Xin-Chang Zhang v. Slattery: Rejecting China's Coercive Population-Control Policy as Grounds for Political Asylum in the United States

Kevin S. Barber

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the Immigration Law Commons

Recommended Citation
Available at: https://digitalcommons.law.villanova.edu/vlr/vol41/iss2/4

This Note is brought to you for free and open access by the Journals at Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
In February 1993, the *Golden Venture*, a rusty and aged freighter, embarked on a 16,000 mile journey from Fujian Province in the People’s Republic of China (China) to Queens, New York. Amassed in the ship’s cargo holds were 300 Chinese nationals desperate to flee their homeland for the sanctity of the United States. For them, the ship’s departure marked an end to communist oppression and the beginning of a long and arduous journey to freedom.

The immigrants lived in squalor for 114 days as the *Golden Venture* sailed past Asia, Africa and across the turbulent Atlantic Ocean. Hopeful of reaching the land of liberty, they endured cramped quarters, unsanitary conditions and illness with little or nothing to eat. Unfortunately for
some, the long and difficult journey ended in death.\textsuperscript{5} For others, the quest for freedom continues.\textsuperscript{6}

I. INTRODUCTION

In 1993, the \textit{Golden Venture} became the twenty-fourth ship carrying hundreds of Chinese nationals to reach the United States.\textsuperscript{7} Since then, a steady flow of such vessels continues to approach U.S. waters.\textsuperscript{8} Leaders of the Chinese community in New York estimate that nearly 40,000 Chinese immigrants have been illegally smuggled into the United States each year since 1990.\textsuperscript{9} The driving force behind this influx of immigrants is the coercive population-control policy strictly enforced by China's communist government.\textsuperscript{10} The policy limits the size of Chinese families to one child

\textsuperscript{5} Pyle, supra note 1, at A1. According to an Emergency Medical Service technician present when the \textit{Golden Venture} ran aground off the coast of Queens, New York, six people drowned before reaching the beach and two others died later at a hospital. \textit{Id.} For a further discussion of the \textit{Golden Venture} tragedy, see infra notes 124-29 and accompanying text.

\textsuperscript{6} See Rep. Nudges Clinton on Detainees, \textit{York Daily Rec.}, June 21, 1996, at D1 (reporting that of 282 \textit{Golden Venture} immigrants, 80 were granted asylum, 30 have been released on bond, 13 juveniles were not detained, 59 remain imprisoned and remainder were returned to China (citing U.S. Rep. Bill Goodling)); Jack Sherzer, \textit{Chinese Immigrant Update}, \textit{Harrisburg Patriot}, Apr. 23, 1996, at A2 (reporting that approximately 80 \textit{Golden Venture} immigrants have been granted asylum or released on bail or parole, 10 were granted asylum in South American countries, 60 were deported to China, 10 children are in foster care, and remaining are being detained at facilities throughout United States).

\textsuperscript{7} Pyle, supra note 1, at A1 (citing William Slattery, director of Immigration and Naturalization Service office in New York).


\textsuperscript{10} Katz, supra note 2, at 10A. Ninety percent of the \textit{Golden Venture} immigrants filed asylum claims based on China's coercive population-control policy. \textit{See also} Pyle, supra note 1, at A1 ("Many asylum-seekers say they are trying to escape China's strict population-control policies, which can lead to forced sterilization and abortions."). \textit{But see} John Omicinski, \textit{How Loophole Allows Chinese to Claim Asylum}, Gannett News Service, July 8, 1993, \textit{available in 1993 WL 7315958} ("Large numbers, perhaps the vast majority, of Fujianese stowaways claim protection under the birth-control policy, only as a convenient ruse.").

Throughout the twentieth century, China's population has grown at an alarming rate, maintaining its status as the world's most populous nation. Karen Y. Crabbs, \textit{United States Domestic Policies and Chinese Immigrants: Where Should Judges Draw the Line When Granting Political Asylum?}, 7 \textit{Fla. J. Int'l L.} 249, 252 (1992) (noting that China became most populous nation in world during third century B.C.). By the early 1980s, the population boom reached dynamic proportions as China became the first nation in the world with over one billion inhabitants. \textit{Id.} at 252 & n.16 (citing Erika Platte, \textit{China's Fertility Transition: The One-Child Campaign},
per couple and encourages couples to marry late in life.\(^{11}\)

57 PAC. AFF. 646 (1984) ("In 1982, China's population, excluding Taiwan, Hong Kong and Macao, was reported in a national census to be 1,008,175,288."). Officials predict at the end of 1995, 1.212 billion people will inhabit mainland China, an area only slightly larger than the United States. China Claiming Greater Success in Controlling Population Growth, AP, Aug. 18, 1995, available in 1995 WL 4402632 [hereinafter China Claiming Greater Success]. Much of the population growth occurred during the early 1950s, due to Chairman Mao Tse-Tsung's belief that large families contributed to a more productive labor force. Michael Weisskopf, Shanghai's Curse: Too Many Fight For Too Little, Tough Birth Control Policy Shakes Chinese Society, WASH. POST, Jan. 6, 1985, at A1 [hereinafter Weisskopf, Shanghai's Curse] (according to Chairman Mao, "every stomach comes with two hands attached"). During the 1950s, China's birth rate soared to 5.87 births per woman. Crabbs, supra, at 252-53.

By the late 1970s, however, the swollen population began to pose serious problems as China encountered a serious grain shortage. Id. at 253 & n.21 (citing Sue Bigelow, Agriculture Reaching Crisis Point, CHINA REV., Aug. 1989, at 23). Faced with diminishing food supplies and stagnant economic growth, population-control became a high priority for the Chinese government. Id. at 255. "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 . . . ." DEPARTMENT OF STATE, SUBMITTED TO SENATE COMM. ON FOREIGN RELATIONS AND HOUSE COMM. ON INT'L RELATIONS, 99TH CONG., 2D SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1985, at 740 (Comm. Print 1986). In 1982, the Chinese government adopted Article 25 of the People’s Republic of China's Constitution, which states: "The state promotes family planning so that population growth may fit the plans for economic and social development." DEPARTMENT OF STATE, SUBMITTED TO SENATE COMM. ON FOREIGN RELATIONS AND HOUSE COMM. ON INT'L RELATIONS, 99TH CONG., 2D SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1985, at 740 (Comm. Print 1986). Under the leadership of Premier Deng Xiaoping, the communist government implemented a strict population-control policy designed to cap China's population at 1.2 billion people by the year 2000. Michael Weisskopf, Abortion Policy Tears at China's Society, WASH. POST, Jan. 7, 1985, at A1 [hereinafter Weisskopf, Abortion Policy]; Weisskopf, Shanghai's Curse, supra, at A1 (according to General Secretary Hu Yaobang, in September 1982, "[e]xcessive population growth will not only adversely affect the increase of per capita income but also cause serious difficulties in food supply, housing, education and employment, and it may even disrupt social stability"); see also Crabbs, supra, at 253 (discussing family planning policy).

Statistically, the policy seems to be working. China's birth rate has dropped from 14.39 births per thousand in 1990 to 12.98 births per thousand in 1995. China Claiming Greater Success, supra. Regardless, there are still nearly 20 million new births in China each year. Id.

11. Crabbs, supra note 10, at 253 n.21. Under this policy, procreation is "an affair of the state," in which human rights are sacrificed for a reduction in China's population growth. E. Tobin Shiers, Note, Coercive Population Control Policies: An Illustration of the Need for a Conscientious Objector Provision for Asylum Seekers, 30 VA. J. INT'L L. 1007, 1011 (1990) (citing Is China's Birth Control Program Still Coercive?: Hearings Before the Senate Comm. on Foreign Relations, 100th Cong. 216 (1987) (statement of John S. Aird, Former Senior Research Specialist on China at U.S. Bureau of the Census)); see also Weisskopf, Abortion Policy, supra note 10, at A1 (discussing state regulation of family size). According to China's Minister of Family Planning, Qian Xinzhong, "the size of a family is too important to be left to the personal decision of a couple. Births are a matter of state planning, just like other economic and social activities, because they are a matter of strategic concern." Id. (emphasis added). In 1981, China promoted its "one couple, one child" family planning policy with the slogan, "late marriage, late childbearing, few births and eugenic
According to the Chinese government, officials enforce the "one couple, one child" policy through economic incentives and birth control education only, not through coercive techniques.\textsuperscript{12} Despite these assurances, numerous documented cases of forced abortions and sterilizations, government-sanctioned infanticide and other forms of brutality suggest that coercion is widespread.\textsuperscript{13} Furthermore, the economic sanctions im-

\textsuperscript{12} Weisskopf, \textit{Abortion Policy}, \textit{supra} note 10, at A1. According to Weisskopf, however, the Chinese government plays a much more active role in carrying out its population-control policy:

What emerges from more than 200 interviews spaced over three years with officials, doctors, peasants and workers in almost two-thirds of China's 29 main subdivisions is the story of an all-out government siege against ancient family traditions and the reproductive habits of a billion people.

The story offers a glimpse of China usually hidden from foreigners but painfully familiar to most Chinese—a world of government-sanc-
tioned infanticide, of strongarm sterilizations and of abortions performed at a rate as high as 800,000 a year in a single province.

\textit{Id.} Privately, Chinese officials acknowledge that forced abortions and sterilizations do take place; however, they insist that physical compulsion to submit to such an operation is not authorized by the Chinese government.\textsuperscript{13} DEPARTMENT OF STATE, \textit{SUBMITTED TO SENATE COMM. ON FOREIGN RELATIONS AND HOUSE COMM. ON INT’L RELATIONS, 104TH CONG., 1ST SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1994, at 561 (Comm. Print 1995).}

\textsuperscript{13} Shiers, \textit{supra} note 11, at 1011-16. According to reports, "descriptions abound of late-night surprise attacks by local officials ‘hustling sleeping women from their beds to 24-hour sterilization clinics.’" \textit{Id.} at 1012 (quoting Weisskopf, \textit{Abortion Policy}, \textit{supra} note 10, at A1); \textit{see also} Weisskopf, \textit{Abortion Policy}, \textit{supra} note 10, at A1 ("Expectant mothers, including many in their last trimester, were trussed, handcuffed, herded into hog cages and delivered by the truckload to the operating tables of rural clinics, according to eyewitness accounts."). In compliance with the policy, doctors perform the abortion operations as late as the ninth month of pregnancy. \textit{Id.} ("Officials say it often takes that long to get reluctant women to clinics."); \textit{see} 135 CONG. REC. S8244 (daily ed. July 19, 1989) (statement of Sen. Armstrong) (urging colleagues to support Armstrong-DeConcini Amendment on Asylum for Chinese nationals).

The case of Mrs. Zhou, a Chinese national in the ninth month of her second pregnancy, illustrates an extreme example of the brutality employed by the Chinese government. \textit{Id.} In October 1984, the Chinese police burst into her home and brought her to the hospital for a mandatory abortion. \textit{Id.} Following a beating, Mrs. Zhou went into labor en route to the hospital. \textit{Id.} Although her child was born alive, it was summarily strangled to death by the accompanying government officials. \textit{Id.} Mrs. Zhou’s husband, who witnessed the child’s murder, was subsequently denied asylum in the United States for failing to demonstrate a “well-founded fear of persecution” based on China’s “one couple, one child” policy. \textit{Id.};
posed on couples who disregard the "one couple, one child" policy are often so extreme that couples have no choice but to comply. To escape these coercive population-control measures, thousands of Chinese nationals seek asylum in the United States each year.

This Note focuses on the refusal of the United States Court of Appeals for the Second Circuit to grant asylum to a Golden Venture immigrant. More specifically, Part II of this Note discusses the laws, administrative pronouncements and judicial rulings that led the Second Circuit to deny the petitioner's request for asylum in Xin-Chang Zhang v. Slattery. Part III presents the facts and procedural history of Xin-Chang Zhang. Part IV analyzes the Second Circuit's reasoning and evaluates the "well-founded fear of persecution" requirement for asylum as well as the applicability of various administrative pronouncements regarding Chinese asylum claims. Finally, Part V of this Note discusses the possible reverberations.

---

14. Shiers, supra note 11, at 1011 ("[T]he severity of economic sanctions for noncompliance with the policy also constitutes coercion in many areas."); see Country Reports on Human Rights Practices for 1994, at 561. According to the Country Report for 1994, Disciplinary measures against those who violate the policy include fines, withholding of social services, demotion, and other administrative punishments, such as loss of employment. Unpaid fines have sometimes resulted in confiscation or destruction of personal property. Because penalties for excess births can be levied against local officials and the mothers' work units, many individuals are affected, providing multiple sources of pressure.

15. For a further discussion on the number of Chinese immigrants smuggled into the United States each year, see supra note 9 and accompanying text. Asylum is defined as the following: "A sanctuary, or place of refuge and protection, where criminals and debtors found shelter, and from which they could not be taken without sacrilege. Shelter; refuge; protection from the hand of justice." Black's Law Dictionary 124 (6th ed. 1990). Additionally, An alien may be considered for asylum or refugee status in the United States if the alien has a well-founded fear of persecution in his or her home country. To be eligible for either asylum or refugee status, the applicant must qualify as a refugee, as defined by 8 U.S.C.A. § 1101(a)(42).


17. For a discussion of the facts governing the Xin-Chang Zhang opinion, see infra notes 117-41 and accompanying text.

18. For an analysis of the Second Circuit's reasoning in Xin-Chang Zhang v. Slattery, see infra notes 142-204 and accompanying text.
of the Second Circuit’s holding in Xin-Chang Zhang throughout the executive, legislative and judicial branches of the United States federal government and suggests that this unsettled area of asylum law stands at an important crossroad.19

II. BACKGROUND

A. Governing Asylum Law

In 1952, Congress enacted the Immigration and Nationality Act (INA),20 a comprehensive piece of immigration legislation designed to regulate the flow of legal and illegal immigrants into the United States.21 Under the INA, the Attorney General of the United States has the discretion to grant asylum to aliens22 that qualify as “refugees.”23

In asylum proceedings, the applicant must prove that he or she qualifies as a refugee under the INA and is therefore eligible for asylum.24 To

19. For a discussion of the impact of the Second Circuit’s decision in Xin-Chang Zhang, see infra notes 205-10 and accompanying text.
22. An alien is defined as a foreign born person who has not qualified as a citizen of the country; but an alien is a person within the meaning of the Fourteenth Amendment due process clause of the U.S. Constitution to same extent as a citizen. Galvan v. Press, 347 U.S. 522 .... Any person not a citizen or national of the United States. 8 U.S.C.A. § 1101.
23. 8 U.S.C. § 1158(a) (“[T]he alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section [1]101(a)(42)(A) of this title.”); see also INS v. Cardoza-Fonseca, 480 U.S. 421, 427-28 (1987) (discussing Attorney General’s role in asylum process). In Cardoza-Fonseca, the United States Supreme Court said: It is important to note that the Attorney General is not required to grant asylum to everyone who meets the definition of refugee. Instead, a finding that an alien is a refugee does no more than establish that “the alien may be granted asylum in the discretion of the Attorney General.” Id. at 428 n.5 (quoting 8 U.S.C. § 1158(a)).
24. 8 C.F.R. § 208.13(a) (1996) (“The burden of proof is on the applicant for asylum to establish that he is a refugee as defined in section 101(a)(42) of the [INA].”); see also Chen Zhou Chai v. Carroll, 48 F.3d 1331, 1336 (4th Cir. 1995) (“In order to establish asylum eligibility, the applicant must demonstrate that [China] selectively enforced its population control policy against the applicant ....” (emphasis added)); Rebollo-Jovel v. INS, 794 F.2d 441, 448 (9th Cir. 1986) (holding that alien bears burden of proving persecution) (citations omitted)); Jia-Hu Gao v. Waters, 869 F. Supp. 1474, 1482 (N.D. Cal. 1994) (concluding that burden of proof “rests on the applicant”); Xiu Qin Chen v. Slattey, 862 F. Supp. 814, 820 (E.D.N.Y. 1994) (“[T]he asylum-seeker bears the burden of proof under the
attain refugee status, the applicant must demonstrate a "well-founded fear" of future persecution (if returned to their native land) based on race, religion, nationality, membership in a particular social group or political opinion. Generally, applicants fleeing China's "one couple, one child" policy assert fear of persecution because of their political opinions. Therefore, courts faced with these asylum applications must determine whether a refusal to submit to a government levied population-control policy qualifies as an expression of political opinion under the INA.

B. Ruling of the BIA in Matter of Chang

The Board of Immigration Appeals (BIA) first confronted asylum claims based upon China's coercive "one couple, one child" policy in Matter of Chang. Mr. Chang, the respondent, filed applications for asylum, voluntary departure and withholding of deportation in the United States regulations promulgated by the Attorney General. The INA defines a "refugee" as: "[A]ny person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to . . . that 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 . . . ." Id.; see also Chen Zhou Chai, 48 F.3d at 1336 (requiring "well-founded fear" of persecution based on one of five categories enumerated in INA); Saleh v. United States Dep't of Justice, 962 F.2d 234, 238-39 (2d Cir. 1992) (applying INA requirement of persecution based on one of five enumerated categories to petitioner's claim); Peng-Fei Si v. Slattery, 864 F. Supp. 397, 400 (S.D.N.Y. 1992) (analyzing claim in light of categories enumerated in INA); Xiu Qin Chen, 862 F. Supp. at 820; Xin-Chang Zhang, 859 F. Supp. at 711-12; Guo Chun Di v. Carroll, 842 F. Supp. 858, 871 (E.D. Va. 1994) (same), rev'd sub nom. Guo Chun Di v. Moscato, 66 F.3d 315 (4th Cir. 1995).

26. See Xiu Qin Chen, 862 F. Supp. at 823 (asserting past persecution on account of "actual political beliefs or imputed beliefs"); Guo Chun Di, 842 F. Supp. at 872 ("The heart of petitioner's asylum claim is the contention that his opposition to [China's] coercive population control policies constitutes a 'political opinion' within the meaning of [8 U.S.C. § 1101(a)(42)(A)]."). For a discussion of China's "one couple, one child" population control policy, see supra note 10 and accompanying text.

27. 8 C.F.R. § 3.1(a)(1) (1996). The Board of Immigration Appeals (BIA) is a branch of the Department of Justice composed of a Chair and eleven other members. Id. At the discretion of the BIA's Chair, the members are divided into three-member panels "empowered to review cases by majority vote." Id. The BIA has jurisdiction to hear appeals from the following proceedings: "(1) Decisions of Immigration Judges in exclusion cases . . . . (2) Decisions of Immigration Judges in deportation cases . . . . (9) Decisions of Asylum Officers of the [INS] on applications for asylum or withholding of deportation filed by alien crewman or stowaways, as provided in § 253.1(f)(4) of this chapter." Id. § 3.1(b). Section 253.1(f)(4) provides: "A decision denying asylum to an alien crewman or stowaway, but not an alien temporarily excluded under section 235(c) of this chapter, may be appealed directly to the [BIA]." Id. § 253.1(f)(4).

because he opposed China's "one couple, one child" policy. In Chang, the BIA reached two important conclusions regarding China's population-control policy that subsequently became imbedded in asylum case law.

First, the BIA concluded that the "one couple, one child" policy of the Chinese Government [was not] on its face persecutive. According to the BIA, officials implemented the policy to control China's population growth, not "as a guise for acting against people." Therefore, the BIA concluded that application of the policy did not create a "well-founded fear of persecution" based on race, religion, nationality, membership in a particular group or political opinion as required by the INA.

29. Chang, 1989 BIA LEXIS 13, at *2-3. According to Mr. Chang, he fled to the United States because "[he and his wife] had two children and did not agree to stop having more children." Id. at *3. Mr. Chang testified at his deportation hearing that the Chinese government insisted that he undergo sterilization and that if he returned to China, he would be forced to do so. Id. The immigration judge denied his applications. Id. at *2.

30. Id. at *10-11 (concluding that China's population-control policy was not on its face persecutive or selectively applied). See, e.g., Chen Zhou Chai, 48 F.3d at 1342 (concluding that "the [BIA's] interpretation of the asylum statute in Matter of Chang is entitled to deference"); Chang Lian Zheng v. INS, 44 F.3d 379, 380 (5th Cir. 1995) (per curiam) ([T]he criteria defined in Matter of Chang and Matter of G for use in Chinese forced abortion/forced sterilization asylum claims...are neither arbitrary nor capricious and are well within the discretion vested in the Attorney General by the Act."); Shan Ming Wang v. Slattery, 877 F. Supp. 133, 142 (S.D.N.Y. 1995) (relying on BIA's decision in Chang as "valid precedent"); Jia-Ging Dong v. Slattery, 870 F. Supp. 53, 59 (S.D.N.Y. 1994) (concluding that BIA's decision in Chang deserves "considerable deference"); aff'd, 84 F.3d 82 (2d Cir. 1996); Shan Qi Lan v. Waters, 869 F. Supp. 1483, 1491 (N.D. Cal. 1994) (relying on Chang as controlling precedent); Jia-Hu Gao v. Waters, 869 F. Supp. 1474, 1483 (N.D. Cal. 1994) ("Chang stands as binding precedent on immigration judges and the BIA, and the BIA properly affirmed the immigration judge's reliance on the decision in the instant case."); Peng-Fei Si v. Slattery, 864 F. Supp. 397, 405 (S.D.N.Y. 1994) (relying on BIA's decision in Chang to affirm petitioner's denial of asylum); Xiu Qin Chen, 862 F. Supp. at 823 (relying on BIA's decision in Chang as "remain[ing] in effect and serv[ing] as precedent"). For a further discussion of the judicial deference given to the BIA's decision in Chang, see infra notes 62-114 and accompanying text.

31. Chang, 1989 BIA LEXIS 13, at *10. In reaching this conclusion, the BIA noted that the continued growth of China's population forced Chinese policy-makers to take steps to discourage births. Id. The BIA noted that:

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. Id. According to the BIA, "[f]or 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." Id.

32. Id. at *11. According to the BIA, "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." Id. at *12.

33. Id. at *11 ("[W]e 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.").
Second, the BIA concluded that individuals claiming persecution under the “one couple, one child” policy must demonstrate that the government has applied the policy “selectively . . . to punish individuals for their political opinions” or for other reasons enumerated under section 1101(a)(42)(A) of the INA.34 The BIA concluded that there must be evidence of government-sanctioned punishment for the applicant’s opinion rather than punishment in furtherance of a national policy such as population-control.35 Therefore, the BIA refused to consider Mr. Chang a victim of persecution or find that he had a “well-founded fear of persecution” within the scope of the INA.36

C. Administrative Actions in Opposition to Chang

From 1988 to 1993, both the executive and legislative branches of the United States federal government took definite steps to advance the asylum claims of Chinese aliens.37 For example, on August 5, 1988, Attorney General Edwin Meese issued the first of many administrative pronouncements designed to loosen the asylum requirements for aliens claiming per-

34. Id. According to the BIA, the “one couple, one child” policy did not selectively persecute Mr. Chang on account of his race, religion, membership in a social group or political opinion as required by section 1101(a)(42)(A) of the INA. Id. at *12. Instead, the Chinese government applied the policy to all Chinese nationals for purposes of population-control. Id. at *10.

35. Id. at *12; see also Saleh v. United States Dep’t of Justice, 962 F.2d 234, 239 (2d Cir. 1992) (“Punishment for violation of a generally applicable criminal law is not persecution.”); MacCaud v. INS, 500 F.2d 355, 359 (2d Cir. 1974) (concluding that punishment for non-political crimes does not warrant asylum in United States); Sovich v. Esperdy, 319 F.2d 21, 28-29 (2d Cir. 1963) (holding that punishment following commission of crime is generally not persecution); Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status 15 (1979) (“Persecution must be distinguished from punishment for a common law offense. Persons fleeing from prosecution or punishment for such an offense are not normally refugees. It should be recalled that a refugee is a victim—or potential victim—of injustice, not a fugitive from justice.”).

36. Chang, 1989 BIA LEXIS 13, at *15. As a result, the BIA dismissed Mr. Chang’s applications for asylum and withholding of departure. Id. at *16. The BIA, however, did grant Mr. Chang the opportunity to depart voluntarily instead of being deported. Id.

secution under China's "one couple, one child" policy. In a series of guidelines issued to the Immigration and Naturalization Service (INS), Attorney General Meese stated that "all INS asylum adjudicators are to give careful consideration to applications from nationals of the People's Republic of China who express a fear of persecution upon return to [China] because they refuse to abort a pregnancy or resist sterilization after the birth of a second or subsequent child." Although the guidelines were properly promulgated, the BIA refused to apply them in Chang, concluding instead that they "were directed to the [INS], rather than the immigration judges and this Board."

In response to the BIA's decision in Chang and the 1989 student uprisings in Tiananmen Square, Congress enacted the Emergency Chinese Immigration Relief Act of 1989 ("Relief Act"). The Relief Act contained a provision drafted specifically to overrule the Chang decision. Although

38. See, e.g., Xiu Qin Chen, 862 F. Supp. at 815-18 (discussing administrative pronouncements surrounding asylum claims).

39. Memorandum from the Office of Attorney General Edwin Meese to INS Commissioner Alan Nelson 1 (Aug. 5, 1988), reprinted in Appellee's Brief at Al, Xin-Chang Zhang v. Slattery, 55 F.3d 732 (2d Cir. 1995) (No. 94-6258). According to Meese, aliens forced to submit to these procedures qualified for refugee status under 8 U.S.C. § 1101 (a) (42) (A) and were therefore entitled to political asylum in the United States. Id.

40. Chang, 1989 BIA LEXIS 13, at *9 (citations omitted); see also Chen Zhou Chai, 48 F.3d at 1331, 1338 (rejecting petitioner's claim that BIA erred in applying Chang to his claim for asylum); Chang Lian Zheng v. INS, 44 F.3d 379, 380 (5th Cir. 1995) (per curiam) (upholding BIA's refusal to grant asylum based on previous ruling in Chang); Jia-Ging Dong v. Slattery, 870 F. Supp. 53, 59 (S.D.N.Y. 1994) (concluding that "Chang is still in force, and is deserving of considerable deference"), aff'd, 84 F.3d 82 (2d Cir. 1996); Xiu Qin Chen, 862 F. Supp. at 825 (upholding BIA's decision in Chang).

41. Liberty Statue Rallies Chinese Students, St. Louis Post-Dispatch, May 30, 1989, at 1. After weeks of regular protest rallies in China's capital city, pro-democracy demonstrators, composed primarily of students and workers, began to gather in Tiananmen Square on May 13, 1989. Id. On June 4, tens of thousands of Chinese troops carrying submachine guns that had surrounded the square moved in to retake the square. Nicholas D. Kristof, Crackdown in Beijing; Troops Attack and Crush Beijing Protest; Thousands Fight Back, Scores are Killed, N.Y. Times, June 4, 1989, at 1. In their efforts to disperse the demonstrators, hundreds were killed. Id. According to reports, "most of the dead had been shot, but some had been run over by armored personnel carriers that forced their way through barricades erected by local residents." Id.

42. Emergency Chinese Immigration Relief Act of 1989 ("Relief Act"), H.R. 2712, 101st Cong. (1989); see also Chen Zhou Chai, 48 F.3d at 1336 (discussing Relief Act).

43. Chen Zhou Chai, 48 F.3d at 1336 ("Soon after the [BIA] issued its opinion in Matter of Chang, Congress began considering legislation to overturn it."); Xiu Qin Chen, 862 F. Supp. at 816 ("Congress reacted to the BIA decision by adding an amendment which would have overruled Chang to the [Relief Act]."); Guo Chun Di v. Carroll, 842 F. Supp. 858, 863 (E.D. Va. 1994), rev'd sub nom. Guo Chun Di v. Moscato, 66 F.3d 315 (4th Cir. 1995) ("Soon after the May 1989 Chang decision, efforts were made in Congress to overturn it. These efforts culminated in the Armstrong-DeConcini Amendment to the [Relief Act], H.R. 2712, which was drafted and offered for the express purpose of overruling Chang.").
Congress passed the Relief Act with widespread bi-partisan support, President George Bush vetoed the bill to “preserv[e] [his] ability to manage foreign relations.”

Despite his veto of the Relief Act, President Bush promised executive action to “accomplish the laudable objectives of Congress.” At the President’s urging, Attorney General Richard Thornburgh promulgated the January 1990 Interim Rule which granted asylum to aliens with “a well-founded fear that they will be required . . . to be sterilized because of their country’s family planning policies . . . on account of political opinion.” Furthermore, on April 11, 1990, President Bush issued Executive Order 12,711, which directed the Secretary of State and the Attorney General to extend “enhanced consideration” to immigrants seeking political asylum due to China’s population-control policy. On July 27, 1990, however, Attorney General Thornburgh published a final rule revising the regula-
tions pertaining to asylum and withholding of deportation claims. Surprisingly, the language contained in the July 1990 Final Rule made no reference to asylum claims based on coercive family planning or even to the January 1990 Interim Rule. In Guo Chun Di v. Carroll, the United States District Court for the Eastern District of Virginia commented that "the January 1990 Interim Rule had quite simply and remarkably vanished without a trace or explanation." Despite the disappearance of the language in the January 1990 Interim Rule, the INS continued to consider coercive family planning policies as a sufficient grounds for asylum "on account of political opinion." Nearly two years after its disappearance, the pro-asylum language of the January 1990 Interim Rule reappeared in a final rule issued by Attorney General William Barr at the close of the Bush administration. Like the previous rule, the January 1993 Final Rule provided for asylum based on opposition to coercive family planning policies. Furthermore, the sterilization, as implemented by the Attorney General's regulation effective January 29, 1990. 

Id. President Bush issued the order to "underscore[s] the substance of the January 1990 Interim Rule." Guo Chun Di, 842 F. Supp. at 863.

51. Id. at 864.
52. Memorandum from the General Counsel of the INS, 69 INTERPRETER RELEASES 311, 311-13 (Mar. 9, 1992). In a memorandum from the Office of the General Counsel of the INS to Regional Counsel and District Counsel, Grover Joseph Rees III stated:

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. This policy is embodied in the Attorney General's directives of August 5, 1988 and December 1, 1989; in the President's directive of November 30, 1989; in Executive Order No. 12711, . . . and in the interim final regulations published on January 29, 1990 . . .

Id. at 311 (citations omitted); see also Memorandum from David M. Dixon, Appellate Counsel, INS, to David B. Holmes, Chief Attorney Examiner, BIA (Apr. 11, 1991) (discussing asylum policy), reprinted in Respondent's Brief at A2, Xin-Chang Zhang v. Slattery, 55 F.3d 732 (2d Cir. 1995) (No. 94-6258).


54. Chen Zhou Chai, 48 F.3d at 1337. The January 1993 Final Rule provided that an applicant qualified for refugee status on account of his or her political opinion if the applicant could establish that:

[P]ursuant to the implementation by the country of the applicant's nationality or last habitual residence of a family planning policy that involves or results in forced abortion or coerced sterilization, the applicant has been forced to abort a pregnancy or to undergo sterilization or has
rule's stated intent was "to supersede the [BIA's] decision in Matter of Chang." The rule stipulated that it became effective upon publication in the Federal Register, which the Bush administration scheduled for January 25, 1993. On January 22, 1993, however, as one of his first official acts, President Bill Clinton blocked from publication all of the rules issued by the previous administration not yet published in the Federal Register.

Confused by the effect of Executive Order 12,711 and other administrative pronouncements on its decision in Chang, the BIA petitioned Janet Reno, the new Attorney General, for review of two of its decisions concerning Chinese asylum claims. In a rather vague response, Attorney General Reno indicated that the BIA conclusions in these decisions did not "require a determination that [either Executive Order 12,711 or Chang] is lawful and binding." Therefore, Attorney General Reno did little to clarify the existing policy concerning Chinese asylum claims.

In sum, between 1988 and 1993, the executive branch of the federal government issued nine separate pronouncements concerning Chinese asylum claims based on opposition to China's "one couple, one child" policy. Reproduced below is a chart compiled by Judge Ellis of the United States District Court for the Eastern District of Virginia which lists each of the conflicting pronouncements and their affect on asylum eligibility.

---

been persecuted for failure or refusal to do so, and that the applicant is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such persecution.

Xiu Qin Chen, 862 F. Supp. at 817 (citing January 1993 Final Rule). The January 1993 Final Rule also grants refugee status to applicants establishing a "well-founded fear [that] . . . the applicant will be forced to abort a pregnancy or undergo sterilization or will be persecuted for failure or refusal to do so." Id. at 817-18.

55. Xiu Qin Chen, 862 F. Supp. at 817; Guo Chun Di, 842 F. Supp. at 858.
57. Chen Zhou Chai, 48 F.3d at 1338. President Clinton had the rules withdrawn from publication so that his "appointees could review and approve the new regulations." Id. (citing 58 Fed. Reg. 6074 (1993)). Included in the unpublished rules was the January 1993 Final Rule issued and signed by Attorney General Barr at the close of the Bush administration. To date, the January 1993 Final Rule remains unpublished in the Federal Register.
58. Id. Pursuant to 8 C.F.R. § 3.1(h)(1), the BIA asked Attorney General Janet Reno to review its decisions in Matter of Chu and Matter of Tsun. Id. (citing 8 C.F.R. § 3.1(h)(1) (1993) which states: "The Board shall refer to the Attorney General for review of its decision all cases which . . . The Chairman or a majority of the Board believes should be referred to the Attorney General for review.").
60. For a further discussion of the administrative pronouncements, see supra notes 37-59 and accompanying text.
When faced with Chinese asylum claims, courts must reconcile the administrative pronouncements permitting asylum with the BIA's refusal to grant asylum in Chang.

<table>
<thead>
<tr>
<th>Pronouncement</th>
<th>Asylum Eligibility</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. August 5, 1988 Guidelines promulgated by then Attorney General Edwin Meese</td>
<td>asylum permitted</td>
</tr>
<tr>
<td>4. Executive Order No. 12,711, 55 Fed. Reg. 13,897 (1990), issued by President George Bush</td>
<td>asylum permitted</td>
</tr>
<tr>
<td>6. November, 1991 Memorandum from the General Counsel of the I.N.S.</td>
<td>determining that [China's] coercive family planning practices constitute persecution on account of political opinion</td>
</tr>
<tr>
<td>9. December 7, 1993 pronouncement by Attorney General Janet Reno</td>
<td>declined to address conflicting views on Chang and Executive Order 12,711</td>
</tr>
</tbody>
</table>

D. Relevant Case Law

1. Courts Giving Deference to Chang

A vast majority of courts contend that the various administrative and legislative pronouncements issued from 1988 to 1993 failed to effectively

*Guo Chun Di*, the district court characterized the pronouncements as "an administrative cacophony undeserving of judicial deference." *Guo Chun Di*, 842 F. Supp. at 867.
overrule or supersede the BIA's decision in Chang.\textsuperscript{62} When considering asylum claims, most courts begin their opinions with an analysis of the applicability of each pronouncement.\textsuperscript{63}

First, courts following Chang generally have concluded that the July 1990 Final Rule, which made no mention of political asylum for opponents of China's "one couple, one child" policy, effectively superseded the January 1990 Interim Rule.\textsuperscript{64} For example, in \textit{Chen Zhou Chai v. Carroll},\textsuperscript{65} the petitioner argued that the July 1990 Final Rule did not revoke the January 1990 Interim Rule because "there was no notice or consideration of the revocation." The United States Court of Appeals for the Fourth Circuit rejected this argument, however, concluding that an exception to the Administrative Procedure Act (APA) waived the requirement of notice and comment.\textsuperscript{66}

The \textit{Chen Zhou Chai} court concluded that the January

\begin{itemize}
\item \textit{Chen Zhou Chai}, 48 F.3d at 1335-38 (analyzing applicability of each pronouncement); \textit{Peng-Fei Si}, 864 F. Supp. at 400-04 (same); \textit{Xiu Qin Chen}, 862 F. Supp. at 815-18 (same); \textit{Guo Chun Di}, 842 F. Supp. at 862-65 (same).
\item \textit{Chen Zhou Chai}, 48 F.3d at 1940 (concluding that "January 29, 1990 interim rule is unenforceable because it was revoked by the July 27, 1990 final rule"); \textit{Dai Xiu Ying v. Caplinger}, Nos. 94-2190, 94-2191, 94-2193, 94-2194, 94-2195, 94-2197, 94-2198, 94-2199, 94-2201, 94-2202, 94-2203, 94-3407, 1995 WL 143850, at *5 (E.D. La. Apr. 25, 1995) ("Because the interim rule was superseded by the 1990 final rule, petitioners' reliance on [the January 1990 Interim Rule] is both unpersuasive and inaccurate."); \textit{Peng-Fei Si}, 864 F. Supp. at 401 ("Si cannot rely on the 1990 Interim Regulations which were effectively revoked by their omission from the final regulations issued in July of 1990."); \textit{Xiu Qin Chen}, 862 F. Supp. at 817 ("The result of the July 1990 Final Rule was effectively to eliminate the January 1990 Interim Rule without explanation."). But see Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 41 (1983) ("[T]he revocation of an extant regulation is substantially different than a failure to act. Revocation constitutes a reversal of the agency's former views as to the proper course."); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970) (concluding that agencies cannot repeal rules by omission).
\item \textit{Chen Zhou Chai}, 48 F.3d at 1311 (4th Cir. 1995).
\item \textit{Chen Zhou Chai}, 48 F.3d at 1340. The Administrative Procedure Act (APA) requires notice of a proposed rule be published in the \textit{Federal Register}. 5 U.S.C. §§ 553(b),(c) (1994). According to the APA, "[g]eneral notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law." \textit{Id.} § 553(b).

Furthermore, the APA requires that proposed agency rules undergo a comment period. 5 U.S.C. § 553(c). The APA states: "After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." \textit{Id.}
\item \textit{Chen Zhou Chai}, 48 F.3d at 1340-41. The APA does not apply the notice and comment requirement in three circumstances. First, rules are exempt from the notice and comment requirement when the rule involves military or foreign affairs. 5 U.S.C. § 553(a)(1); see \textit{Nademi v. INS}, 679 F.2d 811, 814 (10th Cir. 1982)
1990 Interim Rule "was a general statement of policy and therefore exempt from the notice and comment requirement." Furthermore, the Fourth Circuit noted that Attorney General Thornburgh issued the January 1990 Interim Rule without providing for a notice and comment period. Therefore, if considered substantive, the January 1990 Interim Rule was never valid under the APA. Second, numerous courts have rejected the notion that Executive Order 12,711 prevents the BIA from applying Chang as controlling precedent. According to these courts, an executive order does not create a private right of action unless that was the specific intent of the order. Therefore, several courts have held that President Bush's Executive Order 12,711 did not create a private right enforceable by civil action. Instead, (finding that foreign affairs exception to APA applied to regulation limiting grant of voluntary departure to 15 days for Iranian nationals); Malek-Marzban v. INS, 653 F.2d 113, 115-16 (4th Cir. 1981) (same); Yassini v. Crosland, 618 F.2d 1356, 1360-61 (9th Cir. 1980) (holding that regulation regarding Iranian nationals was response to Iranian hostage crisis and was therefore exempt from the APA's notice and comment requirement under foreign affairs exception). Second, a rule is exempt from the notice and comment requirement when it is interpretative, procedural or a general statement of policy. 5 U.S.C. § 553(b)(3)(A); see United States v. Yuzary, 55 F.3d 47, 51-52 (2d Cir. 1995) ("A rule is interpretive . . . if it attempts to clarify an existing rule but does not change existing law, policy, or practice.") (citations omitted)). Third, a rule is exempt from the notice and comment requirement when the agency has "good cause" to reject the notice and comment period. 5 U.S.C. § 553(b)(3)(B); see also National Nutritional Foods Ass'n v. Kennedy, 572 F.2d 377, 384 n.13 (2d Cir. 1978) (discussing "good cause" exception to APA's notice and comment requirement).

68. Chen Zhou Chai, 48 F.3d at 1341 (4th Cir. 1995).
69. Id. at 1341 n.9.
70. Id.
72. See, e.g., Chen Zhou Chai, 48 F.3d at 1339 ("[N]ew executive order is privately enforceable only if it was intended to create a private cause of action." (citing Independent Meat Packers Ass'n v. Butz, 526 F.2d 228, 236 (8th Cir. 1975))).
73. Id. at 1338 ("As a general rule, 'there is no private right of action to enforce obligations imposed on executive branch officials by executive orders.'" (quoting Facchiano Constr. Co. v. United States Dep't of Labor, 987 F.2d 206, 210 (3d Cir. 1993)); Xiu Qin Chen, 862 F. Supp. at 822 ("[N]ew Executive Order may not be enforced by a private party where no private right of action is created." (citing Haitian Refugee Ctr. v. Baker, 953 F.2d 1498, 1510-11 (11th Cir. 1992))); see also United States Dep't of Health and Human Serv. v. Federal Labor Relations Auth., 844 F.2d 1087, 1095 (4th Cir. 1988) (concluding that executive branch "has no power to make the law; that power rests exclusively with Congress"); In re Surface Mining Regulation Litig., 627 F.2d 1346, 1357 (D.C. Cir. 1980) (concluding that executive orders must be grounded in congressional action to be enforceable by private citizens); Independent Meat Packers Ass'n, 526 F.2d at 236 (concluding that creation of private action requires appellees to show "that the Order has the force
these courts have concluded that the executive order merely directed the Secretary of State and the Attorney General to provide "enhanced consideration" to Chinese asylum claims.\textsuperscript{74}

Third, courts have rejected the applicability of the January 1993 Final Rule because it was never published in the \textit{Federal Register}.\textsuperscript{75} For example, in \textit{Peng-Fei Si v. Slattery},\textsuperscript{76} the United States District Court for the Southern District of New York rejected the argument that the January 1993 Final Rule effectively overruled \textit{Chang} despite its failure to be published in the \textit{Federal Register}.\textsuperscript{77} According to the \textit{Peng-Fei Si} court, the asserted exceptions to the Freedom of Information Act (FOIA) cannot be used to bind an agency to a regulation withdrawn from publication.\textsuperscript{78} Therefore, the \textit{Peng-Fei Si} court concluded that there was no support for the "proposition that an agency is bound to follow a rule that it has never before followed and that it in fact withdrew from publication, and thereby affirmatively decided not to adopt."\textsuperscript{79}

In addition to rejecting the applicability of the above pronouncements, courts confronted with asylum claims generally have refused to recognize opposition to a population-control policy as an expression of "political opinion."\textsuperscript{80} In \textit{Chen Zhou Chai}, for example, the petitioner

\begin{footnotesize}
\textsuperscript{74} See, e.g., \textit{Chen Zhou Chai}, 48 F.3d at 1339. According to the Fourth Circuit in \textit{Chen Zhou Chai}, "[a] court should not enforce an executive order intended for the internal management of the President's cabinet." \textit{Id.} (citing \textit{United States Dep't of Health}, 844 F.2d at 1095). Furthermore, the Fourth Circuit described the order as "an internal directive from the President to his Attorney General, instructing him to exercise his statutory authority." \textit{Id.; see also Michigan v. Thomas}, 805 F.2d 176, 187 (6th Cir. 1986) (concluding that executive order was not intended to create any private right of civil action). Similarly, in \textit{Independent Meat Packers Ass'n}, the Eighth Circuit concluded that "[e]ven if appellees could show that the Order has the force and effect of law, they would still have to demonstrate that it was intended to create a private right of action." \textit{Independent Meat Packers Ass'n}, 526 F.2d at 236.

\textsuperscript{75} \textit{Peng-Fei Si}, 864 F. Supp. at 397; \textit{Xiu Qin Chen}, 862 F. Supp. at 814; see also \textit{Chen Zhou Chai}, 48 F.3d at 1331 (dismissing January 1993 Final Rule because not published in \textit{Federal Register}).

\textsuperscript{76} 864 F. Supp. 397 (S.D.N.Y. 1994).

\textsuperscript{77} \textit{Id.} at 402-05. The court observed that "not only were the 1993 Regulations never published . . . they were affirmatively withdrawn from publication by the Acting Attorney General." \textit{Id.} at 403. The court further noted that the 1993 Regulations "have never been followed by the BIA and thus cannot be regarded as a policy or procedure of the agency." \textit{Id.} at 404.

\textsuperscript{78} \textit{Id.} at 404-05; see also \textit{Xiu Qin Chen}, 862 F. Supp. at 822 ("The publication requirement of the Freedom of Information Act is intended to prevent an agency from enforcement of a rule without notice, not to bind an agency to rules never enforced.").

\textsuperscript{79} \textit{Peng-Fei Si}, 864 F. Supp. at 404.

\textsuperscript{80} Matter of Chang, Int. Dec. No. 3107, 1989 BIA LEXIS 13, *10-11 (BIA May 12, 1989) ("We cannot find that implementation of the 'one couple, one child'
sought review of a BIA decision that denied his application for asylum in the United States. The Fourth Circuit dismissed the petitioner's motion, holding that Mr. Chen Zhou Chai failed to demonstrate persecution on account of his political opinion. Similarly, in Jia-Ging Dong v. Slattery, the United States District Court for the Southern District of New York held that a "[Chinese] citizen prosecuted for opposition to a universally applied coercive family planning policy is not being persecuted for his political opinion." 

Policy in and of itself... 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." (quoting 8 U.S.C. § 1101(a)(42)(A)); see also Chen Zhou Chai, 48 F.3d at 1342 (rejecting opposition to population-control policy as political opinion); Chang Lian Zheng v. INS, 44 F.3d 379, 380 (5th Cir. 1995) (upholding BIA's conclusion that petitioner did not demonstrate well-founded fear of persecution); Jia-Ging Dong v. Slattery, 870 F. Supp. 53, 58 (S.D.N.Y. 1994) (rejecting applicant's refusal to adhere to coercive family planning policy as political opinion), aff'd, 84 F.3d 82 (2d Cir. 1996); Peng-Fei Si, 864 F. Supp. at 397. In Peng-Fei Si, the district court held:

The BIA, in Chang, simply held that an alien, in order to establish a claim for asylum, would have to show that forced sterilization was threatened for some motive other than enforcement of the population control policy. It cannot be said that that standard is at odds with the plain meaning of the asylum provisions.

Id. at 405.

81. Chen Zhou Chai, 48 F.3d at 1334. Mr. Chen Zhou Chai ("Chen") testified before an immigration judge that he lived in Fujian Province, China with his wife and two children. Id. In January 1992, government officials forced his wife to undergo an abortion during the fifth month of her third pregnancy. Id. Furthermore, officials imposed a fine of 20,000 yuan (a sum roughly twelve times Mr. Chen's annual salary) for the illegal birth of the couple's second child. Id. Later that year, Mr. Chen underwent sterilization in response to continued threats by the officials. Id. After losing his job for failing "to cooperate with the commune," Mr. Chen booked passage on the U.S. bound Golden Venture. Id. at 1335. After the ship ran aground off the coast of New York, the INS took Mr. Chen into custody. Id.

Before the immigration judge, Mr. Chen asserted persecution under China's "one couple, one child" policy. Id. at 1334. Based on the BIA's holding in Matter of Chang, the immigration judge denied Mr. Chen's asylum claims, holding that Chen's forced sterilization "resulted from [his] noncompliance with [China's] birth control policy and not from any political dissidence." Id. at 1335.

82. Id. at 1344. The court concluded that the government imposed sanctions on Mr. Chen for his failure to comply with the "one couple, one child" policy, not on account of his "political opinion." Id. According to the Fourth Circuit, Mr. Chen failed to demonstrate that the government took such actions for any reason other than enforcing the "one couple, one child" family planning policy. Id. ("Under Matter of Chang, the [BIA] correctly found that [Mr.] Chen did not demonstrate that he suffered persecution or had a well-grounded fear of persecution on account of political opinion.").


84. Id. at 58. Mr. Jia-Ging Dong ("Dong") and his wife lived in Fujian Province, China. Id. at 55. Because their first born child suffered from polio, government officials granted the Dongs an exception to the "one couple, one child" policy and allowed them to have a second child. Id. Following the birth of their second child, Mrs. Dong complied with an order to have an intra-uterine device (IUD) inserted. Id. (according to Dongs, "because an IUD would have been in-
2. **Courts Rejecting Chang**

Since the late 1980s, a minority of district courts have relied on the relevant administrative pronouncements to reject *Chang* as the controlling precedent.\(^8^5\) Like the courts upholding *Chang*, these courts focused their analysis on the applicability of the administrative pronouncements surrounding Chinese asylum claims.\(^8^6\)

According to the United States District Court for the Eastern District of Virginia in *Guo Chun Di v. Carroll*, deference to the BIA's decision in *Chang* was inappropriate because of the inconsistent policy regarding Chinese asylum applications.\(^8^7\) In *Guo Chun Di*, the district court disclosed nine inconsistent administrative pronouncements regarding refugee status under 8 U.S.C. § 1101(a)(42)(A) for opponents of China's "one couple, serted 'by force anyway'" (citations omitted). Despite the IUD, Mrs. Dong became pregnant again. *Id.* A local family planning chairwoman visited the couple and "ordered Dong's wife to have an abortion." *Id.* The woman warned that if Mrs. Dong failed to comply, then their home would be destroyed. *Id.* The couple fled to another village. *Id.* While in hiding, Mr. Dong learned that officials beat his father, destroyed some of their property and threatened to "beat [Dong] up" and "seize his wife for abortion." *Id.* (alterations in original). In response, Mr. Dong fled to the United States aboard the *Golden Venture*. *Id.*

Appearing before an immigration judge shortly after his arrival in the United States, Mr. Dong testified that "if I am sent back to China I will be severely punished for aiding my wife in evading the State policy [and a]dditional punishment will certainly be imposed for leaving China." *Id.* (alterations in original) (citations omitted). Relying on *Chang*, the immigration judge denied Mr. Dong's application for asylum, concluding that opposition to the "one couple, one child" policy does not constitute persecution. *Id.* at 55-56. The BIA affirmed the decision. *Id.* at 56 (according to BIA, "if anything, Dong had a well-founded fear of being prosecuted for violating a validly administered law, not of being persecuted on account of his political opinion").

Mr. Dong filed a petition for habeas corpus following the BIA's refusal to grant him political asylum. *Id.* at 55. Like the Fourth Circuit's decision in *Chen Zhou Chai*, the United States District Court for the Southern District of New York dismissed the claim. *Id.* The district court concluded that "the BIA's determination that [Mr.] Dong does not qualify for asylum because he has failed to prove that he has a well-founded fear that he will be persecuted on account of his political opinion must be upheld, and the petition dismissed." *Id.* at 59.


\(^8^6\) *Xin-Chang Zhang*, 859 F. Supp. at 711-13 (analyzing applicability of administrative pronouncements to asylum claims); *Guo Chun Di*, 842 F. Supp. at 862-65 (same).

\(^8^7\) *Guo Chun Di*, 842 F. Supp. at 870 (concluding that deference to *Chang* is unwarranted given "[the] cacophony of administrative voices, each singing a different tune in a different key"). The court in *Guo Chun Di* began its analysis by noting that "an agency's consistent interpretation of its statute or regulations is entitled to judicial deference." *Id.* at 865 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984)).
one child" policy. Relying on the Supreme Court's decision in *INS v. Cardoza-Fonseca*, the *Guo Chun Di* court concluded that less deference should be accorded to an agency's inconsistent interpretations of statutory provisions. Therefore, the district court rejected *Chang* as governing precedent.

The same minority of district courts also concluded that the January 1993 Final Rule effectively superseded *Chang*, despite its failure to be published in the *Federal Register*. According to the FOIA, an individual cannot be "adversely affected" by an agency rule not published in the *Federal Register*. In *New York v. Lyng*, however, the Second Circuit concluded that "the requirement for publication [in 5 U.S.C. § 552(a)(1)(D)] attaches only to matters which if not published would adversely affect a member of the public." Relying on the above analysis, the United States District Court for the Southern District of New York concluded in *Xin-Chang Zhang v. Slattery* that the publication requirement did not apply to

---

88. *Id.* at 866-67. For a further discussion of the administrative pronouncements surrounding Chinese asylum claims, see *supra* notes 37-61 and accompanying text.


90. *Guo Chun Di*, 842 F. Supp. at 866 ("[A]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretations is entitled to considerably less deference than a consistently held agency view." (quoting *Cardoza-Fonseca*, 480 U.S. at 446 n.30)); see Good Samaritan Hosp. v. Shalala, 113 S. Ct. 2151, 2161 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due."). *But see* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) ("The court is not empowered to substitute its judgment for that of the agency."); American Mining Congress v. EPA, 907 F.2d 1179, 1187 (D.C. Cir. 1990) ("[D]eference to the agency does not, however, require us to abdicate the judicial duty carefully to 'review the record to ascertain that the agency has made a reasoned decision . . . ." (quoting *Natural Resources Defense Council v. EPA*, 902 F.2d 962, 968 (D.C. Cir. 1990))).


92. 5 U.S.C. § 552(a)(1). The FOIA states: "[A] person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." *Id.*

93. 829 F.2d 346 (2d Cir. 1987).

94. *Id.* at 354 (quoting Hogg v. United States, 428 F.2d 274, 280 (6th Cir. 1970)) (emphasis added).

rules, such as the January 1993 Final Rule, that confer a benefit.\textsuperscript{96} Similarly, in \textit{Guo Chun Di}, the district court concluded that the January 1993 Final Rule was "arguably entitled to legal effect."\textsuperscript{97} The \textit{Guo Chun Di} court considered the following three factors in determining when unpublished rules are legally effective: "(i) whether the unpublished interpretation affects individuals' substantive rights, (ii) whether the interpretation deviates from the plain meaning of the statute or regulation at issue, and (iii) whether the interpretation limits administrative discretion."\textsuperscript{98}

In addition to the above arguments, these two courts construed the phrase "political opinion" broadly, extending its coverage to include enforcement of the "one couple, one child" policy as persecution "on account of ... political opinion."\textsuperscript{99} For example, in \textit{Xin-Chang Zhang}, the district court held that the January 1993 Final Rule established the applicable standard by which the BIA should adjudicate Chinese asylum claims.\textsuperscript{100} According to the court, the unpublished January 1993 Final Rule issued by Attorney General Barr recognized opposition to coercive family planning policies as grounds for political asylum.\textsuperscript{101} Therefore, because the BIA failed to apply this standard to Mr. Xin-Chang Zhang's claim, the district court remanded the case back to the BIA for application

\textsuperscript{96} \textit{Id.} at 712 ("Thus, where a rule confers a substantive benefit to a person, an agency must comply with it, even if the rule is not published."); see \textit{Montilla v. INS}, 926 F.2d 162, 167 (2d Cir. 1991) (concluding that agencies must follow their own procedures even if they are not published); see also \textit{Morton v. Ruiz}, 415 U.S. 199, 235 (1974) (stating that agencies must follow established procedures).


\textsuperscript{98} \textit{Id.} (citing \textit{Nguyen v. United States}, 824 F.2d 697, 701 (9th Cir. 1987)). Although the \textit{Guo Chun Di} court concluded that the rule may have some legal effect, it also noted that "the status and legal effect of the 1993 [Final] Rule remains unclear." \textit{Id.}

\textsuperscript{99} \textit{Xin-Chang Zhang}, 859 F. Supp. at 713 (holding that under appropriate legal standard, "one couple, one child" policy constitutes persecution on account of political opinion); \textit{Guo Chun Di}, 842 F. Supp. at 872-73 (concluding that opposition to coercive family planning constitutes political opinion).

\textsuperscript{100} \textit{Xin-Chang Zhang}, 859 F. Supp. at 712 ("The rule recognizing that fear of persecution pursuant to a family planning policy for failure or refusal to undergo sterilization or abortion would be grounds for asylum was signed by the Attorney General on January 15, 1993 ... .")

of the correct standard. As discussed in Part III of this Note, however, the Second Circuit subsequently reversed this decision.

Similarly, in Guo Chun Di, the district court focused on two questions: (1) whether "political opinion" under 8 U.S.C. § 1101(a)(42)(A) encompasses opposition to China’s coercive population-control policy and (2) whether Mr. Guo Chun Di had a "well-founded fear of persecution" on account of this political opinion. The district court answered both of these questions in the affirmative. First, the court noted that "there can be little doubt that the phrase 'political opinion' encompasses an individual’s views regarding procreation." Second, the Chinese government responded to the couple’s failure to comply with the “one couple, one child” policy by confiscating their property and destroying their living quarters. According to the Guo Chun Di court, these actions clearly created a well-founded fear of persecution based on the couple’s political opinion. In an unpublished disposition, however, the United States Court of Appeals for the Fourth Circuit disagreed and reversed the district court’s decision in Guo Chun Di.

Finally, the United States Supreme Court confronted the definition of "a well-founded fear of persecution" under the INA in INS v. Elias-Zacarias. In this case, Mr. Elias-Zacarias, a Guatemalan, filed an application for asylum in the United States following an encounter with armed guerrillas who tried to coerce him and his family into joining their group. The Supreme Court concluded that "[t]he ordinary meaning of

102. Xin-Chang Zhang, 859 F. Supp. at 713. The BIA determined that the application of China’s coercive family planning policy did not constitute “persecution within the meaning of the Act” in light of its decision in Chang. Id.
105. Id. at 872-74.
106. Id. at 872. In reaching this conclusion, the district court commented that "the right to bear children is 'one of the basic civil rights of man.'" Id. (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)). Furthermore, the court suggested that procreation is a right "emanating from the Bill of Rights." Id. (citing Roe v. Wade, 410 U.S. 113, 154-56 (1973); Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965)). Finally, the court noted that the fundamental right to procreate encompassed protection against involuntary sterilization. Id. (citing Skinner, 316 U.S. at 541).
107. Id. at 873.
108. Id. The court stated that "[i]t simply defies logic to contend that these governmental actions did not amount to persecution." Id.
111. Id. at 479-80. According to testimony given before an immigration judge, armed guerrillas came to the home of the Elias-Zacarias family and asked them to join their group. Id. at 479. After the family refused, the guerrillas suggested that they reconsider and threatened to return. Id. Fearing retaliation by the guerrillas, Mr. Elias-Zacarias fled to the United States. Id. at 480. Mr. Elias-Zacarias left Guatemala because, according to the immigration judge, "he was afraid that the guerrillas would return." Id. The immigration judge reviewing his
the phrase ‘persecution on account of . . . political opinion’ . . . is persecution on account of the victim’s opinion, not the persecutor’s.”

According to the Court, Mr. Elias-Zacarias could not assert opposition to the guerillas’ political motives as “persecution on account of . . . political opinion” under the INA. Therefore, the Court reversed the Ninth Circuit’s decision and denied the petitioner’s request for asylum.

Against this backdrop, the United States Court of Appeals for the Second Circuit confronted the issue of asylum for a Chinese alien in the case of Xin-Chang Zhang v. Slattery. In reaching its decision to deny the respondent’s application for asylum, the Second Circuit scrutinized each of the administrative pronouncements surrounding this issue, as well as the correctness of the BIA’s decision in Matter of Chang.

III. Xin-Chang Zhang v. Slattery

A. Factual Background

Mr. Xin-Chang Zhang (“Zhang”) and his wife are natives of Fujian Province in the People’s Republic of China. One month after the birth of their first child in October 1991, government officials approached Mr. Zhang and demanded that his wife comply with the country’s “one couple, one child” policy through the insertion of an intra-uterine device. Although she agreed, the officials returned shortly thereafter and demanded that either Mr. Zhang or his wife undergo sterilization surgery. Mr. Zhang protested, claiming that his wife was too ill to undergo the operation.

application denied Mr. Elias-Zacarias asylum on the ground that he “failed to demonstrate persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” Id. The BIA dismissed his appeal. Id.

In Elias-Zacarias, the INS appealed a ruling of the Ninth Circuit that coercion to join the Guatemalan guerilla group constituted persecution on account of political opinion. Id. According to the Ninth Circuit, coercion to join a nongovernmental group constitutes persecution on account of political opinion. Id.

112. Id. at 482.

113. Id. (“[T]he mere existence of a generalized ‘political’ motive underlying the guerillas’ forced recruitment is inadequate to establish . . . the proposition that Elias-Zacarias fears persecution on account of political opinion, as [the INA] requires.”).

114. Id. at 484.


116. For a further discussion of the relevant administrative pronouncements, see supra notes 37-61 and accompanying text. For a further discussion of the BIA’s decision in Matter of Chang, see supra notes 27-36 and accompanying text.

117. Xin-Chang Zhang, 55 F.3d at 741.

118. Id. For a further discussion of China’s “one couple, one child” policy, see supra notes 10-15 and accompanying text.

In response, the officials threatened the couple with fines and forced sterilization if they refused to comply with their demands. According to Mr. Zhang, he and his wife refused to submit, later protesting that "they wished to have more children because they disagreed with China's 'one child' policy and because they believed people should be free to have as many children as they wish."122

Fearing that the Chinese government would subject one of them to forced sterilization, both Mr. Zhang and his wife went into hiding for nearly six months.123 While in hiding, Mr. Zhang made arrangements to be smuggled to the United States aboard the Golden Venture.124 In February 1993, the ship departed from Fujian Province with Mr. Zhang and more than 300 other Chinese nationals in its holds.125

In the early morning hours of June 6, 1993, after nearly three months at sea, the Golden Venture struck a sandbar off the coast of Queens, New York.126 With helicopters flying overhead and rescue boats in the water, Mr. Zhang climbed down one of the ship's ladders into the water and swam ashore. After "walk[ing] a few steps and then collaps[ing] to the ground," law enforcement officials took Mr. Zhang into custody.127 While in the custody of the INS, Mr. Zhang learned from relatives in China that if he returned, he would be imprisoned for two years and incur a fine of twenty to thirty thousand yuan (an amount roughly twelve times his annual salary) for noncompliance with China's population-control policy.128

120. Xin-Chang Zhang, 55 F.3d at 741. Chinese nationals often claim illness to avoid sterilization operations. According to Mr. Zhang, his wife's health was "'not very good' because she had previously undergone throat surgery." Appellant's Brief at 7, Xin-Chang Zhang v. Slattery, 55 F.3d 732 (2d Cir. 1995) (No. 94-6258).

121. Xin-Chang Zhang, 859 F. Supp. at 710. According to Mr. Zhang, pressure to undergo sterilization surgery is generally not applied until a couple becomes pregnant with a second child. Id. Mr. Zhang believes, however, that a powerful neighbor singled him out following a quarrel. Id.

122. Xin-Chang Zhang, 55 F.3d at 741.

123. Xin-Chang Zhang, 859 F. Supp. at 710. During this period, Mr. Zhang separated from his wife and son and fled to the city of Fuzhou, where he worked for approximately six months. Xin-Chang Zhang, 55 F.3d at 741.

124. Xin-Chang Zhang, 55 F.3d at 741. The smugglers required an initial deposit of $5,000 with a balance of $25,000 due sometime after the ship's arrival in the United States. Id. For a discussion of the voyage and the conditions aboard the ship, see supra notes 1-6 and accompanying text.

125. Xin-Chang Zhang, 55 F.3d at 741-42. For a further discussion of the number of passengers aboard the Golden Venture, see supra note 2 and accompanying text.

126. Xin-Chang Zhang, 55 F.3d at 742. For a further discussion of the voyage of the Golden Venture, see supra notes 1-6 and accompanying text.

127. Xin-Chang Zhang, 859 F. Supp. at 711. For a further discussion of the voyage of the Golden Venture, see supra notes 1-6 and accompanying text.


129. Appellee's Brief at 6, Xin-Chang Zhang v. Slattery, 55 F.3d 732 (2d Cir. 1995) (No. 94-6258). Mr. Zhang earned an annual salary of approximately 2,400 yuan. Id.
B. Procedural History

The INS charged Mr. Zhang with "being excludable from the United States pursuant to sections 212(a) (7) (A) (I), (B) (i) (I), and (B) (i) (II) of the Immigration and Nationality Act of 1952." On July 16, 1993, Mr. Zhang submitted an application to an immigration judge for asylum and withholding of return. He claimed that he had a "well-founded fear" that, if returned to China, government officials would persecute him under the "one couple, one child" policy. The immigration judge denied the applications, concluding that Mr. Zhang failed to establish "a well-founded fear of persecution within the meaning of [the] asylum

130. Appellant's Brief at 4, Xin-Chang Zhang (No. 94-6258). Section 212(a) (7) (A) (I) of the INA states:

[A]ny immigrant at the time of application for admission . . . who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the Attorney General under section 1181(a) of this title . . . is excludable.

8 U.S.C. § 1182 (a) (7) (A) (I) (1994). Section (B)(i)(I) of the INA states:

Any nonimmigrant who . . . is not in possession of a passport valid for a minimum of six months from the date of the expiration of the initial period of the alien's admission or contemplated initial period of stay authorizing the alien to return to the country from which the alien came or to proceed to and enter some other country during such period . . . is excludable.

Id. § 1182 (B)(i)(I). Finally, section (B)(i)(II) of the INA states: "Any nonimmigrant who . . . is not in possession of a valid nonimmigrant visa or border crossing identification card at the time of application for admission, is excludable." Id. § 1182 (B)(i)(II). On June 30, 1993, Mr. Zhang appeared before a New York Immigration Judge to challenge the INS exclusion proceedings. Xin-Chang Zhang, 55 F.3d at 742. Mr. Zhang's attorney argued that the INS had improperly placed Mr. Zhang in exclusion instead of deportation proceedings because Mr. Zhang had indeed effected "entry" into the United States. Lin, supra note 21, at 232. Denying Mr. Zhang's motion for deportation proceedings, the judge concluded that exclusion proceedings were proper because Mr. Zhang failed to effect "entry" into the United States. Xin-Chang Zhang, 55 F.3d at 742. The United States Code defines "entry" 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." 8 U.S.C. § 1101(a) (13). Furthermore, according to the BIA, entry involves: "(1) a crossing into the territorial limits of the United States, i.e. physical presence; (2) (a) an 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." Xin-Chang Zhang, 55 F.3d at 752 (citing Correa v. Thornburgh, 901 F.2d 1166, 1171 (2d Cir. 1990)).

131. Xin-Chang Zhang, 55 F.3d at 742.

132. Id. Mr. Zhang believed that if he returned to China, officials would force him to undergo a sterilization procedure. Id. In addition to sterilization, Mr. Zhang claimed that he would be jailed and fined. Lin, supra note 21, at 233.
laws." Mr. Zhang appealed the decision to the BIA. Relying on Chang, the BIA affirmed the immigration judge's decision to refuse Mr. Zhang's applications for asylum and withholding of deportation.

Subsequently, on March 25, 1994, Mr. Zhang filed a petition for writ of habeas corpus in the United States District Court for the Southern District of New York. The district court remanded the case to the BIA, concluding that the January 1993 Final Rule superseded the Chang standard. Therefore, the district court held that the BIA applied the wrong standard when it considered Mr. Zhang's applications for asylum and withholding of return.

The INS appealed the decision to the United States Court of Appeals for the Second Circuit. The Second Circuit reversed the district court's holding and remanded the judgment back to the district court. The Second Circuit concluded that: (i) no executive or legislative pronouncement, including the January 1993 Final Rule, overruled or superseded the BIA's decision in Chang and (ii) fear of persecution under China's coercive family planning policy did not qualify Mr. Zhang for refugee status under the INA.

---

133. Xin-Chang Zhang, 55 F.3d at 742 (alterations in original) (citations omitted). In rejecting Mr. Zhang's applications, the immigration judge applied the BIA's decision in Chang. Xin-Chang Zhang v. Slattery, 859 F. Supp. 708, 711 (S.D.N.Y. 1994), rev'd, 55 F.3d 732 (2d Cir. 1995), cert. denied, 116 S. Ct. 1271 (1996). According to the immigration judge, "the implementation of the one-couple, one-child policy in and of itself even to the extent that involuntary sterilizations may occur is [not] persecution [nor does it] create[ ] a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." Id. (alterations in original) (citations omitted).

134. Xin-Chang Zhang, 55 F.3d at 742.

135. Id. The BIA concluded that "the immigration judge's decision was correct, and we adopt as our own his findings of fact and conclusions of law on the asylum issue." Xin-Chang Zhang, 859 F. Supp. at 711. For a further discussion of Chang, see supra notes 27-36 and accompanying text.

136. Xin-Chang Zhang, 55 F.3d at 742-43.

137. Id. at 743. According to the district court, "the January 1993 [Final] Rule, which does not affect petitioner adversely, became effective despite the agency's failure to publish it in the Federal Register in accordance with 5 U.S.C. § 552(a)(1)." Xin-Chang Zhang, 859 F. Supp. at 712. The district court also concluded that the BIA incorrectly placed the burden on the petitioner to prove that he effected entry into the United States. Id. at 715.

138. Xin-Chang Zhang, 859 F. Supp. at 713. According to the district court, the BIA's application of the Chang standard was incorrect. Id.

139. Xin-Chang Zhang, 55 F.3d at 743. For a further discussion of the Second Circuit's reasoning in reversing the holding of the district court, see infra notes 142-78 and accompanying text.

140. Xin-Chang Zhang, 55 F.3d at 756.

141. Id. at 752. On July 3, 1995, Appellee Xin-Chang Zhang filed a petition for rehearing with suggestion for rehearing in banc.
IV. Analysis

A. Narrative Analysis

In *Xin-Chang Zhang*, the Second Circuit considered whether China's "one couple, one child" policy served as a legitimate basis for granting asylum under the INA. The court began its inquiry with an examination of the administrative pronouncements concerning Chinese asylum claims and their effect on the BIA's decision in *Chang*. The court then considered whether the BIA's ruling in *Chang* was consistent with the INA.

The court began its analysis of the relevant administrative pronouncements by rejecting Mr. Zhang's argument that the January 1990 Interim Rule "went into effect in January 1990 and has never been expressly repealed." Instead, the court declared the administrative rule invalid because it failed to undergo a period of notice and comment in the *Federal Register* as required by the APA. Furthermore, the court determined

---

142. *Id.* at 743. For a further discussion of China's "one couple, one child" policy in the context of governing asylum law, see *supra* notes 20-115 and accompanying text.

143. *Xin-Chang Zhang*, 55 F.3d at 743 (according to Second Circuit, "our initial inquiry is . . . whether *Chang* is still good law"). For a further discussion of the administrative pronouncements and their effect on *Chang*, see *supra* notes 37-61.

144. *Xin-Chang Zhang*, 55 F.3d at 743. For a further discussion of the BIA's decision in *Chang*, see *supra* notes 27-36 and accompanying text.

145. *Xin-Chang Zhang*, 55 F.3d at 744. For a further discussion of the January 1990 Interim Rule and subsequent rules, see *supra* notes 47-57.

146. *Xin-Chang Zhang*, 55 F.3d at 744. According to the Second Circuit, the "January 1990 [I]nterim [R]ule was never properly promulgated as a legislative rule under the Administrative Procedure Act ('APA') and that, even if it had been properly promulgated, it would have been repealed in June 1990 by the publication of subsequent regulations." *Id.*

The court noted that the APA waives the notice and comment requirement if the rule falls into one of the following exceptions: foreign affairs, interpretive rulings or good cause. *Id.* The APA excepts three categories of rules from the notice and comment requirement:

This section applies, according to the provisions thereof, except to the extent that there is involved . . . a military or foreign affairs function of the United States . . . . Except when notice or hearing is required by statute, this subsection does not apply . . . to interpretive rules, general statements of policy . . . or when the agency for good cause finds . . . that notice and public procedure thereon are impractical, unnecessary, or contrary to the public interest.


In reaching its conclusion, the Second Circuit analyzed each of these exceptions. *Xin-Chang Zhang*, 55 F.3d at 744-47. First, the court considered the foreign affairs exception in light of the fact that numerous courts have applied this exception to immigration cases. *Id.* at 744 (citing *Nademi v. INS*, 679 F.2d 811 (10th Cir. 1982); *Malek-Marzban v. INS*, 653 F.2d 113 (4th Cir. 1981); *Yassini v. Crosland*, 618 F.2d 1356 (9th Cir. 1980)). The court determined, however, that the foreign affairs exception did not apply because "[t]here were no 'definitely undesirable international consequences' that would have resulted from following standard rule-making procedure in this case." *Id.* The court admitted that it was "not in a
that even if the January 1990 Interim Rule had been properly promulgated, the July 1990 Final Rule effectively repealed the interim rule.\textsuperscript{147} According to the court, the July 1990 Final Rule superseded the January 1990 Interim Rule because it substantially rewrote the asylum sections of the regulations without making any reference to the previous rule.\textsuperscript{148} Therefore, the Second Circuit rejected Mr. Zhang's argument that the January 1990 Interim Rule effectively overruled \textit{Chang} and established fear of persecution under China's "one couple, one child" policy as a basis for asylum.

Next, the court concluded that Executive Order 12,711, issued by President Bush, was also ineffective in overruling the BIA's decision in \textit{Chang}.\textsuperscript{149} The court noted: "Generally, there is no private right of action to enforce obligations imposed on executive branch officials by executive orders."\textsuperscript{150} According to the court, the executive order merely directed the Secretary of State and the Attorney General to take steps to further the asylum claims of Chinese aliens fleeing the "one couple, one child" pol-

good position to gauge the sensitivities of foreign nations, or to consider any but the most obvious foreign policy risks." \textit{Id.} at 745. The court, however, saw no "obvious" concerns in this case. \textit{Id.}

Second, the court concluded that the January 1990 Interim Rule was "legislative in character and could not have qualified for the interpretive exception to \textsection{553}'s notice and comment requirement." \textit{Id.} at 746. According to the court, the rule "create[d] a new basis on which aliens may be granted refugee status;" and therefore, the rule was legislative instead of interpretive in character. \textit{Id.} According to the Second Circuit, "'[a] rule is interpretive . . . if it attempts to clarify an existing rule but does not change existing law, policy, or practice.'" \textit{Id.} at 745 (quoting United States v. Yuzary, 55 F.3d 47, 51 (2d Cir. 1995) (citations omitted)).

Finally, the court concluded that there was no "good cause" to exclude the rule from the notice and comment period. \textit{Id.} at 746-47. According to the court, "[i]t would not have been 'impracticable' to subject the January 1990 [I]nterim [R]ule to notice and comment . . . . Nor was notice and comment 'unnecessary': the rule could hardly be classified as 'a minor or merely technical amendment.'" \textit{Id.} at 747 (quoting National Nutritional Foods Ass'n v. Kennedy, 572 F.2d 377, 385 (2d Cir. 1978)).

\textsuperscript{147} Xin-Chang Zhang, 55 F.3d at 744 (concluding that publication of subsequent regulations repealed January 1990 Interim Rule).

\textsuperscript{148} Id. at 747. The court rejected Mr. Zhang's argument that a rule cannot be repealed without being subjected to the same notice and comment period required to properly promulgate a new rule. \textit{Id.} Therefore, according to Mr. Zhang, "this silent repeal of the January 1990 interim rule would itself have violated the notice and comment provisions of the APA." \textit{Id.}

\textsuperscript{149} Id. at 747-48. For a further discussion of Executive Order 12,711, see \textit{supra} notes 48, 58, 59 and accompanying text.

\textsuperscript{150} Xin-Chang Zhang, 55 F.3d at 747 (quoting Facchiano Constr. Co. v. United States Dept' of Labor, 987 F.2d 206, 210 (3d Cir. 1993)); \textit{see also} Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498, 1510-11 (11th Cir. 1992) (concluding that executive order establishing procedure to screen immigrants on high seas was not intended "to allow the interditees to initiate judicial review of their cases"); Michigan v. Thomas, 805 F.2d 176, 187 (6th Cir. 1986) (concluding that executive order was merely managerial tool that did not create private right of action).
The court held that the executive order did not create a private right of action enforceable against officials of the executive branch. Therefore, like the January 1990 Interim Rule, Executive Order 12,711 did not supersede the BIA's decision in Chang.

Finally, the Second Circuit concluded that the January 1993 Final Rule was not successfully promulgated and therefore had no effect on Chang. The court determined that this rule was unenforceable because it was never published in the Federal Register. To reach this conclusion, the court focused primarily on the text of the rule itself. The rule contained the following indication as to its date of effectiveness: "EFFECTIVE DATE: [Insert date of publication in the FEDERAL REGISTER.]

According to the court, because it was never published in the Federal Register, the rule never became effective. Therefore, like the other administrative pronouncements issued during the Bush administration, the January 1993 Final Rule failed to overturn the BIA's ruling in Chang.

After concluding that "Chang is still good law," the Second Circuit considered whether the BIA's ruling in Chang was "based on a permissi-

151. Xin-Chang Zhang, 55 F.3d at 748.
152. Id. According to the Second Circuit, "Executive Orders cannot be enforced privately unless they were intended by the executive to create a private right of action." Id. (citing Independent Meat Packers Ass'n v. Butz, 526 F.2d 228, 234 (8th Cir. 1975); Acevedo v. Nassau County, 500 F.2d 1078, 1083-84 (2d Cir. 1974)).
153. Id. at 748-49.
154. Id. at 749. In its analysis of this rule, the court conceded that "a regulation need not necessarily be published in order to be enforced against the government." Id. at 748. In New York v. Lyng, 829 F.2d 346 (2d Cir. 1987), the Second Circuit held that the publication requirement established by the Freedom of Information Act, applies only to rules that would "adversely affect a member of the public." Id. at 354 (discussing Freedom of Information Act, 5 U.S.C. § 552(a)(1) (1994)). For a further discussion of New York v. Lyng, see supra notes 93-94 and accompanying text.

Applying this rationale to the January 1993 Final Rule, the Second Circuit in Xin-Chang Zhang determined that the rule did not need to be published because nonpublication would not "adversely affect a member of the public." Xin-Chang Zhang, 55 F.3d at 749. The court concluded, however, that the rule must first become effective before it can bind anyone. Id.
155. Xin-Chang Zhang, 55 F.3d at 749.
156. Id. (citations omitted).
157. Id.
158. Id. For a further discussion of the administrative pronouncements made by the Bush administration, see supra notes 37-56.
159. Xin-Chang Zhang, 55 F.3d at 743.
160. Id. at 749-52. In Chang, the BIA concluded:

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."

The court began its analysis of *Chang* by noting that U.S. immigration laws do not specifically address whether aliens subjected to a coercive family planning policy qualify for refugee status. The court noted that as long as the BIA made a "reasoned decision," it was "not empowered to substitute its judgment for that of the agency." The court noted, however, that an agency must provide consistent interpretations of a regulation before courts defer to the agency's interpretation of that regulation. The court quoted *INS v. Cardoza-Fonseca*, in which the United States Supreme Court stated that "an agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." The Second Circuit rejected Mr. Zhang's argument that the various administrative pronouncements issued by the Bush administration created inconsistency in asylum policy. In reference to the Attorney General's rules and President Bush's executive order, the court concluded that "the agency has repeatedly been on the verge of receiving new policy; but throughout the BIA has followed its holding in *Chang* every time it has been asked to consider [China's] 'one child' issue." Through this statement, the court reassured its belief that the

---

161. Xin-Chang Zhang, 55 F.3d at 749 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)); *see also* *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) (concluding that when there are gaps in legislation or ambiguity, "courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program").

162. Xin-Chang Zhang, 55 F.3d at 749. The court stated that if Congress specifically addressed the question, then "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* (quoting *Chevron*, 467 U.S. at 842-43 (1984)).

163. *Id.* at 750 (quoting American Mining Congress v. EPA, 907 F.2d 1179, 1187 (D.C. Cir. 1990)).

164. *Id.* (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)).

165. *Id.* According to the court, "the consistency of an agency's position is a factor in assessing the weight that position is due." *Id.* (quoting Good Samaritan Hosp. v. Shalala, 113 S. Ct. 2151, 2161 (1993)).


167. Xin-Chang Zhang, 55 F.3d at 750 (quoting *Cardoza-Fonseca*, 480 U.S. at 446 n.30).


169. Xin-Chang Zhang, 55 F.3d at 750. The Second Circuit quoted the opinion from another *Golden Venture* case, in which Judge Mukasey said:

> The policy consistently adhered to by the BIA and applied to aliens seeking asylum based on the "one child" rule is the policy articulated in *Chang*. Under the circumstances presented here, therefore, all that the various pronouncements [by the President and the Attorneys General]... suggest is that the legislative and executive branches studiously abstained from overruling *Chang*.
administrative pronouncements issued during the Bush administration failed to effectively overrule Chang. Therefore, the court felt justified in giving deference to the BIA's decision.\textsuperscript{170}

In addition to the above conclusions, the Second Circuit determined that Mr. Zhang failed to demonstrate a "well-founded fear of persecution" because of his political opinion.\textsuperscript{171} In reaching this conclusion, the court drew a distinction between persecution on account of an individual's political opinion and punishment for disobeying the law.\textsuperscript{172} According to the court, "[INS v. Elias-Zacarias] teaches that an applicant for refugee status must establish a fear of reprisal that is different in kind from a desire to avoid the exactions (however harsh) that a foreign government may place upon its citizens."\textsuperscript{173} In this case, Mr. Zhang feared the repercussions of disobeying China's "one couple, one child" policy.\textsuperscript{174} According to the court, the "one couple, one child" policy is a "facially neutral Chinese law" applicable to all Chinese nationals.\textsuperscript{175} Therefore, the court determined that Mr. Zhang did not face persecution in China on account of his political opinion.\textsuperscript{176}

In sum, the United States Court of Appeals for the Second Circuit reversed the decision of the district court to grant Mr. Zhang asylum.\textsuperscript{177} The Second Circuit denied Mr. Zhang's application for three primary reasons: (i) the failure of administrative pronouncements to overrule or supersede the BIA's decision in Chang; (ii) justifiable deference to the conclusion reached in Chang that implementation of the "one couple, one child" policy is not persecutive and does not create a "well-founded fear of persecution" on account of an individual's political opinion; and (iii) Mr. Zhang failed to demonstrate a "well-founded fear of persecution" based on his political opinion.\textsuperscript{178}


\textsuperscript{170} Id.

\textsuperscript{171} Id. For a further discussion of persecution on account of political opinion, see \textit{supra} notes 80-84, 99-114 and accompanying text.

\textsuperscript{172} Xin-Chang Zhang, 55 F.3d at 751.

\textsuperscript{173} Id. (citing INS v. Elias-Zacarias, 502 U.S. 478, 482-83 (1992)). For a further discussion of the facts in INS v. Elias-Zacarias, see \textit{supra} notes 110-14 and accompanying text.

\textsuperscript{174} Xin-Chang Zhang, 55 F.3d at 751.

\textsuperscript{175} Id.

\textsuperscript{176} Id. at 752 ("The BIA properly analyzed (and rejected) [Mr.] Zhang's claim for refugee status based on his fear of being persecuted under China's ['one couple, one child'] policy.").

\textsuperscript{177} Id. at 756.

\textsuperscript{178} Id. at 743-52. A fourth reason, not discussed in this Note, was Mr. Zhang's failure to effectuate entry into the United States which would have made him subject to deportation rather than exclusion proceedings. \textit{Id.} at 752-56.
B. Critical Analysis

In Xin-Chang Zhang v. Slattery, the Second Circuit rejected China’s coercive family planning policy as grounds for political asylum in the United States.\(^{179}\) As a result, the Second Circuit joined the Fourth and Fifth Circuits and nine district courts in upholding the BIA’s decision in Chang.\(^{180}\)

In reaching its decision, however, the Second Circuit hastily rejected a vast number of administrative and regulatory pronouncements specifically intended to grant asylum to opponents of China’s coercive population-control policy.\(^{181}\) In particular, the court’s analysis overlooked several important factors suggesting that the January 1990 Interim Rule and the January 1993 Final Rule effectively overruled Chang.

First, the Second Circuit failed to recognize that the July 1990 Final Rule did not meet the established requirements for revocation of the January 1990 Interim Rule.\(^{182}\) In Motor Vehicle Manufacturers Ass’n of the United States, Inc. v. State Farm Mutual Auto Insurance Co.,\(^{183}\) the United States Supreme Court held that “an agency changing its course by rescinding a rule is obligated to provide a reasoned analysis for the change.”\(^{184}\) The Attorney General issued the July 1990 Final Rule with no “reasoned analysis” or even mention of the pro-asylum language of the January 1990 In-

\(^{179}\) Xin-Chang Zhang, 55 F.3d at 752 (“The BIA properly analyzed (and rejected) Zhang's claim for refugee status based on his fear of being persecuted under China’s ‘one child’ policy.”). For a discussion of the Second Circuit’s reasoning in reversing the holding of the district court, see supra notes 142-78 and accompanying text.


\(^{181}\) For a discussion of the court's analysis concerning these administrative and regulatory pronouncements, see supra notes 145-58 and accompanying text.

\(^{182}\) Moriarty, supra note 61, at 483-86.

\(^{183}\) 463 U.S. 29 (1983).

\(^{184}\) Id. at 42. Also, in Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), the D.C. Circuit concluded that administrative agencies cannot repeal by omission, but rather must "indicat[e] that prior policies and standards are being deliberately changed, not casually ignored." Id. at 852.
terim Rule.\textsuperscript{185} Therefore, the January 1990 Interim Rule remained in effect until the Attorney General promulgated the January 1993 Final Rule.

Furthermore, in assessing the validity of the January 1990 Interim Rule, the Second Circuit unduly dismissed the response of the Department of Justice and the INS to the July 1990 Final Rule.\textsuperscript{186} After the Attorney General issued the July 1990 Final Rule, which failed to address Chinese asylum claims, the Appellate Counsel of the INS stated unequivocally that the January 1990 Interim Rule "has not been amended or repealed" and that coercive family planning policies "[do] constitute persecution on account of political opinion."\textsuperscript{187} Clearly, the INS believed that the effect of the January 1990 Interim Rule extended beyond promulgation of the July 1990 Final Rule.\textsuperscript{188}

Second, the January 1993 Final Rule became effective even though it was not published in the \textit{Federal Register}.\textsuperscript{189} In \textit{Montilla v. INS},\textsuperscript{190} the Second Circuit concluded that "'[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures . . . even though the procedural requirement has not yet been published in the federal register.'"\textsuperscript{191} Furthermore, the FOIA's publication requirement applies only to rules that \textit{adversely affect} members of the public.\textsuperscript{192} Because the January 1993 Final Rule only \textit{benefits} asylum applicants and not members of the American public, the publication requirement does not apply.

\textsuperscript{185} \textit{Xiu Qin Chen}, 862 F. Supp. at 817 ("The July 1990 Final Rule not only made no mention of the January 1990 Interim Rule, but it also changed sections of the C.F.R. . . . so that the resulting regulations concerning asylum procedures made no mention of coercive family planning practices.").

\textsuperscript{186} Moriarty, \textit{supra} note 61, at 485 (stating that "the July 1990 Final Rule was not intended to revoke the January 1990 Interim Rule").


\textsuperscript{188} Appellee's Brief at 21, Xin-Chang Zhang (No. 94-6258). For example, in a memorandum from the Appellate Counsel of the INS to the Chief Examiner Attorney of the BIA, dated April 11, 1991, David Dixon stated: "The regulation set out in 8 C.F.R. 208.5, was published January 29, 1990, as an interim regulation. . . . Although this section did not appear in the recent publication of asylum regulations, it has not been amended or repealed. . . . The policy contained in the interim regulation remains the policy of the service." Memorandum from David M. Dixon, \textit{supra} note 187.

\textsuperscript{189} Moriarty, \textit{supra} note 61, at 483 (suggesting that withdrawal of January 1993 Final Rule from publication "had no effect on the rule's applicability to immigration judges and the BIA").

\textsuperscript{190} 926 F.2d 162 (2d Cir. 1991).

\textsuperscript{191} \textit{Id.} at 167 (quoting Morton v. Ruiz, 415 U.S. 199, 235 (1974)) (concluding that agency must follow its own procedures) (alterations in original).

\textsuperscript{192} New York v. Lyng, 829 F.2d 346, 354 (2d Cir. 1987) (concluding that "the requirement for publication attaches only to matters which if not published would adversely affect a member of the public") (quoting Hogg v. United States, 428 F.2d 274 (6th Cir. 1970))).
not apply. Therefore, the January 1993 Final Rule became effective even though it was not published in the Federal Register.

In addition to the above arguments, the Second Circuit failed to recognize procreation as a fundamental human right that is entitled to protection against persecution. In *Skinner v. Oklahoma*, the United States Supreme Court held that procreation was “one of the basic civil rights of man” and that “[t]he power to sterilize, if exercised, may have subtle, farreaching and devastating effects.” Arguably, any effort to restrict a “fundamental right” qualifies as persecution. Therefore, forced abortions and sterilizations in furtherance of China’s coercive family planning policy constitute “persecution on account of . . . political opinion” under the INA. Granted, the fundamental right of procreation and the prohibition against forced sterilization in *Skinner* apply only to state action by the United States against either United States citizens or people entitled to constitutional protections within the United States. The world community, however, recognizes procreation as a fundamental right. Therefore, it is incumbent upon the United States as a world leader to promote and protect this valued interest whenever possible.

Finally, the BIA’s decision in *Chang* is not entitled to deference because *Chang* is factually distinct from *Xin-Chang Zhang* and other subsequent Chinese asylum cases. In his application for asylum, Mr. Zhang asserted “a well-founded fear that if returned to China he would be persecuted by being subjected to a sterilization procedure in accordance with [China’s] ‘one child’ policy.” In contrast, Mr. Chang merely asserted opposition to China’s “Communist domination.” Thus, the BIA consid-

---

193. Moriarty, supra note 61, at 482-83 (stating that international law and United States court decisions recognize procreation as fundamental right).
194. 316 U.S. 535, 541 (1942).
195. Id. at 541 (declaring Oklahoma’s Habitual Criminal Sterilization Act unconstitutional); see also Roe v. Wade, 410 U.S. 113, 154-56 (1973) (discussing procreation as fundamental right).
196. See Skinner, 316 U.S. at 541 (concluding that sterilization forever deprives individuals of basic liberty); see also Lin, supra note 21, at 242 (“Forced sterilization and abortion no doubt contravene universally recognized fundamental rights, and cannot be excused simply because the government oppresses all under a nationwide regime of coercive family planning.” (citing Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., at 71, arts. 12, 16(3), U.N. Doc. A/810 (1948))).
197. Moriarty, supra note 61, at 481-82.
199. Moriarty, supra note 61, at 481-82 n.104. In *Guo Chun Di v. Carroll*, the United States District Court for the Eastern District of Virginia noted that: [Mr. Chang’s] asylum application merely indicated that petitioner was an anti-Communist who fled PRC “because of Communist domination.” The petitioner in *Chang* further indicated that neither he nor his family had been mistreated, and that the family had not suffered from government policy any more than the rest of the citizens of the PRC . . . . Based on these facts, the BIA in *Chang* stated that the mere implementation of the “one couple, one child” policy was not “on its face persecutive.”
ered a much broader asylum claim in Chang than the claim considered by the Second Circuit in Xin-Chang Zhang.

Furthermore, the BIA based its conclusion in Chang on the inaccurate premise that Chinese officials employed only nonviolent techniques to enforce the "one couple, one child" policy.\textsuperscript{200} In Chang, the BIA concluded that "the one-child policy [was] not routinely enforced by mandatory sterilization and abortion."\textsuperscript{201} Instead, the BIA stated that Chinese officials "used only economic incentives and birth control education but forbid[ ] coercive techniques."\textsuperscript{202} Since Chang, far more coercive and often horrific enforcement techniques have come to light that clearly qualify as persecution under the INA.\textsuperscript{203} Because the BIA based its decision on dissimilar facts and an incomplete understanding of China's enforcement techniques, Chang is no longer entitled to deference.\textsuperscript{204} Thus, the Second Circuit improperly relied on Chang and misinterpreted the relevant administrative actions in deciding to deny Mr. Zhang's asylum request.


200. \textit{Id.} at 482. In Chang, the BIA dealt with facts substantially different from those in subsequent Chinese asylum cases. \textit{Id.}


203. \textit{See} Lin, \textit{supra} note 21, at 242 ("[T]here exists substantial evidence that punishment for violation of the ['one couple, one child'] policy is disproportionately severe."). Although the Chinese government continues to deny the use of coercive techniques, atrocities in the name of population-control are uncontroverted. \textit{See, e.g.,} Chen Zhou Chai v. Carroll, 48 F.3d 1331, 1335 (according to court, "[t]he immigration judge accepted as credible [Mr.] Chen's testimony regarding his refusal to comply with the birth control policy and the sanctions applied by the government for his noncompliance"); Jia-Ging Dong v. Slattery, 870 F. Supp. 53, 55 (S.D.N.Y. 1994) (according to court, immigration judge found Mr. Dong's testimony regarding coercion to be "credible in every respect"), aff'd, 84 F.3d 82 (2d Cir. 1996); \textit{see also} \textit{Department of State, Submitted to Senate Comm. on Foreign Relations and House Comm. on Int'l Relations, 104th Cong., 1st Sess., Country Reports on Human Rights Practices for 1994, at 561} (Comm. Print 1995) (acknowledging that forced sterilizations and abortions do take place).

204. \textit{See} Lin, \textit{supra} note 21, at 242 ("[E]vidence [of disproportionally severe punishment for noncompliance with the 'one couple, one child' policy] presents sufficient justification for the court to discard \textit{Matter of Chang} and to adopt instead an approach to adjudicating [Chinese] asylum claims more consistent with United States asylum law and international human rights law.").
V. Conclusion

Like Mr. Zhang, most of the immigrants aboard the *Golden Venture* came to the United States seeking asylum from China’s coercive family planning policy.\textsuperscript{205} Based on the number of administrative pronouncements surrounding this issue, there seems to be a clear desire among administrators and legislators to grant asylum to Chinese aliens facing persecution under China’s “one couple, one child” policy.\textsuperscript{206} Since 1988, however, they have failed to enunciate a clear and effective asylum policy.\textsuperscript{207}

Following *Xin-Chang Zhang v. Slattery*, this area of asylum law stands at a crossroad. On the one hand, the Second Circuit’s decision in *Xin-Chang Zhang* may drone the “administrative cacophony” surrounding China’s coercive population-control policies by establishing a clear-cut precedent against the asylum claims. In such a capacity, the case will bolster the argument proffered by several circuits that the BIA’s holding in *Matter of Chang* remains “good law.”\textsuperscript{208} Therefore, despite the inexcusable human rights atrocities suffered by Chinese families at the hands of their government, immigration judges and the BIA will continue to deny applications for asylum based on coercive population-control policies. For Chinese immigrants like Mr. Zhang, the quest for freedom will end in defeat.

On the other hand, the court’s decision in *Zhang* may serve to increase the volume of the “administrative cacophony” surrounding this issue. The decision to uphold the BIA’s ruling in *Chang* may spur Congress to pass legislation once again requiring the INS and BIA to extend “careful consideration” to applicants fleeing China’s “one couple, one child policy.”\textsuperscript{209} In addition, the decision may again compel the executive branch to take action to ensure that Chinese immigrants fleeing the op-

\textsuperscript{205} For a discussion of the reason why the Chinese immigrants claim they fled China, see *supra* note 10 and accompanying text.

\textsuperscript{206} For a discussion of the numerous administrative pronouncements surrounding Chinese asylum claims, see *supra* notes 37-61 and accompanying text.

\textsuperscript{207} See *Chen Zhou Chai*, 48 F.3d at 1342 (“Although Congress tried to overrule *Matter of Chang* by statute, and several former Attorney Generals by regulation, these attempts have all failed.”); *Chang Lian Zheng v. INS*, 44 F.3d 379, 380 (5th Cir. 1995) (“While Petitioners have demonstrated various proposals to change the criteria defined in *Matter of Chang* . . . for use in Chinese forced abortion/forced sterilization asylum claims, those proposals have unfortunately never been implemented.”).

\textsuperscript{208} For a discussion of the courts adopting *Chang* as “good law,” see *supra* notes 62-84 and accompanying text.

\textsuperscript{209} In *Dai Xiu Ying v. Caplinger*, the United States District Court for the Eastern District of Louisiana stated: “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.” Nos. CIVA.94-2190, 94-2191, 94-2193, 94-2194, 94-2195, 94-2197, 94-2198, 94-2199, 94-2201, 94-2202, 94-2203, 94-3407, 1995 WL 143830, at *9-4 (E.D. La. Apr. 25, 1995) (emphasis added).
pressive policy are given special consideration by asylum adjudicators. Either way, Mr. Zhang's journey to freedom will continue until a clear and effective policy is properly promulgated by any branch of the United States federal government.

Kevin S. Barber

210. Under the Clinton administration, executive action to further the Chinese asylum claims based on the "one couple, one child" policy seems unlikely. On October 24, 1995, President Clinton met with Chinese President Jiang Zemin to try to improve the poor relationship between the United States and China. Reuters, *U.S. Sees Modest Gains from Clinton-Jiang Summit* (last modified Oct. 24, 1995) <http://www.yahoo.com/headlines/current/news/stories/uschina>. According to Assistant Secretary of State Winston Lord, "both Presidents sought to focus on a framework for improving U.S.-Chinese ties, which are badly frayed over such issues as Taiwan, human rights, arms transfers and trade." *Id.* Furthermore, White House spokesman Mike McCurry said that "[the administration has] begun a process that will lead to a series of dialogues that can help improve the opportunity for comprehensive engagement with China." *Id.* Given the administration's apparent efforts to improve the United States-China relationship, it seems unlikely that President Clinton would take steps to grant Chinese asylum claims based on opposition to China's "one couple, one child" population control policy.