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SUPREME COURT UPHOLDS MANDATORY DETENTION

On April 29, 2003, in a case challenging the mandatory detention of a lawful permanent resident alien pending his removal hearing, the Supreme Court without actually using the word "plenary," reaffirmed the principle that, in the exercise of its broad powers over naturalization and immigration, "Congress may make rules as to aliens that would not be acceptable if applied to citizens." ***Demore v. Kim***, __U.S.__, 2003 WL 1960607 (April 27, 2003). The Court *(Chief Justice Rehnquist*, Justices Kennedy, O'Connor, Scalia, Thomas) held that, under INA § 236(c), 8 U.S.C. § 1226(c) the mandatory detention without bond of an alien during a removal proceeding is constitutionally permissible. "Deportation proceedings would be vain if those accused could not be held in custody pending the inquiry into their true character," said the Court, quoting the century-old decision of *Wong Wing v. United States*, 136 U.S. 228 (1896).

Section 236(c)(1) of the INA requires the Attorney General, and now the Secretary of Homeland Security, to take into custody aliens who are inadmissible to or deportable from the United States because they have committed a specified offense, including an aggravated felony. Section 236(c)(2) prohibits release of those aliens during administrative proceedings to remove them from the United States, except in very limited circumstances which were not present in this case.

"Congress may make rules as to aliens that would not be acceptable if applied to citizens."

Hyung Joon Kim entered the United States legally in 1984, at the age of six and became a lawful permanent resident in 1986. On July 8, 1996, when he was 18 years old, he was convicted in a California state court of first degree burglary. In 1997, Kim was also convicted of "petty theft with priors," in violation of California laws, and received a sentence of three years' imprisonment. In December 1988, while Kim was serving his state sentence, the INS commenced removal proceedings on the basis

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GOV'T FILES FOR CERT IN DETENTION OF INADMISSIBLE ALIEN CASE

The Solicitor General has petitioned the Supreme Court to consider whether the *Zadvydas's* finding of an implied limitation on detention of lawful permanent resident aliens who have been ordered deported, applies to aliens who have been stopped at the border and denied admission to the United States. In ***Rosales-Garcia v. Holland***, 322 F.3d 386 (6th Cir. 2003) (en banc), *petition for cert. filed,* 71 U.S.L.W. 3652 (U.S. Apr. 4, 2003) (No. 02-1464), the *en banc* Sixth Circuit held, over a dissent, that the *Zadvydas* six-month rule applies to excludable aliens. The Ninth Circuit also reached the same conclusion in *Lin Guo Xi v.* INS, 298 F.3d 882 (2002).

Rosales-Garcia is one of approxi-

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ATTORNEY GENERAL JOHN ASHCROFT PRAISES WORK OF IMMIGRATION LITIGATORS AT SEVENTH ANNUAL IMMIGRATION LITIGATION CONFERENCE

Attorney General John Ashcroft praised the work of the Department's attorneys who have been on the front line in defending and prosecuting immigration cases in connection with homeland security. The Attorney General delivered his remarks to about

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that he had been convicted of an aggravated felony. After Kim was released from prison, the INS took him into custody and, in light of the mandatory nature of INA § 236(c), declined to release him on bond.

Kim then filed a habeas corpus petition under 28 U.S.C. § 2241. The district court held that INA 236(c) was unconstitutional on its face and ordered an individualized bond hearing. The government's appeal was unsuccessful. The Ninth Circuit held that § 236 (c) as applied to permanent resident aliens violated substantive due process. That court reasoned that detention would be permissible only if the government establishes a "special justification" that outweighs the lawful permanent resident's liberty interest. *Kim v. Ziglar*, 276 F.3d 523 (9th Cir. 2002).

"Detention during deportation proceedings is a constitutionally valid aspect of the deportation process."

In the petition for certiorari, the Solicitor General argued, *inter alia*, that the lower court had "straightforwardly substituted its own policy judgment for the considered conclusion of the political Branches." The majority opinion, delivered by Chief Justice Rehnquist, agreed with that view because it explained in detail Congress' considered efforts to streamline the removal of criminal aliens in light of various studies and hearings indicating a failure on the part of the INS to do so under the then existing immigration laws. "Congress adopted this provision against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens," said the Court. In particular, the Court noted that "Congress had before it evidence that one of the major causes of the INS' failure to remove deportable criminal aliens was the agency's failure to detain those aliens during their deportation proceedings."

In concluding that Congress' exercise of its broad powers, as reflected in the mandatory detention provision, was a constitutionally permissible rule, the Court rejected the argument that the government could not, consistent with the Due Process Clause of the Fifth Amendment, detain an alien for the brief period necessary for his removal proceedings. While acknowledging that the Fifth Amendment entitles aliens to due process of law in deportation proceedings, the Court pointed out that it had recognized more than a century ago that "detention during deportation proceedings is a constitutionally valid aspect of the deportation process." These precedents, include *Wong Wing*, *Carlson v. Landon*, 342 U.S. 524 (1952), and *Reno v. Flores,* 507 U.S. 292 (1993). The Court further noted that prior to 1907, there was no provision permitting bail for any aliens during the pendency of their deportation proceedings.

Although not raised by the parties, but by the *amicus* Washington Legal Foundation, the Supreme Court also held that INA § 236(e), 8 U.S.C. § 1226 (e), did not deprive the court of jurisdiction. That provision states that, "The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." The Court found that Kim was not challenging the "discretionary judgment" of the Attorney General or a "decision" that the Attorney General made regarding his detention or release. Instead he was challenging the statutory framework that permits and alien's detention without bail. The Court said that when congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear, and, "where a provision precluding review is claimed to bar habeas review, the Court has required a particularly clear statement that such is Congress' intent."

Justice Kennedy, the only other Justice who joined in both parts of the Chief Justice's opinion, also wrote a concurrence. In his view, "the ultimate purpose behind the detention is premised upon the alien's deportability." "As a consequence," he stated, "due process requires individualized procedures to ensure there is at least some merit to the [INS's] charge and, therefore, sufficient justification to detain a lawful permanent resident alien pending a more formal hearing." These procedures were available to Kim, Justice Kennedy stated, but he did not seek relief under them. Justice Kennedy also stated that in his view a lawful resident alien could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified because of "unreasonable delay by the INS in pursuing and completing deportation proceedings."

Justices O'Connor, with whom Justice Scalia and Justice Thomas joined, concurred in the judgment but dissented on the issue of the courts' jurisdiction. In their view INA § 236(e) "unequivocally deprives federal courts of jurisdiction to set aside 'any action or decision' by the Attorney General in detaining criminal aliens under §236(c) while removal proceedings are ongoing." While acknowledging "the strong presumption in favor of judicial review," they would have found here that, "there is simply no reasonable way to read this [statutory] language other than as precluding all review, including habeas review." The three Justices noted their continuing view that *St. Cyr* was wrongly decided.

Justice Souter, joined by Justice Stevens and Justice Ginsburg wrote an opinion concurring with the jurisdic-

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GOV'T FILES CERT IN DETENTION OF EXCLUDABLE ALIEN CASE

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mately 125,000 undocumented Cuban nationals who illegally came to the United States during the 1980 Mariel boatlift, many of whom had engaged in criminal activity in Cuba. The INS apprehended Rosales-Garcia at the border and prevented his entry into the United States. While on immigration parole, in September 1981, Rosales-Garcia was convicted of grand theft; in 1983, he was convicted of burglary and grand larceny; and in January 1986, he was convicted of escape. After serving his state sentence on the escape charge, Rosales-Garcia was transferred to the custody of the INS. INS revoked his parole and commenced exclusion proceedings. In 1987, an immigration judge determined that Rosales-Garcia was excludable, denied his request for asylum, and ordered him removed from the United States. Since that time, however, the United States has been unable to remove Rosales-Garcia because Cuba has not agreed to accept his return.

The extension of the Zadvydas ruling to the detention of excludable aliens "is incorrect, deepens a circuit split, and has great practical importance."

Rosales-Garcia brought this habeas action challenging his continued detention. Meanwhile, he had been released pursuant to the Cuban Review Plan. In January 2001, a divided panel of the Sixth Circuit held that the INS's determination that Rosales-Garcia was releasable under the Cuban Review Plan did not render the case moot. The court then held that detention of Rosales-Garcia was unconstitutional. The court explained that, while the governing statute authorizes the Attorney General to detain excludable aliens indefinitely, such detention implicates a Fifth Amendment interest in liberty, and was unconstitutionally excessive if it was indefinite.

On August 15, 2001, the government filed a petition for *writ of certiorari*, requesting that the Sixth Circuit panel's decision be vacated and remanded in light of *Zadvydas*. The Court granted that request. On remand, the Sixth Circuit consolidated *the Rosales-Garcia* case with the *Carballo*, a similar case which had been decided in the government favor. Like Rosales-Garcia, Carballo is a Mariel Cuban who had been paroled into the United States in 1980 but whose parole was subsequently revoked because of is criminal convictions. The panel that decided *Carballo* determined that *Zadvydas* had not changed the prior law that permitted the indefinite detention of an excludable alien.

On March 5, 2003, a divided *en banc* court held that the INA does not permit post-order detention of more than six-moths. The court adopted the reasoning of the Ninth Circuit in *Lin Guo Xi v. INS*, 298 F.3d 832 (9th Cir. 2002), where that court held that an alien apprehended outside the United States attempting to enter and subsequently ordered removed was entitled to the same presumptive six-month time limitation on post-order detention for deportable aliens established in *Zadvydas*. The court also held, in the alternative, that the indefinite detention of excludable aliens violates the alien's due process rights.

In the petition for certiorari, the Solicitor General contends that the extension of the six-month rule – from the context of deportable former permanent resident aliens presented in *Zadvydas* to the context of excludable aliens stopped at the border while attempting to enter illegally – "is incorrect, deepens a circuit split, and has great practical importance." Furthermore, the government argues that the Sixth Circuit "made a fundamental error of constitutional law" when it determined, in conflict with *Schaughnessy v. Mezei,* that due process principles entitled Rosales-Garcia to be released into the United States. That conclusion, "conflicts with the unanimous view of other courts of appeals," and "effectively establishes a constitutional right of entry into the United States, which this Court has consistently rejected," argues the Solicitor General.

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tional holding and dissenting on the merits. The dissenters criticized the majority claiming that it had failed to distinguish *Zadvydas* "in any way that matters."

The dissenters would have found that Kim, a lawful permanent resident was entitled to greater protections than other aliens under the Due Process Clause. "The Court's holding that the Constitution permits the Government to lock up a lawful permanent resident of this country when there is concededly no reason to do so forgets over a century of precedent acknowledging the rights of permanent residents, including the basic liberty from physical confinement lying at the heart of due process," wrote the dissenters. Consequently, they would have found that due process required that Kim should have been afforded an individualized review of his challenge to the reasons justifying his confinement prior to a determination of deportability.

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TITLE 8 REGULATIONS REORGANIZED DUE TO TRANSFER OF FUNCTIONS TO DHS

The Homeland Security Act of 2002 (HSA) transferred the functions of the Immigration and Naturalization Service (INS) to the Department of Homeland Security (DHS). Within DHS, former INS functions are now administered by the Directorate of Border and Transportation Security and the Bureau of Citizenship and Immigration Services. The HSA, however, retained the Executive Office for Immigration Review (EOIR) in the Department of Justice under the direction of the Attorney General. This functional change required the reorganization of Title 8 of the Code of Federal Regulations (8 CFR).

The 8 CFR changes were published in the Federal Register on February 28 and March 5, 2003, and included the following key provisions:

■Prior to these changes, all regulations in 8 CFR relating to EOIR and INS were codified in Chapter I. As part of the reorganization of 8 CFR, a new Chapter V in 8 CFR, entitled "Executive Office for Immigration Review, Department of Justice," was established.

■Part 3 of Chapter I and almost all of part 240 of Chapter I were moved to the new Chapter V because these provisions relate to the jurisdiction and procedures of EOIR. Thus, part 3 of Chapter I was moved to part 1003 of Chapter V. Similarly, a large portion of part 240 of Chapter I was moved to part 1240 of Chapter V.

■When referring to a regulation that has been moved to Chapter V, the new citation for this regulation should be used in legal filings. For example, former 8 CFR § 3.23 (reopening or reconsideration before the Immigration Court) should now be cited as 8 CFR § 1003.23. Similarly, former 8 CFR § 240.8 (burdens of proof in removal proceedings) should now be cited as 8 CFR § 1240.8. Under this technical restructuring, however, an incorrect citation to a regulation that was moved to Chapter V will be considered inconsequential.

■In addition, a large number of parts and sections of Chapter I were duplicated in the new Chapter V because they relate to proceedings before EOIR and INS. For example, in asylum proceedings before Immigration Judges, applicable provisions of Chapter I, part 208 (*e.g.*, 8 CFR § 208.15(a)) are established in parallel in Chapter V, part 1208 (*e.g.*, 8 CFR § 1208.15(a)).

■When referring to a regulation in Chapter I that has been duplicated in Chapter V (*i.e.*, where there are parallel provisions in both chapters), citation to that regulation in either chapter would be correct under this technical restructuring. For example, 8 CFR § 208.13 (establishing asylum eligibility) has been duplicated in Chapter V as 8 CFR § 1208.13. Practioners may continue to refer to this regulation as 8 CFR § 208.13.

■The March 5, 2003 final rule in the Federal Register amends the rule published on February 28 by changing certain internal reference citations. For example, the reference in §1003.1(b)(2) of Chapter V to "Part 240" has been changed to "Part 1240."

See 68 *Fed. Reg*. 9824 (February 28, 2003); 68 *Fed. Reg*. 10349 (March 5, 2003)

Contributed by EOIR

DHS LAUNCHES OPERATION LIBERTY SHIELD

On March 17, 2003, Secretary Tom Ridge announced that the Department of Homeland Security, in conjunction with numerous departments of the federal government, has begun implementing increased protective measures under a comprehensive national plan to protect the Homeland: "Operation Liberty Shield." "Operation Liberty Shield will increase security at our borders, strengthen transportation sector protections, enhance security at our critical infrastructure, increase public health preparedness and make sure all federal response assets can be deployed quickly," said the Secretary.

Under the plan, DHS increased border surveillance and screening of vehicles and cargo. DHS also announced that asylum applicants from certain "nations where al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to have operated will be detained for the duration of their processing period."

On March 20, 2003, the Bureau of Immigration and Customs Enforcement (ICE) announced that teams of its agents and the Federal Bureau of Investigation have begun seeking out specific Iraqi nationals unlawfully in the United States and apprehending them. The joint initiative is aimed at taking individuals off the street who might pose a threat to the safety and security of the American people. The Iraqis targeted as part of the effort were identified using a range of intelligence criteria and all are in the country illegally.

PROPOSED REGULATION ON NOTICE SHOULD CORRECT FACTUAL CIRCUMSTANCES IN *MATTER OF G-Y-R-*

On July 26, 2002, the INS proposed a new rule amending 8 C.F.R. § 103.2 that would require every applicant for immigration benefits to acknowledge their existing address notice requirements, namely that they notify the INS (and now, presumably, the Department of Homeland Security) of any change of address within ten days of the change. *See* Address Notification to be Filed with Designated Applications, 67 Fed. Reg. 48,818 (proposed July 26, 2002) (to be codified at 8 C.F.R. 103). The proposed regulation, which came about as a result of the Board's decision in *Matter of G-Y-R-*, 23 I. & N. Dec. 181 (BIA 2001), would require that the alien be notified that the INS would use the most recent address provided by the alien for all purposes, including the service of a notice to appear for removal proceedings. Moreover, should the alien fail to notify the INS of any change of address, the alien would be held responsible for any communications sent to the address on file. This includes the possibility that the alien will be ordered removed in absentia if his/her Notice to Appear ("NTA") has been mailed to the address on file.

The new rule would not amend or rescind any existing regulation. An alien over the age of 14 who is in the United States for more than thirty days is still required to register with the INS pursuant to INA § 262(a). Section 265 (a) of the INA continues to require that an alien who changes his or her address notify the INS in writing within ten days of such a change. What the new regulation effectively would do is move up the point in the administrative process where the alien is made aware of this statutory obligation and is thereby subject to the consequences associated with noncompliance.

Interpretations of the Existing Notice Scheme

Prior to the new regulation, the alien was not necessarily made aware of the statutory obligation to notify the INS of any address change until the delivery of the Notice to Appear. INA § 239 requires that, before removal proceedings are initiated against an alien, a Notice to Appear "shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any)[.]" Among other requirements, the Notice to Appear specifies that the alien must provide an address at which he or she can be contacted regarding removal proceedings, and that any change in this contact information must be provided to the INS "immediately." INA §§ 239(a)(1)(F)(1), (2).

The proposed rule would require that the alien be notified that the INS would use the most recent address provided by the alien for all purposes, including the service of a notice to appear for removal proceedings.

Under the foregoing framework, courts have determined that proof of actual receipt of notice by the alien is not required in order to enter an *in absentia* order of deportation/removal. *See Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997) ("due process is satisfied if service is conducted in a manner 'reasonably calculated' to ensure that notice reaches the alien"). Generally, where the immigration judge provided notice of a removal hearing to the last address on file with the INS, as provided by the alien pursuant to INA § 239(a)(1), due process is satisfied. *See Dominguez v. U.S. Attorney General*, 284 F.3d 1258 (11th Cir. 2002) ("notice to the alien at the most recent address provided by the alien is sufficient notice, and . . . there can be an in absentia removal after such notice"); *U.S. v. Estrada-Trochez*, 66 F.3d 733 (5th Cir. 1995).

Matter of G-Y-R-

The Board placed a limitation on this statutory and regulatory scheme. In *Matter of G-Y-R-*, the BIA held that an alien must actually receive, or be charged with receiving, a Notice to Appear informing the alien of his statutory address obligations before the entry of an in absentia removal order. 23 I. & N. Dec. 181 (BIA 2001). In 1997, the INS mailed G-Y-R- an appointment notice to appear for an asylum interview. The notice was mailed to the address on file with the Service. The address on file, however, was from an Alien Address Report Card submitted by the alien in 1991. Subsequently, the INS sent, via certified mail, a Notice to Appear for a removal hearing. The NTA was returned to the INS by the Postal Service as undeliverable.

G-Y-R- failed to appear for the removal hearing and the INS moved to proceed in absentia. The immigration judge refused to proceed, however, finding that the alien had not been made aware of "the requirement that she keep the Court and Service informed of an address or bear the consequences for failure to do so." In affirming, the BIA held that interrelated provisions of the INA precluded the entry of an in absentia removal order where the alien was never made aware of the particular address obligations associated with removal proceedings. *See* INA §§ 239(a) and (c) and 240(b)(5).

The authorization to conduct in absentia removal hearings is found in INA § 240(b)(5). The statute provides that where notice has been provided to the alien or the alien's counsel of record and he or she does not appear at the removal hearing, the alien shall be ordered removed in absentia so long as "the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." INA § 240 (b)(5)(A). Written notice is sufficient "if provided at the most recent address

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PROPOSED RULE ON NOTICE OF CHANGE OF ADDRESS

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provided under [INA §] 239(a)(1)(F)." The issue for the BIA, then, was whether the notice was mailed to an address that qualified as an "address provided under section 239(a)(1)(F)." The Board held that it was not. The Board concluded that INA § 240(b)(5)(A) means that "the alien cannot provide a 'section 239(a)(1)(F)' address (or 'have provided' it and therefore not need to change it) unless the alien has been advised to do so." The Board held that an address cannot therefore be a § 239(a)(1)(F) address unless the alien receives the warnings contained in the NTA. Because the alien in *G-Y-R-* had never received the NTA, and therefore had never been made aware of the particular statutory address obligations associated with removal proceedings and of the consequences of failing to appear, the Board ruled that the NTA was not mailed to a § 239(a)(1)(F) address. Thus, an in absentia removal order was improper.

Matter of M-D-

In *Matter of M-D-*, the Board both clarified and limited the scope of its ruling in *G-Y-R-*. 23 I. & N. Dec. 540 (BIA 2002). As in *G-Y-R-*, the NTA in *M-D-* was sent by certified mail to the address listed by the alien during his administrative asylum proceedings. The Board, however, held that the alien in *M-D-* could be charged with receiving the NTA because it had been sent to the proper address. Whereas in *G-Y-R-*, the alien provided his address six years earlier, in *M-D-*, the alien provided his address just a few weeks previously. Moreover, it was still the address where he resided. After the Post Office's second attempt at delivery of the NTA, it left notice at the address that the certified mail was being held at the Post Office. After it was not picked up by the alien, the envelope was returned to the INS as "unclaimed." The Board noted that where notice is sent by certified mail, a "rebuttable presumption" of service is created, which can only be overcome if the alien has "evidence that the Post Office had not attempted delivery or had conducted delivery improperly." *M-D-*, 23 I. & N. Dec. at 547; see *Fuentes-Argueta v. INS*, 101 F.3d 867 (2d Cir. 1996); *Arrieta v. INS*, 117 F.3d 429 (9th Cir. 1997). Here, where there was proof that the certified mail was sent to the proper address, the alien failed to rebut the presumption. *M-D-*, 23 I. & N. Dec. at 547. The Board held that "[i]t is not reasonable to allow the [alien] to defeat service by neglecting or refusing to collect his mail." *Id.* As the Board noted in *G-Y-R-*, if the NTA reaches the correct address but fails to reach the alien "through some failure in the internal workings of the household," the alien can be charged with receiving proper notice. *Id.*, *quoting G-Y-R-*, 23 I. & N. Dec. 181; *see id.* at 545 ("the alien need not personally receive, read, and understand the Notice to Appear for the notice requirements to be satisfied").

In summary, *G-Y-R-* maintains that where an alien is not made aware of his duty to maintain a current address with the government, or the consequences arising from failing to do so, he cannot be ordered removed in absentia. *M-D-* limits the breadth of this holding, however, by providing that if the Service mails the NTA to the correct and current address of the alien, there is a rebuttable presumption of delivery, even if the alien is never actually made aware of his statutory address obligations.

The Proposed Regulation

The proposed regulation, 8 C.F.R. § 103.2(a)(8), addresses the fact pattern that gave rise to the Board's decision in *G-Y-R-*. *See* Address Notification to be Filed with Designated Applications, 67 Fed. Reg. 48,818 (proposed July 26, 2002) (to be codified at 8 C.F.R. 103). Instead of first becoming aware of his or her address obligations and the consequences associated with not complying when he or she receives a NTA, the alien will be notified of such obligations when he or she first applies for an immigration benefit or work authorization. The proposed regulation would require a mandatory address notification, which must be acknowledged with a signature by the alien, providing notice that:

> (A) He or she is required to provide a valid and current address to the Service, including any change of address within 10 days of the change;
>
> (B) The Service will use the most recent address provided by the alien for all purposes, including for purposes of removal proceedings under sections 239 and 240 of the Act should it ever be necessary of the Service to initiate removal proceedings;
>
> (C) If the alien has changed address and failed to provide the new address to the Service, the alien will be held responsible for any communications sent to the most recent address provided by the alien; and
>
> (D) If the alien fails to appear at any scheduled immigration hearing after notice of the hearing was mailed to the most recent address provided by the alien, or as otherwise provided by law, the alien is subject to being ordered removed in absentia.

67 *Fed. Reg*. 48818-01. Moreover, the alien's signature also serves as an acknowledgment that the address he or she is providing can be used for all purposes, including the service of a NTA, under INA §§ 239(a)(1)(F), 239(c), and 240(b)(5).

The proposed regulation will effectively preclude an alien from arguing that he or she did not receive a Notice to Appear, except when there is evidence that the Post Office never delivered the notice or had conducted delivery improperly. *See Fuentes-Argueta*, 101 F.3d 867. The burden to prove these facts in such instances is on the alien.

By Eric Marsteller, OIL Law Intern

SUMMARIES OF RECENT AG & BIA DECISIONS

Attorney General Holds That It Is Appropriate To Consider National Security Interests In Bond Proceedings Involving Undocumented Aliens Seeking Admission To The United States

In ***Matter of D-J-***, 23 I&N Dec. 572 (A.G. 2003), the Attorney General considered whether an undocumented alien who arrives by sea attempting to evade inspection by authorities should be released on bond or detained. D-J-, a Haitian national, arrived in the United States by a boat which attempted to avoid interdiction by the Coast Guard. The INS opposed D-J-'s bond request, citing its concern that the release of D-J- and other similarly situated aliens would encourage mass migration. Both the Immigration Judge and the Board found that they could not consider the INS' argument.

> The Attorney General found that "the release on bond of undocumented seagoing migrant aliens from Haiti without adequate background screening or investigation presents a risk to national security."

The Department of Homeland Security certified to the Attorney General for review. Finding that his review was *de novo*, the Attorney General reversed the prior decisions. "I have determined that the release of respondent on bond was and is unwarranted due to considerations of sound immigration policy and national security that would be undercut by the release of respondent and other undocumented migrants who unlawfully crossed the borders of the United States on October 29, 2002." 23 I&N Dec. at 574.

The Attorney General also found that his extremely broad discretion to determine whether bond is appropriate contained no limitation on the types of factors that could be considered, and that these factors could include national security and immigration policy reasons. He also considered the effectiveness of the interdiction policy, the effect of mass migration on federal resources, and the greater need to identify and evaluate individual aliens and their motivations for coming to the United States since September 11th. The Attorney General found that "the release on bond of undocumented seagoing migrant aliens from Haiti without adequate background screening or investigation presents a risk to national security that provides additional grounds for denying respondent's release on bond." In particular, the Attorney General noted the State Department's assertion that "it has observed an increase in aliens from countries such as Pakistan using Haiti as a staging point for migration to the United States."

The Attorney General rejected respondent's contention that the detention of asylum seekers violated international law. He found that "the application of U.S. law to protect the nation's borders against mass migrations by hundreds of undocumented aliens violates no right protected by the Universal Declaration of Human Rights or any other applicable rule of international law." He noted that aliens, such as the respondent, are afforded the right to apply for asylum and have those applications duly considered.

The Attorney General directed the Board and Immigration Judges to consider evidence "from sources in the Executive Branch with relevant expertise establishing that significant national security interests are implicated" in all future bond proceedings involving attempted illegal migrants.

Board Finds That Nationality Under The INA May Be Acquired Only Through Birth Or Naturalization

Increasingly, many criminal aliens have argued that they are not subject to removal because they qualify as "nationals" under the INA. On April 29, 2003, the Board rejected this argument in ***Matter of Navas-Costa***, 23 I&N Dec. 586 (BIA 2003). Mr. Navas had applied for naturalization in 1994 and his application was denied in 1996. He subsequently was placed in removal proceedings. Citing *Hughes v. Ashcroft*, 255 F.3d 752 (9th Cir. 2001), Navas argued that he was a national because he applied for citizenship and took an oath of allegiance to the United States.

The Board reviewed the history of the term and related provisions and other jurisprudence to conclude that Navas' argument was unfounded. Noting that an alien cannot become a national merely by his own action, the Board observed that "[a]s we understand the statute, whether one 'owes permanent allegiance to the United States, is not simply a matter of individual choice. Section 101(a)(22)(B) of the Act. Instead, it reflects a legal relationship between an individual and a sovereign." 23 I&N Dec. 587-588. Only Congress can determine when an alien does or does not become a citizen or national.

The Board concluded that "[a]fter considering the historical meaning of the term 'national' and the statutory framework of the Act, we find that nationality under the Act may be acquired only through birth or naturalization." 23 I&N Dec. at 588. The Board reversed the Immigration Judge's contrary conclusion, sustained the Service's appeal, and remanded the case for further proceedings.

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Summaries Of Recent Federal Court Decisions

ASYLUM

■Sixth Circuit Reverses Asylum Denial of Stateless Palestinian, Finding That She Had Been Persecuted in Kuwait

In ***Ouda v. INS***, __F.3d__, 2003 WL 1616284 (6th Cir. March 31, 2003) (Gilman, Gibbons, *Polster* (District Judge N.D. Ohio)), the Sixth Circuit reversed the BIA's denial of asylum to a stateless Palestinian who was born in Kuwait. In July 1992, petitioner, her parents, and her two younger brothers traveled to Bulgaria where they remained for two years. Petitioner entered the United States on December 7, 1994, on a visitor's visa. Prior to the expiration of her visa, petitioner applied for asylum, claiming that she had been mistreated in Kuwait. That application was not granted because petitioner was subsequently placed in deportation proceedings. Petitioner then renewed her request for asylum but declined to identify a country of deportation.

At the hearing, petitioner contended that she was a refugee from Kuwait, while the INS argued her asylum claim arose from Bulgaria where she last resided. Petitioner then testified in support of her claim that she had been persecuted in Kuwait, and that based on her status as stateless, she had been denied entrance to Egypt, Bulgaria, Kuwait, Jordan, and Israel. The IJ denied the asylum application and ordered her deported to Bulgaria, focusing her asylum claim on that country because it was petitioner's country of last habitual residence. On appeal the BIA found that the IJ had erred in ruling that petitioner could only seek asylum with respect to Bulgaria, but found that error to be harmless because Petitioner had testified that Kuwait would not accept her. Alternatively, the BIA found that petitioner had not established an asylum claim with respect to her return to Kuwait.

On appeal, the Sixth Circuit found that the BIA had erred as a matter of law in finding that petitioner could not seek asylum from Kuwait because she could not be deported to that country. "After consulting various immigration treatises and manuals, reviewing the asylum statutes and regulations, and researching the case law in all circuits, we can find no support for the proposition that an asylum applicant is precluded from seeking asylum in the United States should it prove to be the case that the country from which she seeks asylum will not take her back if the INS tries to deport her," said the court. The court then found that the evidence in the record compelled the conclusion that petitioner had established past persecution in Kuwait. The evidence showed that petitioner and her family "were threatened and beaten up, and that they were deprived of food, water, a livelihood and the ability to leave their house because they were Palestinians," said the court. In light of its finding of past persecution, the court remanded the case to the BIA so that it could apply the presumption as to future persecution.

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■Ninth Circuit Holds Ethnic Christian Armenian Entitled To Asylum

In ***Melkonian v. Ashcroft***, 320 F.3d 1061 (9th Cir. 2003) (Schroeder, *W. Fletcher*, Weiner), the Ninth Circuit held that the alien, a Christian Armenian, was eligible for asylum because he feared returning to Abkhazia, a section of former Soviet Georgia, which he fled when ethnic Muslim separatists gained control there. The court found that the separatists had engaged in a campaign of ethic cleansing to eliminate all non-Abkhaz, such as the alien, and had specifically targeted the alien. The court held that the Immigration Judge should not have denied asylum based solely on his finding that the alien could avoid persecution by relocating internally to another area of Georgia, without considering whether relocation was reasonable, and rejected the Immigration Judge's finding that he left Abkhazia for Russia to better himself economically.

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■Tenth Circuit Holds It Lacks Jurisdiction To Review Untimely Asylum Application

In ***Tsevegmid v. Ashcroft***, __F.3d__, 2003 WL 295544 (Kelly, *McKay,* Murphy) (10th Cir. February 11, 2003), the Tenth Circuit agreed with the Eighth, Ninth and Eleventh Circuits that courts of appeal do not have jurisdiction to review the Attorney General's determination that an asylum application is untimely. *See Fahim v. U.S. Attorney General*, 278 F.3d 1216, 1217-18 (11th Cir. 2002); *Hakeem v. INS*, 273 F.3d 812, 815 (9th Cir. 2001); *Ismailov v. Reno*, 263 F.3d 851, 855 (8th Cir.2001);*Van Dinh v. Reno*, 197 F.3d 427 (10th Cir. 1999).

Accordingly, the court dismissed the alien's challenge to the BIA's decision that his asylum application was time-barred as it was filed a year and six days after his admission into the United States.

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■Eleventh Circuit Holds It Lacks Jurisdiction To Address Timeliness Of Asylum Application, Approves BIA Streamlining Procedure

In ***Mendoza v. U.S. Attorney General,*** __F.3d__, 2003 WL 1878422 (11th Cir. April 16, 2003) Anderson, Black, *Hull*), the Eleventh Circuit, held that it lacked jurisdiction to review whether an asylum application was timely filed or whether extraordinary circumstances excused the untimely filing of the application. The court joined the First Circuit in holding that the BIA's summary affir-

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mance procedures do not violate the right to due process, as aliens have no constitutional or statutory right to administrative appeal, and there was no evidence that the BIA member failed to review the facts of his case before streamlining it.

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■Third Circuit Grants Government's Rehearing Petition, Overturns Adverse Credibility Determination, But Remands Under *Ventura*

In ***Obianuju Ezeagwuna v. Ashcroft,*** __F.3d__, 2003 WL 1870900 (3d. Cir. April 14, 2003) (Becker, Scirica, and *Rendell*), the Third Circuit panel granted the government's rehearing petition, vacated its prior opinion, and issued a new opinion. Relying on *INS v. Ventura*, 123 S. Ct. 353 (U.S. 2002), the government's petition challenged the court's failure to remand to the BIA the question of petitioner's credibility (which the BIA had addressed), as well as the question of whether she established persecution (which the BIA had not). Petitioner claimed that she had been persecuted by the government in Cameroon for her political opinion, and supported the claim with documents that a State Department field investigation revealed were fraudulent. The BIA relied on the State Department report to find that petitioner was not credible but did not address whether, assuming she was credible, petitioner had established persecution.

The panel's first opinion ruled that the BIA had violated due process in relying on the report, that petitioner was credible, had suffered past persecution, and was entitled to withholding of deportation. The panel's new opinion reaffirmed its due process finding (and additionally found that the BIA erred in failing to accept a psychological report) but did not decide any other issues. The panel remanded to the BIA for further proceedings regarding petitioner's credibility and eligibility for asylum without reliance on the State Department report.

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■Ninth Circuit Holds That The BIA In An Asylum Case Cannot Base Adverse Credibility On Alien's Statements To Border Patrol Officer

In ***Ahmed v. Ashcroft,*** 2003 WL 1473562 (9th Cir. March 17, 2003) (Pregerson, Thomas, Rawlinson), the Ninth Circuit, in an unpublished decision, held that initial statements made by the alien to a Border Patrol Officer during an interview at the border, which reflected that he entered the United States for economic reasons only and had no fear of returning to his homeland, did not provide a valid basis to discredit his subsequent testimony that he suffered past persecution and had a well-founded fear of future persecution. Citing *Singh v. INS*, 292 F.3d 1017 (9th Cir. 2002), the court found that there is a "significant distinction" between statements made at the border and those made in Immigration Court, and that reliance upon conflicts in the two accounts is "inappropriate."

The Court found that there is a "significant distinction" between statements made at the border and those made in Immigration Court, and that reliance upon conflicts in the two accounts is "inappropriate."

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BIA RESTRUCTURING

■District Court Denies Preliminary Injunction Seeking To Block Reduction Of BIA To 11 Members

In ***Capital Area Immigrants' Rights Coalition v. Dept. of Justice,*** No. 02-2081 (D.D.C. March 31, 2003), the district court denied plaintiffs' motion for a preliminary injunction. Plaintiffs brought an Administrative Procedures Act (APA) challenge to major aspects of the BIA's reform regulations. After the district court announced on March 26 that it was not ready to issue a decision, and the government declined to postpone the reduction of the BIA to 11 members, Plaintiffs filed their request for injunctive relief. In denying the motion, the district court found that: (1) any harm would be of short duration as it will soon enter a decision on the merits of the case; (2) plaintiff's allegation that the BIA's integrity would be injured by BIA members "auditioning for their jobs" while reduction was pending was speculative; (3) it is dubious that plaintiffs have cognizable due process claims in this APA case; (4) even if a cognizable due process claim exists, there is no irreparable harm as aliens continue to have appeal rights to Article 3 courts; (5) removal of BIA members may later be undone later if plaintiffs prevail; and (6) the public interest does not strongly favor the injunction.

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BORDER SEARCHES

■Third Circuit Rejects Constitutional Challenge To Operation Of Departure control Checkpoint In The United States Virgin Islands

In ***United States v. Pollard***, __F.3d__ (3rd Cir. April 17, 2003) (Scirica, Alito, *Rendell*), the Third Circuit reversed a finding by the District Court in the Virgin Island that the departure control checkpoint located at the Cyril E. King Airport in St. Thomas, violated the Fifth Amendment's equal protection guarantee, and, alternatively, the Fourth Amendment's prohibition against unreasonable seizures.

The case arose when Camille Pollard attempted to board a flight depart-

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ing from the U.S. Virgin Islands to New York City. At the Departure Control checkpoint, an INS officer questioned her regarding her citizenship. Despite Pollard's representations to the contrary, the officer suspected that she was not a U.S. citizen and ordered her to undergo secondary inspection. The inspector then concluded that the identification document she was carrying was false, and placed her under arrest. After receiving her *Miranda* warnings, Pollard confessed her true name and that she was a citizen of Guyana. The government then charged her with violating 18 U.S.C. § 911 for falsely representing herself to be a U.S. citizen.

At her trial, Pollard moved to suppress the statements she had made to the INS inspectors, contending that her right to counsel had been violated. The district court heard the testimony and the day after the hearing, *sua sponte*, ordered the parties to file supplemental briefs regarding the authority of the INS to maintain a permanent checkpoint at the airport, and whether the checkpoint violated the equal protection guarantee of the Fifth Amendment. After the parties filed the briefs, the district court ordered the government to produce additional evidence regarding the checkpoints in Puerto Rico, Alaska, and Hawaii. The government partly complied but declined to produce some of the information, noting *inter alia*, that Pollard had the burden to show produced some of the information but declined to produce information regarding an equal protection violation. After a trial where the government produced a several witnesses, the district court granted Pollard's motion to dismiss and determined that INA § 212(d)(7) and the implementing regulations violated the Fifth Amendment's equal protection clause and that the procedures violated the Fourth Amendment.

The Third Circuit held the lower court had improperly placed the burden upon the government to prove that the checkpoint did not violate the guarantee of equal protection. Applying a rational-based analysis to the alleged classification in the statute, the Third Circuit held that there is no way that Pollard can succeed in arguing that the statute fails rational-basis review. The alleged distinction drawn by the statutory provision passes constitutional muster because Congress and the Attorney General rationally could have believed that illegal immigration in the Virgin Islands needs to be dealt with differently than in other U.S. jurisdictions, said the court. Accordingly, it saw no reason to remand the case so that the burden would be shifted to Pollard to prove an equal protection violation.

The Third Circuit also reversed the lower court's finding that Pollard had been subject to an unreasonable search and seizure. The court noted that it was undisputed that the seizure had occurred without an individualized suspicion. However, after balancing the intrusion against the government's interest, the court found that the seizure was reasonable. The court found persuasive that the Supreme Court's decision in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), and the well-reasoned opinion in *Lopez v. Aran*, 844 F.2d 898 (1st Cir. 1988), supported the constitutionality of the checkpoint. The court also relied on *United States v. Hyde*, 37 F.3d 116 (3d Cir. 1994), a case involving customs searches.

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CITIZENSHIP

■Second Circuit Holds Child Citizenship Act Does Not Operate Retroactively To Qualify Adult Alien For Derivative Citizenship

In ***Drakes v. Ashcroft***, 323 F.3d 189 (2d Cir. 2003) (Calabresi, Sack, Cudahy (by designation))(*per curiam*), the Second Circuit joined four circuit courts and the BIA in holding the Child Citizenship Act of 2000 (CCA) does not operate retroactively to "make citizens of adults who, as children, would have satisfied the CCA's current conditions for derivative naturalization, but did not meet the requirements that were in effect when they were minors." The alien, convicted of an aggravated felony as an adult, sought derivative citizenship through her mother, who naturalized but did not effect a legal separation from the alien's father until after the alien turned 21 years old.

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CRIMES

■Ninth Circuit Holds Arizona Conviction For Possession Of Stolen Vehicle Is Not A "Theft Offense" Within The Definition Of "Aggravated Felony"

In ***Huerta-Guevara v. Ashcroft***, __F.3d__, 2003 WL 721729 (Trott, Rymer, Tallman) (9th Cir. March 4, 2003), the Ninth Circuit held that Huerta's conviction for possession of a stolen vehicle in Arizona did not qualify as a "theft offense" amounting to an aggravated felony under either the categorical approach or the modified categorical approach. The court considered the judgment of conviction, which was the sole document submitted by INS, insufficient evidence to prove Huerta was convicted of the elements of a generically defined crime, and that other evidence of record, including Huerta's concession to the removal charges and her statements on brief, were similarly inadequate.

The court rejected INS' argument that Huerta's pro se concession to the removal charges was itself adequate to prove she was an aggravated felon, finding that INS was obliged by the statute to submit clear and convincing evidence apart from her concessions.

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CRIMINAL PROSECUTIONS

■Tenth Circuit Holds Deportation Proceeding Fundamentally Unfair Because Immigration Judge Used The Term "Pardon" Instead Of "Waiver" In Describing Available Relief

In ***United States v. Aguirre-Tello,*** __F.3d__, 2003 WL 1795735 (10th Cir. April 7, 2003) (Seymour, *Holloway*; Anderson, dissenting), the Tenth Circuit held in a criminal case that an indictment for illegal reentry must be dismissed because the alien's deportation proceedings were fundamentally unfair. The alien, convicted of attempted murder, was only 1 day short of accruing 7 years' presence to become eligible for a waiver of deportation under section 212(c) of the immigration statute, and was advised by the Immigration Judge that his case could be postponed to see if he "might be granted a pardon." The court held that a "pardon" is a form of relief distinct from a waiver and was inadequate to apprise the alien of his 50% chance of success in a 212(c) proceeding, that he was not given a list of legal services, and that he was not advised that a $20,000 bond was set for his relief.

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"Counsel's failure to advise a defendant of collateral immigration consequences of the criminal process does not violate the Sixth Amendment right to effective assistance of counsel."

■Ninth Circuit Holds Government Did Not Prove That Defendant Was An Alien, Overturns Conviction For Refusing Cooperation In Procurement Of Travel Documents.

In ***United States v. Mendez-Argueta***, __F.3d__, 2003 WL 1459111 (9th Cir. March 20, 2003) (Cowen, Hawkins, W. Fletcher), the Ninth Circuit overturned the defendant's conviction for wilfully failing or refusing to cooperate in the procurement of travel documents under 8 U.S.C. § 1253(a)(1). The court held that the district court erred in allowing the admission of inadmissible hearsay testimony regarding the defendant's alienage, and that in the absence of such testimony, the government did not present sufficient proof of alienage to sustain a conviction under the statute. The court expressly noted that its ruling would not preclude a retrial of the defendant, and remanded the case for that purpose.

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■Ninth Circuit Holds Counsel Was Not Ineffective In Failing To Advise Criminal Alien Of Immigration Consequences Of Conviction.

In *United States v. Fry,* 322 F.3d 1198 (9th Cir. 2003) (Schroeder, Goodwin, *Clifton*), the Ninth Circuit held that the criminal alien's trial counsel did not offer ineffective assistance of counsel in failing to inform the alien he could be deported if convicted at trial. The court joined eight other circuits in holding that "counsel's failure to advise a defendant of collateral immigration consequences of the criminal process does not violate the Sixth Amendment right to effective assistance of counsel."

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■Ninth Circuit Holds That Defendant's Transportation of Illegal Aliens Was "In furtherance of" Aliens' Violations

In ***United States v. Hernandez***, __F.3d__, 2003 WL 1909287 (9th Cir. April 22, 2003) (O'Brien, *McWilliams*, Anderson), the Ninth Circuit reversed the district court and held that defendants' transportation of illegal aliens was "in furtherance of" aliens' violations under 8 U.S.C § 1324(a). The Ninth Circuit agreed that the evidence supported the government's theory of the case that "once an illegal alien has crossed the border, he, or she, has an understandable desire to get as far away from the border as quickly as possible."

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DETENTION

■Eighth Circuit Holds That *Zadvydas'* Limitation On Post-Removal Order Detention Period Does Not Apply To Inadmissible Aliens

In ***Borrero v. Aljets***, __ F.3d__, 2003 WL 1873304 (8th Cir. April 15, 2003) (*Wollman*, Melloy; Heaney (dissenting)), the Eighth Circuit held that the government has the statutory and constitutional authority to detain inadmissible aliens, indefinitely if necessary, pending their removal from the United States. The court specifically rejected the alien's argument that the Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), which limited the post-removal order detention to a presumptively reasonable period of six months, applies to inadmissible aliens. The court interpreted "*Zadvydas* as limiting the detention of only those aliens whose detention raises serious constitutional doubt - admitted aliens." The court held that the regulations governing the parole of Mariel Cubans are well within the sovereign prerogative of the executive branch to set and do not violate the Fifth Amendment's Due Process Clause.

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DUE PROCESS

■Ninth Circuit Holds Alien Has No Settled Expectation To Be Placed In Deportation Proceedings

In ***Vasquez-Zavala v. Ashcroft***, 324 F.3d 1105 (9th Cir. 2003) (Schroeder, Noonan, *Clifton*), the Ninth Circuit held that petitioners, husband and wife, had no "settled expectation" or due process right to be placed in deportation proceedings, rather than removal proceedings. The petitioners argued that since they had filed an affirmative asylum application with the INS before April 1, 1997, the effective date of IIRIRA, they should have been placed in deportation proceedings where they have remained eligible for suspension of deportation and not placed in removal proceedings. The court found that, although the application for asylum presented "a new twist", the case was not substantively distinguishable from *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594 (9th Cir. 2002), where it had held that an alien who had presented herself to the INS before April 1, 1997, did not have "settled expectations" of being placed in deportation proceedings and was properly in removal proceedings because the INS had not filed the Notice To Appear until after April 1, 1997.

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IN ABSENTIA

■Ninth Circuit Holds Alien Obliged To Notify Attorney General Of Address Change

In *Manjiyani v. INS*, __F.3d__, 2003 WL 1858174 (9th Cir. April 11, 2003) (Gould, *Murguia* (D.J. Ariz., sitting by designation); B. Fletcher (dissenting)), the Ninth Circuit held that the BIA properly denied petitioner's motion to reopen her *in absentia* deportation proceedings. The petitioner pursued an adjustment application with INS in Los Angeles, but made no attempt to advise INS in Seattle, where she was in deportation proceedings, of her change of address. Proper notice sent to the alien's former Washington address did not reach her, and she was ordered deported *in absentia*.

The court held that "INS does have an obligation to maintain a centralized database of current addresses for aliens placed in deportation proceedings," but that the obligation is triggered by an alien's proper filing of a change of address, and that the alien's mere filing of forms relating to adjustment of status proceedings in another city was not sufficient to provide the Attorney General with notice of her address change.

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■First Circuit Holds Exceptional Circumstances Excused Alien's Failure To Appear

In ***Herbert v. Ashcroft***, __ F.3d__, 2003 WL 1824784 (1st Cir. April 8, 2003) (*Lynch*, Cyr, Stahl), the First Circuit vacated the BIA's denial of a motion to reopen an *in absentia* order, and remanded the case for further proceedings on petitioner's request for cancellation of removal. The petitioner, who arrived 30 minutes late for his removal hearing, requested reopening of his case, citing heavy rainfall, traffic congestion, long lines entering the courthouse, and his counsel's filing of an emergency motion for continuance on the day of his hearing due to counsel's need to be present in federal district court the same day. The court held that petitioner was entitled to be represented by his counsel, who was unavailable, and that the Immigration Judge's rejection of the motion to reopen was arbitrary and capricious under the circumstances.

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The Ninth Circuit held that an "exceptional and extremely unusual hardship" determination is a subjective, discretionary judgment that has been carved out of its appellate jurisdiction.

JURISDICTION

■Ninth Circuit Holds It Lacks Jurisdiction To Review Denial of "Exceptional and Extremely Unusual" Hardship

In ***Romero-Torres v. Ashcroft***, __F.3d__, 2002 WL 1957104 (9th Cir. April 28, 2003) (Nelson, *McKeown*, Silverman), the Ninth Circuit held that an "exceptional and extremely unusual hardship" determination is a subjective, discretionary judgment that has been carved out of its appellate jurisdiction by INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B).

The court rejected petitioner's argument that the absence of the "in the opinion of" language, that was originally in the suspension of deportation provisions, did not change "the essential, discretionary nature of the hardship decision." The court added that its decision was consistent with the other circuits that have considered the question. *See e.g. Gonzalez-Oropeza v. Attorney General*, 321 F.3d 1331 (11th Cir. Feb. 2003).

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■Eleventh Circuit Holds Constitutionality Of Pre-Final Order Detention Of An Inadmissible Mariel Cuban Is Moot

In ***De La Teja v. Ashcroft*** __F.3d__, 2003 WL 367927 (Black, *Marcus*, Middlebrooks) (11th Cir. February 21, 2003), the Eleventh Circuit held that the constitutionality of detain-

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ing an inadmissible Mariel Cuban convicted of a controlled substance offense pending a final order of removal was a moot issue when the removal order became final during the alien's appeal. The court also held that removal proceedings cannot form a basis for a double jeopardy claim, and that the district court's order vacating its prior order of removal against the alien did not preclude INS from subsequently initiating removal proceedings against him.

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■Seventh Circuit Finds That Petitioner Waived His Right To Challenge The BIA's Procedural Dismissal Because He Had Not been Presented It In His Appellate Brief

In ***Awe v. Ashcroft***, __F.3d__, 2003 WL 1665668 (7th Cir. March 31, 2003) (*Flaum*, Coffey, Ripple), the Seventh Circuit held that petitioner had waived his right to challenge the BIA's procedural dismissal because he had not been presented it in his appellate brief. The petitioner, a native of Nigeria, has traveled repeatedly to the United States since 1969 when he first entered as a graduate student. From 1993 to 1995, he served as Minister of Agriculture in Nigeria. He claimed that he could not return to Nigeria because he had been persecuted in the past for his political beliefs and his pro-American sympathies. An immigration judge found that petitioner was ineligible for asylum because the loss of appointment as Minister of Agriculture and two-hour interrogation did not rise to the level of persecution. Petitioner filed an appeal to the BIA, but after checking the box indicating that he would file a separate brief, he never did so. Consequently, the BIA summarily dismissed the appeal under 8 C.F.R. § 3.1(d)(2)(i)(D), for failure to file a brief.

Before the Seventh Circuit, petitioner did not challenge the summary dismissal on procedural grounds, but rather argued that the BIA had "rubber-stamped" the decision below denying him asylum. The court agreed with the government's argument that petitioner had waived his right to challenge the procedural grounds for the BIA's decision because he had failed to raise the issue in his appellate brief. The court also found, *in dicta*, that the regulation explicitly gives the BIA authority to dismiss procedurally defective appeals, and that there was nothing in the record to suggest that the BIA had inappropriately used its power.

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■Ninth Circuit Holds It Lacks Jurisdiction Over Constitutional Claims Raised By Aggravated Felon

In ***Cedano-Viera v. Ashcroft***, __F.3d__, 2003 WL 1793056 (Trott, *Rymer*, Tallman) (9th Cir. March 26, 2003), the Ninth Circuit held that it lacked jurisdiction to review petitioner's removal based on his sexual abuse of a minor, an aggravated felony. The petitioner, who had entered the United States in 1993 as an LPR, was later convicted of Lewdness with a Child Under Fourteen Years of Age in violation of Nevada law. Based on that crime, the INS charged that the petitioner was removable as an alien who had been convicted of an aggravated felony. The IJ agreed and the BIA subsequently summarily affirmed the decision under 8 C.F.R. 3.1(a)(7). On appeal petitioner argued that the BIA's summary affirmance violated his due process rights to appeal and that his ineligibilty for INA § 212(h) offended principles of equal protection.

The Ninth Circuit did not reach the merits of petitioner's contentions because it found that his conviction involving sexual abuse of a minor qualified as an aggravated felony. Consequently, the court lacked jurisdiction under INA § 242(a) to consider the petition for review. The court also rejected the parties' arguments that it retained jurisdiction over the petitioner's constitutional challenges, holding that such claims must be raised in a habeas petition in district court. The court noted however, "it remains instructive that the Government acknowledges that background principles of statutory constructions and constitutional concerns must be considered in determining the scope of IIRIRA's jurisdiction-stripping provisions."

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The court also rejected the parties' arguments that it retained jurisdiction over the petitioner's constitutional challenges, holding that such claims must be raised in a habeas petition in district court.

■Seventh Circuit Grants Stay Of Order Permitting Alien Terrorist To Enter The United States, Orders Expedited Briefing.

The Seventh Circuit granted a stay in ***Samirah v. Ashcroft***, No. 03-1786 (7th Cir. March 26, 2003), where the lower court had ordered the Attorney General and the INS to issue documents that would have permitted petitioner to reenter the United States. The petitioner, a Jordanian national, applied for adjustment of status and was granted advance parole to leave the United States to visit a sick family member. On his return, he presented himself at a pre-inspection station abroad and was served by INS with a notice revoking his advance parole on security grounds. Petitioner then filed a complaint in the Northern District of Illinois, asking the district court to order INS to permit his entry into the United States so that he may continue his adjustment application. On March 25, the district court ordered the government allow Petitioner to enter the United States on or before March 28.

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On March 26, the government appealed the order and moved for a stay in the Seventh Circuit. The Seventh Circuit immediately granted the stay motion and ordered expedited briefing and argument.

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MOTION TO REOPEN

■Third Circuit Holds It Has No Jurisdiction To Review BIA's Decisions Declining To Exercise *Sua Sponte* Power to Reopen.

In ***Calle-Vujiles v. Ashcroft,*** 320 F.3d 472 (3rd Cir. 2003) (Sloviter, Rendell, *Stapleton*), the Third Circuit held that the BIA's decision whether to invoke its *sua sponte* authority to reopen deportation proceedings is committed to BIA's unfettered discretion, and that the very nature of such decisions renders them not subject to judicial review.

The petitioner, a citizen of Equador, failed to appear at his deportation hearing and was ordered removed in absentia. Subsequently he moved to reopen the proceedings asserting that he had not received notice. An immigration judge denied the motion and the BIA affirmed that decision. Petitioner then filed an unsuccessful petition for review with the Third Circuit. More than a year after the BIA's decision dismissing his appeal, petitioner filed a motion to reconsider and to reopen in light of *Matter of M-S-* and *Matter of G-Y-R-*. The BIA denied the motions as time-barred. Back before the Third Circuit, petitioner claimed that the BIA had violated his due process rights because it had not *sua sponte* reopened the proceedings. The Third Circuit agreed with the First, Ninth, and Eleventh Circuit, which held that under 8 C.F.R. § 3.2(a), the BIA is given unfettered discretion as to whether to invoke its *sua sponte* authority. *See Luis v. INS*, 196 F.3d 36 (1st Cir. 1999); *Ekimian v. INS*, 303 F.3d 1153 (9th Cir. 2002); and *Anin v. Reno*, 188 F.3d 1273 (11th Cir. 1999).

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■Ninth Circuit Holds That Motion Alleging Ineffective Assistance Of Counsel Is Properly Construed A Motion To Reopen

In ***Iturribarria v. INS***, __F.3d__, 2003 WL 721733 (9th Cir. March 4, 2003) (Canby, Gould, *Berzon*), the Ninth Circuit upheld the BIA's denial of Iturribarria's motion to reopen because he did not demonstrate that he was prejudiced by ineffective assistance of counsel. However, the court held that the BIA abused its discretion when it construed the motion to reopen based on ineffective assistance as a motion to reconsider, and that the ineffective assistance claim warranted equitable tolling of the regulatory time limit.

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The Fifth Circuit held that the summary affirmance procedures do not deprive the courts "of a basis for judicial review and that the procedures do not violate due process."

■Ninth Circuit Holds No "Exceptional Circumstances" Justify Reopening Where Alien Failed To Appear And Was Ineligible For Relief.

In ***Valencia v. INS***, __F.3d__, 2003 WL 751314 (9th Cir. March 6, 2003) (Hall, Thompson, Berzon), the Ninth Circuit upheld the denial of petitioner's motion to reopen her *in absentia* deportation hearing. Valencia claimed that she was tardy for the hearing because she misunderstood when it was scheduled to begin, and this constituted an "exceptional circumstance" meriting reopening. The court found that due process was satisfied because petitioner was properly served notice of her hearing, and distinguished its prior case of *Singh v. INS*, 295 F.3d 1037 (9th Cir. 2002), because Valencia, unlike Singh, was not eligible for any relief from deportation.

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STREAMLINING

■Fifth Circuit Rejects Due Process Challenge To BIA's Streamlining Procedures

In ***Soadjede v. Ashcroft***, __F.3d__, 2003 WL 1093979 (5th Cir. March 28, 2003) (King, Barksdale, Stewart) (*per curiam*), the Fifth Circuit rejected a due process challenge to the BIA's summary affirmance procedures under 8 C.F.R. § 3.1(a)(7). On November 17, 200, an immigration judge denied petitioner's applications for asylum, withholding, and protection under the Convention Against Torture. The IJ denied petitioner's application for asylum on the basis that it had not been filed within one year after his arrival to the United States. The applications for withholding and CAT were denied because petitioner failed to meet his burden of proof. On appeal, the BIA summarily affirmed the decision under 8 C.F.R. § 3.1(a)(7).

Before the Fifth Circuit, the petitioner argued that the BIA order provided an inadequate basis for judicial review and that he had received less than a "full and fair trial." The court noted that it had previously joined the majority of circuits in approving the authority of the BIA to affirm the immigration judge's decision without giving additional reasons. The court then

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agreed with the reasoning of the First Circuit in *Albathani v. INS*, 318 F.3d 365 (1st Cir. 2003), and found that the summary affirmance procedures do not deprive the courts "of a basis for judicial review and that the procedures do not violate due process." The court noted that it, too, uses summary affirmance procedures in enumerated circumstances. Finally, the court found that petitioner had abandoned the issues of the merits of his immigration appeal because he had not raised them in his brief.

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STAYS

■Justice Kennedy Finds Circuit Split On Important Stay Issue Is Appropriate For Certiorari, But Denies Stay Pending Appeal In The Eleventh Circuit

In ***Kenyeres v. Ashcroft***, __U.S.__, 2003 WL 1442464 (Kennedy, J., in chambers) (U.S. March 21, 2003), Circuit Justice Kennedy, in a published decision denied an asylum applicant's request for a stay of removal pending the Eleventh Circuit's adjudication of his petition for review. Justice Kennedy stated that the Eleventh Circuit requires a stay applicant to prove by clear and convincing evidence that the execution of the removal order is prohibited as a matter of law as provided by INA § 242(f)(2), but the Second, Sixth, and Ninth Circuits evaluate stays under the less stringent traditional standard, which factors equities and the likelihood of success. He stated that the issue is important and the Supreme Court should decide it, but this case was inappropriate for certiorari because the alien's stay request would fail under either standard. He described the conflicting policies at stake: a stay standard that is too high might impede the courts' ability to hear meritorious cases, but the traditional standard would frustrate Congress' effort to screen out meritless petitions.

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■Seventh Circuit Upholds BIA's Streamlining Procedure In Asylum Case

In ***Ciorba v. Ashcroft***, __F.3d__, 2003WL1400572 (Easterbook, *Ripple*, Rovner) (7th Cir. March 21, 2003), the Seventh Circuit affirmed the BIA's streamlined decision denying petitioner's request for asylum. The petitioner, a native of Romania, claimed persecution on account of her family's resistance to the former Communist regime and the dictatorship of Ceausesco. In 1990 petitioner's father fled Romania, and a year later, her mother left, too. Petitioner, however, remained in Romania until 1996. She testified that, on a monthly basis, the police would summon her to the police station and question her about her father. She never was arrested, jailed, threatened, or abused in any way.

"This case simply does not present the sort of situation in which the collective judgment of the Board, as opposed to the review of one member, might have resulted in an different assessment of the petitioner's case."

An immigration judge found that petitioner was ineligible for asylum because the harassment that she had suffered at the hands of the local Romanian authorities did not rise to the level of persecution. The BIA affirmed that decision, without opinion, under 8 C.F.R. § 3.1(a)(7).

The Seventh Circuit agreed with the immigration judge's findings that petitioner's experience in Romania constituted harassment and not persecution. The court stated that petitioner's experiences were similar to those that the court had previously recognized as constituting harassment and not persecution. *See Yadegar-Sargis v. INS*, 297 F.3d 596 (7th Cir. 2002); *Mousa v. INS*, 223 F.3d 425 (7th Cir. 2000). Accordingly, the court found that petitioner's asylum application had been properly denied. The court also held that the BIA's decision to employ the streamlined procedure for review by a single member of the BIA was not an abdication of its appellate responsibilities. The court found that the case under review raised no substantial issue of law, and, under existing precedent and there was no factual basis on which to support a grant of asylum. "This case simply does not present the sort of situation in which the collective judgment of the Board, as opposed to the review of one member, might have resulted in an different assessment of the petitioner's case," explained the court.

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VOLUNTARY DEPARTURE

■Ninth Circuit Holds That Voluntary Departure Period In Removal Cases Begins To Run When BIA Enters Order Granting Voluntary Departure

In ***Zazueta-Carrillo v. Ashcroft***, __F.3d__, 2002 WL 1090170 (9th Cir. March 13, 2003) (Canby, *Gould*; Berzon (concurring)), the Ninth Circuit held that the period for voluntary departure in removal cases begins to run when the BIA enters an order granting voluntary departure. The court held that the rationale behind *Contreras-Aragon v. INS*, 852 F.2d 1088 (9th Cir. 1988) (*en banc*) (in which it found that the voluntary departure period begins to run when the court concludes review of the BIA's decision), was eliminated with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act.

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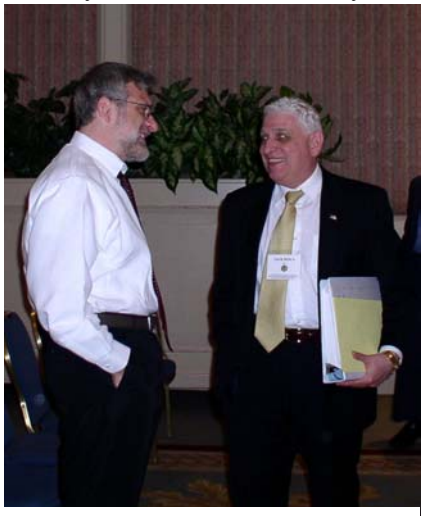

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OIL CONFERENCE

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230 government attorneys who attended the Seventh Annual Immigration Litigation Conference held in St. Louis on April 21-24, 2003. The Attorney General specifically mentioned the work done in several cases involving the removal of terrorists and the Supreme Court's asylum decision in *Ventura*.

Among DOJ officials who spoke were: Acting Associate Attorney General and Assistant Attorney General for the Civil Division Robert D. McCallum, Jr., Laura L. Flippin, Deputy Assistant Attorney General, Kris Kobach, Counsel to the Attorney General, Kevin D. Rooney, Director of the Executive Office for Immigration Review. Among the Department of Homeland Security officials who spoke were: Mark Wallace, General Counsel, Bureau of Immigration and Customs Enforcement, and Alfonso Robles, Chief Counsel, Bureau of Customs and Border Protection, and Barry O'Melinn, Senior Counsel for Enforcement Transition at ICE. Circuit Judge Tallman (9th Cir.) and District Judge Webber (E.D. Mo.) joined Chief Immigration Judge Creppy and Immigration Judge Sam DerYeghiayan in giving a view from the bench.

INSIDE OIL

■**AND THE WINNER IS** – The winner of the OIL's Best Bulletin Article of the Year Award is Trial Attorney **Audrey Hemesath,** whose article "Defending the BIA's Streamlining Regulations" appears in the November 2002 issue of the Immigration Litigation Bulletin.

■Congratulations to **Thankful Vanderstar,** who completed the 2-day Avon walk this weekend (26 miles) and raised close to $2,000 for breast cancer research.

■On March 13, 2003, OIL attorneys **Papu Sandhu, Blair O'Connor,** and **Julia Doig** gave a training presentation at the U.S. Attorney's office in Chicago. The topics included: mandamus, declaratory judgment, habeas, and citizenship issues. Assistant United States Attorney and Deputy Chief of the Civil Division **Craig Oswald** provided helpful links between the topics and the Chicago caseload.

■**Ann Carroll Varnon** has been awarded a $100 prize in poetry for her winning submission in a recent competition of the Chevy Chase Branch of the National League of American Pen Women.

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"

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