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SUPREME COURT TO CONSIDER WHETHER COURTS HAVE JURISDICTION TO HEAR CHALLENGES TO GUANTANAMO DETENTIONS

On November 10, the Supreme Court granted and consolidated two petitions for writs of *certiorari* filed, through their "next friends," by Kuwaiti, Australian, and British nationals captured abroad during hostilities in Afghanistan and held in United States military custody at the Guantanamo Bay Naval Base in Cuba. *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted sub nom.* ***Rasul v. Bush***, 72 USLW 3171, 72 USLW 3323, 72 USLW 3327 (Nov. 10, 2003). The Supreme Court has limited its review to the following question: "Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba."

"Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba."

The petitioners filed their actions in the District Court for the District of Columbia contesting the legality and conditions of their confinement also sued for injunctions and declaratory judgment. Petitioners invoked, among other provisions, the Due Process Clause of the Fifth Amendment, the Alien Tort Act, the Administrative Procedure Act, United States military regulations, and international law. After holding a consolidated hearing in both cases on the jurisdictional issue, the district court granted the government's motion to dismiss both actions. *Rasul v. Bush*, 215 F.Supp.2d 55 (D.D.C. 2002). In the courts' view all of the petitioners' claims went to the lawfulness of their custody and thus were cognizable only in *habeas corpus*. Relying upon *Johnson v. Eisentrager* 339 U.S. 763 (1950), the district court held that it did not have jurisdiction to issue writs of *habeas corpus* for aliens detained outside the sovereign territory of the United States. The district court rejected petitioner's contention that *Eisentrager* applies only to the detention of "enemy" aliens.

In *Eisentrager*, the Supreme Court held that the peti-

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GOVERNMENT AQUIESCES IN DETAINED ALIEN'S PETITION FOR CERTIORARI

The government has acquiesced in a petition for *certiorari* filed by an inadmissible alien who was ordered removed to Cuba, but whose removal has been blocked because the Cuban government refuses to accept him. In ***Benitez v. Wallis***, 337 F.3d 1289 (11th Cir. 2003), *petition for cert. filed*, __U.S.L.W.__ (U.S. Oct. 14, 2003) (No. 03-7434), the Eleventh Circuit held that a non-admitted alien's ongoing detention pending his removal does not deprive him of any statutory or constitutional rights. The court also held that the Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), which imposed a presumptive six-month limit on the post-final order detention of previously-admitted aliens, did not impose a similar limit on non-admitted aliens.

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GOVERNMENT SEEKS EN BANC REHEARING ON ISSUE OF APPROPRIATE HABEAS RESPONDENT

The government is seeking rehearing *en banc* of two Ninth Circuit decisions both of which raise the question of who is the appropriate respondent in an *habeas* action filed by a detained alien. ***Armentero v. Ashcroft***, 340 F.3d 1058 (9th Cir. 2003), and ***Ali Ali v. Ashcroft***, __F.3d__, 2003 WL 22137018 (9th Cir. Sept. 17, 2003). The government sought to consolidate both petitions because the *Ali Ali* panel had relied on the *Armentero* panel's holding that the Attorney General is the appropriate respondent in an *habeas corpus* action. However, on November 24, 2003, the Ninth Circuit denied the motion. The government will thus be filing two separate petitions for rehearing *en banc*.

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Highlights Inside

SUPREME COURT TO CONSIDER COURTS' JURISDICTION TO HEAR CLAIMS OF GUANTANAMO DETAINEES

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tioners, German prisoners who had been captured in China, tried by military commissions, and then transferred to a United States Army prison in Germany, did not have a right to petition for a writ of *habeas corpus*. The prisoners had sought writs of habeas corpus in the United States District Court for the District of Columbia, claiming *inter alia*, violations of the Constitution, other laws of the United States, and the 1929 Geneva Convention. The Supreme Court held that "the privilege of litigation" had not been extended to the German prisoners. "These prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." *Eisentrager*, 339 U.S. at 778.

"The 'enemy status' of aliens captured and detained is a quintessential political question on which the courts respect the actions of the political branches."

On appeal, the D.C. Circuit agreed with the district court that, under *Eisentrager*, the detainees could not seek *habeas* relief in *any* United States court because they are aliens without connection to the United States, captured abroad during military operations. The court found that the Guantanamo detainees have much in common with the German prisoners in *Eisentrager*. "They too are aliens, they too were captured during military operations, they were in a foreign country when captured, they are now abroad, they are in the custody of the American military, and they have never had any presence in the United States," said the court. The court reasoned that "if the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty." The court also rejected the detainees' claim that the court had jurisdiction under the Alien Tort Act, 28 U.S.C. § 1350, because the United States was holding them in violation of treaties and international law. Petitioner then unsuccessfully sought rehearing *en banc*.

In their petitions for *certiorari* petitioners generally contended that the D.C. Circuit misread the Court's opinion in *Eisentrager*. First, they argue that the petitioners in *Eisentrager* were convicted war criminals, while they have never been charged or offered any process. Second, they contend that in *Eisentrager* the prisoners were enemy aliens while they are citizens of U.S. allies. And, third, they claim that Guantanamo Bay is not China, but rather a fully American enclave under the exclusive jurisdiction and continuous control of the United States government.

In its response to the petitions for certiorari the government argued that the lower courts had correctly interpreted *Eisentrager* as foreclosing petitioners' efforts to invoke the jurisdiction of the U.S. courts to challenge the legality of the military's detention of aliens abroad. In the Government's view, *Eisentrager* stands for the principle that "aliens are accorded rights under the Constitution and the laws of the United States only as a consequence of their presence within the United States." The government also argued that the Guantanamo detainees qualify as "enemy aliens" because they were seized in the course of active and ongoing hostilities against United States and coalition forces. "The 'enemy status' of aliens captured and detained," noted the government, "is a quintessential political question on which the courts respect the actions of the political branches." The government also stated that in *Eisentrager* the jurisdictional rule was based on sovereignty and not on "malleable concepts like de facto control" over Guantanamo Bay.

DETAINED ALIEN FILES PETITION FOR CERTIORARI

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The Eleventh Circuit's decision deepened a conflict among the circuit courts, in which the Eleventh, Third, Eighth, and Fifth Circuits have taken the government's position, while the Sixth and Ninth Circuits have taken the contrary view and imposed a six-month limit on the detention of non-admitted aliens. In urging the Supreme Court to hear this case and resolve the circuit conflict, the Solicitor General stated that the Sixth and Ninth Circuits' requirement that criminal aliens be released into the community is erroneous and has fostered uncontrolled immigration from nations with which the United States does not have full diplomatic relations, or that do not cooperate in repatriation of their nationals. This new avenue of unlawful entry jeopardizes United States border security which could be exploited by hostile governments or organizations.

The Solicitor General further argued that the Sixth and Ninth Circuits were incorrect in holding that *Zadvydas* imposes a six-month limit on the detention of all aliens who cannot be immediately removed. *Zadvydas* addressed only the applicability of the detention statute, 8 U.S.C. § 1231 (a)(6), to "aliens who were admitted to the United States but subsequently ordered removed." Therefore, "read [ing] an implicit limitation into the statute" with respect to aliens stopped at the border and denied admission, "would create, rather than minimize, the sort of friction between the Judicial and Legislative Branches that the canon of constitutional avoidance is intended to avoid."

According to DHS there are currently over 1000 non-admitted, arriving aliens who are under final orders of exclusion or removal who cannot be immediately removed because of diplomatic delays.

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QUASHING A FOREIGN CONVICTION DOES NOT NECESSARILY ELIMINATE CONVICTION FOR IMMMIGRATION PURPOSES

The Board of Immigration Appeals ("Board") recently addressed the issue of whether a Canadian court's quashing of a conviction eliminates the conviction for U.S. immigration purposes in *Matter of Pickering,* 23 I. & N. Dec. 621 (BIA 2003). The Board concluded that the conviction continues to stand for the purposes of the alien's application for adjustment of status.

Mr. Pickering is a native and citizen of Canada who was admitted to the United States for a temporary period. Prior to his admission into the United States, on November 6, 1980, Pickering was convicted in Chatham, Ontario, Canada, of the offense of unlawful possession of a restricted drug, namely Lysergic Acid Diethylamide ("LSD"), in violation of Section 41(1) of the Food and Drugs Act. He was sentenced to pay a fine of $300.00, or in default of payment, to thirty days in custody.

In March 1993, Pickering filed an application for adjustment of status. Since he was aware that his controlled substance conviction rendered him ineligible for an adjustment, Mr. Pickering applied to the Ontario Court of Justice (General Division) to have the conviction quashed. On June 20, 1997, the Court quashed the conviction. The former Immigration and Naturalization Service ("INS") denied Mr. Pickering's application for adjustment of status on August 21, 1998. On the same date, the INS issued a Notice to Appear ("NTA"), initiating removal proceedings against Mr. Pickering. The NTA charged him with being a deportable alien subject to removal from the United States under Section 237(a)(1)(A) of the INA, 8 U.S.C. § 1227(a)(2)(A)(iii), because, at the time of entry or adjustment of status, he was inadmissible to the United States, as an alien who has been convicted of a violation of a law of a foreign country relating to a controlled substance, under Section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(2)(A)(i)(II).

At a hearing on September 21, 1999, the Immigration Judge found that Mr. Pickering was removable as charged based upon his criminal conviction, ineligible for relief from removal, and ordered him removed to Canada. The Immigration Judge refused to conclude that the Canadian court's order quashing the conviction eliminated it for the purposes of adjustment of status in the United States, and determined that the court's action was only for rehabilitative purposes, to allow Mr. Pickering to permanently remain in this country. Petitioner appealed the Immigration Judge's decision to the Board.

In its analysis, the Board panel (Filppu, Guendelsberger, and Pauley, Board Members) initially pointed out that section 101(a)(48)(A) of the INA, 8 U.S.C. § 1101(a)(48)(A), which defines the term "conviction," does not directly address the "quashing" of a conviction. The Board looked to two of its own cases, *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999), and *Matter of Rodriguez-Ruiz,* 22 I. & N. Dec. 1378 (BIA 2000), which addressed vacated convictions. In *Roldan*, the Board held that under the section 101(a)(48)(A) no effect is to be given in immigration proceedings to a state action meant to expunge, dismiss, cancel, vacate discharge, or remove a guilty plea or other record of guilt or conviction through a state rehabilitative statute. On the other hand, in *Rodriguez-Ruiz*, the Board concluded that a conviction that was vacated on the merits did not constitute a conviction for immigration purposes.

If a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the alien remains convicted for the purposes of immigration.

The Board then noted that the issue presented by *Pickering* was not directly controlled by either of the aforementioned cases. The holding in *Roldan* is limited to cases in which the alien has received the benefit of a state rehabilitative statute that attempts to eliminate any record of guilt. *Rodriguez-Ruiz* is applicable to cases involving a statute authorizing the vacation of a conviction because of the legal merits of the legal proceedings underlying that conviction.

The Board also looked to federal court decisions that have considered whether section 101(a)(42)(A) of the INA, 8 U.S.C. § 1101(a)(42)(A) provides an exception from the definition of a conviction, for vacated convictions. The Board pointed out that in *Herrera-Inirio v. INS*, 208 F.3d 299, 306 (1st Cir. 2000), the First Circuit stated that the "'emphasis that Congress placed on the *original* admission of guilt plainly indicates that a subsequent dismissal of the charges, based solely on rehabilitative goals and not on the merits of the charge or on a defect in the underlying criminal proceedings, does not vitiate that original admission." The First Circuit concluded that state rehabilitative programs that vacate a conviction on a basis other than a constitutional or statutory violation do not change the outcome under 8 U.S.C. § 1101(a)(48)(A).

The Board also considered *United States v. Campbell,* 167 F.3d 94 (2d Cir. 1999), in which the Second Circuit concluded that no section of the immigration law creates an exception from the definition of a conviction for vacated convictions. The court found that a state order setting aside a conviction was invalid since it was not based on a showing that a conviction was improperly obtained, or that the defendant was innocent.

Finally, the Board analyzed *Zai-*

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QUASHED FOREIGN CONVICTION MAY STILL BE A CONVICTION FOR IMMIGRATION PURPOSES

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tona v. INS, 9 F.3d 432 (6th Cir. 1993), which arose within the jurisdiction of the Sixth Circuit like Mr. Pickering's case. In *Zaitona*, the Sixth Circuit determined that a district court order vacating a federal conviction should not be recognized for immigration purposes because the only reason for the entry of the order was to make an untimely judicial recommendation against deportation and to prevent that deportation from occurring. The court stated that the sentencing court should not be allowed to vacate a judgment for reasons not related to the validity of the original conviction and guilty plea. The Board noted that the Sixth Circuit's approach is consistent with other federal court decisions including: *Renteria-Gonzalez v. INS*, 322 F.3d 804 (5th Cir. 2000); *Beltran-Leon v. INS*, 134 F.3d 1379 (9th Cir. 1998); *cf. United States v. Bravo-Diaz*, 312 F.3d 995 (9th Cir. 2002); *United States v. Tablie*, 166 F.3d 505 (2d Cir. 1999); and *Doe v. INS*, 120 F.3d 200 (9th Cir. 1997).

The Board concluded that based upon the federal decisions and section 101(a)(48)(A)'s definition of a conviction, that there is a significant distinction between convictions vacated on the basis of substantive or procedural defects in the underlying proceedings leading to a conviction, and those vacated as a result of events occurring after the conviction, such as the application of a rehabilitative statute or immigration hardships. The Board pointed out that if a court vacates a conviction based on a defect in the underlying criminal proceedings, the alien in question does not have a conviction for immigration purposes. If, on the other hand, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the alien remains convicted for the purposes of immigration. The Board noted that the fact that Mr. Pickering's case involves a foreign conviction does not alter the analysis regarding the purpose of the vacation of the conviction.

To determine the purpose of the quashing of Mr. Pickering's conviction, the Board looked to the law under which the Canadian court quashed the conviction as cited in its order, the language of the order itself, and the reasons presented by Mr. Pickering to the court in his request to have the conviction quashed. The Canadian court's order did not reference the law under which the conviction was vacated, although Mr. Pickering's affidavit did note the Canadian Charter of Rights and Freedoms.

The Board pointed out that neither the Court's order, nor Mr. Pickering's request, identifies a basis to question the integrity of the underlying criminal proceedings and subsequent conviction. Mr. Pickering's affidavit stated that his conviction is a bar to his permanent residence in the United States, and indicates that the purpose for the requested order is to eliminate that bar.

The Board pointed out that if a court vacates a conviction based on a defect in the underlying criminal proceedings, the alien in question does not have a conviction for immigration purposes.

Under these circumstances, the Board found that the quashing of the conviction was not based on a defect in the conviction or in the underlying proceedings, but instead appeared to have been entered solely for immigration purposes. Accordingly, the Board agreed with the Immigration Judge that Mr. Pickering continues to have a conviction for possession of a controlled substance within the meaning of section 101(a)(48)(A) of the Act, and dismissed his appeal.

Mr. Pickering has filed a petition for review of the Board's decision and a motion for a stay of removal in the Sixth Circuit. *See Pickering v. Ashcroft*, Docket No. 03-3928. In response, the government filed a motion to dismiss his petition for review for lack of jurisdiction, and opposed the motion for a stay of removal as moot.

Specifically, the government argued that section 242(a)(2)(C) of the INA, 8 U.S.C. § 1252(a)(2)(C), bars the court's jurisdiction over final orders of removal issued against aliens convicted of controlled substance violations. Regarding the stay of removal, the government argued that because this court does not have jurisdiction to review petitioner's case under section 242(a)(2)(C) of the INA, his request for a stay of removal was moot and should have been denied for that reason.

Petitioner filed a response to the government's motion to dismiss on August 20, 2003, arguing that the Board erred in determining that his conviction remained for immigration purposes, when the Canadian court quashed it. On September 18, 2003, the court granted petitioner's motion for a stay of removal, and referred the government's motion to dismiss to a panel of judges, who had not adjudicated it as of November 24, 2003.

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Contributions To The Immigration Litigation Bulletin Are Welcomed!

Summaries Of Recent Federal Court Decisions

ADMINISTRATIVE APPEAL

■Sixth Circuit Affirms Denial Of Untimely Administrative Appeal

In ***Sswajje v. Ashcroft***, __F.3d__, 2003 WL 22737363 (6th Cir. November 21, 2003) (*Clay*, Cook, Stafford, (Senior District Judge)), the Sixth Circuit affirmed a BIA decision dismissing as untimely an appeal from a denial of asylum. The court also found that the BIA had properly denied a motion to reconsider.

The petitioner, a citizen of Uganda, did not file a timely notice of appeal from the IJ's denial of his asylum application because his attorney claimed that he had been distracted by a "mini-crisis" in his law practice. When the BIA dismissed the appeal as untimely, petitioner moved to reconsider explaining that his attorney had miscalculated the due date for the appeal, and that he had shown that he would face persecution if returned to Uganda. The BIA denied the motion, finding that petitioner had shown no error of fact or law.

The court found without merit petitioner's contention that the BIA should have considered his appeal timely in light of "extraordinary and unique circumstances," namely the excusable neglect of his attorney in missing the appeal deadline. *See Ansari-Gharachedaghy v. INS*, 245 F.3d 512 (6th Cir. 2000). The court also stated that petitioner could not rely on the alleged merits of his asylum claim to show unique circumstance because under such an approach the court would have to review the decision of the immigration judge. The court said that it could not undertake such review because petitioner had failed to exhaust his administrative remedies.

The court also found that the BIA had properly denied the motion to reconsider. The court rejected for failure to exhaust petitioner's claim that his attorney's failure to file an appeal constituted ineffective assistance of counsel.

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ASYLUM

■Seventh Circuit Affirms Denial of Asylum To Former Algerian Police Officer

In ***Ahmed v. Ashcroft***, __F.3d__, 2003 WL 22455965 (7th Cir. October 30, 2003) (Easterbrook, Manion, *Wood*), the Seventh Circuit affirmed a decision of the BIA finding that petitioner failed to establish past persecution or a well-founded fear of future persecution in Algeria. The petitioner had served in the military and state police forces from 1982 to 1996. Following his resignation in 1996, petitioner spent the next three years evading Islamic militants who, he believed, posed a grave threat to his safety. He testified that he moved to the desert and lived on a farm for two years without incident. In 1999, petitioner slipped into the United States as a stowaway. When placed in removal proceedings, petitioner applied for asylum, withholding, and for protection under CAT. The BIA denied the requested reliefs finding that petitioner had not shown past persecution on account of his former status a military police officer and that he had no shown future persecution because he had failed to adequately develop his claim.

"Fearing for one's life while employed as a police officer will not normally amount to persecution within the meaning of the statute."

The Seventh Circuit, agreed with the BIA's finding that petitioner had failed to present any detailed facts suggesting that he personally suffered from acts of persecution, or that his move to a remote desert farm was necessary to evade such acts. "Unfulfilled threats are generally insufficient to establish past persecution," said the court. The court also agreed with the BIA's finding that "fearing for one's life while employed as a police officer will not normally amount to persecution within the meaning of the statute." However, the court noted that to the BIA might have gone too far if it was suggesting that there is a *per se* rule against finding past persecution for dangers encountered during service as a police officer. As to issue of future persecution, the court noted that petitioner had relied almost exclusively on his own uncorroborated testimony to support his claim. While the regulations establish that an applicant's own credible testimony without corroboration may be sufficient to sustain the burden of proof, the court noted that petitioner' testimony was "almost entirely devoid of dates or other specific details." The court also concluded that, insofar as petitioner's claim was based on his membership in a particular social group, he had failed to establish that "former members of the security and police forces in Algeria are targeted in a manner that is distinct from the risks borne by other segments of the Algerian society."

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■Third Circuit Remands Asylum Case For Further Analysis Of Credible Petitioner's Corroborating Evidence

In ***Miah v. Ashcroft***, __F.3d__, 2003 WL 22310368 (3d Cir. October 9, 2003) (Roth, *Fuentes*, Aldisert), the Third Circuit reversed the BIA's order finding petitioner credible but denying his asylum application for failure to produce corroborating evidence. In its decision, the BIA had rejected the IJ's

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adverse credibility finding, but essentially adopted his finding that petitioner had not provided sufficient evidence corroborating his asylum claim. The court concluded that the BIA should have explored the corroboration issue and reached its own conclusion, or remanded to the IJ with instructions to reconsider the corroboration issue in light of its finding that petitioner's testimony was credible.

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■Ninth Circuit Finds That Somalian's Asylum Claim Was Not Credible, But Remands For Further Analysis Of Whether It Was Frivolous

In ***Farah v. Ashcroft***, __F.3d__, 2003 WL 22682434 (9th Cir. November 14, 2003) (*Schroeder*, Thompson, Graber), the Ninth Circuit upheld the Immigration Judge's determination that the petitioner did not provide a credible story in support of his asylum claim where there were concerns about his identity, his membership in a claimed social group, and his date of entry into the United States.

The petitioner, a native of Somalia, stated in his asylum application that he had arrived in New York on January 24, 1999, using concededly false travel documents, and then transferred immediately to a flight to San Diego. Petitioner then filed an asylum application with the INS on February 16, 1999, and conceded is removability at a removal hearing on April 27, 1999. Petitioner claimed fear of persecution on account of membership in a particular group, namely, his clan. He also stated that he had a fear of persecution by the United Somali Congress. The IJ found petitioner's testimony and that of the witnesses that he presented to be inconsistent and not credible. In particular, the IJ questioned petitioner's story that he navigated through a foreign country and language, found a place to live, and filed an asylum application within a short period of time. The IJ also determined that petitioner had filed a frivolous asylum application under INA § 208(d)(4). The BIA summarily affirmed the IJ's decision.

The Ninth Circuit held that the IJ had established a legitimate, articulable basis to question petitioner's credibility and had offered specific, cogent reasons for disbelief, noting the elements of those findings went to key elements of the asylum application. The court also found that because petitioner's claim under CAT was based on the same evidence as that presented for his asylum claim, the BIA properly rejected that claim. However, the court overturned the IJ's finding that petitioner's asylum application was frivolous, noting that the IJ had relied on different discrepancies than those in his credibility determination and had not allowed the petitioner an adequate opportunity to explain those discrepancies.

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■Seventh Circuit Reverses Adverse Credibility Finding In Rwandan Asylum Case

In ***Uwase v. Ashcroft***, __F.3d__, 2003 WL 22746539 (7th Cir. November 21, 2003) (Posner, *Kanne*, Evans), the Seventh Circuit vacated a denial of asylum finding that the IJ's adverse credibility determinations were not based on substantial evidence and the IJ had given undue weight to petitioner's alleged lack of corroborating evidence.

The petitioner, a native of Rwanda, entered the United States in 1998 on a student visa. When she overstayed her visa, the INS placed her in removal proceedings. Petitioner then sought asylum, claiming that in Rwanda she would be subject to persecution based on her mixed ethnicity and imputed political opinion. Petitioner testified that she had been persecuted in her home country because she had mixed Hutu-Tutsi tribal heritage. She recounted how she had been tortured and raped by soldiers at gunpoint. The IJ denied petitioner's asylum request finding her testimony internally inconsistent and not persuasive. The IJ also determined that petitioner had not established her mixed tribal heritage. The BIA affirmed without opinion the IJ's decision.

The Seventh Circuit noted that the bulk of the evidence consisted of petitioner's testimony which the IJ had found to be incredible and uncorroborated. The court then reviewed each of the four inconsistencies that the IJ had pointed out in the decision and found that they were either not supported by the record or by a "valid, cogent reason," or that they were minor or had nothing to do with the asylum claim. The court also faulted the IJ for placing too much weight on petitioner's inability to provide the testimony of her sister, who had apparently been granted asylum in the United States. Although petitioner's sister had been listed as a witness, she failed to appear on the day of the hearing because, according to petitioner, she was ill with stomach problems. The court remanded the case for a rehearing before the IJ to provide petitioner with an opportunity to present live testimony from her sister and for both parties to present additional documentary evidence.

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■Third Circuit Concludes That It Was Unreasonable To Expect Corroborating Evidence In Congolese Asylum Case

In ***Mulanga v. Ashcroft,*** __F.3d__, 2003 WL 22683042 (3d Cir. November 14, 2003) (Alito, *Fuentes*, Surrick (E.D. Pa.)), the Third Circuit reversed the BIA's decision summarily affirming the Immigration Judge's denial of the alien's application for asylum and withholding of

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removal. The Immigration Judge determined that the alien had failed to sustain her burden of proof, in large part because she had failed to submit evidence corroborating her husband's political affiliation.

The petitioner, a citizen of the Democratic Republic of the Congo, formerly Zaire, was detained at her arrival at John F. Kennedy International Airport while seeking to enter the United States with a fraudulent Canadian passport. After demonstrating a credible fear of persecution, petitioner was placed in removal proceedings where she applied for asylum, withholding, and CAT protection. Petitioner claimed that she had been subject to persecution because of her antigovernment activities and those of her husband who was a member of the opposition party, the Union for Democracy and Social Progress. Petitioner also testified that while participating in a protest organized by the UDSP she had been shot in the chest by a government soldiers. The IJ denied petitioner's application for asylum finding that she had not corroborated parts of her story, and that there were inconsistencies between her testimony at the hearing and what she had stated at the interview at the airport.

"An applicant for asylum must provide corroborating evidence only when it would be reasonably expected."

The First Circuit found, *inter alia*, that the IJ's request for corroborating evidence was unreasonable. The court noted that in *Abdulai v. Ashcroft*, 239 F.3d 542 (3d Cir. 2001), it had upheld the corroborating rule set forth by the BIA in *Matter of S-M-J-*, __I&N Dec.__ (BIA 1997), and had formulated a three-part inquiry. Here, the court found that the IJ's findings and conclusions regarding corroboration were not supported by substantial evidence in the record. In particular, the court found unreasonable "to require corroboration given that [petitioner] had been away from her home for a four-year period before her hearing and she had been in INS detention since her arrival in New York in July 2001." "An applicant for asylum must provide corroborating evidence only when it would be reasonably expected," said the court. The court also found that the IJ had also failed to explain why petitioner's testimony was lacking in credibility.

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CANCELLATION

■Fifth Circuit Finds That Voluntary Departure Interrupts The Accrual of Continuous Physical Presence For Cancellation

In *Mireles-Valdez v. Ashcroft,* __F.3d__, 2003 WL 22432814 (5th Cir. October 27, 2003) (*Barksdale*, DeMoss, Benavides), the Fifth Circuit affirmed the BIA's denial of cancellation of removal. The petitioner, a citizen of Mexico, first entered the United States illegally in 1973. Petitioner departed the United States in 1998, but was apprehended at the border 14 days later. He then accepted voluntary departure in lieu of being placed in proceedings. The day after his departure, petitioner again illegally reentered the United States. On February 8, 1999, the INS instituted removal proceedings against the petitioner as a an alien present illegally in the United States. The IJ held that petitioner was ineligible for cancellation finding that his acceptance of voluntary departure in 1998 interrupted the continuous presence requirement. The BIA affirmed without opinion.

Preliminarily, the Fifth Circuit, noting the "consistent interpretation" of INA § 242(a)(2)(B), joined the Third, Seventh, Ninth, and Eleventh Circuits to hold that it retains jurisdiction to review statutory eligibility questions related to an application for cancellation of removal. The court held that voluntary departure under the threat of deportation proceedings interrupts the accrual of continuous physical presence required for cancellation, giving significant deference to the Attorney General's interpretation expressed in *Matter of Romalez-Alcaide*, 23 I&N Dec. 423 (2002).

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■Tenth Circuit Finds That It Lacks Jurisdiction Over Determination That Aliens Failed To Establish Exceptional And Extremely Unusual Hardship

In ***Ventura v. Ashcroft***, __F.3d__, 2003 WL 22674819 (10th Cir. November 13, 2003) (*Hartz*, Baldock, McConnell), the Tenth Circuit granted the government's motion to dismiss for lack of jurisdiction. The court found that it had no jurisdiction to review the BIA's discretionary determination that the aliens failed to establish exceptional and extremely unusual hardship to their lawful permanent resident parents and United States citizen children. The court additionally determined that the "incidental impact" of the aliens' deportation upon their citizen children did not present a substantial constitutional question, over which the court would have jurisdiction.

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CITIZENSHIP

■Third Circuit Rejects Claim That An Alien Becomes a "National" By The Mere Filing Of An Application For Naturalization

In ***Salim v. Ashcroft***, __F.3d__, 2003 WL 22751083 (3d Cir. July 15, 2003) (Nygaard, Stapleton, Cowen) (*per curiam*), the Third Circuit dismissed for lack of jurisdiction a petition for review because the petitioner had been convicted of an aggravated felony.

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Petitioner, a native of Bangladesh, entered the United States as an immigrant in 1986. In 1996 he filed an application for naturalization. On January 22, 2001, petitioner pled guilty to conspiracy to commit bank fraud, and ten counts of bank fraud in violation of 18 U.S.C. §§ 371, 372. Shortly thereafter, the INS instituted removal proceedings on the basis that petitioner had been convicted of an aggravated felony. The IJ found him removable as charged. On appeal to the BIA, petitioner contended that he was a "national" of the Untied States because he had filed a naturalization application. The BIA rejected the argument and dismissed the appeal.

"Simply filing an application for naturalization does not prove that one 'owes allegiance to the United States.'"

The Third Circuit, following the Ninth Circuit's decision in *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964 (9th Cir. 2003), held that "simply filing an application for naturalization does not prove that one 'owes allegiance to the United States.'" For an alien, such as the petitioner, said the court, "nothing less than citizenship will show 'permanent allegiance to the United States." The court noted that petitioner is now permanently ineligible for citizenship as a result of his conviction of an aggravated felony. INA § 316(a)(3).

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CRIMES

■Third Circuit Finds That Drug Trafficking Conviction Under New Jersey Statute Is Not An Aggravated Felony

In ***Wilson v. Ashcroft***, __F.3d__, 2003 WL 22810289 (3d Cir. Nov. 26, 2003) (Alito, Ambro, *Chertoff*), the Third Circuit reversed a district court's judgment that petitioner had been convicted of an aggravated felony, finding that petitioner's drug trafficking conviction under New Jersey law was not necessarily punishable as a felony under an analogous federal statute.

The petitioner, a permanent resident and a native of Jamaica, pled guilty in 1995, of possession with intent to distribute more than one ounce of marijuana. On October 5, 2002, the INS issued against the petitioner a final administrative order of removal under INA § 238(b). Petitioner sought injunctive relief and also filed a habeas petition. The district court dismissed the petition and denied injunctive relief finding that petitioner had been convicted of an aggravated felony. The Third Circuit explained that a state narcotics violation can be an aggravated felony under the INA when either the crime categorized as a felony under state law involves drug "trafficking," or when the state drug violation, regardless of categorization, would be punishable as a felony under an analogous federal statute. Here the lower court had applied the latter approach. However, the Third Circuit noted that under the analogous federal statute approach, a person who distributes a small amount of marihuana for no remuneration is only punishable for a misdemeanor. Because the state statute under which petitioner pled guilty "does not contain sale for remuneration as an element," said the court, "we cannot determine from the state court judgment that [petitioner's] conviction necessarily entails a finding of remuneration." Accordingly, the court remanded the case to the district court to determine whether petitioner had been convicted of an aggravated felony under the categorization test.

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■Seventh Circuit Finds That A State Offense Of Battery Requires The Use Of Violent Force For Purposes Of Defining A Crime Of Domestic Violence Under INA § 237(a)(2)(E)

In ***Flores v. Ashcroft***, __F.3d__, 2003 WL 22805692 (7th Cir. Nov. 26, 2003) (*Easterbrook,* Wood, Evans), the Seventh Circuit held that petitioner who had been convicted of beating his wife after violating a restraining order and sentenced to a one-year prison sentence had not been convicted of a crime of domestic violence under INA § 237(a)(2)(E).

The petitioner had pled guilty in Indiana to battery, a misdemeanor, which in that state is any touching in a rude, insolent, or angry manner. Petitioner contended that his offense was not a "crime of violence" under 18 U.S.C. § 16, because Indiana law does not require much of either touching or injury. Thus, any contact, direct or indirect, such as a "snowball, spitball, or paper airplane qualifies" as a "touch" if it hits the target. While the court observed that petitioner "did no tickle his wife with a feather during a domestic quarrel, causing her to stumble and bruise her arm," it essentially agreed with his argument that to be convicted a battery that a conviction for battery does not necessarily entail the use of "physical force" as required under 18 U.S.C. § 16. As the court explained "every battery involves 'force' in the sense of physics or engineering, where force means the acceleration of mass. A dyne is the amount of force needed to accelerate one gram of mass by one centimeter per second. That's a tiny amount; a paper airplane conveys more . . . perhaps one could read the word 'force' in § 16(a) to mean one dyne or more, but that would make hash of the effort to distinguish ordinary crimes from violent ones." Accordingly, the court concluded that "to avoid collapsing the distinction between violent and non-violent offenses," the court would "insist that the force be violent in nature –the sort that is intended to cause bodily injury, or at minimum likely to do so." The court declined to defer to the BIA's interpretation of criminal stat-

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ute and also found not persuasive the holding in *Matter of Martin*, 23 I&N Dec. 491 (BIA 2002), which the BIA had applied to petitioner's case.

In a concurring opinion, Judge Evans, while questioning whether his efforts to "expend[ ] dynes" to press the keys in his wordprocessor was worth the effort, noted that while the majority opinion was "correct on the law" it was "divorced from common sense. . . A common-sense review here should lead one to conclude that [petitioner] committed a 'crime of domestic violence.'"

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DETENTION

■Supreme Court Denies Certiorari In South Florida Lawsuit Challenging Detention Of Haitians Pending Adjudication Of Their Asylum Applications

On November 17, the Supreme Court denied plaintiffs' petition for writ of certiorari in ***Moise v. Bulger***, 321 F.3d 1336 (11th Cir. 2003). The Eleventh Circuit had affirmed the district court's "well-reasoned order" which dismissed the complaint/class action habeas petition after finding that the INS Acting Deputy Commissioner validly exercised his delegated authority over parole determinations and provided facially legitimate and bona fide reasons for instituting the detention policy. The original plaintiffs, six inadmissible Haitians who arrived in South Florida aboard a rickety boat, had asked the district court to order their release on parole on an emergency basis and to enter an injunction concerning the INS's future processing of parole requests by members of the putative class.

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■District Court Finds Lack of Jurisdiction To Consider Habeas Challenge to INS Detainer

In ***Bell v. United States***, __F. Supp.2d__, 2003 WL 22769162 (D. Conn. Nov. 20, 2003), the court denied a *writ of mandamus* and *habeas corpus* to an alien serving a prison sentence who challenged an INS detainer. Petitioner was serving a twenty-five months' sentence for a weapon offense. The petitioner claimed that the detainer violated his liberty interest because it had prevented him from being released on parole and had barred his access to specialized programs within the prison facility. Petitioner also sought an immediate hearing before an immigration judge. The court held that petitioner did not have a statutory right to release from state custody or to an immediate hearing regarding the INS detainer and potential deportation proceedings.

"A detainer is not a definitive decision regarding deportation or an order that will necessarily result in INS taking petitioner into custody."

The court also held that it lacked jurisdiction to consider the habeas petition because petitioner was not in INS custody. The court explained that "a detainer is not a definitive decision regarding deportation or an order that will necessarily result in INS taking petitioner into custody." Rather, said the court, it is more of a notice than an order or demand for custody.

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MOTION TO REOPEN

■Ninth Circuit Holds That BIA Properly Denied Motion To Reopen Where Alien Failed To Comply With *Matter of Lozada*

In ***Reyes v. Ashcroft***, __F.3d__, 2003 WL 22660175 (9th Cir. November 12, 2003) (*Wallace*, Hall, O'Scannlain), the Ninth Circuit affirmed the BIA's denial of the alien's motion to reopen and rescind a removal order entered *in absentia*, based on ineffective assistance of counsel. The alien failed to comply with *Matter of Lozada's* requirements that he submit an affidavit detailing his relationship with prior counsel, and failed to provide evidence that he informed his former counsel of the ineffective assistance allegations.

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■First Circuit Upholds BIA's Denial of Reopening And Reconsideration In Chinese Asylum Case

In ***Zhang v. INS***, __F.3d__, 2003 WL 22471948 (1st Cir. Nov. 3, 2003) (Boudin, Selya, *Siler*), the First Circuit affirmed the BIA's denial of petitioner's motion to reopen and reconsider his asylum claim. Petitioner, a citizen of China, is a promoter of democracy. In 1982, he scaled the wall of the U.S. embassy seeking asylum. U.S. officials delivered petitioner to the Chinese authorities who placed him in a labor camp. A year later petitioner escaped, but was recaptured and given three more years at hard labor for "counter-communist behavior." He eventually obtained a visa to travel to the United States. In 1996 Petitioner arrived in the United States and unsuccessfully sought asylum. He was returned to China where he remained without incident or persecution until he returned to the United States in 1987. Subsequent to his second arrival, petitioner became active in China-democracy protests in the United States. The IJ and subsequently the BIA denied his application for asylum for failure to meet the burden of proof. Petitioner then filed a timely motion to reopen and reconsider, which the BIA denied on the basis that he had failed to sustain his burden of proof.

As a threshold matter, the court found that it lacked jurisdiction over petitioner's untimely petition for review of the BIA's order denying asylum.

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"This need to timely appeal is a strict jurisdictional requirement," said the court. The court then held that the BIA rationally explained and supported its denial of petitioner's motion to reopen. The court also found that the BIA had properly denied the motion to reconsider because it raised previously undeveloped arguments. Petitioner had made the assertion in the notice of appeal to the BIA but had not filed a brief. The court noted that it, too, has a similar rule refusing to consider arguments raised but not briefed.

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■First Circuit Affirms Denial Of Motion To Reopen Based On History of Immigration Fraud

In ***Krazoun v. Ashcroft***, __F.3d__, 2003 WL 22778337 (1st Cir. Nov. 25, 2003) (Boudin, *Cyr*, Lynch), the First Circuit affirmed the BIA's denial of petitioner's motion to reopen. The petitioner, a citizen of Syria initially entered the United States on a student visa in 1979. In 1993 he married a United States citizen who filed a visa petition on his behalf. However, petitioner's spouse withdrew the visa petition because of spousal abuse and a year later obtained a divorce. In 1990, petitioner married another United States citizen; months after this second marriage the couple stopped living together. Nonetheless in March 1991, petitioner adjusted his status to conditional permanent resident. In January 1993, a joint motion was submitted by petitioner and by allegedly his spouse attesting that they were continuing to cohabit. The INS grew suspicions when petitioner's spouse repeatedly failed to appear at the interview and her signature on the motion did not appear to match other samples of her handwriting.

In 1994, petitioner's second wife filed for divorce. The INS eventually terminated the conditional resident status and placed petitioner in deportation proceedings. The INS also denied petitioner's application for a waiver of the filing of the joint petition. Petitioner argued that he had married in "good faith" and that his marriage was not a sham. The IJ sustained both the termination of the conditional status and the denial of the waiver. The IJ also found that petitioner lacked credibility and "would lie to get what he wants."

The BIA summarily affirmed that decision. Petitioner did not seek judicial review. Instead, he filed motion to reopen, claiming that in September 2001, he had married a third United States citizen who was expecting a child. The BIA denied the motion for two reasons. First, without regard to the validity of the third marriage, petitioner had a demonstrated history of having entered into two previous marriages with the fraudulent intention to evade immigration laws. Second, petitioner did not produce an approved visa petition and failed to show that his third marriage was bona fide.

The First Circuit, after noting the broad discretion of the BIA to decide when to reopen, agreed with the finding that petitioner's first two marriages had been entered into with intent to evade immigration law, and thus "gave rise to a common-sense inference, as well as the legitimate suspicion that [petitioner's] third marriage -- more likely than not -- had been entered into with the same illegitimate aim."

The court also determined, that even if petitioner had adduced clear and convincing evidence that the third marriage was other than a sham, "the BIA acted well within its discretion in bypassing such an inquiry an denying [petitioner] a discretionary adjustment of status based exclusively upon his history of recurrent immigration fraud."

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REINSTATEMENT

■Tenth Circuit Holds That Review Of Reinstatement Order Should Be Filed With Court Of Appeals

In ***Duran-Hernandez v. Ashcroft,*** __F.3d__, 2003 WL 22438587 (10th Cir. July 21, 2003) (Tacha, Holloway, *Ebel*), the Tenth Circuit affirmed the former INS' decision to reinstate the petitioner's prior order of removal. The petitioner filed a *habeas* petition with the district court challenging his reinstated order. The district court transferred the case to the Tenth Circuit which held that it had jurisdiction to review reinstatement orders. The circuit court denied petitioner's due process challenge to the reinstatement procedures on grounds of no prejudice, because petitioner had not contested that he had been previously ordered removed and that he had illegally reentered the United States.

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STREAMLINING

■First Circuit Remands AWO Decision Finding That It Provided Inadequate Basis For Judicial Review

In ***Haud v. Ashcroft***, __F.3d__, 2003 WL 22776433 (1st Cir. Nov. 25, 2003) (Howard, Campbell, *Stahl*), the First Circuit remanded an asylum case finding that the BIA's affirmance without opinion of an IJ's decision provided an inadequate basis for judicial review. The petitioner, a citizen of Algeria entered the United States as a nonimmigrant in 1995 and never departed. On November 30, 1999, petitioner was arrested by the FBI for carrying a fraudulent green card. Law enforcement agencies were interested in petitioner because of their concerns of possible terrorists activities on the eve on the millennium. The arrest resulted in numerous newspaper articles and television broadcasts linking petitioner to

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terrorists groups. Petitioner was not criminally prosecuted. Instead, he was placed in removal proceedings for overstaying his visa. Petitioner then applied for asylum, withholding, and protection under CAT. The IJ denied relief, finding that his application for asylum was untimely, and alternatively, that he had failed to demonstrate past or future persecution. The BIA affirmed that decision without opinion under 8 C.F.R. § 1003.1(e)(4).

Preliminarily, the court noted that shortly after the IJ had decided the case, the BIA in an unpublished decision had held that an Algerian man, who had also been arrested in Boston under circumstances similar to that of petitioner, had been found eligible for asylum based on imputed political opinion. Petitioner brought that decision to the attention of the BIA.

> "The AWO cannot be used to deny our legitimate review power if we are left without a proper basis to determine our own jurisdiction to evaluate the Board's own critical analysis."

The court found that, since the BIA affirmed without opinion, it could not determine whether the BIA had affirmed the IJ on the timeliness ground, on the merits, or on both grounds. The BIA's decision, said the court, "effectively prevents a reviewing court from knowing whether the affirmance of the IJ's decision is reviewable or nonreviewable. The AWO cannot be used to deny our legitimate review power if we are left without a proper basis to determine our own jurisdiction to evaluate the Board's own critical analysis."

The court then rejected the government's contention that the BIA's decision to streamline a particular case is not subject to judicial review because it is committed to agency discretion. The court found that the BIA's "own regulation provides more than enough law by which a court could review" the BIA's decision to streamline. In particular, the court noted that when the BIA's review of an IJ decision often hinges on Circuit court precedent, "we are well-equipped, both statutorily and practically to review a decision to streamline."

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SUSPENSION

■Sixth Circuit Holds That Stop-Time Rule For Suspension Applies To Cases Where Orders To Show Cause Were Issued Prior To IIRIRA

In ***Suassuna v. INS***, 342 F.3d 578 (6th Cir. 2003) (*Keith*, Cole, Weber District Judge)), the Sixth Circuit affirmed the BIA's denial of petitioner's application for suspension of deportation. The BIA had found that the stop-time rule precluded petitioner from establishing his eligibility for suspension of deportation, even though his case was pending at the time of IIRIRA's enactment.

The court held that for purposes of determining eligibility for suspension of deportation in cases that were pending as of April 1, 1997, the law of the Circuit was that the alien's period of continuous physical presence ends upon service of the order to show cause, even if such order was issued prior to the enactment of the stop-time rule. The court rejected petitioner's contention that the Supreme Court's decision in *St. Cyr* called for a re-examination of the court's prior decisions on the applicability of the stop-time-rule.

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VOLUNTARY DEPARTURE

■Ninth Circuit Finds Appeal To Board Withdrawn After Alien Voluntarily Departed To Mexico For One Day

In ***Aguilera-Ruiz v. Ashcroft***, __F.3d__, 2003 WL 22479999 (9th Cir. November 4, 2003) (*Rymer*, Tallman, Leighton), the Ninth Circuit held that a voluntary departure from the United States by a resident alien who was subject to a removal order served to execute the order of removal and thus constituted a withdrawal of the alien's appeal to the BIA. The court rejected the alien's argument that his trip to Mexico to purchase party supplies was "brief, casual, and innocent," finding that 8 C.F.R. § 1003.4 provided for no such exception.

The petitioner had been a lawful permanent resident since 1981. After being deported, and while his appeal was pending before the BIA, Petitioner went to Tijuana, Mexico "to buy tequila, candies, and pinatas for a party." The BIA deemed his appeal withdrawn under its regulation at 8 C.F.R. § 1003.4. Petitioner then filed a *habeas* action seeking to reinstate his appeal so that his claim for § 212(c) relief could be considered. The district court denied the petition. On appeal, petitioner contended that his departure was within the *Fleuti* exception and that BIA's regulation was ultra vires. The court held that petitioner's departure was distinguishable from that in *Fleuti* where the alien had left the country free of any sanctions and not under a threat of deportation. The court also found that it was within the scope of the Attorney General's authority to establish 8 C.F.R. § 1003.4. Under this rule "any voluntary departure from the United States following entry of an order of deportation will be deemed to withdraw a pending appeal and to render the order of deportation final. This is so regardless of whether the trip is 'brief, casual, and innocent' for no such exception exists.'"

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CASES SUMMARIZED IN THIS ISSUE

Ordered liberty is the reason that we are the most open and the most secure society in the world. Ordered liberty is a guiding principle, not a stumbling block to security.

Attorney General Ashcroft

REHEARING EN BANC SOUGHT IN TWO NINTH CIRCUIT CASES

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In *Ali Ali,* the panel also affirmed a nationwide injunction that currently prohibits the removal of aliens who are subject to final order of removal to Somalia. The panel held, *inter alia*, that aliens cannot be removed to Somalia because that country does not have a functioning government to accept their return. The government also seeks review of this issue. It contends that the panel misconstrued the statute to require the United States to obtain the "acceptance" in this case of Somalia, prior to removing Somali nationals. The government finds support for its argument in *Jama v. INS*, 329 F.3d 630 (8th Cir. 2003), where the Eight Circuit, in addressing the same issue in an individual petition for review, held that the statute does not impose an "acceptance" requirement.

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Editor's Note: The government's consolidated petition for rehearing is available on the OIL web site.

INSIDE OIL

The Annual OIL Holiday Office Party will be held on December 11, 2003, from 4:00-7:00 p.m. at the 1331 Lounge of the JW Marriot Hotel located on 1331 Pennsylvania Avenue. For additional information contact **Jennifer Keeney** at 202-305-02129 or **Keith Bernstein** at 202-514-3567.

On December 11, 2003, OIL will hold its Annual White Elephant Game in Suite 720N, National Place, from 2:00-3:30 pm. For additional information contact **David McConnell** at 202-616-4881.

INSIDE EOIR

The Attorney General has appointed Kevin A. Ohlson as EOIR's Deputy Director. Mr. Ohlson, who had been serving as Acting Deputy Director, was appointed as a Member of the BIA in March 2001. Prior to joining EOIR, Mr. Ohlson served in a variety of positions at the Department of Justice, including chief of staff to the Deputy Attorney General. Mr. Ohlson is a graduate of the Washington and Jefferson College and the University of Virginia School of Law.

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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