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NINTH CIRCUIT FINDS THAT ATTORNEY GENERAL AND DHS SECRETARY ARE THE CUSTODIANS OF DETAINED ALIEN

Finding that the custodian requirement of 18 U.S.C. § 2241 "is sufficiently flexible to permit the naming of respondents who are not immediate physical custodians if practicality, efficiency, and the interest of justice so demand," the Ninth Circuit held in ***Armentero v. INS***, __F.3d__, 2003 WL 22004997 (9th Cir. Aug. 26, 2003) (Meskill (sitting by designation), W. Ferguson, *Berzon*), that "it makes sense for immigration habeas petitioners to name the Attorney General in addition to naming the DHS Secretary as respondents in their habeas petitions."

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The case arose when the petitioner, an excludable alien, who has been in and out of various jails and INS custody since his arrival from Cuba as part of the Mariel boatlift, filed a habeas petition contending that his potential indefinite detention was unlawful under *Zadvydas v. INS*, 533 U.S. 678 (2001), as interpreted by *Xi v. INS*, 298 F.3d 832 (9th Cir. 2002). The petitioner named the INS as the respondent but neither party questioned that designation. The district court dismissed the petition without prejudice and petitioner appealed.

Following the oral argument on the appeal, the Ninth Circuit ordered the parties to file supplemental briefs as to the propriety of naming the INS as a respondent. The petitioner proposed that the INS or its successor administrative body should be the proper respondent, while the government suggested that the appropriate respondent would be the ICE Interim District Director for the region in which a petitioner is detained. The Ninth Circuit rejected both proposals.

Preliminarily, the Ninth Circuit noted that although an application for a writ of habeas corpus requires the naming of a "custodian" pursuant to 28 U.S.C. 2242, the statute does not specify that the respondent named shall be the "immediate physical custodian." The

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NINTH CIRCUIT BLOCKS REMOVAL OF ALL ALIENS TO SOMALIA

The Ninth Circuit, in a split decision in ***Ali v. Ashcroft***, __F.3d__ (Sept. 17, 2003) (Tashima, Paez; Reavly, (dissenting)), affirmed an order of the district court in Seattle, permanently enjoining the government from removing aliens to Somalia because that country does not have a functioning government to accept them.

Section 241(b)(2) of the INA, sets forth the process by which the government determines the country to which an alien can be removed. This action commenced on November 13, 2002, when the four named petitioners with final orders of removal filed a consolidated petition for writs of habeas corpus seeking relief from removal, arguing that under § 241(b)(2), the former INS

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STATE DEPARTMENT AND HOMELAND SECURITY SIGN MOU ON VISA OVERSIGHT

In separate statements released on September 30, 2003, the Secretary of Homeland Security and the Secretary of State announced that they had signed a memorandum of understanding (MOU) that describes the respective roles and responsibilities of the Department of Homeland Security (DHS) and the Department of State (DOS) in the visa issuance process.

The signing of MOU was precipitated by section 428 of the Homeland Security Act (HSA), which provides, *inter alia*, that the Secretary of Homeland Security "shall be vested exclusively with all authorities to issue regulations with respect to, administer, and

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Highlights Inside

Heads of DHS & DOJ Custodians of Detained Aliens

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court acknowledged that typically in habeas petitions brought by prisoners, the warden is named as the custodian, but that the Supreme Court and the Ninth Circuit case law have recognized exceptions. The court noted that the Supreme Court has avoided deciding whether the Attorney General is a proper respondent in immigration habeas actions. However, the court read the pertinent Supreme Court case law as supporting the proposition that "the concept of custodian is a broad one that includes any person empowered to end restraint of a habeas petitioner's liberty, not just the petitioner's onsite, immediate custodian."

The court then looked at its own case law and determined that it has often applied the rule that "a petitioner's immediate physical custodian is the proper respondent in the context of traditional habeas petitions, but has recognized that the custodian requirement may be flexibly interpreted to encompass other custodians when it is efficient to do so." The court also noted that two other circuits had held that a detainee's immediate custodian is the appropriate respondent in habeas cases. In *Vasquez v. Reno*, 233 F.3d 688 (1st Cir. 2000), *cert. denied*, 534 U.S. 816 (2001), the First Circuit held that the Attorney General was not an appropriate respondent in an habeas action brought by an alien detained in Oakdale, Louisiana. That court found that the warden of the Oakdale facility was the proper custodian because he had day-to-day control over the petitioner. Similarly, the Third Circuit in *Li v. Maugan*, 24 F.3d 1994 (3d Cir. 1994), held that the warden of the prison where the alien was detained was the custodian for habeas purposes. The Second Circuit in *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), *cert. denied sub nom. Reno v. Navas*, 526 U.S. 1004 (1999), discussed the pros and cons of naming the Attorney General as the respondent in habeas cases but did not decide the issue.

The court then found that neither the Supreme Court nor Ninth Circuit case law "states a clear path toward identifying the proper respondent or respondents in an immigration detainee's habeas petition." Accordingly, the court decided to apply a "flexibility" standard to permit the naming of respondents who are not "the immediate physical custodians if practicality, efficiency, and the interest of justice so demand." The court then determined that the circumstances surrounding the immigration-related detention of aliens demanded flexibility because aliens are detained in a host of institutions, frequently transferred among local, state and federal facilities across the country, and often relocated in isolated areas where their ability to obtain counsel is "crippled." "A more flexible approach toward naming a respondent need not open the door to forum shopping by petitioners," said the court, because district courts may use traditional venue considerations to control where detainees bring their habeas petitions.

In this case, the court found that when the petitioner filed his petition, the appropriate respondent would have been the Attorney General. However, the court found that under the Homeland Security Act "the Attorney General may share with the DHS Secretary some responsibility for overseeing the detention of aliens." "Until the exact parameters of the Attorney General's power to detain aliens under the new Homeland Security scheme are decisively delineated," said the court, "it makes sense" for immigration habeas petitioners to name both officials as the respondents. Accordingly, the court did not reach the merits of petitioner's appeal and instead remanded the case to permit petitioner to name the proper respondents.

By Francesco Isgro, OIL

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Ed. Note: *See Roman v. Ashcroft*, __F.3d__ (6th Cir. Aug. 13, 2003) for a contrary conclusion.

CONTINUED DETENTION PERMISSIBLE WHERE ALIEN FAILS TO COOPERATE TO OBTAIN TRAVEL DOCUMENTS

In ***Lema v. INS***, __F.3d__, 2003 WL22038390 (9th Cir. Sept, 2, 2003), (Alarcon, *Gould*, Clifton), the Ninth Circuit held that the two year continued detention of a removable alien is authorized under INA § 241(a)(1)(C), "when the alien is refusing to cooperate fully with officials to secure travel document from a foreign government."

The petitioner, an Ethiopian national, was subject to removal for having been convicted of an aggravated felony, namely delivering cocaine. Petitioner allegedly told than Ethiopian consular official that he was Eritrean. The Ethiopian official refused to issue a travel document. Petitioner then refused to furnish the former INS with any evidence of his nationality.

Petitioner challenged his detention in the district court claiming that he was being detained "indefinitely." That court denied the petition and he appealed. *See Lema v. INS*, 214 F. Supp.2d 116 (W.D. Wash. 2002).

The Ninth Circuit, held that, consistent with the *Zadvydas* ruling, "when an alien refuses to cooperate fully and honestly with officials to secure travel documents from a foreign government, the alien cannot meet his or her burden to show there is no significant likelihood of removal in the reasonably foreseeable future." Moreover, said the court, "the due process concerns that motivated the Supreme court in *Zadvydas* do not apply when an aline may have 'the keys to freedom in his pocket,'" citing to *Pelich v. INS*, 329 F.3d 1057 (9th Cir. 2003).

Here, the court found that petitioner could meet his burden of showing no significant likelihood of removal because of his continuing failure to cooperate.

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DEPARTMENT OF HOMELAND SECURITY SUSPENDS TRANSIT WITHOUT VISA (TWVO) PROGRAM — CITES SECURITY THREAT

Citing a "credible security threat" the Secretary of Homeland Security published an interim rule suspending immediately the Transit Without Visa (TWOV) program and the International-to-International (ITI) program. 68 *Fed. Reg.* 46926 (Aug. 7, 2003). Both the TWOV and the ITI allow an alien to be transported in-transit through the United States to another foreign country without first obtaining a nonimmigrant visa.

The TWOV and the ITI programs are authorized under INA 212(d)(4), which provides authority for the Secretary of Homeland Security acting jointly with the Secretary of State to waive nonimmigrant visa requirements for aliens who are proceedings in immediate and continuous transit through the United States. The aliens in transit must use a carrier which has entered into a contract agreement authorized under INA § 233(c). These aliens are not currently prescreened prior to their arrival at a port of entry in the United States. Indeed, under 8 C.F.R. § 212.1 (f)(1)(removed by the interim rule), a "passport and visas are not required of an alien who is being transported in immediate and continuous transit through the United States."

The rule states that DHS and the Department of State have received "specific, credible intelligence . . . that certain terrorist organizations have identified this exemption from the normal visa issuance procedures as a means to gain access to the United States, or to gain access to aircraft en route to or from the United States, to cause damage to infrastructure, injury, or loss of life in the United States or on board aircraft en route to or from the United States."

The Department of State also published a parallel interim rule suspending the TWO and the ITI program as authorized under 22 C.F.R. § 41.2(i).

Secretary Tom Ridge remarked that, "the steps announced today, while aggressive, are an appropriate response to the threat. We know they will have an impact on international travelers, but we believe they are necessary in order to protect lives and property."

The transit without visa program, formerly also known as the "TRWOV," was instituted in 1952. In 1972 it was suspended as a security measure in light of widespread acts of international terrorism. 37 *Fed. Reg.* 20176 (Sept. 27, 1972).

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HOMELAND SECURITY AND STATE DEPARTMENT SIGN MOU

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enforce the provisions of such Act, and all other immigration and nationality laws, relating to the functions of consular officers of the United States in connection with the granting or refusal of visas. . . which authorities shall be exercised through the Secretary of State."

Under this agreement, the State Department will continue to manage the visa process and the foreign policy of the United States. DHS will establish and review visa policy, and ensure that homeland security requirements are fully reflected in the visa process.

DHS officers are already stationed in the Kingdom of Saudi Arabia, as required by the HSA § 428(i). At the discretion of the Secretary of DHS, additional DHS officers may be posted overseas at U.S. Embassies and Consulates to perform functions specified in the MOU. DHS, working in consultation with the State Department, will identify these locations.

As Department of State employees, consular officers and staff who currently work on visa matters will continue to receive direction from the Secretary of State. Consular officers will retain the responsibility for visa adjudication and issuance.

DHS officers assigned overseas will provide expert advice to consular officers regarding security threats relating to the adjudication of visa applications or classes of applications, review visa applications, and conduct investigations involving visa matters in accordance with the MOU.

DHS will have final decision-making responsibilities over policy areas that include classification, admissibility and documentation; place of visa application; discontinuing granting visas to nationals of countries that do not accept the repatriation of aliens; personal appearance; visa validity periods and multiple entry visas; the Visa Waiver Program; notices of visa denials; and the processing of persons from state sponsors of terrorism.

Of interest to attorneys, HSA § 428(f) provides that "nothing in [HSA § 428] shall be construed to create or authorize a private right of action to challenge a decision of a consular officer or other United Sates official or employee to grant or deny a visa."

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Ed. Note: A copy of the MOU is available on the OIL web site.

SUMMARIES OF RECENT BIA DECISIONS

Violation of Protective Order

In *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003), a Board panel recently considered the new protective order regulation, 8 C.F.R. § 1003.46(i), in the context of an alien suspected of terrorist activities. An Immigration Judge had granted a protective order as to a declaration from an FBI Special Agent. He subsequently found that the alien's counsel violated the order by disclosing the declaration to unauthorized persons. After considering the merits of the case, the Immigration Judge found that the alien was barred from asylum and withholding of removal because he was a danger to national security. In an alternate holding, the Immigration Judge also held that the alien was barred from voluntary departure because of the protective order breach, and that he had failed to meet the regulatory burden of "extraordinary and extremely unusual circumstances" or that the breach was beyond the alien's or his attorney's control.

> Alien's counsel violation of a protective order issued by Immigration Judge renders alien ineligible for any form of discretionary relief.

The Board affirmed the Immigration Judge's decision. With regard to the protective order, the Board acknowledged, as did the Immigration Judge, that the alien and his counsel cooperated in the investigation into the breach, but noted that cooperation alone was not enough to overcome the breach. Given that the bar to discretionary relief in the regulation is mandatory, the Board agreed that alien was ineligible for any form of discretionary relief. The Board also rejected the alien's argument that the Immigration Judge violated the protective order by allowing the presence of DOJ attorneys in the courtroom during the closed hearing. The Board also affirmed the Immigration Judge's decision on the merits, finding that there were "reasonable grounds for regarding the alien as a danger to the security of the United States."

Attorney Discipline

In a published decision, a Board panel (*Holmes*, Hurwitz, Osuna) expelled attorney Miguel Gadda from practice before the Immigration Courts, the Board, and the Department of Homeland Security. *Matter of Gadda*, 23 I&N Dec, 645 (BIA 2003). The Board's sanction was more severe than that of the adjudicating official who had recommended an indefinite suspension, and the Board found that it had the authority to increase a sanction. The Board found that the disbarment of Gadda by the Supreme Court of California based on his repeated acts of professional misconduct in immigration cases justified his exclusion from practice before the immigration agencies.

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NEW IMMIGRATION JUDGES SWORN –IN FOR LOS ANGELES

Christine A. Bither, former OIL Senior Litigation Counsel (1995-2003), was recently sworn in as an Immigration Judge in Los Angeles.

Also sworn in as an Immigration Judge in Los Angeles, was **Patrick T. McDermott,** former Regional Counsel for the Central Region of the Immigration and Naturalization Service.

INSIDE OIL

OIL bids farewell to Trial Attorneys **Michelle R. Slack**, and **Audrey Benison Hemesath**.

Ms. Slack joined OIL in 1995 as an Honor Graduate. At OIL she became an expert in naturalization litigation matters, and served on the Attorney General Advisory Committee's Working Group in Citizenship USA. Ms. Slack has joined the law faculty at Mercer Law School, in Macon, Georgia. Ms. Hemesath joined OIL in September 2001, as an Honor Graduate. While at OIL she spearheaded the government's defense of the BIA's streamlining regulations

OIL welcome back from Iraq Trial Attorney and **LtCol. Steven Flynn**, after serving with the United States Marines in the front lines of Operation Iraqi Freedom.

See more *Inside OIL* at page 12.

INSIDE EOIR

The Attorney General has appointed **Kevin A. Ohlson** as the new Deputy Director of the Executive Office for Immigration Review (EOIR).

Mr. Ohlson had been appointed as a Member of the Board of Immigration Appeals in March 2001, and prior to his appointment served as Acting Deputy Director of EOIR.

Mr. Ohlson became a Federal prosecutor in 1989, but was recalled to active duty during Operation Desert Storm and was awarded the Bronze Star for his service in Saudi Arabia and Iraq. Mr. Ohlson then returned to the Justice Department where he served in a variety of positions, to include chief of staff to the Deputy Attorney General.

NINTH CIRCUIT AFFIRMS PERMANENT INJUNCTION BLOCKING THE REMOVAL OF ALL ALIENS TO SOMALIA

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should not be allowed to remove them from the United States due to the absence of a functioning government in Somalia to accept their return. The district court agreed with that statutory interpretation and eventually entered a permanent injunction. *See Ali v. Ashcroft*, 213 F.R.D. 930 (W.D. Wash. 2003). The government appealed.

The Ninth Circuit rejected all of the government's contentions, including the threshold argument that the court below lacked jurisdiction because the petitioners had not appealed the removal orders and therefore had failed to exhaust their administrative remedies under INA § 242(d)(1).

The court found that because acceptance was explicitly required in two sections of the statute, to allow the government to "thwart" that requirement by invoking another section would render the former "superfluous."

The court found that petitioners were not challenging the validity of their individual orders of removal, but rather opposed their removal to Somalia, a country that could not accept them. The court also found that, prudential exhaustion was not necessary because further development of the record was not required as the case involved a purely legal question, and the INS's statutory construction "is set, making it likely that recourse to administrative remedies would be futile."

The court also rejected the contention that petitioners' habeas action was barred by INA § 242(g), noting that the argument was foreclosed by recent Supreme Court decisions.

The Ninth Circuit also rejected the government's argument that the plain language of the statute authorized the Attorney General to remove petitioners to Somalia, their country of birth, without acceptance by that country. The court found that because acceptance was explicitly required in two sections of the statute, to allow the government to "thwart" that requirement by invoking another section would render the former "superfluous." The Ninth Circuit rejected a contrary interpretation by the Eighth Circuit in *Jama v. INS*, __F3d__ (8th Cir. 2003), characterizing that decision as "one exception" that is contrary to the "law of the courts of appeals and the BIA."

The Ninth Circuit also concluded that the INS's policy and regulations were at odds with its construction of the statute. Accordingly, relying on *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1145 n.11 (9th Cir. 2001), the court held that the government's construction of the statute was not entitled to deference. In addition, the Ninth Circuit concluded that the district court did not err in adopting a construction of the statute that was consistent with international law, in that the "preferred course" would be to avoid subjecting petitioners to human rights abuses in Somalia in violation of "customary international law and provisions of three multilateral treaties to which the United States is a signatory."

The Ninth Circuit also affirmed the district court's decision to certify a nation-wide class rejecting the government's argument that INA § 242(f)(1) deprived the district court of subject matter jurisdiction over petitioners' class claims. Section 242(f)(1) provides that no court - other than the Supreme Court - shall have jurisdiction or authority to enjoin or restrain the operation of INA §§ 231-241. The Ninth Circuit found that § 242(f)(1) did not apply because petitioners did not wish to enjoin the operation of section 241(b), but rather sought relief to enjoin a violation of that statute. The court also held, relying on *Armentero v. INS*, __F.3d__, 2003 WL 22004997 (9th Cir. Aug. 26, 2003), that the Attorney General was the proper respondent and not the local INS District Director.

Finally, the court approved the district court's order to release the petitioners rejecting the government's assertion that an extension of the 90-day removal period was warranted because petitioners had acted to prevent their removal to Somalia by filing a habeas petition. The court held that INA § 241 (a)(1)(C) authorized further detention where an alien refused to cooperate with the INS's removal efforts, but that the provision did not apply to petitioners, as they had raised a legal challenge to the INS's statutory authority to remove them.

In a brief dissent, Judge Reavley, sitting by designation from the 5th Circuit, would have found that the statute authorized removal "without the limitation of acceptance of the alien by the removal country."

By Francesco Isgro, OIL

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CIS ANOUNCES PERMANENT MANAGEMENT APPOINTMENTS

On September 24, 2003, Eduardo Aguirre, Director, U.S. Citizenship and Immigration Services (CIS), announced, among others, the following appointments at the CIS Headquarter:

William (Bill) Yates, Associate Director, Operations; **Janis Sposato**, Deputy Associate Director, Operations; **Terrance (Terry) O'Reilly**, Director, Field Operations.

The complete list of appointees is available on the CIS and the OIL's web site.

Summaries Of Recent Federal Court Decisions

ADJUSTMENT

■Second Circuit Remands Case Where Immigration Judge Failed To Advise Petitioner Of His Eligibility For Adjustment of Status

In ***Drax v. Reno***, 338 F.3d 98 (2d Cir. 2003) (McLaughlin, *Cabranes*, Lynch), the Second Circuit held that the Immigration and Nationality Technical Corrections Act of 1994 (INTCA) applies retroactively, and that the immigration judge had failed to advise the petitioner of his eligibility for the so-called "*Gabryelsky* relief" – "a combined form of § 212(c) relief from deportation and § 245(a) adjustment of status."

The petitioner, a citizen of Trinidad and Tobago, was a lawful permanent resident. In 1993 he was convicted of attempted criminal possession of a firearm, and in 1996, he pled guilty to sale of a controlled substance. INTCA, among other changes, made attempted weapons possession a deportable crime. When placed in proceedings in January 1997, petitioner admitted to the convictions but, as he was *pro se*, asked if he was qualified for a "waiver." The immigration judge found him ineligible for a 212(c) waiver and adjustment of status and ordered him deported. His appeal to the BIA was rejected as untimely. Petitioner then obtained counsel who sought to reopen the case arguing that he was eligible for 212(c) relief. The case was then caught in the web of litigation that followed the BIA's *Soriano* decision. When the Supreme Court in *St. Cyr* partly settled the storm, the district court held that petitioner remained eligible for 212(c) relief because he had plead guilty to his offenses prior to the enactment of AEDPA, and that he was eligible for a *Gabryelsky* adjustment because his father, a U.S. citizen had filed a visa petition on his behalf and that a visa was "immediately available." The government then informed the court that it had misunderstood the visa application process and a visa was not "immediately available" for purpose of adjustment. The district court agreed, but *sua sponte* granted the writ on different grounds, finding that the attempted weapon conviction was not a deportable offense because INTCA did not apply retroactively and consequently petitioner could seek 212(c) relief for his drug offense. 178 F. Supp.2d 296 (E.D.N.Y. 2001).

The government then appealed to the Second Circuit contending that INTCA did apply retroactively and that furthermore, petitioner had not exhausted the claim in INS proceedings. Although petitioner did not cross-appeal on his claim for *Gabryeksy* relief, the court held that the fact that he renewed the argument in his brief was sufficient for the court to consider that claim.

After first explaining meticulously the background of the case, the Second Circuit held, that INTCA operated retroactively thus making petitioner's attempted weapons conviction a deportable offense. However, because there is no analogous ground for exclusion, the court found that 212(c) relief was not available to petitioner. The court determined, however, that at the time of petitioner's initial hearing he was eligible for 212(c) relief for his drug conviction. More importantly, under the *Gabryelsky* process petitioner could have applied for adjustment because a weapons conviction alone would not preclude a showing of admissibility. Thus, the immigration judge erred, said the court, when he determined that no relief was available. Accordingly, the court remanded the case for further proceedings.

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Editor's Note: The history of this 212(c) case prompted the court to criticize the "labyrinthine character of modern immigration law" and the "inscrutability of the current immigration law system." The irony of the court's statement should not go unnoticed. It was, after all, the Second Circuit that in 1976 in *Francis v. INS*, 532 F.2d 268, extended 212(c) relief to deportable aliens, a decision that twenty years later contributed to Congress's elimination of this discretionary relief.

ASYLUM

■First Circuit Holds Nigerian Not Entitled To Asylum As A Low-Level Volunteer In A Political Party

In ***Disu v. Ashcroft,*** 338 F.3d 13 (1st Cir. 2003) (*Lynch*, Lipez, Howard), the First Circuit affirmed the BIA's denial of asylum and withholding of removal to a citizen of Nigeria who claimed persecution on the basis of his involvement with the Social Democratic Party (SDP). Petitioner claimed that while in Nigeria he was politically active with various opposition parties and was the driver and mechanic for the local chairman of the SDP. As a result of his activities he had several encounters with government security forces, including one in 1992 when he and other DSP members were detained for one week at a police building, interrogated, and beaten. After that incident he scaled back his participation in the SDP.

The SDP won the 1993 election but the military government cancelled the results and ordered the arrest of the winning candidate. Other SDP members were visited or arrested in their homes by the security forces. At this point, petitioner decided to leave Nigeria and in 1994 entered the Untied States a visitor for pleasure, ostensibly to attend a soccer game. Later that year he unsuccessfully applied for asylum. In 1995, petitioner was placed in proceedings where he renewed his request for asylum and withholding.

An immigration judge denied petitioner's requests on the merits finding that he had not established either past of future persecution on account of his membership in the

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SDP. The immigration judge expressed doubts about the petitioner's credibility but did not make an explicit finding on that issue. The BIA summarily affirmed the decision under 8 C.F.R. § 1003.1(a)(7).

The First Circuit found that there was a sound basis to doubt petitioner's credibility, namely that the facts at the core of his asylum claim were notably absent from his asylum application and unmentioned in his first asylum interview. The court found that the immigration judge's findings on the merits were supported by substantial evidence. The two arrests, more than three years apart, and the last more than eighteen months before petitioner left Nigeria, were frightening, "if they happened at all," said the court, but did not compel a finding of persecution.

The court also held, following *Albathani v. INS*, 318 F.3d 365 (1st Cir. 2003), that the application of the summary affirmance regulation did not violate petitioner's due process rights.

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■Eighth Circuit Holds Guatemalan Not Entitled To Asylum Based On Guerrilla Recruitment Attempts Made 20 Years Ago

In ***Melecio-Saquil v. Ashcroft***, __F.3d__, 2003 WL 21715009 (8th Cir. July 25, 2003) (Hansen, CJ, Smith, *Loken*), the Eighth Circuit affirmed the BIA's streamlined denial of asylum in this Guatemalan guerrilla recruitment case. The court upheld the IJ's findings that the alien's testimony about men looking for him was highly suspect given the significant passage of time and the absence of any corroboration by his family.

The court also held that petitioner had not demonstrated a well-founded fear of future persecution, given the passage of time, the intervening Guatemalan peace accords of 1996, and his successful relocation in that country.

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■Third Circuit Holds It Lacks Jurisdiction To Review Timeliness Of Petitioner's Asylum Application

In ***Tarrawally v. Ashcroft***, ***338*** F.3d 180 (3d Cir. 2003) (Nygaard, *Smith*, Irenas), the Third Circuit held that under INA § 208(a)(3) it lacked jurisdiction to review to review an IJ's determination that an asylum application was not filed within the one year limitations period.

The petitioner, a citizen of Sierra Leone, entered the United States as a visitor, but never departed. When placed in proceedings he applied for asylum, withholding, and CAT. The IJ denied asylum because the application had been untimely filed and denied the other reliefs on credibility grounds. The BIA affirmed without opinion.

The Third Circuit held that the statutory language precluded it from reviewing the timeliness of the asylum application and also whether extraordinary circumstances existed for waiving the on-year filing requirement. The court also found that substantial evidence supported the IJ's adverse credibility determination that petitioner would not be persecuted in Sierra Leone on account of his political involvement in various groups. In particular, the court noted that petitioner made "irreconcilable contradictory assertions within the span of a few minutes." This finding warranted the denial of petitioner's application for withholding of removal, and the withholding claim under CAT.

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■Seventh Circuit Finds Old Detention And Beating Do Not Amount To Past Persecution

In ***Dandan v. Ashcroft***, __ F.3d__, 2003 WL 21878792) (7th Cir. August 11, 2003) (Cudahy, Evans, Williams), the Seventh Circuit held that the petitioner's 3-day detention and beating by Syrian forces in Lebanon in 1989 did not compel a finding of past persecution.

The court ruled that the standard to compel a finding of past persecution is high and is properly difficult to meet without powerful and moving evidence. The court held that INS's seven-year delay in processing the petitioner's asylum claim, which resulted in his being unable to seek suspension of deportation in his removal proceedings, did not violate due process.

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■Third Circuit Finds Cursory BIA Decision On Asylum Does Not Give Sufficient Basis for Review

In ***Awolesi v. Ashcroft***, __F.3d__, 2003 WL 21957697 (3d Cir. August 15, 2003) (*Becker*, Nygaard, Ambro), the Third Circuit reversed the BIA's denial of asylum finding that it could not meaningfully review an order that without explanation had reversed an immigration judge's grant of asylum. The BIA's decision simply stated that the "evidence is insufficient" and "the arguments made by the INS on appeal are persuasive" in reversing the immigration judge.

The petitioner and his son are Nigerian citizens who entered the United States as visitors in 1993. When their visas expired, they applied for asylum directly with the INS. Petitioner claimed that he was subject to persecution by the Muslim fundamentalist police on account of his Christian religion. That application was denied and petitioner was placed in proceedings. Before the IJ, petitioner also claimed that he would be persecuted if returned to Nigeria because of his brother's association with a pro-democracy party. He also stated that he was the owner of a

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successful pharmaceutical company in Nigeria and that he had used some of the proceeds from that business to fund his brother's political career. The IJ granted asylum on the basis of imputed political opinion. The INS appealed to the BIA which summarily reversed.

The Third Circuit characterized the BIA's decision as "extremely terse" and said that it could not tell whether the BIA was making a legal decision that the alien was statutorily ineligible for asylum, or whether it had found his story incredible. "In order for us to be able to give meaningful review to the BIA's decision, we must have some insight into its reasoning," said the court. The court pointed to two other published decisions where it has reversed the BIA because it had not sufficiently explained its reasoning. *See Abdulai v. Ashcroft*, 239 F.3d 542 (3d Cir. 2001); *Sotto v. INS*, 748 F.2d 832 (3d Cir. 1984). The court, however, distinguished the BIA's summary dismissal from a dismissal based on the new streamlining regulations.

"In order for us to be able to give meaningful review to the BIA's decision, we must have some insight into its reasoning."

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CANCELLATION

Third Circuit Holds It Lacks Jurisdiction To Review Discretionary Elements For Cancellation Of Removal.

In ***Mendez-Moranchel v. Ashcroft***, 338 F.3d 176 (3d Cir. July 29, 2003) (*Nygaard*, Becker, Ambro), the Third Circuit joined seven other appellate courts in holding that it lacks jurisdiction to examine the discretionary determination of whether an alien satisfies the "exceptional and extremely unusual hardship" requirement to qualify for cancellation of removal. The petitioner, a citizen of Mexico, unsuccessfully argued to the IJ that his removal would cause extreme and unusual hardship to his three United States children. The BIA affirmed the IJ without opinion.

The Third Circuit held that the determination of the "hardship" was discretionary and that under INA § 242(a)(2)(B)(i) it lacked jurisdiction to review the issues presented on appeal.

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CONVENTION AGAINST TORTURE

■Third Circuit Holds That District Court Has Habeas Jurisdiction Over Torture Convention Claims

In *Ogbudimkpa v. Ashcroft* , __F.3d___, 2003 WL 21995303(3d Cir. Aug. 22, 2003) (Sloviter, *Ambro*, Tucker (District Court Judge)), the Third Circuit joined the First, Second and Ninth Circuit in holding that a district court has jurisdiction to consider a habeas corpus petition that alleges violations of Article 3 of the United Nations Convention Against Torture (CAT).

The petitioner, a citizen of Nigeria, entered the United States in 1982 as a student. In 1985 an immigration judge ordered him removed as an overstay and for working without government authorization. In 1994, petitioner was convicted of a drug offense and after his release from prison he was paroled to the custody of the INS. Petitioner then filed a motion to reopen to apply for protection under CAT. Petitioner's case was reopened but the IJ and later the BIA ruled that he had not demonstrated that it was more likely than not he would be tortured if returned to Nigeria.

Petitioner acting *pro se* sought review in the district court. Eventually, the district court ruled that the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), which implemented the CAT, affirmatively granted federal court jurisdiction over CAT claims only in petitions for review in the courts of appeal. Petitioner filed an appeal, and, in light of the jurisdictional issues, the Third Circuit appointed counsel for petitioner.

The Third Circuit held that FARRA does not expressly foreclose habeas review, relying by analogy on the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001). Specifically, the court noted that the Supreme Court in *St. Cyr* gave "strong indication" that "nothing will suffice but the most explicit statement that *habeas* jurisdiction under 28 U.S.C. § 2241 is repealed." The court followed similar CAT jurisdiction holdings in *Saint Fort v. Ashcroft*, 329 F.3d 191 (1st Cir. 2003), and *Wang v. Ashcroft*, 320 F.3d 130 (2d Cir. 2003), *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000).

The Third Circuit acknowledged that the CAT is a non-self-executing treaty that gives no cause of action to any complainant in federal court, but held that any denial of habeas review for CAT claims, absent express Congressional edict, is "a departure from historical practice," and that "[d]istrict courts have jurisdiction to consider claims alleging violations of CAT raised in habeas corpus petitions."

Finally, the court rejected the government's contention that its scope of review was limited to legal or constitutional claims. It found that "a district court's habeas jurisdiction encompasses review of the BIA's application of legal principles to undisputed facts."

Accordingly, the court remanded the case to the district court to consider the merits of petitioner's CAT claim.

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Summaries Of Recent Federal Court Decisions

CRIMES

■First Circuit Holds A Violation Of The Travel Act Is A Violation Of A Law Relating To A Controlled Substance

In ***Urena-Ramirez v. Ashcroft***, __F.3d__, 2003 WL 21994734 (1st Cir. August 22, 2003)(*Selya*, Coffin, Cyr), the First Circuit, in an issue of first impression, held that an alien convicted under the Travel Act (18 U.S.C. § 1952(a)(3)) for promoting an unlawful activity involving a controlled substance had been convicted of a violation of law relating to a controlled substance within the purview of the INA.

> "As long as there is a sufficiently close nexus between a violation of the Travel Act and the furtherance of a drug-related enterprise," the Travel Act is a law relating to a controlled substance for purposes of the INA.

The petitioner, a native of the Dominican Republic, entered the United States under a false name an without a valid visa. Several years later he was charged with aiding and abetting the distribution of cocaine and pled guilty to a reduced charge of traveling in interstate commerce to promote an unlawful activity in violation of the Travel Act. He was sentenced to a 21-month incarcerative term to be followed by three years of supervised release.

In November, 1997, the INS instituted removal proceedings against the petitioner, claiming that he was subject to removal because he lacked valid entry documents, he was convicted of a offense relating to a controlled substance, and as an alien convicted of an aggravated felony. An immigration judge held that petitioner was removable as charged, finding that the Travel Act conviction constituted both a drug-related offense and an aggravated felony. The BIA affirmed that decision without opinion under 8 C.F.R. § 1003.1(a)(7).

On appeal to the First Circuit, petitioner argued that the Travel Act conviction was not related to a controlled substance because the crime (traveling in interstate commerce) was separate and distinct from the underlying (drug-related) activity.

The First Circuit, reviewing the question of law de novo, found nothing separate or distinct between the Travel Act violation and petitioner's involvement in the cocaine trade. The court also rejected the argument that the conviction was not related to a controlled substance because the Travel Act covers a myriad of criminal activities, many of them non-drug related. Citing the Ninth Circuit's decision in *Johnson v. INS*, 971 F.2d 340 (9th Cir. 1992), the court held that "as long as there is a sufficiently close nexus between a violation of the Travel Act and the furtherance of a drug-related enterprise," the Travel Act is a law relating to a controlled substance for purposes of the INA.

The court also held that the BIA had correctly ruled the alien's Travel Act violation constituted an aggravated felony because it related to a controlled substance. Accordingly, the court affirmed the BIA's denial of the petitioner's request for a discretionary adjustment of status and waiver pursuant to INA § 212(h).

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■Seventh Circuit Holds That First-Time State Drug Offense Is Conviction For Immigration Purposes Notwithstanding State Rehabilitative Statute

In ***Gill v. Ashcroft***, __F.3d__, 2003 WL 21525603) (7th Cir. 2003) (*Easterbrook*, Ripple, Williams), the Seventh Circuit held that it did not have jurisdiction to review the removal order of an alien convicted of a first-time state drug offense. The court ruled in conflict with *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), that a state rehabilitative statute does not negate a conviction for immigration purposes, whether as a first-time or repeat drug offender.

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■Third Circuit Holds That Deferred Adjudication Constitutes A Conviction For Immigration Purposes

In ***Acosta v. Ashcroft***, __F.3d__, 2003 WL 21957666 (3d Cir. Aug. 15, 2003) (*Alito*, McKee, Schwarzer), the Third Circuit dismissed petitioner's appeal for lack of jurisdiction, holding that his conviction for heroin possession under Pennsylvania's deferred adjudication statute constituted a conviction for immigration purposes.

The petitioner, a citizen of the Dominican Republic, entered the United States unlawfully in 1994. In 1995, shortly after marrying a United States citizen, he was arrested and charged with heroin possession under Pennsylvania law. The local police contacted the INS and the petitioner was charged with deportability as an alien who had entered the United States without inspection. Petitioner then filed an application for adjustment of status based on his marriage to a United States citizen. Subsequently petitioner pled *nolo contendere* to the charge of cocaine possession. Eventually, the INS argued that in light of the IIRIRA's amendments to the definition of "conviction" petitioner was not eligible for adjustment of status and was now also deportable a s an alien who had been convicted of a controlled substance violation. The IJ agreed with the INS and order petitioner's removal. The BIA affirmed the removal order also finding that petitioner had been convicted of a drug related offense.

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The Third Circuit rejected the Ninth Circuit's reasoning in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), that first-time simple drug possessions were not convictions under the Federal First Offender Act (FFOA) and (for equal protection purposes) equivalent state statutes. The court held that because petitioner's criminal proceedings were dismissed in state court, he was not entitled to FFOA protection, and his case was squarely governed by the immigration statute's definition of "conviction." The court also held that treating state and federal defendants differently did not violate equal protection because Congress had a rational basis for its concern about the ameliorative effects of various state deferred adjudication statutes.

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DETENTION

■Eleventh Circuit Holds Unadmitted Mariel Cubans Do Not Have Constitutional Or Statutory Rights To Release From Custody

In ***Benitez v. Wallis*** 337 F.3d 1289 (11th Cir. 2003) (Dubina, Black, Hull), 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 v. Davis*, 533 U.S. 678 (2001).

The petitioner, a citizen of Cuba, sought to enter the United States in 1980 as part of the Mariel boatlift. The INS paroled the petitioner into the United States, but subsequently revoked the grant of parole after petitioner pled guilty to, *inter alia*, an armed burglary of a structure and was sentenced to 20 years' imprisonment. In 1994, an immigration judge found petitioner excludable and deportable to Cuba in light of his criminal convictions. Petitioner then filed a habeas petition challenging his indefinite detention. While the case was pending, a Cuban Review Panel determined that petitioner was releaseable, but later revoked the Notice of Releaseability because petitioner had been involved in a planned jail escape. The district court denied the petition finding no statutory or constitutional impediments to petitioner's continued detention.

On appeal, petitioner argued that under *Zadvydas v. Davis*, 533 U.S. 678 (2001), his continued detention was impermissible. In rejecting the argument, the Eleventh Circuit held that the critical distinction *Zadvydas* recognized 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," and declined to "tamper with the authority of the Executive Branch to control entry into the United States."

The court "readily concluded" that, although physically present in the United States for over 20 years, petitioner remained an inadmissible alien, and that his legal status was not altered by either his parole or detention within this country. The court held that petitioner's case was therefore governed by *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), which "remains good law," and does not limit the duration of detention of unadmitted aliens whom the government is unable to remove.

The court adopted the rationale of the Eighth Circuit in *Borrero v. Aljets*, 325 F.3d 1003 (8th Cir. 2003), and added several reasons of its own for rejecting the alien's claim that he was entitled to release under *Zadvydas*, including the limits the Supreme Court placed on its decision, the absence of the constitutional problems that the Court sought to avoid in *Zadvydas*, the Executive Branch's authority to regulate the entry of aliens, as well as its statutory discretion to parole or detain unadmitted aliens it cannot remove, and because reading INA § 241(a)(6) as creating a right to parole after 6 months would "undoubtedly [be] a drastic expansion of the rights of inadmissible aliens" and, "without question," contrary to Congress' intent when it amended the statute in 1996.

The court concluded that unadmitted aliens like the alien are never free of restraint, but may be paroled under terms prescribed by Congress, holding "[t]o pervert this gift from Congress into a right after six months" would distort congressional intent, create "grave security concerns for the people of the United States," and result in "needless difficulties" in processing aliens.

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■Sixth Circuit Finds Proper Respondent In Habeas Case Is INS District Director With Authority Over Detention Facility, Not Attorney General

In ***Roman v. Ashcroft***, __F.3d__, 2003 WL 21919266 (6th Cir. August 13, 2003) (*Moore*, Schwarzer**,** Gibbons (concurring)), the Sixth Circuit, vacated a district court grant of habeas relief, and remanded to determine whether the Cleveland INS District Director ("DD") and the INS Commissioner were proper respondents. The BIA denied petitioner INA § 212(h) relief from deportation. Petitioner, who had been convicted in Ohio but detained in Louisiana, filed a habeas petition in Ohio arguing that INA § 212(h) violated equal protection, naming the Attorney General, New Orleans DD, Cleveland DD, and INS Commissioner as respondents.

The district court dismissed the New Orleans DD, but found the Attorney General a proper respondent and remanded to the BIA for a hearing on INA § 212(h) relief. The Sixth Circuit held that the Attorney General is generally not a proper respondent and that the sole proper respondent, was the DD in

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the district where petitioner's detention facility was located.

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DUE PROCESS

■Ninth Circuit Holds Adult Guatemalan Illegally Present In The U.S. Since Infancy May Be Removed

In ***Munoz v. Ashcroft***, __F.3d__, 2003 WL 21847760 (9th Cir. August 8, 2003) (Tashima, Berzon, *Clifton*), the Ninth Circuit affirmed the Immigration Judge's order finding Munoz removable. Munoz illegally entered the United States 23 years ago as an infant. The Ninth Circuit held that Munoz's claim that removing him from the United States where he has lived effectively his entire life was insufficient to demonstrate any due process violation, and that the Nicaraguan Adjustment and Central American Relief Act's special rule cancellation was not subject to equitable tolling.

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RIGHT TO COUNSEL

■Eleventh Circuit Holds *Lozada* Requirements Must Be Satisfied To Make An Adequate Ineffective Assistance Of Counsel Claim

In ***Gbaya v. Ashcroft,*** __F.3d__, 2003 WL 21961804 (11th Cir. August 19,2003)(Carnes, Marcus, Wilson), the Eleventh Circuit affirmed the BIA's denial of a motion to reopen based on an ineffective assistance of counsel claim because petitioner had failed to comply with the requirements set forth in *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988). The petitioner, a citizen of Sierra Leone, entered the United States as a non-immigrant visitor in 1992. When his visa expired he failed to depart. On March 30, 1999, the INS issued a Notice to Appear to petitioner, charging him with removability pursuant to INA § 237(a)(1)(B). Petitioner conceded that he was removable, but requested asylum and withholding claiming that his father was a traditional tribal ruler in Sierra Leone and that if returned there, he would be targeted by rebel groups for persecution because of his relation to his father. The IJ denied the applications. Petitioner's attorney timely filed a Notice of Appeal to the BIA, and indicated that he would be filing a brief. However, petitioner's attorney never filed a brief, even after the BIA had granted him an extension. Instead, a day before the brief was due, he moved to withdraw as counsel.

The BIA subsequently dismissed the appeal for failure to file a written brief. Petitioner then obtained new counsel and filed a motion to reopen claiming that prior counsel had been ineffective because of his withdrawal from the case on the date that his brief was due to the BIA, and counsel's failure to inform him that he was eligible for Temporary Protected Status. The BIA denied the motion finding a failure to comply with *Matter of Lozada.*

The Eleventh Circuit found that "although it may be true that an examination of the record would reveal the ineffectiveness of [petitioner'] counsel, the entire rationale behind *Lozada* requirement is to prevent the BIA from having to examine the record in each and every ineffective assistance of counsel claim it receives." Accordingly, the court held that the BIA "does not abuse its discretion by filtering ineffective assistance of counsel claims through the screening requirements of *Lozada*."

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■Sixth Circuit Holds That Notice To Alien's Attorney Was Adequate, And Equitable Tolling Did Not Apply

In ***Scorteanu v. INS,*** __F.3d__, 2003 WL 21805209 (6th Cir. August 7, 2003) (*Krupansky*, Siler, Gilman), the Sixth Circuit, affirmed the BIA's denial of the alien's motion to reopen his in absentia deportation order. The alien argued that his attorney received the hearing notice but did not tell him. The court held that notice to the alien or to his attorney of record is proper notice. The court said that ineffective assistance of counsel might qualify as an "exceptional circumstance" excusing an untimely motion to reopen, but that motions based on exceptional circumstances must be filed within 180 days of the BIA's final order of removal. But even if this time limit was subject to equitable tolling, the alien did not prove he was entitled to relief because he waited almost a year to file the motion after receiving notice of his *in absentia* removal order.

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REINSTATEMENT

■Seventh Circuit Holds District Court Lacks Jurisdiction To Review Criminal Alien's Constitutional Claims

In ***Robledo-Gonzales v. Ashcroft***, __F.3d__, 2003 WL 21715838 (7th Cir. July 25, 2003) (*Ripple*, Evans, Williams), the Seventh Circuit held that: (1) the alien could not challenge the legality of his previously-executed removal order because he was not in the custody of any of the named immigration Respondents; (2) the district court lacked jurisdiction over the alien's equal protection claim because the court of appeals is the proper forum to review substantial constitutional claims of criminal aliens through petitions for review; (3) the Attorney General's "*Soriano* regulation," which does not allow certain criminal aliens to apply for relief under repealed section 212(c) if they have been deported, does not violate equal protection.

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CASES SUMMARIZED

IMMIGRATION LAW SEMINAR

OIL's Ninth Annual Immigration Law Seminar will be held October 20-23, 2003, in Washington, D.C. The seminar is an introductory course designed for government attorneys who seek a basic knowledge of immigration law. The seminar is free, but seating is limited. To register contact Francesco Isgro at 202-616-4877 or at francesco.isgro@usdoj.gov.

INSIDE OIL

OIL welcomes the following three new lawyers: **Elizabeth Joanne Stevens**, **Jennifer Keeney**, and **Keith Ian Bernstein**

Ms. Stevens is a graduate of Georgetown University, where she earned a BS in Arabic languages and from the George Mason University School of Law. She clerked for the

U.S. District Court for the Eastern District of Virginia, and subsequently joined EOIR through the Department of Justice Honors Program as judicial law clerk.

Ms. Keeney is a graduate of the Northern Arizona University, where she earned a B.S. in history and secondary education, and the University of Maryland School of Law. She joins

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Mr. Bernstein is a graduate of the University of Virginia, where he earned a B.A. in sociology and psychology, and

of the University at Buffalo Law School. He joins OIL through the Department of Justice Honors Program.

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.

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