UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

JACOB ROGINSKY,	)
Complainant,	)
	)
UNITED STATES	)
DEPARTMENT OF JUSTICE	)
OFFICE OF SPECIAL COUNSEL	)
FOR IMMIGRATION RELATED	)
UNFAIR EMPLOYMENT	)
PRACTICES	)
Intervenor,	)
	)
v.	) 8 U.S.C. §1324b Proceeding
	) Case No. 90200168
DEPARTMENT OF DEFENSE,	)
Respondent.	)
	)

DECISION AND ORDER APPROVING IN SUBSTANTIAL PART THE AGREED DISPOSITION AMONG THE PARTIES
(May 5, 1992)

MARVIN H. MORSE, Administrative Law Judge

Appearances:

Michael Wolf, Esq., for Complainant.
Daniel W. Sutherland, Esq., for the Intervenor.
Richard D. Hipple, Esq., for Respondent.

INTRODUCTION

This Decision and Order addresses the proposed decision and order filed by the parties on March 31, 1992. Concurring in substantial part, but rejecting the suggestion that I retain certain jurisdiction, this decision and order issues in lieu of the text tendered. As promised to the parties, I provide an analysis of the sovereign immunity issue resolved at the May 1, 1991 prehearing conference.

I. *Background*

This is a case under Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, as amended, codified at 8 U.S.C. §1324b. Dr. Jacob Roginsky (Roginsky or Complainant) is a naturalized U.S. citizen of Soviet national origin. On May 17, 1990, Roginsky filed a Complaint which alleged unfair immigration-related employment practices by the United States Department of Defense (DOD), Center for Naval Analysis, and EPL Analysis. The Complaint claimed the Respondents unlawfully discriminated against him in violation of 8 U.S.C. §1324b on the basis of his national origin and citizenship status.[1] The Complaint was filed as a private action. 8 U.S.C. §1324b(d)(2). This Office issued its Notice of Hearing on May 30, 1990 transmitting the Complaint to Respondents, with a courtesy copy to the Acting Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

On July 10, 1990, DOD filed its Answer and a "Suggestion for a Stay of Further Proceedings Pending A Decision by the Office of Legal Counsel (OLC), Department of Justice" (Suggestion).[2] As an affirmative defense, the Answer claimed, inter alia, that on the basis of sovereign immunity this forum lacks subject matter jurisdiction. To obtain substantiation for its affirmative defense, Respondent requested reconsideration by OLC of a May 2, 1990 opinion OLC had rendered at the unilateral request of OSC. That opinion concluded that sovereign immunity is unavailable as a defense to a claim under 8 U.S.C. §1324b. By its Suggestion, DOD requested abatement of this proceeding while OLC reconsidered its May 2 opinion. I granted the unopposed motion, providing time for OLC reconsideration.

On November 19, 1990, Complainant filed an unopposed pleading withdrawing his consent to the stay. He withdrew consent because OLC had at that date still not rendered a reconsideration opinion. By

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[1] DOD, represented in this proceeding by the Office of the General Counsel, Department of the Navy, stipulated that it would not defend on the basis that Complainant had applied for fellowships as distinct from hire, and agreed to treat this as an application for employment case. References throughout this Decision and Order to DOD include its counsel where appropriate.

[2] In addition to DOD and its components, the complaint also charged EPL Analysis (EPL) and the Center for Naval Analyses (CNA) with an unfair immigration-related employment practice (also referred to in this decision and order as discrimination). Complainant filed a motion on June 22, 1990 to voluntarily dismiss EPL. Absent objection by any other party, on July 10, 1990 I dismissed as to EPL. Similarly, I granted Complainant's subsequent motion to dismiss as to CNA. 2 OCAHO 345 (6/17/91).

order dated December 12, 1990, I restored this proceeding to the active docket.

In his Complaint, Roginsky alleged that DOD discriminated against him by applying its regulation then codified at 32 C.F.R. §§154, et seq., against him. According to Complainant, the offensive regulation selectively denied security clearances to naturalized citizens based on their country of origin and either duration of U.S. citizenship or residence in the United States. Complainant contended that the DOD regulation, as applied to him, violated 8 U.S.C. §1324b.

The First Prehearing Conference Report and Order (1/14/91) articulated the inquiry as to whether this case raised a claim of national origin or citizenship discrimination. That Report identified the following jurisdictional issue:

> Whether an administrative law judge under 8 U.S.C. §1324b has jurisdiction where the alleged discrimination arises with respect to a naturalized U.S. citizen to whom employment was allegedly denied because of insufficient duration of U.S. citizenship or residence and the fact that his national origin was one among identified "adverse" countries?

At the second prehearing conference on March 5, 1991, I held, inter alia, that,

> (1) the alleged discrimination essentially was based on and implicated Complainant's citizenship status and not his Soviet national origin;
>
> (2) to the extent national origin may have been implicated, an administrative law judge is not deprived of 8 U.S.C. §1324b jurisdiction over citizenship discrimination allegations, and
>
> (3) national origin jurisdiction may arise also as a result of the national security exception to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §20000e-2(g). See 8 U.S.C. §1324b(a)(2)(B)."[3]

Second Prehearing Conference Report and Order (3/8/91).

[3] Title 42 U.S.C. §2000e-2(g) aside, jurisdiction of administrative law judges over national origin claims generally is limited to claims against employers employing between four and fourteen individuals. 8 U.S.C. §1324b(a)(2)(B). Salazar-Castro v. Cincinnati Public Schools, OCAHO Case No. 90200373 (2/26/92) at 5; U.S. v. Huang, 2 OCAHO 313 (4/4/91), aff'd, Ching-Hua Huang v. U.S. Dept. of Justice, No. 91-4079 (2d Cir. Feb. 6, 1992); Fordjour v. General Dynamics, 1 OCAHO 286 (1/11/91) at 3; Williamson v. Autorama, 1 OCAHO 174 (5/16/90) at 4; Akinwande v. Erol's, 1 OCAHO 144 (3/23/90); Wisniewski v. Douglas County School District, 1 OCAHO 29 (10/17/88).

By that order, I overruled Complainant's motion to strike DOD's sovereign immunity defense. Subsequently, the parties and the bench agreed that the issue of sovereign immunity had to be resolved because a ruling in DOD's favor would bar this action. Conversely, a ruling that sovereign immunity did not attach would be a predicate for going forward on the merits. The sovereign immunity question was framed as follows:

> whether Section 102 of the Immigration Reform and Control Act of 1986, 8 U.S.C. §1324b, enacts liability for unfair immigration-related employment practices by government departments and agencies, specifically the Department of Defense.

Second Prehearing Conference Report and Order (3/8/91).

Following extensive briefing by the parties,[4] including OSC as amicus curiae,[5] I announced my ruling at the May 1, 1991 prehearing conference, as confirmed by the Third Prehearing Conference Report and Order:

> I find and conclude that the defense of sovereign immunity is not available to shield a federal entity from liability under 8 U.S.C. §1324b. Although the question may be a close one, I find in IRCA a sufficient congressional waiver of sovereign immunity to bring such departments and agencies within the ambit of 8 U.S.C. §1324b. During the conference I expanded on that ruling, which will be explained in more detail in a forthcoming order.

2 OCAHO 324 (5/6/91).

On August 7, 1991, as discussed more fully, infra at 14, Complainant and OSC tendered a motion requesting a stay of proceedings until at least May 1, 1992. That motion recited that on August 5, 1991 the parties "entered into a Memorandum of Understanding which, if its terms are carried out, will provide for the settlement and dismissal of this action." On August 8, 1991 I allowed the motion by an Order Granting Stay of Procedures. The order reiterated that,

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[4] I made this ruling on consideration of the submitted briefs and previous filings with OLC by DOD and OSC, copies of which were attached to DOD's July 10, 1990 Suggestion.

[5] OSC initially participated informally without objection of any party, and as amicus curiae, moving after the sovereign immunity ruling to intervene on behalf of Complainant. By order dated June 10, 1991, I granted OSC's motion. OSC's Complaint in Intervention was limited to charging DoD with employment discrimination only at its Naval Research Laboratory (NRL) facility.

[A]s agreed, I will issue an opinion expanding upon my ruling at the May 1, 1991 prehearing conference, ... [which] . . . concluded, after finding a sufficient Congressional waiver, that under 8 U.S.C. §1324b the defense of sovereign immunity to an action under §1324b is not available to Respondent.

2 OCAHO 363 (8/8/91).

II. *Sovereign Immunity Addressed*

A. Generally

Sovereign immunity is invoked when a private party sues the government. The well understood rule is that, "As sovereign, the United States, in the absence of its consent, is immune from suit." Library of Congress v. Shaw, 478 U.S. 310, 315 (1986). Here, Complainant, a private party, brought suit against DOD. The issue is whether Congress, in enacting IRCA, has consented to waive the government's immunity to suit.

DOD did not defend on the basis of the statutory exceptions to Section 102 coverage. 8 U.S.C. §1324b(a)(2). The prohibition against citizenship status discrimination does not apply where discrimination

> is otherwise required in order to comply with law, regulation, or executive order, or required by Federal, State, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government.

8 U.S.C. §1324b(a)(2)(C).

The case at bar does not implicate the IRCA exception.

Here, Roginsky alleged discrimination as the result of applying a particular DOD regulation. That regulation, previously codified at 32 C.F.R. §154.16, prohibited the granting of security clearances to United States naturalized citizens who are natives of designated countries, including the former Soviet Union. The prohibition applied only to those citizens naturalized for less than five years or who had not resided in the United States for ten years. DOD's regulation has been held unconstitutional. Hyunh v. Carlucci, 679 F.Supp. 61 (D.D.C. 1988).

For the reasons discussed below DOD could not successfully rely on sovereign immunity. I am satisfied that IRCA contains sufficient hallmarks of a waiver to support the conclusion that Congress did not intend to immunize federal executive departments and agencies from

the liability it imposed on other employers in the United States. This Decision and Order is intended to satisfy the commitment to confirm and expand the ruling that the defense of sovereign immunity does not per se shield a federal entity from liability under 8 U.S.C. §1324b.

B. Analytic Framework

Preliminary considerations in determining whether the sovereign immunity doctrine applies are that (i) the United States may not be sued without its consent, Block v. North Dakota, 461 U.S. 273, 287 (1983); (ii), congressional waiver is clear and unequivocal, Army & Air Force Exchange Service v. Sheehan, 456 U.S. 728, 734 (1982); and (iii), sovereign immunity waivers are strictly construed in favor of the sovereign and not expanded beyond what the language of the statute requires. Ruckelshaus v. Sierra Club, 463 U.S. 680, 685-86 (1983).

When invoked, sovereign immunity prevails unless trumped by explicit waiver. One line of cases concludes that "a waiver of the traditional sovereign immunity 'cannot be implied but must be unequivocally expressed.'" United States v. Testan, 424 U.S. 392, 399 (1976) (quoting United States v. King, 395 U.S. 1, 4 (1969)). However, such a restrictive interpretation of waiver is not the exclusive interpretation.

At the threshold, analysis to determine whether Congress waived immunity initially requires an examination of the statutory text. Clearly, an explicit waiver in terms leads to the inescapable conclusion that the defense of sovereign immunity is unavailing. For example, the courts have construed certain environmental protection statutes to waive immunity in terms, Ohio v. United States Dept. of Energy, 904 F.2d 1058, 1064-65 (6th Cir. 1990) (interpreting provisions of the Resource Conservation and Recovery Act); Sierra Club v. Lujan, 728 F.Supp. 1513 (D. Colo. 1990) (interpreting provisions of the Clean Water Act).

Failure to include talismanic language in a statute is not necessarily fatal to finding an express congressional waiver. A leading case explained that,

> waiver of sovereign immunity is accomplished not by a 'ritualistic formula;' rather, intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy.

Franchise Tax Board of California v. United States Postal Service, 467 U.S. 512 (1984) (quoting Keifer & Keifer v. Reconstruction Finance Corporation, 306 U.S. 381, 389 (1939)).

What is clearest about the sovereign immunity doctrine is that it is unclear. Schlafly v. Volpe, 495 F.2d 273, 277 (7th Cir. 1974). ("Perhaps the only irrefutable statement that can be made regarding this doctrine is that it appears to offer something for everyone."). Commentators support the view that the traditional rule no longer commands the same influence as it formerly did. 3 SUTHERLAND ON STATUTORY CONSTRUCTION, §62.03 at 67 (4th ed. 1986.) Divining sovereign immunity has been described as a thankless task. In confronting the doctrine, courts are faced with "hopeless confusion in judicial opinions," Knox Hill Tenant Council v. Washington, 448 F.2d 1045, 1059 (D.C. Cir. 1971) (MacKinnon, J. concurring in part and dissenting in part) Commentators also have attacked the judicially developed doctrine. See Scalia, Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public Lands Cases, 68 Mich. L. Rev. 867 (1970). Even the Supreme Court has been critical of the lack of clarity in the sovereign immunity area. National City Bank of New York v. Republic of China, 348 U.S. 356, 359 (1954); Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 391 (1938).

As framed in Franchise Tax Board and Keifer, the sovereign immunity issue at bar is whether a waiver of sovereign immunity under 8 U.S.C. §1324b is consonant with congressional policy? To aid in identifying that policy, i.e., to determine whether Congress intended to waive immunity as to a particular statute, consideration is given to relevant factors, including the statute and its legislative history; construction of similar, related statutes; the context in which the statute operates; and, implementation of the statute by the executive branch.

> The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law.

U.S. v. Bonanno Organized Crime Family of La Cosa Nostra, 879 F.2d 20, 23 (2d Cir. 1989) (quoting U.S. v. Cooper Corporation, 312 U.S. 600, 605, 61 S.Ct. 742, 743-44 (1941)).

In Bonanno, the issue centered on sovereign immunity of the United States from RICO liability. The court recognized that the statutory text is the starting point for determining whether there has been a waiver. "In executing our overarching obligation to give effect to congressional intent . . . 'consideration must first be given to the language of the statute,'" Bonanno, 879 F.2d at 21, (quoting Netherlands Shipmortgage Corp. v. Madias, 717 F.2d 731, 732 (2d Cir. 1983)).

However, the Bonnano court recognized that statutory language is not the exclusive source for determining congressional intent. The Bonanno court inquired,

> "[D]o the relevant sources of congressional intent of the meaning of [the statutory provision at issue], separately or collectively, evince an unequivocal expression of congressional intent to expose the government to Rico liability?" Bonnano, 879 F.2d at 23. The court quoted 3 SUTHERLAND ON STATUTORY CONSTRUCTION, §62.01, at 111 (4th ed. 1986) to the effect that where statutes are written "in such general language as to make them reasonably susceptible to being construed as applicable both to the government and to private parties" the pertinent rule of construction is that the government is not included absent "other particular indice supporting a contrary result in particular instances." Bonnano, 879 F.2d at 23. (Emphasis supplied). As appears from the ensuing discussion, infra at 11-13, I find sufficient particular indice of waiver.

Two recent Supreme Court decisions address the sovereign immunity doctrine. The statutes construed in these decisions differ from IRCA. In United States v. Nordic Village Inc., __ U.S. __ No. 90-1629 (Feb. 25, 1992), 60 U.S.L.W. 4159 (2/25/92), a divided Court held that subsection 106(c) of the Bankruptcy Code, 11 U.S.C. §106(c) failed to waive sovereign immunity with respect to monetary claims against the United States in the face of explicit waiver language. Writing for the Court, Justice Scalia held the statutory text insufficient to support waiver for monetary claims but, on analysis of "the contrasting language used in subsections (a) and (b)," found the waiver applicable to "suits for other relief." He refused to adopt a reading of the statute which imposes monetary liability where he could not find an unambiguous waiver. Finding the subsection at issue to be ambiguous in context of other subsections, he added that "legislative history has no bearing on the ambiguity point." 60 LW at 4161.

In IRCA, unlike the Bankruptcy Code at issue in Nordic Village, the pertinent provisions are consistent, inter se. The ambiguity created by arguably inconsistent provisions is absent. This IRCA feature distinguishes it from the bulk of those which address sovereign immunity. The typical form of the question is whether a waiver reaches a particular cause of action, e.g., amenability to a particular liability claim but uncertainty whether interest accrues on the claim. Here, where liability of general applicability is enacted subject to explicit exceptions, it is unnecessary to make the inquiry as to whether an explicit waiver of sovereign immunity was intended to go so far and no further. No ambiguity arises regarding whether the United States was intended to be treated differently than any other employer. It follows that the rejection of legislative history as an analytic tool in Nordic Village need not control the outcome here.

In Ohio v. U.S. Dept. of Energy, __ U.S. __, Nos. 90-1341, 90-1517 (Apr. 21, 1992), 60 U.S.L.W. 4325 (4/21/92) the Supreme Court found a waiver as to federal liability to the State of Ohio for certain sanctions but not others under the Clean Water Act (CWA). Justice Souter's opinion for the Court, finding waiver for coercive but not punitive sanctions, explicitly relied on distinctions he found among the penalty provisions at issue. Significantly, the majority opinion discussed the tension "between a proviso suggesting an apparently expansive but uncertain waiver and its antecedent text that evinces a narrower waiver with greater clarity." Such a finding does not deny an IRCA waiver. 60 U.S.L.W. at 4331.

The majority opinion addressed the tension which arose from perceived differences in textual treatment of waiver among provisions in the environmental statutes involved. Justice White, concurring in part and dissenting in part, commented, "[I]t is one thing to insist on an unequivocal waiver of sovereign immunity. It is quite another 'to impute to Congress a desire for incoherence' as a basis for rejecting an explicit waiver. Keifer & Keifer v. Reconstruction Finance Corporation, 306 U.S. 381, 394 (1939) . . ." Ohio v. Dept of Energy 60 U.S.L.W. at 4333. There is no such tension in IRCA.

It may argued that these two recent Supreme Court decisions imply an emerging judicial disfavor with caselaw which finds waiver in any but the most stringently explicit circumstances. I think instead that these precedents deal only with statutes susceptible to disparate analysis because expressions of waiver inter se are found to be inconsistent and imprecise.

C. The Parties' Arguments Discussed

IRCA does not state in terms that the United States waives sovereign immunity. Rather, subject to explicit exceptions, infra at 10-11, 8 U.S.C. §1324b provides, that "[i]t is an unfair immigration-related employment practice for a person or other entity to discriminate . . . on the basis of national origin or citizenship status. 8 U.S.C. §1324b(a)(1). (Emphasis supplied).

Complainant contends that the "other entity" phrase in §1324(b) encompasses the federal government because the same phrase does so in §§1324(a) and (c). As evidenced by their regulations and policies, the Office of Personnel Management (OPM) and DOD consider government entities bound by the §1324a requirement that employers verify employee work authorizations, and by the necessary implication of §1324c. Specifically, Complainant cites the OPM Federal Personnel

Manual, to the effect that federal agencies must comply with the employment eligibility verification requirements of IRCA; and DOD's Information and Personnel Security Program, which requires that employees hired subsequent to enactment of IRCA must have their citizenship status verified in conformance with §1324a(b) prior to their appointment. Complainant notes that the relevant INS regulation defines "entity" to include governmental bodies.

Complainant relies also on the executive order compliance exemption, §1324b(a)(2)(C). Suggesting that executive orders apply only to federal governmental activities, Complainant infers that §1324b otherwise covers the federal government.

Additionally, Complainant notes that IRCA was intended to complement and supplement Title VII, which, inter alia, prohibits covered discrimination in federal employment.

Respondent argues that the term "person" does not ordinarily encompass the federal government. United States v. Cooper Corporation, 312 U.S. 600 (1941). Further, the United States is immune from suit absent an express, statutory waiver. Therefore, even if "person or other entity" is ambiguous, the language must be construed in the government's favor under the doctrine of sovereign immunity. See e.g. United States v. King, 395 U.S. 1, 4 (1969). Additionally, Respondent claims support in the legislative history for its position. Finally, Respondent argues that administrative interpretations are not relevant to the issue of congressional waiver of sovereign immunity.

On balance, although not for precisely the same reasons advanced by Complainant, I find that sovereign immunity has been waived for purposes of 8 U.S.C. §1324b liability. I am satisfied that even though the explicit text fails to clearly establish a waiver, underlying policy, context, and history of the statute demonstrates a congressional intent to include federal agencies within the scope of the statute. See Franchise Tax Bd., 467 U.S. 512 (1984).

D. IRCA Analyzed

(1) The text of §1324

The IRCA prohibition against hiring and employing unauthorized aliens, 8 U.S.C. §1324a(a)(1), applies as does the prohibition against discrimination, 8 U.S.C. §1324b, in identical terms to any "person or other entity." The delineated exceptions make no mention of the federal government in either text.

Exceptions to the prohibition of 8 U.S.C. §1324b against unfair immigration-related employment practices include (1) a person or other entity that employs three or fewer employees; (2) national origin discrimination covered under Section 703 of the Civil Rights Act of 1964; and (3) discrimination because of citizenship status otherwise required (a) in order to comply with law, regulation, or executive order, or (b) required by Federal, State, or local government contract, or (c) which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State or local government. 8 U.S.C. §1324b(a)(2). Nowhere is the term "person or other entity" narrowed so as to eliminate the government or any other employer qua employer from the class title.

(2) §1324b Considered as a Whole and in Context

The statute must be considered as a whole. Nordic Village, No. 90-1629; Ohio v. Dept of Energy, Nos. 90-1341, 90-1517; SUTHERLAND ON STATUTORY CONSTRUCTION at Sec. 46.05 (4th ed. 1986) ("it is not proper to confine interpretation to the one section to be construed.") IRCA demonstrates the congressional intent to treat the antidiscrimination and employer sanctions provisions as unitary. This intent is evident because liability for both broadened national origin protection and for citizenship status protection was designed to expire if sanctions were repealed pursuant to 8 U.S.C. §1324b(k). See also 8 U.S.C. §1324a(l). It follows that the antidiscrimination provisions must be analyzed in concert with the employer sanctions provisions.

The Senate Judiciary Committee report addressing §1324(a) unequivocally embraces the universe of employers without excluding governmental employers from the intended class, i.e., any "person or other entity." The Senate committee had before it for consideration only employer sanctions and not the discrimination provisions. After noting that recruiters or referrers who charged no fee or other consideration were excluded, the report commented:

> With the exception of the categories noted, all employers, recruiters, and referrers are covered: individuals, partnerships, corporations and other organizations, nonprofit and profit, private and public, who employ, recruit, or refer persons for employment in the United States.

S. Rep. No. 132, 99th Cong., 1st Sess. 32 (1985). (Emphasis supplied).

The House of Representatives Report of the Judiciary Committee is in accord. H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 56 (1986)

("[sanctions penalties] are uniformly applied to all employers."). The committee of conference summarizing its discussion of §1324b commented that the " antidiscrimination provisions of this bill are a complement to the sanctions provisions, and must be considered in this context." H.R. Rep. No. 1000, 99th Cong., 2d Sess. 87 (1986).

Respondent's reliance on legislative history is misplaced. That §1324b complements §1324a and broadens Title VII's protections against national origin is consistent with waiver. See H.R. Rep. No. 1000 at 87. See also 42 U.S.C. §2000e-16 (employment by federal government covered by Title VII). Nothing in the legislative history reflects an intention to avoid or reject coverage of federal agencies, except as explicitly provided.

Significantly, §1324c enacted several years after §1324b by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, (Nov. 29, 1990), introduced, inter alia, civil money penalties for document fraud. Subsection c excepts from its coverage,

> any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a subdivision of a State, or of an intelligence agency of the United States . . . .

8 U.S.C. §1324c(b).

The necessary implication of the explicit exemption for federal law enforcement and intelligence agencies is that government activities not exempted are included within the ambit of §1324c; otherwise, there would be no rationale for the exemption. Since the scope of §1324c is stated in terms identical to those of §§1324a and b, i.e., any person or other entity, it is reasonable to infer that they mean the same in all three sections, viz., any employer except as explicitly exempted.

(3) IRCA as a Complement to Title VII

Congress enacted IRCA as a complement to Title VII. IRCA as enacted was intended to fill the alienage discrimination gap left by the Supreme Court's interpretation of Title VII in Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973). Endorsing the proposal, which became §102 of IRCA, the House Judiciary Committee recognized that "the Farah Court found that nothing in Title VII prohibits discrimination based on alienage." H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 69 (1986). Accord, H.R. Rep. No. 682, 99th Cong. 2d Sess., pt. 2, at 12

(1986) (Report of the Committee on Education and Labor). The statement by the House Judiciary Committee is compelling:

> Since Title VII does not provide any protection against employment discrimination based on alienage or non-citizen status, the Committee is of the view that the instant legislation must do so.

H. R. Rep. No. 682, pt. 1, at 70.

Title VII, at 42 U.S.C. §2000e-16, renders federal employers amenable to the same nondiscrimination standards as employers in the private sector. Title VII of the Civil Rights Act of 1964, as amended at 42 U.S.C. §2000e-16(a) reaches federal agency employment discrimination based upon "race, color, religion, sex, or national origin." By supplementing Title VII's employment discrimination provisions, IRCA embraces Title VII's explicit reach to the federal government.

(4) Agency Implementation of IRCA

Regulatory implementation of §§1324a and 1324b also point to federal agency compliance. The Immigration and Naturalization Service (INS) is the agency charged with operational responsibility for implementation of the employer sanctions provisions, 8 U.S.C. §1324a. INS defines "entity" to include "a . . . governmental body, agency," etc. 8 C.F.R. §274a.1(b). Traditionally, as discussed in Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980), adjudicators accord deference to "'the interpretation given [a] statute by the officers or agency charged with its administration,' Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978) (quoting Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965)." For a recent leading case, see also Chevron, USA Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).

Similarly, as the government agency tagged with initial responsibility for program development, investigation and prosecution of discrimination cases, OSC's interpretations are also entitled to deference. See Martin v. Occupational Safety and Health Commission, __ U.S.__ Slip op. No. 89-1541, 111 S.Ct. 1171, 1175 (1991). OSC's position, as reflected in its amicus filings, is that the government is subject to 8 U.S.C. §1324b. Indeed, even prior to this litigation, OSC had investigated charges implicating government agencies and had negotiated settlements with them. OSC Memorandum to OLC at 7 (4/27/90).

Title 8 U.S.C. §1324b(a)(1)(C) explicitly recognizes that compliance in specified respects with federal requirements exempts an employer from coverage. Such recognition is consistent with the inference that absent explicit exclusion, federal employment is covered. However, I do not rely on the argument that DOD's compliance with employment eligibility verification requirements of Section 101 of IRCA, 8 U.S.C. §1324a(b), bars its claim of sovereign immunity. Although compliance with Section 101 may demonstrate an agency's understanding of a statute's reach, compliance does not estop the agency from asserting sovereign immunity. Moreover, "administrative regulations cannot waive the federal government's sovereign immunity." Pittman v. Sullivan, et al, 911 F.2d 42, 46 (8th Cir. 1990), (quoting Mitzelfelt v. Dep't of Air Force, 903 F.2d 1293, 1296 (10th Cir. 1990), citing United States v. Mitchell, 463 U.S. 206, 215-16 (1983)).

I cannot agree that reference to executive orders in the exceptions to §102 is tantamount to a statement that §102 otherwise applies to the federal government. As noted by Respondent, executive orders may affect private interests. See e.g., Dames & More v. Regan, 453 U.S. 654 (1981). At a minimum, however, the exception is consistent with the conclusion that except as specifically excepted, coverage was intended to be universal.

D. Sovereign Immunity Found to be Waived

Upon consideration of IRCA as a whole, its legislative history, its relationship to Title VII, and its implementation by the responsible federal agencies, I confirm the earlier conclusion that Congress intended to and did waive sovereign immunity under 8 U.S.C. §1324b.

III. *Remaining Procedural Steps*

Following the May 1, 1991 ruling on sovereign immunity a number of issues were addressed, including whether certain of Complainant's claims were subject to dismissal as having been untimely filed with OSC. Following an exchange of memoranda and a limited evidentiary hearing on June 17 and 25, 1991, I issued an Order on Timeliness. 2 OCAHO 348 (6/25/91). That order confirmed a bench ruling of the same date in Complainant's favor. I held that the violations alleged, implicated a continuing violation as to which limitations had not attached.

Subsequent to a July 25, 1991 prehearing conference in preparation for the evidentiary hearing, Complainant and OSC tendered a request for a stay of proceedings until at least May 1, 1992. During an August 8 telephonic prehearing conference Respondent concurred in that request, I issued an Order Granting Stay of Proceedings, but requiring a status report due not later than January 2, 1992. 2 OCAHO 363 (8/8/91).

At the initiative of OSC, a status conference was held on January 15, 1992 in lieu of the status report. As noted in my January 16, 1992 Order Confirming Status Conference, after discussing forward momentum in implementing the agreement of the parties, I declined Complainant's suggestion that the case be restored to the active docket before May 1, 1992. Instead, a status conference was scheduled for February 26, 1992. Also, the order recited, inter alia, that "OSC will consider its interests in this case satisfied, without more in this docket, if the Order, with Settlement Stipulation attached, filed December 24, 1991 by all parties in Huynh v. Cheney, Civil Action No. 87-3436 TFH (D.C. DC), is adopted by the Honorable Thomas F. Hogan, United States District Judge."

The scheduled status conference was held instead on February 25, and continued on February 26 and 27, 1992. As confirmed by the Status Conference Report and Order dated March 2,

> the parties have affirmed that their Memorandum of Understanding (MOU) (not yet submitted to the bench) has been followed in all respects but the one noted below. Accordingly, Complainant (Roginsky) is expected to start his Department of Defense (DOD) employment on March 16, 1992. Among matters to be resolved subsequent to execution of a current agreement implementing the MOU, the only remaining issue is the treatment of that portion of backpay measured by the maximum allowable contribution to the Thrift Savings Plan (TSP). Discussion regarding OSC's monitoring of DOD's adherence to a non-discrimination policy appears to have been resolved between DOD and OSC, obviating further participation by the judge with respect to this issue.

On March 31, 1992, Complainant and OSC filed a Motion for Approval of Decision and Order "in compliance with" the Settlement Agreement and General Release (Agreement) entered into by them and by Respondent. They also tendered a proposed decision and order. Attachment B to the agreement is a December 31, 1991 stipulation and order in Huynh v. Cheney, which adopts the filing in that case referred to in my January 16 order.

In contrast to the understanding clearly stated in both the August 8, 1991 and March 2, 1992 orders, the Agreement and its attachments

apparently contemplate that I will retain jurisdiction over DOD compliance with its constitutional undertakings in Huynh v. Cheney and, as well, its prospective compliance with IRCA. Neither Complainant, DOD or OSC has provided any explanation for revisiting the proposition that I retain this case on the docket other than to resolve the TSP issue. As noted in the August 8, 1991 order, the parties at that time assured me that the merits of the case had been fully resolved "subject only to implementing steps which are expected to take several months to complete." I cautioned the parties that "because of the delay inherent for those reasons in accomplishing the employment aspects of the settlement, I concur here and depart from my customary practice of requiring that a case be fully resolved before canceling the evidentiary hearing." The implementing steps to be accomplished involved only Roginsky employment matters, not DOD compliance generally.

Although I have no desire to frustrate the reasonable intent of the parties to obtain an agreed disposition of all issues in this proceeding, I am unaware of any reason for this docket to provide a vehicle to oversee DOD compliance with IRCA or with the Constitution. OSC intervention did not alter the posture of this case as a private action. In any event, I take official notice that DOD has published the advertisements it undertook in Huynh, and in this case by incorporation in its Agreement. Indeed, as the apparent result of those advertisements, individuals alleging they were adversely affected by enforcement of the regulation at issue were filing claims with OSC at the rate of 20 per day early in April 1992. Watson, DOD Advertises Its Liability, Legal Times, Apr. 13, 1992, at 4.

To retain this case on the docket for the indefinite future when the relief sought has been substantially obtained, would be inconsistent with sound case management and sound utilization of judicial resources. Another reason which counsels against continued oversight of DOD compliance is that retained jurisdiction could be frustrated if counsel for the Huynh plaintiffs were to seek to compel compliance in that proceeding. Agreement, para. 6. Moreover, this case was not initiated by the United States to vindicate the public interest. In its motion to intervene, OSC did not urge or divulge the intention to utilize this docket to enforce DOD's obligations in Huynh or elsewhere. The case at bar is not a class action brought on behalf of others situated similarly to Complainant. Finally, any new discrimination involving Roginsky would be the subject of a new action.

I will retain jurisdiction for the limited purpose of resolving the TSP allocation. It should be recognized that this forum claims no special

expertise in that particular, and would defer to appropriate Thrift Savings Board determinations. However, to the extent provided in this Decision and Order, I will accommodate the parties in adjudicating this lingering backpay issue in aid of fully disposing of this litigation.

IV. *Order*

The Settlement Agreement and General Release is approved to the extent that it disposes of the dispute between Complainant and Respondent. This case is retained on the docket for the exclusive purpose of adjudicating TSP allocations to the extent that the parties jointly or one authorized on behalf of both, in writing, advise of such a need. If no such advice is filed by May 22, 1992, or if by that date no written filing requests postponement of such deadline, I will promptly issue a final order of dismissal, settled. A request for hearing on the TSP allocation issue shall include a joint statement of issue(s), a memorandum or memoranda of law and authorities, extracts of all pertinent regulatory issuances, and a proposed hearing schedule.

SO ORDERED.

Dated and entered this 5th day of May, 1992.

MARVIN H. MORSE
Administrative Law Judge