belied petitioner's claim that political dissidence caused his problems. In 1988 or 1989, he refused to join the Communist Party, and no action was taken for more than three years thereafter. Only after his wife became pregnant for the third time was petitioner subject to forced sterilization and a fine. Therefore, the IJ held that the proximate cause of these events was his violation of the birth control policy and not his alleged political dissidence.

In looking to the motivation of the alleged persecutor as required, the IJ found that the evidence showed that the PRC government applies its family planning policies to the entire population. He also held that there was no evidence of an invidious application of the policies toward petitioner and his wife, and the record failed to show that the birth control policies were a manifestation of communist political doctrine or used to

enforce political conformity. Ultimately, the IJ held that petitioner had failed to demonstrate that he possessed an immutable trait or belief that was of adverse interest to a potential persecutor in the PRC and, therefore, failed to meet the definition of a "refugee" under the INA.

Petitioner filed a timely notice of appeal to the Board on September 13, 1993. On January 3, 1993, the Board adopted and affirmed the IJ's decision. In answering petitioner's appeal issues, the Board found that he failed to provide evidence establishing a factual nexus between his failure to attend commune meetings and the enforcement of the PRC's family planning policies against him and his wife.

Contrary to Chen's contentions, this Court has jurisdiction under section 106(b) of the INA, 8 U.S.C. § 1105a(b), because petitioner has not effected an "entry" into the United States and, as required by the INA, petitioner's case properly continues in exclusion proceedings. Petitioner argues that the Board "violates" the INA by requiring that an alien by free of official restraint before he enters the United States. The INA provides that an "'entry' means any coming of an alien into the United States, from a foreign port or place from an outlying possession, whether voluntary or otherwise . . ." Section 101(a)(13) of the INA, 8 U.S.C. § 1101(a)(13). Congress has required that those seeking admission to the United States are subject to exclusion proceedings to determine whether they be allowed to enter or shall be excluded. Here, although he came voluntarily, petitioner never "entered"

the United States because he failed to prove that he was free from official restraint. It is well-established that an alien is required to be detained at the border pending formal disposition of his request for admission, Kaplan v. Tod, 267 U.S. 228 (1925), and that there is no formal "entry" until the alien has been freed from this official restraint. See Lazarescu v. United States, 199 F.2d 898, 900 (4th Cir. 1952). As a result, physical presence in the United States alone is not enough to effectuate an "entry".[2] See Leng May Ma v. INS, 357 U.S. 185, 188 (1958). Petitioner has failed to show that he was ever free from official restraint, despite being physically present in the United States. Therefore, this Court has jurisdiction because petitioner never effectuated an "entry" as required by the INA. Thus, his case properly proceeds as one of exclusion.[3]

Under section 208(a) of the INA, the Attorney General, in her discretion, may grant asylum to an alien if it is determined that the alien is a "refugee" within the meaning of section

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[2] Petitioner's argument that the "plain language" of the INA permits an "entry" into the United States by mere physical presence, is undermined by the clear and unambiguous language and structure of the INA itself. The United States Constitution, embodying the sovereign state's inherent right to exclude aliens, commits enforcement of this right to Congress which, in turn, may authorize officers of the Executive Branch to exercise it. Palma v. Verdeyen, 676 F.2d 100, 103 (4th Cir. 1982). Therefore, Congress intended the INA to require, that for admission to the United States, an alien must be stopped at the border for an inspection and a determination of admission. 8 U.S.C. § 1225(a).

[3] This Court, whose jurisdiction for review in this exclusion proceeding arises under 8 U.S.C. § 1105a(b), is limited to a review of the record. Kessler v. Strecker, 307 U.S. 22, 34 (1939).

101(a)(42(A). INS v. Cardoza-Fonesca, 480 U.S. 421, 428 n.5 (1987). Section 101(a)(42(A) defines a "refugee" as a person who is unable to return to his or her country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[4] 8 U.S.C. § 1101(a)(42)(A); see also Figeroa v. INS, 886 F.2d 76, 79 (4th Cir. 1989).

An applicant for asylum has the burden of showing entitlement to the relief requested. 8 C.F.R. §§ 208.5 & 242.17(c). Eligibility for asylum is based, essentially, upon a "reasonable person" test. M.A. v. INS, 899 F.2d 304, 311 (4th Cir. 1990) (en banc). Under this test, determinations of whether an individual possesses a "well-founded fear of persecution" require both a subjective inquiry into the individual's actual feelings and an objective assessment of the specific facts on which his fear is based. Huaman-Cornelio v.INS, 979 F.2d 995, 999 (4th Cir. 1992).

The Board's factual determinations, on which it bases it conclusions regarding an alien's eligibility for asylum or withholding of deportation, are reviewed under the substantial evidence standard. Id. Moreover, under this standard, a reviewing court may not reverse the Board's factual determinations unless the

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[4] Because the ultimate grant or asylum is discretionary, an asylum determination involves two stages: (1) a determination of statutory eligibility based on the "well-founded fear of persecution" standard, and (2) if statutory eligibility is established, a determination whether to exercise discretion in favor of the grant of asylum. See Zamora-Morel v. INS, 905 F.2d 833, 837 (5th Cir. 1990); Ipina v. INS, 868 F.2d 511, 513 (1st Cir. 1989).

court finds the evidence not only supports a contrary conclusion, but compels it. Elias-Zacarias, 112 S. Ct. at 815 & n.1; Huaman-Cornelio, 979 F.2d at 999. The Supreme Court has held that the Board's determination that an alien is not eligible for asylum must be upheld unless the alien shows that the evidence he or she presented "was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." Elias-Zacarias, 112 S. Ct. at 817. In addition, although the Court reviews the Board's legal conclusions de novo, the Court employs a deferential standard of review in which the legal determinations of the Board in interpreting the INA are entitled to great deference. Nwolise v. INS, 4 F.3d 306, 309 (4th Cir. 1993), cert. denied, 114 S. Ct. 888 (1994).

In adopting the IJ's decision, the Board did not find the petitioner credible in claiming that the motive behind the enforcement of the family planning policies was his political nonconformity with the leadership of the commune. Instead, the IJ and the Board found that the enforcement of the family planning policies against the Chen family was because of general family planning enforcement and not because of his alleged political dissidence. The objective evidence in this case does not support Chen's claims. Chen testified to a sequence of events occurring over a period of four to five years. He stated that he declined to join the Communist Party in 1988 or 1989. However, only when petitioner's wife was discovered pregnant for a third time were the family planning policies enforced against his family. Petitioner,

therefore, has failed to satisfy his burden of providing credible and persuasive evidence in support of his claim that his alleged political nonconformity was the motive for the family planning policy enforcement against his family.

The Board's decision is supported by Matter of Chang, which is a reasonable interpretation of the laws governing asylum in the United States, and which is controlling in this case. In Matter of Chang, the Board held that disagreement with the PRC's coercive population control policy is not political opinion for purposes of determining exclusion under 8 U.S.C. § 1158(a), or for withholding of deportation under 8 U.S.C. § 1253(h)(1). The Board issued its ruling in Matter of Chang in 1989, and it has adhered to its initial construction of the statute ever since, despite the unsuccessful regulatory efforts reflecting a different statutory interpretation. The Board remains entitled to deference in its construction of the statutory provisions at issue here. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 (1984) ().

Here, there are no "compelling indications" that the Board's construction of the statute was wrong. Campos-Guardado v. INS, 809 F.2d 285, 289 (5th Cir. 1989). The language of the statute itself does not specifically address whether asylum eligibility can be established based upon coercive population control policies that are applied to a country's populace in general. In this situation, the Board's decision is entitled to this Court's deference. See

Chevron, 467 U.S. at 843, 844 (explaining that where there is no "unambiguously expressed intent of Congress," a court "may not substitute its own construction of a statutory provision for that of the agency.").

Not only is the Board's decision in Matter of Chang legally correct, it is consistent with the Supreme Court's decision in INS v. Elias-Zacarias, 112 S. Ct. 812 (1992). In Elias-Zacarias, the Supreme Court addressed whether attempts by guerrillas to force a person into its military "necessarily constitutes 'persecution on account of . . . political opinion' under section 101(a)(42) of the Immigration and Nationality Act . . . ." 112 S. Ct. at 814. The Court answered this question negatively and, in so doing, established several important principles in asylum law.

First, the Court held that in order to reverse a finding by the Board that an alien failed to establish a well-founded fear of persecution, the record must compel the conclusion that the applicant has expressed a political opinion, and it must compel the further conclusion that the "persecutor" would persecute the applicant specifically because of that political opinion. Elias-Zacarias, 112 S. Ct. at 815-16 & n.1. Second, the Court held that the mere existence of a general political motive underlying the persecutor's actions is insufficient to establish asylum eligibility because the focus of the statute is upon the victim's political opinion, not the persecutor's. Id. at 816. Third, the Court emphasized that since the statute makes motive critical, the applicant must provide some evidence that the persecutor's motive

is to harm the applicant specifically because of his or her political opinion. Id. at 817-18. Thus, the Court held that because Elias-Zacarias had failed to show that he would be persecuted by the guerrillas on account of his political opinion, rather than simply for his refusal to fight with them, he failed to show that he was eligible for asylum, even if his refusal to fight could be considered a political opinion. Id. at 816.

Given that Chen fails to establish a nexus between the motives of a commune official and his alleged political opinions, the Board in this case reasonably followed the Supreme Court's holding in Elias-Zacarias. It is difficult to discern exactly what political opinion Chen claims is the basis of his persecution. He argues that he is an anti-Communist and because of this belief, he refused to attend commune meetings and, thus, was supposedly persecuted. However, he testified that he has lived in the commune all his life and that, despite the actions taken against him, he continued to live and work in the commune. He also stated that the discussions at the commune meetings were not political but, rather, about the market of food sales. Furthermore, he testified that, to this day, his wife and children continue to live in their commune house.

On the other hand, he claims that his political opinion at issue is his opposition of the family planning policies themselves. Yet, the record provides no evidence that the family planning policies are enforced invidiously against those imposing them or that Chen ever made his opposition known to Jian or another authority prior to the policies' enforcement. Petitioner has

failed to meet his burden of proof in showing that he was persecuted on account of his political opinion. He provided no credible evidence that the enforcement of the family planning policies against him was a pretext for punishing him for allegedly anti-Communist views or for any previously existing opposition to those policies. Rather, petitioner went about his life uninterrupted for a full four to five years after his refusal to join the Communist Party. With respect to petitioner's refusal to pay a nominal fine, it is well settled that government reaction to refusal to pay a nominal fine does not constitute persecution under the INA. See Kubon v. INS, 913 F.2d 386, 388 (7th Cir. 1990).

According to petitioner's own testimony, it was not until the third pregnancy that Jian sent him a notice of sterilization. In addition, it was only after the third pregnancy came to Jian's attention that petitioner was fined for having a second child. The objective evidence in this case does not support petitioner's claims of persecution based on his political opinions. Petitioner simply fails to establish a nexus between his alleged anti-Communist or anti-family planning views and Jian's actions against him.

It is well settled that "an alien who has failed to raise claims during an appeal to the BIA has waived his right to raise those claims before a federal court on appeal of the BIA's decision." Farrokhi v. INS, 900 F.2d 697, 700 (4th Cir. 1990). Therefore, this Court need not consider petitioner's argument about allegedly valid regulations promulgated by the Attorney General in

January 1990 and in January 1993 as binding upon the Board, because he never raised this claim before the Board. Only before this Court, for the first time, does Chen raise the argument that the January 1990 and January 1993 rules are independently binding. Because he failed to exhaust his administrative remedies, the Court need not address these claims.

An appropriate Order shall issue.

/s/
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
May 4, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

CHEN ZHOU CHAI,	)	
	)	
Petitioner,	)	
	)	
v.	)	CIVIL ACTION NO. 94-0037-A
	)	
WILLIAM J. CARROLL, District Director, Immigration and Naturalization Service (Washington District), and DAVID L. MILHOLLEN, Director of the Executive Office of Immigration Review and Chairman of the Board of Immigration Appeals,	)	
	)	
Respondents.	)	

ORDER

This matter came before the Court on Petitioner's petition for a Writ of Habeas Corpus. For reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that petitioner's petition for a Writ of Habeas Corpus is DENIED.

/s/
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
May 4, 1994

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LEGALIZATION SETTLEMENT NEGOTIATIONS

1. ISSUE STATEMENT

In the 1986 Immigration Reform and Control Act, Congress created employer sanctions to discourage future illegal immigration and a one-time, one year (1987-1988) amnesty period to permit long-time resident illegal aliens to legalize their status. Congress included restrictions (such as length of residency) on the categories of illegal aliens entitled to amnesty, and, in turn, INS adopted regulations interpreting these limitations.

In general, INS regulations were restrictive. Suits were brought across the country challenging the regulations. In some instances, the suits were successful, and the Department decided not to appeal; in others, INS continues to fight the challenges to its regulations or policies. In all cases, INS argued that District Courts lack jurisdiction to hear the challenges or to extend the one-year amnesty period for aliens who claimed they were discouraged from filing by the challenged regulations. In the cases where the INS lost in the District Court, District Courts set up filing periods for undocumented aliens who allege they were discouraged by the challenged regulations; to date, some 325,000 have filed under those programs.

As a rule, INS lost the jurisdictional argument until a 1993 decision of the Supreme Court, CSS v. Reno. In general, the Supreme Court held that aliens who had not filed during the amnesty period lacked ripe claims and that the District Courts could not hear them. However, the Court qualified its opinion in two important ways. First, there was evidence in the record that INS employees may have turned away some applicants at the front desk, by refusing their applications due to ineligibility. These front-deskers may bring suit and may force the INS to accept and adjudicate their legalization applications. In a footnote, the Court also left open the "unlikely" possibility that there may be other undocumented aliens for whom the invalid regulations were a "substantial" cause of their failure to apply. They might have ripe claims, but the Court did not say whether they would be entitled to a remedy (that is, a legalization adjudication).

Last fall, the cases were remanded back to the lower courts for further proceedings in light of this confusing opinion. Settlement negotiations began in September and are still continuing. Associate Attorney General Hubbell authorized settlement negotiations based on a settlement class including front-desked and constructively front-desked applicants. There remain complicated issues of filing requirements, employment authorization, judicial and administrative review, and fraud prevention, just to name a few.

Meanwhile, several legal developments have strengthened INS' hand. Justice O'Connor issued a stay when a District Judge in the Western District of Washington attempted to create another

nationwide filing program, based on the alleged standing of organizations. The Ayuda case in the District of Columbia was dismissed by the Court of Appeals on remand, when the Court found no plaintiffs who could establish they were front-desked or constructively front-desked. A panel of the 9th Circuit referred to the constructive front-desking CSS footnote as dictum. Finally, the Criminal Division obtained indictments of a number of people, including the national President of one of the plaintiff organizations, for organized immigration fraud in connection with the District Court filing programs.

2. STATUS

Negotiations are about to reach a critical juncture, where the plaintiffs will have identified four major points of disagreement. In a few weeks, we will be determining whether to continue with this signficant litigation or make important concessions in the negotiations. In one case in the Second Circuit (Perales), the plaintiffs have opted to continue with litigation, and oral argument will take place later this month.

3. DEPARTMENT POSITION

The Department has explored settlement and believes it makes sense to settle these cases, which continue to litigate a program that should have ended 6 years ago. At the same time, the Department has been negotiating for a settlement that will contain meaningful precautions against fraud, which has plagued the court-ordered filing programs, and that is consistent with existing law. We do not know whether negotiations will succeed.

4. JUDICIARY COMMITTE MEMBERS INTEREST

Many of the affected undocumented aliens are in California, Sen. Feinstein's state. Sen. Kennedy and Sen. Simpson are leaders on immigration issues; Sen. Simpson and his staff, in the past, have been generally aware of the pending litigation.

5. REFERENCE MATERIALS

Attached is an April 1, 1994, memo to Assistant Attorney General Hunger explaining the background and the case status in more detail.

U.S. Department of Justice
Civil Division

Deputy Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM

April 1, 1994

To: Frank Hunger
Assistant Attorney General

From: Frank Holleman FH
Deputy Assistant Attorney General

Re: Settlement of Legalization Cases
(CSS v. Reno and related cases)

You asked for a memo describing the status of the settlement negotiations. For your information, attached is a February 17 memorandum to the Associate Attorney General which outlines where we stood at that time.

1. The Cases. The negotiations involve six cases: CSS, LULAC, Perales, Zambrano, LEAP/IAP, and Ayuda. The principal cases are CSS and LULAC. In each, the plaintiffs have challenged INS regulations defining requirements for undocumented aliens to obtain legalized status under the 1986 IRCA amnesty program. In some instances, the plaintiffs were successful in their challenges on the merits; in all instances, the INS challenged the jurisdiction of the District Courts. In CSS, LULAC, and Zambrano, the District Courts issued rulings that extended the one-year amnesty period (May 5, 1987 to May 4, 1988) to permit undocumented aliens affected by the challenged regulations to file applications for class membership and legalization and to obtain work authorization. In CSS, the Court did not require a filing fee. Some 325,000 aliens have filed under the programs established by the District Courts, and approximately 100,000 have been granted work authorization by the INS.

Eventually, CSS and LULAC reached the Supreme Court. The Court decided that, in general, the plaintiffs' claims were not ripe and that the District Courts thus could not exercise jurisdiction over them. However, the Court expressly recognized one exception and left open the possibility of a second. In some cases, INS employees at the front desk refused to accept applications of aliens covered by challenged regulations; those "front-desked" aliens do have ripe claims, and the INS can be

ordered to adjudicate their applications. Further, in a footnote, the Court described another possible, ill-defined exception: while the Court thought it "unlikely," there may be aliens who were not front-desked but who can show that front-desking was "a substantital cause of their failure not to apply," and who may thus have ripe claims. The Court did not say whether such aliens would be entitled to a remedy.

In the wake of this decision, the Court vacated and remanded all the legalization cases for reconsideration in light of its decision. With two exceptions described below, the cases are back before the District Courts.

2. Concerns. In settlement discussions and in litigation, these are our principal concerns:

(a) Class Definition. Our negotations are based on a class definition that includes front-desked aliens, who are entitled to relief under CSS, and constructively front-desked aliens, who may or may not be. This class definition is legally defensible under CSS and offers the plaintiffs a reasonable compromise.

(b) Fraud. Investigators in the Criminal Division and INS believe that there was widespread fraud in the District Court filing programs, and, as explained below, there is significant evidence to support that belief. We would like the procedures for seeking class membership to include as many protections against fraud as possible. We have to recognize, however, that any filing program will have a degree of fraud in it and that the risk increases when constructive front-deskers are included in a filing program.

(c) Work Authorization. It is believed that the District Courts' programs encouraged fraud due to the apparent easy availability of work authorization upon only a prima facie review of the class membership application. We are attempting to require that an alien obtain work authorization only after his class membership and legalization applications are approved.

(d) Control of the Border. We want to do all that we can to ensure that a filing program does not hinder the ability of the INS to control the border.

(e) Resolution of the Dispute. This litigation has been continuing for 6 years over a program that should have ended in 1988. We want to bring an end to the litigation and its attendant costs, relieve INS of the administrative burden of the program after a defined time period, and provide the benefits of legalization to aliens who are entitled to them.

3. Legal Developments. While the negotiations have been continuing, there have been several legal developments that strengthen the Government's position and raise questions about the District Courts' filing programs.

a) The Criminal Division has succeeded in obtaining plea agreements from several immigration consultants and related persons for fraud in connection with filings made in the programs set up by the District Courts in CSS and LULAC. Disturbingly, in the plea agreements, the defendants state that immigration fraud was instigated, planned, and coordinated by Jose Velez, then the head of the LULAC Nevada office and subsequently the national president of LULAC (we understand that he still is). One of the accusatory plea agreements is that of Mr. Velez' son, Peter. He states that Velez and associates filed some 5,000 fraudulent CSS/LULAC applications and received approximately $5 million from the enterprise.

(b) On remand in Ayuda, a panel of the D.C. Circuit concluded that there were no ripe claims in the litigation and dismissed the case. The D.C. Circuit denied rehearing. The plaintiffs' time for petitioning for certiorari has not expired.

(c) In LEAP/IAP, the District Court set up a filing program very similar to the ones set up in CSS and LULAC. The District Court and the Ninth Circuit denied a stay of the District Court's order. However, in a strong opinion, Justice O'Connor stayed the District Court's order pending appeal in the Ninth Circuit, finding that the District Court could not base jurisdiction on a theory of organizational standing of the groups that brought suit in LEAP/IAP.

(d) In an unrelated decision in the Ninth Circuit, the Court rejected an attempt by an individual alien who sought to apply late for legalization. The Court held that an alien was not front-desked and did not have a ripe claim if he only alleges that he did not apply because be believed he was ineligible under a challenged INS policy which was subsequently changed. Since the alien did not claim he was constructively front-desked, the Court did not reach that issue, but it referred to the Supreme Court's footnote as "dictum."

(e) In Perales, the plaintiffs, at least for now, have rejected our limitation on the class definition and insist that the INS permit late filing by aliens who did not file simply because they thought they were ineligible under the challenged regulations and policies. Both the plaintiffs and the Government asked the Second Circuit to reconsider its remand of the case to the District Court and to decide the application of CSS to Perales based on the existing record. The Second Circuit agreed, and the parties are in the process of preparing briefs.

4. Status of Negotiations. On February 11, representatives of the Civil Division and INS met with negotiators for the plaintiffs. Earlier, the Department had approved a settlement approach based on the class definition described above; prior to the meeting, we sent the plaintiffs a letter setting forth the general dimensions of the Department's proposed settlement. At the meeting, we gave the plaintiffs a proposed settlement outline, which could form the basis of a settlement agreement. The discussions lasted most of the day, and I believe it is fair to say that we thought we had made progress.

On March 14, we received a formal response from the plaintiffs. It is a 45-page settlement document, consisting of 137 paragraphs, and it raises a whole host of difficult questions, some of which are new to the negotiations. Civil and INS are reviewing it, and we have begun preparing a proposed settlement agreement, based on our earlier outline, that incorporates the portions of the plaintiffs' agreement to which we can agree.

Acting Associate Attorney General Bryson has expressed an interest in the negotiations, and I have sent him a package of materials and briefed him on the negotiations. After reviewing the plaintiffs' proposal, he has suggested that settling this case with plaintiffs' counsel may be extremely difficult. He raised for consideration the possibility that INS should issue a regulation that embodies what the Department thinks is the right approach, and present it to the District Courts. He has asked for a meeting on Tuesday, April 5, with INS and Civil to discuss the settlement negotiations.

For now, we are continuing to put together a responsive settlement document for transmittal to the plaintiffs. This is not an easy task. If the plaintiffs raise significant objections to that proposal, we may be at the point of having to decide whether settlement negotiations are at a standstill. It is also possible that if we make our proposal and stick to it, the plaintiffs may question whether continued litigation makes sense for them.

Once we reach tentative agreement on all these issues, we will still have to face the issue of attorneys' fees.

Of course, any settlement agreement accepted by the negotiators would be subject to the usual Departmental approval process.

5. Conclusion. If you need anything further, please let me know.