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NOTES


I. Introduction

In the late 1970's, during a meeting with Chinese leaders, President Carter pressed his counterparts to lift China's restrictions on emigration. Without blinking an eye, the Chinese officials asked Carter how many million immigrants the United States might like. Carter diplomatically steered the discussion in less volatile directions.¹

The history of the U.S. immigration policy toward Chinese nationals is replete with inconsistencies that reveal the conflicting tensions inherent in U.S. immigration policy in general. In refugee law, these tensions arise when the humanitarian impulse confronts the realities of domestic and foreign policy agendas.

The first Chinese to immigrate to the United States were welcomed with curiosity and respect.² Immigration had been almost unrestricted in America as the new nation quickly expanded westward.³ However, by the 1860s America's attitude toward Chinese immigrants had soured.⁴ Unlike the European immigrants that flooded into the United States from the East, the Chinese were thought to be inassimilable.⁵ In 1882 Congress enacted the first Chinese Exclusion Act (Exclusion Act), which suspended immigration of Chinese, with minor

² "In 1852 the governor of California claimed he wanted 'further immigration and settlement of the Chinese - one of the worthy classes of our newly adopted citizens.' " Harold Hongju Koh, Bitter Fruit of the Asian Immigration Cases, reprinted in 141 CONG. REC. S569, S569 (daily ed. Jan. 6, 1995).
⁴ Id. "White workers assailed the Chinese for working too hard for too little, while the popular press vilified them as lairs [sic], criminals, prostitutes and opium addicts." Id.
⁵ Id. Justice Stephen Field wrote:

[T]hey remained strangers in the land, residing apart from themselves, and adhering to the customs and usages of their own country .... As they grew in numbers each year the people of the [West] Coast saw, or believed they saw .... great danger that at no distant day that portion of our country would be overrun by them unless prompt action was taken to restrict their immigration.

Ping v. United States, 130 U.S. 581, 595 (1889).
exceptions, for the next sixty years.6

The political backlash toward free flowing immigration evidenced by enactment of the Exclusion Act was typical of the "inherent tension that runs through all political and legal decision making on refugee and asylum questions in the United States. The notion of refugee invokes sympathy. The possibility of resulting privileges, especially a potential right to resettle indefinitely, evokes suspicion that the unworthy are trying to claim that status."7 As one commentator noted: "Historically, the United States has led the world in willingness to admit immigrants. Yet for at least one hundred years that willingness has competed with widespread public sentiment in favor of limiting immigration flow."8 Immigration law has thus had to contend with these conflicting domestic attitudes toward the influx of immigrants to this country.

Refugee law in particular has had the additional handicap of developing against the backdrop of cold war politics.9 The adoption of the Refugee Act of 198010 (Act) first introduced to American law a prospective, nonideological framework for refugee admissions.11

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6 22 Stat. 58-60, 214 (1882). This statute and its progeny set the stage for Ping v. United States, the landmark Chinese Exclusion Case that established the plenary power of Congress and of the federal government over immigration. Ping, 190 U.S. at 609. Justice Field for the first time found the unrestricted power to control the nation's borders to be inherent in national sovereignty, both because the sovereignty would be diminished to the extent the government lacked exclusive jurisdiction over its own territory, and because such a power is necessary to guarantee the nation's security. Id. at 603-04.

7 THOMAS ALEINKOFF & DAVID MARTIN, IMMIGRATION: PROCESS AND POLICY 616 (1985); see also GERASSIMOS FOURLANOS, SOVEREIGNTY AND THE INGRESS OF ALIENS 120 (1986) (characterizing such tension as a "competition of principles; on the one hand sovereignty and its related concepts (territorial supremacy, self-defense, self-preservation) and, on the other hand, humanitarian principles deriving from both general international law and from treaties").

8 John Scanlan, Regulating Refugee Flow: Legal Alternatives and Obligations Under The Refugee Act of 1980, 56 NOTRE DAME L. REV. 618, 619 (1981). This tension is illustrated in the debates culminating in the passage of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified in scattered sections of 8 U.S.C.). For example, Senator Alan Simpson stated that the United States should accept "the hideous reality that there are many more people who want to come here than there is room or intent to accommodate them." 1989 CONG. Q. WEEKLY REP. 1785, 1786. Conversely, Senator Edward Kennedy stated that "[w]e can't afford to put a sign on the Statue of Liberty that says, 'No Vacancy.' " Id. at 1785.


11 "Refugee" is defined under the Act as:

any person who is outside any country of such person's nationality . . . who is unable to or unwilling to return to, and is unwilling or unable to avail himself or herself of the protection of, that country because of persecution or a well-
Nonetheless, the Act’s implementation by the Executive Branch has allowed the intrusion of party politics and foreign relations objectives into asylum law to continue.12

In *Guo Chun Di v. Carroll*,13 the United States District Court for the Eastern District of Virginia granted a petition for a writ of habeas corpus to a Chinese national who had been denied asylum based on his claim that he feared persecution because of his opposition to the People’s Republic of China’s (PRC) coercive population control practices.14 In arriving at its decision, the court was forced to grapple with the “cacophony of administrative voices” reflecting the political “flip-flopping” that has characterized this area of refugee law.15 The court in *Guo Chun Di* abandoned this deluge of conflicting agendas in favor of what it determined to be the result warranted by the plain meaning of the Act.16

Part II of this note presents the facts, procedural history and holding of *Guo Chun Di v. Carroll*.17 In Part III, the note relates the applicable background law, including the Refugee Act of 1980 and its application to the issue of Chinese nationals fleeing that country’s coercive family planning measures.18 Then, in Part IV, the note analyzes the holding in *Guo Chun Di* in light of decisions by the Board of Immigration Appeals (BIA or Board) and the decisions of Article III courts. The note explains that the court’s decision in *Guo Chun Di*, while contrary to contemporaneous decisions by other courts, is consistent with controlling precedent, as well as a faithful interpretation of the Act.19 Finally, in Part V, this note concludes that the court’s ruling in *Guo Chun Di* is significant both for its contribution to legal jurisprudence founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.


14 Id. at 874. See infra notes 95-103 and accompanying text (describing China’s population control policy).

15 See infra notes 51-74 and accompanying text.

16 See infra notes 75-92 and accompanying text.

17 See infra notes 21-92 and accompanying text.

18 See infra notes 93-205 and accompanying text.

19 See infra notes 206-53 and accompanying text.
on the issue of refugee status for Chinese nationals and for its illumination of the intrusion of politics into the arena of asylum law.\textsuperscript{20}

II. Statement of the Case

Guo Chun Di\textsuperscript{21} was a twenty-eight year old citizen of the PRC.\textsuperscript{22} Mr. Guo, along with approximately three hundred other Chinese nationals, fled his homeland aboard the vessel \textit{Golden Venture}, which ran aground in New York Harbor on June 6, 1993.\textsuperscript{23} Mr. Guo was rescued while attempting to swim ashore and was taken into custody by the Immigration and Naturalization Service (INS).\textsuperscript{24} He was charged by INS with attempting to enter the United States without valid documents.\textsuperscript{25} Mr. Guo asserted a claim for political asylum and was transferred to a state detention center in Winchester, Virginia, pending exclusion and deportation proceedings.\textsuperscript{26}

At a hearing before an immigration judge in Arlington, Virginia, Mr. Guo testified through an interpreter and explained the circumstances that led to his decision to flee the PRC.\textsuperscript{27} He testified that after the birth of his first child, government planning officials ordered Mr. Guo's wife to report to a local hospital for a sterilization operation.\textsuperscript{28} Because of her opposition to involuntary sterilization, Mr. Guo's wife fled from her home village to a distant city where relatives lived.\textsuperscript{29} Government family planning officials then sent Mr. Guo a similar notice to report to a local hospital for sterilization.\textsuperscript{30} Also opposed to this procedure, Mr. Guo fled his village and joined his wife in the city.\textsuperscript{31} While there, Mr. Guo received word that government officials had vis-

\textsuperscript{20} See infra notes 254-70 and accompanying text.

\textsuperscript{21} Guo Chun Di's name is given in the Chinese fashion, that is, surname first.


\textsuperscript{23} Id. The \textit{Golden Venture} was a cargo freighter piloted during its three month voyage by a crew of thirteen Indonesian nationals. See Matter of G, Int. Dec. 3215 (BIA 1993) (describing the \textit{Golden Venture} incident). The vessel ran aground approximately 100 to 200 yards offshore of the Fort Tilden military reservation located on the Rockaway Peninsula in the Gateway National Recreation Area of Queens, New York. Id. According to newspaper accounts of several passengers interviewed, pandemonium erupted on board when the ship grounded. Id. Passengers spewed out of the cargo bay in which they had been cooped during the voyage and into the fifty-three degree waters. Id. Many of the ship's passengers who attempted to swim ashore suffered from hypothermia and collapsed upon reaching the beach. Id. At least seven of the passengers of the \textit{Golden Venture} are reported to have died. Jane Fritsch, \textit{Smuggled To New York: The Immigrants — Seven Die as Crowded Immigrant Ship Grounds Off Queens}, N.Y. TIMES, June 7, 1993, at A1. The pilots were later arrested and charged with smuggling. Id.

\textsuperscript{24} Guo Chun Di, 842 F. Supp. at 861.

\textsuperscript{25} Id.


\textsuperscript{27} Guo Chun Di, 842 F. Supp. at 861.

\textsuperscript{28} Id. at 861-62. See infra notes 93-108 and accompanying text (discussing the PRC's population control policy).

\textsuperscript{29} Guo Chun Di, 842 F. Supp. at 862.

\textsuperscript{30} Id.

\textsuperscript{31} Id.
ited his home, confiscated his and his wife's personal property, and destroyed their home.\(^3\) Mr. Guo testified that upon receiving this information he decided to leave the PRC and come to the United States.\(^3\)

Mr. Guo testified that in addition to his one child, he wished to have two more children.\(^4\) He feared that family planning officials in the PRC would not allow this to happen.\(^5\) Mr. Guo further testified that he feared that if returned to the PRC he would be imprisoned for his prior noncompliance and forced to undergo the government-ordered sterilization.\(^6\)

The immigration judge found Mr. Guo to be truthful and accepted his account of the circumstances that led to his decision to flee the PRC.\(^7\) Nonetheless, the immigration judge ruled that Mr. Guo was "not a 'refugee' as that term is defined by the law."\(^8\) Therefore, the immigration judge ruled that Mr. Guo was not eligible for asylum in the United States; rather he was subject to exclusion and deportation.\(^9\)

The immigration judge relied on *Matter of Chang*, a decision by the BIA\(^4\) holding that a coercive population control policy that includes sterilization does not constitute "persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."\(^4\) Mr. Guo appealed the decision of the immigration judge to the BIA on the ground that *Matter of Chang* had been

\(^{32}\) Id.

\(^{33}\) Id.

\(^{34}\) Id.

\(^{35}\) Id.

\(^{36}\) Id. An excerpt from Mr. Guo's testimony before the immigration judge follows:

Q: And can you say exactly why you wanted to leave China?
A: Because I feared that China has no freedom. Because I only have one child, I want to have two more child, but they don't let me have. If... I afraid that if they find me, they will took me to get sterilize operation.

Q: Why did you want to come to the United States instead of some other country?
A: Because I heard about the U.S.A. is a freedom country.

Q: What do you think will happen to you if you are sent back to China?
A: They... first they will sent me to the jail and then they will force me to do the sterilize operation.

\(^{37}\) Id.

\(^{38}\) Id. (quoting the opinion of the immigration judge); see infra notes 109-17 and accompanying text (discussing the definition of "refugee" under the law).

\(^{39}\) *Guo Chun Di*, 842 F. Supp. at 862.

\(^{40}\) Int. Dec. 3107 (BIA 1989).

\(^{41}\) Unless modified by the BIA or the Attorney General of the United States, decisions of the BIA are binding upon immigration judges. See 8 C.F.R. § 3.1(g) (1994).

\(^{42}\) *Guo Chun Di*, 842 F. Supp. at 862 (quoting *Matter of Chang*, Int. Dec. 3107 (BIA)). See also 8 U.S.C. § 1101(a)(42)(A) (1988) (defining "refugee" to mean "any person who is outside any country of such person's nationality... who is unable or unwilling to avail himself or herself of the protection of 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... ").
invalidated by certain federal regulations.\footnote{Guo Chun Di, 842 F. Supp. at 862; see infra notes 118-53 (discussing federal regulations Mr. Guo asserted had invalidated Chang).}

The Board of Immigration Appeals rejected Mr. Guo's appeal, noting that \textit{Chang} was still valid controlling administrative precedent.\footnote{Guo Chun Di, 842 F. Supp. at 862. The BIA has consistently applied \textit{Chang} in considering applications for asylum filed by aliens who claim they fear persecution on the basis of their opposition to the PRC's population control policies. See, e.g., Matter of G, Int. Dec. 3215 (BIA 1993) (reaffirming reliance upon \textit{Chang}).} The Board ruled that the federal regulations cited by Mr. Guo "were not codified and [had] no force or effect."\footnote{Guo Chun Di, 842 F. Supp. at 862.} Mr. Guo then petitioned the District Court for the Eastern District of Virginia for a writ of habeas corpus.\footnote{Id.}

The District Court, with Judge Ellis presiding, granted Mr. Guo's petition for writ of habeas corpus.\footnote{Id. at 864. In addition to filing the petition, Mr. Guo filed a request for immediate and preliminary injunctive relief in the Eastern District Court of Virginia. \textit{Id.} at 864-65. Prior to oral argument, the parties stipulated that the execution of the INS order of exclusion and deportation would be stayed. \textit{Id.} at 865. The court endorsed the stipulation and postponed resolution of Mr. Guo's request for injunctive relief. \textit{Id.} At a later date, the court, pursuant to Fed. R. Civ. P. 65(a)(2), ordered that the merits of the case should be accelerated and consolidated with the consideration of the preliminary injunction. \textit{Id.}} In so doing, the court held that none of the several inconsistent administrative pronouncements regarding the ability of aliens to seek asylum based on opposition to coercive population control policies were entitled to judicial deference.\footnote{Id. at 867.} The court further found that Mr. Guo had met the statutory criteria for political asylum by proving that he had fled his country to avoid arrest, imprisonment, and involuntary sterilization because he and his wife opposed and would not obey their country's policy of coercive population control.\footnote{Id. at 873.} The court found that Mr. Guo had made an overt manifestation of his opposition to the population control policy and that he had been persecuted for expressing this opposition.\footnote{Id.}

The District Court reviewed the "regulatory saga"\footnote{Id. at 863.} of the executive branch's position on the refugee status of Chinese nationals fleeing the PRC's coercive population control measures.\footnote{Id. at 859.} The court ruled that these pronouncements amounted to "an administrative
cacophony undeserving of judicial deference.” The court noted that while the BIA had consistently applied the principle elucidated in Matter of Chang to all asylum claims based on opposition to a country’s coercive family planning policies, this was “only one of many Department of Justice (DOJ) pronouncements” on the issue. The court pointed out that the most recent pronouncement was a final rule signed in the waning days of the Bush Administration by then Attorney General William Barr (January 1993 Rule), the preamble of which specifically stated that “one effect of this rule is to supersede the decision of Matter of Chang . . . to the extent that it held that the threat of forced sterilization pursuant to a government family planning policy does not give rise to a well-founded fear of persecution on account of political opinion . . . .” The court noted that it was “especially significant” that this was a pronouncement by the Attorney General who has the authority to overrule BIA decisions.

The court addressed, yet failed to satisfactorily resolve, the question of whether the January 1993 Rule, which was withdrawn from the Federal Register three days prior to its publication, ever became effective. The court considered the factors that govern whether a unpub-

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53 Id. at 867 (“To hold otherwise would be judicial abdication, not principled judicial deference.”).  
54 Id. at 867 & n.11 (citing 8 C.F.R. § 3.1(g) (1993) (“decisions designated by the Board shall serve as precedents in all proceedings involving the same issue or issues”); Matter of G, Int. Dec. 9215 (BIA) (applying Chang in denying PRC residents asylum based on opposition to coercive family planning practices); accord Matter of Tsun, A 71 824 320 (BIA June 17, 1993); Matter of Chu, A 71 824 281 (BIA June 7, 1993).  
55 Guo Chun Di, 842 F. Supp. at 867; see infra part III.B. (discussing regulatory history of refugee status of Chinese nationals fleeing that country’s population control measures).  
56 See infra notes 146-51 and accompanying text.  
57 Guo Chun Di, 842 F. Supp. at 867 (alteration in original).  
58 Id. (citing 8 C.F.R. § 3.1(g) (1993) (stating that decisions of the Board shall be binding in the administration of the Act “[e]xcept as they may be modified or overruled by . . . the Attorney General”); see also Matter of Anselmo, Int. Dec. 3105 (BIA 1989) (“[T]he Board and immigration judges . . . only have such authority as is created and delegated by the Attorney General”).  
59 See infra notes 148-51 and accompanying text.  
60 Guo Chun Di, 842 F. Supp. at 867-68. Both Mr. Guo and INS classified the January 1993 Rule as a substantive, as opposed to interpretive, rule. Id. But see id. at 868 n.12 (noting that the rule “could arguably be classified as an interpretive rule setting forth a general statement of policy”).  
61 Federal Register publication is required for substantive rules of general applicability, as well as for statements of general policy or interpretations of general applicability formulated and adopted by an agency.” Id. at 868 (citing 5 U.S.C. § 552(a)(1)(D) (1988) (Supp. 1992) and Knutzen v. Eben Ezer Lutheran Hous. Ctr., 815 F.2d 1343, 1351 (10th Cir. 1987) (noting that the APA requires publication of rules and public statements if such rules or public statements constitute change from existing law, policy or practice)). However, the court noted that “failure to publish a rule is not necessarily fatal.” Id. (citing Caribbean Produc Exch. v. Secretary of Health and Human Serv., 893 F.2d 3, 7 (1st Cir. 1989); and Welch v. United States, 750 F.2d 1101, 1111 (1st Cir. 1985) (“[F]ailure to publish in the Federal Register does not automatically invalidate an administrative regulation or guideline.”)). But cf. Jerri’s Ceramic Arts v. Consumer Prod. Safety Comm’n, 874 F.2d 205, 208 (4th Cir. 1989) (indicating that a substantive rule not published, as required under the Federal Hazardous Substances Act, must be set aside).
lished agency interpretation should nonetheless be given effect\textsuperscript{61} and concluded that under these factors “the unpublished [January] 1993 Rule is arguably entitled to legal effect.”\textsuperscript{62}

Regardless, the court pointed out that “there [was] no doubt” that an interim rule issued in 1990 (January 1990 Interim Rule),\textsuperscript{63} which also contradicted Chang, was validly published and in effect from January through June 1990.\textsuperscript{64} The court recognized that “this validly published and promulgated rule reflect[ed] the considered opinion of the Attorney General to construe Section 1101(a)(42)(A) to permit granting asylum” in cases of applicants fleeing persecution under the coercive population control measures of the PRC.\textsuperscript{65} However, the court conceded that “there is significant doubt whether the [January] 1990 Interim Rule [was] either binding on BIA judges or affected the legal force of Chang.”\textsuperscript{66}

The court also characterized an Executive Order issued by President Bush in 1990 (1990 Executive Order)\textsuperscript{67} as having “underscored the correctness of the Attorney General’s construction of the Act” by directing the Attorney General and Secretary of State to give “en-

\textsuperscript{61} \textit{Guo Chun Di}, 842 F. Supp. at 868. The court cites \textit{Nguyen v. United States}, 824 F.2d 697 (9th Cir. 1987) for the proposition that courts should consider a variety of factors in determining whether a non-published agency interpretation should nonetheless be given legal effect, including (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{62} \textit{Guo Chun Di}, 842 F. Supp. at 868. The court pointed out that the January 1993 Rule: (i) impacts Mr. Guo’s substantive rights, \textit{id.} at 868 n.15 (citing \textit{Nguyen}, 824 F.2d at 701 (stating that an unpublished rule affects substantive rights when it changes existing rules, policy, or practice)); (ii) deviates from other agency interpretations of 8 U.S.C. § 1101(a)(42)(A), \textit{id.}; and (iii) restricts the discretion of immigration officers in classifying an individual as a refugee, \textit{id.} (citing \textit{Nguyen}, 824 F.2d at 701).


\textsuperscript{63} See infra note 157 and accompanying text.

\textsuperscript{64} \textit{Guo Chun Di}, 842 F. Supp. at 869. \textit{See also infra notes} 137-42 and accompanying text.

\textsuperscript{65} \textit{Guo Chun Di}, 842 F. Supp. at 869.

\textsuperscript{66} The court acknowledged that “[t]hough it contradicted Chang, the January 1990 Interim Rule likely did not erase or overrule Chang, for it was apparently an interpretive rule of limited legal force.” \textit{Id.} \textit{See also infra notes} 137-42 and accompanying text.

\textsuperscript{67} \textit{See infra} note 198 and accompanying text.
hanced consideration” to asylum claims related to an applicant’s opposition to the PRC’s policy of forced abortion or coercive sterilization. 68

Finally, the court stated that “it is worth noting that four Attorneys General in three administrations have made pronouncements” regarding the refugee status of immigrants fleeing the PRC population control policy. 69

The court in Guo Chun Di v. Carroll recognized the “well established principle” dictated by the Supreme Court in Chevron v. Natural Resources Defense Council 70 that an agency’s interpretation of its statute or regulation is entitled to considerable judicial deference. 71 Nevertheless, the court held that judicial deference was not warranted for the agency construction of Section 1101(a) (42) (A) expressed in Matter of Chang. 72 In reaching this conclusion, the court relied upon a line of decisions limiting the appropriateness of judicial deference to those instances in which an agency’s interpretation of its own statutes and regulations has been consistent. 73 The court concluded that on the question of statutory interpretation of Section 1101(a) (42) (A), “there [was] a cacophony of administrative voices, each singing a different tune in a different key” and that therefore “[d]eference to one voice or one tune in these circumstances [was] unwarranted.” 74

The court then considered, independently of past administrative interpretations of Section 1101(a) (42) (A), whether Mr. Guo met the definition of “refugee” so as to qualify for asylum under the Act. 75

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69 Guo Chun Di, 842 F. Supp. at 870. Attorney General Edwin Meese in August 1988 "promulgated a series of policy guidelines classifying opposition to coercive population control measures as ‘political opinion’ sufficient” for refugee status. Id.; see infra note 119 and accompanying text. Attorney General Richard Thornburgh then issued the January 1990 Interim Rule “which implicitly overruled Chang.” Guo Chun Di, 842 F. Supp. at 870; see infra note 137 and accompanying text. Attorney General William Barr signed the January 1993 Rule “that was explicitly intended to overrule Chang.” Guo Chun Di, 842 F. Supp. at 870; see infra note 147 and accompanying text. Finally, in December 1993 current Attorney General Janet Reno declined an opportunity to resolve the conflict between Chang and the other conflicting DOJ interpretations of Section 1101(a) (42) (A). Guo Chun Di, 842 F. Supp. at 870; see infra notes 152-53 and accompanying text.

70 467 U.S. 837 (1984); see infra notes 157-61 and accompanying text.


72 Id. at 870.

73 Id. at 866 (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987); General Elec. Co. v. Gilbert, 429 U.S. 125, 143 (1976); Ehlert v. United States, 402 U.S. 99, 105 (1971); Wilcox v. Ives, 864 F.2d 915, 924-25 (1st Cir. 1988); United Transp. Union v. Dole, 797 F.2d 823, 829 (10th Cir. 1986); and Allen v. Bergland, 661 F.2d 1001, 1004 (4th Cir. 1981)).

74 Guo Chun Di, 842 F. Supp. at 870. The Court also noted that, “in any event, ‘the agency’s preferred interpretation is only one input in the interpretational equation.’ ” Id. at 870 n.25 (citing United Transp. Union v. Dole, 797 F.2d 823, 829 (10th Cir. 1986) and Zuber v. Allen 396 U.S. 168, 192 (1969)).

75 Id. at 870-71.
court separated its inquiry into two stages: (1) "whether [Mr. Guo's] opposition to coercive population control practices in the PRC constit[uted] a 'political opinion' within the meaning of 8 U.S.C. § 1101(a)(43)(A);" and (2) "whether [Mr. Guo had] a particularized, well-founded fear of persecution based on this purported political opinion."76

The court concluded that "there can be little doubt that the phrase 'political opinion' encompasses an individual's view regarding procreation."77 The court began by noting that the term "political" is commonly understood to mean "of or pertaining to the exercise of rights or privileges . . . ."78 The court cited the Supreme Court's decision in *Skinner v. Oklahoma*79 for the proposition that "the right to bear children is 'one of the basic civil rights of man.' "80 Particularly, the court emphasized that *Skinner* viewed involuntary sterilization as an egregious infringement of this fundamental right:81

The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands, it can cause races or types which are inimical to the dominant group to whither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.82

The court analogized the right to procreate, which is protected under the Bill of Rights,83 to other fundamental rights that are well recognized as legitimate grounds for asylum.84 In addition, the court ruled that "it [was] beyond dispute that the expression of one's views regarding issues related to the right to procreate is 'political'."85

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76 Id. at 871-72.
77 Id. at 872.
78 Id. (quoting BLACK'S LAW DICTIONARY 1158 (6th ed. 1991)).
81 *Guo Chun Di*, 842 F. Supp. at 872 (citing *Skinner*, 316 U.S. at 541).
82 *Skinner*, 316 U.S. at 541.
83 See *Carey*, 431 U.S. at 684-85 ("The decision whether or not to beget or bear a child is at the very heart of [a] cluster of constitutionally protected choices."); *Griswold*, 381 U.S. at 484-86.
84 *Guo Chun Di*, 842 F. Supp. at 872 (discussing asylum based upon freedom of religion and freedom of speech).
85 Id. (citing Planned Parenthood of Southeastern Pa. v. *Casey*, 112 S. Ct. 2791, 2815 (1992) (expressing hesitation to overrule *Roe* v. *Wade*: "[W]hatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure . . . ."), "In addition, opposition to certain aspects of procreative rights and privileges may involve the exercise of protected political rights and privileges."
The court held that the right to procreate and the expression of that right are analogous to other fundamental rights that may support an asylum claim based upon "persecution on the basis of political opinion." Therefore, Mr. Guo's opposition to the PRC's family planning policies constituted a "political opinion" within the meaning of Section 1101(a)(42)(A).

Finally, the court in Guo Chun Di considered whether Mr. Guo had a "well-founded fear of persecution" because of his "overt manifestation of a political opinion." The court found that "[t]here can be no question that [Mr. Guo] made an 'overt manifestation' of his opposition to the PRC's 'one couple one child' policy, and that [he] has been persecuted for expressing this opposition." Thus, the court ruled that Mr. Guo had established prima facie eligibility for asylum. The court therefore stated that Mr. Guo was, in essence, "one of the 'huddled masses...yearning to be free' who [had] established statutory eligibility for asylum," and that it was now within the discretion of the Attorney General to grant or deny his asylum request.

III. Background Law

A. China's Population Control Policy

For Communist China, population has always played an important role in the Communist Party's ideology. In the 1950s Communist Party Chairman Mao Zedong officially encouraged people to have children as part of their civic duty because, as one analyst wrote, Mao "regarded each newborn Chinese as a set of productive hands waiting to work..." Under this policy, the population growth rate in the PRC increased from 1.6 percent in 1949 to 2.8 percent in 1965. In 1979

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Id. (citing Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993) (discussing balancing of rights of abortion protesters and women seeking abortions)).
86 Id. at 873.
87 Id.
88 Id. (citing De Valle v. INS, 901 F.2d 787, 797 (9th Cir. 1990) and Bolanos-Hernandez v. INS, 767 F.2d 1277, 1287 (9th Cir. 1984)).
89 Id. The court found that Mr. Guo and his wife's opposition to the PRC's family planning policies had been openly expressed by their refusal to comply with sterilization orders and by fleeing their village in response to those orders. Id. The government's response to these actions was to confiscate the couple's personal property and to destroy their home. Id. The court held that "it simply defies logic to contend that these governmental actions do not amount to persecution." Id.
90 Id. at 874.
91 Id. (citing E. LAZARUS, NEW COLOSSUS (alteration in original)).
92 Id. (citing 8 U.S.C. § 1158(a) (1988) and M.A. v. INS, 899 F.2d 304, 307 (4th Cir. 1990) (en banc)); see infra notes 112-13 and accompanying text (discussing the discretionary aspect of a grant of asylum).
93 Steven Mufson, Population Curbs Slip in China, 1.2 Billion Reached Five Years Early, WASH. POST, Feb. 14, 1995, at A17. Chairman Mao was the leader of the Communist Party of China in 1949 when the post-revolution People's Republic of China was founded. See P.R.C. CONST. pmbl.
94 Mufson, supra note 93, at A17.
Mao revised his strategy and launched the PRC's "one couple, one child" policy as the centerpiece of an ambitious plan to contain China's population at 1.2 billion by the year 2000.95

Population control is considered one of the most important objectives on China's Communist Party agenda. Article Twenty-Five of the Constitution of the PRC, which was adopted on December 4, 1982, provides: "The state promotes family planning so that population growth may fit the plans for economic and social development."96 Chinese leaders consider their policy of "one couple, one child" a fight for national, as well as party, survival. The PRC's Minister of Family Planning explained:

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. A couple cannot have a baby just because it wants to. That cannot be allowed if China is to stabilize its population and keep it from doubling and redoubling as it might.97

As one observer noted:

Faced with strong popular resistance, Peking resorts to even stronger measures. To this struggle, it brings the full powers of a totalitarian state, operating without fear of political opposition. There is no check on official abuse, no outlet for human rights complaints and no forum for public debate of this 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.98

China's family planning policy is backed by the full organizational might of the Communist Party.99 In the PRC, every citizen belongs to

95 Id. The population control program in China is guided by a joint directive of the Chinese Communist Party and the State entitled "On the Further Implementation of Family Planning Work" issued in 1982. Matter of Chang, Int. Dec. 3107 (BIA 1989) (citing Letter from Library of Congress to Immigration and Naturalization Service (Nov. 25, 1987) [hereinafter Library of Congress Letter]). The policy provides that citizens are allowed only one child per couple, with limited exceptions when permission is obtained. Id. For a comprehensive history of the establishment and implementation of the "one couple, one child" policy, see JUDITH BANISTER, CHINA'S CHANGING POPULATION 185-226 (1987).

The technical policy of birth control is formulated by the State Family Planning Commission with the approval of the leadership of the Party Central. Its principal content is: "Those women who have already given birth to one child must be fitted with IUD's, and couples who already have two children must undergo sterilization by either the husband or the wife. Women with unplanned pregnancies must adopt remedial measures as soon as possible."

Id. at 212. "Remedial measures" is a euphemism used by the Chinese government officials for abortion. Id. at 208. China's population reached 1.2 billion in 1995, five years ahead of the government's goal. Mufson, supra note 93, at A17.

96 P.R.C. Const. art. XXV.


98 Id.

99 Id.
a unit, which is a workplace or rural governing body. Every unit has a birth control committee headed by Party officials. These officials control citizens' salaries; their eligibility to occupy housing space and to grow crops; their educational opportunities; as well as their ability to marry and have children. Peking, in order to insure compliance with the policy, distributes cash bonuses to local officials only if their units observe birth control limits.

Opposition to the "one couple, one child" policy is considered political dissent in the PRC and is dealt with severely. This reality is evident in a series of letters by the Population Control Office of a bearing factory in Dalian, China. The letters were sent to a Chinese woman studying in the United States who had learned she was pregnant with her second child:

Birth control is one of our nation's basic policies.

Second children are absolutely banned. If a woman insists on having a second child, all the staff and line workers of her factory will be punished. No salary increases will be allowed, and the factory will be disqualified from production contests. She herself will be placed on probation, and receive only minimum living expenses. You absolutely cannot afford these political and financial losses... Do not lose anymore time. Fix this problem as soon as possible.

If you come back at the end of this year pregnant, even if you are eight or nine months along, you will absolutely not be allowed to have

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100 Id.
101 Id.

Extensive regulation of individual and family life is one of the distinctive features of the Chinese sociopolitical system. For most Chinese (particularly urban residents), life revolves around the work unit, which provides not only employment, but housing, ration coupons, permission to marry and have a child, and other aspects of ordinary life...

Id.

103 Weisskopf, supra note 97, at A1; Matter of Chang, Int. Dec. 3107 (BIA 1989) (citing Library of Congress Letter, supra note 95) ("Economic sanctions, peer pressure and propaganda are used to insure compliance."). When the local cadres report failure, they are publicly criticized and admonished to stop waiving in their determination to succeed. Always speaking in euphemisms, the media urge the local cadres to achieve the ends no matter what the means required. Indeed, when it comes to family planning program abuses... the roots of coercion originate from the top.

Banister, supra note 95, at 205.

104 See Banister, supra note 95, at 200.

To refuse to control fertility or to encourage others to refuse is sometimes treated as a crime against the state. Most married people of reproductive age in China must control their fertility to avoid being guilty of an ideological offense in the eyes of the government. Those who would rather not practice birth control find that they must do so, or at least pretend to, in order to avoid political reprisals.

Id. ["Family planning must be understood as the implementation of party discipline and state law." Director of State Family Planning Commission quoted in Jiankang Bao [Health Gazette, Beijing], Feb. 27, 1985, at 1.
The Chinese government has consistently denied supporting the use of force to obtain compliance with birth quotas. However, provinces are allowed to make their own regulations regarding enforcement of the population control laws so long as overall birthrates match the state imposed goals. Overwhelming evidence indicates that the "one couple, one child" policy is enforced by local officials through violent methods that include mandatory sterilization, forced abortions and infanticide.

B. The Refugee Act of 1980


106 Id. at Int. Dec. 5107 (citing Library of Congress Letter, supra note 95).

107 Id.

108 "Although coercive family planning is contrary to official Chinese policy, there have been numerous reports of coercive birth control practices, including forced abortions and sterilization . . . ." 1985 COUNTRY REPORTS, supra note 102. See, e.g., STEVEN MOSHER, A MOTHER'S ORDEAL: ONE WOMAN'S FIGHT AGAINST CHINA'S ONE-CHILD POLICY (1993); JOHN AIRD, SLAUGHTER OF THE INNOCENTS: COERCIVE BIRTH CONTROL (1990); BANISTER, supra note 95; Nicholas Kristof, China's Crackdown on Births: A Stunning, and Harsh, Success, N.Y. Times, April 25, 1993, at A1; Steven Mosher, 'One Couple, One Child': China's Brutal Birth Ban; For Chinese Women, It's Abortion or Sterilization, Wash. Post, Oct. 18, 1987, at D1; Weisskopf, supra note 97; Michael Weisskopf, China Orders Sterilization for Parents, Wash. Post, May 28, 1983, at A1. These methods are referred to in official jargon as "technical measures." BANISTER, supra note 95, at 201 ("The phrase 'technical measures' is a euphemism for required sterilization, abortion and IUD insertion."). Implementation of "technical measures," rather than education or voluntary compliance, is the main criterion for judging the achievements of local family planning officials. Id. at 202.


110 United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268 [hereinafter U.N. Protocol]. Article 1.2 of the Protocol defines a refugee as one who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country . . . ." U.N. Protocol, supra, at art. 1.2.

Article 1.2 of the Protocol largely incorporated the definition of refugee contained in Article IA(a) of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6261, 189 U.N.T.S. 137, to which the United States was not a party.


Because Congress intended for the definition of refugee under the Refugee Act of 1980 to conform to the U.N. Protocol, the BIA has recognized the appropriateness of considering international interpretations of the agreement when determining the meaning of "refugee"
A grant of asylum under the Act is a matter of discretion. Aliens seeking asylum are eligible for the favorable exercise of that discretion only after a determination that they qualify as a "refugee" under Section 1101(a)(42)(A) of the Act. This section creates four separate elements that must be satisfied before an alien qualifies as a refugee: (1) the alien must have a "fear of persecution"; (2) the fear must be "well-founded"; (3) the persecution must be "on account of race, religion, nationality, membership in a particular social group, or political opinion"; and (4) the alien must be "unwilling to return" to his country of nationality because of his well-founded fear of persecution.

C. Regulatory History

The history of the position of the United States government and its various agencies toward the refugee status of Chinese nationals fleeing persecution as a result of that country's coercive population control measures is a bizarre and convoluted story of bureaucratic inconsistency.

In August 1988, the DOJ issued policy guidelines to the INS designed to insure that asylum would be granted to persons showing a well-founded fear of government persecution stemming from the PRC's involuntary sterilization and abortion programs.
In May 1989 the BIA issued its decision in *Matter of Chang*.\(^\text{119}\) In that decision the Board held that the implementation of the "one couple, one child" policy by the government of the PRC, "in and of itself, even to the extent that involuntary sterilization 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.' "\(^\text{120}\) The Board expressly stated that it was not bound by the policy guidelines announced a year earlier by the DOJ because those guidelines were directed toward the INS and not toward immigration judges and the Board.\(^\text{121}\)

The petitioner in *Chang* in his application for asylum indicated that neither he nor his family had been mistreated, and that the family had not suffered from the government's policy any more than the rest of the citizens of the PRC.\(^\text{122}\) The petitioner's testimony regarding his alleged persecution under the "one couple, one child" policy was found by the Board to be "simply not sufficiently detailed to provide a plausible and coherent account of the basis of his asylum claim . . . ."\(^\text{123}\) The Board also found the testimony to have been contradicted by other information on the record.\(^\text{124}\) It was based on this account that the BIA found that the mere implementation of the PRC's population control policy was not "on its face persecutive."\(^\text{125}\)

The Board did not foreclose the possibility that the policy could be enforced in such a manner so as to be persecution on account of a ground protected by the Act.\(^\text{126}\) However, according to the Board's

\(\ldots\) DOJ guidelines, noting that the PRC government views such defiance as an act of 'political dissent', state that "a finding of the requisite 'well-founded fear of persecution' under these circumstances is reasonable." This constitutes persecution for 'political opinion' under the Immigration Act and would result in a grant of asylum.

*Id.* (citing 135 CONG. REC. S8244 (daily ed. July 19, 1989)).

\(^\text{119}\) Int. Dec. 3107 (BIA 1989).

\(^\text{120}\) *Id.*

\(^\text{121}\) *Id.* (citing 8 C.F.R. §§ 21.1, 31.1, 236.1, 236.3, 242.2(d), 242.8(a) (1988) (delegating and defining the authority of the INS commissioner, BIA and immigration judges)); see also United States *ex rel.* Accardi v. Shaughnessey, 347 U.S. 260, 266-67 (1954) ("The Board must exercise its own judgement when considering appeals . . . .").

\(^\text{122}\) *Chang*, Int. Dec. 3107. In fact, the petitioner in *Chang* made no reference to the PRC's population control measures in his asylum application. *Id.* Instead, he indicated that he was an anti-communist who fled his homeland "because of Communist domination of China." *Id.* It was not until his deportation hearing that the petitioner in *Chang* testified that he feared persecution because, among other things, "he and his wife were forced to flee from their commune because they had two children and did not agree to stop having more children; and, that they disagreed with China's family planning policies . . . ." *Id.*

\(^\text{123}\) *Id.*

\(^\text{124}\) *Id.*

\(^\text{125}\) *Id.* "Because the alien in *Chang* failed to establish the factual predicate of a well-founded fear of persecution, the holding [in *Chang*] with respect to involuntary sterilization is arguably dictum." Guo Chun Di v. Carroll, 842 F. Supp. 858, 862 n.2 (E.D. Va. 1994).

\(^\text{126}\) *Matter of Chang*, Int. Dec. 3107. According to the Board, an applicant for asylum
holding, "a policy [that is] tied solely to controlling population, rather than as a guise for acting against people for reasons protected by the Act," can never be the basis for a well-founded fear of persecution.\(^{127}\)

The Board addressed the applicant's assertion that the right to procreate is a fundamental right under the United States Constitution, and that any country abridging that right must be engaging in persecution.\(^{128}\) The Board stated that "the fact that a citizen of another country may not enjoy the same constitutional protections as a citizen of the United States does not mean that he is therefor persecuted on account of one of the five grounds enumerated in . . . the Act."\(^{129}\)

Shortly after the decision in *Chang*, efforts were made in Congress to overturn it. These efforts culminated in the Armstrong-DeConcini Amendment to the Emergency Chinese Immigration Relief Act of 1989,\(^{130}\) an amendment offered expressly for that purpose.\(^{131}\) By November 1989, the Senate had unanimously passed the Amendment and the House, by a substantial margin, had voted to concur in the amendment.\(^{132}\) President Bush, while voicing approval for the amendment, vetoed the Emergency Chinese Immigration Relief Act of 1989 because of concerns about other portions of the bill.\(^{133}\) While the House of Representatives voted to override the veto, the Senate failed to do so by a margin of five votes.\(^{134}\) Several of the Senators who voted to uphold the veto stated that they did so relying upon assurances made by the President that administrative action would be taken to reverse *Chang*.\(^{135}\)

would need to provide additional facts proving that the population policy was in fact persecutive or that he had a well-founded fear that it would be persecutive "on account of one of the five reasons enumerated in section 1101(a)(42)(A)." \(^{127}\) Id. Examples the Board gives of how the population policy could be enforced so as to amount to persecution under the Act include: selective application against members of particular religious groups; use to punish persons for their political opinions; or more severe treatment of those who publicly oppose the policy. \(^{128}\) Id. \(^{129}\) Id. Similarly, the court argued that even if the population control policy of the PRC were found to be a violation of internationally recognized human rights, "that fact in itself would not establish that an individual subjected to such [a policy] was a victim of persecution 'on account of race, religion, nationality, membership in a particular social group, or political opinion.'" \(^{127}\) Id.

\(^{131}\) The amendment is reprinted at 135 Cong. Rec. S8244 (daily ed. July 19, 1989): The Armstrong amendment would by statute apply the DOJ policy to all relevant agencies, including the INS and the Board of Immigration Appeals. It would thereby assure that applications for asylum by Chinese nationals who fear persecution because they have defied the party's population control policies would be given the fullest possible consideration.

\(^{134}\) Guo Chun Di, 842 F. Supp. at 863.
\(^{135}\) Id. (citing 135 Cong. Rec. S376 (daily ed. Jan 25, 1990)).
Faithful to his assurances, President Bush issued instructions to then Attorney General Thornburgh to take appropriate steps to overturn Chang. In January 1990, the Attorney General issued the January 1990 Interim Rule amending the regulations governing asylum and withholding of deportation to allow asylum for those applicants showing a well-founded fear of sterilization or persecution as a result of the PRC's coercive population control measures. Three months later, the 1990 Executive Order was issued underscoring the substance of the January 1990 Interim Rule.

In July 1990, Attorney General Thornburgh published a final rule which implemented extensive changes in the regulations pertaining to asylum and withholding of deportation (July 1990 Rule). Inexplicably, the July 1990 Rule made no mention of the January 1990 Interim Rule and did not refer to the issue of asylum for persecution resulting from coercive family planning practices in the PRC. Nonetheless, the July 1990 Rule rewrote the sections of the Code of Federal Regulations that ostensibly had been amended by the January 1990 Interim Rule. Consequently, when the Code of Federal Regulations was published in January 1991, the January 1990 Interim Rule, quite simply, vanished.

This regulatory hocus-pocus caused understandable confusion among immigration administrators. In April 1991 the Chief Attorney Examiner of the BIA made a written inquiry to the Appellate Counsel of the INS requesting the position of the INS on the status of the January 1990 Interim Rule in light of the July 1990 Rule. The Appellate

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136 Id. See also Memorandum of Disapproval, supra note 133, at 1853-54 ("I [, President Bush,] have directed that enhanced consideration be provided under the immigration laws for any country who express a fear of persecution upon return to their country related to that country's policy of forced abortion or coerced sterilization.").

137 Specifically, the January 1990 Interim Rule amended then existing 8 C.F.R. § 208.5 to provide:

(1) Aliens who have a well-founded fear that they will be required . . . to be sterilized because of their country's family planning policies may be granted asylum on the ground of persecution on account of political opinion.
(2) An applicant who establishes that the applicant (or the applicant's spouse) has refused . . . to be sterilized in violation of a country's family planning policy, and who has a well-founded fear that he or she will be required . . . to be sterilized or otherwise persecuted if the applicant were returned to such country may be granted asylum.


138 The executive order stated:

The Secretary of State and the Attorney General are directed to provide for enhanced consideration under the immigration laws for individuals from any country who express a fear of persecution upon return to their country related to that country's policy of forced abortion or coerced sterilization, as implemented by the Attorney General's regulation effective January 29, 1990.


140 Id.

141 Id.

Counsel responded that the January 1990 Interim Rule had not been amended or repealed and that the Interim regulation remained the policy of the INS. In a memorandum to Regional Counsel and District Counsel dated November 1991, the Office of the General Counsel of the INS stated that the DOJ and INS’s “policy with respect to aliens claiming asylum or withholding for deportation based upon coercive family planning policies is that the application of such coercive policies does constitute persecution on account of political opinion” and directed that INS trial attorneys act accordingly. According to this view, an applicant whose claim was based on family planning measures involving forced abortions or sterilization was not required to demonstrate that the coercive measures were tied to a governmental purpose other than to control the population.

There is some indication that the failure of the July 1990 Rule to include the January 1990 Interim Rule was mere inadvertence. Regardless, in the waning days of the Bush administration, then Attorney General William Barr signed the January 1993 Rule, a final rule that essentially reiterated the January 1990 Interim Rule. The January 1993 Rule was sent to the Federal Register where it was made available for public inspection and scheduled for publication on January 25, 1993. Immediately after President Clinton was inaugurated on January 22, 1993, the proposed Director of the Office of Management and Budget, Leon Panetta, issued a directive prohibiting the publication of any new regulations not approved by a new agency head appointed by President Clinton. Acting on this directive, the Acting Assistant Attorney General sent a memorandum to the Office of the Federal Register requesting the return of, among other things, the January 1993 Rule. The January 1993 Rule has not been resubmitted or published.

In June 1993, Attorney General Reno granted a request by the BIA

143 Id.
145 Matter of G, Int. Dec. 3215; cf. Matter of Chang, Int. Dec. 3107 (BIA 1989) (holding that in order to make a showing of persecution, the applicant must present evidence that “the governmental action [arises] for a reason other than general population control . . .”).
146 An October 1990 article entitled “INS Asylum Regulations Mistakenly Supersede Regulations on PRC ‘One Couple, One Child Policy’ “ characterizes the July 1990 rule as “an example of the bureaucratic left hand not noticing what the bureaucratic right hand is doing.” 67 Interpreter Releases 1222 (Oct. 29, 1990). The article further quotes an INS spokesperson as indicating that new regulations would be issued to correct the oversight. Id.
147 Guo Chun Di, 842 F. Supp. at 864.
148 Id.
150 Guo Chun Di, 842 F. Supp. at 864.
151 Id.
to review two cases of individuals seeking asylum based on the PRC's population control measures in order to resolve the conflict between the 1990 Executive Order and Chang. After several months, the Attorney General concluded, without explanation, that no determination was required concerning the conflict between the 1990 Executive Order and Matter of Chang and rescinded her grant of review.

D. Judicial Deference

In an appeal from a decision of the BIA, the Board’s conclusions of law are reviewable de novo. The Board’s factual findings, however, are given considerable deference. A finding of fact will not be disturbed simply because the reviewing court differs with the Board’s evaluation of the facts; the court will uphold the Attorney General’s determination whether to grant asylum unless the petitioner shows that the action was arbitrary, capricious, or an abuse of discretion.

Additionally, in Chevron v. Natural Resources Defense Council, Inc., the Supreme Court held that an agency’s interpretation of its statute

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152 See Att’y Gen. Order No. 1756-93 (June 29, 1993). The Attorney General has the authority to perform such a review pursuant to 8 C.F.R. § 3.1(h)(1)(ii) (1993).

153 The Attorney General’s statement follows:

IN EXCLUSION PROCEEDINGS Pursuant to 8 C.F.R. § 3.1(h)(1)(ii), the Board of Immigration Appeals (“BIA”) referred, for my review, its decisions in these two cases in which nationals of the People’s Republic of China claimed eligibility for asylum and withholding of deportation under the Immigration and Nationality Act (“INA”), 8 U.S.C. §§ 1101(a)(42)(A), 1255a(h). In both cases, the BIA found that the applicant’s evidence was not credible, and that the applicants’ accounts, if true, were inadequate to establish eligibility for asylum and withholding of deportation under the interpretation of the INA that the BIA adopted in Matter of Chang, Int. Dec. 3107, 1989 WL 247513 (B.I.A. May 12, 1989). The BIA also noted that Executive Order No. 12,711, 55 Fed. Reg. 13,897 (1990), which sets forth standards for eligibility for asylum and withholding of deportation of aliens fleeing coercive abortion and sterilization policies, is in conflict with Chang. Matter of Chu, A 71 824 281 (B.I.A. June 7, 1993) at 6-14; Matter of Tsun, A 71 824 320 (B.I.A. June 7,1993) at 7-11. In referring these cases for my review, the BIA requested that I resolve the conflict. I granted the BIA’s request for review. Attorney General Order No. 1756-93 (June 29, 1993). After review, it is apparent that the BIA’s determination in these cases do [sic] not require a determination that one or the other of these standards is lawful and binding. Because such a determination is not required, the Order granting review is rescinded.


155 See 8 U.S.C. § 1105a(a)(4) (1988) (stating that findings of fact are conclusive “if supported by reasonable, substantial, and probative evidence on the record considered as a whole”). The Supreme Court, in INS v. Elias-Zacarias, 112 S. Ct. 812 (1992), stated that a petitioner seeking reversal of a BIA factual determination must show “that the evidence he presented was so compelling that no reasonable fact finder could fail to find the requisite fear of persecution.” Id. at 815.

156 Castillo-Rodriguez v. INS, 992 F.2d 181, 184 (5th Cir. 1991).

or regulation is entitled to considerable judicial deference.\textsuperscript{158} The Court established a two-part analysis for reviewing an agency's construction of the statute it administers:

First . . . is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . . Rather, . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.\textsuperscript{159}

The Court explained that "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."\textsuperscript{160} Thus the Court held that an agency's construction is to be given controlling weight if it is reasonable and not "arbitrary, capricious, or manifestly contrary to the statute."\textsuperscript{161}

Since the Supreme Court's decision in \textit{Chevron}, courts have recognized certain limits to the notion of judicial deference to agency interpretations.\textsuperscript{162} One such exception states that deference is less appropriate where an agency's interpretation of its own statutes and regulations has been inconsistent.\textsuperscript{163} In \textit{INS v. Cardoza-Fonseca},\textsuperscript{164} the

\textsuperscript{158} Id. at 842-43.
\textsuperscript{159} Id. (emphasis added). "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." Id. at 843 n.11.
\textsuperscript{160} Id. at 843 (alteration in original) (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).
\textsuperscript{161} Id. at 844 ("A court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").
\textsuperscript{162} A comprehensive review of the treatment that the \textit{Chevron} principle has received by subsequent courts is beyond the scope of this note. For such analysis see Peter Schuck & E. Donald Elliot, \textit{To the Chevron Station: An Empirical Study of Federal Administrative Law}, 1990 DUKE L. J. 984 (1990); Thomas Merrill, \textit{Judicial Deference to Executive Precedent}, 101 YALE L.J. 969 (1992); Cass Sunstein, \textit{Law and Administration After Chevron}, 90 COLUM. L. REV. 2071 (1990).
\textsuperscript{163} Guo Chun Di, 842 F. Supp. at 866 (citing Ehlert v. United States, 402 U.S. 99, 105 (1990)).
\textsuperscript{164} The court in \textit{Chevron} explicitly noted two situations in which judicial deference to an agency's construction would be inappropriate. First, deference is not required in the absence of administrative interpretation. \textit{Chevron}, 467 U.S. at 843 & n.9; see \textit{Guo Chun Di}, 842 F. Supp. at 866 (Only when an agency has endeavored to interpret its rules or regulations "is there any validity to the assumption that underlies judicial deference, namely a congressional intent to delegate certain policy choices to expert independent agencies or to the Executive Branch." (citing \textit{Chevron}, 467 U.S. at 844)). The second instance in which \textit{Chevron} indicated deference was inappropriate is where an administrative construction is contrary to clear congressional intent. \textit{Chevron}, 467 U.S. at 843 & n.9; \textit{second} Bureau of Alcohol, Tobacco, and Firearms v. Federal Labor Relations Auth., 464 U.S. 89, 98 n.8 (1983); International Bd. of Teamsters v. Daniels, 499 U.S. 551, 566 n.29 (1990) ("Deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history."). The Court in \textit{Chevron} did not indicate that these were the only situations in which deference was not warranted.
\textsuperscript{165} Guo Chun Di, 842 F. Supp. at 866 (citing Ehlert v. United States, 402 U.S. 99, 105 (1990)).
Supreme Court overruled the BIA's interpretation of the burden of proof required by the Refugee Act of 1980 in order for aliens seeking asylum to show that they have a "well-founded fear of persecution."\(^\text{165}\)

Although the holding in *Cardoza-Fonseca* was based on the Court's determination that the agency's interpretation conflicted with the plain language in the statute,\(^\text{166}\) the decision also contained dicta regarding the application of judicial deference in light of inconsistent agency interpretation.\(^\text{167}\) The Court stated that "[a]n additional reason for rejecting INS's request for heightened deference" to the agency's interpretation of the statute was the "inconsistency of the positions the BIA has taken through the years."\(^\text{168}\) The Court noted that "[a]n 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."\(^\text{169}\)

\(^{164}\) 480 U.S. 421 (1987). The issue presented in *Cardoza-Fonseca* was whether the "well-founded fear of persecution" standard that must be met by an alien seeking asylum, 8 U.S.C. § 1101(a)(42)(A) (1988), and the "clear probability of persecution" standard required to be met by an applicant for withholding of deportation, 8 U.S.C. § 1253(h) (1988) (standard of eligibility for withholding of deportation), were functional equivalents. *Cardoza-Fonseca* 480 U.S. at 430.

Asylum and withholding of deportation are two distinct remedies under the INA. See *Cardoza-Fonseca*, 480 U.S. at 429 n.6. (describing the differences between asylum and withholding of deportation).

\(^{165}\) Id. at 448-49 (holding that the Immigration Judge and the BIA were incorrect in holding that the two standards — "well-founded fear" and "clear probability" — are identical). Id. at 448.

\(^{166}\) Id. at 449 ("Our analysis of the plain language of the Act . . . lead[s] to the inexorable conclusion that to show a 'well-founded fear of persecution,' an alien need not prove that it is more likely than not that he or she will be persecuted in his or her home country.").

\(^{167}\) Id. at 446 n.30.

\(^{168}\) Id. at 447 n.30 (noting that the BIA and the INS had answered the question as to the relationship between the two standards in at least three different ways between 1965 and 1985).

\(^{169}\) Id. at 446 n.30 (quoting Watt v. Alaska, 451 U.S. 259, 273 (1981); and citing General Elec. Co. v. Gilbert, 429 U.S. 125, 143 (1976) ("We have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency."); accord NLRB v. United Food and Commercial Workers, 484 U.S. 112, 124 n.20 (1987) ("We consider the consistency with which an agency interpretation has been applied . . ."); Southeastern Community College v. Davis, 442 U.S. 397, 411-12 n.11 (1979) ("[T]he assertion by HEW of the authority to promulgate any regulations . . . has been neither consistent nor longstanding . . . [T]his fact substantially diminishes the deference to be given to HEW's present interpretation of the statute."); Skidmore v. Swift and Co., 323 U.S. 134, 140 (1944) ("[T]he weight of such [an administrative] judgement in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and prior pronouncements, and all those factors which give it power to persuade, if lacking power to control."); Wilcox v. Ives 864 F.2d 915, 924-25 (1st Cir. 1988); United Transp. Union v. Dole, 797 F.2d 823, 829 (10th Cir. 1986).
In *Wilcox v. Ives* \(^{170}\) the Secretary of Health and Human Services (HHS) published an initial regulation regarding monthly child support payments to AFDC families. \(^{171}\) Nine days later the Secretary proposed a second, incongruous version of the same rule. \(^{172}\) In a *Federal Register* statement a year later, the Secretary reiterated the position outlined in the second rule but ultimately withdrew the proposed amendment in response to perceived difficulties that would result from implementation. \(^{173}\) The Secretary then "flip flopped" and revised the rule two more times. \(^{174}\) The First Circuit observed that "[w]hat is revealed by the history of the Secretary's regulations . . . since the amended statute was passed in 1984 is a series of self-contradictory rules." \(^{175}\) The court then held that deference was not appropriate when the agency's interpretation had "radically and repeatedly alternated between polar extremes . . . ." \(^{176}\)

However, the inconsistency exception to judicial deference has not been universally applied. The district court in *Chen v. Slattery* \(^{177}\) held that "an inconsistency of policy is not, by itself, sufficient to require less deference to an agency's determination." \(^{178}\) Rather, according to the court, "[a]n interpretation will be rejected only where it is unreasonable and at odds with the plain meaning of the statute." \(^{179}\) The court relied upon the Second Circuit's decision in *Himes v. Shalala*, \(^{180}\) which in turn relied upon the Supreme Court's decision in *Rust v. Sullivan*, \(^{181}\) for the proposition that an agency's interpretation is entitled to deference despite representing "a sharp break with prior

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\(^{170}\) 864 F.2d 915 (1st Cir. 1988). The issue addressed by the court in *Wilcox was whether to defer to the Department of Health and Human Services* (HHS) interpretation of 42 U.S.C. § 657(b)(1), the federal statute regarding the distribution of "pass-throughs" of portions of child support payments received by a state to families receiving Aid To Families With Dependent Children (AFDC). *Id.* at 916. The dispute between the AFDC recipients and HHS arose from situations in which no child support payments were received one month and a multiple payment was received in another month. *Id.* The Secretary of HHS had promulgated a regulation that provided that the AFDC family should receive only a single pass-through in such situations. 45 C.F.R. § 302.51 (1988).

\(^{171}\) *Wilcox*, 864 F.2d at 922 (citing 45 C.F.R. § 302.51 (1984)).

\(^{172}\) *Id.* (citing 49 Fed. Reg. 36,797 (1984)).

\(^{173}\) *Id.* (citing 50 Fed. Reg. 19,634 (1985)).

\(^{174}\) *Id.* at 922-23 (citing 50 Fed. Reg. 19,648 (1985) and 53 Fed. Reg. 21,642 (1988)).

\(^{175}\) *Id.*

\(^{176}\) *Id.* at 925.

\(^{177}\) 862 F. Supp. 814 (E.D.N.Y. 1994).


\(^{180}\) 999 F.2d 684 (2d Cir. 1993). The issue presented in *Himes was whether an interpretation by the Secretary of HHS setting eligibility standards for Medicaid recipients deserved less deference because it represented a shift in position. *Id.* at 690. The circuit court held that the Secretary's shift of position in that case was "not enough to cause this court to ignore the deference normally due the Secretary . . . because it [was] a reasonable attempt to interpret and apply all sections of the statute, including [a section] added in 1988 . . . ." *Id.*

\(^{181}\) 500 U.S. 173 (1991)
interpretations.”

Rust v. Sullivan concerned a facial challenge to HHS regulations that limited the ability of Title X fund recipients to engage in abortion related activities. The petitioners in Rust argued, inter alia, that the regulations were entitled to little or no deference because they “reverse[d] a longstanding agency policy that permitted nondirective counseling and referral for abortion,” and thus represented a “sharp break” from the Secretary’s prior construction of the statute.

The Court stated that it had previously rejected the argument that “an agency’s interpretation ‘is not entitled to deference because it represents a sharp break with prior interpretations’ of the statute in question.” The Court found that “the Secretary amply justified his change of interpretation with a ‘reasoned analysis.’” The Court found that the Secretary had explained that the regulations were in response to reports that the prior policy had failed to properly implement the statute and that it was necessary to provide “‘clear and operational guidance to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning.’” The Court also found that the Secretary made the determination “that the new regulations [were] more in keeping with the original intent of the statute, [were] justified by client experience under the prior policy, and . . . [were] supported by a shift in attitude against the ‘elimination of unborn children by abortion.’” The Court held that “these justifications [were] sufficient to support the Secretary’s revised approach.”

E. INS v. Elias-Zacarias

Since Chang, federal courts, with the exception of Guo Chun Di, have considered the propriety of the Board’s decision in light of traditional judicial deference to an agency’s interpretation of its own stat-

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183 Id. at 177-78.
184 Id. at 186 (citing Brief for Petitioners at 20, id. (No. 89-1392).
185 Id.
186 Id. (citing Chevron, 467 U.S. at 862-64 (holding that a revised agency interpretation deserves deference because “[a]n initial agency interpretation is not instantly carved in stone” and “the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis”)); see also Motor Vehicle Mfrs. Ass’n of United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (stating that an agency is not required to “establish rules of conduct to last forever,” (quoting American Trucking Ass’n’s, Inc. v. Atchinson, T. & S.F.R. Co., 387 U.S. 397, 416 (1967)), but rather “must be given ample latitude to ‘adapt [its] rules and policies to the demands of changing circumstances.’” (quoting Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968))).
187 Rust, 500 U.S. at 187 (quoting Motor Vehicle Mfrs., 463 U.S. at 42.)
188 Id. (citing 53 Fed.Reg. 2923-2924 (1988)).
189 Id.
190 Id.
ute. Thus, these courts have upheld the Board’s policy absent a showing that it is an unreasonable interpretation. All of the courts, again, with the exception of the court in Guo Chun Di, have determined that the Board’s decision in Chang was not unreasonable. The Supreme Court’s decision in INS v. Elias-Zacarias is often cited as support for this determination.

In Elias-Zacarias, the Supreme Court denied asylum eligibility for a Guatemalan native who had fled his country because of a guerrilla organization’s attempt to conscript him into military service. The Court understood the ordinary meaning of the phrase “persecution on account of . . . political opinion” in Section 1101(a)(42)(A) to be limited to “persecution on account of the victim’s political opinion, not the persecutor’s.” “Thus,” the Court reasoned, “the mere existence of a generalized ‘political’ motive underlying the guerrillas’ forced recruitment [was] inadequate to establish . . . the proposition that Elias-Zacarias fear[ed] persecution on account of political opinion,” as Section 1101(a)(42)(A) required. Rather, the Court required that “since the statute makes motive critical,” aliens seeking asylum must prove that they were persecuted for their political opinion, rather than for some other reason not enumerated by the Act.

The principle of Elias-Zacarias is that when determining whether an alien fears persecution on account of his or her political opinion, the Act requires courts to focus on the motive of the persecutor and

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191 Wang v. Slattery, No. 94 CIV 9489 (CSH) 1995 WL 46392, at *10 n.8 (S.D.N.Y. 1995) (stating that because the court had concluded that the Board’s decision in Chang was entitled to deference, “it [was] not for [the court] to determine de novo whether the desire to have more children manifested by the act of procreation constitutes a political opinion”); See supra notes 154-90 and accompanying text.


195 Id. at 482. By analogy the court notes that “[i]f a Nazi regime persecutes Jews, it is not, within the ordinary meaning of language, engaging in persecution on account of political opinion . . . .” Id.

196 Id. See Osorio v. INS, 18 F.3d 1017, 1029 (2d Cir. 1994) (interpreting Elias-Zacarias).

The court in Osorio interpreted this requirement to mean that “the persecutor’s political motive is insufficient to infer the relevant causal connection, persecution on account of the victim’s political opinion.” Id.

197 Elias-Zacarias, 502 U.S. at 480. The Court noted that applicants need not necessarily provide direct proof of their persecutors’ motives, but that they must provide some evidence of it, either direct or circumstantial. Id.

198 Id. at 483 & n.2.; Osorio, 18 F.3d at 102. The Court in Elias-Zacarias determined that Elias-Zacarias would be persecuted for his refusal to fight and not for his political opinion. Elias-Zacarias, 502 U.S. at 483.
the belief of the victim. The Board in Chang asserted that the PRC's population policy had an objectively legitimate and nonpolitical goal of controlling population growth. The Board also implicitly held that opposition to the PRC's policy manifested by a desire to have more children was not a political opinion. Courts have thus concluded that the Board's interpretation is consistent with the statute because it focuses upon the political belief of the victim and the motivation of the alleged persecutor.

IV. Analysis

The court's conclusion in Guo Chun Di that judicial deference to the Board's decision in Chang was inappropriate conforms with the law on judicial deference in response to administrative inconsistency. Language in the Supreme Court's decision in INS v. Cardoza-Fonseca supports the determination that judicial deference to a decision by the BIA is unwarranted where the decision represents one of many conflicting agency pronouncements on the issue. However, the inconsistencies in agency interpretation relied upon by the court in Guo Chun Di v. Carroll are distinguishable in one important respect from those present in Cardoza-Fonseca. In Guo Chun Di, the government correctly pointed out that the BIA, "which is the highest administrative tribunal empowered to conduct deportation proceedings, has acted consistently and designated Chang as the precedent applicable to all cases involving asylum claims on opposition to a country's coercive family planning policies." The court in Guo Chun Di relied upon the contradictory pronouncements of the several Attorneys General, the President and INS in order to show agency inconsistency on the is-

201 See Elias-Zacarias, 502 U.S. at 482-83. Elias-Zacarias does not require that a victim necessarily hold the belief for which he faces persecution if he can adequately prove that his persecutors have imputed to him such political opinion. Id. at 482. See also, Canas-Segovia v. INS, 970 F.2d 599, 601-02 (9th Cir. 1992) ("Imputed political opinion is still a valid basis for relief after Elias-Zacarias."); Desir v. Ichert, 840 F.2d 729, 729 (9th Cir. 1988) ("[W]hether the political opinion is actually held or implied makes little difference where the alien's life is equally at risk."); Hernandez-Ortiz v. INS, 777 F.2d 509, 517 (9th Cir. 1985) ("[I]t is irrelevant whether a victim actually possesses any of these opinions as long as the government believes that he does."); Dong v. Slattery, 870 F. Supp. 53, 58 (S.D.N.Y. 1994).


204 See, e.g., Wang, 1995 WL 46392, at *4-5.


206 See INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987); supra notes 164-69 and accompanying text.

sue. In Cardoza-Fonseca, however, the BIA itself had issued contradictory rulings on the question of the relationship between the standards of proof necessary for refugee status and for withholding of deportation.

The court in Guo Chun Di v. Carroll finds more direct support for its action by analogizing the administrative inconsistency in the case to the inconsistency in Wilcox v. Ives. Similar to the situation presented in Guo Chun Di, the administrative inconsistencies at issue in Wilcox were the conflicting pronouncements of the executive officers directly responsible for promulgating regulations to enforce the statute whose interpretation was in question. In addition, the court in Wilcox did not consider it relevant that one of those conflicting pronouncements was contained in a proposed amendment to the regulation that was subsequently withdrawn prior to publication.

Of the numerous federal district court decisions contemporaneous with Guo Chun Di v. Carroll that address the issue of whether Chang is entitled to judicialdeference, the court in Guo Chun Di is the only one that has ruled that it is not. For the most part, however, these courts have concentrated solely on the question of whether any of the administrative pronouncements that are contrary to Chang ever had legal effect. As such, these decisions are inapposite to Guo Chun Di's

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208 Id. at 866-67 (listing the various pronouncements). See also supra notes 119-53 and accompanying text.
209 Cardoza-Fonseca, 480 U.S. at 447 n.30. However, in the course of discussing the agency's inconsistency, the Court noted that at one time the INS was instructing its officials to apply a standard that was at odds with BIA precedent. Id. (citing Matter of Dunar, 14 I. & N. Dec. 310 (BIA 1973) and DEPT. OF JUSTICE, INS OPERATING INSTRUCTIONS REGULATIONS TM 100, § 208.4, at 766.9 (Nov. 11, 1981)); cf supra notes 142-45 (discussing INS's position that refugee status was appropriate for aliens fleeing PRC's coercive population control practices despite decision in Chang).
210 Guo Chun Di, 842 F. Supp. at 870 n.24 (citing Wilcox v. Ives, 864 F.2d 915 (1st Cir. 1988)).
211 Supra notes 170-76 and accompanying text.
212 See Wilcox, 864 F.2d at 922-23 (discussing the conflicting regulations but making no differentiation between proposed and actual regulations).

Indeed, two of Judge Ellis' fellow Eastern District of Virginia Judges have ruled the other way since Guo Chun Di v. Carroll was handed down. See Li Zhi Guan v. Carroll, Civ. A No. 94-410-A, 13 (E.D. Va. May 13, 1994) ("I reach the same issue [as in Guo Chun Di] and, with respect, I come to a different conclusion.") (bench decision); Chen v. Carroll, 866 F. Supp. 283, 285 (E.D. Va. 1994) (Brinkema, J.).

But see Xin-Chang v. Slattery, 859 F. Supp. 708, 712-13 (S.D.N.Y. 1994) (holding that January 1993 Rule became effective despite being unpublished and that BIA was required to apply the standard mandated thereby).

214 See, e.g., Wang, 1995 WL 46332, at *3-7 (holding that the January 1990 Interim Rule, 1990 Executive Order and the January 1993 Rule did not invalidate Chang); Gao, 869 F. Supp. at 1480 ("While legislative and executive events subsequent to Chang have shaken its foundation they have not brought the decision down."); Si, 864 F. Supp. at 401-04 (holding that the
ruling that the culmination of these inconsistent pronouncements, rather than the actual legal effect of any particular one,215 creates the "cacophony of administrative voices" that makes judicial deference inappropriate.216

Where the specific issue of diminished judicial deference due to administrative inconsistency has been addressed by these courts, it has generally been dismissed with little analysis.217 The district court in Wang v. Slattery noted that "[w]hile it is readily apparent that various arms from time to time made inconsistent pronouncements concerning the policy to be followed, the only consistent policy which has in fact been applied is the Chang decision . . . ."218 This statement by the court cannot be reconciled with the history of administrative policy regarding the refugee status of PRC nationals seeking asylum due to coercive family planning practices. First, three Attorneys General have issued regulations that were directly contrary to the Board’s decision in Chang.219 Second, the Board’s refusal in Chang to follow the guidelines issued by Attorney General Meese, because "the[ ] guidelines . . . were directed to the Immigration and Naturalization Service, rather than the immigration judges and this Board,"220 indicates that the BIA and INS, though both departments within the DOJ, applied different standards.221 Third, the decision in Chang was apparently not the policy of the agency during the seven months that the January 1990 Interim Rule was in effect.222 Finally, while the BIA may have consistently applied the standard in Chang, immigration judges have routinely applied the policy announced in the 1990 Executive Order to grant asylum to refugees fleeing coercive population control practices

1990 Executive Order and January 1993 Rule did not invalidate Chang); Chen v. Carroll, 866 F. Supp. at 286-288 ("Even without giving the appropriate deference to the Board’s determinations, this Court would find that Chang is valid legal authority."); Chen v. Slattery, 862 F. Supp. at 821-23 (holding that neither the January 1990 Interim Rule, the 1990 Executive Order, nor January 1993 Rule overruled Chang).

215 Guo Chun Di v. Carroll, 842 F. Supp. 858, 866-70 (E.D. Va. 1994); see also Wilcox, 864 F.2d at 922-23. The court in Guo Chun Di conceded that "the status and legal effect of the [January] 1993 Rule remains unclear." Guo Chun Di, 842 F. Supp. at 868. However, the court did not rely upon the validity of the January 1993 Rule in reaching its conclusion regarding deference. Id. at 868 n.16 ("In the final analysis, . . . [the] continuing validity of the [January] 1993 Rule need not be resolved in order to decide the case at bar."). Likewise, the court conceded that the January Interim Rule "likely did not erase or overrule Chang . . . ." Id. at 869.

216 See Guo Chun Di, 842 F. Supp. at 870.

217 See Wang, 1995 WL 46332, at *9 (concluding BIA’s decision in Chang is reasonable); Dong, 870 F. Supp. at 58 (brief discussion downplaying inconsistencies); Si, 869 F. Supp. at 405 (Si has not shown Chang to be overruled); Chen v. Carroll, 866 F. Supp. at 286 n.3 (discussing inconsistencies in a footnote).

218 Wang, 1995 WL 46332, at *9; accord Chen v. Carroll, 866 F. Supp. at 286 n.3.

219 See supra notes 119-53 and accompanying text.


221 Guo Chun Di, 842 F. Supp. at 870 n.21; see also supra notes 142-45 (discussing the position of INS regarding validity of January 1990 Interim Rule).

222 See supra notes 137-41.
in the PRC. The court in Dong v. Slattery asserted that “all that the various pronouncements cited in Guo Chun Di suggest is that the legislative and executive branches studiously abstained from overruling Chang.” This argument ignores the period between January 1990 and July 1990 when the BIA’s decision in Chang was presumably overturned by then Attorney General Thornburgh’s January 1990 Interim Rule. Furthermore, the 1990 Executive Order, despite the fact that it did not give rise to a private right of action, nonetheless explicitly evinced the executive branch’s determination to overrule Chang.

The district court in Chen v. Slattery incorrectly interpreted the holdings in Himes v. Shalala and Rust v. Sullivan to require deference to the BIA’s decision in Chang. The facts of Himes and Rust are distinguishable from those presented in Chen v. Slattery, and the similar refugee cases. In Himes, the court found that “because [of] the circumstances surrounding” the Secretary of HHS’s change of position, namely, the issuance of a policy ruling by the Federal Health Care Financing Administration and New York State’s subsequent amendment to its eligibility rules, the Secretary had provided “sufficient justification” for the current policy. Similarly, in Rust the Court found that the Secretary’s change in position was occasioned by a determination that the previous policy had failed to enforce the statute. The Court in Rust found it determinative that the Secretary had “amply justified his change of interpretation with a ‘reasoned analysis.’”

Himes and Rust characterize the challenged inconsistencies as shifts that were justified responses in light of well-reasoned analyses of changed circumstances. This characterization does not describe the inconsistencies in administrative policy regarding aliens seeking asy-


Dong v. Slattery, 870 F. Supp. 53, 59 (S.D.N.Y. 1994). The court in Dong stated that this conclusion was “all the more compelling when one considers that the Attorney General has the express authority to formally review any BIA decision . . . .” Id. (citing 8 C.F.R. § 3.1(h)(1)(i) (1994)).

See supra notes 137-41 and accompanying text (discussing the January 1990 Interim Rule).

See supra note 180.

See supra notes 181-90 and accompanying text.

Himes v. Shalala, 999 F.2d 684, 690 (2d Cir. 1993).


Rust, 500 U.S. at 186-87; Himes, 999 F.2d at 690.
lum in response to the PRC’s coercive family planning practices. To the contrary, there is a conspicuous lack of justification for the inconsistencies. The Board in *Chang* did not justify its disregard of Attorney General Meese’s policy guidelines except to say that it was not bound to adhere to them.\(^{234}\) The January 1990 Interim Rule was superseded and ostensibly repealed by the July 1990 Rule without so much as a reference.\(^{235}\) The January 1993 Rule was removed from the office of the Federal Register three days prior to publication, again without any stated policy justification.\(^{236}\) And finally, Attorney General Reno expressly declined to either resolve or justify the continuing inconsistency that exists between the 1990 Executive Order and the Board’s decision in *Chang*.\(^{237}\) Therefore, contrary to the court’s decision in *Chen v. Slattery*, the holdings in *Himes* and *Rust* compel the conclusion that judicial deference to the BIA’s decision in *Chang* is not merited in the absence of a well-reasoned justification for the administrative inconsistency presented by the regulatory history.

The BIA’s ruling in *Matter of Chang*, deprived of the trappings of judicial deference, is revealed by the court in *Guo Chun Di* to be disingenuous to the plain meaning of the Refugee Act.\(^{238}\) The Board’s reasoning in *Matter of Chang* was incomplete. It concluded that the abrogation of an alien’s fundamental right was not persecution because disregard of human rights, per se, was not one of the enumerated reasons under the Act.\(^{239}\) What the Board failed to adequately address was whether opposition to a country’s policy of infringing the fundamental right to procreate was a form of political opinion. If such opposition constituted political opinion, then an alien’s persecution for manifesting that opinion should have qualified him for refugee status.\(^{240}\)

The Board did off-handedly remark that aliens who show that “they are opposed to the policy [of coercive population control], but were subjected to it anyway, have [not] demonstrated that they are being ‘punished’ for their opinions.”\(^{241}\) Rather, according to the Board, the alien would have to show “evidence of disparate, more severe treatment for those who publicly oppose the policy.”\(^{242}\)

This spurious requirement, however, was not supported by any


\(^{237}\) See Att’y Gen. Order No. 1756-93 (June 29, 1993).

\(^{238}\) *Guo Chun Di*, 842 F. Supp. at 871-73.


\(^{240}\) See *Guo Chun Di*, 842 F. Supp. at 871-73.

\(^{241}\) *Chang*, Int. Dec. 3107.

\(^{242}\) *Id.; accord Matter of G*, Int. Dec. 3215 (BIA 1998) (denying asylum eligibility because applicant failed to show how he had been treated any more severely than others who had violated the population policy).
language in the Act.\textsuperscript{243} Nothing in the Act precludes asylum to an alien persecuted because of his political opposition to a governmental policy that was uniformly applied.\textsuperscript{244} In fact, this requirement was disingenuous to the purpose of the Act. As the court in \textit{Guo Chun Di} pointed out,

the uniformly applied policy of most totalitarian governments (e.g. Cuba and the former Soviet Union and its satellites) is to persecute all who disagree with the government's legitimacy, or who seek to replace the government by democratic means. Yet citizens in this category have always been beneficiaries of asylum under Section 1101(a)(42)(A).\textsuperscript{245}

Thus the Board's decision in \textit{Chang} failed to provide a reasonable justification for why an alien who has been persecuted for his opposition to his country's policy of forced sterilization does not qualify as a refugee eligible for asylum under the Act.

Furthermore, courts' subsequent reliance on the principle of \textit{Elias-Zacarias} to validate \textit{Chang} has been misguided. This conclusion arises from a misconception of the PRC's population control policy.\textsuperscript{246} These courts have ignored the persecutor's view of birth activity that not only gives the background necessary to understand the dispute leading to the persecution, but also provides evidence of the victim's political beliefs.\textsuperscript{247}

In light of the political nature of the PRC's attitude toward population control,\textsuperscript{248} those who manifest their opposition to coercive family planning measures face persecution on account of their political beliefs. In the PRC, a couple's decision to have more than one child is viewed as a direct affront to the legitimacy of the power of that government over its citizenry.\textsuperscript{249} Not only does the government view such opposition as politically subversive, but efforts to enforce the policy in the face of opposition are considered necessary to the maintenance of totalitarian rule.\textsuperscript{250} The expression of the desire to have more than one child despite the potential repercussions is an act of defiance that strikes at the heart of a fundamental party policy and is thus necessarily an expression of political opinion.\textsuperscript{251} Refugee law does not require

\begin{itemize}
  \item \textsuperscript{243} \textit{Guo Chun Di}, 842 F. Supp. at 871 n.29.
  \item \textsuperscript{244} Id.
  \item \textsuperscript{245} Id.
  \item \textsuperscript{246} \textit{See supra} notes 93-108 and accompanying text.
  \item \textsuperscript{247} \textit{See Osorio v. INS}, 18 F.3d 1017, 1030 (2nd Cir. 1994) (criticizing the BIA for "ignoring the underlying political context of the dispute" in the Board's misapplication of the \textit{Elias-Zacarias} motive principle).
  \item \textsuperscript{248} \textit{See supra} notes 93-108 and accompanying text.
  \item \textsuperscript{249} \textit{See supra} note 104.
  \item \textsuperscript{250} "We must expose and deal resolute blows at class enemies who sabotage planned parenthood." Foreign Broadcast Informational Serv. Daily Rep. - P.R.C., Vol I, 152, Aug. 7, 1978, at G4.
  \item \textsuperscript{251} \textit{See supra} notes 97-98 and accompanying text; \textit{see also} 140 CONG. REC. S517-02 (daily ed. Feb. 1, 1994) (statement of Sen. Helms) ("There is an extremely strong case that people facing persecution for resistance to the coercive population control programs are refugees
that victims of persecution be politicians, only that they have been persecuted for their political beliefs.\textsuperscript{252} It seems clear that persons fleeing persecution resulting from their opposition to the PRC’s coercive family planning measures have met the \textit{Elias-Zacarias} motive requirement for asylum on “political opinion” grounds.

Unlike the applicant seeking asylum in \textit{Chang}, Mr. Guo was not challenging the mere implementation of the PRC’s ‘one couple, one child’ policy. Rather, “he [was] contending that his opposition to the policy . . . led to a situation where the government directly persecuted him and his family as a result of his opposition to the policy.”\textsuperscript{253} The court’s decision in \textit{Guo Chun Di} convincingly demonstrates that a faithful interpretation of the Act leads to the conclusion that an alien fleeing such persecution qualifies for refugee status.

\textbf{V. Conclusion}

The District Court’s decision in \textit{Guo Chun Di v. Carroll} is not binding precedent for future decisions by the BIA. To this day, the BIA continues to adhere to its decision in \textit{Matter of Chang}.\textsuperscript{254} Since \textit{Guo Chun Di} was decided in January 1994, numerous other challenges to the Board’s reliance upon \textit{Chang} have been brought in both Federal District Court and the United States Court of Appeals in various circuits.\textsuperscript{255} Almost without exception, these challenges have failed.\textsuperscript{256}

Nonetheless, the decision in \textit{Guo Chun Di} has far-reaching implications. The decision provides a sensible alternative analysis of the definition of “refugee,” enabling the Board to overturn its decision in \textit{Chang}.\textsuperscript{257} The court’s decision in \textit{Guo Chun Di} exposes the Board’s imprudent determination that a Chinese national’s choice to have more than one child is not political. The court correctly characterizes the fundamental right to procreate and the expression of one’s opinions regarding that right as inherently political. This conclusion seems within the definition of the act. The PRC regime treats these people not as ordinary lawbreakers but as its political and ideological enemies.”\textsuperscript{252}

\textsuperscript{253} \textit{Id.}, \textit{osorio}, 18 F.3d at 1030.


\textsuperscript{255} \textit{See supra note 202 and the cases cited therein.}

\textsuperscript{256} \textit{See supra note 202 and the cases cited therein. But cf. Xin-Chang v. Slattery, 859 F. Supp. 708 (S.D.N.Y. 1994) (granting habeas relief and holding that the Board should have applied the unpublished January 1993 Rule interpreting “refugee”).}

\textsuperscript{257} There is some indication that immigration judges have already taken the lead in this respect. According to a report in the New York Times in May of 1994, Immigration Judge Alan Vomacka granted three Chinese men, each the father of two children in China, relief from deportation due to their fear of persecution resulting from the PRC’s population control policy. Robert McFadden, \textit{Three Smuggled Refugees Are Granted Asylum}, \textit{N.Y. Times}, May 29, 1994, at A27. The three men were believed to be the first from the \textit{Golden Venture} to win asylum from an immigration judge on the grounds of China’s family planning measures. \textit{Id. See supra note 23 and accompanying text}.
obvious considering the political polarization that has occurred over abortion in American society. When considered in light of the PRC's coercive population control measures, however, the conclusion seems inescapable. The BIA and immigration judges should recognize this reality when evaluating asylum claims by Chinese nationals and acknowledge that persons are persecuted under the PRC's policy because of their political opinion and thus are eligible for consideration as refugees under the Act.

Failure by the BIA to follow the lead of the court in *Guo Chun Di* may convince Congress to act legislatively to correct Board policy that is contrary to the intent of the Refugee Act. Adoption of this position would not equate to wholesale asylum for all Chinese nationals claiming persecution resulting from the PRC's coercive population control program. Aliens seeking asylum on this basis would still be required to prove that: (1) they in fact had been persecuted or possessed a well-founded fear of persecution; (2) they made an overt manifestation of their opposition to coercive family planning; and (3) the persecution was because of this opposition and not some other reason not protected by the Act. Furthermore, after a determination that an applicant has made the requisite showing in order to qualify as a refugee under the Act, the Attorney General still must decide as a matter of discretion whether or not to grant asylum. The adoption of the definition of refugee expressed in *Guo Chun Di* would not open the proverbial floodgates to Chinese applicants who claim a fear of persecution as a result of the PRC's coercive population control practices. Rather, recognition that these are legitimate political refugees would simply allow them to be considered for asylum on terms equal to those imposed upon other refugees that arrive on our nation's shores.

In addition, *Guo Chun Di* is an example of a well-reasoned decision that calls into question the assumptions and conclusions in the multi-

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258 An attempt was made to do just that during the 1994 session of Congress. Senator Jesse Helms (R-NC) introduced an amendment to the Foreign Relations Authorization Act For The Fiscal Years 1994 and 1995, S. 1281, 103d Cong., 2d Sess. (1994), the purpose of which was to "provide relief from exclusion and/or deportation . . . to persons who can show that they have a well founded fear of persecution for refusal to submit to forced abortion or sterilization under the coercive population control program" of the PRC. 140 CONG. REC. S517 (daily ed. Feb. 1, 1994). The bill along with the amendment passed the Senate; however the corresponding House bill contained no corollary amendment and the Conference Committee adopted the House perspective. H.R. CONF. REP. No. 482, 103d Cong., 2d Sess. 559 (1994).


260 8 U.S.C. § 1158(a) (1988). As former INS General Counsel Joseph Rees points out "[i]t is also important to remember that several thousand applications during a year typically result in only a few hundred actual grants of asylum during the year." Rees Letter, supra note 223.

261 The reported 6,500 Chinese nationals who sought asylum on this basis in 1993 was "hardly the 'floodgate' that opponents of refugee status were predicting earlier in the year. It is a tiny fraction of the many thousands of asylum applications received during the year . . . ." Rees Letter, supra note 223.
tude of contrary contemporary decisions. The court's analysis withstands scrutiny and provides a legitimate means for reviewing courts to set aside traditional judicial deference to the Board's interpretation of the Refugee Act and to examine the continued legitimacy of Chang. The legislative history related in Guo Chun Di reveals the politicization that can occur when Congress vests authority in an agency to interpret and enforce a statute. Judicial deference to inconsistent agency interpretation risks "a scheme of statutory construction based not on a government of laws, but rather on a government of 'who was most recently elected.' "262

In particular, the executive branch has faced repeated criticism for its use of immigration policy to clandestinely further foreign and domestic policy, as well as ideological objectives.263 The adoption of the Refugee Act of 1980 was a recognition of this country's moral responsibility to admit, as refugees, persons fleeing specified types of persecution without discrimination as to their country of origin or personal beliefs. Nonetheless, grants of asylum have flowed almost exclusively to persons fleeing countries with which the United States has hostile relations.264 Likewise, the exclusion policy regarding homosexuals seeking asylum that was in effect until the passage of the Immigration Act of 1990 further exemplifies how political and moral judgments can corrupt what is meant to be an ideologically neutral determination as to refugee status.265

It is unlikely that mere coincidence adequately explains why the Bush administration sought to facilitate the immigration of Chinese nationals fleeing persecution at a time when television viewers were

263 Norman and Naomi Zucker observe:

The major provisions of the Refugee Act — ideologically neutral admissions and a fair asylum policy — were never implemented. The admission of refugees and the granting of asylum have been bent to the exigencies of foreign policy, public pressure and budget restraints. . . . Thus, the Congress, despite its intentions, created a monster when it provided for the granting of asylum: the asylum apparatus has the body of a border patrol officer and the mind of a foreign policy bureaucracy.

horrified by scenes of the Tiananmen Square massacre. Similarly, in light of the progress that President Clinton has made toward reestablishing friendly diplomatic and trade relations with China, it is not surprising that the administration does not wish to address the potentially embarrassing issue of China's coercive population control practices. Domestic policy considerations have probably also played a part in both administrations' choices of action. President Bush's political alliance with the anti-abortion movement necessitated a strong reaction towards any population control program that included government-sponsored abortion, whether coerced or not. President Clinton had to be concerned with appearing to "open the flood gates" of potential Chinese refugees in light of American voters' growing resentment toward immigrants. 

Ironically, the adoption of the Chinese Exclusion Act marked the beginning of political intrusion into immigration policy. It is clear that the practice continues to thrive at the expense of Chinese persons seeking to relocate to the United States. The story beneath the surface of the court's decision in Guo Chun Di is that under the current implementation of the Refugee Act, through capricious agency interpretation glossed with judicial deference, people who legitimately deserve the protection afforded by our laws are routinely sacrificed as pawns in a political game.

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266 The Armstrong-DeConcini Amendment was introduced as an amendment to the Emergency Chinese Immigration Relief Act of 1989, a bill designed to offer various safeguards to Chinese students residing in the United States in light of the Tiananmen Square Massacre. See supra notes 130-32 and accompanying text. President Bush also announced his intention to implement the policy of the Amendment despite vetoing the bill in a release that denounced the Chinese government for its actions during the June 1989 student uprising. See Memorandum of Disapproval, supra note 133.


268 "What you have is an ideological decision made by the Bush and Reagan Administrations based on their attitudes toward population control and politics." Weiner, supra note 264 (quoting George High, Executive Director of the Center for Immigration Studies).


270 See supra notes 2-6 and accompanying text.