U.S. Department of Justice
Washington, D.C. 20530

Immigration Litigation Bulletin

Vol. 6, No. 7 **VISIT US AT: https://oil.aspensys.com** *July 31, 2002*

PETITIONS FOR CERTIORARI FILED IN TWO NINTH CIRCUIT ASYLUM CASES RAISING CREDIBILITY AND JUDICIAL REVIEW ISSUES

Contending that the Ninth Circuit has "defied the most basic rules of judicial review," the Solicitor General has filed petitions for certiorari in two asylum cases asking the Supreme Court to "correct the court of appeals' systematic departure from the requirements of the Immigration and Nationality Act and this Court's precedents in this widely litigated area of immigration law." The petitions were filed in the cases of ***Chen v. INS***, 266 F.3d 1094 (9th Cir. 2001), *pet. for cert. filed*, S. Ct. No. 02-25 (July 3, 2002), and ***Ventura v. INS***, 264 F.3d 1150 (9th Cir. 2001), *pet. for cert. filed*, S. Ct. No. 02-29 (July 5, 2002).

Chen involves an asylum applicant from the People's Republic of China (PRC), who first entered the United States illegally in 1995. At that time he claimed that he feared persecution because of his alleged participation in the pro-democracy movement. After being denied asylum and removed from the United States, he again reentered illegally in 1998 and again applied for asylum. This time he claimed that he feared persecution because of alleged resistance to the PRC's coercive family planning program. Eventually, the BIA, in a split opinion, found that petitioner was not credible and denied his request for asylum solely on that basis. In particular, the BIA noted that the applicant had previously submitted counterfeit birth certificates, had provided contradictory statements regarding his marital status, and had failed to mention an abortion notice that was placed in evidence.

> ***The Ninth Circuit has "defied the most basic rules of judicial review."***

The Ninth Circuit not only overturned the BIA's credibility finding for of lack of substantial evidence, but also found the applicant credible, eligible for asylum, and entitled to withholding of deportation. The court held, *inter alia*, that "adverse credibility determinations based on minor discrepancies, inconsistencies, or omissions that do not go to the heart of

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DISTRICT COURT LACKS JURISDICTION OVER DETENTION OF ALIENS AT GUANTANAMO BAY, CUBA

In two consolidated cases, the District Court for the District of Columbia held that it lacked jurisdiction to consider the constitutional claims of aliens detained at the military base in Guantanamo Bay, Cuba. ***Rasul v. Bush***, __F. Supp.2d__, 2002 WL 1760825 (D.D.C. July 30, 2002).

In the first case, styled *Rasul v. Bush*, two detainees and some friends and relatives, filed a petition for writ of habeas corpus requesting the court to order their release and to meet and confer with their counsel. In the case styled *Odah v. United States*, twelve Kuwaiti nationals and twelve of their family members filed an action for preliminary and permanent injunctions prohibiting the government from refusing to allow the Kuwaiti nationals to "meet with

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MICHAEL P. LINDEMANN RECEIVES ATTORNEY GENERAL'S AWARD FOR EXCEPTIONAL SERVICE

In recognition of his exceptional leadership, dedication, and service to the United States in fighting the war on terrorism, Michael P. Lindemann, Assistant Director, Office of Immigration Litigation, has been awarded the Attorney General's Award for Exceptional Service. This is the highest

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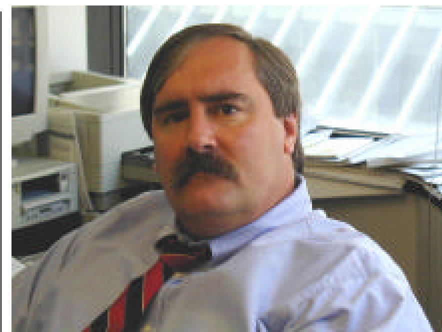

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SOLICITOR GENERAL FILES CERTIORARI PETITIONS IN TWO NINTH CIRCUIT ASYLUM CASES

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an applicant's asylum claim cannot constitute substantial evidence" to support a finding by the BIA.

The two questions presented by the petition for *certiorari* filed in *Chen* are: First, whether the court of appeals exceeded the proper scope of judicial review when it overturned a determination by the BIA that respondent did not testify credibly when seeking asylum and withholding of removal from the United States. Second, whether the court of appeals erred when, after reversing the BIA's determination that respondent failed to provide credible testimony, the court itself decided the remaining legal and factual issues relevant to respondent's eligibility for asylum and withholding of removal from the United States, rather than remanding the case to the BIA to address those issues in the first instance.

The Solicitor General urges the Supreme Court to grant *certiorari* because, *inter alia*, *Chen* "is part of a series of recent asylum and withholding of removal cases in which the Ninth Circuit has disregarded the fact-finding role assigned by statute, regulations, and this Court's decisions to immigration judges and the Board of Immigration Appeals." In particular, the Solicitor General contends that the Ninth Circuit "has turned the rule of *Elias-Zacarias* on its head by accepting the alien's explanation for an inconsistency unless the record compels the conclusion that the BIA was correct in rejecting the alien's explanation." On the other hand, the Solicitor General notes that other courts of appeals "faithfully apply those binding authorities and so enforce the asylum applicant's burden of proof, defer to the BIA's reasonable factual inferences, and recognize that evidentiary defects may carry cumulative significance."

The Ninth Circuit "has turned the rule of Elias-Zacarias on its head by accepting the alien's explanation for an inconsistency unless the record compels the conclusion that the BIA was correct in rejecting the alien's explanation."

The Solicitor General also argues that the Ninth Circuit's practice of "refusing to remand unresolved issues to the BIA for administrative consideration in the first instance contravenes this Court's repeated instruction outlining the correct relationship between the administrative agencies and reviewing courts, and further intrudes upon the Executive Branch's implementation of the INA." The petition points out that, as in *Chen*, the Ninth Circuit "frequently makes its own *de novo* finding that the alien has carried his burden of proof and announces the alien's eligibility for asylum. . . . routinely usurp[ing] the BIA's role in addressing withholding of removal." "The Ninth Circuit's non-deferential review of BIA asylum decisions puts the judiciary in the position of making immigration decisions that are reserved to Congress and the Executive Branch," notes the Solicitor General.

Finally, the petition for *certiorari* notes that one-third of the immigration proceedings involving asylum occur within the Ninth Circuit. The Ninth Circuit itself decides more asylum cases than all the other circuits combined. Therefore, the Solicitor General contends that the Ninth Circuit's departure from the judicial review requirements of the INA "compromises enforcement of the immigration laws."

The applicant in *Ventura,* a citizen of Guatemala, entered the United States illegally in 1993. In his asylum application he asserted that he would be killed by members of a Guatemalan guerilla organization if returned to Guatemala. Ventura testified that the guerillas had left messages at his house implying that harm would come to him and his family if he did not join the guerillas' cause. The Immigration Judge denied asylum, finding the case controlled by *Elias-Zacarias* where the Supreme Court held that a Guatemalan who refused to join a guerilla group had not shown persecution on account of a protected ground. As an additional basis, the Immigration Judge denied asylum based on changed country conditions. The BIA dismissed the appeal finding that Ventura's claim of persecution on account of a protected characteristic was based on speculation.

The Ninth Circuit reversed the BIA and granted Ventura asylum as well as withholding of deportation. The court held that the guerillas' threats and efforts to recruit Ventura constituted past persecution on account of imputed political opinion. The court also found that a State Department report in the record was insufficient to rebut the presumption of a well-founded fear of future persecution, even though the BIA had not reached that issue. The court declined to remand the case to the BIA, on the ground that "it would be compelled to reverse the BIA's decision if the BIA decided the matter against the applicant." Accordingly, the court granted asylum and withholding of deportation.

The question presented to the Supreme Court in *Ventura* is whether once a court of appeals rejects the BIA's particular grounds for finding that an asylum applicant failed to establish past persecution based on a protected characteristic, the court should remand to the BIA for further proceedings, rather than itself adjudicate the applicant's eligibility for relief. This is the same question raised by the Solicitor General in the *Chen* petition.

By Francesco Isgro and John Cunningham OIL

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District Court Finds That It Lacks Jurisdiction To Consider Claims Challenging Detention At Guantanamo Bay

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their families," "be informed of the charges, if any, against them," "designate and consult with counsel of their choice," and "have access to the courts or some other impartial tribunal." In both cases, the government moved to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

In *Rasul*, the petitioners sought to invoke the court's jurisdiction under a host of separate provisions. The court, however, found that the suit was brought explicitly as a petition for writ of habeas corpus and thus they could not invoke other jurisdictional bases because challenges to an individual's custody can only be brought under the habeas provision. In *Odah,* the plaintiffs sought to disclaim any desire to be released from confinement and thus avoid having their suit being considered as a petition for habeas corpus. However, the court found that plaintiffs in their complaint were challenging the lawfulness of their custody, and their prayer for relief was "nothing more than a frontal assault on their confinement." Accordingly, the court concluded that it would review the jurisdictional basis of the *Odah* case as if it were styled as a petition for a writ of habeas corpus.

The court then found that since both cases were petitions for habeas corpus on behalf of aliens detained by the United States at Guantanamo Bay, the Supreme Court's ruling in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and it progeny, was controlling and barred the court's consideration of the merits of the two cases. In *Eisentrager*, the Supreme Court held that no court had jurisdiction to entertain the claims of twenty-one German nationals who had been captured in China for engaging in espionage against the United States. The prisoners had been tried in China, convicted, and then placed under U.S. military custody in Germany. The Supreme Court held that the writ of habeas corpus did not extend to aliens held outside the sovereign territory of the United States.

The court found that in Eisentrager the Supreme Court rested its ruling not on the fact that the Germans were enemy aliens but that they were aliens outside territory over which the United States was sovereign.

Here, the district court found that the detainees at Guantanamo Bay were aliens who did not fall into any of the categories of cases — such as aliens seeking to become citizens — "where the courts have entertained the claims of individuals seeking accesss to this country." The court then rejected the petitioners' claims that *Eisentrager* was inapplicable because it only applied to "enemy" aliens and that no determination has been made about the aliens presently held in Guantanamo. The court found that in *Eisentrager* the Supreme Court rested its ruling not on the fact that the Germans were enemy aliens but that they were aliens outside territory over which the United States was sovereign. Thus, even in the absence of a determination that the detainees in Guantanamo Bay were "enemies," the *Eisentrager* ruling would apply.

Finally, the court held, finding support in *Cuban American Bar Ass'n v. Christopher*, 43 F.3d 1412 (11th Cir. 1995), that the military base in Guantanamo Bay is outside the sovereign territory of the United States.

By Francesco Isgro, OIL

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Michael P. Lindemann

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award in the Department of Justice. Mr. Lindemann shared the award with a team of Department officials who participated in drafting, negotiating, and securing passage of the USA Patriot Act in the Fall of 2001. In bestowing the award, Attorney General Ashcroft stated that "through their dedication, teamwork, and leadership, these recipients made a critical contribution to the foremost challenges of the new century — protecting America from future terrorist attacks and ensuring that the perpetrators of the September 11th attacks are brought to justice."

Mr. Lindemann joined the Department of Justice, Antitrust Division in 1976 through the Attorney General's Program for Honor Law Graduates. In 1982, he transferred to the Civil Division's Office of Immigration Litigation.

Mr. Lindemann is a graduate of the University of Virginia and the George Mason University School of Law. He directs the activities of an OIL team which specializes in counter-terrorism and national security litigation, as well as cases arising in the 1st, 2d, 3d, 4th, and District of Columbia Circuits.

Since 1987, Mr. Lindemann has been lead counsel in deportation and collateral constitutional litigation in Los Angeles involving members of an international terrorist organization, litigation that led to the Supreme Court's landmark decision in *Reno v. American-Arab Anti-Discrimination Committee*, 521 U.S. 471 (1999).

Mr. Lindemann serves as the Civil Division's representative on the Attorney General's Alien Terrorist Removal Court Task Force, and chairs the Task Force Litigation Unit. He is also the Civil Division's representative on the Justice Department's Working Group on International Human Rights Treaties.

***Ed. Note**: Read the Attorney General's Remarks at the 50th Awards Ceremony at page 5.*

RECENT REGULATIONS

Final Rule Authorizing State and Local Law Enforcement to Perform Immigration Functions During Mass Influxes of Aliens

On July 24, 2002, the Attorney General published a final rule that implements INA § 103(a)(8), permitting the Attorney General to authorize State and local law enforcement officers to exercise federal immigration enforcement authority on a voluntary basis during any mass influx of aliens, defined as "an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, [which] presents urgent circumstances requiring an immediate Federal response." 67 *Fed. Reg.* 48354 (July 24, 2002). The Attorney General stated that the measure would ensure that the INS can "respond in an expeditious manner to urgent and quickly developing events during a declared mass influx of aliens to protect public safety, public health, and national security . . . [while preserving] constitutional and civil rights protections."

This final rule becomes effective August 23, 2002, and requires the consent of state and local government officials in command of those law enforcement officers that participate, as well as appropriate notification to Congress and the Administration. Additionally, advance written "contingency agreements" with state and local law enforcement officials are required, and will detail the terms and conditions of authorization and a system for reimbursement of expenditures.

The Justice Department's authority to publish the final rule arises under § 372 of IIRIRA. Factors to be considered by the Attorney General in determining whether a "mass influx of aliens" exists are highlighted in 28 CFR 65.81, which defines an "immigration emergency." These factors include the magnitude of the influx, the likelihood of continual growth in that magnitude, any connection between the influx and increases in criminal activity, and any actual or imminent corresponding strain on law enforcement agencies. However, the Attorney General must identify a time period and geographic boundaries for any declared mass influx, and the Commissioner of the INS has authorization to redefine, expand, or decrease the identified boundaries as the situation dictates. The authorization of state and local law enforcement officials will exist only within the defined boundaries, except in cases of transporting and guarding of aliens in custody, and only within the defined time period.

In response to commenters' concerns about the prospect of state and local law enforcement officials exercising Federal immigration enforcement authority, the Attorney General emphasized that this authority will only be authorized during a declared mass influx of aliens, and only those immigration law enforcement functions deemed essential will be authorized. Because state and local law enforcement officers would likely be the first to respond to such a situation "[t]hey must be provided with the necessary authority to provide effective assistance to Federal authorities to contain and control the situation." Furthermore, civil rights safeguards such as defining limited boundaries and durations for such events, requiring training and certification for state and local officers who would exercise such authority, and creating a complaint reporting and resolution procedure and a complaint monitoring system have been incorporated into the regulation to address such concerns.

TPS Status Extended for Salvadorans

On July 11, 2002, the Attorney General extended for one year the Temporary Protected Status (TPS) for eligible nationals of El Salvador. The designation was previously set to expire on September 9, 2002. 67 *Fed. Reg.* 46000 (July 11, 2002). As a result, eligible nationals of El Salvador will be required to re-register for TPS status and apply for extension of employment authorization during the re-registration period, which runs from September 9, 2002 through November 12, 2002. The notice also automatically extends the validity of current Employment Authorization Documents (EADs) until March 9, 2003, in order to cover the period of time between which the old documents will expire and the new documents will be received.

Under INA § 244(b)(3)(A), the Attorney General must review conditions in a foreign state with TPS at least sixty days before expiration of the designation. If, in reviewing those conditions, the Attorney General does not find that they cease to justify the TPS designation, pursuant to § 244(b)(3)(C) it is automatically extended for six months, and can be extended to 12 or 18 months at his discretion. In this case, El Salvador initially received TPS on March 9, 2001, due to the effects of a number of severe earthquakes which left 1.6 million people without adequate housing. Because the Attorney General found that the conditions that warranted the initial designation still exist based on reports from the Department of State and the Department of Justice, TPS was extended.

According to a Department of State report, "While the Government of El Salvador has made great strides in responding to the immediate humanitarian impact of the earthquakes . . . much of the country remains devastated." This is attributed to delays in the disbursement of aid, and a subsequent drought effecting already depleted food stocks. The situation, therefore, justifies the Attorney General's finding that a substantial, but temporary, disruption of living conditions in El Salvador continues as a result of environmental disaster such that the country is unable, temporarily, to adequately handle the return of its nationals.

By Jill Quinn, OIL Summer Intern

Remarks of Attorney General John Ashcroft At His July 17, 2002 Awards Ceremony

One of my great privileges as Attorney General is the opportunity I have to speak on occasions such as this – ceremonies that honor the men and women of justice and at the same time pay an unspoken tribute to the role of family in service to the nation.

When justice honors its own, the hall is often filled – as it is today – with the husbands, wives, children and parents of the honorees. Your presence is a reminder that our service to our country is also a lesson to those around us. When we sacrifice for the cause of justice, we teach others that there are more important things than ourselves – causes and struggles and principles that transcend us; things that are worth sacrificing for. Welcome, and thank you for being here.

This past year has been an extraordinary one for America, for the Department of Justice, for the men and women who serve here, and for the families we love and support. Last year, when I stood in this great hall and presided over my first Attorney General's Awards ceremony, no one could have foreseen that the coming year would call us, not only to greater sacrifice for our country, but to a new way of serving our country.

History has presented us with a new challenge: to identify, disrupt and destroy the terrorism that threatens our nation. To meet this challenge, we have been called to a new mission of justice that is rooted in cooperation, driven by excellence, secured by accountability and focused on a single, overarching goal: to prevent future terrorist attacks. This call echoes that of another time in American history, over a hundred years ago, when a great president appealed to the nation to rise up to the daunting task that lay before it.

"The dogmas of the quiet past are inadequate to the stormy present," Abraham Lincoln told Congress in 1862, just before issuing the Emancipation Proclamation. "The occasion is piled high with difficulty, and we must rise with the occasion. As our case is new, so we must think anew and act anew."

The past year, too, has been a year piled high with difficulty. And among the high honors of my life has been to witness the many ways in which the Department of Justice has risen to meet the challenge that history has placed before us. Last November, I announced a reorganization and mobilization of the Department of Justice to meet our new mission. I called on the men and women of the Department to join me in rededicating ourselves to greater effectiveness, greater efficiency, and greater resolve in protecting the nation's homeland.

Today, at this 50th Annual Attorney General's Awards Ceremony, it is my great privilege to announce that the past eight months have seen great progress toward each of the ten goals we set forth in November.

- We've eliminated waste and retargeted our resources to better meet our terrorism prevention mission.
- We are demanding higher standards of accountability, and meeting those standards.
- We are attracting a diverse, high-quality workforce; improving our use of information technology; and forging more cooperative relationships with state and local law enforcement.
- Finally, we have initiated substantial restructuring and reform of the Federal Bureau of Investigation and the Immigration and Naturalization Service.

Today is a day to acknowledge these accomplishments. And today is a day to express our most heartfelt thanks. All of the men and women of the Justice Department have been a part of the accomplishments of this past year. The awards that will be presented today honor merely a representative sample of the excellent work that has been done. More than 540 individuals were nominated for awards in 27 categories. Of these, 188 were selected to receive special recognition in this awards ceremony. Twenty award recipients are from outside the Department of Justice.

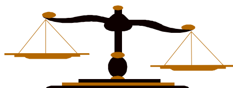
The Attorney General's Awards are an opportunity to express our gratitude. But these awards serve also as an opportunity to look to the future. As is so often the case, I find myself on occasions such as this drawn back to the words of Abraham Lincoln.

In his 1862 address, Lincoln sought to send a message to his fellow Americans that resonates to this day. As the Civil War took its destructive toll on the nation, Lincoln's message was designed to be both inspiring and humbling; to remind his fellow citizens of the great privilege and great responsibility that fell to them as the nation endured its time of greatest testing.

"Fellow citizens, we cannot escape history," Lincoln said. "We . . . will be remembered in spite of ourselves. The fiery trial through which we pass will light us down, in honor or dishonor, to the latest generation. We – even we here – hold the power and bear the responsibility."

We, too, cannot escape history and the challenge that history has put before us. All of us – each and everyone one of us – holds the power and bears the responsibility of defending the great, glorious, and eternal ideal of justice. I thank you for wielding this power respectfully, and upholding this responsibility faithfully. May the fiery trial through which we now pass be of short endurance, and may our passage light us down in honor for generations of Americans to see.

Thank you for our leadership. Thank your for your service. God bless you and God bless the United States of America.



Summaries Of Recent Federal Court Decisions

ASYLUM

■Fourth Circuit Affirms the BIA's Denial of Asylum Despite Finding That Video-conferenced Asylum Hearings May Violate Due Process

In ***Rusu v. INS***, ___F.3d___, 2002 WL 1609750 (4th Cir. July 22, 2002) (*King*, Widener, Hamilton), the Fourth Ciruit held that despite the "haphazard manner" of petitioner's asylum hearing, he was unable to establish prejudice because of the changed circumstances in his native country of Romania. Petitioner fled the Communist government in Romania in 1989, alleging that due to his leadership role with a transcendental meditation group he was subjected to interrogation and assaults by the Romanian secret police. Petitioner stated that during one interrogation the secret police tortured him by removing his teeth with pliers and a screwdriver. He fled to Yugoslavia and Canada, applying for asylum in both countries, before illegally entering the United States in 1999. After attempting to enter the United Kingdom with false documents he was forcibly returned to the United States, and removal proceedings were instituted against him. In February of 2002, he applied for asylum and withholding of removal.

Petitioner's asylum hearing was conducted via video-conferencing. His lawyer was present with the IJ, and petitioner participated from a detention facility. He declined an interpreter and the judge had some difficulty understanding him both because of his poor English and because of the injuries sustained to his mouth and teeth. The three hour hearing was plagued with communication problems. The resulting transcript contained 132 markings of "indiscernible". Despite these problems, the IJ indicated that she understood his testimony and denied relief, largely based on the changed circumstances in Romania.

> ***"We need not definitely resolve whether [petitioner] was accorded a full and fair hearing, because he is unable, in any event, to show any prejudice resulting from a due process violation."***

In addressing the due process challenge to the video-conferenced asylum hearing, the court acknowledged that petitioner's hearing was plagued with problems. However, said the court, "we need not definitely resolve whether [petitioner] was accorded a full and fair hearing, because he is unable, in any event, to show any prejudice resulting from a due process violation." Furthermore, because petitioner could not first establish his status as a refugee, the court found that he was unable to qualify for asylum based on his claim of past persecution.

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■Ninth Circuit Finds That Grant of Asylum Is Compelled by Record Despite Fact That Petitioner Failed To Communicate Political Beliefs To Persecutors

In ***Silva-Jacinto v. INS***, No. 00-71426, 2002 WL 1292794 (9th Cir. June 11, 2002) (Nelson, Noonan, Hawkins), the Ninth Circuit in an unpublished order granted petitioner's asylum petition, stating, "We grant . . .[the] petition, rather than remand this case for further proceedings, because the administrative record compels the conclusion that his fears of future persecution were based on a protected ground . . . [because petitioner] presented uncontradicted and credible evidence that he feared . . . persecution because of imputed political beliefs, particularly an allegiance to rival groups or subversives."

After being forcibly recruited into the Guatemalan armed forces, petitioner refused an assignment to the G-2 division based on its reputation for human rights abuses, citing his conscience and religious beliefs. After this, he was pursued, even after leaving the area. The court noted that petitioner's assertion that "Guatemalans who refuse the 'invitation' to join the ranks of the G-2 are then routinely marked for execution" was uncontradicted by the INS, and therefore, "compelled the conclusion that . . . [Petitioner's] fears of future persecution were objectively reasonable." The court, therefore, held that since his testimony was deemed credible and uncontradicted, it was sufficient to establish past persecution.

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■Ninth Circuit Holds Immigration Judge's Boilerplate Adverse Credibility Finding Not Supported By Substantial Evidence

In ***Paramasamy v. Ashcroft***, __F.3d__, 2002 WL 1544588 (9th Cir. July 16, 2002) (*McKeown*, Brunetti, Trott), the Ninth Circuit in a published decision reversed the BIA's denial of asylum to an applicant from Sri Lanka who had not been found credible. The court criticized the Immigration Judge for using a "boilerplate" demeanor finding (that was nearly identical to language the Immigration Judge used in two other Sri Lankan asylum cases decided the same week), to support an adverse credibility finding, and held that the BIA erred in upholding it. The court remanded the case for an individualized determination of credibility, suggesting that a different Immigration Judge hear the case.

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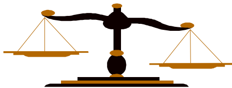

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■Seventh Circuit Affirms Board's Denial Of Asylum And Withholding Of Deportation

In ***Toptchev v. INS***, ___F.3d___, 2002 WL 1433405 (7th Cir. July 3, 2002) (Ripple, Kanne, *Rovner*), the Seventh Circuit, noting that "[a] petitioner who has not first presented an issue to the Board has failed to comply with the statutory requirement that he exhaust his administrative remedies," held that it lacked jurisdiction to address alleged errors in the IJ's decision where they were not first raised before the BIA. Furthermore, the Court concluded that there was sufficient evidence in the record to support the IJ's denial of asylum and withholding of deportation. Additionally, the court found that there was no due process violation where the Board took administrative notice of a State Department country conditions report on Bulgaria because petitioners were represented by counsel.

Petitioner and his wife alleged they were persecuted by Bulgarian security personnel on account of their religious and political beliefs. The alleged incidents included harassment, detainment, death threats, and physical assaults. The court found that while "we may assume . . . that the mistreatment that they experienced prior to their departure amounts to adequate evidence of past persecution . . . we must affirm the denial . . . if the evidence before the IJ supported his finding that [petitioners] are not likely to be persecuted in the future if returned to Bulgaria." To reach that conclusion, the IJ relied on a State Department report, as well as record evidence that petitioner's had relatives living in Bulgaria unharmed, petitioners had received official permission to leave Bulgaria, and petitioners still owned property there. In considering this evidence, the court noted that "certainly, none of these circumstances forecloses the possibility of future persecution, but collectively, and along with the *Profile*, they amount to 'reasonable, substantial, and probative evidence' supporting the IJ's determination."

Additionally, addressing the fact that the IJ considered a *Country Report* not in the administrative record, the court noted that petitioners could have filed a motion to reopen their case, producing evidence that might rebut these facts. Therefore, there was adequate evidence in the record to justify the BIA's decision.

> ***"A petitioner who has not first presented an issue to the Board has failed to comply with the statutory requirement that he exhaust his administrative remedies."***

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■Ninth Circuit Finds That Guatemalan Policeman Is Entitled To Asylum

In ***Zuleta-Aldana v. Ashcroft,*** 2002 WL 1453747 (9th Cir. July 3, 2002) (Schroeder, D.W. Nelson, Reinhardt), the Ninth Circuit in an unpublished decision reversed the BIA's denial of asylum. The alien, a former police officer, claimed that he feared returning to Guatemala because he was placed under house arrest, faced obstacles at work, heard of a death threat against him, and was in danger because he knew of his supervisors' illegal activities. The court held that the alien established a well-founded fear of persecution, despite his having lived in Guatemala for months without harm after learning of the death threat, a lack of harm to his remaining family, and lack of pursuit by the police.

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■Seventh Circuit Holds That Forced Islamic Dress Code Does Not Constitute Persecution For Female Iranian Christian

In ***Yadegar-Sargis v. INS***, __F.3d__, 2002 WL 1608220 (7th Cir. July 22, 2002) (Bauer, *Ripple*, Kanne), the Seventh Circuit affirmed the BIA's denial of asylum and withholding of deportation to an Iranian woman. The woman, an Armenian Christian, claimed that Iranian authorities threatened to imprison or harm women who did not wear Islamic religious garments, that she was hassled by government agents when attending church, and was forced to the end of food rationing lines because of her ethnicity and religion. The court held that while she was a member of a particular social group of Christian women who opposed wearing Islamic garments, her past compliance with the code and ability to practice her religion precluded a finding of a well-founded fear of persecution. The court encouraged INS to consider alternatives to deportation, noting significant delays in the administrative processing of the alien's case and the hardships deportation would likely cause the alien, who is now 71 years old.

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CONVENTION AGAINST TORTURE

■Eleventh Circuit Dismisses As Moot Habeas Appeal In Torture Case

In ***Soliman v. United States***, ___F.3d___, 2002 WL 1482768 (11th Cir. July 11, 2002) (Birch, Markus, Fullam (D.J. E.D. Pa.)), the Eleventh Circuit granted the Government's motion to dismiss petitioner's appeal, finding that petitioner's deportation to Egypt mooted the issues before the court and required the court to dismiss with directions to the district court to dismiss the petition. Petitioner entered the U.S. on a nonimmigrant business visa in 1988 and,

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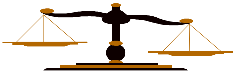

Summaries Of Recent Federal Court Decisions

(Continued from page 7)

after remaining in the country illegally, applied for adjustment of status after marrying an American citizen in 1991. The INS denied his petition for adjustment of status in 1994. However, in removal proceedings it was revealed that petitioner had been charged and convicted of participating in the 1981 assassination of Egyptian President Anwar Sadat and was alleged to have connections to terrorists. Though petitioner denied having connections to terrorists the IJ ordered him removed, finding his marriage to be a "sham". Petitioner was detained for six months while the INS attempted to remove him to a number of countries. During that time he undertook a number of hunger strikes to protest his detention, and was ultimately fed with intravenous fluids during these occasions.

Petitioner argued that his lengthy detention pending removal, during which time the INS force-fed him, provided sufficient grounds for habeas corpus relief. However, petitioner had already been removed to Egypt due to the Attorney General's termination of his grant of deferral of removal upon receiving assurances from the Egyptian government that petitioner would not be tortured once returned. Therefore, the court found that "because . . . [he] was removed from the United states and returned to his native country . . . [and] is no longer being detained or force-fed . . . his appeal is moot, depriving this Court of jurisdiction over the case."

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■Ninth Circuit Reverses BIA Finding On Materiality Of PRC Birth Control Regulation To Claim Under Convention Against Torture

In ***De Liu v. INS***, No. 01-70623 (9th Cir. May 24, 2002) (Browning, Hug, Berzon), the Ninth Circuit in an unpublished opinion held that the BIA erred in finding that a provincial People's Republic of China birth control regulation was immaterial to a motion to reopen seeking protection under the Convention Against Torture (CAT). The court held that because the regulation facially applied to "returning overseas Chinese," it was material to the CAT claim and the BIA abused its discretion in denying petitioner's motion to reopen on that ground.

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BORDER ISSUES

■District Court Holds Alien's Complaint That Expedited Removal Violated Constitutional Rights Should Proceed To Discovery.

In ***Wong v. Beebe*** (D. Or. June 25, 2002), in an unpublished decision, the district court held that Wong set forth potentially sufficient claims for monetary damages under *Bivens*, the Federal Tort Claims Act (FTCA), and the Religious Freedom Restoration Act of 1993 (RFRA). The court rejected qualified immunity for the individual defendants, and granted Wong's motion to compel discovery. The court found that Wong, an alien who resided in the United States while her adjustment application as a religious worker was pending, had the right to leave the country without advanced parole. The court concluded that when Wong attempted to enter the United States without documents, her claims that the INS officers improperly denied her *nunc pro tunc* advance parole on account of her religion stated a claim for damages. The court also held that Wong's claims of an improper strip search and denial of vegetarian meals stated claims under the FTCA and the RFRA.

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■District Court Holds That Permanent Departure Control Checkpoint At Virgin Islands Violates Constitution

In ***United States v. Pollard***, __F. Supp.2d __, 2002 WL 1363433) (D. V.I. June 18, 2002), the court granted the alien defendant's motion to suppress a statement given to immigration officers at a permanent departure control checkpoint located in the airport on St. Thomas. The alien was admitted to the airport through the foreign arrivals gate based on her representations that she was a United States citizen, but when she was leaving for New York, immigration officers at the permanent departure control checkpoint observed her demeanor, grew suspicious, and conducted a background check. They concluded that she had presented false identification and made a false claim to U.S. citizenship, and obtained admissions from her when she waived her *Miranda* rights.

> ***"INS inspectors must have an articulable individualized suspicion that the person is illegally present in the United States before [they] may detain a traveler leaving the Virgin Islands for Puerto Rico or the continental United States."***

Before the district court, the alien moved to suppress her statement, arguing it was obtained as a result of an unconstitutional seizure under the Fourth Amendment and a violation of her right to equal protection under the law. The district court granted her motion to suppress, finding that "on their faces, section 212(d)(7) [of the INA] and 8 C.F.R. § 235 violate the equal protection guarantees of the Fourteenth and Fifth Amendments," and that "the systematic, unnecessary, ineffective, intrusive, and oppressive immigration departure control checkpoint" at the airport was "not compatible with the Fourth Amendment."

The court concluded that "INS inspectors must have an articulable individualized suspicion that the person is illegally present in the United States before [they] may detain a traveler leaving the Virgin Islands for Puerto Rico or the con-

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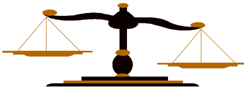

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tinental United States."

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CRIMES

■First Circuit Holds That Crime Of Moral Turpitude Is Determined By Sentence That May Be Imposed, Not By Sentence Actually Imposed Or Time Served

In ***Aquino-Encarnacion v. INS,*** __F.3d__, 2002 WL 1587061) (1st Cir. July 23, 2002) (*Boudin*, Torruella, Howard), the First Circuit affirmed the decision of the BIA which had ordered the alien removed for his conviction of a crime of moral turpitude, despite the alien's argument that he was not removable because his sentence was reduced to eleven months' probation for each offense. The court held that the statute reflected Congress' intent to remove aliens convicted of crimes of moral turpitude for which the potential sentence was one year or longer, regardless of the sentence actually imposed or time served.

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DETENTION

■District Court Holds That *Zadvydas* Does Not Apply To Inadmissible Aliens And That Such Aliens May Be Detained Indefinitely

In ***Chavez-Rivas v. Olsen***,194 F. Supp.2d 368 (D. N.J. July 8, 2002) (Orlofsky), the district court held that while the detention of Mariel Cubans was governed by 8 U.S.C. § 1231(a)(6), the Supreme Court's construction of § 1231 set forth in *Zadvydas v. Davis*, 533 U.S. 678 (2001), did not extend to inadmissible aliens and that such aliens may be detained indefinitely. Although the parole procedures of the Cuban Review Plan generally comport with the requirements of due process, the INS erred by relying on arrests to detain this alien without any evidence he committed the offenses.

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DUE PROCESS

■Fourth Circuit Holds District Court Has Jurisdiction Over Old Habeas Petition, But Rejects Alien's Due Process Claim

In ***Smith v. Ashcroft,*** __F.3d __, 2002 WL 1420372 (4th Cir. July 1, 2002) (Gregory, *Beam*, Niemeyer), the Fourth Circuit held that the district court had jurisdiction to review the alien's habeas petition, which he filed before his previous deportation and his illegal reentry, because he was "in custody" for purposes of habeas corpus jurisdiction and was deprived of judicial review in the prior proceedings. However, the Fourth Circuit rejected the alien's argument that his due process rights were violated because he was denied relief under former section 212(c) of the Immigration and Nationality Act, as he had no liberty or property interest in such discretionary relief.

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■Ninth Circuit Holds Immigration Judge Improperly Advised Pro Se Alien Of Rights At Hearing

In ***Agyeman v. INS***, __F.3d__, 2002 WL 1611190 (9th Cir. July 23, 2002) (*Ferguson*, Gould; Kleinfeld, (dissenting)), the Ninth Circuit held that the Immigration Judge incorrectly advised the alien that his wife must testify in an adjustment of status hearing, and so violated the pro se alien's due process right to a full and fair hearing. The court noted that "our holding today will not transform IJs into attorneys for aliens appearing pro se in deportation proceedings." The court reversed the BIA and remanded the case for a new hearing. The dissent noted there was no evidence to support the majority's assumption that the alien's wife was unable to attend the hearing, and that the Immigration Judge's advisement to the alien on his evidentiary burden was fully consistent with the court's decision in *Jacinto v. INS*, 208 F.3d 725, 727 (9th Cir. 2000).

> ***"Our holding today will not transform IJs into attorneys for aliens appearing pro se in deportation proceedings."***

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JUVENILES

■District Court Grants Summary Judgment In Special Immigrant Juvenile Case

In ***Yeobaoh v. INS***, No. 01-CV-3337, __WL___ (E.D. Pa. June 26, 2002)(Van Antwerpen), in an unpublished decision, the district court granted the INS' motion for summary judgment and dismissed the plaintiff's complaint for declaratory and injunctive relief. The plaintiff was ten years old when he arrived from Ghana unaccompanied and without travel documents. He requested that the INS consent to a dependency hearing to allow him to qualify for special immigrant juvenile ("SIJ") status. The Immigration and Nationality Act makes a dependency order a precondition to SIJ status, but precludes a state juvenile court from exercising jurisdiction to conduct a dependency hearing absent the Attorney General's consent. The INS District Director declined consent, finding that the plaintiff failed to establish that he suffered abuse, abandonment or neglect at the hands of his father in Ghana. In granting the INS' motion, the district court held that it "must resolve its

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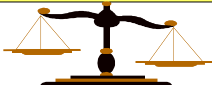

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doubts in favor of the agency, because it relied upon credible information in the record when making its determination."

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CITIZENSHIP – NATIONAL

■District Court Holds That Aggravated Felon Is A "National" And Cannot Be Deported.

In ***Lee v. Ashcroft***, __F.Supp.2d__, 2002 WL 1585856 (E.D. N.Y. July 15, 2002) (Johnson), the district court held that Lee, an aggravated felon convicted of conspiracy to commit mail fraud, was a "national" as defined in the immigration statute. The district court held that Lee had demonstrated his allegiance to the United States because he applied for naturalization ("thereby expressing his willingness to take an oath of allegiance to the United States"), and registered for Selective Service, and was therefore a national who could not be deported. The district court noted that all of Lee's immediate family were United States citizens, he entered the United States as a child, and had no connections to his native country.

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REMOVAL ORDER IN ABSENTIA

■Seventh Circuit Affirms BIA Decision That Alien Did Not Establish Exceptional Circumstances For Failure To Attend Hearing

In ***Ursachi v. INS,*** __F.3d__ (7th Cir. July 16, 2002) (Flaum, Coffey, *Kanne*), the Seventh Circuit affirmed the BIA's denial of the alien's motion to reopen an in absentia deportation order. The court held that the BIA did not abuse its discretion in finding that evidence from the alien which did not detail the cause, severity, or treatment of his alleged illness was inadequate to establish exceptional circumstances excusing his failure to appear at his deportation hearing. The BIA's evidentiary requirements did not offend due process because the requirements were not "new." The court did not consider the alien's claim that his in absentia order should have treated the merits of his asylum claim, as that was outside the statutory limits upon judicial review of in absentia orders.

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■Ninth Circuit Holds That Deporting Alien Who Failed To Attend Hearing Was Unconscionable And An Abuse Of Discretion.

In ***Singh v. INS***, __F.3d__ , 2002 WL 1485122(9th Cir. July 12, 2002) (*Schroeder*, D. Nelson, Reinhardt), the Ninth Circuit held that the BIA abused its discretion in denying the alien's motion to reopen his *in absentia* deportation order, noting that the alien had an approved visa petition through which he might adjust status and no reason to miss his hearing. The court ruled that the immigration statute may not be interpreted to produce unreasonable, unfair and absurd results, and that an "absurd result" would occur in deporting an alien with a valid claim to relief from deportation.

> ***The Court ruled that the immigration statute may not be interpreted to produce unreasonable, unfair and "absurd results."***

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STAYS

Ninth Circuit Holds That Immigration Statute Does Not Prohibit Temporary Stays Of Removal

In ***Maharaj v. Ashcroft***, __F.3d__, 2002 WL 1420184 (9th Cir. July 2, 2002) (Hawkins, Tashima, Gould), the Ninth Circuit held that the immigration statute's bar on courts enjoining the removal of an alien only affects the courts' power to grant permanent injunctive relief, but does not prevent courts from issuing interim injunctions to stay the removal of aliens while they appeal the denial of habeas petitions challenging the merits of their removal orders. The court relied on *Andreiu v. Ashcroft*, 253 F.3d 477 (9th Cir. 2001) (*en banc*), which held that the immigration statute limits the powers of courts to enjoin the operation of immigration law, but not stays of removal pending dispositions of petitions for review.

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NACARA

Ninth Circuit Holds That NACARA Does Not Violate Constitution

In ***Hernandez-Mezquita v. Ashcroft***, __F.3d__, 2002 WL 1339128) (9th Cir. June 20, 2002) (*Fletcher*, Wardlaw, Whyte), the Ninth Circuit affirmed the BIA's denial of cancellation of removal and voluntary departure and dismissed petitioner's equal protection challenge to NACARA § 203(b), the special rule regarding cancellation of removal for Salvadorans.

Under NACARA certain aliens can take advantage of special-rule cancellation of removal, which allows certain persons to take advantage of more lenient pre-IIRIRA provisions regarding suspension of deportation. To qualify under this provision, an alien must either have been (1) . . . a Salvadoran national who first entered the United States on or before September 19, 1990,

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and who registered for benefits pursuant to the settlement in *American Baptist Churches, et al. v. Thornburgh (ABC),* 760 F. Supp. 796 (N.D.Cal. 1991) on or before October 31, 1991, or applied for temporary protected status on or before October 31, 1991; or, in the alternative (2) . . . a Guatemalan or Salvadoran national who filed an application for asylum with the Immigration and Naturalization Service on or before April 1, 1990.

Petitioner did not meet either of these criteria. However, focusing on category (2), he argued that it violated equal protection because it treated similarly situated applicants for relief differently, creating an irrational distinction based solely on when an asylum application was filed. Furthermore, petitioner objected to the very prerequisite of filing an asylum application. After emphasizing congressional and presidential authority to draw lines in the context of immigration and naturalization, so long as they are rationally related to a legitimate government purpose, the Ninth Circuit found that the rational basis for the filing requirement was to identify aliens entering before April 1, 1990, and those who had a genuine threat of persecution.

The court also found that because the special-rule cancellation of removal was created through NACARA, petitioner could not argue that he was deprived of a right he never had before its creation. Finally, the court noted that it lacked jurisdiction to address petitioner's claim that the BIA abused its discretion in denying the extension of voluntary departure.

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WAIVERS

■Ninth Circuit Holds That Alien Who Engaged In Marriage Fraud Eligible To Apply For Waiver Of Deportation.

In ***Virk v. INS***, __F.3d__, 2002 WL 1544665 (9th Cir. July 16, 2002) (*Canby*, Fernandez, F., Kleinfeld), the Ninth Circuit vacated the BIA's denial of petitioner's motion to reopen to apply for a waiver of deportation under INA § 241(f).

The petitioner, a citizen of India, entered the United States in 1983 and almost immediately engaged in marriage fraud to obtain lawful permanent resident (LPR) status. His first marriage ended in divorce. Subsequently he was ordered deported in 1992 and his review petition was denied in 1994.

Petitioner did not depart from the United States. Instead, he remarried to a woman who had participated in the earlier marriage fraud scheme. On the basis of his marriage to a U.S. citizen petitioner, he then moved to reopen his proceedings so that he could request a waiver of deportation under INA § 241 (f). This provision permits waivers for aliens who are deportable for marriage fraud but who have a current qualifying relationship with a citizen or LPR. The BIA denied the motion, finding that petitioner and his wife would both be barred from petitioning for an immigrant visa under INA § 204(c) because they had both previously engaged in marriage fraud.

In reversing the BIA, the court held that, if granted relief under INA § 241(f), petitioner would have no need of a new visa upon petition of his current wife, because he would revert back to his former status of LPR (absent its illegality based on the sham marriage), and thus that INA § 204(c) is irrelevant. Because the petitioner for the visa in this case was a citizen, the statute did not bar her from applying for a visa for her spouse. The court also found that in denying the motion the BIA failed to adequately consider the impact of deportation on the family. The court remanded the case to the BIA.

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■Third Circuit Holds That Alien Convicted After The Repeal Of INA § 212(c) Is Not Entitled To Relief.

In ***Perez v. Elwood***, __F.3d__, 2002 WL 1398527 (3d Cir. June 28, 2002) (*Becker*, Greenberg, Barzilay (by designation)), the Third Circuit held that the alien, who committed an aggravated felony in 1992, was found guilty by a jury in January 1997 and sentenced and convicted in June 1997, was not entitled to relief under INA § 212(c). The court held that the alien was not "convicted" until entry of judgment, which occurred after the repeal of INA § 212(c) in April 1997.

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■Ninth Circuit Holds That Proceedings Commence On INS' Filing of Charging Document And That AEDPA § 440(d) Is Constitutional

In ***Armendariz-Montoya v. INS***, 291 F.3d 1116 (9th Cir. 2002) (*O'Scannlain*, Tallman, King), the Ninth Circuit reversed a district court decision granting a habeas petition finding that petitioner's deportation proceedings commenced upon service of the charging document and thus, he was eligible to seek a former INA § 212(c) waiver of deportation. The court held that proceedings commence, whether for purposes of the AEDPA or IIRIRA, when INS files the charging document. The court also found that applying AEDPA § 440(d) to aliens who were convicted after a jury trial does not result in a retroactive effect and that the provision does not violate equal protection.

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Contributions To The ILB Are Welcomed!

The goal of this monthly publication is to keep litigating attorneys within the Department of Justice 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. The deadline for submission of materials is the 20th of each month. 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.

INSIDE OIL

Pictured from left to right: Robert Davis, Doug Park, Keith Bernstein, Ben Provost, Shirley Rivadeneira, Kurt Larson, Eric Marsteller, Jill Quinn, Aric Anderson, Jose Pereyo. Not pictured: Vince Robertson, Jennifer Keeney.

OIL hosted eleven summer interns this year. The interns conducted legal research and prepared motions and briefs. In addition to their legal work, the interns participated in Civil Division programs including: tours of the Capitol, Supreme Court, and the Holocaust Museum; lectures by Attorney General John Ashcroft, National Security Advisor Condoleeza Rice, and others; and brown bag lunches with each of the Division's sections.

OIL's intern coordinator, Kurt Larson, also provided numerous opportunities for the interns. They toured the BIA, the INS Forensic Document Lab, and Dulles Airport Inspections. DAAG Laura Flippin arranged a behind-the-scenes tour of the White House. In perhaps the highlight of the summer for many, the interns were able to participate in simulated training exercises at the DEA Academy. The DEA took the interns for a ride in a "skid car" and taught them defensive driving techniques. They also permitted the interns to use a battering ram to break down a door, and to simulate a raid on a drug den.

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

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