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

Immigration Litigation Bulletin

Vol. 6, No. 5 **VISIT US AT: https://oil.aspensys.com** *May 31, 2002*

PRESIDENT PROPOSES ESTABLISHMENT OF DEPARTMENT OF HOMELAND SECURITY IMMIGRATION FUNCTIONS TO BE TRANSFERRED

On June 6, 2002, President Bush announced to the Nation an historic proposal to create a permanent Cabinet-level Department of Homeland Security. Vowing that "this great country will lead the world to safety, security, peace and freedom," the President said that the reason for creating the new Department was not to increase the size of the government, "but to increase its focus and effectiveness."

"This great country will lead the world to safety, security, peace and freedom."

The proposal would merge dozens of agencies, including the Immigration and Naturalization Service, and more than 160,000 workers into the new department. Under the President's proposal the Department of Homeland Security would be organized into four divisions: Border and Transportation Security; Emergency Preparedness and Response; Chemical, Biological, Radiological, and Nuclear Countermeasures; and Information Analysis and Infrastructure Protection.

The new department would be charged with securing our nation's air, land, and sea borders. The INS functions would be transferred to the Division for Border and Transportation Security. According to a proposed organizational chart, this Division would further be divided into Border Security, Transportation Security, Coast Guard, and Immigration Services. The Border Security section would combine the United States Border Patrol, Customs, and other agencies involved in border controls. The Immigration Services would include the INS, other than the Border Patrol, and would be further separated into immigration services and enforcement. According to the White House, the new Department "would assume the legal authority to issue visas for foreign nationals and admit them into the country. The State Department would continue to administer the visa application and issuance process."

In a message to all Justice Department employees, Attor-

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DETENTION POLICY IN FLORIDA UPHELD BY DISTRICT COURT

Concluding that "in immigration matters, neither individuals nor the Court can substitute their policy perspective for the judgments made by Executive officials, based upon facially legitimate and bona fide reasons," a district court on May 17, 2002, dismissed a suit filed by a class of detained Haitian aliens who were applying for admission into the United States. ***Jeanty v. Bulger***, __F. Supp.2d__, 2002 WL 1059513 (S.D. Fla. May 17, 2002).

Early in December 2001, the Coast Guard rescued 167 Haitians from a rickety and overloaded sailboat. Some of the Haitians swam to the shore, while two more individuals reportedly drowned. Concerned over the potential for more loss of life and the threat of mass migration, the INS reversed its

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DISTRICT COURT ENJOINS DIRECTIVE TO CLOSE IMMIGRATION HEARINGS

In ***North Jersey Media Group v. Ashcroft***, __F. Supp.2d, 2002 WL 1163637 (D.N.J May 28, 2002) (*Bissell*, J), the district court preliminarily enjoined further enforcement of Chief Immigration Judge Creppy's September 21, 2001, directive to all immigration judges closing immigration proceedings involving 9/11 interest aliens to the public and press. The court's order further enjoins the Department of Justice from closing any immigration proceedings without case-specific findings by immigration judges pursuant to 8 C.F.R. § 3.27.

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Highlights Inside

DETENTION POLICY UPHELD

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general presumption of release of undocumented Haitians arriving in South Florida. The Acting INS Deputy Commissioner instructed the Miami INS office that no undocumented Haitians should be released without the approval of INS Headquarters.

On March 15, 2002, six inadmissible Haitians who had demonstrated a "credible fear" of persecution if returned to Haiti, filed a petition for a class writ of habeas corpus combined with a complaint for declaratory, injunctive, and mandatory class action relief. The petitioners claimed, *inter alia*, that the parole decisions were not made on a case-by-case basis and that the government had discriminated against them on the basis of their race or national origin. Petitioners sought to compel the INS to immediately release them and to readjudicate their requests for parole from immigration detention pending adjudication of their asylum applications.

"The law teaches us that the power to control a nation's borders is so fundamental to its sovereignty that we must abide by the lawfully enacted policy decisions made by the Legislative and Executive branches, or seek change at the ballot box."

In a 35-page opinion, District Judge Lenard denied petitioners' requests for class certification and for extraordinary relief, and dismissed the lawsuit. Preliminarily, the court held that while the statute precluded a full-scale review of the parole decisions, the court had habeas jurisdiction to determine the legality of petitioners' detention. The court noted, however, that scope of its review was "limited to determining whether the Government has advanced a 'facially and legitimate and bona fide reason' for its parole policies and decisions." As the court explained, petitioners, "as arriving aliens, have no constitutional rights with respect to their immigration applications but, rather, only the rights granted by Congress and the Executive by statute or administrative regulations."

Section 235(b)(1)(B)(ii) of the INA, authorizes the detention of an undocumented alien who has passed the credible fear interview, until the adjudication of the asylum application. However, the Attorney General may, in his discretion, parole aliens who have established a "credible fear" of persecution. Pursuant to 8 C.F.R. § 212.5, the Attorney General delegated his parole authority to the INS Commissioner and certain designees including among others the Deputy Commissioner. The Commissioner, in turn, delegated the exercise of the parole authority to certain field officials, without divesting his delegated authority and that of his designees. Thus, as the court found here, the Acting INS Deputy Commissioner acted within his delegated authority under the immigration statute when he instructed the INS Miami office to adjust its parole policy regarding inadmissible Haitians arriving in South Florida

The court then considered the reasons why the Acting Deputy Commissioner established the policy of detaining arriving Haitian nationals. The court relied heavily on declarations submitted by officials from the Coast Guard and the INS attesting to the sharp increase in migrant departures from Haiti which precipitated the policy adjustment. Evidence showed that almost all vessels used in these voyages must be destroyed by the Coast Guard after interdiction because of their unseaworthiness. "In light of such credible evidence from Executive officials of recurring loss of life and the potential for future danger and large-scale loss of life," the court found that it would "not further scrutinize the policy choices made by the properly delegated Executive officials." Accordingly, the court held that the government had provided facially legitimate and bona fide reasons for the policy.

Finally, the court held that the policy to detain arriving Haitians was not subject to APA notice-and-comment rulemaking because it was merely an adjustment limited to one INS district.

The court concluded its opinion with the following observation:

> Paramount within our democratic values is the separation of powers among the three co-equal branches of government. The law teaches us that the power to control a nation's borders is so fundamental to its sovereignty that we must abide by the lawfully enacted policy decisions made by the Legislative and Executive branches, or seek change at the ballot box. In immigration matters, neither individuals nor the Court can substitute their policy perspectives for the judgments made by Executive officials, based upon facially legitimate and bona fide reasons, pursuant to statutory and delegated authority.

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HOMELAND SECURITY

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ney General Ashcroft applauded the President for "seizing this historic moment." "We are facing the greatest threat to our nation and our way of life since World War II. The President's plan recognizes that, when terrorists threaten the very ground beneath our feet, we must build even stronger foundations for freedom's defense," said the Attorney General.

by Francesco Isgro, OIL

LOPEZ v. DAVIS: AN EFFECTIVE COUNTER-TERRORISM TOOL

Aliens involved in terrorist activity in the United States, as a general matter, fall into one of three classes – lawful permanent residents, nonimmigrants, or aliens without lawful status. Most of the Office of Immigration Litigation's national security work in recent years has involved aliens in the last category — and much of the litigation in these cases concerned their applications for discretionary relief. It is also possible that removal cases against suspected terrorists have not been brought because of concerns about the relief phase of proceedings. The President recently stated, however, that we must direct "every instrument of law enforcement . . . to the disruption and to the defeat of the global terror network." *Address to Joint Session of Congress*, September 20, 2001.

Because discretionary relief is merely a matter "of grace" in the nature of a pardon, *Jay v. Boyd*, 351 U.S. 345, 354, n.16 (1956), the question must be asked whether the law provides a better way to ensure the removal of status violators who are, or who may be, involved in terrorism or other dangerous activity in the United States. An answer is suggested by a recent Supreme Court decision and two sets of INS and EOIR regulations.

On May 9, 2002, the INS and EOIR published regulations requiring aliens ordered removed from the United States to surrender to the INS. Aliens who fail to do so will be denied certain discretionary immigration benefits. *See* 67 *Fed. Reg*. 31157 (2002). On May 28, 2002, a regulation was published providing that aliens who violate protective orders will be denied discretionary relief from removal. 67 *Fed. Reg*. 36799 (2002). The authority cited in the Supplemental Information of both regulations is *Lopez v. Davis*, 531 U.S. 230 (2001). This case, with the interesting majority of Justices Ginsburg, O'Connor, Scalia, Souter, Thomas, and Breyer, confirms that in addition to case-by-case adjudications, federal agencies may exercise congressionally-granted discretionary authority by regulation. It provides the Attorney General with a powerful tool for streamlining and expediting the removal of alien terrorists and criminals.

At issue in *Lopez v. Davis* were regulations issued by the Bureau of Prisons (BOP) implementing a 1994 statute providing that certain prisoners who participated in drug rehabilitation programs would be eligible for early release. *See* 18 U.S.C. § 3621(e)(2)(B). The statute vested BOP with broad discretion to determine which of the prisoners who meet the statutory prerequisites (serving a sentence for a "nonviolent offense" and completion of a substance abuse program) should be granted early release. BOP issued two sets of implementing regulations. The first set, issued in 1995, interpreted the "nonviolent offense" requirement in the statute to exclude persons convicted of crimes of violence, including certain drug offenders who had received a two-level sentence enhancement under the sentencing guidelines. Drug offenders who possessed a firearm during the commission of their offense fell into this category. A majority of circuits held, however, that § 3621(e)(2)(B) required BOP to look only to the offense of conviction, and not to sentencing factors, like firearm possession, in determining whether an offender was convicted of a "nonviolent offense." *Lopez v. Davis*, 531 U.S. at 234-35. Other courts, however, upheld BOP's classification of drug offenses attended by firearm possession as violent crimes. *Id.*

Lopez v. Davis provides the Attorney General with a powerful tool for streamlining and expediting the removal of alien terrorists and criminals.

BOP responded to this circuit split by issuing new regulations in 1997, which barred early release to the same exact class of inmates — drug offenders who had possessed a firearm. The difference from the 1995 regulations, however, was as follows:

> In contrast to the earlier rule . . . , the 1997 regulation does not order this exclusion by defining the statutory term "prisoner convicted of a nonviolent offense" or the cognate term "crimes of violence." Instead, the current regulation relies upon "the discretion allotted to the Director of the Bureau of Prisons in granting a sentence reduction to exclude [enumerated categories of] inmates."

Id. at 235. Thus, the new regulation "categorically excludes such an inmate, not because § 3621(e)(2)(B) so mandates, but pursuant to the Bureau's asserted discretion to prescribe additional early release criteria." *Id.* After the circuits again split on the validity of this rule, the Supreme Court granted certiorari.

In the Supreme Court, the complaining inmate argued that "by identifying a class of inmates ineligible for sentence reductions under § 3621(e)(2)(B), *i.e.*, those convicted of a violent offense, Congress has barred the Bureau from identifying further categories of ineligible inmates." *Id.* at 239. The Court rejected this view, noting preliminarily that "[i]f § 3621(e)(2)(B) functions not as a grant of discretion to determine early release eligibility, but both as an authorization and a command to reduce sentences, then Congress' use of the word 'may,' rather than 'shall,' has no significance." The Court in *Lopez*, citing *INS v. Yang*, 519 U.S. 26 (1996), then stated that "the statute establishes only the alien's eligibility for the waiver. Such eligibility in no way limits

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Lopez v. Davis – Possible Uses

(Continued from page 3)

the considerations that may guide the Attorney General in exercising her discretion to determine who, among those eligible, will be accorded grace." *Id.* at 242-43 (internal quotations omitted).

Finally, addressing the inmate's argument that the agency must rely on case-by-case assessments, the Court held:

> [E]ven if a statutory scheme requires individualized determinations, which this scheme does not, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority.

Id. at 243-44. Indeed, the Court noted the advantages of the categorical approach to exercising discretion. That is, the case-by-case approach "could invite favoritism, disunity, and inconsistency. The Bureau is not required continually to revisit issues that may be established fairly and efficiently in a single rulemaking proceeding." *Id. See also Sandin v. Conner*, 515 U.S. 472, 482 (1995) (disciplinary "guidelines are not set forth solely to benefit the prisoner. They also aspire to instruct subordinate employees how to exercise discretion vested by the State in the warden, and to confine the authority of prison personnel in order to avoid widely different treatment of similar incidents).

Lopez v. Davis makes clear that the Attorney General may by regulation create classes of aliens who, as a matter of discretion, may not be granted discretionary relief. Thus, for example, a regulation might provide that nationals of state sponsors of terrorism who hold leases on crop dusting aircraft may not receive discretionary relief from an order of removal — not as a matter of eligibility, but in the exercise of discretion. Likewise, the regulation could provide that aliens who are members or representatives of terrorist organizations, or who committed aggravated felonies prior to April 1, 1997, may not receive relief. In the wake of *Lopez v. Davis*, these categorical exercises of discretion should clearly survive legal challenge. Moreover, as exercises of discretion under Title II of the INA, they "should" be unreviewable under section 242(a)(2)(B). At the least, *Lopez v. Davis* clarifies that the Attorney General possesses a powerful instrument of law enforcement which may be wielded to address longstanding problems in the removal of alien terrorists and criminals.

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DISTRICT COURT ENJOINS CLOSED HEARINGS

(Continued from page 1)

Relying on Supreme Court decisions construing the public's First Amendment access rights to criminal judicial proceedings and Third Circuit cases extending that jurisprudence to civil judicial and a few other nonfederal administrative proceedings, the court concluded that the public and press have a qualified right of access to immigration removal proceedings. Employing the Supreme Court's two-pronged test in *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555 (1980), the court concluded that deportation proceedings "traditionally" have been open or at least that "there is no tradition of their presumptive closure," and that open immigration proceedings serve similar structural interests found in judicial proceedings. In any event, the court observed that recent Third Circuit precedent has found access rights in the absence of clear tradition.

The court rejected the government's arguments, among others, that: (1) sensitive immigration cases traditionally have been closed; (2) precedents controlling Judicial Branch trials should not be extended to Executive Branch administrative proceedings; (3) Executive and Legislative Branch plenary power over immigration and the Supreme Court's decision rejecting citizens' access claims in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), should control; and (4) the Creppy directive is as narrowly drawn as it could be consistent with the commonality of national security interests to the run of affected cases.

The court further concluded that the Creppy directive fails to advance the government's stated interests because the immigration court record would become available on appeal to the BIA, and the directive did not preclude the alien or his attorney from public disclosure of matters transpiring in immigration court.

The court granted the government's motion to dismiss in part, holding that the plaintiff media organizations have no private right of action to challenge the Creppy directive as being in violation of immigration regulations.

On May 30, the Civil Division filed a motion seeking a stay pending appeal and resolution in the Third Circuit, and clarification of the court's order. The order is broadly written so as to suggest that the injunction may apply not simply in the court's judicial district but nationwide, and so as to suggest that no hearings, including those such as exclusion proceedings which fall outside the Creppy directive, may be closed without an individualized showing. On June 5, 2002, the district court denied the Government's motion for stay and clarified that the preliminary injunction is nation-wide but limited to the Creppy directive.

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ATTORNEY GENERAL REVERSES GRANT OF HARDSHIP WAIVER TO WOMAN GUILTY OF SECOND-DEGREE MANSLAUGHTER OF 19-MONTH-OLD BABY

Finding the Board's analysis of respondent's waiver application to be "grossly deficient," the Attorney General on May 2, 2002, reversed the unpublished Board's decision in ***Matter of Jean***, 23 I&N Dec. 273 (A.G. May 2002).

The respondent, Melanie Beaucejour Jean, was conditionally admitted to the United States as a refugee in November 1994. In August 1995, she pled guilty to second-degree manslaughter in connection with the death of a nineteen-month-old child who was left in her care. The child died after being struck, then violently shaken by Jean. After his death, the respondent did not seek assistance, but waited until her husband and the child's mother returned home. Jean was sentenced to two to six years' imprisonment for the offense.

After completion of her sentence, the respondent sought to adjust her status to that of a lawful permanent resident. The INS denied the application and exclusion proceedings were commenced. The respondent was charged with inadmissibility pursuant to section 212(a)(2)(A)(i)(I) and 240(a) of the INA, as an alien convicted of crime involving moral turpitude. She conceded inadmissibility and sought a section 209 (c) waiver, asylum and withholding or deferral of removal under both the statute and the Convention Against Torture. The Immigration Judge found that the conviction was an aggravated felony and denied her applications for relief or protection. The respondent appealed.

The Board of Immigration Appeals reversed and remanded, concluding that the conviction was not a "'crime of violence' — the necessary predicate for classifying the offense as an 'aggravated felony' under the facts of this case — "because there was no substantial risk that physical force would be used in the commission of the crime." BIA Decision (Dec. 16, 1999) at 2. 23 I&N Dec. at 376. On remand, the Immigration Judge again denied the applications for relief or protection. With regard to the adjustment application, the Judge found that the respondent did not merit a discretionary grant. The Judge also found that Jean was statutorily ineligible for asylum and withholding for failing to show the requisite fear of persecution. The Judge subsequently denied the CAT claim. The respondent again appealed.

Before addressing the merits, the Attorney General considered the claim of INS that the Board lacked jurisdiction to consider the appeal because it was untimely. The Attorney General agreed that the second notice of appeal, filed June 28, was untimely. Therefore, he did not consider any issues related to the CAT denial.

Although the Board only addressed the respondent's applications for a section 209(c) waiver and adjustment of status, the Attorney General addressed each form of relief or protection individually. As to the section 209 (c) waiver, the Attorney General criticized the Board's only decision on the issue, *Matter of H-N-*, Interim Decision 3414 (BIA 1999). He noted "I find the majority opinion in *H-N-* to be wholly unconvincing. The majority there treated the applicant's crime – participation in a burglary in which one of the applicant's co-conspirators shot a woman to death in front of her children – as a virtual afterthought." 23 I&N Dec. 382. In the present case, he criticized the Board's sole reliance on letters from the respondent's family and the effect of her departure on her husband and children and its failure to balance such claims against the criminal offense itself. "Little or no significant appears to have been attached to the fact that the respondent confessed to beating and shaking a nineteen-month-old child to death, or that her confession was corroborated by a coroner's report documenting a wide-ranging collection of extraordinarily severe injuries." 23 I&N Dec. at 383. Noting that the decision to grant a section 209(c) waiver is a discretionary one, the Attorney General expressed his view that "[i]t would not be a prudent exercise of the discretion afforded to me by this provision to grant favorable adjustments of status to violent or dangerous individuals except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of status adjustment would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, such a showing might still be insufficient." 23 I&N Dec. at 383.

"It would not be a prudent exercise of the discretion afforded to me by this provision to grant favorable adjustments of status to violent or dangerous individuals except in extraordinary circumstances."

As to the asylum application, the Attorney General found it unnecessary to decide whether the respondent's conviction was a crime of violence. Citing the reasons articulated in the discussion of adjustment of status, he noted that "she is manifestly unfit for a *discretionary* grant of relief." 23 I&N Dec. at 385. The Attorney General also found that the respondent had failed to prove that she was entitled to withholding of deportation, specifically that she failed to show that her life or liberty would be threatened on account of a protected ground.

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SUMMARIES OF RECENT BIA DECISIONS

TORTURE CONVENTION

In ***Matter of G-A-***, 23 I&N Dec. 366 (BIA May 2, 2002), the *en banc* Board unanimously dismissed an INS appeal of a grant of protection under the Convention against Torture. The respondent was an Iranian citizen who was convicted in the Souther District of New York of conspiracy to possess with intent to distribute cocaine. The INS commenced deportation proceedings and charged the respondent as an alien convicted of a controlled substance offense. The Immigration Judge granted deferral of removal to Iran under the Convention Against Torture. The question on appeal was whether the respondent had shown that it was more likely than not that he would be tortured in Iran.

After reviewing the evidence, including Department of State Country Reports, a Human Rights Report, and the respondent's testimony, the Board concluded that the cumulative evidence justified a grant of deferral of removal. The Board pointed to the following specific evidence: that the respondent would be recognizable by authorities as a non-Muslim ethnic minority; that he would face repercussions from the Iranian government because he spent many years in the United States and was convicted of a drug offense here; that the respondent would be tried before an Islamic tribunal where few rights are accorded and execution was a possible, if not probable, punishment; and that conditions in Iranian prisons are abysmal and torture of prisoners was documented.

AGGRAVATED FELONY

In ***Matter of Yang-Garcia***, 23 I&N Dec. 390 (BIA May 13, 2002), the *en ban* Board reversed a precedent decision, *Matter of K-V-D-*, Interim Decision 3422 (BIA 1999), and modified two others, *Matter of L-G-*, 21 I&N Dec. 89 (BIA 1995), and *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992). The issue was whether a state felony narcotics conviction constitutes an aggravated felony under section 101(a)(43)(B) of the INA.

Section 101(a)(43)(B) of the INA defines the term aggravated felony as "illicit trafficking in a controlled substance (as described in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code.)" Section 924(c) defines "drug trafficking crime" to include "any felony punishable under the Controlled Substances Act (CSA) (21 U.S.C. 801, *et seq*.)." The plain language of the CSA defines a felony as "any Federal or State offense classified by applicable Federal or State law as a felony." 21 U.S.C. § 802(13). Section 2L1.2 of the Sentencing Guidelines and its application notes were revised, effective November 1, 1997. The revision explicitly incorporated the definition of aggravated felony found in the INA (application note 1 to U.S.S.G. section 2L1.2).

In *Matter of K-V-D-*, the Board had held that a state drug conviction was an aggravated felony for immigration purposes only if it was analogous to a federal felony, and that, in the immigration context, it would not follow circuit precedent interpreting the Sentencing Guidelines. In *Yanez*, the respondent was convicted twice of felony possession of cocaine in violation of Illinois law, though either conviction would have only constituted a misdemeanor offense if prosecuted under federal law.

In its decision, the Board considered the federal cases decided since *K-V-D-* and the disagreement of several circuits with its *K-V-D-* analysis. The 1st, 5th, 8th, 9th, 10th, and 11th had all held in Sentencing Guidelines cases that a state felony could be an aggravated felony even if it would only be a federal misdemeanor. In immigration cases, only the 2nd and 3rd circuits had adopted the *K-V-D-* analysis, noting that policy considerations may dictate a different interpretation for criminal and immigration cases. In *Yanez*, the Board reversed its prior interpretation and held that, in immigration cases, it will follow the circuit's interpretation of section 924(c)(2) in the criminal context. For circuits that had not yet addressed the issue, the Board will apply the majority approach, namely that a state felony conviction is an aggravated felony. In the respondent's case, the Board found that his state felony convictions were aggravated felonies for immigration purposes and dismissed his appeal.

AGGRAVATED FELONY

In ***Matter of Santos-Lopez***, 23 I&N Dec. 419 (BIA May 14, 2002), the *en banc* Board unanimously sustained and remanded the respondent's appeal based on its opinion in *Matter of Yanez.*

The respondent was convicted of two misdemeanor marijuana possession offenses under Texas law. His appeal raised the question of whether his convictions met the definition of aggravated felony in the INA. Applying *Yanez*, the Board looked to Fifth Circuit law to resolve the issue. In *United States v. Hinojosa-Lopez*, 130 F.3d 691, 694 (5th Cir. 1997), the court held that a state felony conviction would be considered a felony under 18 U.S.C. § 924(c)(2). See *also United States v. Hernandez-Avalos*, 251 F.3d 505 (5th Cir.), *cert. denied*, 122 S. Ct. 305 (2001). In the present case, the convictions were classified as state misdemeanors and thus did not constitute aggravated felonies for immigration purposes.

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Summaries Of Recent Federal Court Decisions

ASYLUM

■Ninth Circuit Holds That Shining Path Death Threats And Demonstrated Willingness To Carry Them Out Entitles Applicant To Asylum

In ***Salazar-Paucar v. INS***, __F.3d__, 2002 WL 287701 (9th Cir. May 9, 2002) (*Paez*, Tallman, Wardlaw), the Ninth Circuit concluded that the death threats against petitioner by the Shining Path in Peru, combined with harm to family members and the murder of his political counterparts, compelled a finding of past persecution. In its first decision, published on February 9, 2002, the Court had granted the application for withholding of deportation and had remanded the case to the BIA for a grant of asylum. The government petitioned for panel rehearing, arguing that the court did not have the authority to grant asylum outright. The court revised its opinion to note that the case was remanded to the BIA "for the Attorney General to exercise his discretion whether to grant Petitioner asylum."

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■Eighth Circuit Vacates And Remands To BIA For Consideration Of Overlooked Evidence Regarding Aliens' Citizenship And Nationality

In ***Palavra v. INS***, 287 F.3d 690 (8th Cir. April 18, 2002) (*Arnold*, Heaney; Hansen, dissenting), the Eighth Circuit in a split opinion vacated the BIA's denial of asylum to petitioner and his family. The petitioners had entered the United States in 1995 as nonimmigrant visitors on passports issued by the government of Croatia and on visas issued by the United States Consul in Croatia. Petitioners sought asylum on the basis that they would face persecution in Bosnia. They expressed no fear of returning to Croatia. The immigration judge refused to consider the asylum application and ordered them deported to Croatia. The petitioners then filed a motion to reconsider supported by an affidavit from the father, that they were really life long residents of Bosnia. The motion was denied. On appeal, the BIA affirmed the deportation to Croatia and did not reach the issue of Bosnian persecution.

The Eight Circuit held that the BIA completely ignored an affidavit submitted by the petitioners which may have rebutted the presumption raised by their passports that they were Croatian nationals. The court said that the BIA "made only the bald statement that the [petitioners] have presented 'absolutely no evidence,'" in support of their Bosnian nationality.

The dissent would have found that the BIA's decision was supported by substantial evidence, noting that the affidavit in question was not presented at the hearing before the immigration judge but attached to subsequent motions.

"It is not necessary that persecution be solely on account of one of the forbidden grounds for an asylum applicant to secure asylum. It is enough that a principal reason for the persecution be on account of a statutory ground."

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■Ninth Circuit Holds That Punishment Of A Family Member For A Crime Committed By Another Immediate Family Member Is Punishment "On Account Of" Membership In A Particular Social Group

In ***Chen v. Ashcroft***, __F.3d__, 2002 WL 971784 (9th Cir. May 13, 2002) (Schroeder, *Noonan*, Fletcher), the Ninth Circuit held that the alien demonstrated a well-founded fear of future persecution by the Chinese government on account of his membership in a particular social group consisting of immediate family members.

The petitioner was smuggled into the the United States from China after paying about $40,000 to the so called "snakeheads." When apprehended, he became a witness for the government in the prosecution of of seven persons charged with smuggling aliens from China. When placed in proceedings the petitioner testified that his mother had defaulted on government loans and that he would be persecuted as a member of the family. He also claimed he would be tortured and killed by the snake heads. His claim for asylum was denied on causation grounds.

The Ninth Circuit preliminarily held that members of an immediate family constitute a social group. The panel treated as "*dicta*" another panel's contrary finding in *Estrada-Posada v. INS*, 924 F.2d 916 (9th Cir. 1991). The court then found that the punishment of a family member for a crime committed by his mother constituted punishment "on account" of membership in the family. "It is not necessary that persecution be solely on account of one of the forbidden grounds for an asylum applicant to secure asylum. It is enough that a principal reason for the persecution be on account of a statutory ground," said the court. Finally, the court also found that petitioner if imprisoned in China, would be subject to persecution by the snakeheads with the acquiescence of the Chinese government.

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■Eighth Circuit Holds That Ukranian Failed To Demonstrate Persecution On Account Of German Ethnicity Or Lutheran Religion

In *Fisher v. INS*, __F.3d.__, 2002 WL 1050236) (8th Cir. May 28, 2002)

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Summaries Of Recent Federal Court Decisions

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(Wollman, *Gibson*, Magill), the Eighth Circuit held that the alien did not prove that he was persecuted on account of his actual or perceived national origin, or his membership in a particular social group, when he was denied educational opportunities and insulted by co-workers. The court also held that alien was not persecuted on account of his religion because his salary was reduced and because Ukraine has been slow to return church property confiscated during the communist era.

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■Ninth Circuit Holds That Country Report of Peace Accord Not Sufficient to Rebut Finding That Petitioners Were Persecuted And Had Well-Founded Fear Of Persecution On Account Of Political Opinion

In ***Rios v. INS***, __F.3d, 2002 WL 818832 (9th Cir. May 1, 2002) (*Pregerson*, Trott, Goodwin), the Ninth Circuit reversed the BIA's asylum denial, granted withholding of deportation, and remanded the case to the BIA to exercise its discretion under the asylum provision. The petitioners were the Guatemalan wife and son of a Guatemalan military officer. The mother was kidnapped, injured but released by men who claimed they were going to punish her husband. Other men attempted to kidnap the son. Both the father and another son were killed. Three years after petitioners came to the United States they sought asylum which was denied. When placed in proceedings they again sought asylum and voluntary departure. Asylum and withholding of removal were denied for failure to establish political opinion as the cause of the persecution and because of changed country conditions.

"Where police beat and threaten the spouse of a known dissident, it is logical, in the absence of evidence pointing to another motive, to conclude that they did so because of the spouse's presumed guilt by association."

The Ninth Circuit held that petitioners had been persecuted on account of political opinion because there appeared to be no other logical reason for the persecution and because petitioner was married to a known dissident. The court cited to prior Ninth Circuit decision where it found that "where police beat and threaten the spouse of a known dissident, it is logical, in the absence of evidence pointing to another motive, to conclude that they did so because of the spouse's presumed guilt by association." *Ernesto Navas v. INS*, 217 F.3d 646, 659 n.18 (9th Cir. 2000).

Since petitioners had been persecuted there was a presumption that they had a well-founded fear of future persecution. The court found that this presumption was not rebutted by changed country conditions because the State Department report on country conditions lacked "individualized" proof that conditions had changed for the petitioners.

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CANCELLATION & SUSPENSION

■Ninth Circuit Holds That Alien Who Surrendered To INS Before IIRIRA's Effective Date Not Entitled To Suspension Of Deportation.

In ***Jimenez-Angeles v. Ashcroft***, __F.3d__, 2002 WL 1023103 (Nelson, *Fletcher*, Aiken, D.J. D. Or., sitting by designation) (9th Cir. May 22, 2002), the Ninth Circuit sustained a BIA order finding the petitioner statutorily ineligible for cancellation of removal. In March 1997, petitioner turned herself in to INS after acquiring more than seven years of physical presence in the United States. However, the INS placed her in removal proceedings in 1998, long after the April 1, 1997, effective date of IIRIRA . The immigration judge and subsequently the BIA held that she was ineligible for either cancellation of removal or suspension of deportation.

On appeal, petitioner first argued that the INS should have commenced deportation proceedings against her immediately. The court found that it lacked jurisdiction under INA § 242(g) to address this issue. The court noted that § 242(g) was not subject to the transitional rules and that it applied "without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings." IIRIRA § 306c)(I)(2). The court found jurisdiction, however, to consider whether the application of IIRIRA permanent rules to her was impermissibly retroactive. After considering the legislative history, and St. Cyr, the court held that Congress's replacement of suspension of deportation relief by the more stringent cancellation of removal relief was not impermissibly retroactive because the alien did not surrender valuable legal rights when she turned herself in to INS, and did not have a settled expectation of being placed in deportation proceedings. Finally, the court held that the Nicaraguan Adjustment and Central American Relief Act of 1997 did not violate equal protection because it favors aliens from certain countries.

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■Third Circuit Holds That Cancellation Provision Applies Because Filing Of Asylum Application Prior To April 1, 1997, Does Not "Commence" Deportation Proceedings

In ***Uspango v. Ashcroft***, 289 F.3d 226 (3rd Cir. 2002) (Sloviter, Ambro, *Shadur*, U.S.D.J. N.D. Ill., sitting by designation), the Third Circuit held that the BIA did not abuse its discretion when it determined that petitioner, who had filed an asylum application prior to April 1, 1997, but was not served with an NTA

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until after this date, was subject to the requirements of cancellation of removal and not suspension of deportation. The court reasoned that the more stringent requirements of cancellation of removal, including the stop-time rule and the 10-year continuous physical presence requirement, were not impermissibly retroactive. It found that petitioner could not demonstrate detrimental reliance on the availability of suspension of deportation, and that the act of filing an asylum application did not implicate any *quid pro quo* arrangement with the Government. The court also rejected a claim of incompetence of counsel based on late filing of the asylum application because petitioner was not prevented from presenting his case.

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CAT - MOTION TO REOPEN

■Third Circuit Affirms BIA's Denial of Motion to Reopen to Apply For Protection Under Convention Against Torture.

In ***Sevoian v. Ashcroft***, __F.3d__, 2002 WL 970913 (3d Cir. May 8, 2002) (*Scirica*, Ambro, Gibson), the Third Circuit held that the appropriate standard of review for denial a of motion to reopen under the the Convention Against Torture (CAT) is abuse of discretion with factual determinations reviewed under the substantial evidence standard.

The petitioner, a Kurdish ethnic citizen of Georgia, traveled through the United States on his way to Canada, where he unsuccessfully applied for refugee status. He was returned by Canada to the United States and promptly placed in removal proceedings. He then sought asylum claiming that he would be persecuted in Georgia because he had evaded military service to avoid mistreatment based on his ethnicity and religion. He was denied relief and the BIA affirmed. He then sought reopening under the Torture Convention, submitting evidence that criminal prisoners were subject to torture. In denying reopening for failure to establish a prima facie case, the BIA noted that the torture was generally to extract confessions and reasoned it was not likely to be used in a prosecution for draft evasion.

"We are poorly positioned to review mixed factual and legal determinations by immigration agencies."

Preliminarily, the Third Circuit held that it would review the BIA's denial of a motion to reopen for lack of prima facie evidence under an abuse of discretion standard. However, the BIA's factual findings would be reviewed under the deferential version of the substantial evidence standard. The court rejected petitioner's argument that the denial of a motion to reopen to apply for relief under CAT should receive heightened review because the underlying relief was mandatory. "Motions to reopen implicate finality concerns even when they seek to raise an underlying claim for relief . . . that is not committed to the Attorney General's discretion," said the court. Moreover, "[w]e are poorly positioned to review mixed factual and legal determinations by immigration agencies. Deference is appropriate when reviewing decisions like the one here, which turn on both the totality of the circumstances and the applicable legal standards for relief" noted the court.

Here, the court found that the BIA had properly exercised its discretion. The BIA's conclusion that petitioner failed to produce sufficient evidence of torture in Georgia was based on substantial evidence. The court rejected petitioner's contention that the BIA was required to address explicitly each type of evidence that he had presented. The BIA was only required to show that "it had reviewed the record and grasped the movant's claim," said the court. Finally, the court found that the BIA did not abuse its discretion by giving more weight to the State Department's report than to non-governmental sources of evidence.

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CRIMES

■Tenth Circuit Holds That Scheme Which Results In Loss To Victim In Excess Of $10,000 Is An Aggravated Felony

In ***Khalayleh v. INS***, 287 F.3d 978 (10th Cir. April 23, 2002) (Kelly, Brorby, *Hartz*), the Tenth Circuit affirmed the BIA's conclusion that petitioner's conviction for a scheme in which the loss to the victim was in excess of $10,000 was an aggravated felony.

The petitioner was convicted of bank fraud on a guilty plea to an indictment listing six NSF checks written in connection with a check kiting scheme. His plea, pursuant to an agreement was to one count of a multiple count indictment. That count referred to a single check which was less than $10,000. Restitution of over $10,000 was ordered because the scheme involved more than that amount. The IJ and BIA treated the offense as an aggravated felony after finding that the loss to the victim was more than $10,000.

The Tenth Circuit found that neither the doctrine of lenity nor deference to the Board was involved because the indictment was clear. Even though the petitioner only entered a plea to one count, that count charged a scheme to defraud which was not limited to a single check. To determine that it had jurisdiction the court had jurisdiction to determine whether petitioner had been convicted of an aggravated felony

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which happened to coincide with the merits issue. Having found he had been convicted of an aggravated felony the court dismissed the petition for want of jurisdiction.

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■Fifth Circuit Holds That Document Fraud Is A Crime Involving Moral Turpitude

In ***Omagah v. Ashcroft***, 288 F.3d 254 (5th Cir. April 22, 2002) (Jones, Smith and *Emilio M. Garza*), the Fifth Circuit upheld the decision of BIA that the petitioner's prior conviction for conspiring to obtain, possess, and use illegal immigration documents was a crime involving moral turpitude. The petitioner, a Nigerian citizen, had entered the United States as a student in 1981 and overstayed. He was convicted of attempted possession of false immigration documents with intent to use them. When placed in proceedings, he sought suspension of deportation under the IIRIRA transition rules. His application for relief was denied for failure to establish good moral character based on the IJ and BIA's finding that his crime was one involving moral turpitude. The Fifth Circuit agreed with the BIA's interpretation that petitioner's conviction was a crime of moral turpitude.

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■Ninth Circuit Holds That Expunged Conviction For Firearms Offense Does Not Eliminate Immigration Consequences

In ***Ramirez-Castro v. INS*** __F.3d__, 2002 WL 663799 (9th Cir. April 24, 2002) (*Graber*, Ferguson, Tashima), the Ninth Circuit dismissed the alien's petition for review and held that petitioner's expunged firearms conviction did not fall within the exception under *Lujan v. Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). The court stated that *Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. 2001), controlled and thus applied the general rule that convictions expunged under state law retain their immigration consequences.

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DUE PROCESS

■Ninth Circuit Holds That Defective Notice Of Appeal Form And BIA's Summary Dismissal Without Notice Denied Due Process.

In ***Vargas-Garcia v. INS,*** __F.3d__, 2002 WL 726644 (9th Cir. April 25, 2002) (*Fernandez*, Rawlinson, Reed), the Ninth Circuit granted the petition for review and remanded the case to the BIA for further proceedings. The petitioner illegally entered the United States from Mexico in 1988 and has been here ever since. When placed in proceedings, he sought suspension of deportation based on hardship to his citizen daughter. The IJ denied him relief for failure to establish exceptional and extreme hardship, and the requisite physical presence. Petitioner filed a notice of appeal pro se to the BIA. He provided a brief description of the basis of his appeal in the Form EOIR-26 and did not file a separate brief. The BIA summarily dismissed the appeal because his allegations of error lacked specificity.

"The concatenation of EOIR 26, the BIA's strict Notice of Appeal requirements, and the failure to give any advance warning before an appeal is dismissed, [resulted] in a violation of the due process rights."

The Ninth Circuit held that "the concatenation of EOIR 26, the BIA's strict Notice of Appeal requirements, and the failure to give any advance warning before an appeal is dismissed, [resulted] in a violation of the due process rights." The court further stated that "[i]f the BIA continues to hold out the 'benefit' of its no-brief required rule, it would surely ameliorate the problems we have seen if the BIA gave notice to aliens who have not come up to snuff, rather than briskly issuing summary dismissals."

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JURISDICTION

■Ninth Circuit Holds That Manslaughter Conviction Bars Judicial Review

In ***Bayudan v. Ashcroft, 287*** F.3d 761 (9th Cir. 2002) (*Beezer*, O'Scannlain, Kleinfeld), the Ninth Circuit affirmed the BIA's order of removal against the petitioner who had been admitted to the United States as an immigrant in 1983. In 1986, the then 16-year old petitioner took part in a gang beating resulting in the death of the victim. Petitioner was tried as an adult and convicted of manslaughter in 1995. His conviction became final in 1997. The INS then instituted removal proceedings and an immigration judge ordered the petitioner removed for having been convicted for crime involving moral turpitude. A charge as an aggravated felon was dropped by the INS. Petitioner also sought relief under INA § 212(h)(1)(B). The IJ originally found him ineligible for relief but the BIA remanded for reconsideration. The IJ again denied relief for failure to establish extreme hardship and the BIA affirmed.

The Ninth Circuit held that it lacked jurisdiction to review petitioner's removal order that was based on his

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manslaughter conviction, a crime involving moral turpitude (CIMT) and an aggravated felony. The court found "irrelevant" the fact that petitioner's order was based on grounds of moral turpitude. The court also held that it lacked jurisdiction to remand for consideration of petitioner's claim for relief under INA § 212(h)(1)(A) because he had failed to raise it before the BIA.

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■Eleventh Circuit Holds That Habeas Jurisdiction Exists To Review BIA's Decision That Alien Was Ineligible For Waiver Of Deportation

In ***Bejacmar v. Ashcroft,*** __F.3d__, 2002 WL 984193) (11th Cir. May 14, 2002) (*Birch*, Wilson, Dowd), the Eleventh Circuit) held that the district court had habeas jurisdiction to review a criminal alien's claim that the BIA incorrectly found him ineligible for relief under former INA § 212(c). The court reasoned that the Supreme Court in *INS v. St. Cyr* had removed the "last statutory pillar," INA § 242(b)(9), which supported the Eleventh Circuit's view that IIRIRA had repealed habeas jurisdiction. The court found that the facts in *St. Cyr* were squarely on point with facts in petitioner's case. Accordingly, the court reversed and remanded the case to the district court.

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■Ninth Circuit Finds That It Lacks Jurisdiction To Review Challenge To Denial of Voluntary Departure

In ***Martinez-Lopez v. Ashcroft***, __F.3d__, __WL___ (9th Cir. May 22, 2002) (O'Scannlain, Silverman, Gould), the Ninth Circuit held that under INA § 242(a)(2)(B)(i), 8 U.S.C. §1252(a)(2)(B)(i) it lacked jurisdiction to review voluntary departure decisions. The immigration judge and subsequently the BIA had denied petitioner's request for voluntary departure pursuant to INA § 240B, 8 U.S.C. §1229c. Section 242(a)(2)(B)(i) of the INA provides in pertinent part that there is "no jurisdiction to review any judgment regarding the granting of relief under 1229c."

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REGISTRY

Ninth Circuit Denies Relief To Alien Under The Registry Statute.

In ***Angulo-Dominguez v. Ashcroft***, __F.3d__ 2002 WL 1012972 (9th Cir. May 21, 2002) (Pregerson, Rawlinson, *Weiner*, D.J. E.D. Pa., sitting by designation), the Ninth Circuit held that the alien was not entitled to relief under the Registry Statute, INA § 249, because a record of the alien's lawful entry existed and because his controlled substance convictions rendered him statutorily ineligible for such relief. The BIA's construction of the statute was reasonable and entitled to deference, and the statute's distinction between aliens with a record of entry and those without did not violate equal protection.

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REINSTATEMENT

■Fifth Circuit Holds That Reinstatement Of Pre-IIRIRA Deportation Order Is Not Impermissibly Retroactive

In ***Bonhomme-Ardouin v. U.S. Attorney General,,*** __F.3d__, 2001 WL 721069) (5th Cir. May 9, 2002) (*Davis*, Parker, Aldisert), the Fifth Circuit held that the INS had properly reinstated petitioner's deportation order under INA § 241(a)(5). The petitioner had been deported in 1984. In 1991 he reentered the United States without permission. He was later apprehended by the INS and served with a notice to reinstate the prior deportation order. Petitioner then filed a review petition challenging the retroactive application of the IIRIRA provision on reinstatement.

The Fifth Circuit held that under step two of the *Landgraf* analysis the reinstatement statute did not have an impermissible retroactive effect as applied to petitioner who had illegally reentered prior to the enactment of the statute. Finally, it held that petitioner failed to show prejudice and therefore a due process violation, given his concession of all the predicate facts for reinstatement.

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Ed. Note: Copy of government's brief is available on the OIL web site.

STAYS

■Eleventh Circuit Denies Stay Under INA § 242(f)(2); Concurrence Suggests *En Banc* Consideration

In ***Bonhomme-Ardouin v. U.S. Attorney General***, __F.3d__, 2002 WL 1020636 (11th Cir. May 21, 2002) (*Carnes*, concurrence by Barkett, Wilson), the Eleventh Circuit denied without opinion the alien's emergency motion for a stay of removal pending his petition for review. Judges Barkett and Wilson concurred but added that the correct standard of review for stay motions is the standard applied in *Andreiu v. Ashcroft*, 253 F.3d 477, 483 (9th Cir. 2001) (*en banc*), which requires aliens to demonstrate either probability of success on the merits and irreparable injury, or serious legal question and hardship. The concurrence noted that the Eleventh Circuit's standard in *Weng v. U.S. Attorney General*, 287 F.3d 1335 (11th Cir. 2002), requires aliens seeking a stay to present clear and convincing evidence that their removal is prohibited as a matter of law, and suggested that the issue of standard of review be considered *en banc*.

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CASES SUMMARIZED IN THIS ISSUE

Contributions To The ILB Are Welcomed!

INSIDE OIL

More than 200 federal government attorneys attended the Sixth Annual Immigration Litigation Conference held in Scottsdale on May 6-9, 2002. Among the Department officials who spoke at the Conference were: **Robert D. McCallum, Jr**., Assistant Attorney General for the Civil Division; **Kevin D. Rooney**, Director of EOIR; **Paul K. Charlton**, U.S. Attorney for the District of Arizona; **Stuart E. Levey**, Associate Deputy Attorney General; **Edwin S. Kneedler**, Deputy Solicitor General; **Laura L. Flippin**, Deputy Assistant Attorney General for the Civil Division; **Owen B. Cooper**, General Counsel of the INS; **Charles Adkins-Blanch**, General Counsel of EOIR; **Lori L. Scialabba**, Acting Chairman of the Board of Immigration Appeals; and **Michael J. Creppy**, Chief Immigration Judge. also speaking at the Conference were **Stephen M. McNamee**, Chief Judge for the U.S. District Court in Arizona, and Judge **Roslyn O. Silver**, from the District of Arizona.

Congratulations to newly appointed Senior Litigation Counsel **Michelle E. Gordon** who will serve on the OIL Appellate Team. Congratulations to **Douglas E. Ginsburg** and **Ethan B. Kanter** who have been appointed Senior Litigation Counsel for Counter-Terrorism.

Senior Litigation Counsel, **Hugh Mullane,** has been designated as OIL's Juvenile Coordinator. Any litigation involving juveniles should be brought to his attention.

OIL welcomes the following summer interns: **Vince Robertson** (Regent University Law School); **Shirley Rivadeneira** (American University, Washington College of Law), **Eric Marsteller** (George Washington University Law School), **Aric Anderson** (Catholic University of America, Columbus School of Law), **Robert Davis** (William & Mary School of Law/College of William and Mary), **Ben Prevost** (Louisiana State University Law Center), **Jennifer Kenney** (University of Maryland School of Law), **Keith Bernstein** (University of Buffalo Law School), **Douglas Park** (Wake Forest University School of Law), **Jill Quinn** (American University, Washington College of Law), and **Jose Pereyo** (Georgetown University).

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.

Office of Immigration Litigation

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

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