

"If we're serious about environmental protection, then we must seriously question the wisdom of backing away from what is, as a matter of record, a safe, clean, and very plentiful energy source."

- U.S. Vice President Dick Cheney, speaking of nuclear energy, April 30, 2001, Toronto.

IN THE
Supreme Court of the United States

October Term, 1982

Jeannine Honicker,
Petitioner,

United States of America,

Nunzio Palladino, John Ahearne,
Victor Gilinsky, Thomas Roberts,
and Peter Bradford, Commissioners,
United States Nuclear Regulatory Commission

and

United States Nuclear Regulatory Commission
Respondents.

**Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit**

Albert Bates,
On the Petition,

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Question Presented.

Whether the activities of the United States in fostering and regulating the production of nuclear energy, by causing planned, non-accidental deaths to citizens, foreign nationals, and unconsenting future persons, and damage to the genetic inheritance from which all living beings must originate, violate either the petitioner's constitutional, natural and statutory rights or the obligations of the United States under international law.

Reasons for Granting the Writ

- I. The order and judgment of the Court of Appeals will cause the deaths of thousands of innocent citizens and millions of persons as yet unborn
- II. The majority of these deaths will occur in children who will neither enjoy the benefits of the federal activity for which they are to be sacrificed, nor are capable of consent to that sacrifice.
- III. The final order violates the natural rights of Posterity to enjoy the Blessings of Liberty for which the Constitution of the United States was established.
- IV. The final order violates the obligations of the United States under international law.

TABLE OF AUTHORITIES

Cases:

Calder v. Bull, 3 U.S. (3 Dall) 386, 1 L-Ed. 648 (1798)
Honicker v. Hendrie, et al, 465 F.Supp. 414 (M.D.Tenn.,1979)
Honicker v. N.R.C., et al, 59o F.2d 1207 (D.C.Cir., 1979)

Statutes:

Atomic Energy Act (42 U.S.C. §§ 2011, et seq.)
U.S. Constitution

Treaties of the United States:

Charter of the United Nations (1946)
Convention on Genocide (1948)
Helsinki Agreement (1975)

Optional Protocol on Civil and Political Rights (1966)
Universal Declaration of Human Rights (1948)
Nuremberg Principles (1946)

Miscellaneous:

Blackstone, W. Commentaries (1765)
Burke, E., Works (1803-27)
Jeannine Honicker Petition (1978)
Junius (Anon.), in the Public Advertiser (1798)
Legislative History of the Atomic Energy Act (1954)
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Schell, J., The Fate of the Earth (1981)

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IN THE
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October Term, 1982

Jeannine Honicker,

Petitioner,

V.

United States of America, et al.,

Respondents.

**Petition for a Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit.**

The petitioner, JEANNINE HONICKER, prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the District of Columbia Circuit entered in this proceeding on May 11, 1982.

Opinions Below.

The unreported judgment of the U.S. Court of Appeals for the District of Columbia Circuit appears as Appendix A hereto. The Court's denials of rehearing and rehearing en banc appear as Appendices B and C, respectively. The final order and opinion of the U.S. Nuclear Regulatory Commission, affirmed without opinion by the Court of Appeals, is published at 46 Federal Register 39573 (August 4, 1981), and appears as Appendix D hereto.

Jurisdiction.

Final judgment of the Court of Appeals was entered on May 11, 1982. Petition for rehearing and suggestion of rehearing en banc were denied on June 7, 1982, and this petition for certiorari is being filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 254(l). jurisdiction is founded upon the Constitution of the United States, Article III, Section 2, and Amendments IV and V; and upon the inherent and traditional power of this Court to do justice.

Constitutional Provisions Involved.

The constitutional provisions involved are set out in the relevant portion as Appendix E hereto. The provisions involved include: Article 1, Section 8; Article 11, Section 3; Article III, Section 2; Article IV, Sections 2 and 3; Article VI, Section 2; and Amendments IV, V, IX, X and XIV.

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Treaties Involved.

The treaties of the United States involved are set out in relevant portion as Appendix F hereto. These include: The United Nations Universal Declaration of Human Rights; The United Nations International Covenant on Civil and Political Rights; The United Nations International Covenant on Economic, Social, and Cultural Rights; The United Nations Convention on the Prevention and Punishment of the Crime of Genocide; The Nuremberg Principles; The United Nations Convention on the Rights of a Child; and The Helsinki Agreement.

Statutes Involved.

The statutes involved are set out in relevant portion as Appendix G hereto. These statutes include 5 U.S.C. § 702 and 42 U.S.C. §§ 2011 et seq..

Statement of the Case.

This is an appeal by Jeannine Honicker, a citizen of Nashville, Tennessee, from an order by the United States Court of Appeals for the District of Columbia Circuit, affirming the final order of the Nuclear Regulatory Commission, denying her petition for emergency and remedial action. As set out in greater detail in the record of proceedings below, this case constitutes a challenge to the authority of the federal government to cause fatal cancer, genetic effects, and incompensible illnesses to the general population of the United States and other nations as an intended

consequence of normal, non-accidental operation of the nuclear fuel cycle.

On July 29, 1978, Mrs. Honicker filed with the Nuclear Regulatory Commission (herein NRC or Commission) a 152-page petition requesting immediate action to redress an alleged condition of peril into which she and other members of the general public had been placed by the radiation protection standards of the agency. To underscore the seriousness of the constitutional principles at stake, Mrs. Honicker requested that all federal licenses which could be expected to result in, and condone, non-accidental or planned deaths to members of the general public be suspended at once, and that unspecified, but "substantial" remedial action be commenced within 30 days of the filing of her petition.

When the NRC failed to act within a reasonable time upon this request, the petitioner appeared before the U.S. District Court for the Middle District of Tennessee seeking a temporary restraining order and other injunctive relief. Following the district court's denial of immediate relief, petitioner applied to the Court of Appeals for the Sixth Circuit for extraordinary writs, and subsequently to Justice Potter Stewart for writ of injunction, on September 13, 1978. These applications were denied without prejudice.

At the direction of the District Court, appeal of the agency's denial of emergency relief

was taken to the Court of Appeals for the District of Columbia Circuit and there relief was denied because the order of the NRC was not final for purposes of review under 28

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U.S.C. § 342. *Honicker v. NRC*, 590F.2d 1207, reh. denied (D.C. Cir.), cert.denied, 441 U.S. 906, 99 S.Ct.1995, 60 L.Ed.2d 374 (1979). Appeal was then taken to the Sixth Circuit of the decision of the District Court to dismiss the petitioner's complaint because of the adequacy of the remedy under 28 U.S.C.§ 342. There relief was denied because primary jurisdiction under § 342 precluded judicial intervention prior to the agency's issuance of a final order. *Honicker v. Hendrie*, 465 F.Supp. 414, affirmed, 605 F.2d 556 (6th Cir.), cert.denied, 444 U.S. 1072, 100 S.Ct. 1015, 62 L.Ed.2d 753 (1980).

The Commission issued its final order on July 29, 1981, which was published in the August 4, 1981 Federal Register (Appendix D, *infra*). On August 17, 1981, petitioner applied to the Middle District of Tennessee for an emergency order to preserve innocent lives during constitutional review of the agency decision. This application was denied on August 27, 1981. On September 14, 1981, Mrs. Honicker petitioned for review by the Court of Appeals for the District of Columbia Circuit and on September 23rd again moved for extraordinary writ to preserve innocent lives. On review, petitioner was supported by amici curiae representing persons and groups in 29 nations. The Court denied the petitioner's motion for writ, dispensed with oral arguments, and on May 11, 1982, affirmed the judgment and order of the Commission, without opinion. It is from this order that Mrs. Honicker now appeals.

Reasons For Granting the Writ.

1. The Order and judgment of the Court of Appeals Will Cause the Deaths of Thousands of Innocent Citizens and Millions of Persons As Yet Unborn.

At the time of the passage of the Atomic Energy Act of 1954, it was widely believed by both the Members of Congress who drafted the Act and by the general public that the use of atomic energy as a means of generating heat or electricity would have virtually no deleterious effects upon the health of the general population, except in the event of a serious accident involving a large scale release of either special nuclear material, fission products, or byproduct material.¹

This early optimism found clear expression in the legislative history of the Atomic Energy Act: "Operation of atomic reactors, whether for power or for fissionable material production, involves some degree of hazard from radioactivity. One of the questions explored briefly during the hearings was how these hazards might be minimized and the practices of industry with regard to them regulated.... With the normal operation of any of the designs now in sight, the problem of the safety of the operators or the nearby people is entirely one of shielding, which is a straightforward engineering problem."²

¹ Honicker v. United States, et al. (D.C. Cir. No. 81-2006), Appellant's Brief (App.Br.) at 26, 38-40; Joint Committee on Atomic Energy (JCAE), Atomic Power and Private Enterprise, 82nd Cong., 2d Sess., December, 1952, at 30-31, 4243, and 53; and JCAE, Summary of a Hearing Before the Joint Committee: Atomic Power Development and Private Enterprise, 83rd Cong., 1st Sess., December, 1953, at 17; but see: Favish, A., Radiation Injury and the Atomic Veteran: Shifting the Burden of Proof on Factual Causation, 32 Hastings L.R. 933 (March, 1981). The historical record indicates that prominent radiologists, health physicists, and geneticists of the time recognized even at the outset of America's atomic power program that any large population exposure to even very minute amounts of ionizing radiation could create lingering public health problems and genetic damage, and these scientists went to some lengths, including sacrificing their own illustrious careers, to express their views publicly. See, e.g.: Wasserman, H., and N. Solomon, et al., Killing Our Own: The Disaster of America's Experience with Atomic Radiation (Dell Publishing; New York, 1982); Rosenberg, H.L., Atomic Soldiers, American Victims of Nuclear Experiments, (Beacon Press; Boston, 1980), Ch.71- pp. 135-154; Shutdown: Nuclear Power on Trial, Bates, A., ed. (Book Publishing Co.; Summertown, 1979), pp. 160-168; Nader, R., and J. Abbotts, The Menace of Atomic Energy (W.W.Norton; New York, 1977); Grossman, K., Cover- Up: What You Are Not Supposed To Know About Nuclear Power (Permanent Press: New York, 1980), Ch.4, pp.73-112; House Subcommittee on Health and the Environment of the Committee on Interstate and Foreign Commerce, Hearings on the Effect of Radiation on Human Health, Ser.No. 95-179, 95th Cong. 2d Sess. (1978), Vol. 1, pp. 672-677; House Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, The Forgotten Guinea Pigs, A Report on the Health Effects of Low-Level Radiation Sustained as a Direct Result of the Nuclear Weapons Testing Program Conducted by the United States Government, Comm.Pr. 96-IFC53, 96th Cong., 2d Sess. (1980); and House Subcommittee on Energy Conservation and Power of the Committee on Energy and Commerce, Hearing on Economic Growth Through Energy Efficiency, Ser.No. 97-53, 97th Cong., 1st Sess. (1981).

² App.Br. at 38; Atomic Power and Private Enterprise, *ibid.*

"It is now evident that greater private participation in [nuclear] power development need not bring with it attendant hazards to the health and safety of the American people." ³

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By 1954, nuclear reactors had been in use for a decade and were widely believed to be one of the most environmentally benign of all methods of power production. It was not until 1969, at a time when 65 of the 73 commercial reactors now operating had already been licensed, that ominous warnings about the effects of increased radiation exposure to the U.S. population began to emanate from Atomic Energy Commission(AEC) laboratories. ⁴

In 1969, the AEC released the first, preliminary findings from its new program to comprehensively investigate "man-made environmental radioactivity and [its] effects upon plants, animals, and human beings." ⁵ These findings, issued by Lawrence Livermore Radiation Laboratory, cautioned that emissions from the fuel cycle considered "acceptable" under the Code of Federal Regulations could in fact kill large numbers of people. "If the average exposure of the U.S. population were to reach the allowable 0.17 rads per year on the average," the scientists

³ App.Br. Attachment: Atomic Energy Act of 1954, Senate Report No. 1699, 83rd Cong., 2d Sess., U.S. Code Cong. and Admin. Nrws (1954), at 3458.

⁴ In 1967, Congress passed authorizing legislation to permit expanded environmental safety research in Atomic Energy Commission laboratories. See: Public Law 90-190, To Amend the Atomic Energy Act, Sec. 7, 81 Stat. 575, 577 (1967); and Senate Report No. 743, 90th Cong., 1st Sess., U.S. Code Cong. and Admin. News (1967), at 2153.

⁵ AEC San Francisco Operations Office, "Biomedical Studies Planned for AEC's Livermore Laboratory," press statement.

warned, "there would in time be an excess of 32,000 cases of fatal cancer plus leukemia per year." These deaths, they emphasized, would continue to occur "year after year." ⁶

As study followed study, the initial estimates not only were confirmed, but the numbers increased. As more came to be revealed about the effects of radiation experienced by atom-bomb survivors, uranium miners and early atomic workers, and as more was learned about many unsuspected pathways by which radiation was reaching the genetic material of the human population, the number of potential radiation victims expected to occur from normal operation of the nuclear

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fuel cycle stretched into the millions. ⁷

As health physics, microbiology, and human radioepidemiology developed, our early national optimism about the harmlessness of low-level radiation vanished. Repeated studies verified that

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⁶ See: JCAE, Environmental Effects of Producing Electric Power, Hearings pp. 640-706, 91st Cong., 1st Sess., Part 1, (Oct.-Nov., 1969); Senate Subcommittee on Air and Water Pollution of the Committee on Public Works, Underground Uses of Nuclear Energy, Hearings on S.3042, pp. 319-444, 91st Cong., 1st Sess., Part I (Nov. 1820,1969) and pp. 1382-1625 91st Cong. 2nd Sess., Part 11 (Aug. 5, 1970). See also: Gofman, J.W. and A.Tamplin, Poisoned Power (Rodale Press; Emmaus, 1971) at 96.

Operation of NRC licensed facilities is governed by dose-design objectives appended to the Code of Federal Regulations. These design-objective values are chosen to permit flexibility of operation while keeping the radiation exposure to the public from normal operation as low as readily achievable. 10 CFR 20 sets a limit for exposures to members of the public from any licensed facility of 500 mrem/yr total body dose. 40 CFR 190, the Environmental Protection Agency's standard, sets a limit of 25 mrem/yr total body dose to an individual member of the public from all fuel cycle operations (radon exposures excepted). The range of whole body exposure within these permissible guidelines is therefore from one fifth to four times natural background levels. See note 11.

⁷ Honicker, Petition for Emergency and Remedial Action Before the Nuclear Regulatory Commission (Petition), pp. 5-43, 68-80 (1978); and see, Gofman, J.W., Radiation and Human Health (Sierra Club Books; San Francisco, 1981); National Academy of Sciences, Risks Associated with Nuclear Power: A Critical Review of the Literature, (Academy Press; Washington, 1979); National Academy of Sciences, Energy in Transition 1980-2010, (W.H. Freeman and Co., San Francisco: 1980), at 623-627, 640; and Comey, D., The Legacy of Uranium Tailings, Bull. Atomic Scientists 31:7;43-45 (Sept.,1975).

radiation is a powerful bio-genetic poison, capable of causing irreversible health damage at the lowest measurable doses.⁸

Today it has become universally recognized that there is no proven threshold for potentially fatal injury from radiation—that there is no "safe" dose. It is now also widely recognized that all exposures to radiation are cumulative; both in individuals, and in the species as a whole. Indeed, studies have shown that exposure of parents increases the susceptibility of their offspring to cancer.⁹

We are thus confronted with accumulating genetic susceptibility to an increasingly radioactive environment, a process which places the survival of the species itself in jeopardy.¹⁰

In the natural environment, our species has always been enveloped in radiation: from our sun and moon; from distant stars and cosmic winds; and from elements distributed in the Soil, rocks, and oceans of the Earth. All human populations pass through life exposed to some part of this radioactive environment. It is now estimated that up to half of all new cancers are caused by this "background" radiation, which had previously been thought harmless, or even beneficial.¹¹ It is now thought that the small dose which we receive from natural background radiation is a significant factor in the normal aging process, the process of the bodies of living organisms

⁸ Petition; *ibid.*, at 8-9; Mancuso, TY., et al., Radiation exposures of Hanford workers dying from cancer and other causes, *Health Physics* 33:369 (1977); Kneale, G.W., et al. Re-analysis of data relating to the Hanford study of the cancer risks of radiation workers, *Late Biological Effects of Ionizing Radiation*, Vol.1 (International Atomic Energy Agency; Vienna, 1978); Kneale, et al. Hanford Radiation Study III: a cohort study of the cancer risks from radiation to workers at Hanford, *Br.]Ind.Med.* 38:156 (1981)7 Advisory Committee on the Biological Effects of Ionizing Radiation (BEIR 111), *The Effects on Populations of Exposure to Low-Levels of Ionizing Radiation: 1980* (Academy Press; Washington, 1981); and Stewart, A.M., Delayed effects of A-bomb radiation: a review of recent mortality rates and risk estimates for five-year survivors, *Br.]Epid. and Com.Health*, 36:80 (1982).

⁹ Petition at 17; and see, Bross, I.D.J., and N. Natarajan, Cumulative genetic damage in children exposed to preconception and intrauterine radiation, *Investig. Radiology* 15:52 (1980).

¹⁰ Petition at 150; and see, Bertell, R., Radiation Exposure and Human Species Survival, *Envir. Health Rev.* (Canadian Inst. of Public Health Inspectors, June 1981), 43-52 (App. Br. at 12).

¹¹ Petition at 10-12; and see, Archer V.E., Effects of Low Level Radiation: A Critical Review, *Nuclear Safety* 21:1;68, 75 (1979) (App.Br. at 6); and Cohen, J.J., An evaluation of the effect of natural background radiation on cancer incidence, *Health Physics* 35:916 (Dec., 1978). The Department of Energy has estimated that up to 170,000 cancers per year in America are attributable to natural radiation; *Final Generic Environmental Impact Statement: Management of Commercially Generated Radioactive Waste* (DOE/EIS0046F, 1980), Vol 1, p. 3.30. This would represent approximately 50 percent of the current national cancer rate. If radiation exposures to the general population were to be increased by 20 percent over background, 34,000 new cancers per year could be expected. A four-fold increase could cause 680,000 new cancers in the U.S. annually. Of course, all populations are exposed to a multitude of other physical and chemical properties of the environment and will experience the totality of the effect which these processes will cause. We will know death and illness from our environmental releases of PCBs, dioxin, lead, and asbestos; just as we will increase our birth defects and cancers from any release of radioactive materials.

whereby abnormal cells gradually

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replace normal cells until a vital function is sufficiently impaired to result in death.¹²

Before life could begin upon the Earth, it took millions of years for our planet to quench the radiation from its surface and to erect atmospheric barriers to radioactive bombardment from space. Yet background radiation has continued to play a vital role in our billion-year process of evolution. By continual death and replacement, and by continual minor mutations over many eons, the human species, as well as all other lifeforms, have developed into what they are today. Very early in this evolutionary process, primary emphasis had to be given to the protection of our genetic code through the development of extremely efficient and sophisticated chemical repair mechanisms. Only in this way could the advancements of evolution be protected against the deteriorating effect of ever-present natural radiation, and could the high stability of the human species over periods of millions of years be assured. For evolution to proceed, however, it was also necessary that a balance be struck between the ability of the human organism to repair itself and the need for continual death and replacement to evolve the species. This fine balance was made between the evolving human organism and the relatively constant natural background level of radiation over the course of millions of years, and is an extremely delicate one.¹³

Our acquisition of knowledge about the biological effects of ionizing radiation has been a slow and painful process. Recent advances in computerized epidemiology have permitted the identification of a five-fold increase in lung cancer among uranium miners, an abnormal rate

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of specific site cancers among atomic production workers, and significantly elevated rates of leukemia among both servicemen at nuclear weapons tests and children living downwind of the Nevada Test Site, all of whom were protected by stringent federal regulations at the time of their exposures.¹⁴

Yet, to say that we may attribute cancer and birth defects to radiation as an entire population is not to say that individual victims can as yet attribute exposure to radiation to be the cause of their particular injury. Radiation has been likened to tiny, imperceptible bullets, which randomly strike the cells of the body and through several physical processes cause breaks in the structure of our

¹² Petition at 20; Bertell, R., X-ray exposure and premature aging, *J. Surg. Oncology*, 9:4 (1977).

¹³ Petition at 6.

¹⁴ Petition at 16-35; and notes 1, 6, 7, and 8, *supra*. But our newfound knowledge of microbiology, epidemiology and health physics also allowed the National Cancer Institute to discover that the national mammography program which planned to administer an annual breast screening to all women-would have caused twelve breast cancers for each cancer it detected, in time for NCI to abruptly order the x-ray program terminated. See Wasserman, et al., *supra* n.1 at 133; and I.D.J. Bross, "Written Statement Submitted for the NIH/NCI Consensus Development Meeting on Breast Cancer Screening," (1977).

DNA; our genetic code. Of course, a particular break does not, and probably never will, reveal its causation. Since we live in a constant barrage of radiation, natural and unnatural in origin, we as individuals can never know for certain whether a cancer, birth defect, or any genetically inspired injury was a product of nature or of human design. There is, by the nature of the physical process, no means of providing legal redress for the victims of man-made radiation in the overwhelming majority of cases. If due process of law is ever to be provided to these victims, it may only be provided at the time the damage is attributable - at the source, at the time of release, by mathematical, epidemiological projection.¹⁵

In order to reap the benefits of nuclear energy we have told ourselves that the health consequences of radioactive releases will be obscured by time and distance, by the inability to show causation, or by a perpetual scientific controversy concerning the

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quantum of effect. Tragically, by this lapse of foresight, we have enabled enormous damage to be done to the public health; and more ominously, to the genetic inheritance from which all health derives, and will derive in future generations.¹⁶

In the numerous publications cited in the Commission's order, the NRC staff has estimated in detail the number of cancers, birth defects, and other causes of premature death which are likely to result from the designed operation of the nuclear fuel cycle. Totaling these figures for the 190 nuclear reactors expected to be operating in the U.S. by the year 2000, and barring accidents, NRC would anticipate some 378,000 lethal cancers and 113,000 genetic effects to result over the long term during which the released isotopes will persist in the environment. The Commission has indicated that these figures could be low by a factor of 2, which would make the upper range estimate of the agency 756,000 lethal cancers and 226,000 genetic effects. All cancers (i.e.:

¹⁵ An imminent hazard may be declared at any point in a chain of events that may ultimately lead to public harm. See: Gelpe and Tarlock, *The Uses of Scientific Information in Environmental Decisionmaking*, 48 S. Cal. L. R. 371, 419 (1974), and *Ethyl Corp., et al., V. Envir. Protection Agency*, 541 F.2d 1, 13-19 (1976).

¹⁶ Petition at 77-84, 126-127; Wasserman, et al., *supra* n.1.; Gofman, *supra* n.6; and Sternglass, E.J., *Secret Fallout* (McGraw-Hill; New York, 1981). In the order below, the NRC has left little doubt that: ". . . the Commission's own estimates of nuclear power health effects include a number of radiologically induced cancer deaths among present and future populations." (46 Fed. Reg. 39579, col 1.)

double the number of lethal cancers) and birth defects could total 1,740,000 in the Commission's upperbound estimate, which it terms "acceptable." ¹⁷

Because four out of every five of these deaths will be experienced by children who cannot possibly consent to sacrifice their lives for the benefit of nuclear electricity; because the class of victims will be predominately those of a particular genetic subgroup; and because those whose ancestors will suffer genetic damage from radiation will be those most susceptible to the effects of increased environmental radiation levels in the future - a downward-accelerating spiral of ruptured DNA molecules - this case is now presented to this Court.

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The respondents have made a decision to conduct a historic experiment upon the genetic material from which all future humans must originate. They have done so without express direction from Congress or the President, without statutory or Constitutional authorization, without consent of those who must bear the consequences, and without adequate controls to prevent irreversible damage. Review of that decision by this Court is therefore urgently required.

II. The Majority of these Deaths Will Occur in Children who Will neither Enjoy the Benefits of the Federal Activity for which They Are To Be Sacrificed, nor Are Capable of Consent to that Sacrifice.

If one million American schoolchildren were selected at random and assembled in one place, one would expect to find a wide range of backgrounds, interests, and abilities. They would come from all walks of life, all races, all religions, and all ethnic subcultures. Some might be future Olympian gold-medalists. Some might one day walk the surface of distant planets, or devise the means for others to travel through space and return. One might hold the key to nuclear disarmament, or the cure for the common cold. There might be a future President of the United States, or a prospective Secretary-General of the United Nations.

If a federal commission ordered that these million children be lined up and shot, it would be an atrocity never before witnessed in America. If circumstances permitted, some of the children's parents would rush for a court order to stay the execution. After all, these children would have been singled out

¹⁷ App. Br. at 20. The NRC has previously referred to these numbers as "the Commission's health effects estimates" for purposes of litigation on the question presented. While the Commission hastens to characterize all these injuries as "potential" rather than "actual," the distinction is of no practical or legal significance. Since there is scientific controversy in prediction of human health effects from the low levels of ionizing radiation usually associated with routine releases under federal license, some number of the predicted cancers or birth defects may never occur. If a natural or man-made catastrophe were to suddenly extinguish the human species, none would occur. But, by all reasonable estimates of present science, some fatal health effects not only will occur, but are now occurring from population exposures of the magnitude which the NRC allows.

“particularized”— and their planned execution would be immediate unless prevented.

By publication in the Federal Register on August 4, 1981,¹⁸ a federal Commission ordered the deaths of more than one million American schoolchildren. Their deaths were felt necessary in order to render nuclear energy economically competitive with its principal alternatives for the generation of electricity. The cost in megadeaths in exchange for the benefits in megawatts was deemed to be in the best interests of the nation on the long term.¹⁹

This is not to say that these deaths were essential in order to continue the immediate supply of electricity. On the contrary, these deaths were ordered at a time when one electrical generating station in three was sitting idle at peak-use hours because of a national overcapacity in electricity.²⁰ Moreover, even with the sacrifice, and even with continuing multi-billion-dollar annual federal

¹⁸ In The final order below, which appears as Appendix D.

¹⁹ 46 Fed. Reg. 39580, col 3.

²⁰ Petition at 135; Energy Information Administration, Electric Power Monthly, August, 1981 (Dept. of Energy, DOE/EIA0220181/08), Table 60, p.91; and note Ahearne, J.F., Remarks before the American Nuclear Society, NRC Speech No. S-9-82, May 14, 1982.

subsidies,²¹ nuclear power remained ten times more expensive²² than competing, but federally neglected, investments to improve electrical supply.²³

The petitioner, who is a parent and grandparent of some of the potential victims, brought suit to enjoin the needless slaughter of these innocent children, and to preserve her own inalienable rights. The Commission denied relief under the Atomic Energy Act, arguing that the Act could not be used to halt "the very industry which it was intended to bring into being."²⁴

As to the constitutional claims, the Commission argued:

"The Supreme Court appears to have stressed that for the Fifth and Fourteenth Amendments

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²¹ The FY 1982 budget allocates more than \$1 billion to direct Department of Energy subsidies of nuclear energy, and over \$2 billion for government-owned nuclear research laboratories. See too the indirect subsidies: Petition at 135; App.Br. at 25; House Committee on Government Operations, Nuclear Power Costs, H.Rep. 05-1090, 95th Cong. 2d. Sess. (1978); and Bowring, J., Testimony to the House Subcommittee on Oversight and Investigations of the Committee on Interior and Insular Affairs, October 23, 1981.

²² Petition at 135, App.Br. at 64; and see, Hearing on Economic Growth Oirough Energy Self-Sufficiency, supra n.1; House Committee on Energy .111d Environment, Report on Building a Sustainable Future, Comm.Print 07K, 97th Cong., 1st Sess. (1981); Center for Renewable Resources et al., The Reagan Energy Plan: A Major Power Failure (Nat. AUdobon Society, Washington, 1982); Lovins and Lovins, i nergyIWar: Breaking the Nuclear Link (Friends of the Earth; San Francisco, 1981); Joint Economic Committee of the Congress, I nergy Conservation: Emerging Consensus, Diverging Commitment, 97th (ong. 2d Ses. (1980); Sant, R., Eight Great Energy Myths, (Energy Productivity Center; Arlington, 1981); Taylor, V., The Easy Path I nergy Plan (Union of Concerned Scientists; Cambridge, 1979); 1 N-partment of Energy, Low Energy Futures for the United States (DOE/FE-0020, 1980); Council on Environmental Quality, The Good News About Energy (1979); Stobaugh and Yergin, Energy Futures: A Report of the Harvard Business School Project on Energy (Random House; New York, 1979); and Carlson, Freedman and Scott, A Strategy for ,i Non-Nuclear Future, Environment 20*6 (1979). [Appellant's Reply Brief, pp. 25-29, n.3, and Comments, infra, note 42.1

²³ The Commission has confined its search for less damaging Alternatives to only other alternatives for generating electricity. This eliminates the least intrusive, most voluntary, least expensive, And safest alternatives entirely; namely, alternatives to electricity for supplying our needs. If what we want is not volts or amps but aid and comfort, we need to look at the possibilities for federal activity of a comparable scale to the nuclear energy effort which would supply these needs at a comparable or better price, with less involuntary impact. Clearly, improvements in energy end-use efficiency and solar-renewables have the overwhelming advantage today. These alternatives have actually accounted for 50 times more new energy than nuclear power has provided in the three years since the Honicker petition was filed, despite a tenfold greater expenditure during that period to give nuclear power a competitive margin.

to apply, the threat to life must be borne by particular ascertainable individuals rather than the public at large." ²⁵

The Commission further argued, in briefs before the Court of Appeals, that any distinction between accidental, and frequently compensable, injury to members of the general public - a necessary and unavoidable concomitant of any large-scale governmental or industrial activity - and the planned, non-accidental, virtually uncompensable - yet entirely avoidable - deaths of a million innocent children, is "inherently implausible" or "pragmatically irrelevant." ²⁶

Said the Commission:

"The benefit provided by nuclear power, generation of electricity, is clearly of great value to society. Although the program is not free of hazards, the risks to any individual are slight. The number of deaths estimated to result from the nuclear power program is extremely small compared to the number of persons benefited, and it may be expected that all reasonable means to reduce the health impacts still further will be taken as they are discovered. ²⁷

With that order, the children were sent to their deaths, not with a bang but with a whimper. Not in a hail of bullets or herded into gas chambers, but bleeding the entire volume of blood from their tiny bodies in the last stages of leukemia, or convulsed in the agonizing pain of terminal cancer. On May 11, 1982, the Court of Appeals summarily affirmed the order of execution, and ordered further that that affirmance not be published in the public record.

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The authority to fashion a remedy adequate to this occasion no longer lies with the legislative or executive branches. That authority now resides solely in this Supreme Court. It is therefore to this Court that the petitioner respectfully addresses her final prayer for relief.

III. The Final Order Violates the Natural Rights of Posterity To Enjoy the Blessings of Liberty for which the Constitution of the United States Was Established.

A decision of those now living to injure future generations, willfully and for our own gain, compels us to ask sweeping questions about what rights these unborn ones may have if it is wrong to kill or intentionally injure a human being now living, is it not also wrong to intend the death of a multitude of future people, or to force them to suffer lives of illness or deformity? As the President of the United States said on August 3, 1982:

²⁵ 46 Fed. Reg. 39579, n. 22.

²⁶ Honicker v. U.S. (D.C. Cir., No.81-2006), Respondents' Brief at 32, n.18.

²⁷ 46 Fed. Reg. 39580, col 3.

"I strongly believe that the protection of innocent life is, and has always been, a legitimate and indeed the first duty of government."

Yet there is a problem of recognizing the rights of future persons who have no distinct "particularity" under the law, or are not yet "persons" within the meaning of the Bill of Rights. It was perhaps best expressed by Jonathan Schell in *The Fate of the Earth*:

"And if we find the subject 'strangely

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impersonal' it may be in part because the unborn, who are the ones directly imperilled by extinction, are not yet persons. What are they then? They lack the individuality that we often associate with the sacredness of life, and may at first thought seem to have only a shadowy, mass existence. Where are they? Are they to be pictured lined up in a sort of fore-life, waiting to get into life? Or should we regard them as nothing more than a pinch of chemicals in our reproductive organs, toward which we need feel no special obligations? What standing should they have among us? How much should their needs count in competition with ours? How far should the living go in trying to secure their advantage, their happiness, their existence?"²⁸

By discounting the lives of these innocents, the respondents are embarked upon governmental territory uncharted by the framers of the Constitution. Through its role in developing and promoting nuclear power, the federal government has, for the first time, begun to determine what level of fatal and genetic injury it may "acceptably" cause the general public - and future generations. As the numbers have consistently grown over recent years, now running into the millions - or even billions - of delayed deaths over the long term, the government's philosophical - and constitutional - dilemma has deepened. Moreover, even if future generations were not involved, this dilemma would persist, because nearly half of the deaths will occur to persons other than Americans, yet all of the electricity will be consumed by the American economy.²⁹

It is unlikely that this consequence was foreseen when the Atomic Energy Act was passed in 1946,

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²⁸ Schell, J., *The Fate of the Earth* (Alfred A. Knopf; New York, 1982), p. 116.

²⁹ *Honicker v. U.S.* (D.C. Cir., No-81-2006), Appellant's Reply Brief at 7.

revised in 1954, or amended in 1974.³⁰ However, as early as 1976, when the NRC published its "GESMO" study,³¹ the Commission began to acknowledge that planned deaths in the general population were a necessary evil of nuclear development.³² By planning deaths, the Commission implicitly sanctioned non-accidental, willful, intentional, premeditated extermination of predictable numbers (and to some extent, genetically predetermined classes) of citizens and foreign nationals by federal licensees who were, by the same Order, rendered immune from prosecution.³³

What has been placed at jeopardy by these sanctions is a concept of law as old as the Code of Hamurabi. Put very eloquently by the anonymous writer, Junius, in a letter to the printer of the London Public Advertiser on August 8, 1769, the idea is that:

"We owe it to our ancestors to preserve entirely those rights which they delivered to our care: we owe it to our posterity not to suffer their dearest inheritance to be destroyed."

This generation is in the process of destroying precious inheritance for all succeeding generations: not only the genetic code from which all future humans must originate, but also the right of posterity to be free from human sacrifice to ancient or foreign governmental decisions which carry no benefits to them at all.

³⁰ However, the public record indicates that the problem was known to at least a few. Declassified health physics reports from the Manhattan Project (App. Br. at 9) indicate that the senior scientists believed at least as early as 1945 that:

". . . the genetic effect has no threshold and exposure is not only cumulative in the individual, but in succeeding generations. On this basis, there would be no tolerance dose, but rather an acceptable injury-limit." [Parker, H.M., Instrumentation and Radiation Protection (March, 1947), Health Physics, 38:957,970, June 1980]

and:

"Even sub-tolerance radiations produce certain biological changes (cosmic rays are supposed to have some biological effects), so tolerance radiation is not what one strives to get but the maximum permissible dose." [Morgan, K.Z., The Responsibilities of Health Physics, The Scientific Monthly, 93 (August 1946); reprinted in Health Physics 38:949-952, June 1980.]

³¹ Generic Environmental Statement on the Use of Recycled Plutonium in Mixed Oxide Fuels in Light Water Cooled Reactors, NUREG-0002, 1976.

³² Petition at 134; GESMO *ibid*, Table ES-3, p. ES-14.

³³ The question of what percentage of the population can be acceptably damaged came first to the attention of the AEC at a meeting of the Advisory Committee on Biology and Medicine on January 16-19, 1957. At this meeting the AEC advisors determined that a 20-percent increase in the rate of bone cancers and birth defects nation-wide would be an "acceptable" effect of U.S. nuclear weapons testing activities. These scientists also acknowledged at this time that the long-term genetic effects were totally unknown.

In both law and medicine, a doctrine of prudent behavior requires that when public health is placed in jeopardy, a higher standard of protection must be adopted until a lower standard may reasonably be

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believed to provide equally adequate public safety. In 1978, the petitioner requested that NRC adopt a higher standard for protection of the general human environment from non-accidental releases from the entire nuclear fuel cycle, and suspend operation of the fuel cycle to prevent unnecessary loss of life until such time as this standard could be implemented. Her request was made pursuant to the provisions of the Atomic Energy Act which contemplate no non-accidental deaths among members of the general population in the normal course of operation of the nuclear fuel cycle,³⁴ and under the Constitution and international human rights obligations of the United States which expressly prohibit "normal" deaths to any predesignated portion of the general population as the intended result of any federal activity.³⁵

The final order of the Commission did not dispute the fact that these millions of deaths are unnecessary in order to derive a reasonably priced, reliable supply of electricity, or that a higher standard for radiation protection is indeed feasible, albeit less economical. The Commission instead determined that the decision of the federal government to cause public deaths lies within the constitutional authority of the executive and legislative branches. While the petitioner concurred in the reasoning advanced by the Commission that all acts of government-and all human endeavors carry the prospect of accidental injury to innocent persons, the petitioner steadfastly maintained that there is nothing in the Constitution that allows Congress, the Executive, or the judiciary to sacrifice the lives of innocent children in order to produce electricity, or to

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³⁴ See: 42 U.S.C. §§ 2011, 2012, 2013, 2015, and 2201 (Appendix G); and Senate Report 1699, supra n.3. Where the 1946 Act used the phrase, "as far as practicable" in Section 1's declaration of purpose to promote the public health and welfare, the 1954 version deleted the phrase in favor of a simple, mandatory order. In only one section of the Act is "protection" modified by the word "adequate," implying a balancing of interests: in Section 182a (42 U.S.C. § 2232a), "License Applications - Contents and Form." Upon this use of the word "adequate" alone, the Commission hinges its entire argument for Congressional authorization. Yet, the Senate Report makes clear that the word "adequate" in Section 182a is meant only to modify license information, not the public's protection. See Senate Report 1699, supra n.3, at 3458. The unambiguous expectation of the 83rd Congress was zero radiation deaths in the general population from the normal, daily operation of federally licensed reactors.

³⁵ The legal basis claimed by Congress in enacting the 1954 Act is Article 1, Section 8, and Article IV, Section 3. While it cannot be denied that the Constitution gives Congress the power to regulate interstate and foreign commerce in order to provide for the common welfare, and that Congress may make all needful rules and regulations respecting United States property (which includes all fissionable nuclear material), there is nothing in the Constitution that indicates Congress may sacrifice innocent lives in order to further these ends.

further the common welfare of the nation in any comparable way, especially when non-lethal, economically favored, but federally neglected alternatives abound for implementing the same federal purposes.

By declining to pass upon this question, the Court of Appeals has necessitated the intercession of this honorable Court.

IV. The Final Order Violates the Obligations of the United States under International Law.

The social philosopher, Edmund Burke (1729-1797), described the binding links between generations as a perpetual partnership. He wrote: “

Society is indeed a contract. . . . It is a partnership in all science; a partnership in all art; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained except by many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born."

Speaking of the society into which each of us is born, Burke argued that it is always wrong to "hack that aged parent in pieces." Likewise, of the future children to be born to the partnership, Burke argued that:

"the temporary possessors and life renters... should not think it among their rights to cut off the entail, or commit waste on the inheritance. . . [lest they] leave to those who come after them a ruin instead of a habitation."

Burke regarded the liberties of the people as:

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"an entailed inheritance derived to us from our forefathers, and to be transmitted to our posterity; as an estate specially belonging to the people of this kingdom, without any reference whatever to any more general or prior right." ³⁶

It is the liberty which belongs to future generations which is sacrificed by the federal order below. The government destruction of a large group of citizens, selected in substantial part on a genetic (racial) basis, constitutes the international crime of genocide. Genocide-the attempted destruction of a certain type of people-impairs the interior diversity of our species. It is an attack not merely upon existing people, but upon the biological heritage that human beings transmit from one generation to the next. It is a crime against the future.

Yet as this Court wrote in *Calder v. Bull*, 3 U.S. 386 (1798):

³⁶ Edmund Burke, Works, Rivington Edition (16 Vols., London 1803-27) V, 78.

"There are acts which the federal or state legislature cannot do, without exceeding their authority. There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the legislature (for I cannot call it law), contrary to the first great principles of the social compact, cannot be considered a rightful exercise of the legislative authority....

"The legislature may enjoin, permit, forbid, and punish; they May dec are new crimes; and establish rules of conduct for all its citizens in

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future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime.... To maintain that our Federal, or State, legislature possesses such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments." ³⁷ It was after the holocaust of World War 11 that the governments of the world convened in New York in an attempt to devise some standard by which the conduct of nations toward innocent populations could be internationally regulated. What emerged was the Universal Declaration of Human Rights, unanimously adopted in 1948 by the United Nations General Assembly. ³⁸ While some human rights conventions have yet to be ratified by the U.S. Senate, the United States is bound to all the U.N. human rights treaties, both by subscription to the United Nations Charter, which is itself a multilateral treaty, and by adoption (and frequent invocation) of the Helsinki Agreement. ³⁹

One of the first codifications of human rights adopted by the U.N. General Assembly was the Convention on the Prevention and Punishment of the Crime of Genocide, ratified by approximately 80 nations. The Convention was adopted to prevent a recurrence of the brutal policies of Nazi Germany; ". . . crimes so great that they overwhelm[ed] the capacity of every existing system of jurisprudence, or other organized human response, to deal with them adequately." ⁴⁰ The Genocide Convention affirmed that genocide is a crime under international law which is punishable whether the principals and accomplices are private or public and

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³⁷ *Calder v. Bull*, 3 U.S. (3 Dall) 386, 1 L.Ed. 648; Petition at 141.

³⁸ U.N. Gen. Ass. Res. 217A (111), GAOR Res. (A/810), Dec.10, 1948, at 71-77 (see Appendix F); Petition at 138.

³⁹ The Helsinki Agreement was signed by the U.S. on August 1, 1975. It requires all 35 signatories to observe the human rights standards promulgated by the United Nations.

⁴⁰ *The Fate of the Earth*, supra n. 27, at 145.

whether the crime is committed on religious, racial, political or any other grounds.⁴¹ The Genocide Convention was closely tied to the Nuremberg Principles, which were general maxims of international law derived during prosecution of war criminals after World War II. The Principles were endorsed at the First Session of the U.N. General Assembly in 1946. The Principles define murder, extermination, involuntary experimentation, enslavement, and other inhuman acts against atiy civilian population as "crimes against humanity."

Whenever crimes against humanity or acts of genocide are committed, a special obligation is assumed by the offending government to the international community. Nations which are party to the Helsinki Agreement may not take any legislative, judicial or other measures which may prejudice these obligations. Whenever such crimes are committed, they must be halted, prosecuted, and prevented from recurrence. Any persons in government who tolerate the commission of such crimes are themselves guilty of a crime against humanity. The fact that internal law does not impose a penalty for an act which constitutes an international crime, or the fact that the person committing the act serves as a responsible government authority or acts under orders of a superior or by legislative enactment, does not relieve the actor of responsibility under international law, provided a moral choice is possible.⁴²

In the present case, a moral choice is not only possible, but sweetly alluring. One of many examples which the petitioner gave to the Commission was the actual

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experience of the City of Los Angeles in reducing commercial display lighting following the oil embargo of 1973.⁴³ On that occasion, a modest, and largely voluntary reduction of advertising and decorative electric displays resulted in an 18 percent reduction of the city's entire electric load, with no corresponding losses in business revenues. This is only one small example of the enormous potential for increasing our national energy efficiencies and diminishing unnecessary human suffering.

It is simply untrue that all policy choices for generating or conserving electricity "can almost certainly be linked to a few deaths," obviating the moral question.⁴⁴ The sadder truth is that the Commission has elsewhere proposed that "the deaths which may be caused by the fuel cycle may

⁴¹ Under the Genocide Convention, "genocide" is defined as any act "committed with the intent to destroy, in whole or in part group as such" - including deliberately inflicting upon the conditions of life calculated to bring about its physical destruction in whole or part. The Convention leaves enforcement a government bodies to national courts of the respective sovereign states. See Appendix F.

⁴² In re Honicker Petition (U.S. Nuclear Regulatory Conimi rulemaking), Comments of the Petitioner's Staff on the NRC Staff Response to her Petition: An Older View Concerning Inalienable Rights, SECY-78-560 (1979), at 14.

⁴³ Ibid., and see note 22, supra.

⁴⁴ 46 Fed. Reg. 39580, see Appendix D.

not be considered in a federal decision on whether or not to license a plant," and that "if a viable alternative, which was not expected to kill, were otherwise equal on a cost-benefit basis with a reactor, the Commission would ignore the alternative's lack of human casualties." ⁴⁵

The Commission states in the final order below that:

"This Commission does not sit as an arbiter of any national morality alleged to exist... Nor does any Commission. Nor does any Court. ⁴⁶

"For the reasons we have discussed, some deaths from activities with the scope and value of nuclear power are 'acceptable,' at least in the sense that the Congress, K Executive and the judiciary know about them and accept them." ⁴⁷

The eminent English jurist, William Blackstone (1723-1780), observed that there are "fundamental principles of law; which, though legislators may depart

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from, yet judges are bound to observe." ⁴⁸ Blackstone viewed our natural liberty as protected merely by a matter of judgment; by the maintenance within free governments of judicial bodies, capable, by tradition, position, and training, of judging well. The fundamental principles to which judges must adhere are drawn from custom and morality - it is moral judgment which gives the law its weight and authority. Blackstone referred to this moral quality as the "*lex non scripta*"; the unwritten law.

Never before has humanity witnessed a period of evolution that can compare to the last four decades. We have discovered fundamental relationships between energy and matter, and in so doing, have entered an era that holds both the promise of prosperity and the peril of our own annihilation. To cleave to the promise while avoiding the peril we will have to apply every bit of wisdom we have discovered in our long journey through the ages. If we elect, at this hour, to regard innocent lives as less important than inanimate wealth, we will take a disastrous turn toward extinction-and what value will our material wealth then have, without anyone to possess it? If we elect instead to affirm our faith in those principles which, in the past, have served us so well, those so intrinsically human commandments as, "Thou shalt not kill," and "Do unto others as you would have them do unto you, " we advance our prospects for survival, and with them, our natural rights, our liberty, and our inestimable value to the whole of creation.

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These decisions which must now be made, not just for a solitary litigant, but for endless

⁴⁵ 46 Fed. Reg. 15175, Col. 1.

⁴⁶ 46 Fed. Reg. 39580, col 2.

⁴⁷ 46 Fed. Reg. 39580, col 3.

⁴⁸ Blackstone, Commentaries on the Laws of England, Vol. I (1765) Br. at 48.

Posterity, must be made on moral principle. While the words chosen by the founders of our Republic are clear, and while the formulations of the United Nations counsel wisely, the final judgment in this case must derive from the *lex non scripta* that dwells within the human soul. A moral choice is possible. This is a question of conscience.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment of the District of Columbia Circuit. Respectfully submitted,

Albert Bates,

On the Petition, Joel Kachinsky,

Counsel for the Petitioner.

The Natural Rights Center Summertown, Tennessee August, 1982.