

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

YANG YOU YI, et al.,	:
	:
Petitioners	:
	:
v.	: NO. 1: CV-93-1702
	:
JANET RENO, et al,	: (CJ Sylvia H. Rambo)
	:
Respondents	:

**PETITIONERS' PETITION FOR AN EVIDENTIARY HEARING
REGARDING GOVERNMENTAL POLITICAL INFLUENCE AND
PREJUDICIAL *EX PARTE* COMMUNICATIONS, RESULTING IN
A DENIAL OF DUE PROCESS OF LAW, A DENIAL OF EQUAL
PROTECTION BASED UPON NATIONALITY, A DENIAL OF FAIR
ASYLUM HEARINGS AND APPELLATE REVIEW, AND
VIOLATIONS OF JUDICIAL AND LEGAL ETHICS**

COMES NOW THE PETITIONERS, through the Petitioners Steering Committee, requesting the Court to grant an evidentiary hearing to hear testimony and documentary evidence pertaining to the above captioned issues.

INTRODUCTION

In the summer of 1993, the National Security Council (NSC), the Attorney General's office, the Immigration and Naturalization Service (INS), and the U. S. State Department, among other agencies, engaged in a widespread program of *ex parte* communications, misrepresentations, and political influence directed at the Executive Office for Immigration

Review (EOIR)¹, in order to deter Chinese asylum seekers from attempting to reach our shores. As part of the program, Administration officials, from the White House down to EOIR law clerks, were apprised that the *Golden Venture* passengers were to be singled out, rushed through the asylum system, and deported back to China to reverse the perceived "magnet effect" that was drawing increasing numbers of Chinese asylum applicants to the U. S. The actions of Administration officials prejudicially impacted the substantive outcome of the *Golden Venture* asylum claims, resulting in a denial of due process, a denial of equal protection under the law, a violation of the Administrative Procedures Act, and generated judicial impropriety in both the initial Immigration Judge hearings and in appellate review of these cases by the BIA.

The danger of political pressure being exerted on administrative judges is not only that it corrupts the legal process absolutely and diminishes public trust in its judicial institutions, but that it manifests itself in subtle ways. As the Government has repeatedly argued, no EOIR adjudicator has come forth to admit to being improperly influenced in the *Golden Venture* cases. It would certainly be contrary to human nature for any adjudicator to declare, "Yes, I have been improperly influenced." Fortunately, this issue is not dependent upon a "Perry Mason" style declaration of culpability. As noted by Justice Black in *Shaughnessy ex rel v. Accardi*, 349 U.S. 280, 75 S. Ct. 746, 99 L.Ed. 1074, a BIA judge's statements regarding the absence of influence are not dispositive of the issue and the Court must examine the entire record to detect if improper influence, indeed, existed. 349 U.S. at 291-292, 99 L.ed. at 1081.

¹EOIR is a Department of Justice subagency comprised, inter alia, of the Immigration Judges (IJ's), who hear and adjudicate requests for asylum under the Immigration and Naturalization Act (INA or "the Act"), and the Board of Immigration Appeals (BIA), which has appellate review authority over the IJ's.

Whether improper influence existed in the *Golden Venture* cases can only be determined by viewing the totality of the evidence regarding the Clinton Administration's motives and actions toward the *Golden Venture* asylum applicants. This petition seeks to draw together the large quantity of evidence obtained in the past two years into a digestible form. This Petition will reveal that at least twelve different federal agencies² coordinated their efforts under the White House chaired Border Security Working Group (BSWG), to make a negative example of the *Golden Venture* Petitioners as a future deterrent to Chinese asylum seekers. In so doing, Petitioners contend that these agencies exerted direct and indirect influence upon EOIR to hurriedly decide and reject the asylum claims of Petitioners, contrary to Due Process, the right to a fundamentally fair hearing, and equal protection under the law.³

PROCEDURAL HISTORY

Pursuant to this Court's Order of December 7, 1993, Petitioners have conducted Discovery upon the United States regarding whether the Petitioners' asylum claims have been prejudiced by political influence and *ex parte* contacts with adjudicators.

Petitioners have taken twenty depositions of Clinton Administration officials and obtained over 4,000 pages of document Discovery, pertaining to the Administration's desire to make a harsh deterrent example of the *Golden Venture* passengers. Pursuant to this Court's Order, Discovery closed on July 20, 1995. While some outstanding Discovery issues remain to be

²NSC, DPC, INS, State Department, Bureau of Human Rights and Humanitarian Affairs (BHRHA), Office of the Attorney General, DOJ, U. S. Information Agency, CIA, Coast Guard, U. S. Navy, Office of Management and Budget (OMB), among others.

³A snapshot of the scope of the asylum applicant deterrence plan is shown in a State Department cable of June 1993 [Doc. 2186-2187], attached as Exh. 1.]

resolved, Petitioners believe that there is ample evidence in the record to date justifying the granting of an evidentiary hearing to determine if political influence and prejudicial *ex parte* communications existed.

An evidentiary hearing, rather than a mere review of the depositions and document production to date is requested, because there are significant credibility issues to be resolved by this Court based upon conflicting and inconsistent answers given by Government witnesses in oral deposition.⁴

FACTUAL BACKGROUND

In the spring of 1993, the newly elected Clinton Administration was faced with an increasing number of Chinese asylum seekers arriving in the United States via ship. Prior to the *Golden Venture* landing a number of ships (e.g. *M/V Eastwood* and *M/V Mermaid*) filled with Chinese Nationals escaping from the People's Republic of China, were intercepted by U.S. maritime forces and diverted to third countries for deportation back to China. Another highly publicized group of Chinese refugees arrived at the base of the Golden Gate Bridge in May, 1993, fueling the Administration's perception that there was a looming immigration emergency.⁵ In response to this influx, the Department of Justice and the National Security Council took the lead in a coordinated program to stop what it calls the "smuggling of human cargo". [Transcript of May 4, 1994 Deposition of Gerald S. Hurwitz ("Hurwitz I") [Exh. 3], p.25 at 10, p. 46 at

⁴The Government's response to Requests for Admissions are attached hereto as Exh. 2. These responses, in particular the denials, provide a indicia of the factual disputes that currently exist between the parties.

⁵The arrival of these asylum applicants came on the heels of two other highly publicized incidents which the Administration characterized as immigration problems: (1) The terrorist attack on the World Trade Center in February 1993; (2) the shooting of CIA employees outside the McClean, VA CIA headquarters by a terrorist in April 1993. These two incidents have been linked with the *Golden Venture* arrival repeatedly in speeches given by INS Commissioner Doris Meissner as examples of U.S. immigration problems.

8-10; Deposition Transcript of Grover Joseph Rees ("Rees Tr."), [Exh. 4], p.106 at 1, p. 107 at 5.] Specifically, the goal of the Administration was to deter the smugglers and their passengers from attempting to reach the shores of the United States. [Government Admission #14, attached as Exh. 2.] ✓

During this same period of time, the Administration developed a series of "initiatives" to deal with the problem of illegal immigration generally. The culmination of these initiatives was the execution of Presidential Decision Directive #9 on June 18, 1993, in which the President laid forth the broad guidelines of a plan to stop alien smuggling, [Document No. 2385-88, attached as Exh. 5.]⁶ In responding to the Petitioners' Requests for Admissions, the Respondents have relied heavily on PDD #9 as evidence that there was no improper intent nor conduct on the part of Government officials. What the Government fails to acknowledge, however, is that under the mantle of authority of PDD #9, Administration officials engaged in improper and overzealous acts on a Departmental and individual level to attain a deterrent impact on Chinese asylum seekers.

Petitioners were used as test cases by the Administration to explore how quickly exclusion cases could be hurried through the current system to "send a message to the smugglers and future asylum applicants."⁷ The program to deter Chinese smuggled aliens took several forms, some of which were a proper exercise of executive power, and others which improperly

⁶Petitioners note that PDD #9 seems to fill the role envisioned by Mr. Hurwitz in his June 15, 1993 memorandum to Deputy Associate Attorney General Phyllis Coven, when he suggested that the Attorney General declare an "immigration emergency" to give Immigration Judges "additional authority" and to preserve the *Golden Venture* cases against appellate attack.

⁷The *Golden Venture* passengers were, in fact, acknowledged as test cases in a press conference given by NSC official Randy Beers and Domestic Policy Counsel (DPC) staffer Donsia Strong on June 18, 1993. [Attached as Exh. 6, p. 0299.] This is consistent with Gerald Hurwitz's testimony, *infra*, that the EOIR expedited hearing program was never again used after the *Golden Venture* cases.

&2yinfluenced asylum judicial proceedings within the Department of Justice's (DOJ) Executive Office of Immigration Review (EOIR). The Department of Justice characterized the influx of Chinese nationals as an "Immigration Emergency", setting the tone under which the DOJ subagencies, EOIR and Immigration and Naturalization Service (INS) would process these cases.⁸ [See DOJ Immigration and Naturalization Service, "The Immigration Emergency," Document No. 2299; Exhibit 71]. [See also Hurwitz I, p.68 at 8; Rees Tr., p. 269 at 2-5.]

The Administration's deterrence program was coordinated by the Border Security Working Group⁹, which was co-chaired by staff members from the National Security Council (NSC's Eric Schwartz and Randy Beers) and White House Domestic Policy Counsel (DPC's Donsia Strong-Hill). [Rees Tr., p.106 at 7-11.] In addition to the twelve permanent BSWG agency members, EOIR acted as an advisory member, as on at least three occasions, 5/12/93, 6/25/93, and 6/26/93, the Chief Legal Advisor to the Chairman of the BIA¹⁰, Gerald Hurwitz participated in BSWG meetings at the Old Executive Office Building on the White House compound. (Affidavit of William Leary at document 3949-3953 at Exh. 8.) During these meetings, issues pertaining to Chinese smuggled aliens were discussed and policies developed

⁸The attitudes of the Administration policymakers regarding the treatment of Chinese asylum seekers in the spring/summer of 1993 are memorialized in the handwritten notes of INS General Counsel Grover Joseph Rees from a May 1993 meeting with BSWG Chairman and NSC staff member Eric Schwartz concerning the Chinese refugees ship *M/V Mermaid*. The notes reflect the cavalier attitude of the Administration toward the fate of those fleeing communist oppression, when Mr. Schwartz ["E.S."] stated: "We are going to have to accept a degree of uncertainty about the fate of these people. [But we should at least do something.]" [Document 3601-3608, Exh. 7.]

⁹In some deposition transcripts (e.g. Phyllis Coven) this same entity is also referred to as the Border Control Security Group (BCSG).

¹⁰BIA Chairman David Milhollan occupied the dual roles of Chairman of the BIA and Director, EOIR, from the founding of EOIR in 1983 until his retirement in December 1993. Until his recent appointment as a judge on the BIA, Gerald Hurwitz served as Chief Legal Advisor to the Director, EOIR. By virtue of the dual roles of Mr. Milhollan, Mr. Hurwitz was by consequence also advising the BIA.

to deter Chinese asylum seekers. The content of these meetings was then communicated back to the BIA through Mr. Hurwitz briefing BIA Chairman Milhollan. [Transcript of April 29, 1995 Deposition of Gerald S. Hurwitz, (Hurwitz II), [Exh. 9], p. 97 at 5-13.]

The BSWG coordinated numerous facets of the Administration's Chinese deterrence program. These included information gathering by INS and other U. S. intelligence agencies on the status of human smuggling operations in Asia. The Navy and Coast Guard were tasked to screen and intercept ships suspected of carrying Chinese asylum seekers and to divert the ships to third countries in order that the passengers did not have the opportunity to seek asylum under United States law. [Rees Tr., p. 55 at 20, p 56 at 3.] The State Department utilized its "information" assets (US Information Agency and Voice of America) to broadcast programs seeking to deter potential future asylum applicants who were still in China. As discussed in detail below, the State Department also developed an "opinion letter" to be provided by the Bureau of Human Rights and Humanitarian Affairs (BHRHA) to Immigration Judges, which characterized virtually all asylum seekers from Fujian Province as incredible, and in particular sought to establish that coerced family planning did not exist in Fujian Province.¹¹ [Rees Tr., p.358 at 5-10; p.364 at 16-17;] [See also p.298 at 11-13, p.299 at 15. State Department opinion letter used in the *Golden Venture* cases is attached as Exh. 10]. The BSWG, and in particular its NSC members, coordinated the above activity.

Other aspects of the deterrence program were coordinated by subagencies of the Department of Justice. The INS began a 100% detention program for Chinese smuggled aliens upon the arrival of the *Golden Venture*. [Rees Tr., p.192 at 6; p.193 at 16; p.315 at 25; p.316

¹¹Many of the *Golden Venture* passengers are from Fujian Province, Peoples Republic of China.

at 2; Hurwitz II, p. 56 at 17.] In exclusion proceedings, INS trial attorneys also began to oppose the granting of asylum to Chinese asylum seekers who had credible claims of flight from coerced sterilization and forced abortion in China.¹² The program of deterrence was not limited to the enforcement arms of the Department of Justice (DOJ), however. EOIR, which had been established in 1983 to preserve the independence of the immigration judiciary,¹³ was approached through representatives of the Office of the Attorney General and the NSC (Mr. Schwartz) to expedite the *Golden Venture* hearings in order to have a future deterrent impact on Chinese alien smuggling. As discussed below, the active involvement of EOIR officials and adjudicators in support of the Administration's deterrence program was improper and led to a lack of independence and impartiality, which has prejudiced the Petitioners' original asylum hearings before the IJ's and appellate review before the BIA.

ISSUES TO BE PRESENTED AT AN EVIDENTIARY HEARING

I. WHETHER EOIR ADJUDICATORS WERE MADE AWARE OF CLINTON ADMINISTRATION POLITICAL PRIORITIES REGARDING THE DISPOSITION OF THE *GOLDEN VENTURE* CASES IN AN *EX PARTE* MANNER?

A. CONTACTS BETWEEN MR. HURWITZ AND MS. COVEN TO DEVELOP AN EXPEDITED PROGRAM

The *Golden Venture* arrived in New York harbor in the early morning hours of June 6, 1993, generating a high level of national media coverage. Within 48 hours of the ship's arrival,

¹²While the BIA has continued to adhere to its precedent decision *Matter of Chang*, Int. Dec. 3107, May 12, 1989, since 1989, the INS had followed a Bush Administration policy of discontinuing exclusion and deportation proceedings in cases where coerced family planning could be established by the asylum applicant. [Hurwitz I, p.105 at 13-p.107 at 6.] This policy changed with the arrival of the *Golden Venture*, and was subsequently memorialized in an August 5, 1994 memorandum of INS Deputy Commissioner Chris Sale, attached as Exh. 11. [See Respondent's Admission response no. 69, attached as Exh. 2.]

¹³[See Respondent's Admissions 2, 3, 4, and 5 attached as Exh. 2.]