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SOLICITOR GENERAL FILES BRIEFS IN TWO CASES CHALLENGING CONTINUED DETENTION OF INADMISSIBLE ALIENS

The issue in two cases before the Supreme Court is whether aliens who are stopped at the border, denied admission, and subsequently ordered removed based on the commission of crimes within the United States while on immigration parole, may be detained when their country of origin refuses to accept their return. ***Benitez v. Wallis***, 337 F.3d 1289 (11th Cir. 2003), *cert. granted* 2004 WL 67860 (2004)(No. 03-7434) and ***Crawford v. Martinez***, No. 03-878. The lower courts have disagreed as to whether the *Zadvydas v. Davis*, 533 U.S. 678 (2001), six-month rule should be extended to limit the length of detention of these inadmissable aliens.

"A judicially created time limit on detention would interfere significantly with the constitutional responsibility of the political Branches to protect the nation's borders, manage migration crises, and conduct foreign relations."

In the two briefs filed with the Supreme Court, the Solicitor General argues that the continued exclusion through detention of these inadmissible aliens is authorized by INA § 241(a)(6), 8 U.S.C. § 1231(a)(6), and is permitted by a century of constitutional precedent from the Supreme Court. The Solicitor General further contends that "a judicially created time limit on detention would interfere significantly with the constitutional responsibility of the political Branches to protect the nation's borders, manage migration crises, and conduct foreign relations."

The aliens in both cases are Cuban nationals who attempted to enter the United States during the 1980 Mariel boatlift. At that time, the Attorney General exercised his authority to parole most of those Cubans, including Benitez and Martinez, into the United States. Unlike the vast majority of Cubans who remain on parole or who adjusted their status, there are approximately 750 Mariel Cubans, including Benitez and Martinez, who have been held in immigration custody for more than six months after having their parole revoked because of their criminal behavior. The United States has been engaged in ongoing negotiations with the Cuban government and has consistently maintained that as a matter of international law

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NINTH CIRCUIT HOLDS THAT INA DOES NOT PERMIT CONTINUED DETENTION OF MENTALLY ILL ESPECIALLY DANGEROUS ALIEN

In ***Thai v. Ashcroft,*** __F.3d__, 2004 WL 937258 (9th Cir. May 3, 2004) (Hug, Graber, *Clifton*), the Ninth Circuit held that the government could not continue to detain the petitioner beyond the six-month removal period under INA § 241(a)(6), as construed by *Zadvydas v. Davis*, 533 U.S. 678 (2001), notwithstanding a regulation authorizing his continued detention because his mental illness makes him especially dangerous.

Since his entry into the United States in 1996, the petitioner has had a particularly violent criminal history, including among other crimes, convictions for assault, harassment, and third-degree rape. The underlying facts concerning petitioner's domestic violence

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DEPUTY ATTORNEY GENERAL COMEY PRAISES WORK OF IMMIGRATION LITIGATORS AT EIGHTH ANNUAL IMMIGRATION LITIGATION CONFERENCE

Deputy Attorney General James B. Comey, Jr., praised the work of the Department's immigration litigators, and in particular the attorneys in the Office of Immigration Litigation, who have been handling an increasing workload of immigration cases. The Deputy Attorney General delivered his remarks to about 250 attorneys who attended the Eighth Annual Immigration Litigation Conference held on May 4-6, 2004, in the Great Hall of the Robert F. Kennedy Building, the headquarters of U.S. Department of Justice.

Assistant Attorney General Peter Keisler, who made welcoming remarks,

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Highlights Inside

GOVERNMENT BRIEFS FILED IN DETENTION CASES

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Cuba is required to take back all of its nationals denied admission to the United States. Approximately 1,672 Mariel Cubans have been repatriated under a 1984 accord between the two countries.

In 2001, the Supreme Court in *Zadvydas* held that a resident alien generally may not be detained for more than six months following a final order directing his removal from the United States, if the alien demonstrates that there is not a significant likelihood of removal in the reasonably foreseeable future. The courts disagree whether the *Zadvydas* six-month rule should be extended to limit the detention of arriving aliens who are stopped at the border and denied admission to the United States, and who cannot be removed to another country.

In the *Benitez* case, the Eleventh Circuit held that inadmissible aliens "have no constitutional rights precluding indefinite detention," and refused to extend the Supreme Court's "narrowing construction" of INA § 241(a)(6) in *Zadvydas*. That court reasoned that *Zadvydas* recognized that the critical distinction between resident aliens who have effected an entry, and aliens denied admission on arrival, "has been a hallmark of immigration law for more than a hundred years." The court held that *Shaughnessy v. Mezei*, 345 U.S. 206 (1953), "remains good law," and does not limit the duration of detention of unadmitted aliens whom the government is unable to remove. In contrast, in *Martinez*, the Ninth Circuit, following its decision in *Xi v. INS*, 298 F.3d 832 (9th Cir. 2002), held that because INA § 241(a)96) draws no distinction between excluded aliens and those who have gained entry, the two groups must be treated identically for detention purposes under *Zadvydas*.

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CONTINUED DETENTION OF MENTALLY ILL, ESPECIALLY DANGEROUS ALIEN NOT PERMISSIBLE UNDER ZADVYDAS

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convictions are so chilling that they question, without more, petitioner's sanity. After petitioner was released from state custody, he was placed in immigration detention by ICE, pending his removal proceeding. After a hearing, an Immigration Judge ordered the petitioner removed to Vietnam as an alien who had been convicted of an aggravated felony. That order became final on November 1, 2002, when petitioner waived his right to appeal.

> "The reference in *Zadvydas* to special justifications and harm-threatening mental illness was not a statement of what INA § 241(a)(6) authorizes."

In December 2002, petitioner filed a habeas petition challenging his continued detention under *Zadvydas*. As of that time, ICE had been unable to remove the petitioner to Vietnam, because that government had not responded to a request for his travel documents. Subsequently, ICE determined to continue petitioner's detention beyond the 90-day removal period, given his propensity for violence. On July 28, the district court granted the habeas petition, finding that petitioner's detention after the six-month removal period violated the limitations established by *Zadvydas*. On July 29, 2003, ICE initiated continued detention hearings against the petitioner under 8 C.F.R. § 241.14(f), on the basis that his release might pose a danger to the community. That regulation, enacted by the Attorney General following the *Zadvydas* decision, reflects the government's interpretation that the Supreme Court recognized an exception that allows the indefinite detention of an alien under special circumstances. An immigration judge, after a series of hearings, concluded that petitioner would pose a special danger to the public given his mental illness and that his continued detention was therefore justified.

The Ninth Circuit disagreed with the government's reading of *Zadvydas*. The court found that the Supreme Court had not created an exception under INA § 241(a)(6), permitting the government to detain an alien beyond six-months in circumstances even where the alien had a mental illness making him especially dangerous to the community. "The *Zadvydas* Court's acknowledgment that certain civil detention schemes are permissible under limited and 'special circumstances' served as a juxtaposition to § 241(a)(6)'s potentially tremendous scope," said the court. Thus, "the reference in *Zadvydas* to special justifications and harm-threatening mental illness was not a statement of what § 241(a)(6) authorizes. It was instead, an explanation of why the Court felt it was necessary to construe the statute narrowly." The court declined to address the question of whether *Zadvydas* permits the indefinite detention of an alien when there are issues of "terrorism or other special circumstances," finding that matters of national security were not implicated in petitioner's case. The court, however, indicated that it did "not agree that the danger of criminal conduct by an alien is automatically a matter of national security, as that term was used in *Zadvydas*."

The court also held that since the INA § 241(a)(6) did not authorize petitioner's continued detention, the regulation at 8 C.F.R. § 241.14(f), could not authorize the government to act contrary to the statute.

Finally, the Ninth Circuit indicated that the government may still subject petitioner to supervision with conditions after he is released from detention and incarcerate him for violations of those conditions.

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DEFENDING THE AUTO STAY REGULATION

DHS is authorized by 8 C.F.R. § 1003.19(i)(2) to invoke an automatic stay of an immigration judge's release order in cases where it has determined that an alien should either not be released or has set bond of $10,000 or more. The regulation's purpose is "to allow [ICE] to maintain the status quo during such time as is necessary to take a prompt appeal to the Board, and the stay only remains in place until the Board has an opportunity to consider the matter." 66 F.R. 54909, 54910 (Oct. 31, 2001). In scores of habeas petitions filed around the country, aliens alleged procedural and substantive due process violations. From this litigation experience, the Government learned that it is critical to describe clearly for the courts exactly how this regulation fits into the INA's custody provisions and established immigration jurisprudence. In particular, it is important not to begin the analysis by conceding that aliens have a substantive due process right to bond pending removal proceedings, and that the Government loses unless it proves that this process is justifiable and narrowly tailored. Likewise, the Government must not concede the application of constitutional standards borrowed from criminal law cases. Aliens have at best a weak constitutional interest in bond, and the Government need not employ the least burdensome methods when creating a process for adjudicating bond requests. Moreover, agencies have broad discretion to organize their internal decisionmaking, and they may exercise discretion broadly through rulemaking, instead of relying exclusively on individual adjudications.

Aliens have attacked the regulation by alleging that an immigration judge ruled they are not a flight risk or danger to the community, and if by chance the immigration judge was wrong, DHS could file an emergency stay motion with the Board. In addition, the automatic stay regulation contains no timeframe for how long the alien will actually be detained. The courts were initially receptive to these arguments. *See, e.g.,* Ashley v. Ridge, 288 F. Supp. 2d 662 (2003); *Bezmen v. Ashcroft*, 245 F. Supp.2d 446 (D. Conn. 2003); *Uritsky v. Ridge*, 286 F. Supp.2d 842 (E.D. Mich. 2003). *See Pisciotta v. John Ashcroft*, __ F. Supp. 2d __, 2004 WL 601795 (D.N.J. January 9, 2004); *Marin v. John Ashcroft*, Civ. Action No. 04-675(JAP) (D.N.J. March 17, 2004); *Alameh v. John Ashcroft*, Civ. Action No. 03-6205(DRD) (D.N.J. January 6, 2004); *Inthathirath v. Maurer*, No. 03-N-2245 (D. Colo. November 20, 2003); *Perez-Cortez v. Maurer*, No. 03-2244 (D.Colo. November 20, 2003). The courts remain skeptical, however, and the ultimate viability of this regulation is uncertain. *See Zavala v. Ridge*, __ F. Supp. 2d __, No. C04-00253 (N.D.Ca. March 1, 2004) (finding automatic stay regulation unconstitutional). Educating the courts on the underlying jurisprudence, as well as improved Board processing of these cases, was key to this turnaround.

> Aliens have no substantive due process right to be at large during proceedings because they have no fundamental right to be in the United States at all.

Aliens have no substantive due process right to be at large during proceedings because they have no fundamental right to be in the United States at all. *See Carlson v. Landon*, 342 U.S. 524, 531 (1952) ("So long, however, as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders"); *Munoz v. Ashcroft*, 339 F.3d 950, 954 (9th Cir. 2003) (rejecting alien's substantive due process argument, because control over immigration is a "fundamental sovereign attribute exercised by the Government's political departments"). Moreover, aliens have no substantive due process right to bond, because "detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process," *Demore v. Kim*, 538 U.S. 510, 123 S. Ct. 1708, 1717-18 (2003), and "Congress eliminated any presumption of release pending deportation, committing that determination to the discretion of the Attorney General." *Reno v. Flores*, 507 U.S. 292, 306 (1993).

The automatic stay regulation does not violate procedural due process. The Attorney General and the DHS Secretary have broad detention authority. Id. at 295 ("Congress has given the Attorney General broad discretion to determine whether, and on what terms, an alien arrested on suspicion of being deportable should be released pending the deportation hearing"). INA section 236(a), the regulations, and Board decisions place no limit on the discretion exercised by the Attorney General or his delegates with respect to the granting of bond or parole during removal proceedings. Release on bond is, in fact, "a form of discretionary relief." *Barbour v. INS*, 491 F.2d 573, 578 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974). Given that many aliens in removal proceedings are engaged in a continuing violation of United States law by their mere presence in the United States (often admittedly so), release on bond is an extraordinary act of sovereign generosity. *See Reno v. American-Arab Anti- Discrimination Comm.*, 525 U.S. 471, 491 (1999) ("in all cases, deportation is necessary in order to bring to an end an ongoing violation of United States law"); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984) ("deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws"); *Gomez-Chavez v. Perryman*, 308 F.3d 796, 800-01 (7th Cir. 2002) (aliens "can have no liberty

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AUTO STAY

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interest in remaining in violation of applicable United States law").

Another primary distinction between a criminal defendant and an alien detained pending his removal proceedings is that the alien may secure his release at any time by agreeing to leave the country. *See Richardson v. Reno*, 180 F.3d 1311, 1317 (11th Cir. 1999) (immigration detention "is not entirely beyond [the alien's] control; he is detained only because of the removal proceedings, and he may obtain his release any time he chooses by withdrawing his application for admission and leaving the United States"); *Parra v. Perryman*, 172 F.3d 954, 957 (7th Cir. 1999) (detained alien "has the keys in his pocket"); *Doherty v. Thornburgh*, 943 F.2d 204, 212 (2d Cir. 1991) (detained alien "possessed, in effect, the key that unlocks his prison cell"). Aliens who are clearly deportable (often admittedly so) and seek only discretionary relief, have even less at stake, because they have no liberty interest in discretionary relief applications. *See Tovar-Landin v. John Ashcroft*, 361 F.3d 1164 (9th Cir. 2004); *Tefel v. Reno*, 180 F.3d 1286, 1300 (11th Cir. 1999). Thus, to the extent an illegal alien in proceeding has any constitutional right to remain at large, it is a weak one.

Agencies are afforded great latitude in organizing themselves internally, and the INA places no restrictions on the Attorney General's discretion to prescribe procedures for the adjudication of bond requests. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 544 (1978); *Dia v. Ashcroft*, 353 F.3d 238 (3d Cir. 2003) ("The Supreme Court has forcefully emphasized that '[a]bsent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure'") (citing *Vermont Yankee*). This is particularly true in the immigration area. In finding that individual bond hearings are not required to detain aliens during proceedings, the Supreme Court in Kim stated that "when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal." 123 S. Ct. at1720.

The Attorney General and the DHS Secretary exercised their discretion to create a system for determining whether, and when, aliens in removal proceedings ought to be released. Under this system, an initial custody determination is made by DHS's Immigration and Customs Enforcement (ICE) acting in an adjudicative capacity. See 8 C.F.R. § 1236.1(a). *See Marcello v. Bonds*, 349 U.S. 302, 311 (1955). Though not required by law, the Attorney General has provided that if an alien is dissatisfied with that determination, he or she may ask an immigration judge to review his custody. See 8 C.F.R. § 1003.19(c)(1)-(3); 8 C.F.R. § 236.1(d)(1); See *Belbruno v. Ashcroft*, 2004 WL 603501, *6 (4th Cir. 2004) ("Aliens possess, for example, no constitutional right to an administrative appeal"); *Albathani v. INS*, 318 F.3d 365, 376 (1st Cir. 2003) ("An alien has no constitutional right to any administrative appeal at all.").

The immigration judge is a delegate of the Attorney General, and his decision is not necessarily the final agency action.

The immigration judge is a delegate of the Attorney General, and his decision is not necessarily the final agency action. The Attorney General determined that certain cases require additional safeguards. In these cases the immigration judge's order is only an interim decision, and the Attorney General's discretion is exercised by another of his delegates, the Board of Immigration Appeals, which then will generally issue the final agency action. The Attorney General provided, as a matter of discretion, that the alien should remain detained during the brief period necessary for the Board to review the case. This is a categorical discretionary denial of early release to this class of aliens. *See Lopez v. Davis*, 531 U.S. 230 (2001).

Zadvydas v. Davis, 533 U.S. 678 (2001), is inapposite. In *Zadvydas,* removal proceedings were completed, and the immigration-related purpose of the detention as an aid to deportation was challenged because repatriation was improbable. The alien could not secure his freedom simply by agreeing to go home. Detention pending removal proceedings, however, is limited by the ultimate completion of those proceedings, and its immigration purpose as an aid to deportation is well-established. In *Kim*, the Supreme Court found that "because the statutory provision at issue in this case governs detention of deportable criminal aliens pending their removal proceedings, the detention necessarily serves the purpose of preventing the aliens from fleeing prior to or during such proceedings." The Court also found that the detention during removal proceedings was not "indefinite" or "potentially permanent," because the detention "has a definite termination point," that being the completion of proceedings. *See also Pisciotta v. Ashcroft*, __ F. Supp.2d __, 2004 WL 601795 (D.N.J. 2004) (affirming automatic stay regulation because "removal proceedings, unlike the post-removal period, have a termination point").

The regulations currently require the Board to give "a priority for cases or custody appeals involving detained aliens." 8 C.F.R. § 1003.1(e)(8)(i). It also provides guidance with respect to how long appeals take in general. In general *all appeals* assigned to a single judge of the Board shall be disposed of within 90 days of completion of the record on appeal, and all appeals assigned to a three-judge panel of the Board shall be disposed of

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ANNUAL IMMIGRATION CONFERENCE

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also acknowledged the burgeoning immigration caseload both at OIL and in the U.S. Attorneys' Offices.

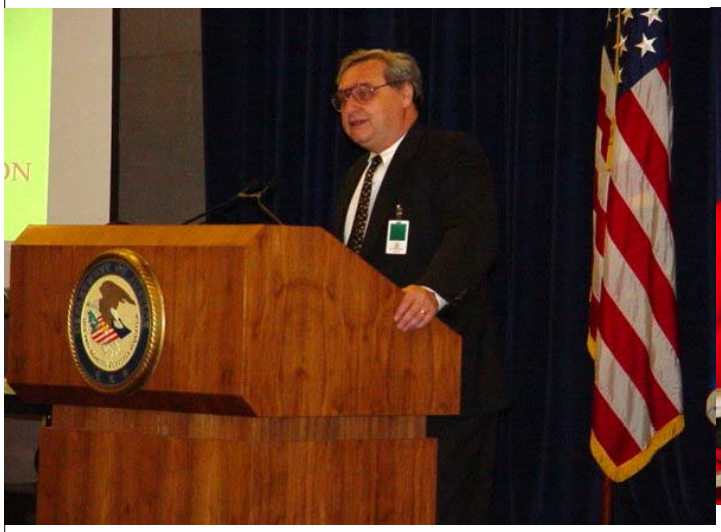
Asa Hutchinson, the Undersecretary of the Department of Homeland Security spoke about the challenges facing the new Department, especially in enforcing immigration laws at our Nation's border. Joe Whitley, the first General Counsel of the Department of Homeland Security, spoke about the legal infrastructure of the new Department and in particular the immigration functions.

Eduardo Aguirre, the Director of the United States Immigration and Citizenship Services, spoke about how the agency is trying to reduce the backlog of pending cases while providing timely services.

Conference attendees also heard remarks from a special guest from Canada, Bill Pentney, who is the Assistant Deputy Attorney General for Citizenship, Immigration, and Public Safety Portfolio. He spoke about some of the current immigration issues facing the Canadian Government.

Francesco Isgro, Thomas Hussey, Peter D. Keisler, Joe D. Whitley

View of attendees from above the Great Hall



Honorable Alex Kozinski, Circuit Judge, Ninth Circuit Court of Appeals

Lori L. Scialabba (L) and Terry J. Scadron (R)

Summaries Of Recent Federal Court Decisions

ADJUSTMENT

■Fourth Circuit Defers To Attorney General's Interpretation Of Section 246(a) Of The INA

Section 246(a) of the INA authorizes the Attorney General at any time within five years after the status of a person has been otherwise adjusted under INA § 245, to rescind the grant of that status. The Attorney General held in *Matter of S–* , 9 I&N Dec. 548 (Att'y Gen. 1962), that the five-year limitation on the rescission of status does not apply to deportation proceedings. In ***Asika v. Ashcroft***, __F.3d__, 2004 WL 603522 (4th Cir. March 29, 2004) (Wilkins, Luttig, Traxler), the Fourth Circuit deferred to the Attorney General's "longstanding interpretation that section 246(a)'s temporal limitation on the power to *rescind* does not serve to abridge the distinct power to *deport*."

> "Section 246(a)'s temporal limitation on the power to *rescind* does not serve to abridge the distinct power to *deport*."

The petitioner, had been denied temporary resident status under the 1986 legalization program. However, he subsequently filed an application for adjustment based on his already denied application for temporary resident status. The INS granted adjustment and issued a green card to petitioner. Six years later, in 1995, when petitioner applied for naturalization, the INS determined that it had erroneously granted the application for adjustment. The INS denied naturalization and instead instituted removal proceedings. The petitioner argued that section 246(a) foreclosed the INS from removing him based on an erroneous adjustment after five years had passed.

In deferring to the Attorney General's interpretation, the court applied the *Chevron* analysis to find that the Attorney General's interpretation was a reasonable construction of the INA.

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■Ninth Circuit Remands For BIA To Consider Impact Of Five-Year Statutory Bar To Adjustment Of Status

In ***Velezmoro v. Ashcroft***, __F.3d__, 2004 WL 720349 (9th Cir. April 1, 2004) (*B. Fletcher*, Pregerson, Brunetti), the Ninth Circuit remanded the case to the BIA for it to consider whether petitioner continues to be barred from applying for adjustment of status after former INA § 242B's five-year statutory bar expired while his petition was pending before the court of appeals.

The petitioner, had been ordered removed for entering the country without inspection, and had been granted voluntary departure until May 23, 1998. Petitioner did not depart voluntarily. Instead, he filed two motions to reopen his proceedings so that he could apply for adjustment of status based on his marriage to a United Sates citizen. The BIA denied the second motion finding that petitioner was ineligible for adjustment because of his failure to depart as required by the earlier grant of voluntary departure.

The court found that though petitioner had not complied with the terms of the grant of voluntary departure, denying his petition would effectively turn the 5-year ban into a much longer period of ineligibility, since he would not be eligible to reenter the United States for another ten years under INA § 212 (a)(9)(A)(ii). Accordingly, the court decided that since five years had already lapsed from the time he was granted voluntary departure, the case should be remanded to the BIA to consider, in the first instance, whether petitioner continues to be barred under INA § 242B.

In a dissenting opinion, Judge Brunetti would have found that the BIA had properly applied the five-year bar at the time of its decision and the issue that the majority decided was not before the court.

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ASYLUM

■Ninth Circuit Sustains BIA's Adverse Credibility Finding In Sudanese Asylum Case

In ***Taha v. Ashcroft***, __F.3d__, 2004 WL 626532 (9th Cir. March 31, 2004) (Beezer, Kozinski, *Schwarzer* (N.D. Cal.)), the Ninth Circuit affirmed the BIA's adverse credibility finding and denied the petition for review.

The petitioner, a native of Sudan, had applied for asylum and withholding of removal in 1999, and had submitted a seven-page declaration describing himself as a member of the Umma Party and an active opponent of a series of military dictatorships. He wrote that, as a result of his opposition to the regime, he had been fired from his job in 1991 and unfairly arrested in 1994. However, at his immigration hearing he told a vastly different story of past acts of persecution that he had suffered in Sudan. The IJ denied petitioner's applications as well as his oral request for protection under CAT, on credibility grounds. That finding was affirmed by the BIA which concluded that petitioner had "hampered" his credibility by failing to explain or resolve several substantial discrepancies between his testimony and declaration.

On appeal, the court rejected petitioner's contention that the discrepancies underlying the adverse credibil-

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ity findings were minor and revealed nothing about his fear for his safety. The court held that the "vast" differences between petitioner's written asylum application and testimony before the IJ regarding two incidents constituted substantial evidence supporting the BIA's adverse credibility finding. The court also rejected petitioner's contention that his due process rights had been violated because he was not afforded a meaningful opportunity to address the inconsistencies. The court found that the IJ gave petitioner "every reasonable opportunity to present his case," and that he had been put on notice by the IJ's decision that it was his responsibility to explain the discrepancies before the BIA. Finally, the court rejected petitioner's contention that the BIA had erred when it failed to independently evaluate his CAT claim. The court determined that unlike its decision in *Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001), the petitioner's CAT claim was based on the same testimony that the BIA found incredible.

In a dissenting opinion, Judge Kozinski criticized the majority for abdicating their responsibility and "sign[ing] off on the BIA's superficial analysis." He would have reversed the BIA's credibility finding noting that "this is one of the rare instances where a different result than the BIA's is compelled." Judge Kozinski would have also remanded the case to the BIA to independently evaluate petitioner's CAT claim.

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■Ninth Circuit Holds That Immigration Judge Erred In Imputing Persecutory Actions of Bosnian Serbs As A Group To Individual Alien

In ***Vukmirovic v. Ashcroft***, 362 F.3d 1247, 2004 WL 720241 (9th Cir. April 4, 2004) (Fernandez, *Hawkins*, Thomas), the Ninth Circuit reversed an IJ's finding that petitioner was ineligible for asylum under INA § 101(A)(42)(b) because he had participated in the persecution of Croats on account of their race and religion.

The petitioner, a Bosnian Serb, had joined in 1990 an anti-communist group whose purpose was to defend his town from Bosnian Croats. Petitioner , admitted to physically harming the attacking Croats and beating them with sticks and pistols. Petitioner stated that he had not participate in the ethnic cleansing campaign launched by the Bosnian Serbs against the Muslims, which occurred after he left Bosnia Herzegovina in 1991. Petitioner arrived in the United States as a crewmember on a cruise chip, overstayed his visa, and never departed. The INS instituted deportation proceedings in January 1996. In February 1996, Petitioner married a United States citizen, and subsequently filed an application for adjustment.

"The IJ erred as a matter of law in determining categorically that acts of self-defense constitute persecution under the statute."

The IJ declined to continue the hearing to permit the INS to rule on the adjustment application. At the conclusion of the hearing, the IJ found petitioner ineligible for asylum because he had persecuted others. Before the IJ issued his written decision, petitioner with the assistance of new counsel filed a motion to reopen based on ineffective assistance of counsel, to apply for CAT protection. When the IJ issued his written decision denying asylum, he also denied the motion to reopen because petitioner had not complied with *Matter of Lozada*. The BIA summarily affirmed that decision without opinion.

The Ninth Circuit held that the IJ committed two errors of law when he analyzed petitioner's asylum claim. First, the IJ erred to the extent that he denied asylum based on the imputed actions of Bosnian Serbs who engaged in persecution of others. Second, "the IJ erred as a matter of law in determining categorically that acts of self-defense constitute persecution under the statute." The court reasoned that, as construed by the IJ, INA § 101(A)(42)(b) would preclude entire classes of legitimate asylum seekers from safe harbor, notably those involved in civil strife. The court noted that there was no affirmative evidence in the record that petitioner had participated in physical attacks on Croats other than in the context of self-defense. Accordingly, the court remanded the case to the IJ to make his determination applying the proper legal analysis. The court also found that the IJ also erred in denying the motion to reopen because the petitioner might still be eligible for deferral of removal under 8 C.F.R. § 208.17.

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■Seventh Circuit Determines That Ethnic Albanians' Fear Of Forced Military Service Was Not Sufficient Grounds For Asylum.

In ***Pelinkovic v. Ashcroft***, __F.3d__, 2004 WL 899638 (7th Cir. April 28, 2004) (Easterbrook, Manion, *Kanne*), the Seventh Circuit affirmed the BIA's denial of a motion to reopen filed by an ethnic Albanian male who claimed to fear forced service in the army in Montenegro. The petitioner entered the United States in February 1992, with his wife and son. The petitioner, who is a Muslim, also claimed generalized discrimination, mistreatment, and economic hardship based on his faith and Albanian ancestry. The IJ denied asylum, and ultimately the Seventh Circuit affirmed that decision in February 1998. Petitioners did not depart. Instead they subsequently filed two motions to reopen based on changed country conditions. The BIA

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denied the motions on July 18, 2002.

The court agreed with the BIA's finding that the eligibility of the lead petitioner and his son for military service did not amount to persecution where there was no evidence that if either man were forcibly conscripted, they would be required to serve in Kosovo and commit the acts to which they morally objected. The court also agreed with the BIA's finding that the petitioner failed to show changed country conditions beyond escalating civil strife. The court also found that the BIA did not abuse its discretion in determining that petitioner had failed to state a prima facie claim under CAT. "Petitioners' failure to make a particularized showing that any of them would more likely than not be subject to torture upon their return, as differentiated from the general risk shared by all ethnic Albanians in Montenegro, dooms their case," concluded the court.

"Petitioners' failure to make a particularized showing that any of them would more likely than not be subject to torture upon their return, as differentiated from the general risk shared by all ethnic Albanians in Montenegro, dooms their case."

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■Ninth Circuit Denies *En Banc* Rehearing And Amends Panel Opinion To Create Exception To Supreme Court's *Ventura* Decision.

In ***Baballah v. Ashcroft***, ___F.3d__, 2004 WL 964164 (9th Cir. May 6, 2004) (Tashima, Thomas, *Paez*), the Ninth Circuit denied the government's petition for rehearing *en banc* and issued an amended opinion. In its original opinion (335 F.3d 981), the panel determined that Baballah, an Arab-Israeli, had established past persecution on account of harassment and discrimination by Israeli marines while he conducted his fishing business, and that the agency failed to rebut the presumption of a well-founded fear of persecution. The government's rehearing petition argued that the panel failed to remand for further consideration of the well-founded fear claim under *INS v. Ventura*, 537 U.S. 12 (2002), once it overturned the finding of no past persecution. The court denied the rehearing petition, but amended its decision by adding a footnote stating that remand under *Ventura* was unnecessary because the INS should not have an additional opportunity to rebut the well-founded fear presumption on the basis of changed country conditions.

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■Ninth Circuit Finds Ethiopian Rape Victim Credible, Remands For Humanitarian Reasons.

In ***Kebede v. Ashcroft***, 366 F.3d 808 (9th Cir. 2004) (*Goodwin*, Pregerson, Tallman), the Ninth Circuit ruled that the Immigration Judge erred in making an adverse credibility determination and in finding that petitioner had failed to support her claim of past persecution with substantial evidence.

The petitioner, an Ethiopian citizen, comes from a family that was powerful under the rule of former Emperor Haile Selassie. Petitioner testified that her stepfather was imprisoned and died shortly after his release from illness and injuries resulting from beatings by prison officials. Petitioner also stated that in 1988 two soldiers from the Dergue revolutionary government came to her family's house ostensibly to conduct a search but instead violently raped petitioner, causing her to black out. Her mother took her to the hospital where she regained consciousness.

The IJ did not find petitioner credible, focusing on her reluctance to discuss the rape, or to report it in her asylum interview and application. Additionally, the IJ found certain discrepancies between petitioner's testimony and that of her mother, who also testified at the hearing.

In reversing the adverse credibility finding, the Ninth Circuit found that none of the IJ's proffered reasons called into question the fact and nature of petitioner's rape. Moreover, her account was corroborated by petitioner's mother, said the court. The court also reversed the IJ's finding that petitioner had not been raped "because of" her family background. The court found that the IJ had ignored the evidence indicating that the soldiers had linked their assault on petitioner with her family's authority and position in the Selassie regime. Because petitioner did not contest the finding that she no longer had a fear of future persecution, the court remanded her case for a determination of whether her past persecution was so atrocious that it warrants a grant of humanitarian asylum.

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■Sixth Circuit Affirms Immigration Judge's Adverse Credibility Finding In Chinese Asylum Case

In ***Yu v. Ashcroft***, __F.3d__, 2004 WL 792804 (6th Cir. April 15, 2004) (*Siler*, Daughtrey, Gibbons), the Sixth Circuit sustained the Immigration Judge's adverse credibility finding and dismissed the petition for review. The petitioner, a citizen of China, sought asylum based on his alleged connection with Falun Gong. The IJ did not find the petitioner credible based on implausibilities and inconsistencies found in four separate statements taken from his airport interview, asylum application, credible fear interview, and his testimony in front of the IJ.

The court ruled that the IJ reasonably based his decision on major implausibilities and inconsistencies in the alien's statements and testimony. The court stated that multiple minor inconsistencies, which would not otherwise be an adequate basis for an adverse credibility finding,

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cumulatively supported the other grounds relied upon by the IJ. "Although some of the IJ's grounds seem weak, when the discrepancies are viewed in the context of the surrounding record, we cannot say that a 'reasonable adjudicator would be compelled to conclude to the contrary.'"

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■First Circuit Holds That Participation In Guatemalan Civil Defense Patrol Does Not Compel Finding Of Asylum Eligibility

In ***Samayoa-Cabrera v. Ashcroft***, __F.3d__, 2004 WL 943647 (*Singal*, Selya, Howard) (1st Cir. May 4, 2004), the First Circuit held that petitioner's participation in a civil defense patrol did not compel the conclusion that he was subject to politically-inspired past persecution by the guerillas in Guatemala. The court further held that petitioner failed to demonstrate an objectively reasonable fear of future persecution based on his actual or imputed political opinion.

Petitioner's participation in a civil defense patrol did not compel the conclusion that he was subject to politically-inspired past persecution by the guerillas in Guatemala.

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■Tenth Circuit Reverses Asylum Denial To Indonesian of Chinese Ethnicity

In ***Wiransane v. Ashcroft***, 366 F.3d 889 (10th Cir. 2004) (Ebel, Anderson *Hartz*), the Tenth Circuit held that substantial evidence did not support the Immigration Judge's decision that petitioner failed to establish that he is of Chinese ethnicity and, as such, has a well-founded fear of persecution in Indonesia.

The petitioner claims that he was born in Indonesia in 1978 to Chinese parents. Eventually, petitioner and his mother moved to Holland, where he settled for about four years. In September 1997, petitioner entered the United States on a false Belgian passport. He claimed that he left Holland to get away from his mother who became increasingly abusive. In his asylum application he claimed that he feared future persecution on account of country-wide anti-Chinese persecution in Indonesia. In denying asylum, the IJ did not address the evidence of anti-Chinese violence in Indonesia and did not credit petitioner's claim that he was ethnically Chinese.

The Tenth Circuit held that the IJ had failed to state a substantial basis for rejecting petitioner's claim that he is ethnically Chinese. Accordingly, the court remanded the case for the Immigration Judge to adequately explain his reasons for his finding and to address whether the anti-Chinese violence in Indonesia would support a well-founded fear or a clear probability of persecution by someone of Chinese ethnicity. The court concluded that it was immaterial for purposes of determining asylum eligibility that petitioner fled to the United States to escape from his domineering mother, since the statute makes no mention of the reason an applicant came to this country.

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■Ninth Circuit Sustains Immigration Judge's Denial Of Asylum And Withholding Of Removal Based On Alien's Terrorist Activities

In ***Bellout v. Ashcroft***, __F.3d__, 2004 WL 764890 (9th Cir. April 12, 2004) (Kozinski, O'Scannlain, *Silverman*), the Ninth Circuit affirmed the Immigration Judge's finding that the petitioner, an Algerian citizen, was statutorily ineligible for relief from removal because he engaged in a terrorist activity when he joined a designated terrorist organization and lived in its camps for three years.

The court held that, because "there are reasonable grounds to believe that [petitioner] engaged or is likely to engage in terrorist activity under 8 U.S.C. §1158(b)(2)(A)(v)," it lacked jurisdiction over the Immigration Judge's denial of asylum under INA § 208(b)(2)(D). The court also held that substantial evidence supported the IJ's conclusion that the petitioner was ineligible for withholding of removal under the INA and the Convention Against Torture.

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■Eighth Circuit Rules No Due Process Violation Where Translator Failed To Fully Convey Alien's Fear Of Persecution

In ***Meas v. Ashcroft***, 363 F.3d 729 (8th Cir. April 9, 2004) *(Bye*, McMillian, Riley), the Eighth Circuit affirmed the BIA's denial of asylum to a Cambodian citizen. Preliminarily, the court rejected petitioner's contention that her due process rights were violated because the translator did not fully convey her fear of persecution. The court found that the transcript as a whole was "understandable and coherent," and that petitioner was able to convey her story to the Immigration Judge. Additionally, the court found that petitioner had not explained how she was prejudiced by the translator's alleged deficiencies.

On the merits, the court agreed with the IJ's finding that that while petitioner had been persecuted in the past by the Khmer Rouge, the likelihood of any future persecution was rebutted the State Department reports.

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■Eighth Circuit Determines That Alien Is Ineligible For Asylum Because of Serious Non-Political Crimes

In ***Chay-Velasquez v. Ashcroft***, __F.3d__, 2004 WL 963746 (8th Cir. May 6, 2004) (*Murphy*, Smith, Colloton), the Eighth Circuit upheld the finding that the petitioner was ineligible for asylum and withholding for removal because there were significant reasons to believe he had committed serious nonpolitical crimes in Guatemala. Petitioner had participated in violent protests during which he burned buses, broke windows of government buildings, and made bombs to throw at police. The IJ determined that these were acts of anarchy rather than genuine political protest.

The court found that the evidence in the record supported the IJ's findings that petitioner "had endangered the public and committed violent acts out of proportion to any political aspect of his conduct." Consequently, the denial of asylum "is supported by law, as well as by substantial evidence," held the court.

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■Eighth Circuit Affirms Immigration Judge's Denial Of Asylum To Lebanese Citizen

In ***Al_Tawm v. Ashcroft*** __F.3d__, 2004 WL 769469) (8th Cir. April 13, 2004) (Loken, Bowman, *Wollman*), the Eighth Circuit sustained the Immigration Judge's determination that the petitioner failed to establish past persecution or an objectively reasonable fear of future persecution in Lebanon on account of his membership in the Lebanese Forces. The court found that although petitioner had been detained twice, the detentions lasted a few hours each and did not result in serious injury. Brief periods of detention do not necessarily constitute persecution, held the court.

The court also rejected petitioner's challenge to the BIA's use of streamlining, because it was "not inappropriate" for the BIA to make the choice to utilize that procedure in this case.

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■Ninth Circuit Panel Orders Parties To Brief Whether The En Banc Court Should Decide If A Family May Constitute A Particular Social Group

In ***Lin v. Ashcroft***, 356 F.3d 1027 (9th Cir. 2004) (Fletcher, Kozinski, Trott), the panel *sua sponte* on April 19, 2004, ordered the parties to file simultaneous briefs setting forth their positions on whether the case should be reheard en banc on the issue of whether a family may constitute a particular social group for purposes of asylum eligibility. The panel previously held, in a published decision, that the BIA had abused its discretion in denying petitioner's motion to reopen, partly because he had raised a plausible claim for refugee status as a member of a particular social group consisting of his immediate family.

The court directed the BIA to apply its expertise to the question of whether involuntary insertion of an IUD or imposition of fines for an unauthorized pregnancy constitutes per se persecution.

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■Ninth Circuit Reverses Immigration Judge's Adverse Credibility Finding In Chinese Asylum Case

In ***Chen v. Ashcroft***, __F.3d__, 2004 WL 615199 (9th Cir. March 30, 2004) (*Alarcón*, Beezer, W. Fletcher), the Ninth Circuit reversed the Immigration Judge's adverse credibility finding. The court held that the IJ impermissibly relied on information not in the country report of record and testimony which did not go to the heart of the asylum application. The court declined to reach the merits of this case and remanded to the BIA, expressly distinguishing its decision in the instant case from *He v. Ashcroft*, 328 F.3d 592 (9th Cir. 2003) (reversing an Immigration Judge's adverse credibility finding in a Chinese family-planning case and deciding the case on the merits). The court directed the BIA to apply its expertise to the question of whether involuntary insertion of an IUD or imposition of fines for an unauthorized pregnancy constitutes *per se* persecution.

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CANCELLATION/ SUSPENSION

■Ninth Circuit Holds That Petitioner Is Ineligible For Suspension Even Though She Was Served With An OSC Before IIRIRA's Effective Date

In ***Martinez-v. Ashcroft***, __ F.3d__, 2004 868557 (Hall, Graber, *Weiner* (E.D. Pa.)) (9th Cir. April 23, 2004), the Ninth Circuit sustained the Immigration Judge's finding that the petitioner was ineligible for suspension of deportation because she had not been placed in deportation proceedings before IIRIRA's effective date.

The petitioner, a citizen of Mexico, entered the United States along with her mother when she was three years old. She is now eighteen years old. On March 25, 1997, the INS served petitioner with an Order to Show Cause which was never filed with the immigration court. Instead, after IIRIRA's enactment, petitioner was served with a Notice to Appear, restating the charges in the prior OSC. Petitioner then applied for cancellation, and also argued that she should have been eligible for suspension of deportation. These reliefs were denied and the BIA summarily affirmed that decision.

The Ninth Circuit rejected the peti-

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tioner's argument that she should have been allowed to apply for suspension of deportation merely because she was served with an Order to Show Cause, prior to the IIRIRA's effective date. The court observed that after the IIRIRA's effective date on April 1, 1997, the alien was served with a Notice to Appear that was filed with the Immigration Court, and that she was therefore subject to the IIRIRA's permanent rules. The court reaffirmed the well-established rule that an "alien is not 'in proceedings' until the appropriate charging document is actually filed with the immigration court."

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CONVENTION AGAINST TORTURE

■Ninth Circuit Finds BIA Abused Its Discretion In Denying Reopening Under Convention Against Torture

In ***Azanor v. Ashcroft***, __F.3d__, 2004 WL 720166 (*Wallace,* Noonan, McKeown) (9th Cir. April 1, 2004), the Ninth Circuit granted in part petitioner's petition for review. The court held that the BIA did not abuse its discretion by requiring petitioner to demonstrate that prospective torture would occur with the consent or acquiescence of a Nigerian government official. But, the court also concluded that it could not determine whether the BIA also required petitioner to demonstrate that she would face torture while under a public official's "custody or physical control." Because of this uncertainty, the court found that it was required to remand.

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CRIMES

■Fifth Circuit Holds That Facilitating A Drive-By Shooting Is A Crime Of Violence

In ***Nguyen v. Ashcroft,*** __F.3d__, 2004 WL 764588 (5th Cir. April 26, 2004) (Garwood, Jones, *Stewart*), the Fifth Circuit found that a facilitation conviction under Oklahoma's drive-by shooting statute was a crime of violence under 18 U.S.C. § 16(b). The petitioner, who was driving a vehicle from which a passenger discharged a firearm, argued that his facilitation crime was complete when the assistance he provided by driving the car began. The court rejected this claim, holding that "it is not the driving of the vehicle that is criminalized, but rather when one uses a vehicle to facilitate the act of discharging a weapon. Without the weapon being intentionally discharged, there can be no facilitation conviction."

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■Fifth Circuit Holds That A Conviction Overturned For Any Reason Remains A Conviction For Immigration Purposes

In ***Discipio v. Ashcroft***, __F.3d__, 2004 WL 912597(5th Cir. April 29, 2004) (Jones, *Benavides*, Clement), the Fifth Circuit granted the government's motion to dismiss a petition for review brought by a criminal alien who asserted that, because his criminal conviction had been overturned by a Massachusetts state court and a new trial granted, he was no longer an alien convicted of an aggravated felony.

The petitioner, citizen of Brazil, became a permanent resident of the United States in 1970. In 2002, a Massachusetts court convicted him of possession with intent to distribute Percocet. That conviction was subsequently overturned because of procedural and substantive flaws, and petitioner was granted a new trial. An IJ, and later the BIA, determined that petitioner's conviction remained valid for immigration purposes.

The Fifth Circuit held that based on its own holding in *Renteria-Gonzalez v. INS*, 322 F.3d 804 (5th Cir. 2002), the conviction remained valid for immigration purposes. The court stated that because the decision in *Renteria* "failed to tailor its discussion of the term 'conviction' to the facts before it," the court had no alternative but to find that the alien's conviction remained valid and to dismiss the petition for review.

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■Seventh Circuit Dismisses For Lack Of Jurisdiction Based On Alien's Firearms Offense

In ***Dave v. Ashcroft,*** __F.3d__, 2004 WL 787242 (Kanne, *Rovner*, Willams) (7th Cir. April 14, 2004), the Seventh Circuit dismissed the petition for review for lack of jurisdiction because the petitioner had been convicted of a firearms offense.

The petitioner, had been a lawful permanent resident in the United States since his arrival from India in 1980 at the age of five. In 1998, he was convicted of reckless discharge of a firearm, leading the INS to charge him with deportability for that offense. The court rejected petitioner's claim that he presented a substantial constitutional question for the court's review.

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DUE PROCESS

■Eighth Circuit Finds That Immigration Judge Denied Alien A Full And Fair Hearing

In ***Al Khouri v Ashcroft***, __F.3d__, 2004 WL 635397) (8th Cir. April 1, 2004) (Riley, *Melloy*, Erickson), the Eighth Circuit remanded the alien's case for a new hearing, finding that the petitioner was prejudiced by fundamental errors in the immigration proceedings.

The petitioner, a Lebanese citizen, contended that the immigration judge had violated his rights to due process by denying his motion for a continuance, limiting his testimony, and giving him

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only minutes to review a 200-page document. On appeal, the BIA affirmed without opinion the denial of asylum, withholding of removal and relief under the Torture Convention,

The court held that the IJ did not violate petitioner's rights to due process by refusing to grant his request for a continuance of his removal hearing because he was responsible for the continued delay of his hearing, and for his proceeding unrepresented. However, the court also found that the IJ did not fully develop the record and that it was unfair to expect an alien's testimony to be as complete as his asylum application. Finally, the court further found that it was unfair to give the petitioner only ten minutes to review a 200-page document written in a foreign language.

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EXPEDITED REMOVAL

Expedited removal proceedings "apply to all aliens not admitted for permanent residence, including parolees . . . who are convicted of an aggravated felony."

■Third Circuit Holds That Paroled Alien Is Subject to § 238(b) Expedited Removal

In ***Bamba v. Riley***, __F.3d__, 2004 WL 885236 (3d Cir. April 27, 2004) (Roth, Ambro, *Chertoff*), the Third Circuit, affirmed the district court's denial of habeas and held that expedited removal provision under INA § 238(b) "is applicable to all aliens convicted of an aggravated felony who are not lawfully admitted for permanent residence."

The petitioner, who in 1997 had been convicted of an aggravated felony argued that the expedited procedures did not apply to him because he was not lawfully admitted at all, but merely "paroled" into the United States for a limited purpose. The court concluded that as a parolee, the petitioner was properly placed into expedited removal proceedings because those proceedings "apply to all aliens not admitted for permanent residence, including parolees such as [petitioner], who are convicted of an aggravated felony."

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GOOD MORAL CHARACTER

■Ninth Circuit Sustains Immigration Judge's Finding That Alien Who Had Previously Been Removed From United States Could Not Establish Good Moral Character

In ***Avendano-Ramirez v. Ashcroft,*** __F.3d__, 2004 WL 868585 (9th Cir. April 23, 2004) (Nelson, *Fernandez*, Kleinfeld), the Ninth Circuit held that an alien who has been removed from the United States within the past five years cannot, as a matter of law, be regarded as a person of good moral character.

The petitioner was apprehended while seeking to reenter the United States in February 2001 and ordered removed without a hearing because she did not possess proper entry documents. Petitioner was again apprehended on February 25, 2001, while seeking to reenter with a false travel document. She was then taken into custody and placed in proceedings. While in proceedings, she married the father of her two youngest United States citizen children. She then requested a number of reliefs including cancellation of removal, adjustment, withdrawal of admission, and voluntary departure. The IJ denied these reliefs on the basis that she lacked good moral character because she was seeking admission after having been removed within the previous five years. The BIA summarily affirmed that decision.

The court rejected petitioner's contention that Congress had made a mistake in including previously removed aliens to the list of people who lack good moral character. "We must presume Congress said what it meant and meant what it said," responded the court. The court held that it lacked jurisdiction to consider the propriety of petitioner's prior removal order. Here, said the court "Congress has spoken quite clearly. As a result we have been stripped of jurisdiction to fossick in the details of petitioner's prior removals." Finally, the court held that it lacked jurisdiction to review the IJ denial of her request to withdraw her application for admission.

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MARRIAGE

■Third Circuit Holds That The Courts Lack Jurisdiction To Review The Attorney General's Refusal To Grant Hardship And Good Faith Marriage Waivers.

In ***Urena-Tavarez v. Ashcroft***, 367 F.3d 154 (3d Cir. 2004) (*Sloviter*, Rendell, Aldisert), the Third Circuit held that the statutory bar to judicial review of discretionary decisions (INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1152(a)(2)(B)(ii)), precludes judicial review of an agency action denying an application for an extreme hardship and/or good faith marriage waivers of the alien's obligation to file a joint application for the removal of the conditions on his permanent residency.

The petitioner, a citizen of the Dominican Republic, obtained conditional permanent resident status on January 8, 1994, after marrying a U.S. citizen in 1992. On December 1, 1995, the petitioner and his wife filed a joint application to have the conditions removed. Apparently, just before the petitioner and his wife were to be interviewed by an INS officer, they quarreled. Then, while petitioner was in the men's room, his wife was called into the interview alone where she admitted that she did not live with

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petitioner but rather was just a friend. She then signed a sworn statement stating that she never lived with petitioner as a married couple and that they did not consummate their marriage. When petitioner came to the interview room, he was told that he was no longer eligible for permanent resident status.

The INS District Director denied petitioner's application to remove the condition on his permanent resident status. That status expired on January 8, 1996, and thereafter, the INS instituted removal proceedings against the petitioner. During the proceedings, the petitioner applied for a waiver of the obligation to file a joint statement. In the meantime, petitioner and his wife obtained a divorce. The IJ denied the waiver request on the basis that he had not qualified for any of the statutory exceptions. The BIA affirmed that decision noting that petitioner had submitted evidence that his marriage was in good faith.

"Courts have been zealous in their efforts to preserve our jurisdiction to review administrative decisions, but that effort must fail under the overarching reality that it is Congress that has the power to decide the jurisdiction of the inferior federal courts."

In finding a lack of jurisdiction to review the denial of the waiver, the court reasoned that the waiver provision, INA § 216(c)(4), 8 U.S.C. § 1186a (c)(4), clearly states that the Attorney General, in his "discretion, may" grant such waivers, and then provides that he has the "sole discretion" to decide "what evidence is credible and the weight to be given that evidence." "Courts have been zealous in their efforts to preserve our jurisdiction to review administrative decisions, but that effort must fail under the overarching reality that it is Congress that has the power to decide the jurisdiction of the inferior federal courts," observed the court.

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MOTION TO REOPEN

■Ninth Circuit Holds That It Has Jurisdiction To Review Denial Of Motion To Reopen For Discretionary Relief

In ***Medina-Morales v. Ashcroft***, __F.3d__, 2004 WL 736995 (9th Cir. April 7, 2004) (Nelson, *Fisher*, Gould), the Ninth Circuit reversed the BIA's dismissal of petitioner's appeal from an Immigration Judge's denial of his motion to reopen his proceedings to allow him to apply for adjustment of status.

Preliminarily, the court rejected the government's contention that it lacked jurisdiction to review the denial of motion to reopen to apply for the discretionary relief of adjustment of status. The court explained that under INA § 242(a)(2)(B)(i) courts lack jurisdiction to review "any judgment regarding the grant" of certain reliefs. Thus, the question, said the court, is whether denials of motions to reopen are judgments "regarding the grant of relief." Here, the IJ never ruled on petitioner's application for adjustment, but instead granted voluntary departure. Thus, petitioner was not appealing the denial of an adjustment of status application, said the court. Therefore, the court held that the denial of the BIA's motion to reopen, was not a judgment "regarding the grant of relief" under the enumerated provisions. The court further found that the jurisdictional bar under INA § 242(a)(2)(B)(ii) does not apply to denials of motions to reopen, because INA § 240(c)(6) specifies guidelines for the filing of motions to reopen and makes no mention of discretion.

On the merits, the court held that the BIA could consider an alien's prior agreement to voluntarily depart from the United States as a factor to deny the motion to reopen. However, the court then found that the BIA could not consider the strength of petitioner's relationship to his stepparent as a factor in denying his motion to reopen.

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■First Circuit Holds That Deported Haitian Nationals With Criminal Records Are Not a Protected Social Group Eligible for Asylum

In ***Elien v. Ashcroft***, __F.3d__, 2004 WL 817137 (1st Cir. April 16, 2004) (Torruella, Lipez, *Cyr*), the First Circuit affirmed the BIA's denial of the alien's motion to reopen based on allegedly changed conditions in Haiti.

The petitioner, who entered the United States as a visitor from Haiti in 1981, was placed in proceedings in 1994, and eventually ordered deported by an Immigration Judge in 1996. While the petitioner's appeal was pending before the BIA, Haiti implemented a new policy of detaining all repatriated Haitians who had incurred a criminal record while residing in the United States. After the BIA denied petitioner's appeal in July 2001, petitioner filed a motion to reopen to apply for asylum, withholding, and CAT protection, based on the new Haitian detention policy. The BIA denied the motion, declining to recognize deported Haitian aliens with criminal records as a particular social group. The BIA reasoned that such recognition would serve to encourage and reward aliens who committed crimes while in the United States, thus immunizing them from deportation.

The First Circuit deferred to the BIA's interpretation of social group finding that the policy choice made by the BIA was neither unreasonable or impermissible. Such recognition unquestionably would create a perverse incentive for Haitians coming to or residing in the United States, to commit crimes, observed the court. The court also found that petitioner had failed to demonstrate that he would be subjected to torture upon his return to Haiti.

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NATIONAL

■Ninth Circuit Holds That Service In United States Military Does Not Confer Nationality

In ***Reyes-Alcaraz v. Ashcroft***, 363 F.3d 937 (9th Cir. April 8, 2004) (Hall, *Graber*, Weiner (E.D. Pa.)) , the Ninth Circuit held that service in the armed forces of the United States, along with the taking of the standard military oath, does not alter an alien's status to that of a national within the INA. The court rejected the petitioner's contention that its decision in *Perdomo-Padilla v. Ashcroft,* 333 F.3d 964 (9th Cir. 2003), was distinguishable, and found that an alien could only become a national under the INA through birth or naturalization. The court concluded that his conviction for exhibiting a deadly weapon with the intent to evade arrest was an aggravated felony crime of violence.

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RIGHT TO COUNSEL

■Ninth Circuit Holds That Alien Did Not Make Knowing And Voluntary Waiver Of Right To Counsel

In ***Tawadrus v. Ashcroft*** __F.3d__, 2004 WL 794529 (9th Cir. April 15, 2004) (Fernandez, *Hawkins*, Thomas), the Ninth Circuit held that the Immigration Judge's failure to advise petitioner of his right to counsel at the time his attorney withdrew and to inquire whether petitioner knowingly and voluntarily waived that right was an abuse of discretion and a violation of due process.

The petitioner, a citizen of Egypt and a Coptic Christian, and his wife founded an engineering and construction firm. Petitioner claimed that because he failed to convert to Islam, certain government-controlled agencies placed economic sanctions on him, leaving him with no income, and inability to earn a living as a contractor. Petitioner also described two incidents in which he was attacked by unidentified Islamic fundamentalists. At the preliminary hearing petitioner's counsel withdrew his appearance. The IJ then set a merits hearing for that afternoon. When petitioner returned he appeared pro se at the hearing. Petitioner was unable to introduce most of his documents to support his claim because the documents were not properly certified. The IJ then denied asylum and withholding. With the help of new counsel petitioner appealed, and the BIA summarily affirmed.

The court held that petitioner's due process rights had been violated and that "the outcome of the proceeding may have been affected by the alleged violation." The due process prejudice test said the court, is not a "but for" or "harmless error" standard, and that in proper circumstances the petitioner need not explain what evidence he would have presented had he been provided the opportunity to do so. Here, the court found that the absence of a lawyer at petitioner's hearing and "the mere two hours he was given to prepare resulted in prejudice to his case."

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SUMMARY DISMISSAL

■Ninth Circuit Holds That Summary Dismissal For The Failure To File A Brief Was In Error

In ***Garcia-Cortez v. Ashcroft***, __F.3d__, 2004 WL 885262 (9th Cir. April 27, 2004) (*Hall*, Trott, Callahan), the Ninth Circuit held that the BIA's summary dismissal of petitioners' administrative appeal for failure to timely file a brief violated their due process rights because the notice of appeal form made sufficiently detailed allegations of the Immigration Judge's errors.

"The reason why it is permissible for the BIA to summarily dismiss an appeal for failure to timely file a brief is that an alien appealing an order of removal must provide the BIA with adequate notice of the specific grounds for his appeal. But when the alien has in fact provided such notice to the BIA, this justification falls away, and summary dismissal for failure to timely file a brief violates an alien's constitutional right to a fair appeal," said the court.

Here, the court found that petitioners had provided sufficient details in their notice of appeal. The petitioners, who had been denied cancellation of removal, stated in their notice that the IJ had erred in determining that they had not met the physical presence requirement. The petitioners also brought to the BIA's attention a valid and specific due process argument when they complained that IJ had treated them unfairly. Accordingly, the court remanded the case to the BIA for a decision on the merits.

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VOLUNTARY DEPARTURE

■Eighth Circuit Withdraws Portion Of Published Decision That Reinstated Alien's Voluntary Departure Period.

In ***Loulou v. Ashcroft,*** __F.3d__ (8th Cir. April 28, 2004) (Murphy, Lay, Fagg), the Eighth Circuit granted the government's petition for a panel rehearing and issued a published substitute opinion that deleted the portion of a prior opinion (354 F.3d 706) which reinstated an alien's expired period of voluntary departure. The government's rehearing petition argued that the court lacked authority under the permanent rules of the Immigration and Nationality Act to reinstate an alien's expired period of voluntary departure.

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AUTO-STAY LITIGATION

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within 180 days. *Id.* Thus, the automatic stay "is a limited measure and is limited in time - it only applies where [ICE] determines that it is necessary . . . and the stay only remains in place until the Board has had the opportunity to consider the matter." 66 Fed. Reg. at 54910; *see also Pisciotta* at *8 ("this Court finds that separate regulations governing the timeliness of BIA decision-making provide for the speedier resolution of custody rulings and make clear that the detention of aliens, pursuant to an automatic stay, should not be indefinite.").

The automatic stay in creates no new class of mandatory detention, as some courts have held. Section 236(c) covered aliens are detained without any individualized risk assessment, while aliens subject to the automatic stay, through the Board appeal, are receiving just such an individualized assessment.

In any event, as discussed, the Supreme Court in *Lopez v. Davis*, affirmed the authority of agency's "to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority." *Lopez v. Davis*, 531 U.S. at 244.

In short, in briefing these cases it is important to establish the alien's narrow constitutional interest in immigration bond, and to explain that the automatic stay is merely part of the Attorney General's process for providing individualized assessments of aliens' bond requests. Presented this way, we should have a fighting chance of prevailing.

By Douglas E. Ginsburg, OIL
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INSIDE OIL

A warm welcome to **Jonathan Cohn**, the new Deputy Assistant Attorney General, who is responsible for the Office of Immigration Litigation.

Mr. Cohn joined the Department of Justice in December 2003. He is a graduate of the University of Pennsylvania and Harvard Law School. He clerked for Judge O'Scannlain in the Ninth Circuit Court of Appeals and for Justice Thomas on the Supreme Court. He has practiced law with the law firm of Wachtell, Lipton, Rosen & Katz in N.Y. Most recently, Mr. Cohn was associated with the law firm of Sidley, Austin, Brown & Wood in Washington, D.C.

OIL bids farewell to Trial Attorney **Brenda O'Malley** who has accepted a position as Counsel to EOIR's Chief Immigration Judge.

During April and May, OIL welcomed the following new and returning lawyers:

Mr. **Bryan Beier** is a graduate of the University of Virginia, where he earned a B.A. in American government, and of George Mason University of Law. Mr. Beier returns to OIL after a stint as an associate with the law firm of Covington & Burling.

Ms. **Carol Federighi** is a graduate of Carleton College and Cornell University, where she earned a B.A. and M.S. in physics, and of Stanford Law School. She was a Senior Counsel for the Federal Programs Branch before becoming a detailee for OIL in July 1999; she recently joined the team permanently.

Ms. **Joanne E. Johnson** is a graduate of Georgetown University and Catholic University Law School. She joins OIL from the Commercial Litigation Branch.

Mr. **Victor M. Lawrence** is a graduate of Indiana University, where he earned a B.A. in political science, and of the University of Richmond School of Law. Prior to joining OIL, he was a Trial Attorney in the Torts Branch of the Civil Division.

Mr. **Ari Nazarov** is a graduate of the University of Connecticut, where he earned a B.A. in finance, and of the University of Connecticut School of Law. He joins OIL after working for six years with the Office of the General Counsel at the U.S. Department of Veterans Affairs.

Mr. **Thomas Ragland** is a graduate of the University of Virginia, where he earned a B.A. in philosophy, and of Boston College Law School. He joined DOJ through the Attorney General Honor Program and joined OIL in April.

Ms. **Patricia Ann Smith** is a graduate of Northwestern University, where she earned a B.A. in economics and Political Science, and of the University of Notre Dame Law School. Prior to joining OIL, Ms. Smith was a Trial Attorney for the National Courts Section.

Ms. **Shahira M. Tadross** is a graduate of Wright State University, where she earned a B.A. in political science, and of the University of Dayton School of Law. Prior to joining OIL, she was an Attorney Advisor for the Executive Office for United States Attorneys.

Contributions To The ILB Are Welcomed!

CASES SUMMARIZED IN THIS ISSUE

INSIDE OIL

OIL welcomes the following Summer 2004 Interns!

Hugh Carney (University of Virginia); **Sally Elshihabi** (American University, Washington College of Law); **Sarah Ghani** (American University, Washington College of Law); Erik Goergen (University of Buffalo Law School); **Jason Gould** (George Washington); **Jedidah Hussey** (Georgetown University Law Center); **Tracie Jones** (Syracuse University College of Law); **Lauren Lanahan** (Reed College); **Christopher Mattei** (University of Connecticut School of Law); **James Mitre** (New York University School of Law); **Kate Miller** (William and Mary Law School); **Anna Horning Nygren** (American University, Washington College of Law); **Nowelle Trecarten** (University of Baltimore).

Front (left to right): Tracie Jones, Sally Elshihabi, Sarah Ghani, Jedidah Hussey, Nowelle Trecarten, Kate Miller, Anna Horning Nygren—Back (left to right): Lauren Lanahan, Jason Gould, James Mitre, Erik Goergen, Christopher Mattei, Hugh Carney

The goal of this monthly publication is to keep litigating attorneys within the Departments of Justice and Homeland Security informed about immigration litigation matters and to increase the sharing of information between the field offices and Main Justice. This publication is also available online at https://oil.aspensys.com. If you have any suggestions, or would like to submit a short article, please contact Francesco Isgro at 202-616-4877 or at francesco.isgro@usdoj.gov. Please note that the views expressed in this publication do not necessarily represent the views of this Office or those of the United States Department of Justice.

Office of Immigration Litigation

"To defend and preserve the Executive's authority to administer the Immigration and Nationality laws of the United States"

If you are not on our mailing list or for a change of address please contact francesco.isgro@usdoj.gov

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