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NATIONAL SECURITY COUNCIL

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CLASSIFIED

MORANDUM FOR: SEE BELOW

TO: Eric P. Schwartz
(SCHWARTZ)

SUBJECT: Chinese Family Planning and U.S. Asylum Law

EAP/Global Affairs:

Attached will be radically shortened. I will delete most of the legal analysis and include more on policy considerations. This is a draft for discussion with Kreczko, DPC and White House Counsel.

Comments are welcome.

Eric

Beers Exh. No. 13

3116

ACTION

MEMORANDUM FOR THE PRESIDENT

FROM: ANTHONY LAKE
CAROL RASCO
BERNIE NUSSBAUM

SUBJECT: U.S. Law on Refugees and Asylum and Abusive Family Planning Practices in China

Purpose

To obtain preliminary decisions on U.S. policy toward protection of Chinese asylum-seekers in the U.S. who fear abusive family planning practices upon return to China.

Background

I. U.S. REFUGEE LAW AND PROTECTION AGAINST RETURN TO CHINA OF THOSE WHO FEAR ABUSIVE FAMILY PLANNING PRACTICES

As a general matter, U.S. refugee and asylum law incorporates the standards of the 1951 Convention on the Status of Refugees. Under U.S. law applying the Convention standards, those who demonstrate a "well-founded fear" of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion are entitled to protection against return to their country of origin.

The Bush Administration's Justice Department believed that our laws on refugee and asylum could be used to protect Chinese fleeing coercive family planning practices, such as involuntary sterilization or forced abortion. Their theory was that those who opposed abusive family planning practices were considered "enemies of the state" in China, and that the persecution they suffered upon return was therefore based on political opinion imputed to them by the authorities.

The Clinton Justice Department does not agree with this legal theory, and contends that our refugee and asylum laws by themselves do not provide protection from return for most claimants who fear that they will be compelled to abort a pregnancy or to undergo sterilization if returned to China. To be sure, involuntary sterilization or forced abortion is fairly described as persecution. However, these practices, while clearly abusive, apply to all Chinese and do not appear to be

based on "race, religion, nationality, membership in a particular social group or political opinion." Thus, according to Justice, they fall outside of the protections of U.S. refugee and asylum law.

II. ACTIONS OF THE BUSH ADMINISTRATION

Consistent with the Bush Administration's orientation, Attorney General Thornburgh issued an interim rule in January 1990 that provided that "an alien fleeing coerced population control policies of forced abortions or sterilization may be considered to [have a well founded fear of persecution] on account of political opinion."

On April 11, 1990, President Bush issued an executive order that reaffirmed these protections for Chinese in the United States. That order included an instruction to the Attorney General--

to provide enhanced consideration under the immigration laws for individuals from any country who express a fear of persecution on 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.

With this "enhanced consideration" in effect, matters remained settled until July 1990. Up to that date, applicants who had been subjected to involuntary sterilization or abortion, or who demonstrated a well-founded fear that such measures would be applied to them upon return, were eligible for asylum.

In July 1990, however, the Attorney General -- in an apparent drafting error -- issued new regulations that seemed to supersede the January 29, 1990 regulation but did not incorporate any of its provisions. To compensate for this seeming oversight, INS issued a written instruction to its officials along the lines of the earlier regulation, reaffirming enhanced consideration for Chinese claimants.

Despite the INS action, the Board of Immigration Appeals (the administrative body that reviews asylum decisions of immigration judges) has not recognized the INS instruction and, adopting the more narrow interpretation of refugee and asylum law, has denied asylum status to applicants claiming fear of abusive family planning practices. The judges claim that the Executive Order is not binding on their decisions without some sort of regulation coming from the Attorney General and that the regulation referenced in the Executive Order has been superseded.

III. DOES THE BUSH EXECUTIVE ORDER PROVIDE ADDITIONAL PROTECTIONS FOR CHINESE WHO FEAR ABUSIVE FAMILY PLANNING PRACTICES?

This issue is relevant to a number of cases that are expected to enter the courts. In these cases, the Justice Department will

adopt the following positions:

- the January 1990 regulations were indeed superseded by the July 1990 regulations; thus there are no current regulations providing "enhanced consideration" for Chinese who express fears relating to abusive family planning practices;
- the Bush Executive Order by itself is vaguely worded and does not change the standards for granting or denying asylum status.
- our refugee and asylum law does not provide protection for most Chinese who fear they will be subjected to abusive family planning practices and the President is without the authority to change such standards under the refugee and asylum laws even if he wanted to.

If the Courts rule on behalf of the Administration position, you will have to decide what protections, if any, should be accorded to Chinese nationals who make bonafide claims that they fear being subjected to abusive family planning practices. And if the Courts rule that the Bush Executive Order does indeed provide additional protections and is a valid exercise of executive authority, you will have to consider whether to rescind the order or to maintain it and issue new implementing regulations.

IV. SHOULD WE PROTECT CHINESE ASYLUM-SEEKERS WHO EXPRESS A FEAR OF PERSECUTION BASED ON INVOLUNTARY STERILIZATION OR FORCED ABORTION?

While Chinese officials at the national level do not condone these kinds of abuses, it is undeniable that involuntary sterilization and forced abortions do occur in China. Moreover, while international and U.S. refugee law might not provide protections for most who might suffer such treatment, such action certainly seems to violate human rights. In this respect, the UN High Commissioner for Refugees has commented that--

even where the requirements of the [International Refugee] Convention may not be fulfilled[,] the case could nevertheless give rise to important human rights considerations justifying permission to remain or at least refusal to return [to China] on humanitarian grounds.

Moreover, in view of past protections provided by the Bush Administration to asylum-seekers under these circumstances, a decision not to extend protections would be politically controversial.

On the other hand, it also clear that the possibility of making a asylum claim based on abusive family planning practices creates incentives for fraud perpetrated by alien smugglers and their human cargo. These concerns suggest that any protections that may be provided should be designed to minimize the chance of

abusive claims while providing important protections.

V. WHO SHOULD BE PROTECTED?

Should you decide to provide protection for those fleeing abusive family planning practices, the protected classes could include all, or only some, of the following:

- those who had suffered forced abortion or involuntary sterilization;
- those who had refused to undergo abortion or sterilization and who might be at risk of such procedures (or other reprisals) upon return;
- those who had resisted application of coercive population control policies to persons other than themselves and who had a well-founded fear of being prosecuted for such resistance upon return;
- those who had a well-founded fear that, if returned, they would suffer involuntary sterilization or forced abortion or severe mistreatment for refusing to undergo such procedures.

The first three categories are relatively straightforward. If you accept that such persons should be protected, the issue for the adjudicator becomes one of credibility -- is the claimant telling the truth (such a determination would be based on whether these practices are common in the claimant's home country, whether the claimant has any documentary evidence, etc.).

The final category is more difficult. It is certainly the case that many Chinese asylum-seekers would prefer to have more than one child and that, upon return to China, their fear of the consequences would deter them from attempting to do so. If, however, this standard were used to determine who would be eligible for U.S. residence, it would open the door to a large, if not massive, number of claimants. In our view, it is neither reasonable nor necessary to provide protection for all such persons.

A more reasonable approach toward the applicant in the final category -- an applicant who has not previously manifested any opposition to China's family planning practices -- might generally require the applicant to show that--

1) he or she comes from an area where involuntary sterilization and forced abortion (as well as severe mistreatment for refusal to submit to such procedures) is common;

2) in the case of a claim related to involuntary sterilization, the claimant has a reasonable expectation that the procedure will be applied to him or her (or that he

however, several reasons why this would be an awkward alternative to use to protect Chinese fleeing abusive family planning practices --

- it is unclear whether the Attorney General could specify a "subcategory" of protected nationals under the TPS status, or whether she would have to authorize TPS for all Chinese in the U.S.
- if she did authorize a subcategory of those fleeing abusive family planning practices, it is unclear how such persons would be chosen;
- it is not clear that current abuses in Chinese family planning practices constitute a temporary condition as required under the TPS statute;
- under TPS, protections would have to be country-specific, and while China is the principal (and probably exclusive) focus of concern, you may not want to limit a protection such as this one to nationals of any one country.
- the TPS relief might be too narrow -- for example, under the terms of TPS, protection from return only applies to those who have "continuously resided in the Untied States since such date as the Attorney General may designate."

C. PROVIDING SUCH PROTECTION BY STATUTE

We could, however, seek to provide protection by statute to those fleeing abusive family planning practices. This is what the Congress attempted to do after the Tiananmen massacre, in legislation that was vetoed by President Bush. By presenting our own legislation, we could frame the debate, structure the solutions and avert unwelcome legislative initiatives. On the other hand, Congress does act slowly and the proposed legislation could be subjected to undesirable amendments.

We might limit undesirable amendments by drafting a generic (rather than a China-specific) bill providing the Attorney General to designate categories of persons who are likely to suffer serious human rights violations upon return but who are not eligible for asylum under our refugee and asylum law. The bill could empower the Attorney General to designate by regulation such categories and establish an appropriate adjudicatory mechanism to implement such a policy.

D. WHAT TO DO UNTIL LEGISLATION IS ENACTED: A PRESIDENTIAL MORATORIUM ON ENFORCEMENT

Until enactment of legislation and implementing legislation, you could declare a moratorium on the enforcement of the Act's exclusion and deportation provisions with respect to victims of China's (or other nations') coercive population control policies.

The moratorium might be limited in scope, focussing on those cases where credible claims have been made along the lines outlined above.

As a general matter, the Executive has considerable discretion to decide what cases to prosecute, and, on balance, we believe you could declare such a moratorium and be on relatively solid legal ground.

E. WHAT TO DO WITH THE BUSH EXECUTIVE ORDER

If the Courts accept the Justice Department's position without explicitly striking down the Bush Executive Order, we see no need to rescind the Order. Such action would only provoke controversy and would be unnecessary.

RECOMMENDATION

That, presuming that the Justice Department's position will be upheld by the courts, you approve the drafting of new legislation that would provide protections for those who are likely to suffer serious human rights deprivations upon return but who cannot obtain protection under our asylum laws.

Approve _____ Disapprove _____

That, in the meantime, you approve a Presidential moratorium on enforcement of deportation against Chinese applicants who make credible claims (along the lines described above) that they fear return to abusive family planning practices.

Approve _____ Disapprove _____

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