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YI NI v. HOLDER: FORCED ABORTION'S IMPACT ON A HUSBAND'S RIGHT TO REPRODUCE

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In *Yi Ni v. Holder*,[1] the United States Court of Appeals for the Fourth Circuit addressed a contentious aspect of immigration law: whether the spouse of a woman who has been forced to undergo an abortion or sterilization procedure, as a result of China's "One Couple, One Child" policy ("one-child policy"), has suffered persecution such that he can remain in the United States.[2] The court, agreeing with the Attorney General's opinion in *J-S-*,[3] held that despite Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"),[4] which permits victims of China's one-child policy to stay in the United States,[5] a husband cannot establish persecution based solely on his wife's forced abortion or sterilization because he did not undergo the procedure himself.[6]

In so holding, the Fourth Circuit ignored that a husband is persecuted when his wife is forced to undergo a sterilization or abortion procedure because he is not able to exercise his fundamental right to reproduce,[7] he is often punished by the Chinese government,[8] and he

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1. 613 F.3d 415 (4th Cir. 2010).

2. *Id.* at 420–21.

3. 24 I. & N. Dec. 520 (A.G. 2008).

4. 8 U.S.C. § 1101(a)(42) (2006).

5. *See* J-S-, 24 I. & N. Dec. 520 (A.G. 2008) ("Section 601(a) of IIRIRA defines the circumstances in which the enforcement against a person of a coercive population control program constitutes persecution on account of 'political opinion' and thus qualifies that person for political asylum under the Act.").

6. *Yi Ni*, 613 F.3d at 430. Withholding of removal is available to applicants who can establish a clear probability of persecution. 8 U.S.C. § 1231(b)(3) (2006). To establish a clear probability of persecution, the applicant must demonstrate that it is more likely than not that his life or freedom would be threatened in the country of removal. *Id.*

7. *See infra* Part IV.A.1.

8. *See infra* Part IV.A.2.

feels the pain of not having more than one child.[9] If this narrow interpretation stands, it will lead to an unequal application of the law, as wives will be permitted to seek asylum using Section 601 while husbands will be prevented from doing the same.[10] The Fourth Circuit should have rejected the Attorney General's opinion because Section 601 is ambiguous,[11] and the Attorney General's interpretation was impermissible because Congress intended to include husbands within the statute's scope.[12]

I. THE CASE

Yi Ni filed an application for asylum and withholding of removal[13] with the Department of Homeland Security in 2002.[14] A citizen of the People's Republic of China, Ni argued that he was persecuted by the Chinese government, and that he would suffer future persecution because of China's one-child policy if he returned.[15] He based his claim on Section 601 of the IIRIRA.[16] At the time Ni filed his application, a husband could establish persecution, which is required for asylum or withholding of removal, under Section 601 if he could show that the Chinese government forced his wife to undergo an abortion or sterilization procedure.[17]

Accordingly, Ni's application alleged that he married Ni Hong Mei in 1992 and fathered a son with her a year later.[18] Two months

9. *See infra* Part IV.A.3.

10. *See infra* Part IV.B.

11. *See infra* Part IV.C.1.

12. *See infra* Part IV.C.2.

13. "Asylum" and "withholding of removal" are two distinct concepts, yet are generally applied for at the same time. Asylum is a form of protection granted to aliens designated as "refugees." 8 U.S.C. § 1158(b)(1)(B)(i) (2006). Asylum protection allows a refugee to stay in the United States, gain employment, and travel abroad. 8 U.S.C. § 1158 (c)(1)(A)–(C). Under "withholding of removal," an alien cannot be removed from the United States "if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A).

14. Yi Ni v. Holder, 613 F.3d 415, 418 (4th Cir. 2010).

15. *Id.* at 418–19.

16. *Id.* at 419. The statute is codified at 8 U.S.C. § 1101(a)(42) (2006). Courts refer to the same provision interchangeably as "Section 601" or "8 U.S.C. § 1101(a)(42)." *Id.* at 419 n.2. This Note will refer to the provision as "Section 601."

17. *Id.* (citing C-Y-Z-, 21 I. & N. Dec. 915, 918 (B.I.A. 1997) (en banc) (finding that an applicant established asylum through his wife's forced sterilization)); *see also* S-L-L-, 24 I. & N. Dec. 1, 4 (B.I.A. 2006) (en banc) (limiting its holding in *C-Y-Z-* to legally married spouses, only if they show they were persecuted for "other resistance to a coercive population control program").

18. *Yi Ni*, 613 F.3d at 419.

after the birth of Ni and Mei's son, the Chinese government forced Mei to have an intrauterine contraceptive device ("IUD") inserted as a form of population control.[19] This procedure followed from Chinese municipal policies that "prohibited rural couples from having more than one child."[20] Despite the contraceptive device, Mei was later found to be pregnant during a government-required "IUD checkup" in May 2000.[21] Because it was the couple's second pregnancy, the government forced Mei to have an abortion in accordance with the policy.[22] Following the abortion, Ni asserted that he and his wife became depressed because they wanted to have more children but were afraid to conceive another child and violate the policy.[23] Ni left the country shortly thereafter and traveled to the United States.[24] Mei, however, stayed in China.[25]

On June 21, 2005, an Immigration Judge ("IJ") in Baltimore, Maryland, denied Ni's asylum and withholding of removal applications.[26] Regarding the withholding of removal application, the IJ found that Ni's private objection to the one-child policy would probably not make him the victim of future Chinese persecution.[27] The IJ focused on Mei's medical history, specifically that the medical history did not mention an abortion occurring in 2000.[28] Ni appealed to the Board of Immigration Appeals ("BIA"), and the BIA affirmed the IJ's

19. *Id.* The device was inserted pursuant to the policies of the Fuzhou municipality where the couple lived. *Id.*

20. *Id.*

21. *Id.* Ni asserted that the pregnancy occurred because the IUD dislodged without his wife's knowledge. *Id.*

22. *Id.*

23. *Id.* According to Ni, he and his wife hated the policy because they "would never have the chance to have more children." *Id.*

24. *Id.*

25. *Id.* It is not immediately apparent why Ni chose to leave China without his wife. Mei's absence, however, precluded the possibility of Ni applying for derivative asylum, which grants the spouse of a persecuted individual refugee status only if he accompanies her to the United States and cannot qualify for refugee status himself. *See id.* at 426 (explaining derivative asylum). As a result, Ni had to rely on Section 601, which originally extended presumptive refugee status to a husband if his wife was forced to undergo an abortion or sterilization procedure, regardless of whether his wife was present in the United States at the time of his claim.

26. *Yi Ni*, 613 F.3d at 419. The IJ held that Ni's asylum claim was time-barred because he failed to show that he filed his application within one year of arriving in the United States. *Id.*

27. Ni submitted Mei's medical examination booklet in support of his application. *Id.* at 419. Showing a clear probability of future persecution must be established for a judge to grant a withholding of removal application. *Id.* at 421.

28. *Id.* at 419.

decision in part and remanded in part.[29] In remanding Ni's application for withholding of removal, the BIA noted that the IJ's decision was insufficient because she rendered her decision on the medical evidence as opposed to Ni's credibility and the merits of his claim.[30] On remand, the IJ found that Ni's claim that his wife was forced to have an abortion was not credible because of a material discrepancy between Ni's oral account of what happened—that the government forced his wife to have an abortion—and the medical documentation he submitted to support his claim, which did not show his wife ever underwent an abortion.[31] Ni again appealed the IJ's decision to the BIA.[32]

Before the BIA heard Ni's appeal, however, the Attorney General issued an opinion in a separate case, *J-S-*.[33] This opinion overturned over a decade of precedent and held that a spouse could not establish past persecution[34] and therefore could not establish refugee status under Section 601 based on his wife's forced abortion or sterilization.[35] The Attorney General determined that "the text, structure, history, and purpose" of the IIRIRA strongly suggested that Section 601 conferred refugee status only to the person who had physically undergone a forced abortion or sterilization procedure.[36] In light of the Attorney General's opinion rejecting an applicant's ability to establish refugee status based on his spouse's forced abortion, the BIA also concluded that Mei's forced abortion and forced IUD insertion did not rise to the level of persecution against Ni personally.[37] In turn, the BIA found Ni was not eligible for withholding of removal because he had not alleged any other grounds for eligibility, and was

29. *Id.* The BIA affirmed the IJ's decision that Ni's application was time-barred. *Id.* at 419–20. Ni did not dispute this determination on appeal. *Id.* at 420 n.3.

30. *Id.* at 420.

31. *Id.* The IJ again found the fact that Mei's medical booklet did not make any reference to abortion, noting that Ni offered no explanation for why the reference would have been omitted and failed to provide corroborating evidence despite having three years to do so. *Id.*

32. *Id.*

33. 24 I. & N. Dec. 520 (A.G. 2008). The applicant in *J-S-* also arrived in the United States without his wife. *Id.* at 522.

34. *Yi Ni*, 613 F.3d at 422–23.

35. *J-S-*, 24 I. & N. Dec. at 521.

36. *Id.*

37. *Yi Ni*, 613 F.3d at 420.

therefore not a refugee.[38] Thereafter, Ni petitioned the United States Fourth Circuit Court of Appeals for review of the BIA's decision.[39]

II. LEGAL BACKGROUND

The right to choose whether to bear children has long been considered a fundamental right in the United States.[40] This right has also been extended to immigrants within the United States' jurisdiction.[41] As such, immigration courts, administrative bodies that are part of the U.S. Department of Justice, have to address this fundamental right when aliens claim to have been victims of China's one-child policy. The Board of Immigration Appeals, also an administrative body within the Department of Justice, is in charge of reviewing the decisions of the IJs who sit on the immigration courts. The judicial branch gives the decisions of immigration courts and the BIA strong deference.[42] When it comes to the interpretation of a statute, however, the judicial branch can overturn any administrative body's interpretation if the language of the statute is unambiguous, or the interpretation is not based on a permissible construction of the statute.[43]

Congress, the immigration courts and BIA, and the judicial branch have agonized over how to adequately evaluate immigrants seeking refuge from China's one-child policy.[44] At first, the immigration courts and BIA decided that China's one-child policy was not persecution, but Congress then amended the Immigration and Nationality Act ("INA") with Section 601 to include the one-child policy in the definition of persecution.[45] The BIA subsequently found that the newly enacted Section 601 conferred presumptive refugee status to spouses of those forced to undergo an abortion or sterilization procedure. Nearly a decade later, the BIA affirmed this interpretation after Congress expanded the annual cap of asylees that could be permitted under the provision.[46]

38. *Id.* The BIA also noted that no nexus existed between Ni's alleged resistance to the one-child policy and the IUD insertion, and Ni's claim that he would face persecution for having more children was too speculative. *Id.*

39. *Id.*

40. *See infra* Part II.A.

41. *See infra* Part II.A.2.

42. *See infra* Part II.B.1.

43. *See infra* Part II.B.2.

44. *See infra* Part II.C.

45. S-L-L-, 24 I. & N. Dec. 1, 2–3 (B.I.A. 2006) (en banc); *see infra* Part II.C.1–2.

46. *See infra* Part II.C.2.

Various federal courts, in addition to the Immigration and Naturalization Services ("INS")[47], questioned the BIA's interpretation as overly broad.[48] The rulings of the various federal courts created a circuit split, prompting Attorney General Alberto Gonzales to address whether Section 601 covered the spouses of women forced to undergo an abortion or sterilization procedure under the one-child policy, and he found that the section did not include these spouses.[49]

A. The United States Supreme Court Has Long Recognized the Fundamental Right to Procreate Between Married Couples, Including Non-Citizens Within the Jurisdiction of the United States

Although not specifically mentioned in the U.S. Constitution, the right to reproduce is part of the right to privacy protected by the Fourteenth Amendment.[50] The right to procreate has been extended to non-U.S. citizens who are within the jurisdiction of the United States, as all persons are guaranteed their due process and equal protection rights.[51]

1. The Right to Reproduce Is Protected Under the Fourteenth Amendment Right to Privacy

The U.S. Supreme Court has long recognized the fundamental right to reproduce, particularly between married individuals. Among the earliest cases to recognize this right to procreate was *Skinner v. Oklahoma*,[52] where the Court held that reproduction is "one of the basic civil rights of man" and condemned involuntary sterilization as an irreparable injury.[53] Many cases followed *Skinner*, outlining, in some respect, either the right to reproduce among individuals, with particular emphasis on married couples, or the right to choose when to repro-

47. The INS was renamed United States Citizen and Immigration Services ("USCIS"). The USCIS is part of the Department of Homeland Security, while the INS was part of the Department of Justice. The INS services and functions were taken over by USCIS on March 1, 2003.

48. *See infra* Part II.C.3.

49. *See infra* Part II.C.4.

50. *See infra* Part II.A.1.

51. *See infra* Part II.A.2.

52. 316 U.S. 535 (1942).

53. *Id.* at 541 ("We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects.").

duce as a form of liberty.[54] In fact, throughout the last century, the Court's decisions extended constitutional protection to personal decisions relating to marriage,[55] family relationships,[56] child rearing and education,[57] contraception,[58] and child bearing.[59]

These cases culminated with *Roe v. Wade*,[60] where the Court held that a woman's decision to terminate her pregnancy is part of the "liberty" protected against government interference by the Due Process Clause of the Fourteenth Amendment.[61] Although ultimately labeled an abortion case, *Roe* is equally significant for establishing a woman's right to bear a child as part of her right to privacy. In *Roe*, the Court reiterated that government intrusions on fundamental rights required a narrowly tailored, compelling interest.[62]

Planned Parenthood of Southeastern Pennsylvania v. Casey[63] solidified that women have a fundamental right to decide whether to bear a child, even as it rolled back certain abortion rights. In *Casey*, the Court concluded that "[o]ur law affords constitutional protection to personal decisions relating to marriage, procreation, contraception,

54. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (finding that the liberty interests protected by the Fourteenth Amendment supported its holding that "[t]his right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent"); Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (striking down as unconstitutional a Connecticut law that prohibited the use of contraceptives under the penumbras of privacy guaranteed by the Bill of Rights).

55. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." (quoting *Skinner*, 316 U.S. at 541)).

56. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (recognizing that there is a "private realm of family life which the state cannot enter").

57. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

58. *See* Griswold v. Connecticut, 381 U.S. 479, 483 (1965) ("[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion.").

59. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (citations omitted)).

60. 410 U.S. 113 (1973).

61. *See id.* at 153–56 (citations omitted) (holding that the right of privacy is broad enough to encompass abortion, and regulation can only be justified by a compelling state interest that must be narrowly tailored).

62. *Id.* at 155. The state may regulate some areas protected by the right to privacy so long as it has a compelling interest to do so, and the regulation is not so broad that it infringes on other rights. *Id.* at 154–55 (citations omitted).

63. 505 U.S. 833 (1992).

family relationships, child rearing, and education."[64] As such, *Casey*, *Roe*, and the preceding cases recognized "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[65] In addition, the Supreme Court has continuously respected private family decisions as a realm protected from state intrusion.[66] These recognitions compelled the Court in *Casey* to conclude:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, and of the mystery of human life. Under compulsion of the state, one cannot define these attributes of personhood.[67]

The Court has thus held for decades that women in intimate relationships, especially marriage, have a fundamental right to decide whether to bear children.

2. *Non-Citizens Within the United States' Jurisdiction Also Have the Right to Reproduce Under the Fourteenth Amendment*

Non-citizens within the United States' jurisdiction have been granted many of the same fundamental constitutional rights that are granted to all Americans. In 1866, the U.S. Supreme Court declared that "[t]he Fourteenth Amendment to the Constitution is not confined to the protection of citizens," and that its "provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."[68] Specifically, non-citizens are protected

64. *Id.* at 851 (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977)).

65. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (emphasis omitted) (citations omitted).

66. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

67. *Casey*, 505 U.S. at 851.

68. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (invalidating a race-neutral ordinance that discriminated against Chinese immigrants in its application). Consequently, these rights have been extended to both legal and illegal immigrants. *See* Japanese Immigrant Case, 189 U.S. 86, 101 (1903) ("[N]o person shall be deprived of his liberty without opportunity, at some point, to be heard," particularly "an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here . . . ."); *see also* Plyler v. Doe, 457 U.S. 202, 213 (1982)

under the Due Process and Equal Protection Clauses of the Fourteenth Amendment because the clauses refer to "persons" and not "citizens."[69] All people, regardless of citizenship, are thus afforded Fourteenth Amendment protection so long as they are within the jurisdiction of the United States.

A non-citizen's equal protection rights are recognized expressly. In *Graham v. Richardson*,[70] for example, the Court held that policies that denied benefits to non-citizens violated the Equal Protection Clause of the Fourteenth Amendment.[71] In *Graham*, a disabled resident alien in Arizona was denied state disability benefits because she failed to meet the state's residency requirement.[72] After determining that the statute was discriminatory toward non-citizens,[73] the Court concluded that Arizona did not have a "special public interest" in favoring its own citizens over aliens when distributing limited resources.[74] More importantly, the Court recognized non-citizens as a suspect class deserving of "close judicial scrutiny," explaining that "classifications based on alienage . . . are inherently suspect,"[75] and that "[a]liens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate."[76] Thus, non-citizens are afforded the same fundamental rights as citizens under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, which includes the right to procreate, so long as they are within the jurisdiction of the United States.

(striking down a Texas law prohibiting illegal aliens from enrolling in public schools because it violated the Equal Protection Clause).

69. *Yick Wo*, 118 U.S. at 369. The word "citizen," however, is used in the Privileges or Immunities Clause. *See* U.S. CONST. amend. XIV, § 1, cl. 2 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .").

70. 403 U.S. 365 (1971).

71. *Id.* at 376.

72. *Id.* at 367. The state only extended benefits to aliens who had resided in the United States for at least fifteen years. *Id.* At the time of her application, Carmen Richardson, the appellee, had only resided in the United States for thirteen years. *Id.* Despite meeting every other requirement, the state declined Richardson's application solely because of her residency status. *Id.*

73. *Id.* at 376.

74. *Id.* at 374. Under the "special public interest" doctrine, states retained broad discretion to classify who could receive social or economic benefits, so long as the classification had a reasonable basis. *Id.* at 371 (citing Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)).

75. *Id.* at 371–72.

76. *Id.* at 372 (citation omitted).

B. Statutory Interpretation in the Area of Immigration Law

The executive and legislative branches largely control U.S. immigration policy based on the plenary power doctrine.[77] In the executive branch, IJs, the BIA, and the Attorney General interpret and execute congressional statutes regarding immigration.[78] If the judicial branch reviews the executive branch's statutory interpretations in the area of immigration law, it usually defers to the executive branch's interpretation of the law because the plenary power doctrine has historically provided the executive and legislative branches with the overwhelming power to regulate immigration.[79]

1. The Plenary Power Doctrine Gives the Legislative and Executive Branches Widespread Authority to Regulate Immigration Law

Historically, the executive and legislative branches have had plenary power over immigration law.[80] This means that these branches are given almost complete judicial deference in their exercise of immigration power. It follows that the legislative and the executive branches have an extensive power to regulate all aspects of immigration, insulated from judicial review, as a basic feature of sovereignty.[81]

The U.S. Constitution leaves open the possibility of such a stringent policy. Although it invests the power of naturalization in Congress, the Constitution does not speak as to what authority any branch of government has over immigration.[82] As a consequence, immigration law gradually developed over time through statutes, regulations, and case law.

As immigration law developed, the U.S. Supreme Court seemed resigned to deferring to the other branches of government without oversight. As early as 1889, the Court held that Congress had a sovereign power to regulate immigration that was not enumerated in the Constitution.[83] This sovereign power was not subject to judicial re-

77. *See infra* Part II.B.1.

78. *See infra* Part II.B.2.

79. *See infra* Part II.B.2.

80. *See* Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373, 377–78 (2004).

81. *Id.* at 378.

82. *See* U.S. CONST. art. I, § 8 ("The Congress shall have Power To . . . establish a uniform Rule of Naturalization . . . [and] [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . .").

83. The Chinese Exclusion Case, 130 U.S. 581, 605–06 (1889).

view.[84] By the twentieth century, plenary power had become entrenched in immigration jurisprudence, particularly as immigration grew in political significance.[85] In 1976, nearly a century removed from when the Court first introduced plenary power in the immigration law context, the Court firmly outlined its deferential doctrine in *Mathews v. Diaz*.[86] In *Mathews*, the Court unanimously upheld a federal statute that denied insurance benefits to aliens solely on the basis that they were not United States citizens.[87] The Court stated plainly that:

> For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.[88]

Although frequently contested—many argue that the judiciary needs to play more of a role in the area of immigration—the plenary power doctrine has remained relatively unchanged ever since.[89]

84. *See id.* at 606 (stating that those who wish to contest the executive branch's determinations regarding immigration "can make complaint to the executive head of our government, or resort to any other measure which, in its judgment, its interests or dignity may demand; and there lies its only remedy").

85. *See* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 13–15 (1998) (noting that, as immigration to the United States increased during the early twentieth century, the U.S. Supreme Court upheld Congress's attempts to limit naturalization).

86. 426 U.S. 67 (1976).

87. *Id.* at 69–70.

88. *Id.* at 81 (internal citations omitted).

89. There are indications, however, that courts are unwilling to abide by the plenary power doctrine when they find an Attorney General's interpretation of an agency's statute to be an unauthorized exercise of his authority. *See* Prudencio v. Holder, 669 F.3d 472, 476 (4th Cir. 2012) (holding that the framework the Attorney General established to determine moral turpitude was an unauthorized exercise of his authority).

2. *The BIA Is the Administrative Body that Chiefly Reviews Immigration Decisions, but When There Is an Inconsistency, the Attorney General Sometimes Reviews Those Decisions, and Determinations of Both are Subject to Judicial Review*

Exercising its plenary power, the executive branch established the Executive Office for Immigration Review ("EOIR") to execute and interpret the immigration laws that Congress passes.[90] The EOIR, part of the U.S. Department of Justice, adjudicates immigration cases and conducts appellate reviews through immigration courts and the BIA, which are two of its administrative bodies.[91] The BIA, in particular, has the authority to review the decisions of the IJs who sit on immigration courts in removal proceedings.[92]

The BIA is comprised of fifteen attorneys appointed by the Attorney General to serve as the Attorney General's delegates.[93] Most of the BIA's decisions are nonprecedential and unpublished, and they are often decided by a single Board member affirming the IJ's decision either arbitrarily or with unsupported reasoning.[94] This leads to widely inconsistent applications of the law.[95] These inconsistencies cause the BIA to refer particularly difficult issues to the Attorney General for his review, oftentimes at the Attorney General's request. As a result, appeals from immigration proceedings are sometimes decided by the BIA and sometimes decided by the Attorney General.

All immigration court, BIA, and Attorney General decisions, however, are subject to judicial review. Federal circuit courts review these agencies' decisions when appealed.[96] When reviewing a statute that these agencies administer, though, the judicial branch gives the statutory interpretations of these agencies deference.[97] The level of deference depends on the statute. On the one hand, if a statute is

90. 8 C.F.R. § 1003.0(a) (2006).

91. *Id.* at § 1003.0(b)(1)(ii).

92. *Id.* at § 1003.1(b)(3).

93. *Id.* at § 1003.1(a)(1).

94. Aaron G. Leiderman, *Preserving the Constitution's Most Important Human Right: Judicial Review of Mixed Questions Under the REAL ID Act*, 106 COLUM. L. REV. 1367, 1408 (2006).

95. *Id.*

96. Margaret Graham Tebo, *Asylum Ordeals: Some Immigrants Are 'Ground to Bits' in a System That Leaves Immigration Judges Impatient, Appellate Courts Irritated, and Lawyers Frustrated*, 92 A.B.A.J. 36 (2006) ("Appeals from BIA determinations go directly to the circuit courts, bypassing federal district courts."); Shruti Rana, *"Streamlining" the Rule of Law: How the Department of Justice is Undermining Judicial Review of Agency Action*, 2009 U. ILL. L. REV. 829, 839.

97. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (explaining that, when reviewing an ambiguous statute, courts must decide whether the agency's interpretation is a permissible construction of the statute).

unambiguous, then the court "must give effect to the unambiguously expressed intent of Congress."[98] On the other hand, if the statute is ambiguous, then reviewing entities must defer to the BIA's interpretation of a statute if the interpretation is a permissible construction of the ambiguous statute.[99]

This standard of review was first pronounced in 1984, when the U.S. Supreme Court decided *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[100] In *Chevron*, several federal Clean Air Act amendments required states to meet the national air quality standards that the Environmental Protection Agency ("EPA") established.[101] This required states that did not previously meet the federal standards to establish permit programs that regulated "new or modified major stationary sources" of air pollution in accordance with stringent requirements.[102] After the agency's entities and federal courts had conflicting interpretations of what the EPA meant by the term "stationary source," the Supreme Court examined what standard of review would apply to an administrative agency's own reading of a statute that it administers.[103]

The ensuing opinion developed what is commonly now known as the *Chevron* two-step analysis, requiring courts to first determine whether the statutory language at issue is ambiguous, or whether the language is clear when examined under traditional statutory construction principles.[104] If the statute is unambiguous, it will give the statute the expressed intent of Congress. If the statute is ambiguous, however, the Court will determine whether the agency's interpretation is reasonable or permissible.[105] If the statute is ambiguous, and the Court finds that the agency's interpretation is reasonable, then it will uphold the agency's interpretation.[106]

98. *Id.* at 843.

99. *See id.* at 842–43.

100. 467 U.S. 837 (1984).

101. *Id.* at 840.

102. *Id.*

103. *Id.* at 842.

104. *Id.* at 842–43. If the provision is clear, the Court ends its analysis and declares the clear meaning of the statute. *Id.*

105. *Id.* at 843.

106. *See id.*

C. The History of the Executive and Legislative Reaction to China's One-Child Policy

Initially, the executive branch found that China's one-child policy did not constitute persecution of an individual such that the individual could seek refuge in the United States.[107] The legislative branch reacted to this by passing a statute that explicitly deemed a person persecuted if that person was forced to undergo an abortion or was punished for resisting a coercive population program. The executive branch interpreted this statute to include the spouses of those who had undergone an abortion or resisted an abortion.[108] After some courts questioned this interpretation,[109] however, the Attorney General issued an opinion clarifying that the spouse of someone who was forced to have an abortion had not been persecuted.[110]

1. The BIA Initially Found That China's One-Child Policy Did Not Constitute Persecution

Congress enacted the Immigration and Nationality Act ("INA") in 1952, effectively consolidating the existing collection of immigration policies into a single text.[111] The consolidated text governs a wide array of areas, including immigration, citizenship, and asylum requirements and procedures.[112] An immigrant petitioning for asylum under the INA bears the burden of proving that he is a "refugee" within the INA's statutory definition.[113] Even then, the applicant is still not guaranteed asylum, because all decisions are subject to the Attorney General or the now-Secretary of Homeland Security's discretion.[114]

Originally, the INA's definition of refugee required an applicant to "demonstrate that, because of his race, religion, nationality, membership in a particular social group, or political opinion, he either was the victim of past persecution or maintains a well-founded fear of fu-

107. *See infra* Part II.C.1.

108. *See infra* Part II.C.2.

109. *See infra* Part II.C.3.

110. *See infra* Part II.C.4.

111. *See* Mizrahi v. Gonzales, 492 F.3d 156, 167 (2d Cir. 2007) (characterizing the INA as a "comprehensive revision in federal immigration law").

112. *See, e.g.*, 8 U.S.C. § 1158 (2006) (governing asylum).

113. Torres v. Mukasey, 551 F.3d 616, 625 (7th Cir. 2008) (citing 8 U.S.C. § 1101(a)(42) (2006)).

114. *Id.* (citing Jun Ying Wang v. Gonzales, 445 F.3d 993, 997 (7th Cir. 2006); 8 U.S.C. § 1158(b)(1)(A) (2006)).

ture persecution."[115] In 1989, however, the BIA held in *Chang* that China's one-child policy did not persecute an individual who wanted to have more than one child.[116] This was true even when that individual underwent an involuntary abortion or sterilization.[117] This decision prompted Congress to amend the INA, and enact Section 601.[118] Section 601, however, was vulnerable to an interpretive dichotomy from its enactment: one interpretation extended presumptive refugee status to husbands of wives forced to undergo abortion or sterilization procedures, and one interpretation did not.[119]

2. The BIA Initially Interpreted Section 601 to Extend Presumptive Refugee Status to Husbands When Their Wives Forcibly Underwent Abortions or Contraceptive Insertions

Congress amended Section 1101(a)(42)(A) in 1996 with Section 601 to expand the definition of "refugee" to the following:

> For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.[120]

Right after Congress passed Section 601, the BIA interpreted the section to include "the spouse of a woman who has been forced to undergo an abortion or sterilization procedure."[121] The BIA reasoned that "[t]he impact of forced abortions or sterilizations on a husband and wife's shared right to reproduce and raise children is such that the forced sterilization of a wife could be imputed to her

115. *Id.* (citing Oryakhil v. Mukasey, 528 F.3d 993, 998 (7th Cir. 2008); 8 U.S.C. § 1101(a)(42) (2006)).

116. Chang, 20 I. & N. Dec. 38, 47 (B.I.A. 1989).

117. *Id.*

118. J-S-, 24 I. & N. Dec. 520, 534 (A.G. 2008).

119. S-L-L-, 24 I. & N. Dec. 1, 4 (B.I.A. 2006) (en banc).

120. Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, § 601(a), 110 Stat. 546, 689 (1996) (codified at 8 U.S.C. § 1101(a)(42) (2006)).

121. C-Y-Z-, 21 I. & N. Dec. 915, 918 (B.I.A. 1997) (en banc).

husband, whose reproductive opportunities the law considers to be bound up with those of his wife."[122]

The BIA solidified this notion in *C-Y-Z-*, holding that an applicant can establish asylum under Section 601 by virtue of his wife's forced abortion.[123] In *C-Y-Z-*, a native of the People's Republic of China filed for asylum in the United States after fathering three children with his wife.[124] The Chinese government ordered his wife to obtain an IUD after the birth of their first child.[125] He protested and was imprisoned for a day.[126] Following the couple's second pregnancy, the applicant's wife narrowly avoided undergoing a forced abortion by hiding with relatives, hiding once more to give birth to a third child.[127] The Chinese government forced the applicant's wife to undergo a sterilization procedure after the birth of their third child, prompting the applicant to leave China a year later.[128] In its brief opinion, the BIA concluded that a sterilized wife's husband could "stand in her shoes" and make a bona fide claim for asylum for issues that intimately impacted her more than him.[129]

In her concurring opinion, however, Board Member Lory D. Rosenberg made an impassioned argument for international human rights.[130] The BIA granted asylum, Rosenberg explained, in part because the applicant articulated his opposition to "a compulsory government policy that fails to respect fundamental human rights," and the government punished the applicant and his wife for that opposition.[131] Noting that the right to privacy, bodily integrity, and the right to "unfettered reproductive choice" are fundamental and internationally recognized human rights, Rosenberg concluded that anyone who refused a coercive government program was expressing a politi-

122. *S-L-L-*, 24 I. & N. Dec. at 8 (quoting Cai Luan Chen v. Ashcroft, 381 F.3d 221, 226 (3d Cir. 2004)) (internal quotation marks omitted).

123. *C-Y-Z-*, 21 I. & N. Dec. at 918.

124. *Id.* at 915.

125. *Id.* at 916.

126. *Id.*

127. *Id.*

128. *Id.* At his hearing, the applicant submitted unauthenticated copies of his wife's sterilization certification, a document showing he was fined, their marriage certificate, their children's birth certificates, and a household registry. *Id.*

129. *Id.* at 918. The BIA also noted that there was a regulatory presumption that the applicant satisfied a well-founded fear of future persecution under 8 C.F.R. § 208.13(b)(1) (1997), but that presumption could be rebutted by demonstrating that circumstances had changed to the extent that the applicant no longer had a well-founded fear of future persecution in that country. *Id.* at 919.

130. *Id.* at 920–21 (Rosenberg, Bd. Mem., concurring).

131. *Id.* at 921.

cal opinion that could be imputed to another based on association with that individual, especially when applying for asylum.[132]

3. A Circuit Split Developed as Courts Began to Question the BIA's Initial Interpretation

In the ensuing years, several courts began to question the BIA's interpretation in *C-Y-Z-*.[133] In *Chen v. Ashcroft*,[134] for example, the Third Circuit doubted how every spouse not forced to undergo a forced abortion or sterilization procedure showed resistance to a "coercive population control program."[135] The court reconciled the seeming anomaly by concluding that the forced abortion or sterilization procedure could constitute persecution because it impacted the husband's reproductive rights.[136] Quickly thereafter, however, the Second Circuit voiced its concern over the interpretation set forth in *C-Y-Z-*,[137] specifically calling for the BIA to explain the basis for its decision.[138]

The BIA answered this call by re-affirming its interpretation with a split decision in *S-L-L-*.[139] More importantly, the BIA limited its holding in *C-Y-Z-* in two respects: (1) it restricted Section 601's applicability to applicants who opposed their wife's forced abortion or sterilization, and (2) restricted its applicability to spouses who were "legally married under Chinese law."[140] The BIA also noted that Congress had the opportunity, through statute, to limit the IIRIRA's protection, or to rebuke the BIA's interpretation of Section 601, but instead Congress expanded the number of asylees permitted under Section 601.[141]

Conceding that the statute does not specifically reference spouses, the BIA explained that "nexus and level of harm" principles ap-

132. *Id.* at 921–23.

133. J-S-, 24 I. & N. Dec. 520, 522 (A.G. 2008).

134. 381 F.3d 221 (3d Cir. 2004).

135. *Id.* at 226.

136. *Id.* The court further noted, however, that it would take "some effort to reconcile" Section 601's language because it could be most naturally read to confer refugee status only to the person forced to undergo the procedures. *Id.*

137. *See* Lin v. U.S. Dep't of Justice (*Lin I*), 416 F.3d 184, 191 (2d Cir. 2005) ("[A] fresh look at *C-Y-Z-* reveals that the BIA never adequately explained how or why . . . it construed IIRIRA § 601(a) to permit spouses of those directly victimized by coercive family planning policies to become eligible for asylum themselves.").

138. *See id.* at 192 (asking the BIA to explain why spouses were eligible for presumptive refugee status and clarify whether boyfriends or fiancés were eligible as well).

139. 24 I. & N. Dec. 1, 11–12 (B.I.A. 2006).

140. *Id.* at 4.

141. *Id.* at 4–5.

plied in determining whether a spouse has been subject to the persecution described in Section 601.[142] Applying those principles, the BIA concluded that Congress enacted Section 601 to extend presumptive refugee status "to persons whose fundamental human rights were violated by a government's application of its coercive family planning policy."[143] Moreover, the BIA noted that, although the wife undergoes the forced abortion or sterilization procedure, Congress was also concerned about the government's unfettered intrusion into the married couple's private decisions.[144] Indeed, the Chinese government sees the married couple as a single unit when it chooses to intervene,[145] and the law considers a husband's reproductive opportunities "to be bound up with those of his wife."[146] The BIA concluded that a forced abortion or sterilization procedure impacts a couple's shared right to reproduce such that the wife's forced sterilization or abortion is imputed to her husband.[147]

Lastly, the BIA declined to extend *C-Y-Z-* to applicants claiming the government had subjected their girlfriend or fiancée to a forced abortion or sterilization procedure.[148] Focusing on marriage as the "linchpin," the BIA stressed that the sanctity of marriage, and the long-term commitment it places on a husband, distinguishes it from the responsibility placed on an unmarried father.[149] The BIA acknowledged, however, that there are cases where an unmarried partner in an "extremely close and committed relationship" can demonstrate persecution based on the clause in Section 601 referring to

142. *Id.* at 5. The BIA again referenced the Code of Federal Regulations, which allows an applicant to establish asylum if he could show that he suffered past persecution or had a well-founded fear of future persecution. *Id.* at 5 n.5. Past persecution was established if the applicant suffered persecution based on his "race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself . . . of the protection of, that country owing such persecution." *Id.* (quoting 8 C.F.R. § 1208.13(b)(1) (2006)).

143. *Id.* (citations omitted). *See also* Ma v. Ashcroft, 361 F.3d 553, 559 (9th Cir. 2004) (finding that "Congress's goal in passing the amendments [was] to provide relief for 'couples' persecuted on account of an 'unauthorized' pregnancy and to keep families together") (citing H.R. REP. NO. 104-469, pt. 1, at 174 (1996)).

144. *S-L-L-*, 24 I. & N. Dec. at 6.

145. *Id.* at 6–7. The Chinese government imposed joint responsibility on married couples for family planning decisions, and equally threatened the couple and subjected them to social ostracism for failing to comply with municipal family planning policies. *Id.*

146. *Id.* at 8.

147. *Id.*

148. *Id.*

149. *Id.* at 8–9. The BIA highlights that requiring marriage is practical and manageable because it accounts for the statutory definition of "refugee" as well as the general principles of asylum law. *Id.* at 9.

"other resistance to a coercive population control program."[150] That applicant, however, would have to meet the nexus requirement by demonstrating his resistance to a coercive population control program and demonstrate that he was persecuted for that resistance.[151]

4. *The Attorney General Addressed the Circuit Split by Holding That Section 601 Did Not Extend Presumptive Refugee Status to Husbands of Women Forced to Undergo Abortions or Insertions of Contraceptive Devices*

The BIA's clarification in *S-L-L-* did not convince the Second Circuit because the court subsequently reversed, holding that Section 601 is unambiguous in that it does not extend presumptive refugee status to the spouses of persons physically subjected to forced abortions or sterilization procedures.[152] As such, according to the Second Circuit, the BIA was not entitled to deference since the statute is unambiguous and therefore the BIA erred in its interpretation of Section 601.[153] The Second Circuit's divergence created a circuit split, conflicting with other courts that deferred to the BIA's interpretation in *C-Y-Z-*.[154]

The circuit split prompted the Attorney General to direct the BIA to refer its decision in *J-S-*, a case with facts similar to *C-Y-Z-*, for his review.[155] The Attorney General vacated the IJ's decision, rejected the BIA's interpretation of Section 601 in *C-Y-Z-*, and concluded that Section 601 did not extend presumptive refugee status to the spouse of a person physically subjected to undergo a forced abortion or sterilization procedure.[156] Similar to *C-Y-Z-*, the applicant in *J-S-* was a Chinese citizen who sought asylum under Section 601 because the Chinese government forced his wife to undergo an involuntary sterilization procedure.[157] The applicant requested permission from the

150. *Id.* at 10.

151. *Id.*

152. Shi Liang Lin v. U.S. Dep't of Justice (*Lin II*), 494 F.3d 296, 299–300 (2d Cir. 2007) (en banc).

153. *Id.* at 300.

154. *See, e.g.*, Lin-Jian v. Gonzales, 489 F.3d 182, 188 (4th Cir. 2007) (deciding not to challenge the BIA's interpretation of Section 601 and noting that other courts have approved the BIA's interpretation as well).

155. J-S-, 24 I. & N. Dec. 520, 520 (A.G. 2008). The Attorney General is granted this reviewing authority under 8 C.F.R. § 1003.1(h)(1)(i) (2010). *Id.*

156. *J-S-*, 24 I. & N. Dec. at 521.

157. *Id.* at 522. The applicant alleged that Chinese officials forcibly removed his wife from their home to insert an IUD and then required his wife to make frequent medical visits to check its effectiveness. *Id.* at 524.

Chinese government to have another child three separate times, but Chinese officials refused each request.[158]

In his opinion, the Attorney General first examined Congress's intent by analyzing Section 601's text, concluding that the statutory language refers only to "a person" who has been forced to "undergo" an involuntary abortion or sterilization procedure.[159] The Attorney General explained that, when interpreting the statute in a way that gives its words "their 'ordinary or natural' meaning," "a person" referred only to the individual subjected to the procedure and not to spouses.[160] He asserted that Congress would have expressly said "spouses" if it wanted to include them in Section 601's forced abortion and sterilization clauses.[161] The Attorney General also noted that the BIA's interpretation that allowed spouses to use Section 601 circumvented the INA's separate derivative asylum requirements,[162] and the INA's requirement that applicants establish asylum on their own merits.[163] Because the Attorney General found that the one-child policy did not persecute a husband who wanted to have more than one child, he also found that the BIA's interpretation permitted a large number of applicants to gain asylum without having to meet the statutory burden of proving past persecution or a well-founded fear of future persecution because of their political opinion.[164]

To explain why Congress did not alter the statute and raise its annual cap of permitted asylees after *C-Y-Z-*,[165] the Attorney General stated that not altering the text could be interpreted merely as a failure to express an opinion.[166] As for raising the annual cap, the Attorney General contended that Congress could have merely raised the cap because the original cap was unrealistically low and had created an unmanageable backlog of applicants awaiting approval, even absent the *C-Y-Z-* opinion.[167] Further, the Attorney General disagreed

158. *Id.* at 524. The applicant testified he did not want to interfere with the IUD's forced insertion because he did not want to "further jeopardize his wife." *Id.*

159. *Id.* at 528.

160. *Id.* at 529 (citations omitted).

161. *Id.* at 530.

162. Derivative asylum extends presumptive refugee status to spouses only if they accompany, follow, or join the alien that is eligible for, and is granted, asylum. *Id.* The applicant in *J-S-* arrived in the United States without his wife. *Id.* at 522.

163. *Id.* at 530. These requirements are distinct from derivative asylum. *Id.*

164. *Id.* (quoting Shi Liang Lin v. U.S. Dep't of Justice (*Lin II*), 494 F.3d 296, 308 (2d Cir. 2007) (en banc)).

165. *Id.* at 533.

166. *Id.*

167. *Id.* (quoting S-L-L-, 24 I. & N. Dec. 1, 4 (B.I.A. 2006) (en banc) (Pauley, Bd. Mem., concurring)).

with the respondent's recount of Section 601's legislative history. He explained that the legislative history does not expressly address presumptive refugee status for spouses,[168] although there was some evidence that Congress expected the provision to benefit both spouses when each spouse was able to satisfy the asylum requirements.[169]

To support the claim that spouses do not receive presumptive refugee status, the Attorney General referenced portions of the House Report[170] where committee members advised against conferring presumptive refugee status to spouses by emphasizing that the burden of proof remains with every applicant to establish that he has been subject to persecution.[171] Nonetheless, throughout his opinion, the Attorney General noted repeatedly that his decision did not prevent the spouse of a person subjected to a forced abortion or sterilization procedure from establishing asylum in his own right by virtue of Section 601's provisions relating to "failure," "refusal," "other resistance," or "well founded fear."[172]

III. THE COURT'S REASONING

In *Yi Ni v. Holder*, the United States Court of Appeals for the Fourth Circuit agreed with the Attorney General's opinion in *J-S-* and held that Ni, an alien and Chinese citizen, failed to establish persecution based on his wife's forced abortion and sterilization procedure.[173] Writing for the court, Judge Allyson K. Duncan began by explaining that the court would apply the *Chevron* standard to the AG's opinion in *J-S-*.[174] Under this analysis, the Court held that the Attorney General's interpretation of the statute was permissible,[175] finding that Section 601 unambiguously expressed Congress's intent.[176] The court examined Section 601's plain language and agreed with the Attorney

168. *Id.* at 538.

169. *Id.* (citing H.R. REP. NO. 104-469, pt. 1, at 174–75 (1996)). There were references in the House Report and floor discussions to "couples" and "women and men . . . fleeing from forced abortion." *Id.* The Attorney General notes, however, that the references say nothing as to a spouse establishing asylum solely because his wife was subjected to a forced abortion or sterilization procedure. *Id.*

170. H.R. REP. NO. 104-469, pt. 1, at 174 (1996).

171. *J-S-*, 24 I. & N. Dec. at 539.

172. *Id.* at 523–24.

173. 613 F.3d 415, 428, 431–32 (4th Cir. 2010).

174. *Id.* at 424 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984)) (determining whether to adopt an agency's interpretation of a statute that it administers requires examining whether the statute is ambiguous and if so, then whether the interpretation is a "permissible construction of the statute").

175. *Id.* at 427.

176. *Id.* at 425.

General that Congress intended only to cover the individual the government had forced to either have an abortion or undergo the forced sterilization procedure; the statute referred to a singular "person" instead of a couple, precluding the extension of presumptive refugee status to spouses based solely on those grounds.[177]

The court then noted that even if the terms were ambiguous, it would still give the Attorney General's opinion particular deference because the statute's expressed language conferred decision-making authority for decisions regarding eligibility for withholding of removal to the Attorney General.[178] Moreover, the court explained that the U.S. Supreme Court has also favored judicial deference to the executive branch in sensitive immigration contexts implicating foreign relations.[179] Thus, the court found that the Attorney General's analysis of the statutory language was consistent with the rules of statutory construction.[180]

The court also agreed with the Attorney General's reasoning that automatically granting a husband asylum would circumvent the INA's derivative asylum requirements and the IIRIRA's requirement that every applicant establish eligibility on his or her own merits.[181] The court explained that the INA grants derivative asylum to spouses of persecuted individuals "if such spouses do not themselves qualify as refugees, but only if they accompany, or follow to join, the alien who is eligible for, and is actually granted, asylum."[182] Therefore, the court concluded that granting applicants automatic refugee status would undermine the provision's implied derivative asylum by extending refugee status to spouses who do not accompany their wives.[183] Further, the court disagreed with Ni's claim that withholding of removal is a much broader concept than asylum.[184] The court ultimately held that Ni could not establish a claim for withholding of removal using his wife's forced abortion as his sole basis.[185]

Next, the court relied on the Attorney General's reasoning to conclude that persecution could not be based solely on fear of psy-

177. *Id.* at 424–25.

178. *Id.* at 425–26 (citations omitted).

179. *Id.* at 426 (citations omitted).

180. *Id.* The Court explained that it would be inconsistent to interpret the statute to encompass two people—a husband and a wife—being able to have an abortion. *Id.* (citing J-S-, 24 I. & N. Dec. 520, 529 (A.G. 2008)).

181. *Id.* at 426–27.

182. *Id.* at 426 (quoting *J-S-*, 24 I. & N. Dec. at 530 (internal quotation marks omitted)).

183. *Id.*

184. *Id.* at 427.

185. *Id.* at 428.

chological harm.[186] Reiterating the IJ's conclusion that Ni's claim failed to show a nexus between his political opinion and the alleged harm, the court found no evidence that the government perceived Ni as a political dissident.[187] As a result, the court determined that Ni's fear of having more children was speculative because it depended on forces beyond Ni's control.[188] Ni failed, the court noted, to show that he would face persecution for resisting the policies.[189] Lastly, the court rejected Ni's request to remand the case to present additional evidence in light of a new legal standard.[190] Distinguishing Ni's case from *Chen v. Holder*,[191] in which the court permitted the petitioner to obtain additional evidence in light of a new legal standard, the court noted that Ni turned in his initial legal briefs two months after the standard changed and thus had ample time to provide additional evidence.[192]

IV. ANALYSIS

In *Yi Ni v. Holder*,[193] the Fourth Circuit held that an alien failed to establish asylum and withholding of removal because his wife's forced abortion and sterilization did not amount to persecution of the husband.[194] In so holding, the court inadequately considered the infringement on a husband's rights when his wife is forced to undergo an abortion or sterilization procedure.[195] Additionally, the court's ruling will lead to an unequal application of Section 601.[196] The court should have disagreed with the Attorney General's interpretation of Section 601 because Section 601 is ambiguous and the Attorney General's interpretation was not a permissible construction of the ambiguous statute.[197]

186. *Id.*

187. *Id.* at 429.

188. *Id.* at 428–29. These include Mei's willingness to have additional children, and Ni's uncertainty of their ability to conceive again. *Id.* at 429.

189. *Id.* The court noted that Ni never took affirmative steps to violate the policies and testified to the opposite effect—that he would not have more children in violation of the policy if he returned. *Id.*

190. *Id.* at 430–31.

191. 578 F.3d 515 (7th Cir. 2009).

192. *Yi Ni*, 613 F.3d at 431.

193. 613 F.3d 415 (4th Cir. 2010).

194. *Id.* at 431–32.

195. *See infra* Part IV.A.

196. *See infra* Part IV.B.

197. *See infra* Part IV.C.

A. The Yi Ni *Court Ignored That a Husband's Rights Are Affected When the Government Does Not Permit His Wife to Have Additional Children*

By agreeing with the Attorney General's interpretation that a wife's forced abortion or insertion of a contraceptive device did not rise to persecution for a husband, the Fourth Circuit failed to acknowledge that a husband is also persecuted when his wife is forced to have an abortion or is sterilized. First, a husband has a fundamental right to procreate, and the one-child policy infringes on that right.[198] Second, a husband is often emotionally hurt by not being able to have more than one child, and by his wife's pain.[199] Finally, the Chinese government frequently punished couples, and not just wives, for violating the one-child policy through fines or job loss.[200]

1. A Husband's Right to Reproduce Is Affected When His Wife Is Forced to Have an Abortion or Have a Contraceptive Device Inserted

The right to reproduce is a fundamental and constitutionally protected right that has been recognized by the U.S. Supreme Court.[201] It is also regarded as one of the most valued human rights.[202] It guarantees all individuals "the right to determine 'freely and responsibly the number and spacing of their children'" and the right to make decisions concerning reproduction "free of coercion, discrimination and violence."[203] In fact, in her concurring opinion in *C-Y-Z-*, Board Member Lory D. Rosenberg recognized that "[t]he right to privacy, the right to have a family, the right to bodily integrity, and the right to unfettered reproductive choice are fundamental individ-

198. *See infra* Part IV.A.1.

199. *See infra* Part IV.A.2.

200. *See infra* Part IV.A.3.

201. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

202. Kala M. Strawn, *Standing in Her Shoes: Recognizing the Persecution Suffered by Spouses of Persons Who Undergo Forced Abortion or Sterilization Under China's Coercive Population Control Policy*, 24 WIS. J.L. GENDER & SOC'Y 205, 225 (2009).

203. Paula Abrams, *Population Politics: Reproductive Rights and U.S. Asylum Policy*, 14 GEO. IMMIGR. L.J. 881, 889–90 (2000) (citing UNITED NATIONS, PROGRAMME OF ACTION OF THE INTERNATIONAL CONFERENCE ON POPULATION AND DEVELOPMENT, para. 7.3, U.N. Doc. A/Conf. 171/13, U.N. Sales No. E. 95.XIII.18.CI Annex (1994)).

ual rights, recognized domestically and internationally."[204] This right extends to both a man and woman.[205] It also extends to any individual within the United States' jurisdiction,[206] including Chinese aliens attempting to escape China's oppressive policies.

As a constitutionally protected right, the right to reproduce that a Chinese citizen in the United States possesses is analogous to other fundamental rights, such as the freedom of speech or religion. Courts in the United States find that the latter two rights are legitimate grounds for granting asylum based on persecution on account of one's political opinion.[207] Like any other opinion, a husband has a political opinion when he objects to policies that infringe on his right as a married individual to choose whether to bear children.[208] Similarly, bearing children in bold defiance of a suppressive policy is equally an expression of political opinion.[209] When the government then chooses to abort a husband's child or forcibly insert a contraceptive device into his wife to infringe on his "unfettered reproductive choice," it violates his right to procreate and amounts to persecution for both spouses.[210]

Denying a husband the power to establish presumptive refugee status based on his wife's abortion ignores his right to control his own reproduction, and ignores that his wife's abortion equally affects his right to reproduce. A husband is incapable of procreating without his wife.[211] When she is persecuted by means of a forced abortion, so is he. When the government forcibly aborts or sterilizes the wife, it is an intrusive act that violates both the wife's and the husband's funda-

204. C-Y-Z-, 21 I. & N. Dec. 915, 921 (B.I.A. 1997) (en banc) (Rosenberg, Bd. Mem., concurring). Rosenberg added that "one who opposes or resists a coercive population control program involving forced abortion and sterilization because he or she believes that it is wrong or improper on personal, ethical, religious or philosophical grounds, holds a political opinion." *Id.* at 922.

205. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 90 (1976) (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)) (acknowledging "a man's right to father children and enjoy the association of his offspring").

206. *See supra* Part II.A.2.

207. Strawn, *supra* note 202, at 226.

208. *Id.* at 225–26 (citations omitted).

209. *See id.* (citing Guo Chun Di v. Carroll, 842 F. Supp. 858, 872 (E.D. Va. 1994)) ("[T]here is little doubt that the phrase 'political opinion,' as defined in § 101(a)(42) of the INA, encompasses an individual's views regarding procreation.").

210. *See id.* at 226 ("For both men and women, denial of the choice to remain fertile or procreate constitutes persecution on the basis of political opinion.").

211. *See id.* at 224–25 (citing Sun Wen Chen v. Atty. Gen. of U.S., 491 F.3d 100, 107–08 (3d Cir. 2007)) (explaining that sterilizing a woman deprives a couple of the children that would have been born to the both of them, and that "the forced abortion or sterilization of one spouse will directly affect the reproductive capacity of the other").

mental rights because it impedes their decision whether to reproduce by using both violence and coercion.[212] Although the *Yi Ni* court acknowledged that the BIA's earlier interpretations of Section 601 allowed a husband to establish past persecution based on his wife's forced abortion,[213] the court instead chose to apply the Attorney General's narrow interpretation, seemingly ignoring the devastating impact that a forced abortion has on a husband's right to reproduce.[214]

2. *A Man Is Persecuted When His Child Is Aborted Because He Suffers Emotional Harm*

Although abortion and sterilization procedures are performed almost exclusively on women, husbands also experience pain and loss when their wives are forced to terminate their pregnancies.[215] The entire family feels the impact.[216] It can be traumatic, for example, for children to witness their mothers, or a husband to witness his wife, experience the physical and psychological suffering associated with forced abortion or sterilization procedures.[217] Indeed, because these families want to do something very natural by enlarging their family, and because forced abortions and sterilizations traumatically impede on the natural inclinations of each family member, it is a narrow-minded view to conclude that a forced abortion persecutes only one individual.[218]

When one spouse is subjected to a forced abortion or sterilization procedure, it "naturally and predictably has a profound impact on both parties to the marriage."[219] The forced abortion or steriliza-

212. *See* Abrams, *supra* note 203, at 889 (explaining that the right to reproduce includes the right to make decisions concerning reproduction "free of coercion, discrimination and violence" (citing UNITED NATIONS, PROGRAMME OF ACTION OF THE INTERNATIONAL CONFERENCE ON POPULATION AND DEVELOPMENT, para. 7.3, U.N. Doc. A/Conf. 171/13, U.N. Sales No. E. 95.XIII.18.CI Annex (1994))).

213. *See* Yi Ni v. Holder, 613 F.3d 415, 422 (4th Cir. 2010) (citations omitted) (acknowledging that the BIA's earlier interpretation was largely based on the shared impact that a forced abortion had on a husband and wife's right to reproduce).

214. *Id.* at 425. Despite the impact on a husband and wife's shared right to reproduce, the court agreed with the Attorney General's interpretation that Congress only intended to cover the specific person physically harmed under China's one-child policy. *Id.*

215. *See* Strawn, *supra* note 202, at 224.

216. *Id.* at 211.

217. *Id.*

218. *See* Shi Liang Lin v. U.S. Dep't of Justice (*Lin II*), 494 F.3d 296, 329 (2d Cir. 2007) (en banc) (Sotomayor, J., concurring in the judgment) (noting that a spouse, "while physically unharmed," also is a target of persecution since his own health and emotional well-being is affected by a forced abortion).

219. S-L-L-, 24 I. & N. Dec. 1, 7 (B.I.A. 2006) (en banc).

tion of a husband's spouse "deprive[s] a couple of the natural fruits of conjugal life"—a child.[220] Some, including judges, argue that one can be persecuted simply by witnessing someone with whom he shares an intimate relationship be harmed.[221] Given the impact of China's one-child policy, the Fourth Circuit could not in good faith deny that "one has suffered harm or injury sufficiently severe to constitute persecution when one's spouse is forced to undergo an abortion or sterilization."[222]

3. China's One-Child Policy Persecutes a Family in Several Ways, All Through Which the Husband Continues to Suffer Emotional Harm

The Fourth Circuit failed to adequately consider the overwhelming human rights violations that China endorses through its one-child policy, all of which are emotionally imposed on a spouse by extension. The one-child policy's most easily recognizable offense is that it violates human rights by restricting the right and ability of Chinese citizens to reproduce.[223] It explicitly prohibits married couples from having children.[224] The one-child policy, however, has deeper devastating effects by committing harsher human rights crimes against individuals that go unpublicized.[225]

The Chinese government, for example, punishes married couples for unplanned pregnancies through a series of penalties, including heavy fines and job loss.[226] The government has forcibly aborted full-term pregnancies with little regard for the mother's safety or the emotional effect it would have on the married couple.[227] These atrocities are not just reserved to a few select cases. During one horrific thirty-five-day period in 2003, the Chinese government forcibly aborted 271 pregnancies and sterilized 1,369 women to ensure their

220. *Lin II*, 494 F.3d at 330 (Sotomayor, J., concurring in the judgment) (quoting Qu v. Gonzales, 399 F.3d 1195, 1202 (9th Cir. 2005) (citations omitted)).

221. *Id.*

222. *Id.*

223. Megan A. Carrick, *Ensuring That Federal Circuit Courts Adhere to the Spirit of the Law: Why Legally and Non-Legally Married Spouses Deserve Explicit Asylum Protection Under Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act*, 42 CREIGHTON L. REV. 181, 207 (2009).

224. *Id.* at 208. Even full-term pregnancies have been aborted if couples were found to have violated the one-child policy. *Id.*

225. *See id.* 207–08 (outlining the various methods the Chinese governments used to enforce its one-child policy).

226. *Id.* at 208.

227. *See id.* (describing China's actions to ensure compliance with the one-child policy).

compliance with the one-child policy.[228] Read alternatively, the spouses of individuals subjected to forced abortions or sterilization procedures in China either saw their child aborted, or were forced to give up their ability to have another child, more than 1,600 times in just those thirty-five days. Moreover, the forcibly inserted IUDs, in particular, have physical side effects, including "heavy bleeding, weight loss, fatigue, and anxiety disorders."[229] Although the husband is seldom sterilized,[230] it is still traumatic to watch his wife experience those physical side effects.[231]

Even still, the emotional reactions to forced abortions or forcible insertions of contraceptive devices vastly outweigh any physical turmoil or side effects.[232] The State Department has estimated that about 500 Chinese women commit suicide every day due, in part, to the one-child policy.[233] In one case in 2004, the State Department reported that a Chinese woman, in an attempt to avoid sterilization, injured herself by jumping out of an operating room window.[234] In these cases, husbands have not only lost their children, or had their rights infringed upon, but also abruptly lost their spouses in sometimes gruesome fashion.

These are terrible crimes that the Chinese government regularly commits against its own citizens, causing many individuals to flee and seek asylum in the United States. They are the very individuals that Section 601 aims to protect.[235] And yet the Fourth Circuit chose to take a narrow view—agreeing with the Attorney General's interpretation that would make it harder for individuals, particularly spouses who have suffered great emotional harm or actual loss, to establish persecution under a statute specifically promulgated for that purpose.[236]

228. *Id.*

229. *See* Strawn, *supra* note 202, at 210.

230. *Id.* at 209.

231. *Id.* at 211.

232. *Id.* at 210.

233. *Id.*

234. *Id.*

235. *See* Carrick, *supra* note 223, at 209 ("Congress intended to provide asylum protection to all victims of China's coercive family planning policy by amending [the IIRIRA with Section 601] to provide asylum protection to *persons* persecuted by a forced abortion or sterilization.").

236. Yi Ni v. Holder, 613 F.3d 415, 431–32 (4th Cir. 2010).

B. The Fourth Circuit's Acceptance of the Attorney General's Interpretation of Section 601 Will Lead to an Unequal Application of the Law

Because the Fourth Circuit found that only those who suffer a forced abortion or sterilization qualify as persecuted for these purposes, immigration judges will apply Section 601 unequally.[237] Clearly, only women can undergo forced abortions. But the disparity does not end there, as women also comprise a much larger percentage of those subjected to forced sterilization.[238] Although men can be sterilized, China historically sterilized less than a third of husbands compared to wives.[239] This inconsistency is partially due to the belief in China that sterilization renders men weak.[240] In addition, women are traditionally seen as being primarily responsible for using birth control.[241] Thus, China has a strong cultural incentive to focus its policy heavily on women, making it less likely that men can seek refuge under Section 601 on their own merit following the Fourth Circuit's decision, despite the traumatic emotional and psychological harm they suffer.

C. The Yi Ni *Court Erred in Agreeing with the Attorney General's Opinion Because Section 601 Is Ambiguous and the Attorney General's Interpretation Is Not a Permissible Construction of the Statute*

Contrary to the Fourth Circuit's finding that "Congress unambiguously expressed the intent to cover only the specific individual who has undergone forced abortion or sterilization" under Section 601,[242] the statute ambiguously defines who is specifically protected under the INA and can show past persecution under China's one-child policy.[243] Under a *Chevron* analysis, courts must defer to the administrative agency's interpretation when reviewing an ambiguous statute if

237. *See* Jamie Jordan, *Ten Years of Resistance to Coercive Population Control: Section 601 of the IIRIRA of 1996 to Section 101 of the Real ID Act of 2005*, 18 HASTINGS WOMEN'S L.J. 229, 234 (2007) (explaining that the Chinese government monitors the entire female population of child-bearing age, rewards neighbors for turning in pregnant neighbors, and immediately forces women to use contraceptives after giving birth for the first time).

238. *See* Strawn, *supra* note 202, at 209 (comparing the data of men and women sterilized between 1979 and 1984).

239. *See id.* ("Between 1979 and 1984, 31 million women and 9.3 million men were sterilized, which represents almost one-third of all married couples in China.").

240. *Id.* at 210.

241. *Id.*

242. Yi Ni v. Holder, 613 F.3d 415, 425 (4th Cir. 2010).

243. *See infra* Part IV.C.1.

the agency's interpretation is permissible.[244] In this case, the Attorney General's interpretation was not permissible because legislative history reveals that Congress intended the statute to include husbands.[245]

1. Section 601's Usage of the Word "Person" in Regard to Several Provisions That Apply to a Single Sex Is Ambiguous

The Fourth Circuit should have found that Section 601 was ambiguous on whether it extends to spouses. Although the statute does refer only to a "person," Congress used a gender-neutral term to describe who could be protected by the provision.[246] Since it is women who undergo forced abortions and sterilizations, Congress may have used the gender-neutral term intending this protection to extend to both individuals and their spouses.[247] Linking this gender-neutral term across no less than six embedded clauses,[248] Section 601 is thus ambiguous because it refers to "a person" when discussing procedures that can only be applicable to one sex, and is confusingly linked to claims that can equally be raised by either a husband or wife.[249] Moreover, Congress did not define "persecution" to "exclude harms not personally suffered by an applicant."[250] Section 601 states only that "'any person' who 'because of persecution or a well-founded fear of persecution' is 'unable or unwilling' to return to his or her country is entitled to asylum."[251] Under this provision alone, "there is no indication whatsoever of how personal or direct the harm or injury must be, only that persecution to an individual can merit asylum protection."[252]

In fact, the government acknowledged that the statute was ambiguous in *Shi Liang Lin v. U.S. Department of Justice*.[253] There, the government conceded that Section 601 is ambiguous with regard to a husband's authority to claim past persecution based on his wife's

244. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

245. *See infra* Part IV.C.2.

246. 8 U.S.C. § 1101(a)(42) (2006).

247. Carrick, *supra* note 223, at 209.

248. 8 U.S.C. § 1101(a)(42) (2006).

249. Shi Liang Lin v. U.S. Dep't of Justice (*Lin II*), 494 F.3d 296, 328–29 (2d Cir. 2007) (en banc) (Sotomayor, J., concurring in the judgment) (explaining that Congress did not state that the harms must be "personally" suffered by the applicant, whether it be a man or woman, but that anyone with a well-founded fear of persecution could be entitled to asylum in the United States).

250. *Id.* at 328 (internal quotation marks omitted).

251. *Id.* at 328–29.

252. *Id.* at 329.

253. *Id.* at 316 (Katzmann, J., concurring in the judgment).

forced abortion or sterilization under the provision.[254] As even the government conceded that the statute is ambiguous, it was an error for the Fourth Circuit to find the statute was unambiguous.

2. The Attorney General's Interpretation of Section 601 Is Not a Permissible Construction Because Congressional Intent Shows That Section 601 Includes Husbands Who Are Forced to Limit Their Family to One Child

If a statute is ambiguous, then the court must move to the second prong of the *Chevron* analysis, where it must decide if the administrative decision is a permissible construction of an ambiguous statute. Accordingly, the Fourth Circuit should first have found the statute was ambiguous, and then found that the Attorney General's interpretation was not permissible.[255] After giving deference to the Attorney General's interpretation, the Court found the Attorney General's analysis of the statutory language to be consistent with the rules of statutory construction.[256] The Attorney General concluded that, giving Section 601's words "their ordinary or natural meaning," "a person" referred only to the individual subjected to the procedure and not to spouses.[257] He also asserted that Congress would have expressly said "spouses" if it wanted to include spouses in Section 601's forced abortion and sterilization clauses.[258]

This interpretation, however, ignores Congress's intent to use Section 601 to expand the availability of asylum under the INA to victims of coercive population control policies.[259] Contrary to the Attorney General's assertion, Section 601's legislative history indicates that Congress intended to endorse earlier executive policies that granted asylum protection to those individuals who were subjected to forced

254. *Id.*

255. *See id.* at 327–28 (Sotomayor, J., concurring in the judgment) (arguing that it would be unreasonable to interpret Section 601 too narrowly in conflict with congressional intent).

256. Yi Ni v. Holder, 613 F.3d 415, 426 (4th Cir. 2010). The court explained that it would be inconsistent to interpret the statute to encompass two people—a husband and a wife—as able to have an abortion. *Id.* (citing J-S-, 24 I. & N. Dec. 520, 529 (A.G. 2008)).

257. *J-S-*, 24 I. & N. Dec. at 529. (citing Leocal v. Ashcroft, 543 U.S. 1, 9 (2004) (quoting Smith v. United States, 508 U.S. 223, 228 (1993))).

258. *Id.* at 530.

259. *Lin II*, 494 F.3d at 328 (Sotomayor, J., concurring in the judgment) ("Section 601 was, after all, expressly enacted to *expand*, not contract, the availability of asylum under § 1101(a)(42) in the context of coercive population control programs.").

abortion and sterilization procedure, as well as their spouses.[260] In fact, two of Section 601's sponsors reiterated that Congress intended Section 601 to extend refugee status and provide asylum to every victim of China's one-child policy, including the spouses of individuals who personally underwent a forced abortion or sterilization procedure.[261]

Additionally, Congress intended to include individuals "who have been submitted to undeniable and grotesque violations of fundamental human rights."[262] With this intent in mind, Congress specifically indicated, when looking at the "individual burden" of proof, "that he or she has been subject to persecution—in this case, to coercive abortion or sterilization—or has a well-founded fear of such treatment." This would be a difficult standard for a man to prove because he would not undergo these procedures.[263] Congress knows this fact and this therefore shows that the only applicants that Congress intended to exclude under Section 601 were those who "merely speculate that they will be so mistreated at some point in the future," not the spouses of individuals who have already been harmed.[264] Considering the mounting evidence, the Attorney General erred in narrowing the statute's scope contrary to Congress's intent, and thus, his interpretation is unreasonable.[265]

V. CONCLUSION

In *Yi Ni v. Holder*, the Fourth Circuit Court of Appeals agreed with the Attorney General's narrow interpretation in *J-S-* and held that a husband could not establish persecution under Section 601 based solely on his wife's forced abortion or sterilization procedure.[266] This interpretation contradicts Congress's original intent and could lead to vastly unequal applications of Section 601.[267] Instead, the court should have found that the statute was ambiguous and the Attorney General's exclusion of spouses was an impermissible interpretation of

260. *See* H.R. REP. NO. 104-469, pt. 1, at 174 (1996) (clarifying that Congress's intent in passing Section 601 was to provide asylum protection to those men, women, and couples whose human rights had been violated as part of China's coercive family planning policy).

261. *See* Carrick, *supra* note 223, at 209.

262. H.R. REP. NO. 104-469, pt. 1, at 174 (1996).

263. *Id.*

264. *Id.*

265. *See* J-S-, 24 I. & N. Dec. 520, 529 (A.G. 2008) (citing Leocal v. Ashcroft, 543 U.S. 1, 9 (2004) (quoting Smith v. United States, 508 U.S. 223, 228 (1993))).

266. Yi Ni v. Holder, 613 F.3d 415, 428, 431–32 (4th Cir. 2010).

267. *See supra* Part IV.B.

the statute.[268] A husband is persecuted when he loses a child through a forced abortion or must watch his wife be subjected to a forced abortion or sterilization procedure.[269] Accordingly, a husband should be able to demonstrate persecution based on his wife's forced abortion or sterilization procedure under China's one-child policy, thereby qualifying for refugee status under Section 601.

268. *See supra* Part IV.C.

269. *See supra* Part IV.A.