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Articles

THE IMMIGRATION SHADOW DOCKET

Faiza W. Sayed

ABSTRACT—Each year, the Board of Immigration Appeals (BIA)—the Justice Department's appellate immigration agency that reviews decisions of immigration judges and decides the fate of thousands of noncitizens—issues about thirty published, precedential decisions. At present, these are the only decisions out of approximately 30,000 each year, that are readily available to the public and provide detailed reasoning for their conclusions. This is because most of the BIA's decision-making happens on what this Article terms the "immigration shadow docket"—the tens of thousands of other decisions the BIA issues each year that are unpublished and nonprecedential. These shadow docket decisions are generally authored by a single BIA member and consist overwhelmingly of brief orders and summary affirmances. This Article demonstrates the harms of shadow docket decision-making, including the creation of "secret law" that is accessible to the government but largely inaccessible to the public. Moreover, this shadow docket produces inconsistent outcomes where one noncitizen's removal order is affirmed while another noncitizen's removal order is reversed—even though the deciding legal issues were identical. A 2022 settlement provides the public greater access to some unpublished BIA decisions, but it ultimately falls far short of remedying the transparency and accessibility concerns raised by the immigration shadow docket.

The BIA's use of nonprecedential, unpublished decisions to dispose of virtually all cases also presents serious concerns for the development of immigration law. Because the BIA is the final arbiter of most immigration cases, it has a responsibility to provide guidance as to the meaning of our complicated immigration laws and to ensure uniformity in the application of immigration law across the nation. By publishing only 0.001% of its decisions each year, the BIA has all but abandoned that duty. This dereliction likely contributes to well-documented disparities in the application of immigration law by immigration adjudicators and the inefficiency of the immigration system that leaves noncitizens in protracted states of limbo and prolonged detention. This Article advances principles for reforms to increase transparency and fairness at the BIA, improve the quality, accuracy and

political accountability of its decisions, and ensure justice for the nearly two million noncitizens currently in our immigration court system.

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> *"If the BIA proposed to narrow the class of deportable [noncitizens] eligible to seek . . . relief by flipping a coin—heads [a noncitizen] may apply for relief, tails he may not—we would reverse the policy in an instant."*
>
> –U.S. Supreme Court, *Judulang v. Holder*[†]

INTRODUCTION

Joshim Uddin was a member of the Bangladesh Nationalist Party (BNP), one of two major political parties in Bangladesh.[1] On several occasions, Mr. Uddin alleged that he was harmed by members of the Awami League, the political party then in power.[2] This harm included beating him so severely that he required stitches to his face, breaking his leg, threatening him with death, and burning down his home.[3] As a result, Mr. Uddin fled to the United States.[4]

[†] 565 U.S. 42, 55 (2011).

[1] Uddin v. Att'y Gen., 870 F.3d 282, 285 (3d Cir. 2017).

[2] *Id.* at 285–86.

[3] *Id.* at 286.

[4] *Id.*

When the Department of Homeland Security (DHS) initiated removal proceedings against Mr. Uddin, he requested withholding of removal, a mandatory form of relief that prohibits the removal of a noncitizen to a country where that noncitizen's life or freedom would be threatened because of a protected ground such as political opinion.[5] Mr. Uddin argued that because of his affiliation with the BNP, he would face persecution based on his political opinion if he was forced to return to Bangladesh.[6] The Immigration Judge (IJ) denied Mr. Uddin relief after finding that the BNP was a Tier III "terrorist organization" as defined by the Immigration and Nationality Act (INA), and that therefore Mr. Uddin's membership in the group barred him from relief under the INA's terrorism bar.[7] Mr. Uddin appealed the decision to the Board of Immigration Appeals (BIA or Board), which, in an unpublished decision, affirmed the IJ's finding that the BNP was indeed a Tier III organization.[8]

Unbeknownst to Mr. Uddin, in several other unpublished decisions, the BIA had held the exact opposite: that the BNP was *not* a Tier III terrorist organization, and that therefore membership in the party did not bar the granting of immigration relief.[9] The Board did not acknowledge or attempt to distinguish these cases in the opinion deciding Mr. Uddin's fate.[10] Even more curiously, in some unpublished decisions the Board had announced a new rule for determining whether an organization qualifies as a Tier III terrorist organization.[11] The Board has never discussed this new rule in a published, precedential decision and did not explicitly apply or mention it in Mr. Uddin's case.[12]

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5 *Id.*; Immigration and Nationality Act § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B).

6 *Uddin*, 870 F.3d at 286.

7 *Id.*

8 *Id.* at 287–88.

9 *Id.* at 291.

10 *See generally* Dec. 15, 2016 Unpublished Decision of the Board of Immigration Appeals at 102, *Uddin*, 870 F.3d 282 (No. 17-1056) (failing to acknowledge or distinguish the unpublished decisions). The author obtained the unpublished decisions cited throughout this Article from immigration advocates and through FOIA requests she filed with the BIA.

11 *Uddin*, 870 F.3d at 290; *see, e.g.*, Unpublished Decision of the BIA at 5 (Nov. 3, 2016) (on file with author) ("We . . . hold that the phrase 'a group . . . which engages in' terrorist activity under section 212(a)(3)(B)(vi)(III) of the Act requires some evidence that a group authorizes, ratifies, or otherwise approves or condones terrorist activity committed by its members. Absent such evidence, a political party such as the BNP cannot be deemed an undesignated terrorist organization under section 212(a)(3)(B)(vi)(III) of the Act." (citation omitted)); Unpublished Decision of the BIA at 5 (Dec. 16, 2016) (on file with author) (same); Unpublished Decision of the BIA at 4 (April 7, 2017) (on file with author) (same).

12 *Uddin*, 870 F.3d at 292, 292 n.14. *See generally* Unpublished Decision of the BIA (Dec. 15, 2016) (failing to address the rule).

The Board's decision in Mr. Uddin's case was unpublished and nonprecedential. This is not unusual. In fact, of the approximately 30,000 decisions the Board issues each year, only around thirty, or 0.001%, are published and precedential.[13] Mr. Uddin's case is thus just one example of a case on what this Article terms "the immigration shadow docket"—the tens thousands of *other* decisions the Board issues each year that are unpublished and nonprecedential. These shadow docket decisions are generally authored by a single Board member and frequently conflict with each other or with published decisions—one noncitizen's removal order is affirmed, while another noncitizen's removal order is reversed, even though the deciding legal issues in the cases were similar or nearly identical.

Compounding the problem is the fact that the Board rarely, if ever, explains why two seemingly similar cases should have such disparate outcomes. In fact, many shadow docket decisions provide little or no reasoning at all to support the outcome (in contrast to published decisions, which generally provide detailed analysis) and are riddled with legal errors. Unpublished decisions of the BIA are largely inaccessible to the public, including noncitizens in removal proceedings and their lawyers. In contrast, lawyers representing the government in removal proceedings have access to these decisions, as do IJs and members of the Board.

This asymmetry in access is profoundly useful to the government because the BIA sometimes announces new law through the shadow docket. And although the Board discourages citations to its unpublished opinions in briefs filed by parties, IJs and the Board itself cite to these decisions to support their own arguments. A groundbreaking settlement reached in *New York Legal Assistance Group v. Board of Immigration Appeals* on February 7, 2022 aims to address some concerns relating to this asymmetry in access by requiring the Board to make certain unpublished decisions available electronically starting in 2023.[14] Nonetheless, the settlement falls far short of remedying all transparency and accessibility concerns raised by the immigration shadow docket.

The existence of an immigration shadow docket is deeply concerning for several reasons. First, all Board decisions are extremely high-stakes—a removal order means permanent banishment from the United States and separation from loved ones, and the noncitizen may be detained for years during the pendency of removal proceedings and appeals. Second, because

[13] See *infra* Section II.A for an explanation of how this figure was calculated.

[14] Press Release, N.Y. Legal Assistance Grp., Huge Win in NYLAG Lawsuit Levels the Legal Playing Field for Immigrant Advocates (Feb. 10, 2022), https://nylag.org/nylag-lawsuit-against-the-board-of-immigration-appeals-2022/ [https://perma.cc/L5PK-DH2D] [hereinafter NYLAG Settlement Announcement].

Congress stripped the federal courts of jurisdiction over most immigration cases and the Supreme Court has further narrowed judicial review of these cases, the BIA is the final arbiter of most immigration questions. Thus, an appeal to the BIA is often a noncitizen's last opportunity to seek review of their case. Third, the risk of erroneous removal or prolonged detention is high. Unlike in criminal court, indigent noncitizens in immigration court do not have a right to counsel appointed at the expense of the government, and even where noncitizens are represented, there are well-documented deficiencies in the representation they receive.[15]

The Board's use of its shadow docket to dispose of nearly all cases also presents serious concerns for the development of immigration law. As the final arbiter of most immigration questions, the Board has a responsibility to provide guidance as to the meaning of vague, often complicated statutory language and to ensure uniformity in the application of immigration law across the nation.[16] By publishing only thirty precedential decisions a year, the Board has all but abandoned its duty. This dereliction stunts the development and understanding of immigration law and likely contributes to well-documented disparities in its application by immigration adjudicators. Finally, shadow docket decision-making defies important principles of administrative governance, including notice, justification, coherence, and procedural fairness, and undermines political accountability and judicial review.

The use of unpublished, nonprecedential decisions is not unique to the BIA. The federal courts of appeal have long issued decisions as nonprecedential, and scholars have long criticized the practice.[17] In 1964, the Judicial Conference of the United States instructed the federal courts of appeal to authorize the publication of only those opinions which have precedential value.[18] Following this resolution, individual circuits developed rules providing for publication only when certain circumstances exist, such

[15] *See* Robert A. Katzmann, *Study Group on Immigrant Representation: The First Decade*, 87 FORDHAM L. REV. 485, 486 (2018) (noting that the quality of counsel is poor "in far too many deportation cases").

[16] The Board's own regulations charge it with this duty. 8 C.F.R. § 1003.1(d)(1) (2021) ("[T]he Board, through precedent decisions, shall provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the [Immigration and Nationality] Act and its implementing regulations.").

[17] *See, e.g.*, William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1194–1204 (1978) (attacking the premises of no-citation rules and countering that the rules hinder both judicial responsibility and accountability).

[18] ROBERT TIMOTHY REAGAN, FED. JUD. CTR., CITING UNPUBLISHED OPINIONS IN FEDERAL APPEALS 2 (2005).

as when an opinion announced a new rule of law.[19] Many circuit courts subsequently adopted rules forbidding citations to unpublished opinions.[20] Nonprecedential decisions quickly dominated and now make up 87% of appellate court decisions.[21]

While federal judges supported selective publication and no-citation rules for cost, timesaving, and fairness reasons,[22] scholars overwhelmingly condemned the practice. Critics argued that selective publication policies created a body of "secret law" and encouraged unscrupulous behavior by judges.[23] Studies by scholars demonstrated that courts were creating new law in unpublished decisions,[24] and they illuminated a conflict between unpublished and published decisions.[25] Scholars pointed out that no-citation rules did not alleviate fairness concerns because those with access to unpublished decisions could still benefit from the language and reasoning of those decisions, even if they could not formally cite to them.[26] Scholars writing after the use of electronic case law databases became common stressed that technology eliminated the cost and fairness concerns originally motivating these rules.[27]

This debate eventually led to the creation and approval of Federal Rule of Appellate Procedure 32.1. Effected in December 2006, Rule 32.1 bars

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[19] *Id.* Some circuits modeled their rules after the *Standards for Publication of Judicial Opinions*, which provided for publication only when "a. [t]he opinion establishes a new rule or law or alters or modifies an existing rule; or b. [t]he opinion involves a legal issue of continuing public interest; or c. [t]he opinion criticizes existing law; or d. [t]he opinion resolves an apparent conflict of authority." Reynolds & Richman, *supra* note 17, at 1176.

[20] REAGAN, *supra* note 18, at 2–4.

[21] *See* ADMIN. OFF. OF THE U.S. CTS., TABLE B-12: U.S. COURTS OF APPEALS—TYPE OF OPINION OR ORDER FILED IN CASES TERMINATED ON THE MERITS, BY CIRCUIT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2020 (2020) https://www.uscourts.gov/sites/default/files/data_tables/jb_b12_0930.2020.pdf [https://perma.cc/LFS3-JFTJ].

[22] *See, e.g.*, Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, http://www.nonpublication.com/don't%20cite%20this.htm [https://perma.cc/95B7-4BW7] (article written by two Ninth Circuit judges in support of unpublished decisions); Boyce F. Martin Jr., *In Defense of Unpublished Decisions*, 60 OHIO ST. L.J. 177, 177–78 (1999) (article written by then-Chief Judge of the Sixth Circuit in support of unpublished decisions); Philip Nichols Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909, 927–28 (1986) (article written by a senior judge of the Fifth Circuit in support of selective publication of judicial opinions and no-citation rules).

[23] Reynolds & Richman, *supra* note 17, at 1200–01; ELIZABETH GOITEIN, BRENNAN CTR. FOR JUST., THE NEW ERA OF SECRET LAW 14 (2016) (explaining the origins of the term "secret law").

[24] *See* Kirt Shuldberg, Comment, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CALIF. L. REV. 541, 555 n.65 (1997) (collecting studies that examined unpublished opinions and found "numerous instances of unpublished opinions that in fact did make law").

[25] Reynolds & Richman, *supra* note 17, at 1194 n.139.

[26] *Id.* at 1195–96.

[27] Cappalli, *supra* note 22, at 757.

federal appellate courts from prohibiting or restricting the citation of unpublished federal judicial opinions issued on or after January 1, 2007.[28] The rule largely ended the debate about selective publication policies by creating a sense of transparency in circuit court decision-making and diffusing worries about arbitrary decisions.[29] No such rule governs the BIA.

The BIA's selective publication policy and rule discouraging citations to its unpublished decisions are far more worrying than similar practices at the federal appellate courts. First, the percentage of published, precedential decisions issued by the BIA is much lower than in the federal circuit courts. While 87% of circuit court decisions are currently unpublished—and scholars were alarmed when the percentage was much lower—the BIA issues nearly 100% of its decisions as unpublished. Second, individuals appearing before the immigration courts are likely far more vulnerable than petitioners in circuit courts, as they are all noncitizens, are often unrepresented, and tend to have lower incomes, less proficiency with English, and less familiarity with the American legal system. Third, unpublished BIA decisions are even less accessible to the public than unpublished decisions of the circuit courts. Yet despite the active scholarly debate about the validity and consequences of limited publication and no-citation rules of the federal circuit courts and the Supreme Court's shadow docket, the consequences of similar practices at the BIA have received little scholarly attention.[30]

This Article fills that void. Part I provides background on the evolution of the BIA's structure, its selective publication policy, and its rule discouraging citation to unpublished decisions. Part I further describes the public's limited access to unpublished decisions, both historically and even now that the New York Legal Assistance Group (NYLAG) settlement has gone into effect, and the narrow judicial review available for immigration cases. Part II situates the immigration shadow docket and its consequences, including the impact of the near-exclusive use of nonprecedential, unpublished decisions on the development of immigration law, and discusses four implications of the Board's shadow docket for individual immigration cases: (1) the creation of secret law, (2) inconsistent decision-making in cases that logically should have the same outcome, (3) low-quality opinions, and (4) error-prone decision-making. Part II closes by exploring other

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[28] FED. R. APP. P. 32.1.

[29] *See* Michael Kagan, Rebecca Gill & Fatma Marouf, *Invisible Adjudication in the U.S. Courts of Appeals*, 106 GEO. L.J. 683, 685 (2018). But see *infra* Section IV.B for a brief discussion of "invisible" federal court decisions relating to immigration.

[30] *See* Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 447–48, 464 nn.104–05 (1991) (criticizing the lack of precedential opinions from the BIA and its inconsistent decisions and collecting other early discussion of these practices).

potential explanations for these problems and by explaining why the BIA must implement reforms to address the harms caused by the immigration shadow docket. Part III raises principles for reform to increase transparency and fairness at the Board and improve the quality and accuracy of Board decisions. These reforms are critical to ensure that noncitizens in immigration court receive justice.

I. THE BOARD OF IMMIGRATION APPEALS

The BIA is the highest administrative body charged with interpreting and applying immigration law.[31] It reviews decisions of hundreds of IJs and, in certain circumstances, of DHS officers.[32] The BIA has evolved considerably throughout its existence, eventually becoming the shadowy, backlogged institution it is today.

A. The Beginnings of the BIA

The Board of Immigration Appeals was created in 1940 when the Immigration and Naturalization Service (INS) moved from the Department of Labor to the Department of Justice (DOJ)[33] through regulations issued by the U.S. Attorney General.[34] It has never been recognized by statute.[35] In 1983, the Attorney General moved the Board and the trial-level immigration court into a newly created agency, the Executive Office for Immigration Review (EOIR), to separate the quasi-judicial functions of the Board and immigration court from the enforcement and benefits-granting functions of the INS.[36] In 2003, the Homeland Security Act moved the functions of the former INS to the newly created DHS but kept EOIR within DOJ.[37]

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[31] Exec. Off. for Immigr. Rev., *Board of Immigration Appeals: Biographical Information*, U.S. DEP'T OF JUST. (Aug. 10, 2022), https://www.justice.gov/eoir/board-of-immigration-appeals-bios [https://perma.cc/322B-NKA8].

[32] *See* Exec. Off. for Immigr. Rev., *Office of the Chief Immigration Judge*, U.S. DEP'T. OF JUST. (July 30, 2022), https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios [https://perma.cc/BG83-M9S4] (noting that there are approximately 600 IJs "located in 68 immigration courts and three adjudication centers" across the United States); 8 C.F.R. § 1003.1(b), (d) (2021).

[33] Exec. Off. for Immigr. Rev., *Evolution of the U.S Immigration Court System: Pre-1983*, U.S. DEP'T. OF JUST. (Apr. 30, 2015), https://www.justice.gov/eoir/evolution-pre-1983 [https://perma.cc/BR6B-XTUY]. For the fascinating history of how and why the immigration court system ended up within the DOJ, see ALISON PECK, THE ACCIDENTAL HISTORY OF THE U.S. IMMIGRATION COURTS: WAR, FEAR, AND THE ROOTS OF DYSFUNCTION 5 (2022).

[34] Immigration and Naturalization Service, 5 Fed. Reg. 3503 (Sept. 4, 1940).

[35] T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, MARYELLEN FULLERTON, JULIET P. STUMPF & PRATHEEPAN GULASEKARAM, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 833 (9th ed. 2021).

[36] *Evolution of the U.S Immigration Court System: Post-1983, supra* note 33; 1 SHANE DIZON & POOJA DADHANIA, IMMIGRATION LAW SERVICE § 1:218 (2d ed. 2022).

[37] DIZON & DADHANIA, *supra* note 36, § 1:218.

Although the BIA is an administrative body, members of the Board are not administrative law judges (ALJs), whose authority derives from Article I of the Constitution and who conduct proceedings under the Administrative Procedure Act.[38] Rather, Board members are merely "attorneys appointed by the Attorney General to act as the Attorney General's delegates in the cases that come before them."[39] BIA members thus do not have the same insulation from political influence and decisional independence that ALJs enjoy.

Due to a rising caseload, major changes to immigration laws, and the fluctuating number of Board members and other staffing issues at the Board by the 1990s a substantial backlog of BIA appeals had developed and continued to grow.[40] In response, the Executive Branch made several significant and controversial changes to the BIA. These reforms shaped the BIA we have today.

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[38] Because of the inherent conflict of interest of having EOIR within the DOJ (the nation's chief law enforcement agency) and the politicization of the immigration court system, advocates, scholars, and immigration judges have urged Congress to replace EOIR with an independent Article I immigration court system that would include both trial-level adjudications and appellate review. *See, e.g.*, NAT'L ASS'N OF IMMIGR. JUDGES, AN ARTICLE I IMMIGRATION COURT - WHY NOW IS THE TIME TO ACT: A SUMMARY OF SALIENT FACTS AND ARGUMENTS (2021), https://www.naij-usa.org/images/uploads/newsroom/Article_1_-_NAIJ_summary-of-salient-facts-and-arguments_2.20.2021.pdf [https://perma.cc/6Q6P-GQK7]; AM. IMMIGR. LAW. ASS'N, AILA POLICY BRIEF: RESTORING INTEGRITY AND INDEPENDENCE TO AMERICA'S IMMIGRATION COURTS 1 (2020), https://www.aila.org/advo-media/aila-policy-briefs/aila-calls-for-independent-immigration-courts [https://perma.cc/7MBE-WF2F]; COMM'N ON IMMIGR., AM. BAR ASS'N, 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM, at UD i-6 (2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.pdf [https://perma.cc/VUZ2-G472] [hereinafter ABA 2019 UPDATE REPORT]; Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1639 n.7 (2010) (collecting earlier calls for reform).

Congress has considered such proposals over the years, but none has received significant traction. *See* Suzanne Monyak, *Congress Mulls Independent Immigration Courts as Backlog Soars*, ROLL CALL (Jan. 19, 2022, 3:12 PM), https://rollcall.com/2022/01/19/congress-mulls-independent-immigration-courts-as-backlog-soars/ [https://perma.cc/A77H-Z5M5].

In *Restructuring Immigration Adjudication*, Professor Stephen Legomsky instead proposed converting IJs into ALJs and moving them from the DOJ into a new, independent administrative agency, abolishing both the BIA and the current role of the federal courts of appeals and replacing them with a single round of appellate review by a new Article III immigration court. Legomsky, *supra*, at 1685–86.

EOIR opposes proposals to create an independent immigration court system. ABA 2019 UPDATE REPORT, *supra*, at UD 6-11.

[39] 8 C.F.R. § 1003.1(a)(1) (2022). Previously this same regulation emphasized the Board's independence by stating that "Board Members shall exercise their independent judgment and discretion in the cases coming before the Board." 8 C.F.R. § 3.1(a)(1) (2001). This language was amended to the current language, which emphasizes that Board Members are merely delegates of the Attorney General, by Attorney General Ashcroft as part of his "streamlining reforms" in 2002. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,882–83 (Aug. 26, 2002).

[40] DORSEY & WHITNEY LLP, BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT 13 (2003).

B. Reforms of the BIA

In 1999, Attorney General Janet Reno attempted to deal with the BIA's rapidly increasing backlog of appeals by implementing "streamlining rules" that made several changes to the way the Board operated.[41] Most importantly, certain single permanent Board members were now permitted to affirm an IJ's decision on their own and without issuing an opinion.[42] The Chairman of the BIA was authorized both to designate certain Board members with the authority to grant such affirmances and to designate certain categories of cases as appropriate for such affirmances.[43] Finally, Attorney General Reno increased the size of the Board to twenty-three members.[44] Evaluations of the reforms found that they "appear to have been successful in reducing much of the BIA's backlog" and "there was no indication of 'an adverse effect on non-citizens.'"[45]

Despite the documented success of Attorney General Reno's reforms, in 2002, Attorney General John Ashcroft announced controversial plans to further streamline the BIA's decision-making.[46] These rules "fundamentally changed the nature of the BIA's review function and radically changed the composition of the Board."[47] To support the reforms, Ashcroft cited not only the backlog but also "heightened national security concerns stemming from September 11."[48] The reforms included making single-member decisions the norm for the overwhelming majority of cases and three-member panel decisions rare, making summary affirmances common, and reducing the size of the Board from twenty-three members to eleven.[49] A subsequent study found that Attorney General Ashcroft removed those Board members with

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[41] Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135, 56,137, 56,142 (Oct. 18, 1999).

[42] *Id.* at 56,141.

[43] *Id.*

[44] BANKS MILLER, LINDA CAMP KEITH & JENNIFER S. HOLMES, IMMIGRATION JUDGES AND U.S. ASYLUM POLICY 109 (2015).

[45] *Id.* at 109–10 (quoting Andrew I. Schoenholtz, *Refugee Protection in the United States Post-September 11*, 36 COLUM. HUM. RTS. L. REV. 323, 354 (2005)).

[46] *See, e.g.*, Legomsky, *supra* note 38, at 1668 (documenting Attorney General Ashcroft's reduction of BIA members from twenty-three to eleven). For a more detailed history of the streamlining reforms and subsequent criticism and litigation, see John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 22–32 (2005).

[47] MILLER ET AL., *supra* note 44, at 111 (internal quotation marks omitted) (quoting Schoenholtz, *supra* note 45, at 355).

[48] *Id.*

[49] Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,882, 54,886, 54,901 (Aug. 26, 2002); MILLER ET AL., *supra* note 44, at 110.

the highest percentages of rulings in favor of noncitizens.[50] As a result of the reforms, outcomes at the BIA became significantly less favorable to noncitizens,[51] and the federal circuit courts received an unprecedented surge of immigration appeals.[52]

In the wake of harsh criticism of immigration adjudications by federal circuit courts, Attorney General Alberto Gonzales directed the DOJ to conduct a comprehensive review of the immigration courts and the Board in 2006. Based on this review, Attorney General Gonzalez announced additional reforms "to improve the performance and quality of work" of IJs and Board members.[53] The most significant change was the introduction of performance evaluations, which include an assessment of whether the Board member adjudicates appeals within a certain time frame after assignment.[54] Scholars have explained that "the performance evaluations give an incentive to affirm rather than reverse IJs by emphasizing productivity, and because immigrants file the overwhelming number of appeals with the BIA . . . the incentive to affirm means outcomes that favor the government."[55]

The Trump Administration once again transformed Board membership. Board members whose appointments predated the Trump Administration were reassigned after refusing buyout offers,[56] and the Administration expanded the Board to add new members.[57] Most of the new Board members

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[50] Peter J. Levinson, Paper Delivered at the 2004 Annual Meeting of the American Political Science Association: The Facade of Quasi-Judicial Independence in Immigration Appellate Adjudications (Sept. 2–5, 2004), https://immigrationcourtside.com/wp-content/uploads/2018/05/Levinson-The-Facade-Of-Quasi-Judicial-Independence.pdf [https://perma.cc/X2AJ-2GPF].

[51] Legomsky, *supra* note 38, at 1670 n.163 (collecting sources showing the decrease in favorable outcomes for noncitizens).

[52] For a thorough discussion of the surge and its causes, see Palmer et al., *supra* note 46, at 3–4; John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y. L. SCH. L. REV. 13, 13–14 (2007); Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y. L. SCH. L. REV. 37, 38–40 (2007); and Stacy Caplow, *After the Flood: The Legacy of the "Surge" of Federal Immigration Appeals*, 7 NW. J. L. & SOC. POL'Y 1, 4–8 (2012).

[53] *See* Press Release, U.S. Dep't of Just., Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006), https://www.justice.gov/archive/opa/pr/2006/August/06_ag_520.html [https://perma.cc/3QSL-JFCS].

[54] U.S. DEP'T OF JUST., EOIR PERFORMANCE PLAN: ADJUDICATIVE EMPLOYEES, https://www.justice.gov/eoir/page/file/1358951/download [https://perma.cc/F4ND-4US9].

[55] MILLER ET AL., *supra* note 44, at 117 (internal quotation marks omitted) (quoting Legomsky, *supra* note 38, at 1662).

[56] Tanvi Misra, *DOJ 'Reassigned' Career Members of Board of Immigration Appeals*, ROLL CALL (June 9, 2020), https://www.rollcall.com/2020/06/09/doj-reassigned-career-members-of-board-of-immigration-appeals/ [https://perma.cc/4JPW-PLVU].

[57] Expanding the Size of the Board of Immigration Appeals, 85 Fed. Reg. 18,105, 18,105–06 (Apr. 1, 2020) (expanding the Board from twenty-one to twenty-three members); Expanding the Size of the

appointed under the Trump Administration had previously served as IJs, where they had some of the highest asylum denial rates in the country.[58]

C. Current Procedures and Case Load

Under current regulations, the Board consists of twenty-three members.[59] But the Director of EOIR may also appoint temporary Board members, who have the same authority to decide cases as permanent members but cannot vote on any matters decided en banc.[60] Currently, the Board consists of twenty-three permanent members and five temporary members.[61]

All BIA appeals are initially referred to a screening panel, which determines whether to assign the case to a single member or a three-member panel. Appeals are assigned to a single member unless the case falls into one of seven narrow exceptions that prompt three-member review.[62] The single member "shall" issue an Affirmance Without Opinion (AWO) if they determine that certain circumstances exist.[63] If the single member determines

Board of Immigration Appeals, 83 Fed. Reg. 8321, 8321 (Feb. 27, 2018) (expanding the Board from seventeen to twenty-one members).

[58] For example, Board member Couch had a denial rate of 94.1% and Cassidy 99%. *Judge V. Stuart Couch*, TRAC IMMIGR., https://trac.syr.edu/immigration/reports/judgereports/00394CHL/index.html [https://perma.cc/NWV5-QMD5] (select "V. Stuart Couch – Charlotte" in judge field and "Latest Report" in report series field); *Judge William A. Cassidy*, TRAC IMMIGR., https://trac.syr.edu/immigration/reports/judgereports/00004ATD/index.html [https://perma.cc/7ZGW-WMZV] (select "William A. Cassidy – Atlanta - ATD" in judge field and "Latest Report" in report series field). In October 2021, Andrea Saenz, an immigration advocate, was appointed to the Board. *See Biographical Information*, *supra* note 31. This may not reflect a significant change in hiring practices, as overall the Biden Administration has continued to appoint IJs with the usual enforcement backgrounds. *See* Andrew Cohen, *Biden's New Immigration Judges Are More of the Same*, BRENNAN CTR. FOR JUST. (May 10, 2021), https://www.brennancenter.org/our-work/analysis-opinion/bidens-new-immigration-judges-are-more-same [https://perma.cc/VRQ5-TTPP] ("Almost all of the 17 new immigration judges come with backgrounds as federal, state, or local prosecutors or have strong ties to U.S. Immigration and Customs Enforcement or the Department of Homeland Security.").

[59] 8 C.F.R. § 1003.1(a)(1) (2021).

[60] *Id.* § 1003.1(a)(4).

[61] *See Biographical Information*, *supra* note 31.

[62] 8 C.F.R. § 1003.1(e). Regulations limit reviews of appeals by three-member panels to seven narrow circumstances: (i) the need to settle inconsistencies among the rulings of different IJs; (ii) the need to establish a precedent construing the meaning of laws, regulations, or procedures; (iii) the need to review a decision by an IJ or DHS that is not in conformity with the law or with applicable precedents; (iv) the need to resolve a case or controversy of major national import; (v) the need to review a clearly erroneous factual determination by an IJ; (vi) the need to reverse the decision of an IJ or DHS, other than a reversal under 8 C.F.R. § 1003.1(e)(5); or (vii) the need to resolve a complex, novel, unusual, or recurring issue of law or fact. *Id.* § 1003.1(e)(6).

[63] *Id.* § 1003.1(e)(4)(i). The Board Member "shall" issue an AWO if they find

that the case is not appropriate for an AWO, they may still decide the case by issuing a "brief order" affirming, modifying, remanding, or reversing the decision.[64] Currently, most BIA decisions are brief orders written by single members.[65]

The Board may review any case en banc. It may also reconsider en banc any case that has been considered or decided by a three-member panel upon direction of the Board's Chairman or by majority vote of the permanent members of the Board.[66] Per regulations, en banc review is "not favored" and is "ordered only where necessary to address an issue of particular importance or to secure or maintain consistency of the Board's decisions."[67]

The BIA receives and decides a staggering number of appeals each year. Since 2008, it has received almost 30,000 appeals each year (and often many more than that; in 2019, 63,226 appeals were filed). It also completes nearly 30,000 appeals each year.[68] Despite this apparent balance, the BIA's backlog is immense. In FY 2021, 31,226 appeals were filed with the BIA and 30,727 appeals were completed by the Board.[69] However, 91,569 appeals remain pending in the Board's backlog.[70]

D. BIA's Selective Publication Policy

1. Published Decisions

The Board's regulations mandate that "the Board, through precedent decisions, shall provide clear and uniform guidance to the [DHS], the immigration judges, and the general public on the proper interpretation and administration of the [INA] and its implementing regulations."[71] Published decisions bind the Board, IJs, DHS officers, attorneys representing the government, and noncitizens in future cases—unless the Board's decision is

> that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that (A) [t]he issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or (B) [t]he factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.

Id.

64 *Id.* § 1003.1(e)(5).

65 ABA 2019 UPDATE REPORT, *supra* note 38, at UD ES-20 ("[S]hort opinions by single members of the Board continue to be the predominant form of BIA decision making . . . .").

66 8 C.F.R. § 1003.1(a)(5).

67 *Id.*

68 U.S. DEP'T OF JUST., EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: ADJUDICATION STATISTICS: ALL APPEALS FILED, COMPLETED, AND PENDING (2022), https://www.justice.gov/eoir/page/file/1248506/download [https://perma.cc/P6UJ-43TE].

69 *Id.*

70 *Id.*

71 8 C.F.R. § 1003.1(d)(1).

modified or overruled by the Board itself, the AG, or Congress.[72] Precedential Board decisions overturned by a federal circuit court are not followed in that circuit but are still binding in other circuits.[73]

Per regulations, precedential decisions are designated by a majority vote of the Board's permanent members and are issued by a three-member panel or en banc.[74] The Board may consider the following criteria, among others, in determining whether to publish a precedential decision:

(1) Whether the case involves a substantial issue of first impression;
(2) Whether the case involves a legal, factual, procedural, or discretionary issue that can be expected to arise frequently in immigration cases;
(3) Whether the issuance of a precedent decision is needed because the decision announces a new rule of law, or modifies, clarifies, or distinguishes a rule of law or prior precedent;
(4) Whether the case involves a conflict in decisions by immigration judges, the Board, or the federal courts;
(5) Whether there is a need to achieve, maintain, or restore national uniformity of interpretation of issues under the immigration laws or regulations; and
(6) Whether the case warrants publication in light of other factors that give it general public interest.[75]

Although the regulations describing the criteria for publication were first proposed in 2008, they were not finalized until 2019.[76] However, even before 2019, the BIA Practice Manual described (and currently describes) published decisions as meeting

> one or more of several criteria, including but not limited to: the resolution of an issue of first impression; alteration, modification, or clarification of an existing rule of law; reaffirmation of an existing rule of law; resolution of a conflict of authority; and discussion of an issue of significant public interest.[77]

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[72] *Id.* § 1003.1(g)(1).

[73] DIZON & DADHANIA, *supra* note 36, § 1:155.

[74] 8 C.F.R. § 1003.1(g)(3); U.S. DEP'T OF JUST., BOARD OF IMMIGRATION APPEALS STYLE MANUAL: A GUIDE TO DRAFTING BOARD DECISIONS § 9.7 (2020) [hereinafter BIA STYLE MANUAL 2020].

[75] 8 CFR § 1003.1(g)(3).

[76] *See* Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 84 Fed. Reg. 31,463, 31,463 (July 2, 2019).

[77] U.S. DEP'T OF JUST., BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL § 1.4(d)(i)(A) (2018); U.S. DEP'T OF JUST., BOARD OF IMMIGRATIONS APPEALS PRACTICE MANUAL § 1.4(d)(1)(A) (2022) [hereinafter BIA PRACTICE MANUAL 2022]. The BIA Style Manual similarly states that the BIA "will generally determine whether to publish as precedent decisions those cases involving novel and important questions of law and decisions that overrule, modify, or further explain a published BIA decision." BIA STYLE MANUAL 2020, *supra* note 74, § 9.7.

Notably, the 2019 final rule was codified without an additional notice and comment period. Thus, when publishing the final rule in 2019, the Department responded only to the comments received in 2008. Of the six comments received, none commented on the criteria for publication, and only one discussed the number of Board members needed to issue a precedential decision.[78] The proposed rule had permitted publication of a decision upon majority vote of permanent members of a three-member panel. The commentator objected to this proposal in part because "the change will result in increased numbers of precedent decisions" and "the BIA is currently issuing an adequate number of decisions."[79] The Department agreed and decided that the BIA would continue to publish precedential decisions through the process of a majority vote of permanent members because it feared "potential for greater inconsistency and lack of uniformity among the panel decisions selected for publication."[80] Section II.A shows that the Board is in fact not issuing sufficient precedential decisions, and this lack of precedent is likely contributing to the well-documented and troubling disparities in the application of immigration law.

2. *Unpublished Decisions*

Virtually all BIA decisions are nonprecedential, unpublished,[81] and issued by single members of the Board.[82] Unpublished decisions, while binding on the parties in the case, are not binding on IJs, noncitizens, or the government in future cases, nor are they considered precedent in other cases.[83]

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[78] *See* 84 Fed. Reg. at 31,463–68. Comments focused on more troubling matters in the proposed regulations, including text that stated that "[a] decision by the Board . . . carries the presumption that the Board properly and thoroughly considered all issues, arguments, claims and record evidence raised or presented by the parties, whether or not specifically mentioned in the decision." *Id.* at 31,466.

[79] *Id.* at 31,468.

[80] *Id.* A comprehensive 2010 American Bar Association report on reforming the immigration system, which recommended that the Board issue more precedential decisions, found that "[t]his proposed procedural change . . . would appear to be an unsatisfactory solution to the small volume of issued precedent; careful consideration by the Board as a whole as to whether a particular opinion offers needed clarification in the law is a necessary step to crafting greater uniformity in immigration adjudication." COMM'N ON IMMIGR., AM. BAR ASS'N, REFORMING THE IMMIGRATION SYSTEM 3-19 (2010) [hereinafter ABA 2010 ORIGINAL REPORT]. The American Bar Association reaffirmed this position in its 2019 Update Report. ABA 2019 UPDATE REPORT, *supra* note 38, at UD 3-17.

[81] BIA PRACTICE MANUAL 2022, *supra* note 77, § 1.4(d)(1)–(2); ABA 2010 ORIGINAL REPORT, *supra* note 80, at 3-3.

[82] ABA 2019 UPDATE REPORT, *supra* note 38, at UD 3-3 ("[S]hort opinions by single members of the Board continue to be the predominant form of BIA decision making . . . .").

[83] BIA PRACTICE MANUAL 2022, *supra* note 77, § 1.4(d)(2).

The BIA further divided unpublished decisions into "restricted" and "non-restricted" decisions.[84] The Board never publicly shared how it classified decisions and never sought public input on the matter. However, this author obtained an internal EOIR memorandum from 2013 through a Freedom of Information Act (FOIA) request that describes "restricted" decisions. According to this memorandum, restricted decisions covered a wide swath of BIA decisions. Restricted decisions included, for example, all decisions relating to asylum, withholding of removal, the Convention Against Torture (CAT), cancellation of removal, bond, visa petition denials, and certain common waivers.[85] Employees of the BIA's Clerk's Office also had independent authority to classify other decisions as restricted.[86] While the NYLAG settlement makes this classification system irrelevant (at least for future Board decisions), the system dictated which unpublished decisions were accessible to the public for many years.

E. Access to BIA Decisions

Precedential Board decisions are publicly available electronically as individual PDFs in the EOIR virtual law library. While most newer decisions are searchable PDFs, there is no way to search through all precedential decisions at once by key term.[87] These decisions are also available on Westlaw and Lexis.

[84] Memorandum from Immigrant & Refugee App. Ctr. to Jean King, Deputy Gen. Couns., Exec. Off. for Immigr. Rev. 2 (Sept. 26, 2013) (on file with author) [hereinafter IRAC].

[85] Memorandum from Chrissy Burghard, Mgmt. & Program Analyst, Bd. of Immigr. Appeals, to Amy Minton, Senior Legal Advisor, Bd. of Immigr. Appeals (June 20, 2013), https://www.brennancenter.org/sites/default/files/June%2020%202013%20Restricted%20Cases%20and%20Board%20Decisions.pdf [https://perma.cc/4PE8-KLKH]. Some restricted decisions are available on Westlaw or Lexis, possibly because they were mistakenly placed in the LLIRC or because the attorney representing the noncitizen shared the decision. While EOIR's memorandum does not explain the reasoning behind making certain unpublished decisions restricted, the classification may have been rooted in privacy concerns for sensitive cases. Asylum, withholding of removal, and CAT cases involve allegations of serious past harm or fear of future harm by government authorities or individuals the government is unable or unwilling to control. Cancellation of removal, 212(h), and 212(i) waivers may involve the demonstration of extreme hardship to family members. However, privacy concerns do not fully explain the restricted versus nonrestricted distinction for unpublished decisions for two reasons: First, certain restricted decisions do not involve sensitive matters. Second, when the Board published decisions covering any restricted subject other than asylum, withholding, or CAT cases, it did not do anything to protect the identity of the noncitizen.

[86] IRAC, *supra* note 84, at 4. Independent determinations made by the Clerk's Office are often incorrect. *Id.*

[87] *See* Exec. Off. for Immigr. Rev., *Agency Decisions*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/ag-bia-decisions [https://perma.cc/4KG3-JLS5] (demonstrating that the website lists agency decisions but does not have a key term search function).

Government attorneys in immigration court have access to all unpublished BIA decisions, as do Board members and IJs.[88] IJs have access to the internal BIA case database, which allows them to search for any BIA decision (unpublished or published) if they know the alien registration number ("A number") of the noncitizen.[89] However, they are not able to search for decisions in this database by key term, which limits the database's utility.[90] Public access to unpublished decisions has historically been far more limited. But the tide is turning. The NYLAG settlement, further described below, will provide the public greater access to certain past and future unpublished decisions starting in January 2023.[91]

1. Public Access to Unpublished Decisions: Pre-January 2023

Attorneys representing noncitizens and the public have historically had extremely limited access to unpublished decisions. Except for a few "frequently requested" unpublished decisions posted on the EOIR website (as required by FOIA),[92] the BIA did not make unpublished decisions available electronically.[93] Some unpublished decisions were available in hard copy at the EOIR's publicly accessible Law Library and Immigration Research Center (LLIRC) in Falls Church, Virginia. However, as I learned during a research trip to the LLIRC on August 3, 2018 and through a conversation with a BIA law librarian, only unrestricted decisions were available at the LLIRC. The BIA did not make restricted decisions available to the public at all.[94] There was no index or filing system for unpublished

[88] *See* Complaint at ¶¶ 21–22, N.Y. Legal Assistance Grp. v. Bd. of Immigr. Appeals, 401 F. Supp. 3d 445 (S.D.N.Y. 2019), *vacated*, 987 F.3d 207 (2d Cir. 2021) (No. 18-cv-9495) [hereinafter NYLAG Complaint] (noting that BIA members, IJs, and government attorneys in immigration court have access to all unpublished decisions while these decisions are not made publicly available); author conversation with former IJ (notes on file with author).

[89] Author conversation with former IJ (notes on file with author).

[90] *Id.*

[91] NYLAG Settlement Announcement, *supra* note 14.

[92] 5 U.S.C. § 552(a)(2)(D) (requiring agencies to make frequently requested records available); *see* Exec. Off. for Immigr. Rev., *Frequently Requested FOIA Records*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/frequently-requested-foia-records [https://perma.cc/2EAP-X287].

[93] N.Y. Legal Assistance Grp. v. Bd. of Immigr. Appeals, 987 F.3d 207, 210–11 (2d Cir. 2021). EOIR previously included some unpublished "indexed decisions" from 1996–2001 on its website, but these decisions have since been removed. *See Immigration Law Research Guide: 3. Administrative Decisions*, UCLA SCH. OF L. HUGH & HAZEL DARLING L. LIBR., https://libguides.law.ucla.edu/c.php?g=183356&p=1208993 [https://perma.cc/GMB9-UD8H]; *Board of Immigration Appeals: Indexed Decisions*, INTERNET ARCHIVE WAYBACK MACH., https://web.archive.org/web/20120831051104/http:/www.justice.gov:80/eoir/vll/intdec/indexnet.html [https://perma.cc/58HN-3YBG].

[94] Interview with Law Librarian, Bd. of Immigr. Appeals, in Falls Church, Va. (Aug. 3, 2018). Before 2013, a greater number of decisions were available at the LLIRC. The 2013 EOIR memorandum narrowed the decisions made available at the LLIRC. *See* IRAC, *supra* note 84, at 1 ("For unknown reasons, many

decisions at the LLIRC, which made finding relevant decisions extremely time-consuming. Decisions at the LLIRC were organized by month and year only. The only way to find decisions on a particular topic was to leaf through them, one by one. Because of the unrestricted/restricted distinction, the Immigrant and Refugee Appellate Center (IRAC) estimated that less than 6% of unpublished decisions issued since 2011 were available at the LLIRC.[95]

Individuals could also access some unpublished decisions through unofficial sources. Lexis and Westlaw both have databases that include unpublished BIA decisions that they located at the LLIRC.[96] IRAC maintains an online index of unpublished BIA decisions that individuals can purchase.[97] IRAC further posts "noteworthy" unpublished decisions free of charge online "as a public service . . . to promote consistency in decision-making and to benefit attorneys with similar cases."[98] The current edition of Professor Deborah Anker's treatise *The Law of Asylum in the United States* includes cited unpublished decisions,[99] as does Bender's *Immigration Case Reporter*.[100] Finally, advocates sometimes share redacted copies of important unpublished decisions received in their cases through listservs and other means.

As a last resort, individuals could file FOIA requests with EOIR for unrestricted or restricted unpublished decisions. However, obtaining unpublished BIA decisions through FOIA was fraught with difficulties because decisions were not centrally located in one electronic database and

types of decisions that were once available in the LLIRC—such as those involving bond appeals, cancellation of removal, and common waivers of removability—are no longer made available."); Interview with Benjamin Winograd, Attorney, Immigrant & Refugee App. Ctr. (Aug. 9, 2018).

[95] IRAC, *supra* note 84, at 2.

[96] NYLAG Complaint, *supra* note 88, ¶ 20.

[97] *Index of Unpublished Decisions of the Board of Immigration Appeals*, IMMIGR. & REFUGEE APP. CTR., http://www.irac.net/unpublished/index-2/ [https://perma.cc/8U4Q-CA8Y]. The current edition of IRAC's index includes 5,000 decisions and costs $125.

[98] *Unpublished BIA Decisions*, IMMIGR. & REFUGEE APP. CTR., https://www.irac.net/unpublished/ [https://perma.cc/W5DE-L66B].

[99] DEBORAH E. ANKER, *Highlights of the 2022 Edition*, *in* LAW OF ASYLUM IN THE UNITED STATES, Westlaw (database updated June 2022). The current edition costs $653 for both the e-book and print versions. *See Law of Asylum in the United States, 2022 ed.*, THOMSON REUTERS, https://store.legal.thomsonreuters.com/law-products/Practice-Materials/Law-of-Asylum-in-the-United-States-2022-ed/p/106807868 [https://perma.cc/GR54-YK99]. Older editions of the treatise included an appendix of unpublished decisions that was invaluable for scholars and advocates alike. *See* Carolyn Patty Blum, *License to Kill: Asylum Law and the Principle of Legitimate Governmental Authority to "Investigate Its Enemies"*, 28 WILLAMETTE L. REV. 719, 721 n.8 (1992).

[100] The current e-book costs $3,819 and the print version costs $4,202. *Bender's Immigration Case Reporter*, LEXIS NEXIS STORE, https://store.lexisnexis.com/products/benders-immigration-case-reporter-skuusSku10436 [https://perma.cc/T7WR-BWZ6].

were mostly not electronically searchable by key term.[101] Worse still, EOIR sometimes heavily redacted released decisions such that they were useless to the requester.[102]

In early 2016, the EOIR General Counsel initiated a pilot project to redact and release a subset of unpublished Board decisions.[103] The purpose of the project was to assess the feasibility of a discretionary release of unpublished decisions.[104] Less than a year after beginning, EOIR placed the pilot project on hold.[105] Because EOIR could digitally search this small subset of decisions (issued between April 1, 2016 and November 30, 2016), it sometimes asked FOIA requesters to limit requests for BIA decisions on specific topics to the decisions redacted as part of this project.[106]

My own experience attempting to obtain unpublished BIA decisions is illustrative of how limited the public's access to unpublished decisions

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[101] Unpublished BIA decisions were found in three locations: (1) the agency's internal ShareDrive viewable through a web interface called "eDecisions"; (2) one or more of eighteen Federal Records Centers (FRCs) (long-term storage facilities) geographically located throughout the contiguous United States; and (3) the sixty-two Immigration Courts geographically located throughout the United States and its territories. Declaration of Joseph R. Schaaf in Support of United States Department of Justice, Executive Office for Immigration Review's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment at 7, N.Y. Legal Assistance Grp. v. Bd. of Immigr. Appeals, 401 F. Supp. 3d 445 (S.D.N.Y. 2019), *vacated*, 987 F.3d 207 (2d Cir. 2021) (No. 18-cv-9495) [hereinafter Schaaf February 2019 Declaration]. The eDecisions database did not contain copies of all BIA decisions. *Id.* For FY 1997 through FY 2017, the database contains approximately 83% of the total number of BIA decisions for this period. *Id.* at 8. The rest of the decisions for this period are available only in hard copy at one of the eighteen FRCs or one of the sixty-two Immigration Courts. *Id.* at 7–8. Crucially, the eDecisions database was searchable through a limited set of queries, including alien number of the noncitizen, fine number, date range, IJ name, the city in which the immigration court sits, and appeal type; the database was *not* searchable by key terms or words. *Id.* at 8; Email from Shelley M. O'Hara, Att'y Advisor, Exec. Off. for Immigr. Rev., to Author (July 1, 2019, 5:01 PM) (on file with author). Further, most of the scanned decisions within the database were not electronically searchable or redactable. Schaaf February 2019 Declaration, *supra*, at 9.

[102] *See* Letter from Author to Melanie Ann Pustay, Dir., Off. of Info. Pol'y, (Sept. 10, 2019) (on file with author) (noting the unpublished decisions disclosed in response to a FOIA request contained many unjustified redactions); *see also* Jeffrey S. Chase, *EOIR's Knee-Jerk Reaction?* JEFFREY S. CHASE OPS./ANALYSIS ON IMMIGR. L. BLOG (May 27, 2018), https://www.jeffreyschase.com/blog/2018/5/27/eoirs-knee-jerk-redaction [https://perma.cc/B8HU-CRBC] (noting EOIR's redaction of innocuous information such as references to sections of the Immigration and Nationality Act and citations of BIA precedent decisions).

[103] Schaaf February 2019 Declaration, *supra* note 101, at 2.

[104] *Id.*

[105] *Id.* at 3.

[106] O'Hara, *supra* note 101. Because of the limitations of EOIR's eDecisions database and record keeping, when this author sought unpublished decisions relating to specific subjects and covering a span of years, the agency denied the request as too burdensome because fulfilling it would require searching each of the three locations where decisions are stored. *See* Letter from J.R. Schaaf, Chief Couns. for Admin. L., Exec. Off. for Immigr. Rev., to author (July 2, 2019) (on file with author). When this author offered to narrow the search to just those decisions located in the eDecisions database, the request was still denied because the database is not searchable by key term. *See* O'Hara, *supra* note 101.

was.[107] In 2018, I attempted to obtain the unpublished decisions mentioned by the Third Circuit in Mr. Uddin's case, as well as other Board decisions interpreting the INA's definition of a Tier III terrorist organization. I was unable to access the unpublished Board decisions the government submitted to the Third Circuit in Mr. Uddin's case on PACER, as the government filed the submission under seal. A trip to the LLIRC led only to a discovery that the Board classifies most unpublished decisions as restricted and does not make restricted decisions available to the public. Tier III decisions were, unsurprisingly, restricted since most involved asylum claims, and would not be found in the LLIRC. Most of the FOIA requests I filed with the Board were denied as too burdensome to fulfill due to the limitations of EOIR's database. Finally, the government heavily redacted the decisions that were released through one of my successful FOIA requests.[108]

Ultimately, I obtained some useful decisions by reaching out to Mr. Uddin's attorney, other advocates, and by filing a successful appeal arguing that the redactions of the released decisions were improper. Even still, I was unable to access most of the decisions that I sought.

2. *Public Access to Unpublished Decisions: January 2023 and Beyond*

In October 2018, the New York Legal Assistance Group (NYLAG), a nonprofit that provides free legal services to low-income New Yorkers, filed a lawsuit against the Board arguing that by failing to make unpublished decisions publicly available, the agency violated its affirmative obligation under FOIA to "make available for public inspection in an electronic format . . . final opinions . . . [and] orders, made in the adjudication of cases."[109] The district court granted the BIA's motion to dismiss, but the Second Circuit vacated that judgment and remanded the case back to the district court.[110] In February 2022, the parties entered into a historic settlement that requires EOIR to post certain "past" and future unpublished decisions online in its electronic reading room on a staggered timeline.

[107] In an article written in 1992, Professor Carolyn Blum similarly described the difficulty she had in obtaining unpublished Board decisions necessary for her research. *See* Blum, *supra* note 99, at 721 n.8.

[108] *See* Letter from Author to Melanie Ann Pustay, *supra* note 102. The redactions included the names of precedential Board and circuit court decisions, the relief the noncitizen sought and, crucially for my purposes, the names of the organizations being considered for Tier III status.

[109] NYLAG Complaint, *supra* note 88, ¶ 9; 5 U.S.C. § 552(a)(2)(A) (2018).

[110] Stipulation of Settlement at 1–2, N.Y. Legal Assistance Grp. v. Bd. of Immigr. Appeals, 401 F. Supp. 3d 445 (S.D.N.Y. 2019), *vacated*, 987 F.3d 207 (2d Cir. 2021) (No. 18-cv-9495) [hereinafter NYLAG Settlement].

Under the terms of the settlement, EOIR must post decisions on the following schedule:[111]

TABLE 1: EOIR DECISION SCHEDULE

Type of Decisions	Dates Decisions Were Issued	Disclosure Deadline
2016 pilot project decisions	04/01/2016–11/30/2016	04/15/2023
Past decisions	01/01/2017–12/31/2021	Begins on a rolling basis by no later than 07/15/2024. All past BIA decisions must be posted by 07/15/2027.
Interim Fiscal Year 2022 decisions	01/01/2022–9/30/2022	Begins on a rolling basis by no later than 01/15/2023. All interim FY22 decisions must be posted by 07/15/2023.
Future decisions–Q1 of Fiscal Year 2023	10/01/2022–12/31/2022	10/15/2023
Future decisions–Q2 of Fiscal Year 2023	01/01/2023–03/31/2023	01/15/2024
Future decisions–Q3 of Fiscal Year 2023	04/01/2023–06/30/2023	04/15/2024
Future decisions–Q4 of Fiscal Year 2023	07/01/2023–09/30/2023	07/15/2024
Fiscal Years 2024, 2025, and 2026	10/01/2023–09/30/2026	On a quarterly basis with publication of opinions for the given Fiscal Year being completed by no later than July 15 of the following calendar year.
Fiscal Year 2027	10/01/2026–09/30/2027	04/15/2028
Fiscal Year 2028 and after	10/01/2027–future	Within 6 months of the date decisions are issued.

The settlement excludes decisions on interlocutory appeals, decisions "which, even with reasonable redactions, may put the Respondent at risk of his/her identity being revealed," decisions for which disclosure would violate 8 U.S.C. § 1367(a)(2) (prohibiting disclosure of information relating to applications for VAWA self-petitions, VAWA cancellation of removal, U or T visas), and any "past BIA decisions" that are available only in hard

[111] *Id.* ¶¶ 3–5.

copy.[112] If the Board wishes to withhold other decisions, it must meet and confer with counsel for NYLAG.[113] Individuals may continue to file FOIAs for decisions exempt from disclosure, but actually obtaining decisions may be challenging in light of EOIR's FOIA practices described above.

This settlement is significant because it will grant the public access to unpublished decisions on a large-scale and electronic basis for the first time. However, it ultimately falls short of remedying all transparency and accessibility concerns raised by the immigration shadow docket because of the potential for EOIR to exploit the exclusion provisions, unconscionable timelines for disclosure, and lack of guidance to EOIR about redactions and the form in which decisions must be disclosed. Section III.A. provides a full evaluation and critique of the settlement with recommendations for the government and advocates.

F. EOIR Citation Rules for BIA Decisions

The BIA Practice Manual "discourage[s]" parties from citing to unpublished decisions, which an earlier edition of the Practice Manual explains is "because these decisions are not controlling on any other case."[114] Citations to unpublished decisions are likewise "discouraged" by the immigration court "because these decisions are not binding on the Immigration Court in other cases."[115] Despite this language, IJs and attorneys representing the government have relied upon unpublished decisions to support their arguments.[116]

The BIA Style Manual similarly "discourage[s]" paralegals, staff attorneys, and law clerks who draft Board opinions from citing to unpublished decisions, which an earlier version of the Style Manual explains is "because these decisions are not controlling on any other case"; however,

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[112] *Id.* ¶¶ 1, 6.

[113] *Id.* ¶ 6.

[114] BIA PRACTICE MANUAL 2022, *supra* note 77, § 4.6(d)(2); U.S. DEP'T OF JUST., BOARD OF IMMIGRATIONS APPEALS PRACTICE MANUAL app. J-2 (2021) [hereinafter BIA PRACTICE MANUAL 2021].

[115] THE OFF. OF THE CHIEF IMMIGR. JUDGE, IMMIGRATION COURT PRACTICE MANUAL J-3 (2020) [hereinafter IMMIGRATION COURT PRACTICE MANUAL 2020].

[116] *See, e.g.*, Perez-Herrera, 2018 WL 4611455, at *6 (B.I.A. Aug. 20, 2018) ("The Immigration Judge considered the relevant jury instructions, Pennsylvania state court cases, and unpublished Board decisions . . . ."); Bayoh, 2018 WL 4002292, at *1 n.1 (B.I.A. June 29, 2018) ("The Immigration Judge's decision specifically referenced and attached . . . two Board unpublished decisions . . . ."); Stewart, 2016 WL 4035746, at *1 (B.I.A. June 30, 2016) ("In its motion, the Government sought remand for the Board to determine the effect on the noncitizen's removability [of] . . . the Board's decision in an unpublished case . . . ."); Iqbal, 2007 WL 2074540, at *3 (B.I.A. June 19, 2007) ("[T]he Immigration Judge declined to find that the [noncitizen] had knowingly committed marriage fraud . . . . The DHS urges us to find otherwise based on an unpublished case."); A-, 9 I. & N. Dec. 302, 310 (B.I.A. 1961) (referencing "*Matter of V*—, unreported, cited by the Service representative in oral argument").

it acknowledges that sometimes such citations may be "necessary."[117] In its own decisions, the BIA has referenced and relied upon unpublished decisions.[118] For example, in *Matter of A-C-M-*, a precedential Board decision, the BIA referenced earlier unpublished decisions in coming to its conclusion that the "material support" bar includes no quantitative limitation.[119]

The BIA further relies internally on unpublished "indexed decisions."[120] EOIR previously maintained "indexed decisions" issued from 1996 to 2001 on its website, but it has since removed the decisions.[121] These decisions were described on the website as follows: "The following indexed decisions of the Board have not been published and accordingly have NO value as precedent. The decisions were indexed *in order to provide internal guidance*, and are offered here to the public as a courtesy. Citation to unpublished decisions is disfavored by the Board."[122] Logically, the Board must have used these decisions to guide its decision-making in unpublished and published opinions.

G. *Judicial Review of BIA Decisions*

Prior to 1996, "noncitizens had broad access to the federal courts" for review of BIA decisions.[123] However, the Antiterrorism and Effective Death Penalty Act, the Illegal Immigration Reform and Immigrant Responsibility

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117 BIA STYLE MANUAL 2020, *supra* note 74, § 6.2(b)(ii).

118 *See, e.g.*, A-C-M-, 27 I. & N. Dec. 303, 307–10 (B.I.A. 2018) ("In several nonprecedential decisions, some of which have been reviewed by the Federal courts of appeals, we have found that 'material support' includes activities, both voluntary and involuntary, such as fundraising, making payments of money, providing food and shelter, and performing physical labor."); Razo, 2017 WL 7660432, at *1 n.1 (B.I.A. Oct. 16, 2017) ("We separately note that in an unpublished decision issued after the Immigration Judge's decision in these proceedings, the Board found that solicitation of prostitution under a Florida criminal statute is a CIMT."); Alvarez Fernandez, 2014 WL 4966372, at *2 (B.I.A. Sept. 23, 2014) ("[T]he [noncitizen] . . . submitted an unpublished decision . . . . Although this decision is not precedential, we adopt a similar analysis . . . .").

119 *A-C-M-*, 27 I. & N. Dec. at 307–10. The INA bars a noncitizen from most immigration relief if they have provided "material support" for the commission of a "terrorist activity" to any individual who the noncitizen knows, or reasonably should know, has committed or plans to commit a "terrorist activity," or to a Tier I, II, or III terrorist organization or any member of such an organization. Faiza W. Sayed, *Terrorism and the Inherent Right to Self-Defense in Immigration Law*, 109 CALIF. L. REV. 615, 621–24 (2021). For the statutory definitions of "Engage[d] in terrorist activity" and "Terrorist activity," see Immigration and Nationality Act (INA) § 212(a)(3)(B)(iii), (iv), 8 U.S.C. § 1182(a)(3)(B)(iii), (iv).

120 IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 1436 (14th ed. 2014) ("In addition to the BIA's published interim decisions, the BIA also relies internally on unpublished 'indexed decisions.'").

121 *See Immigration Law Research Guide*, *supra* note 93.

122 *Board of Immigration Appeals Indexed Decisions*, *supra* note 93 (emphasis added).

123 3 SHANE DIZON & POOJA DADHANIA, IMMIGRATION LAW SERVICE §§ 15:1, 13:222 (2d ed. 2022).

Act (IIRAIRA), and the Supreme Court's interpretation of the INA have substantially limited the nature and scope of judicial review of immigration cases.[124] As summarized by the Supreme Court in a recent decision, "Congress has comprehensively detailed the rules by which noncitizens may enter and live in the United States. When noncitizens violate those rules, Congress has provided procedures for their removal. . . . *Federal courts have a very limited role to play in this process*."[125]

But a "limited role" is not exactly no role.

1. Limited Scope of Review and Availability of Stays of Removal

Decisions of the BIA are now directly appealed to the federal circuit courts.[126] Federal circuit courts may review final orders of removal, including findings of removability and denials of applications of relief, denials of motions to reopen or motions to reconsider, and denials of asylum in asylum-only proceedings.[127]

Prior to 1996, the filing of a petition for review with a federal court automatically stayed the execution of a removal order in most cases; however, IIRAIRA has since eliminated automatic stays of removal.[128] Noncitizens now must file a motion for a stay of removal with the circuit court.[129] In most circuits, the filing of a petition for review and motion for a stay does not immediately stay the removal order. Rather, the government may remove the noncitizen until the court grants the stay.[130]

In contrast, federal circuit courts are now barred from reviewing most immigration decisions, including, for example:

- Discretionary decisions regarding detention or release, including the grant, revocation, or denial of bond or parole.[131]
- Final orders of removal against noncitizens who have been convicted of certain crimes.[132]
- Discretionary decisions other than granting asylum.[133]

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[124] *Id.* §§ 15:4, 13:222.

[125] Patel v. Garland, 142 S. Ct. 1614, 1618 (2022) (emphasis added).

[126] ANKER, *supra* note 99, § 1:4.

[127] DREE K. COLLOPY, AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 981 (7th ed. 2015).

[128] DIZON & DADHANIA, *supra* note 123, § 13:222.

[129] *Id.*

[130] *See* CATHOLIC LEGAL IMMIGR. NETWORK, INC., PRACTICE ADVISORY: STAYS OF REMOVAL 11 (2021), https://cliniclegal.org/resources/removal-proceedings/practice-advisory-stays-removal [https://perma.cc/5GGP-M6XC].

[131] INA § 236(e), 8 U.S.C. § 1226(C).

[132] INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C).

[133] INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii)

- Discretionary decisions to grant or deny certain waivers.[134]
- Discretionary decisions relating to voluntary departure, cancellation of removal, or adjustment of status under INA § 245.[135]
- Decisions denying asylum because the IJ found the applicant faced certain bars to asylum.[189]

For these types of decisions, Congress preserved circuit court review only for constitutional claims and questions of law.[136]

In a recent decision, *Patel v. Garland*, the Supreme Court held that federal courts lack jurisdiction to review not only the ultimate discretionary decision of an IJ to grant or deny relief but also factual determinations that underlie those decisions.[137] This extreme position was not advanced by the government, which argued at the Supreme Court that the federal courts do have jurisdiction to review the factual determinations at issue in the case. Rather, it was advanced by an amicus appointed by the Supreme Court, signaling the Court's hostility to judicial review of immigration cases.[138] The repercussions of this decision are enormous, as the dissent noted:

> Today, the Court holds that a federal bureaucracy can make an obvious factual error, one that will result in an individual's removal from this country, and nothing can be done about it. No court may even hear the case. It is a bold claim promising dire consequences for countless lawful immigrants. And it is such an unlikely assertion of raw administrative power that not even the agency that allegedly erred, nor any other arm of the Executive Branch, endorses it. Today's majority acts on its own to shield the government from the embarrassment of having to correct even its most obvious errors.[139]

This decision again underscores the critical role of the BIA as the final arbiter of immigration cases.

2. Deferential Standards of Review

While federal courts review constitutional issues, questions of law, and the BIA's legal conclusions de novo,[140] they must defer to reasonable interpretations of the INA and regulations the BIA administers.[141] Even where courts have jurisdiction to review factual determinations, they can

[134] INA § 212(i), 8 U.S.C. § 1182 (i); INA § 242(a)(2)(B)(i), 8 U.S.C. § 1252(a)(2)(B)(i).

[135] INA § 242(a)(2)(B)(i), 8 U.S.C. § 1252(a)(2)(B)(i).

[136] INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D).

[137] 142 S. Ct. 1614, 1627 (2022).

[138] *Id.* at 1621 ("Because the Government has continued to take the position that § 1252(a)(2)(B)(i) does not prohibit review of the fact determinations at issue, we invited Taylor A. R. Meehan to brief and argue this case, as *amicus curiae*, in support of the judgment below.").

[139] *Id.* at 1627–28 (Gorsuch, J., dissenting).

[140] DIZON & DADHANIA, *supra* note 123, § 15:14.

[141] *See* Chevron, U.S.A. Inc. v. NRDC, 467 U.S. 837, 844 (1984).

overturn a finding of fact in an immigration case only where "any reasonable adjudicator would be compelled . . . to the contrary."[142] Where courts have jurisdiction to review a discretionary judgment, they review the decision for an abuse of discretion, which generally assesses whether the decision was arbitrary, irrational, or contrary to law.[143]

The modern BIA is a backlogged, politically influenced body subject to minimal review that often operates in the shadow of the law. The next Part discusses the contours—and the depth—of that shadow.

II. THE IMMIGRATION SHADOW DOCKET

An "immigration shadow docket" exists in the United States. But before describing that shadow docket, I will provide a brief summary of the better-known Supreme Court shadow docket. Each term, the Supreme Court hears oral arguments in about eighty cases and for each of these cases issues a signed opinion of the Court.[144] This signed opinion provides a detailed explanation of the Court's decision and identifies the Justices joining or concurring with the opinion and the Justices dissenting from it.

In 2015, Professor William Baude coined the term "shadow docket" to describe the thousands of *other* decisions the Supreme Court issues each year in the form of nonmerits orders and summary decisions. Professor Baude was troubled by the fact that these decisions "do not always live up to the high standards of procedural regularity set by its merits cases."[145] He highlighted several issues with shadow docket decision-making, including (1) that the Court does not explain its legal reasoning in these decisions, (2) that it is difficult for lower courts, parties, and the public to know what, if any, impact the decisions should have on other cases that raise the same issue, and (3) that there is a lack of consistency and transparency in cases selected.[146] Professor Stephen Vladeck, when testifying before the Senate Committee on the Judiciary, echoed this view, explaining that, "Owing to their unpredictable timing, their lack of transparency, and their usual inscrutability, these rulings come both literally and figuratively in the shadows."[147]

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142 INA § 242(b)(4)(B), 8 U.S.C. § 1252(b)(4)(B).

143 DIZON & DADHANIA, *supra* note 123, § 15:14.

144 *The Supreme Court at Work*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/courtatwork.aspx [https://perma.cc/TYH2-QCFG].

145 William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1, 4–5 (2015).

146 *Id.* at 2–4.

147 *Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 2–3 (2021) (testimony of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law).

Similarly, an "immigration shadow docket" exists in the United States. Each year the Board issues thirty published, precedential decisions that are readily available to the public and that provide detailed reasoning to support the Board's conclusions. These decisions are issued by three-member panels or by the Board en banc, with clear identification of the members joining or concurring with the opinion and those dissenting from it.

In contrast, most of the Board's decision-making happens on its shadow docket—the tens of thousands of *other* decisions it issues each year that are unpublished and nonprecedential. These decisions are generally authored by a single Board member and overwhelmingly consist of brief orders and summary affirmances. These shadow docket decisions are often inconsistent with other unpublished or published decisions and lack transparency because they provide little or no reasoning and are largely inaccessible to the public, including noncitizens in removal proceedings and their representatives.

This Part first explains the consequences of this immigration shadow docket on the development of immigration law. It then outlines four characteristics of the shadow docket that demonstrate its harms: (1) the creation of secret law that is accessible to the government, but largely inaccessible to the public; (2) inconsistent decision-making in cases that logically should have the same outcome; (3) low-quality opinions that are thinly reasoned or lack reasoning entirely; and (4) error-prone decision-making. This Part concludes by exploring other potential explanations for these problems and by discussing why the BIA must implement reforms to address the problems caused by shadow docket decision-making.

A. Consequences on the Development of Immigration Law

The fact that most BIA decisions are unpublished, nonprecedential decisions has serious consequences for the development of immigration law and for the immigration system as a whole. The lack of precedent from the Board interpreting, expanding, and applying the law impairs immigration adjudicators from accurately applying the law, advocates and the public from understanding the law, and policy and lawmakers from evaluating the law. Lack of precedent likely contributes to the well-documented inconsistencies in the application of immigration law and the inefficiency of the immigration system that leaves noncitizens in protracted states of limbo, or even prolonged detention.[148] I will draw here on Professor Richard Cappalli's *The*

[148] For example, remands by the BIA and the circuit courts are not unusual *See* U.S. DEP'T OF JUST., EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ADJUDICATION STATISTICS: CIRCUIT COURT REMANDS FILED (2022), https://www.justice.gov/eoir/page/file/1199211/download [https://perma.cc/X44H-DG46] (reporting that the circuit court files at least hundreds of remands each year).

Common Law's Case Against Non-Precedential Opinions, which criticizes the rise of nonprecedential decisions at the federal circuit courts of appeal.[149]

Precedent is particularly needed in immigration law because it is a complex area of the law. Various factors make immigration law difficult to understand and apply, including the inscrutable statutory language of the INA, various amendments to the statute, the need to examine state law to resolve certain questions, and the multitudinous factual situations IJs encounter. Many scholars have written about the complexity and difficulty of applying immigration law,[150] and even federal circuit court judges have discussed the challenges that they have faced when interpreting immigration law. The Ninth Circuit described the field as "second only to the Internal Revenue Code in complexity" and a "labyrinth" that only a lawyer can thread.[151]

A body of law cannot develop without precedent interpreting, expanding, and applying the law to different factual circumstances.[152] In the realm of immigration law, Congress has left much to the interpretation of IJs. For example, the concept of "persecution" is central to asylum law. If a noncitizen has suffered harm or fears harm in their home country that rises to the level of persecution, they may be eligible for asylum.[153] But despite the importance of the term, persecution is defined by neither statute nor regulation.[154] IJs must examine case law finding persecution occurred or did not occur under different factual circumstances and attempt to analogize or distinguish the asylum seeker in the case before them to these other cases.[155] Without precedent, IJs would have little to guide their application of the statutory term. While consulting legislative history and examining other sources of law (for example, international law) may prove fruitful, neither would be as helpful as precedential decisions from the Board interpreting and applying the law.

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[149] Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 759 (2003).

[150] *See* Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501, 1508–14 (2010).

[151] Castro-O'Ryan v. U.S. Dep't of Immigr. & Naturalization, 847 F.2d 1307, 1312 (9th Cir. 1987) (quoting ELIZABETH HULL, WITHOUT JUSTICE FOR ALL 107 (1985)).

[152] *See generally* Cappalli, *supra* note 22, at 761–68 (outlining the role of precedent and the enactment of law).

[153] DAVID A. MARTIN, T. ALEXANDER ALEINIKOFF, HIROSHI MOTOMURA & MARYELLEN FULLERTON, FORCED MIGRATION: LAW AND POLICY 133 (2d ed. 2013).

[154] ANKER, *supra* note 99, § 4:4 & n.1.

[155] *Id.* § 4:4. In the case of persecution, the BIA has issued decisions interpreting the term, which have been supplemented by numerous decisions of the federal circuit courts. *Id.* However, this is not true for many other statutory terms.

Precedent gives meaning to the often imprecise statutory language of the INA.[156] In the words of the Ninth Circuit, "we are in the never-never land of the Immigration and Nationality Act, where plain words do not always mean what they say."[157] To return to the "material support" bar, while the INA explains that "material support" includes "a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons . . . , explosives, or training," the statute leaves many questions unanswered.[158] Other than those listed in the statute, what other kinds of support qualify? How much support is required to trigger the bar (in other words, is there a quantitative limitation to the bar)? Has a woman who was kidnapped by guerillas and forced to cook, clean, and wash clothes for them provided "material support"? Many people would likely answer "no" to this last question for two reasons. First, the bar must have a voluntariness requirement or, in other words, an exception for activity committed under duress. Second, cooking, cleaning, and washing clothes are not "material."

Although the material support bar was drastically expanded in 2001, the Board remained silent as to these questions for a long time.[159] Awaiting legal guidance on these questions, the Asylum Office began placing on "hold" asylum applicants who reported many different kinds of interactions with armed groups, leaving these applicants in limbo.[160] Noncitizens applying for asylum in immigration court faced a different situation: from 2001 to early 2005, attorneys representing the government took the position that duress was a defense to the material support bar.[161] A number of IJs agreed with this interpretation.[162] But in late 2004 and early 2005, government lawyers began arguing that the bar applied to any noncitizen who had given anything to a terrorist organization, even if the noncitizen did so under duress.[163] In 2016, the Board finally issued a precedential decision holding that the bar does not include an implied exception for material support provided under duress, and, in 2018, it issued a precedential decision declaring that there is no de

[156] Baum, *supra* note 150, at 1509.

[157] Yuen Sang Low v. Att'y Gen. of the U.S., 479 F.2d 820, 821 (9th Cir. 1973).

[158] INA § 212(a)(3)(B)(iv), 8 U.S.C. § 1182(a)(3)(B)(iv).

[159] HUM. RTS. FIRST, DENIAL AND DELAY: THE IMPACT OF THE IMMIGRATION LAW'S "TERRORISM BARS" ON ASYLUM SEEKERS AND REFUGEES IN THE UNITED STATES 21–22 (2009).

[160] *Id.* at 23.

[161] *Id.*

[162] *Id.*

[163] *Id.* at 24.

minimis exception to the bar.[164] The woman who had cooked, cleaned, and washed clothes for the guerillas under duress was out of luck.

Precedent can help adjudicators understand the scope of standards in the INA as they are applied to new factual circumstances.[165] For example, to win cancellation of removal, a nonpermanent resident must prove that their removal will cause a qualifying family member "exceptional and extremely unusual hardship."[166] Here, too, the INA does not define the standard.[167] Although Congress created the "exceptional and extremely unusual hardship" standard in 1996, the BIA has published only a few precedential decisions directly interpreting and applying it.[168] These decisions provide a framework of elements for the adjudicator to consider, which make clear only that the determination is a fact-intensive inquiry made on a case-by-case basis.[169]

Given the fact-intensive inquiry and the variety of factual circumstances IJs encounter, precedential opinions applying the exceptional and extremely unusual hardship standard to different factual situations would help develop the law and guide the IJs and practitioners seeking to understand and apply it. Professor Cappalli explains:

> In areas of law where factual settings are diverse . . . the true content of law is known not by the verbal rule formulations but by the application of those verbal formulations to specific settings . . . . In sum, the actual scope of a doctrinal formulation is learned through its applications and not through the words chosen to express the doctrine . . . .
>
> The legal system needs not merely the leading case but also the expansions and contractions of old, verbally stable rules that are found in humdrum applications, or what we might call the "rules in operation" as compared to the "rules in the books."[170]

The BIA issues so few precedential opinions that application of specific immigration standards to different factual settings is rare. The scant BIA precedent is particularly egregious in cancellation of removal cases; because

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164 M-H-Z-, 26 I. & N. Dec. 757, 761–64 (B.I.A. 2016); A-C-M-, 27 I. & N. Dec. 303, 306 (B.I.A. 2018).

165 *See generally* Cappalli, *supra* note 149, at 755, 763 (providing a hypothetical example, in the field of privacy law, of when precedent is valuable to future rulings on similar matters).

166 INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D).

167 Eva Marie Loney, *Syncing Law with Psychology: Redefining Cancellation of Removal Hardship*, 3 AILA L.J. 95, 98 (2021).

168 J-J-G-, 27 I. & N. Dec. 808, 809 (B.I.A. 2020); Calderon-Hernandez, 25 I. & N. Dec. 885, 886 (B.I.A. 2012); Andazola, 23 I. & N. Dec. 319, 324 (B.I.A. 2002); Recinas, 23 I. & N. Dec. 467, 468 (B.I.A. 2002).

169 Loney, *supra* note 167, at 98.

170 Cappalli, *supra* note 22, at 768–69.

Congress has stripped the federal courts' jurisdiction to review decisions about cancellation, only the BIA can rule on such cases.[171]

Precedent can help immigration law expand when new factual circumstances not addressed by the bare words of the INA give rise to rule exceptions.[172] As an example, the INA bars noncitizens who have participated in the persecution of others from receiving nearly all immigration benefits.[173] Adjudicators have long grappled with the question of whether this bar includes an implied duress exception, particularly in the situation of child soldiers and other noncitizens who themselves were victims of persecution. Does the persecutor bar prevent an adjudicator from granting asylum to a child from the Democratic Republic of Congo who was forcibly recruited by a rebel group and participated in fighting?[174] What about women kidnapped by Boko Haram in Nigeria who were forced to carry ammunition and lure targets into ambushes?[175]

The BIA failed to rule on this question in any precedential opinion, but in 2009, the question finally reached the Supreme Court in *Negusie v. Holder*.[176] The Court held that the INA's persecutor bar provision was ambiguous as to whether coercion or duress was relevant in determining if a noncitizen had participated in persecution and remanded the case to the BIA to address the issue in the first instance.[177] Despite this mandate, the BIA again failed to issue a precedential decision on the issue for years.[178] In the absence of an authoritative interpretation from the Board, "federal circuit courts and immigration judges [were] forced to arrive at their own conclusions, often with divergent results."[179] Finally, in 2018—nearly ten years after the Supreme Court's remand—the BIA recognized a narrow duress exception to the persecutor bar.[180]

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171 INA § 242(a)(2)(B)(i), 8 U.S.C. § 1252(a)(2)(B)(i).

172 For an example of one such circumstance, see Cappalli, *supra* note 149, at 765.

173 *See, e.g.*, INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (excluding noncitizens who have persecuted others from refugee status); INA § 208(b)(2)(A)(i), 8 U.S.C. § 1158(b)(2)(A)(i) (excluding noncitizens who have persecuted others from applying for asylum).

174 *See* Kate Evans, *Drawing Lines Among the Persecuted*, 101 MINN. L. REV. 453, 454 (2016).

175 *See id.*

176 555 U.S. 511, 517 (2009).

177 *Id.*

178 Evans, *supra* note 174, at 456, 456 n.13.

179 *Id.* at 456.

180 Negusie, 27 I. & N. Dec. 347, 352–63 (B.I.A. 2018), *vacated*, 28 I. & N. Dec. 120 (A.G. 2020). Just two years later, during the Trump Administration, the decision was vacated by the AG. Negusie, 28 I. & N. Dec. 120, 120–21 (A.G. 2020). In October 2021, Attorney General Garland certified the *Negusie* decision to himself, perhaps to reinstate the duress exception. Negusie, 28 I. & N. Dec. 399, 399 (A.G. 2021).

Finally, precedent is crucial for creating uniformity in immigration law. Given the imprecise statutory language and lack of guidance from Congress on the meaning of crucial statutory terms, without precedent to guide decision-making, IJs apply the law in wildly inconsistent ways. Immigration law thus features dramatic disparities. One well-known study described shocking disparities in asylum grant rates across IJs,[181] which continue to exist to this day.[182]

A more recent study found large disparities in relief rates (the rate at which an IJ grants relief from removal) in general across IJs.[183] This study found that in an average immigration court, "approximately one third of [noncitizens] have their cases decided by judges either nine percentage points harsher or nine percentage points more generous than the court average."[184] Thus, "[i]n a court in which 30% of [noncitizens] obtained relief, this level of disparity meant that the luckiest 15% of [noncitizens], assigned to generous judges, were twice as likely to avoid deportation as the

[181] Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 313–17 (2007). The study found serious disparities in asylum grant rates between immigration courts. For example, a Chinese asylum seeker in the Atlanta Immigration Court had a 7% chance of success, as compared to 47% success rate nationwide and a 76% success rate in the Orlando Immigration Court. The study also found serious disparities in asylum grant rates *within* immigration courts. For example, one IJ at the New York Immigration Court granted 6% of asylum cases, while another IJ in the same building granted 91%. Significant disparities were also found in the Asylum Offices. In one region, some asylum officers granted 0% of Chinese asylum cases, while other officers granted as many as 68% of these cases. *Id.* at 329–30, 334. *See generally* JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 3 (2009) (analyzing the variability in asylum case decisions across individual adjudicators).

[182] In 2006, the Transactional Records Access Clearinghouse (TRAC) published its first report on the immigration courts' decisions in asylum cases. That report found large disparities in asylum denial rates from IJ to IJ. For example, one IJ in the New York Immigration Court denied 94.5% of Chinese asylum cases, while another IJ in the same immigration court denied 6.9% of the same cases. Overall IJ denial rates ranged from a low of 10% to a high of 98%. *See Immigration Judges*, TRAC IMMIGR. (July 31, 2006), https://trac.syr.edu/immigration/reports/160/ [https://perma.cc/Y6PT-UEAB]. In response, Attorney General Gonzales ordered EOIR to review TRAC's study and provide recommendations. EOIR's internal review confirmed that "some notable" disparities existed, and it instituted additional training, mentoring, and supervision. While there was a brief dip in disparities because of these efforts, the disparities quickly returned and persist to this day. *Latest Data from Immigration Courts Show Decline in Asylum Disparity*, TRAC IMMIGR. (June 22, 2009), https://trac.syr.edu/immigration/reports/209/ [https://perma.cc/7YK9-GY36]. For example, a recent TRAC report shows denial rates of asylum cases range from 5% to 95% in the New York Immigration Court and from 73% to 99% in the Miami Immigration Court. Overall denial rates range from 5% to 99%. *Asylum Success Varies Widely Among Immigration Judges*, TRAC IMMIGR. (Dec. 9, 2021), https://trac.syr.edu/immigration/reports/670/ [https://perma.cc/J4TB-W5Y4].

[183] David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177, 1186–87 (2016).

[184] *Id.* at 1187.

unluckiest 15%."[185] These disparities are more than three times larger than disparities across federal judges in decisions about whether to send a criminal defendant to prison.[186]

The BIA is uniquely positioned to create uniformity in immigration law. Congress stripped federal courts of jurisdiction over most immigration cases, and even where the federal circuit courts do have jurisdiction to consider an immigration appeal, the precedential opinions of federal circuit courts are only binding on IJs within each circuit court's jurisdiction.[187] In addition, because of *Chevron* deference, the federal courts must defer to Board interpretations of the INA when the statute is silent or ambiguous,[188] which, as described above, is often.

In comparison, IJs in all jurisdictions must follow the precedential decisions of the Board.[189] The Board's regulations also charge it with the duty of publishing precedent to ensure uniformity. Despite this, the BIA appears to have all but abdicated its duty to ensure uniformity in the application of immigration law. The Board designates about 30 of the approximately 30,000 decisions it issues a year as precedential.[190] Assuming thirty precedential decisions a year, the Board publishes as precedential a mere 0.001% of its decisions. This is far fewer than the number of precedential opinions issued by the federal circuit courts, which scholars such as Cappalli found alarming.[191] Given the intricacy of immigration law, the Board's actions (or rather lack of action) have hampered the development of and uniform application of immigration law. In fact, the lack of published precedent has resulted in inconsistent decision-making at the Board itself.

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[185] *Id.* at 1191. In *The Failure of Immigration Appeals*, Professor David Hausman similarly concludes that the BIA fails to promote consistency across IJ decisions. *Id.* at 1180. Using empirical data, he argues that this failure arises because the Board does not review a representative sample of IJ decisions. *Id.* Hausman shows that the Board rarely reviews the removal orders of noncitizens who might have meritorious claims but who are assigned harsh IJs and lack lawyers at the beginning of their cases. *Id.* at 1197. Because the Board does not review the decisions of these harsh IJs, it cannot correct their errors. *Id.* This is because harsher IJs more often order noncitizens removed early in their cases, before they have found a lawyer or filed an application for relief, and noncitizens without lawyers rarely appeal. *Id.* Hausman's quantitative data also suggests that the Board's failure to achieve consistency may relate to the 2002 streamlining rules. *Id.* at 1205–07.

[186] *Id.* at 1178–79.

[187] DIZON & DADHANIA, *supra* note 36, § 1:155.

[188] Chevron, U.S.A. Inc. v. NRDC, 467 U.S. 837, 842–45 (1984).

[189] 8 C.F.R. 1003.1 (g)(1).

[190] N.Y. Legal Assistance Grp. v. Bd. of Immigr. Appeals, 987 F.3d. 207, 210 (2d Cir. 2021); NYLAG Complaint, *supra* note 88, ¶ 15.

[191] Cappalli, *supra* note 149, at 757–58 ("Whatever the justification, the number of non-precedential [federal circuit court] opinions currently outnumber by far the ones that count as authority, reaching a four-to-one ratio in the federal circuits as a whole.").

B. Consequences for Individual Immigration Cases

Shadow docket decision-making not only negatively impacts the development of immigration law in general, but it has serious consequences for noncitizens appearing before the Board. Noncitizens appearing before the Board face inaccessible law, inconsistent application of the law, a lack of reasoned opinions, and error-prone decision-making. Given the high stakes of Board decisions, such decision-making is deeply troubling.

1. The Creation of (Secret) Law

The Board has announced secret law through the shadow docket, even though unpublished decisions are technically nonprecedential and not binding on IJs or parties in other cases.[192] The term secret law was coined during congressional hearings on the Freedom of Information Act,[193] and one of the goals of the Act was to prevent the development of secret law.[194] While at first blush it may seem obvious what the term means, determining whether the BIA is indeed creating secret law requires a precise definition because both "secret" and "law" can be defined in many ways and because of the public's natural repugnance towards secret law.[195]

"Secret" has a range of meanings in the dictionary from (a) "done, made, or conducted without the knowledge of others" to (b) "kept from the knowledge of any but the initiated or privileged" to the more nefarious (c) "designed or working to escape notice, knowledge, or observation."[196] Professor Jonathan Manes in *Secret Law* defines "secret" as "not officially made available to the general public."[197] Professor Dakota Rudesill in *Coming to Terms with Secret Law* defines "secret" as "classified or otherwise withheld from the public."[198]

For the purpose of this Article, "secret" simply refers to laws that the BIA does not make available to the general public in an official or accessible manner. This definition is closest to dictionary definition (b). I have added accessibility to the definition because disclosing laws in a manner that is not

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[192] The late Professor Kenneth Culp Davis similarly "criticiz[ed] the INS for its 'system of secret law,' including its 'careful concealment of all decisions except the few—less than 1 in 10,000—that are published.'" Anker, *supra* note 30, at 448 n.48 (quoting KENNETH CULP DAVIS, ADMINISTRATIVE LAW: CASES—TEXT—PROBLEMS 86 (1965)).

[193] GOITEIN, *supra* note 15, at 14.

[194] 2 ADMIN. L. § 7.05 (2020), Lexis.

[195] *See* GOITEIN, *supra* note 15, at 8.

[196] *Secret*, DICTIONARY.COM, https://www.dictionary.com/browse/secret [https://perma.cc/24ET-J8ZA].

[197] Jonathan Manes, *Secret Law*, 106 GEO. L.J. 803, 813 (2018).

[198] Dakota S. Rudesill, *Coming to Terms with Secret Law*, 7 HARV. NAT'L SEC. J. 241, 249 (2015) (emphasis omitted).

accessible to most of the public is not all that much different than keeping them completely "secret." Dictionary definition (b) demonstrates a common understanding that "secret" does not refer to absolute secrecy.[199]

"Law" is more challenging to define. When the BIA interprets a provision of the INA in a precedential decision, all IJs must follow its interpretation, and federal courts must defer to it unless it is unreasonable. Thus, the BIA's interpretation essentially becomes part of the INA. It is therefore uncontroversial to say that the BIA's precedential decisions interpreting the INA are a type of law.

But how does one determine if a nonprecedential decision constitutes law? Professor Manes, when examining a different body of potential secret law"—internal Executive Branch texts relating to national security—argues that texts "constitute 'law' if they articulate rules or principles of general applicability that are regarded by the relevant officials as binding on their conduct."[200] The focus of Manes' test is on the *social function* of the administrative text, not the name the text has been assigned (for example, "directive," "rule," "opinion," etc.).[201] Similarly, the D.C. Circuit has stated that whether an agency action has "the force of law" depends on "if it either appears on its face to be binding . . . or is applied by the agency in a way that indicates it is binding."[202]

To summarize, the binding nature of a decision, or in other words whether it requires compliance, can indicate whether it is law. However, in both the Manes and D.C. Circuit definitions, another way to determine if an administrative decision is law is to look at whether the relevant adjudicator treats it as law. Therefore, the fact that the BIA classifies unpublished decisions as nonprecedential is not the end of the analysis. Instead, I will also consider the content of unpublished decisions and whether the BIA treats these decisions like precedential decisions, which assuredly create law.

a. Unpublished BIA decisions are secret

Using the above definition of secret law, unpublished decisions of the BIA are secret. The BIA has historically not made its unpublished decisions accessible to the public, and hundreds of thousands of unpublished decisions will remain hidden from the public either permanently or temporarily—even under the terms of the NYLAG settlement. When the federal circuit courts were accused of creating secret law through unpublished opinions, some

[199] *See* Manes, *supra* note 197, at 813.

[200] *Id.* at 810–11.

[201] *Id.* at 811.

[202] Gen. Elec. Co. v. EPA, 290 F.3d 377, 382–83 (D.C. Cir. 2002).

judges vehemently disagreed that the decisions were secret.[203] Then-Judge Alito explained to the Senate Judiciary Committee:

> The fact of the matter is that today the vast majority of opinions, even if they are not printed in the traditional source, the Federal Reporter, are published in any sense of the word. They are available to subscribers to services such as LEXIS and WESLAW [sic]. They are now printed in a separate series of case reports called the Federal Appendix, which is available in most law libraries. All of the courts of appeals now have web sites, and most of them now post all of their opinions on those web sites so that anybody with access to the Internet can have easy and cheap access to all of those opinions.[204]

In contrast, the BIA does not make its unpublished decisions "very broadly available to the public at little cost."[205] The fact that the EOIR previously posted a few frequently requested unpublished decisions on its website (as required by FOIA) and made some nonrestricted unpublished decisions available to the public at the LLIRC does not impact this analysis. The BIA has issued nearly 30,000 decisions per year since 2008 (and often many more than that). The few frequently requested unpublished decisions available on EOIR's website, plus the small number of unpublished decisions available at the LLIRC, still left hundreds of thousands of decisions unavailable to the public. Moreover, to access these decisions, one had to physically go to the LLIRC and review hard copies. Practically speaking, this hurdle made even the unpublished decisions housed at the LLIRC inaccessible to most of the public. The fact that unpublished decisions have always been available to government attorneys in removal proceedings and the parties in each case similarly does not impact the analysis, as the public remained shut out.

Due to the NYLAG settlement, the Board has begun providing greater public access to unpublished decisions as of January 2023. However, certain decisions will continue to remain secret either permanently or temporarily.[206]

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[203] *See Unpublished Judicial Opinions: Hearing Before the Subcomm. on Cts., the Internet, and Intell. Prop. of the H. Comm. on the Judiciary*, 107th Cong. 5 (2002) (statement of Samuel A. Alito Jr., J., United States Court of Appeals for the Third Circuit); *see also id.* at 10–12 (statement of Alex Kozinski, J., United States Court of Appeals for the Ninth Circuit) (concurring with then-Judge Alito that unpublished decisions are not secret law).

[204] *Id.* at 5.

[205] *Id.* at 6.

[206] Decisions issued in December 2016 or before April 2016, past BIA decisions (defined by the settlement as decisions issued on or after January 1, 2017 and prior to January 1, 2022) issued in hard copy only, decisions on interlocutory appeals, decisions where redaction would not protect the noncitizen's identity, and decisions for which disclosure would violate 8 U.S.C. § 1367(a)(2) (prohibiting disclosure of information relating to applications for VAWA self-petitions, VAWA cancellation of

Because the Board has existed since 1940,[207] these carveouts mean that hundreds of thousands of decisions will remain unavailable to the public. Although they are old, many of these decisions may still be useful to noncitizens and their advocates, academics studying the Board, and policymakers and lawmakers seeking to understand the law's impact. For example, an attorney recently reached out to an advocates listserv for help locating unpublished decisions from 1999 and the early 2000s that would be helpful for a current asylum case.[208] Nonprecedential opinions of the BIA are largely secret currently and to some extent will remain secret in the future.

b. Unpublished BIA decisions are law

Whether unpublished decisions can be viewed as law is a more challenging question, but ultimately these decisions do qualify as law. Using the Manes and D.C. Circuit definitions for law, which focus on the binding nature of the decision, an unpublished decision may or may not be law depending on the party and the case. An unpublished decision has the force of law on the individual noncitizen who appears before the Board in that case. That noncitizen and their representative are bound by and must comply with the Board's decision. The government attorney and IJ in that case are also bound by and required to comply with the Board's decision. However, unpublished decisions are not precedential and have no impact on any future case. Unpublished decisions do not bind the future decisions of the Board or IJs, and they do not require legal compliance by government attorneys or noncitizens and representatives in other cases. In other words, when the definition of law focuses only on the binding nature of unpublished decisions, these decisions are law for the parties involved in the case but are not law for others.

Unpublished decisions may be law, however, even though the BIA designates these decisions as "non-precedential" and therefore nonbinding in other cases. This is because what truly matters when deciding whether an administrative text is a law is its function, not its name. Instead of looking at how the BIA labels these decisions, I will examine how the BIA treats them.

removal, U or T visas) will remain secret permanently. Past BIA decisions issued electronically will likely remain secret temporarily. Under the terms of the settlement, EOIR does not have to begin posting these decisions until July 15, 2024, and does not have to complete posting them until July 15, 2027. Future unpublished decisions will also likely remain secret temporarily, as they do not have to be made available immediately—depending on the fiscal year they are issued in, these decisions can be posted one year, ten months, seven months, or six months later. *See* NYLAG Settlement, *supra* note 110, at 6–7.

[207] *Evolution of the U.S Immigration Court System: Pre-1983*, *supra* note 33.

[208] *See* Posting of Immigration Attorney to New York Asylum Email Listserv (June 1, 2022, 2:16 PM) (on file with author). To protect confidentiality, the names of the immigration attorneys interviewed in this Article have been replaced with the term "immigration attorney."

By looking at these factors, it becomes clear that unpublished decisions can be law.

First, the BIA is creating precedent and law in nonprecedential cases. It is hard to believe that of the 30,000 cases that the Board issues every year, only 30 meet the criteria for publication. Mr. Uddin's case, described in the introduction, is illustrative. When Mr. Uddin appealed the Board's decision, the Third Circuit announced a rule requiring leadership authorization of "terrorist activity" for an IJ to classify an organization as a Tier III terrorist organization. The Third Circuit explained that its rule "mirrors the Board's own reasoning in the mine-run of its [unpublished] cases involving the BNP's status as a Tier III organization."[209]

The Board has never issued a precedential decision instructing IJs that they must find leadership authorization of "terrorist activity" for Tier III determinations. Therefore, in the line of nonprecedential cases referenced by the Third Circuit, the Board decided (1) a substantial issue of first impression; (2) a legal issue that can be expected to arise frequently in immigration cases; (3) a new rule of law; (4) a case that involves a conflict in decisions by the Board (the Third Circuit said that in only "some" Board cases in which the IJ did not make a finding as to leadership authorization did the Board remand to the IJ); and (5) an issue where there is a need to maintain national uniformity, all of which the Board's regulations establish as criteria for publishing a precedential decision.[210]

In another case, known unofficially as *Matter of A-D-*, the BIA considered whether an applicant's youthful status created an extraordinary circumstance excusing the one-year filing deadline for asylum.[211] This issue was so novel that the BIA solicited supplemental briefing from the parties and amici.[212] The BIA made numerous novel holdings in the decision, including defining "minor" for purposes of the one-year bar as someone who is under eighteen years old, holding that "an applicant's age . . . in combination with other factors, if shown that they were directly responsible for the failure to timely file, may constitute an extraordinary circumstance" exception to the one-year filing deadline, and enumerating various factors that the IJ should consider when making that decision.[213]

Despite the novelty of these legal questions and their likelihood of recurrence given the large numbers of minors seeking asylum, the BIA did

[209] Uddin v. Att'y Gen. U.S., 870 F.3d 282, 290 (3d Cir. 2017).

[210] 8 C.F.R. § 1003.1(g)(3).

[211] Unpublished Decision of the BIA at 2 (May 22, 2017) (on file with author).

[212] *See id.*

[213] *Id.* at 7.

not publish its decision.[214] Because the decision was secret, some advocates grappling with these same issues were unaware of it.[215] These two cases are not the only examples of secret law created by the Board. Immigration lawyers have pointed out other times where the BIA created new law but nevertheless issued an unpublished decision.[216] IRAC even maintains a database of "noteworthy" unpublished Board decisions that may be useful to attorneys in other cases.[217] Given the sheer number of unpublished decisions issued each year, there are likely many decisions creating new law that most immigration attorneys do not know exist.

Second, in practice, the BIA has itself relied upon unpublished decisions when interpreting the INA—underscoring the importance of these decisions. For example, in *Matter of A-C-M-*, a precedential decision, the BIA considered whether the INA's "material support" bar includes a quantitative limitation.[218] The BIA found that the bar has no such limitation.[219] Importantly, in reaching its conclusion, the BIA referenced "several nonprecedential decisions" in which it found that "material support" included de minimis support.[220] In *Matter of A—*, another precedential decision, the BIA, after citing to a string of unpublished decisions, explained that nonprecedential decisions are relevant although "all unreported" because "they demonstrate a firmly established administrative practice and, therefore, cannot be ignored."[221]

Finally, even if unpublished decisions are not law in the same way as binding precedential opinions, unpublished decisions are still important because they may reveal the agency's developing thinking on a certain issue. In *Matter of A-C-M-*, the Board cited to a string of unpublished decisions finding minor activity—including fundraising, providing food and shelter, and performing physical labor—as qualifying as "material support" to back its ultimate precedential decision that the bar contains no quantitative

[214] Advocates did push the Board to publish the decision, but the Board refused. *See* Email from Advocate to Author (June 8, 2022, 11:17 AM) (on file with author).

[215] *See* Emails Between Advocates (Nov. 2, 2021, 6:20 AM) (on file with author).

[216] *See, e.g.*, Jason Dzubow, *The BIA on Firm Resettlement,* THE ASYLUMIST (June 22, 2017), https://www.asylumist.com/2017/06/22/the-bia-on-firm-resettlement-2/ [https://perma.cc/UX9K-WMGS] (describing unpublished decision where BIA provided new guidance about the firm resettlement bar); *see also* Unpublished Decision of the BIA (June 22, 2022) (on file with author) (finding injury to a child in violation of Texas Penal Code § 22.04(a)(3) is not a "crime of violence" aggravated felony); Anker, *supra* note 30, at 447 n.46 ("Some of the most important principles in the BIA's jurisprudence have been articulated only in unpublished decisions.").

[217] *Unpublished BIA Decisions*, *supra* note 98.

[218] A-C-M-, 27 I. & N. Dec. 303, 306 (B.I.A. 2018).

[219] *Id.* at 306–08.

[220] *Id.* at 308, 310.

[221] A—, 9 I. & N. Dec. 302, 310 (B.I.A. 1961).

limitation.[222] If noncitizens and their advocates had access to these prior unpublished decisions, they would have understood the Board's direction on the issue. Moreover, the BIA itself previously acknowledged that it used certain unpublished decisions internally as guidance, and even indexed these decisions and made them publicly available on its website. A leading immigration source book therefore instructed lawyers that "[s]uch decisions, though unpublished, should be referenced and may provide guidance regarding the BIA's treatment of key issues."[223]

IJs also recognize that unpublished BIA decisions (indexed or not) provide crucial guidance on how the BIA interprets the law. They reference unpublished decisions in their opinions, as do government attorneys in their submissions to the immigration court and BIA. So do lawyers representing noncitizens—when they can find unpublished decisions. The Board's practices, together with IJs', government attorneys', and advocates' reliance on unpublished opinions, establish that unpublished Board opinions are "secret" and do sometimes create "law."

2. *Inconsistent Decision-Making*

When decisions are made in the shadows, decision-makers can apply the law in an inconsistent and unfair manner (either consciously or unknowingly).[224] A review of decisions from the federal circuit courts reveals that the BIA regularly issues inconsistent decisions, even in cases that should logically have the same outcome. Crucially, these unpublished decisions rarely, if ever, attempt to justify the different outcomes, making it difficult for the noncitizen or the federal circuit court reviewing the decision (where such review is available) to know whether the Board acted erratically or whether it chose to depart from a prior decision for a good reason. In numerous decisions, the federal circuit courts have expressed exasperation at these inconsistent decisions and have remanded cases back to the Board to change their position or explain the differing results.[225] Three such decisions are highlighted in detail below.

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[222] A-C-M-, 27 I. & N. Dec. at 310.

[223] KURZBAN, *supra* note 120, at 1436.

[224] *See* GOITEIN, *supra* note 15, at 20, 23.

[225] *See, e.g.*, Benitez v. Wilkinson, 987 F.3d 46, 54 (1st Cir. 2021); Thompson v. Barr, 959 F.3d 476, 485–87 (1st Cir. 2020); Ishac v. Barr, 775 F. App'x 782, 788–89 (6th Cir. 2019); Sultana v. Holder, 532 F. App'x 711, 714 (9th Cir. 2013); Mei Fun Wong v. Holder, 633 F.3d 64, 77–78 (2d Cir. 2011); Cruz v. Att'y Gen. of the U.S., 452 F.3d 240, 250 (3d Cir. 2006); *see also* ANKER, *supra* note 99, § 1:4 n.15 (collecting other cases in which circuit courts criticized inconsistent Board decisions); Blum, *supra* note 99, at 732 (discussing inconsistent Board decisions relating to exceptions to the right of governments to investigate subversive activities); Derek Smith, Note, *A Refugee by Any Other Name: An Examination of the Board of Immigration Appeals' Action in Asylum Cases*, 75 VA. L. REV. 681, 712 (1989) (describing

a. *Case Example 1:* Uddin v. Attorney General of the United States

In *Uddin*, the Third Circuit reviewed a decision of the BIA which found Mr. Uddin ineligible for withholding of removal.[226] In Bangladesh, Mr. Uddin was a member of (and eventually a general secretary for) the BNP, one of two major political parties in the country.[227] Mr. Uddin alleged that on several occasions he was harmed because of his political opinion by members of the Awami League, the political party in power.[228] This harm included beating him so severely that he required stitches to his face, breaking his leg, threatening him with death, and ultimately burning down his home.

Because of this oppression, Mr. Uddin fled Bangladesh in 2011 and entered the United States without inspection in 2013. When the government initiated removal proceedings in 2016, Mr. Uddin requested withholding of removal and other relief, arguing that because of his affiliation with the BNP, he would face persecution based on his political opinion if he was forced to return to Bangladesh. Mr. Uddin was detained during the pendency of his removal proceedings and appeals.[229]

At his hearing in immigration court, the IJ denied Mr. Uddin relief after finding that the BNP was a Tier III terrorist organization and Mr. Uddin was a willing member of the party.[230] Mr. Uddin appealed the IJ's decision to the BIA. However, the Board agreed with the IJ that Mr. Uddin was ineligible for withholding of removal based on his membership in the BNP. The Board affirmed that the BNP was a Tier III terrorist organization based on sufficient evidence on the record that the BNP used violence for political purposes in the past.[231]

Mr. Uddin filed a petition for review with the Third Circuit, which announced a new rule: that a group qualifies as a Tier III terrorist organization only if leaders of the organization authorized the terrorist activity committed by its members. While the IJ and the Board found evidence that members of the BNP committed acts of terrorism, they did not discuss whether this violence was authorized by the BNP's leaders.[232]

inconsistencies in Board's adjudication of asylum applications of former members of guerrilla organizations fleeing government retribution).

[226] 870 F.3d 282, 284 (3d Cir. 2017); *see also* INA § 241(b)(3)(A), 8 U.S.C § 1231(b)(3)(A) (withholding of removal provision of the INA).

[227] *Uddin*, 870 F.3d at 285.

[228] *Id.* at 286.

[229] Telephone Interview with Immigration Attorney (Sept. 3, 2018).

[230] *Uddin*, 870 F.3d at 286.

[231] *Id.* at 288.

[232] *Id.*

Therefore, the court remanded the case to the Board to address this issue. The court based the new rule partially on the Board's *own reasoning* in "the mine-run" of cases that the Board has reviewed concerning the BNP's status as a Tier III organization.[233] The court pointed out that "[i]n fact, in some cases where IJs did not make a finding as to BNP leaders' authorization of allegedly terrorist acts, the Board found error in the IJs' omissions, and remanded to the IJs to take up that very question of authorization."[234]

The Third Circuit went on to express dismay at the Board's "highly inconsistent results regarding the BNP's status as a terrorist organization," noting that its own research "turned up several Board rulings concluding that the BNP was not in fact a terrorist organization . . . in stark contrast to the Board's finding in Uddin's case."[235] This led the court to order the government to submit all Board opinions from 2015 to 2017 addressing the terrorism bar's application to the BNP. After reviewing the disclosed decisions, the court was shocked to find that:

> In six of the opinions, the Board agreed with the IJ that the BNP qualified as a terrorist organization based on the record in that case. But in at least ten, the Board concluded that the BNP was not a terrorist organization. In at least five cases, the Government did not challenge the IJ's determination that the BNP is not a terrorist organization. And in one case, the Board reversed its own prior determination, finding that "the Board's last decision incorrectly affirmed the Immigration Judge's finding that the BNP is a Tier III terrorist organization." Many of the cases discussed the BNP's terrorist status during the same time periods, reaching radically different results.[236]

The court recognized that these unpublished decisions lacked precedential value and that determinations of Tier III status are made on a case-by-case basis. Nevertheless, the court declared that "something is amiss where, time and time again, the Board finds the BNP is a terrorist organization one day, and reaches the exact opposite conclusion the next."[237] The court blamed the inconsistent decisions on the "dearth of precedential opinions" in Tier III cases and felt compelled to announce a new rule to "provide the Board a principled method of adjudicating Tier III cases."[238]

The court was even more concerned by the IJ's statement that "he was 'aware of no BIA or circuit court decision to date which has considered

233 *Id.*

234 *Id.*

235 *Id.* at 291.

236 *Id.*

237 *Id.*

238 *Id.*

whether the BNP constitutes a terrorist organization.'"[239] At the time of his decision, there were in fact several such decisions.[240] The court was further troubled that the government's attorney did not know whether IJs are able to access unpublished decisions about the BNP's status as a terrorist organization.[241] Altogether, the court declared this "a troubling state of affairs."[242] Overall, the Third Circuit's discussion of the Board in *Uddin* and creation of a rule for Tier III cases clearly indicates that the Board itself has failed to take charge of its duty to publish precedent to ensure uniformity in immigration law.

b. *Case Example 2:* Vassell v. U.S. Attorney General

In *Vassell v. U.S. Attorney General*, the Eleventh Circuit reviewed a decision of the Board finding that Mrs. Vassell was deportable because she was convicted of a "theft offense" that qualified as an "aggravated felony" under the INA.[243] Mrs. Vassell is a citizen of Jamaica and became a lawful permanent resident in 1990.[244] In 2013, she pled guilty to "theft by taking" in violation of Section 16–8–2 of the Georgia Code.[245] The government initiated removal proceedings against Mrs. Vassell based on this conviction.

The INA provides that any noncitizen who is convicted of an "aggravated felony" any time after admission is deportable.[246] An aggravated felony under the INA includes a theft offense.[247] Because the INA does not define theft offense, courts use the generic federal definition of theft to determine if a state offense qualifies as a theft offense under the INA.[248] A state offense matches with a generic federal offense only if a conviction of the state offense necessarily involves commission of the generic federal offense.[249] Further, "[g]eneric theft is 'the taking of, or exercise of control over, property *without consent* whenever there is criminal intent to deprive

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[239] *Id.*

[240] *Id.*

[241] *Id.* As discussed in Section I.E, while IJs did have access to unpublished decisions at the time of Mr. Uddin's immigration court hearing, they did not have a way to search through them by key term (and still do not). This helps explain why the IJ was unaware of Tier III decisions by the Board (although it does *not* explain why he did not know about circuit court case law on the topic).

[242] *Id.*

[243] Vassell v. U.S. Att'y Gen., 839 F.3d 1352, 1355 (11th Cir. 2016).

[244] *Id.*

[245] *Id.* at 1355–56.

[246] INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii).

[247] INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G).

[248] *Vassell*, 839 F.3d at 1356.

[249] *Id.*

the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent.'"[250]

The IJ in Mrs. Vassell's removal proceedings held that "theft by taking" in violation of Section 16–8–2 of the Georgia Code was a theft offense as that term is used in the INA—and therefore that Mrs. Vassell was deportable.[251] The BIA first reversed the IJ, holding that Georgia's theft by taking offense is not generic theft because it does not require "lack of consent of the victim."[252] The government asked the BIA to reconsider, and upon reconsideration, the BIA held that Georgia's theft by taking *does* require lack of consent of the victim.[253] The BIA therefore ordered Mrs. Vassell removed to Jamaica.

The Eleventh Circuit granted Mrs. Vassell's petition in part because her case was not the only one in which the BIA decided whether Section 16–8–2 was a theft offense as that term is used in the INA, and in every other case the BIA ruled that Section 16–8–2 was *not* a theft offense.[254] These unpublished decisions included decisions that were older than Mrs. Vassell's case, as well as newer decisions. In those decisions, the BIA invoked the exact reasoning Mrs. Vassell asked the Eleventh Circuit to apply. Moreover, the government cited no cases in which the BIA ruled as they had here. Ultimately, the "government [gave] no explanation for why Mrs. Vassell must be deported for her § 16–8–2 conviction but [another noncitizen] can't be deported for his."[255]

c. *Case Example 3:* Andrews v. Barr

In *Andrews v. Barr*, the Second Circuit reviewed a decision of the BIA denying Mr. Andrews's motion to reopen his removal proceedings. Mr. Andrews was born in Guyana and arrived in the United States in 1982 at the age of seventeen as a lawful permanent resident.[256] In the United States, he worked for the city of New York from 1995 to 2009. He eventually married and raised five children with his wife. His wife and four of his children are U.S. citizens.

After Mr. Andrews's brother was murdered in 1989, he developed a drug dependency. He later successfully completed rehabilitation and maintained his sobriety from 1993 through 2006. In 2006, he relapsed after his family was left destitute because of a cousin's mismanagement of money

[250] *Id.* (emphasis added) (quoting Garcia-Madruga, 24 I. & N. Dec. 436, 436 (B.I.A. 2008)).
[251] *Id.* at 1355–56.
[252] *Id.* at 1356.
[253] *Id.*
[254] *Id.* at 1364.
[255] *Id.*
[256] Brief for Petitioner at 4, Andrews v. Sessions, No. 17-3827 (2d Cir. Mar. 26, 2018).

his wife invested in a family business. On February 24, 2009, Mr. Andrews was arrested and charged under Section 220.31 of the New York Penal Law (criminal sale of a controlled substance in the fifth degree). In September 2009, the government initiated removal proceedings against Mr. Andrews because of this conviction. The government charged him as removable pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii) for having an aggravated felony conviction and 8 U.S.C. § 1227(a)(2)(B)(i) for having a conviction for a controlled substance offense.[257]

At an immigration court hearing in 2010, Mr. Andrews's attorney conceded that his conviction was an aggravated felony.[258] This concession made Mr. Andrews both removable and ineligible for cancellation of removal. Instead, his attorney pursued asylum, withholding of removal, and relief under CAT. Each of these forms of relief are more challenging to obtain than cancellation. In 2011, the IJ denied him each form of relief, but he made clear that he would have granted cancellation of removal if it were not for the perceived aggravated felony bar. Specifically, the IJ stated: "'If this were a cancellation of removal case, it would have taken me 15 seconds to make a decision' to allow Mr. Andrews to remain in the United States."[259]

Mr. Andrews pursued every avenue for appellate review. In mid-2011, he appealed the IJ's decision on the merits and also sought to reopen his case based on ineffective assistance of counsel. He argued that because of ineffective counsel, he lost his chance to pursue cancellation of removal. The Board denied relief after finding that "Mr. Andrews was not prejudiced by his original counsel's conduct."[260] Mr. Andrews filed a petition for review of the Board's decision with the Second Circuit, but the court affirmed the Board's decision after finding that his "conviction was 'categorically a drug trafficking aggravated felony.'"[261]

Mr. Andrews was removed to Guyana in 2014; however, he continued to pursue avenues of relief, including a coram nobis petition in state court and an application for gubernatorial clemency.[262] In 2017, the Second Circuit in *Harbin v. Sessions*, a precedential decision, held that Section 220.31 of the N.Y. Penal Law is not an aggravated felony under the INA and therefore does not bar an application for cancellation of removal.[263]

[257] *Id.* at 5–6.

[258] *Id.* at 6.

[259] *Id.* at 7.

[260] *Id.*

[261] *Id.* at 7–8 (quoting Andrews v. Holder, 534 F. App'x 32, 34 (2d Cir. 2013)).

[262] *Id.* at 8.

[263] 860 F.3d 58, 61 (2d Cir. 2017).

Based on *Harbin*, Mr. Andrews promptly filed a motion for reconsideration with the BIA.[264] In his motion, Mr. Andrews argued that he was entitled to equitable tolling of the thirty-day deadline for filing a motion to reconsider (in accordance with 8 U.S.C. § 1229a(c)(6)(B)), having diligently pursued his rights at every possible opportunity and having filed within thirty days of the dispositive change in law. The Board denied his motion. The Board's decision stated that Mr. Andrews's motion was more properly characterized as a motion to reopen, but in any case it was untimely, and reopening was not warranted. The Board failed to explain why reopening was not warranted.

Mr. Andrews again filed a petition for review in the Second Circuit.[265] The Second Circuit remanded the case back to the Board after finding that it "did not adequately explain its decision that equitable tolling was not warranted, particularly considering its inconsistent decisions in apparently similar cases."[266] In fact, the Court pointed out that "just days after denying Andrews' motion, the BIA granted reopening to another petitioner based on *Harbin*, even though the motion to reconsider was untimely in that case as well."[267] Ultimately, the Court found that the Board's decision, which "in a single line" stated that Mr. Andrews failed to show that he was entitled to equitable tolling, was an abuse of discretion because it lacked any rational explanation for denying Mr. Andrews the relief he sought.[268]

3. *Low-Quality Decisions*

When decisions are made in the shadows, decision-makers have little incentive to write reasoned opinions.[269] A review of federal circuit court opinions reveals that shadow docket decision-making indeed suffers from this problem.[270] The federal circuit courts frequently point out significant deficiencies in unpublished decisions. The opinion might be devoid of any analysis or provide only cursory analysis.[271] It might have inexplicably

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[264] Brief for Petitioner, *supra* note 256, at 9.

[265] *Id.* at 10.

[266] Andrews v. Barr, 799 F. App'x 26, 27 (2d Cir. 2020).

[267] *Id.* at 28.

[268] *Id.* at 27–28.

[269] GOITEIN, *supra* note 15, at 53.

[270] *See* ANKER, *supra* note 99, § 1:4 n.15 (collecting cases in which circuit courts criticized low-quality Board decisions).

[271] *See, e.g.*, Marqus v. Barr, 968 F.3d 583, 593 (6th Cir. 2020) ("Without a real analysis by the BIA of why this evidence is immaterial, we cannot at this stage determine whether the BIA abused its discretion in denying remand. We therefore remand to the BIA either to explain or to change its position on the new evidence."); Hernandez-Hernandez v. Barr, 789 F. App'x 898, 900 (2d Cir. 2019) (indicating that the BIA failed to provide any analysis to support statement that serious nonpolitical crime bar had no

departed from established precedent[272] or failed to consider key factors of the petitioner's claim or the record as a whole,[273] or contained only summary or conclusory statements.[274]

Federal circuit court judges have issued scathing indictments of the Board's decision-making. The Seventh Circuit, in an opinion authored by Judge Richard A. Posner, once wrote that the adjudication of immigration cases "has fallen below the minimum standards of legal justice."[275] Similarly, Judge Jon O. Newman of the Second Circuit testified before the Senate that

duress exception); Velasquez-Escovar v. Holder, 768 F.3d 1000, 1003 (9th Cir. 2014) ("It is arbitrary to discount Petitioner's unrefuted claim without providing a reason."); Santos v. Att'y Gen. of the U.S., 552 F. App'x 197, 203 (3d Cir. 2014) ("[B]ecause the BIA provided inadequate reasoning for its no-nexus finding, we will remand Ulloa's asylum claim for further explanation consistent with this opinion."); Cordova v. Holder, 759 F.3d 332, 339 (4th Cir. 2014) (remanding because the Board failed to adequately explain its decision finding that a noncitizen's proposed particular social group was not cognizable and that there was no nexus); Aponte v. Holder, 610 F.3d 1, 8 (1st Cir. 2010) ("The BIA abused its discretion by issuing an inadequately reasoned decision denying Aponte's motion to reopen.").

[272] *See, e.g.*, Facundo v. Garland, 860 F. App'x 497, 501 (9th Cir. 2021) (remanding to BIA because the reason for which BIA denied motion was contrary to published precedent); Thompson v. Barr, 959 F.3d 476, 489–90 (1st Cir. 2020) ("[W]e are persuaded that the BIA departed from its settled course of accepting full and unconditional pardons granted by a state's supreme pardoning authority when the pardon is executive, rather than legislative, in nature."); Hussam F. v. Sessions, 897 F.3d 707, 718 (6th Cir. 2018) (remanding to BIA after finding that BIA failed to follow its precedential decisions relating to the exercise of discretion in asylum cases); Avila-Ramirez v. Holder, 764 F.3d 717, 725 (7th Cir. 2014) ("[T]he agency failed to follow its binding precedent in *Arreguin*, which it did not cite, when it gave significant weight to uncorroborated arrest reports in which Avila–Ramirez denied any wrongdoing after finding him credible."); Galvez-Vergara v. Gonzales, 484 F.3d 798, 803 (5th Cir. 2007) (remanding because the Board disregarded a highly similar precedential decision without providing any reasonable explanation); Corado v. Ashcroft, 384 F.3d 945, 947 (8th Cir. 2004) (finding that BIA failed to follow 8th Circuit and its own precedent regarding death threats as persecution).

[273] *See, e.g.*, Ajayi v. Att'y Gen. of the U.S., 489 F. App'x 578, 581 (3d Cir. 2012) (finding that the "BIA's truncated review of the record and its selective reliance on only a few factors pertinent to a determination of 'good moral character' is inadequate."); Malonga v. Holder, 621 F.3d 757, 768–69 (8th Cir. 2010) (remanding because BIA failed to consider key facts relating to the probability of future persecution); El-Sheikh v. Ashcroft, 388 F.3d 643, 648 (8th Cir. 2004) ("Lacking a BIA finding as to El Sheikh's credibility and an analysis of what material facts central to his claim of past persecution should have been reasonably corroborated, 'we have no way of reviewing the Board's actual reasoning.'" (quoting Abdulai v. Ashcroft, 239 F.3d 542, 555 (3d Cir. 2001))); Yousefi v. INS, 260 F.3d 318, 329–30 (4th Cir. 2001) (remanding because the Board did not consider the record as a whole and failed to consider "the two most important *Frentescu* factors"); *Zhao*, 265 F.3d at 96–97 ("[T]he Board failed to address all the factors relevant to petitioner's claim . . . ."); *Anderson*, 953 F.2d at 806 (finding that BIA failed to consider the record as a whole).

[274] *See, e.g.*, Jourbina v. Holder, 532 F. App'x 1, 3 (2d Cir. 2013) (remanding because BIA provided only conclusory statements in support of its decision); Cheng Zhi Lin v. Holder, 366 F. App'x 271, 272 (2d Cir. 2010) (finding that BIA's conclusory statement that the harm noncitizen suffered did not rise to the level of persecution insufficient to permit meaningful review); Hang Zhou Guo v. Gonzales, 187 F. App'x 87, 87 (2d Cir. 2006) ("The BIA abused its discretion in denying Guo's motion to reopen because its decision contained 'only summary or conclusory statements.'" (quoting Zhao v. U.S. Dep't of Just., 265 F.3d 83, 93 (2001))).

[275] Benslimane v. Gonzales, 430 F.3d 828, 830 (7th Cir. 2005).

when reviewing BIA decisions, "the courts of appeals often lack the reasoned explication that is to be expected of a properly functioning administrative process."[276] Judge John M. Walker Jr., also of the Second Circuit, testified that "[o]ne of my court's problems with the BIA is that it rarely seems to adjudicate the outstanding legal issues in a case."[277]

These criticisms from federal circuit court judges were leveled closer in time to the streamlining reforms, when remands to the BIA were more common than they are now.[278] But a review of recent circuit court opinions reveals that fundamental problems with inadequate Board decision-making persist.[279] For example, in *Marqus v. Barr*, a recent Sixth Circuit opinion, the court reviewed a BIA decision denying the petitioner's motion to remand to consider new evidence, including the latest human rights and religious freedom reports from the State Department.[280] A motion to remand for consideration of new evidence must show that the evidence is material and was previously unavailable. The petitioner sought relief under CAT based on his fear that he would be tortured if he was forced to return to Iraq, in part because he is Christian.

Despite recognizing that the new evidence the petitioner presented on appeal might help with his argument that Iraqi Christians are at risk of detention and torture, the BIA denied the petitioner's motion. The BIA's decision provided nothing more than a "bald" statement that the petitioner's "new evidence is insufficient to meet his burden of proof to establish his claim."[281] The BIA failed to even name the new evidence submitted, "let alone analyze why each piece of new evidence was either immaterial or previously unavailable."[282] Although State Department reports are given special weight in immigration cases, the BIA neglected to address conclusions in the report that undermined key findings of the IJ. The Sixth Circuit found that it was "clear" that the new evidence "could be significant" to the petitioner's claim, but it ultimately concluded that without any "real analysis" by the BIA, it could not meaningfully review the decision and

[276] JON O. NEWMAN, STATEMENT BEFORE THE SENATE COMMITTEE ON THE JUDICIARY 8 (2006).

[277] JOHN M. WALKER JR., STATEMENT BEFORE THE SENATE COMMITTEE ON THE JUDICIARY 3–4 (2006).

[278] BETSY CAVENDISH & MALCOLM RICH, APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 33 (2009), https://www.appleseednetwork.org/uploads/1/2/4/6/124678621/assembly_line_injustice-_blueprint_to_reform_americas_immigration_courts.pdf [https://perma.cc/9UQJ-RW2N] ("As a result of these improvements, the BIA's reversal rate in the federal courts of appeals has dropped substantially, from 17.5 percent in 2006 to 12.6 percent in 2008.").

[279] *See supra* notes 271–274.

[280] 968 F.3d 583, 592 (6th Cir. 2020).

[281] *Id.*

[282] *Id.*

remanded the case for the BIA to either explain or change its position on the new evidence.[283]

4. Error-Prone Decision-Making

When decisions are made in the shadows, the risk of legal errors increases.[284] The risk of mistakes in Board decisions is significant not only because these decisions are secret but also because many noncitizens appear pro se before the immigration courts[285] and have limited English proficiency.[286] Even those who are represented may have deficient counsel.[287] Thus, only the government's position may be adequately briefed before the Board.[288]

The fact that Board members may issue an AWO that does not provide any reasoning to support the decision, or a brief order that may provide only limited analysis, further increases the risk of legal errors. The act of writing an opinion that must withstand public scrutiny has significant benefits. If Board members knew that their decisions could be reviewed by the public, academics, and immigration lawyers, and if the Board was forced to explain each decision with a reasoned opinion, Board members would take more care in reviewing the record and crafting their decisions, which in turn would help prevent Board members from committing errors.

Here too, a review of federal circuit court decisions reveals numerous instances of remands to the BIA on the ground that the Board applied the incorrect legal standard.[289] In many of these cases, the Board issued an AWO

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[283] *Id.*

[284] *See* GOITEIN, *supra* note 15, at 21.

[285] INGRID EAGLY & STEVEN SHAFER, AM. IMMIGR. COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 2 (2016) ("Nationally, only 37 percent of all immigrants secured legal representation in their removal cases.").

[286] *See* EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., STATISTICS YEARBOOK FISCAL YEAR 2018, at 18 (2018) ("In parallel to the many nationalities that come before IJs, there are similarly hundreds of languages in which hearings are conducted.").

[287] *See* Katzmann, *supra* 15, at 486.

[288] Further, error-prone decision-making also may—though infrequently—result in errors that favor the noncitizen, though the imbalance in power between the government lawyer and the pro se noncitizen is so large that this result is unlikely. Moreover, as discussed in Section I.B, reforms of the BIA's decision-making, changes in its membership, and the institution of performance evaluations tied to productivity have all tilted outcomes in the government's favor. Nevertheless, a judicial decision that is wrong is still concerning. Such errors artificially inflate noncitizen success rates without corresponding changes to the immigration law, confounding policy and lawmakers' attempts to fix what is broken.

[289] *See, e.g.*, Arita-Deras v. Wilkinson, 990 F.3d 350, 359 (4th Cir. 2021) (remanding to the BIA after finding the Board "erred as a matter of law in requiring [the Petitioner] to demonstrate she suffered physical harm in conjunction with the death threats she received"); Montero-Cabrera v. Barr, 833 F. App'x 451, 453 (9th Cir. 2020) (remanding to the BIA after finding the Board's holding that threats, "standing alone," did not constitute persecution was an erroneous statement of the law considering the

of an IJ decision, even though the IJ committed obvious legal errors.[290] A study on BIA decision-making conducted shortly after the streamlining procedures went into effect similarly found that "federal courts are describing obvious errors committed by the BIA: errors that would be comic, if they were not so tragic."[291]

Obvious errors in BIA decision-making persist to this day. For example, in *Cantarero Castro v. Attorney General of the United States*, a recent Third Circuit case, the BIA affirmed without opinion an IJ decision denying the petitioner, a noncitizen from Honduras, withholding of removal and CAT relief. The Third Circuit remanded the case to the BIA after finding that the IJ's decision "erred in significant respects."[292] First, the IJ erred by finding that persecution cannot be established when the persecutors are motivated by criminal intent. This statement ignored a basic tenet of asylum law that "[p]ersecutors may have mixed motives" for harming a petitioner, so long as a protected characteristic was "one central reason" for their harmful conduct.[293]

Second, to the extent that the IJ found the persecutors were motivated by criminal intent alone, the court found that this was not supported by substantial evidence given the petitioner's testimony and evidence in the record indicating that Honduras has a pervasive problem with homophobia. At the very least, the court explained that the IJ should have provided an

relevant precedent); Pablo Lorenzo v. Barr, 779 F. App'x 366, 374–75 (6th Cir. 2019) (remanding to the BIA after finding the Board applied incorrect legal standards in two instances by ignoring Ninth Circuit rulings bearing on standards to prove "changed country conditions"); Sanchez v. Sessions, 894 F.3d 858, 864 (7th Cir. 2018) (remanding to the BIA after finding Board applied the incorrect prejudice standard to Petitioner's ineffectiveness claim by requiring proof of a possibility rather than the probability of a different outcome); Alimbaev v. Att'y Gen. of the U.S., 872 F.3d 188, 200 (3d Cir. 2017) (remanding to BIA after finding Board applied the erroneous standard of review by effectively reweighing witness testimony and engaging in the de-novo-type review that is prohibited by regulation); Marmorato v. Holder, 376 F. App'x 380, 386–87 (5th Cir. 2010) (remanding to BIA because Board's opinion incorporated the IJ's misunderstanding of the "official capacity" requirement, meaning it incorporated the wrong legal standard).

[290] *See, e.g.*, Cantarero Castro v. Att'y Gen. of the U.S., 832 F. App'x 126, 129, 132 (3d Cir. 2020) (finding that BIA affirmed without explanation an IJ decision that erred in "significant respects," including by applying the wrong legal standard to evaluate a claim of persecution based on political opinion); Romer v. Holder, 663 F.3d 40, 43 (1st Cir. 2011) (remanding because "the IJ produced (and the BIA silently endorsed) a deficient decision that too casually glossed over the question whether tolling might apply"); Irasoc v. Mukasey, 522 F.3d 727, 729–30 (7th Cir. 2008) (finding that BIA adopted and affirmed IJ decision applying an incorrect legal standard to petitioner's past persecution claim); Rafiq v. Gonzales, 468 F.3d 165, 166 (2d Cir. 2006) (finding that BIA adopted and affirmed IJ decision that appeared to apply the wrong legal standard to petitioner's CAT claim); Reyes-Reyes v. Ashcroft, 384 F.3d 782, 786–87 (9th Cir. 2004) (finding that BIA affirmed without opinion an IJ decision applying an incorrect standard to petitioner's CAT claim).

[291] DORSEY & WHITNEY LLP, *supra* note 40, at 41.

[292] *Cantarero Castro*, 832 F. App'x at 129.

[293] *Id.*

explanation if she intended to reject the petitioner's testimony and other evidence relating to this issue so that the court could have engaged in a meaningful review of her decision.[294]

Third, the IJ erred when denying the petitioner's political opinion claim because the petitioner did not identify a political opinion that he holds.[295] Again, this ignored the existence of *imputed* political opinion claims in asylum law. Finally, in finding that the Honduran government was willing and able to control the petitioner's persecutors, the IJ addressed only the government's efforts to control violence against the LGBTI community. The IJ did not acknowledge that the standard under the law is disjunctive ("unable *or* unwilling") and failed to address evidence on the record indicating that despite the government's efforts, it was *unable* to control homophobic violence.[296] The BIA's decision to affirm the IJ's decision in this case without an opinion is alarming because the IJ committed numerous basic errors of law.

C. *Other Explanations*

The BIA's inconsistent decision-making, poorly reasoned opinions, and frequent legal errors may have explanations other than the unpublished and secret nature of Board decisions. This Section will outline three other theories and explain why each of these theories does not completely account for the problems with the Board's decision-making.

First, overwork: the sheer number of appeals, the small number of Board members, and the streamlining reforms may explain the inconsistency in decisions, as well as the low quality of Board decisions and frequent legal errors committed by the Board. Since 2008, the BIA has received nearly 30,000 appeals each year. During this time, the number of Board members has fluctuated, but it has never been more than twenty-three members, the maximum permitted by current regulations. This means that at a minimum (using 30,000 decisions and twenty-three members and assuming single member opinions), each member is responsible for deciding 1,304 appeals a year.

Consistency and accuracy across this staggering number of decisions may be impossible to achieve.[297] Given the number of appeals in comparison

[294] *Id.*

[295] *Id.* at 129, 132.

[296] *Id* .at 131, 133 (emphasis added).

[297] In fact, the Social Security Administration, an agency that receives comparable levels of cases, has also been accused of inconsistent decision-making. *See* Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1099 (2018);

to the small number of Board members, when Board members are resolving cases, they simply do not have the time to give each case a careful review or write a thorough decision and, in fact, they are discouraged from doing so under the streamlining reforms. According to EOIR, each Board member currently spends a mere one hour adjudicating each appeal.[298]

Under these conditions, inconsistencies, poorly written decisions, and legal errors will naturally flourish. In fact, in the same breath that Judge Walker criticized the BIA's decision-making, he also acknowledged that the streamlining procedures, the small number of Board members (at that time there were only eleven), and a lack of resources at the BIA were to blame.[299] A study of BIA decision-making conducted after the streamlining procedures were implemented also attributed errors to these reforms.[300] But even if these factors are at play (which is probable), the fact that the Board's decisions are nonprecedential and hidden likely exacerbates problems with its decision-making. Board members are aware that they face little public accountability for inconsistency or errors in these decisions.

Second, case-by-case review—or review that must be conducted based on the evidence and testimony submitted in the case before the adjudicator—is a hallmark of immigration adjudications. Thus, the BIA's finding in one case that the BNP is a Tier III terrorist organization, but its contradictory finding in another case, could simply be a function of this case-by-case review, rather than actual inconsistency in decision-making. For example, perhaps different decisions occur because one noncitizen provided more proof that the BNP is not a Tier III organization in one case than another noncitizen did in another case.

The government made this very argument in *Uddin*, but the Third Circuit nevertheless found the inconsistency across Board decisions disturbing. One problem with the BIA's resort to case-by-case review as an excuse for inconsistent decision-making is that it rarely explains why two cases that present identical legal issues should have different outcomes; in other words, when the Board finds that the BNP is a Tier III organization in

PETER L. STRAUSS, TODD D. RAKOFF, GILLIAN E. METZGER, DAVID J. BARRON & ANNE JOSEPH O'CONNELL, GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 1045 (12th ed. 2018); JERRY L. MASHAW, CHARLES J. GOETZ, FRANK I. GOODMAN, WARREN F. SCHWARTZ, PAUL R. VERKUIL & MILTON M. CARROW, SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM 42–43 (1978).

[298] U.S. DEP'T OF JUST., EOIR ACTIVITY-BASED COSTING ANALYSIS: BIA FORM E-26 (TIME AND CASE % ASSUMTIONS [sic]) (on file with author); U.S. DEP'T OF JUST., EOIR ACTIVITY-BASED COSTING ANALYSIS: BIA FORM E-29 (TIME ASSUMTIONS) (on file with author).

[299] WALKER, *supra* note 277, at 2.

[300] DORSEY & WHITNEY LLP, *supra* note 40, at 6–7. Hausman's quantitative data in *The Failure of Immigration Appeals* also suggests that the Board's failure to achieve consistency may relate to the 2002 streamlining rules. Hausman, *supra* note 183, at 1205–07.

one case, it does not explain why the case is different than an earlier one where the Board found that the BNP was not a Tier III organization. Without such an explanation, it is impossible to know whether the agency acted arbitrarily and why such cases frequently end in a remand to the BIA to change its position or provide an explanation for the differing outcomes. This is particularly true because noncitizens in removal proceedings may be unable to bring inconsistencies to the BIA's attention because of their limited access to unpublished decisions.[301]

Third and finally, the problems with BIA decision-making could all be explained by the fact that most cases before the Board are decided by single members.[302] Others have suggested that single Board members are bound to make more errors than three-member panels, especially because they can summarily affirm IJ decisions.[303] Inconsistencies could also be explained by single Board member opinions. As described above, a well-known study described shocking disparities in asylum grant rates across IJs.[304] The study found that IJs who had worked for DHS in an immigration enforcement capacity were less likely to grant asylum than other IJs, while IJs who had worked for nonprofit organizations were more likely to grant asylum than other IJs.[305] Similarly, there is evidence that ideologically liberal federal courts of appeal judges (or those appointed by Democrats) are more likely to rule in favor of a noncitizen than conservative courts of appeal judges.[306] All of this indicates that disparities in decisions across single Board members may also exist because of ideological differences. However, while errors may indeed increase where a single Board member decides a case, the inconsistency in decision-making may not be due to single member opinions

[301] Two immigration attorneys have also pointed out to this author instances where they made the same argument and supported it with the same evidence in different cases, but nevertheless the Board reached opposite results. Interview with Immigration Attorney (June 20, 2022); Interview with Immigration Attorney (Sept. 3, 2018), *supra* note 229.

[302] *See* Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135, 56,139 (Oct. 18, 1999) (to be codified at 8 C.F.R. pt. 3) ("Commenters noted that appellate review by a single Board Member increases the risk of error resulting from the mistakes or prejudices of one person. Three-Member panels provide both a moderating influence and a check against possible undetected errors. Commenters also feared that review by a single Board Member would compromise consistency . . . .").

[303] Palmer et al., *supra* note 46, at 5.

[304] *See generally* Ramji-Nogales et al., *supra* note 181, at 295 (detailing disparities across IJs).

[305] *Id.* at 346–47. Because of limitations in the Board's recordkeeping, the authors of this study were not able to determine the existence or extent of disparities in asylum decisions from one Board member to the next. *Id.* at 354.

[306] *See* Margaret S. Williams & Anna O. Law, *Understanding Judicial Decision Making in Immigration Cases at the U.S. Courts of Appeals*, 33 JUST. SYS. J. 97, 112 (2012).

because over the years the BIA has become a more uniformly conservative body.[307]

D. Why Change Is Necessary

The BIA should implement reforms to remedy the problems created by the shadow docket highlighted above because secret, flawed decision-making (1) has profound consequences for the lives of noncitizens and their families, and the risk of BIA errors going uncorrected is high; (2) defies important rule of law values used to evaluate administrative governance; (3) undermines political accountability and judicial review; and (4) ultimately harms the Board itself.

Errors in BIA decision-making have profound consequences on the lives of noncitizens and their families, and it is likely that BIA errors will go unchecked given the current restrictions on judicial review and lack of competent representation in immigration proceedings. Errors in BIA decision-making can lead to permanent banishment, separation from loved ones, and, where the noncitizen has applied for humanitarian protection such as asylum, serious harm, torture, or death of the noncitizen. For a noncitizen who is detained pending their removal proceedings, BIA errors result in prolonged detention. The risk of erroneous removal or prolonged detention is high for several reasons. Because of limitations on judicial review, many Board decisions cannot be reviewed by federal courts at all—and even when decisions can be reviewed by the federal courts, in many instances the courts must apply a deferential standard of review.

The lack of representation (or competent representation) in immigration proceedings[308] means that errors in Board decision-making may never make it to the federal courts, even when there is an appealable issue.[309] If a noncitizen does have counsel and the appealable issue is reviewable by a federal court, counsel may not be aware of Board case law or inconsistency on an issue because of the secrecy of unpublished decisions. Moreover, the

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[307] *See supra* Section I.B. In a conversation with the author, one immigration attorney also described instances where the same Board member decided the same issue inconsistently in different cases. Interview with Immigration Attorney (June 20, 2022), *supra* note 301.

[308] *See* Katzmann, *supra* 15, at 486.

[309] Moreover, in *The Failure of Immigration Appeals*, Professor David Hausman found that appeals might not even make it to the Board, let alone the federal courts. Hausman found that "[t]he Board . . . rarely reviews the removal orders of [noncitizens] who might have meritorious claims but who are assigned harsh [IJs] and lack lawyers at the beginning of their [cases]." Hausman, *supra* note 183, at 1177. Because the Board rarely reviews decisions of these harsh IJs, it effectively cannot correct their errors. *Id.* at 1197. Hausman explained that this is because harsher IJs more often order noncitizens removed early in their cases, before they have found a lawyer or filed an application for relief, and noncitizens without lawyers rarely appeal. *Id.*

noncitizen may not be granted a stay of removal while the federal court considers the appeal. If a noncitizen is not granted a stay and is removed while their appeal is pending, the likelihood that the government will facilitate the noncitizen's return after a win on appeal is extremely uncertain.[310] Even in the best case scenario where a federal court has jurisdiction over a case and grants a stay of removal pending appeal, the noncitizen is not detained and has competent counsel, and the court is able to correct a Board error, the noncitizen has still spent years in limbo with the stress of a removal order looming over their head.

Shadow docket decision-making further defies important rule of law principles that scholars have articulated to evaluate administrative governance, including notice, justification, coherence, and procedural fairness.[311] Notice helps ensure that the law guides the actions of the public, and includes publicity, clarity, and consistency principles.[312] "In administrative law consistency is, or should be, assured and erratic agency action avoided, by assigning agency action to published rules and standards."[313] Consistency also relates to distributive justice and requires that like cases be treated alike.[314] Justification describes the "reason-giving requirements" for agency action to be valid.[315] Administrative law checks arbitrary agency action partly by requiring reasoned decision-making and providing for judicial review under the arbitrary and capricious standard.[316] Coherence describes the agency's obligation to create a logical system in the law that it administers.[317] Finally, scholars of administrative law have evaluated agency procedures for fairness based on, among other things, whether individuals impacted by government action are satisfied with the procedures provided in their cases[318] and whether decisions are accurate

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[310] *See generally* NAT'L IMMIGR. PROJECT OF THE NAT'L LAWS. GUILD, AM. IMMIGR. COUNCIL & IMMIGRANT RTS. CLINIC, PRACTICE ADVISORY: RETURN TO THE UNITED STATES AFTER PREVAILING ON A PETITION FOR REVIEW OR MOTION TO REOPEN OR RECONSIDER (2012) (providing advisory directives for individuals seeking to return to the United States and warning of the inherently haphazard process even for citizens who fully qualify to return).

[311] *See* Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1987 (2015).

[312] *Id.* at 2002.

[313] ALFRED C. AMAN JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 245 (3d ed. 2014).

[314] *Id.*

[315] Stack, *supra* note 311, at 2009.

[316] *Id.* at 2010.

[317] *See id.* at 2012–13.

[318] *See, e.g.*, Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976) (examining and criticizing the Supreme Court's formulation of due process in administrative

under the law.[319] To give the agency legitimacy, an agency's decisions must not only be accurate but also be *perceived* as accurate by parties.[320] Parties appearing before an agency must feel that they have been given a fair opportunity to be heard by a neutral decisionmaker who has given their case appropriate consideration and reached the correct legal outcome.[321]

The creation of secret law, inconsistency in Board decisions in cases that raise the same issue, lack of reasoning to support appeal outcomes, and errors in decision-making all present serious notice, justification, coherence, and fairness concerns. The creation of secret law is problematic for obvious reasons: it is impossible for the public to comply with or advocate for changes to the law if they are unaware of what the law says. If attorneys representing noncitizens are unaware of the law, they cannot represent their clients competently. Because government attorneys have always had access to unpublished decisions, this puts attorneys representing noncitizens at a huge disadvantage.

The creation of law in nonprecedential decisions will remain problematic even now that the NYLAG settlement has gone into effect. Attorneys representing noncitizens will still be at a disadvantage, as the government will continue to have immediate access to all unpublished decisions, while attorneys representing noncitizens will still not have access to certain unpublished decisions and may have to wait up to one year to access future decisions covered by the settlement. Moreover, most unpublished decisions are issued by single Board members, whereas published, precedential decisions are issued by three Board members or en banc. Thus, even though advocates will now more quickly know about new standards announced in unpublished decisions, it will be impossible for advocates to know if at least two other Board members agree with the decision and therefore what weight they should give to it. In addition, unpublished decisions sometimes conflict with each other, so there will be great confusion about what the law really is.

Given the significance of Board decisions, noncitizens appearing before the Board should feel that their cases have been carefully reviewed by a neutral decision-maker and that the outcome was fair. Brief orders and AWOs by single Board members that provide little or no reasoning to

adjudication); Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 742 (1976) (evaluating the informal procedures of administrative agencies); AMAN & MAYTON, *supra* note 313, at 126–27 (emphasizing that fairness is "essential to an individual's effective and comfortable participation in the agency's application of its standards").

[319] AMAN & MAYTON, *supra* note 313, at 127.

[320] *See id.*

[321] *Id.* at 129.

support the outcome provide noncitizens little comfort that their appeal has been fairly adjudicated.[322] The sense of unfairness is heightened in circumstances where the Board's opinion is inconsistent with another unpublished decision or is riddled with errors. When one noncitizen is granted an untimely motion to reopen to pursue immigration relief but a similarly situated noncitizen who files a motion using the same legal basis is denied that opportunity without any explanation for the differing outcomes, the noncitizen deprived of relief will justifiably feel that the Board is acting unfairly. In the words of *Judulang*, the noncitizen might feel that the Board simply flipped a coin to decide whose motion to grant and whose to deny.[323] At least some inconsistencies in decision-making likely could be eliminated if the Board published more precedential decisions interpreting the law and announcing new rules and exceptions—or even simply applying existing standards to different factual scenarios—and relied less on its shadow docket to resolve cases.

The asymmetry in access to unpublished opinions raises further fairness concerns. The government already has an advantage in immigration court. It is represented by trained attorneys, and most contested removal proceedings turn on the availability of relief from removal, where the burden of proof is on the noncitizen.[324] Moreover, as discussed in Section I.A, reforms of the BIA's decision-making, changes in its membership, and the institution of performance evaluations tied to productivity have all tilted outcomes in the government's favor. Denying noncitizens equal access to unpublished Board decisions further stacks the odds in favor of the government.

While the NYLAG settlement greatly expands public access to unpublished decisions, it does not completely even the playing field. Attorneys representing noncitizens will still be at a disadvantage, as the government will continue to have access to all unpublished decisions, while attorneys representing noncitizens will still not have access to pre-2016 decisions, some "past" and future decisions, and may have to wait up to a year to access future decisions covered by the settlement. Noncitizens involved in immigration proceedings and the public will perceive this situation as unfair at best and insidious at worst. They will be correct.

Unpublished decisions also undermine political accountability. In the criminal legal context, statistics and information compiled from accessible

[322] Oral argument is also rarely ordered at the BIA, removing another opportunity for noncitizens to make sure that the Board heard their arguments. *Board of Immigration Appeals*, U.S. DEP'T OF JUST. (Sept. 14, 2021), https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/T5X2-BPT].

[323] Judulang v. Holder, 565 U.S. 42, 55 (2011).

[324] 8 C.F.R. § 1240.8(d) (2021).

judicial decisions about who we are incarcerating, for how long, and for what reasons have long been used to push for greater equity in prosecutions and sentencing and other reforms of the criminal legal system. In contrast, because unpublished BIA decisions have been (and to some extent will continue to be) inaccessible to the public, the voting public is unaware of how the BIA is interpreting immigration law. This impedes the public's ability to petition representatives to amend the law or change how it is interpreted or applied. Representatives themselves may be unaware of how the BIA is interpreting immigration law in unpublished decisions. They may be thwarted from legislating (or advocating for change in other ways) to correct misinterpretations of the law or unintended consequences of statutory language or stopped from otherwise amending immigration law in response to the BIA's interpretation.

Unpublished decisions thwart review by the federal courts of appeal because these opinions lack sufficient (or any) reasoning. As the Third Circuit explained in a recent opinion reviewing a BIA decision, "judicial review necessarily requires *something* to review and, if the agency provides only its result without an explanation of the underlying fact finding and analysis, a court is unable to provide judicial review."[325] The BIA is thus largely insulated from political accountability for decisions made in unpublished opinions. The low quality of these decisions hinders judicial review.

Finally, shadow docket decision-making has harmed the BIA's own mandate to ensure uniform, accurate, and consistent application of the immigration laws. Instead, the shadow docket has contributed to incoherence in immigration law, error-prone decision-making, and an overall inefficient immigration court system. This has led to "profound cynicism and distrust" of the BIA by courts, scholars, and advocates alike.[326] Ultimately, these actions hurt the BIA because it is not viewed as a competent appellate body. The next Part will discuss reforms to improve the Board's decision-making.

III. RECOMMENDATIONS

This Part proposes three categories of reforms to address each of the above problems created by shadow docket decision-making and to achieve transparency, fairness, consistency, and accountability of Board decisions. These reforms are critically important to ensure that noncitizens in immigration court receive just treatment and correct decisions.

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[325] Valarezo-Tirado v. Att'y Gen. of the U.S., 6 F.4th 542, 549 (3d Cir. 2021) (emphasis added).

[326] CAVENDISH & RICH, *supra* note 278, at 33.

A. Addressing Inaccessible Law

The asymmetry in access to unpublished Board opinions is one of the most insidious features of the immigration shadow docket, particularly because the Board's creation of law in these opinions gives the government an edge over noncitizens and their representatives in an immigration court system where outcomes are already stacked against noncitizens. While the recent settlement between NYLAG and the Board helps resolves some major transparency and fairness issues relating to public access to unpublished decisions, the settlement does not entirely level the playing field. Problems remain because of following issues: the exclusion of decisions issued before April 2016 (or in December 2016), of all decisions on interlocutory appeals, and of past decisions only available in hard copy; unconscionable timelines for disclosure and resulting delayed public access to past and future decisions; the lack of guidance given to the Board on redactions, the electronic reading room, or the format of decisions; and the potential for EOIR to exploit the exclusion provisions. I explore each of these issues further below, followed by recommendations to EOIR and advocates.

1. Critique of the NYLAG Settlement

The NYLAG settlement does not go far enough to address the transparency and accessibility injustices of the shadow docket. This is true for five reasons.

First, under the terms of the settlement, the Board has only limited obligations to make decisions available in its electronic reading room. Unpublished decisions on any interlocutory appeal, past decisions (defined as decisions issued between January 1, 2017 and January 1, 2022) only available in hard copy, and decisions issued before April 2016 (or those issued in December 2016) will remain unavailable.[327]

Access to BIA decisions issued before April 2016 (or in December 2016) would be invaluable to noncitizens and their representatives. As detailed in Section II.B.1, the Board has likely created significant secret law in older unpublished decisions that is still useful for immigration cases today. Access to interlocutory appeals could also be invaluable to noncitizens in removal proceedings because the Board itself describes these appeals as involving either "important jurisdictional questions regarding the administration of the immigration laws, or . . . recurring problems in the

[327] It is unclear as of the publishing of this Article whether the BIA will continue to maintain any unpublished decisions at the LLIRC, but even if it does, one would have to travel to Falls Church, Virginia to access these decisions.

handling of cases by immigration judges."[328] Access would also be invaluable for academics studying Board adjudications and the development of immigration law, and for journalists, policymakers, and lawmakers seeking to assess the law and the Board itself.

By making the Board's disclosure of unpublished decisions primarily a forward-looking policy, noncitizens in removal proceedings will remain at a disadvantage because IJs, government attorneys and Board members would still have access to all unpublished decisions. The Board could address this concern by barring citations to unpublished decisions issued before April 2016 but allowing citations to unpublished decisions issued since then,[329] but this too is an imperfect solution. Having access to the reasoning, arguments, and language in pre-April 2016 unpublished decisions—even if they cannot cite to them—would still give government attorneys an unfair advantage over noncitizens.

Second, the timelines for posting past BIA decisions, pilot project decisions, and interim FY22 decisions are unconscionable. The BIA does not have to begin posting past BIA decisions until July 15, 2024, seven years after the earliest decisions from 2017 were originally issued. All past BIA decisions do not have to be posted until July 15, 2027, ten years after the 2017 decisions were originally issued and more than six years after the oldest decisions from 2021 were issued. Pilot project decisions (which were issued between April 1 and November 30 of 2016) do not have to be posted until April 15, 2023, seven years after they were issued. Finally, the BIA does not have to begin posting FY22 decisions (decisions issued between January 1 and September 30 of 2022) until January 15, 2023, nearly a year after many of the decisions were issued. The BIA also need not finish posting FY22 decisions until July 15, 2023, eight months after the last FY22 decisions were issued.[330] While government attorneys, IJs, and Board members read and cite to these decisions, noncitizens in removal proceedings and the general public are forced to wait.

Third, the BIA does not have to post future BIA decisions immediately after issuance. For FY 2023, the Board does not have to post decisions from each quarter until a year after the earliest decisions of that quarter were issued. For example, decisions issued in the first quarter of FY 2023 (October

[328] K-, 20 I. & N. Dec. 418, 419 (B.I.A. 1991); BIA PRACTICE MANUAL 2022, *supra* note 77, § 4.14(c).

[329] Somewhat similarly, Federal Rule of Appellate Procedure 32.1 bars federal appellate courts from prohibiting or restricting the citation of unpublished federal judicial opinions issued on or after January 1, 2007; thus, federal circuit courts can still limit citations to unpublished decisions issued before the rule went into effect in December 2006. *See* FED. R. APP. P. 32.1.

[330] See *supra* Table 1 (describing when EOIR must post decisions under the terms of the NYLAG settlement).

1 to December 31 of 2022), do not have to be posted until October 15, 2023. For FYs 2024, 2025, and 2026, the settlement states that the Board will post these decisions "on a quarterly basis with publication of opinions for the given Fiscal Year being completed by July 15 of the following calendar year. Specifically, all BIA Decisions from Fiscal Year 2024 will be published by July 15, 2025 . . . ."[331] The inclusion of "completed by July 15 of the following calendar year" language is an explicit acknowledgement that the Board may not meet the "on a quarterly basis" requirement (if it did, all decisions should be posted by April 15). Thus, under the terms of the settlement, the Board can post decisions from October 2024, October 2025, and October 2026 seven months later in July 2025, July 2026, and July 2027. Starting in FY 2028 and forward, the Board can post unpublished decisions as late as six months after issuance. Mr. Uddin's ordeal could easily be repeated where a noncitizen is unaware of Board decisions that could have helped their case even though the decisions were issued months before the IJ, Board, or federal circuit court issued a decision in their case. Thus, the settlement does not completely eliminate the harms stemming from an asymmetry in access to unpublished Board decisions.

Fourth, the settlement provision permitting exclusion of decisions that cannot be redacted without disclosing the noncitizen's identity implies that the Board is conducting some redaction of all decisions prior to their release. But the settlement curiously fails to discuss what information the Board may redact before it posts decisions publicly. This is worrisome. When releasing decisions through FOIA, EOIR has historically engaged in such extensive redacting as to render the released decisions useless to the requester.[332]

Fifth, and finally, the settlement provides the Board with no guidance relating to the format of decisions or the creation of the electronic reading room. The usefulness of the decisions to noncitizens, advocates, and the public will be limited if they are not posted as searchable PDFs or in a database that is searchable by key term. The Board's current electronic reading room contains all precedential decisions, and while newer decisions are individually searchable by key term, these decisions are not in a public database that is searchable by key term. Although Westlaw and Lexis will likely include unpublished decisions released under the terms of the settlement in their databases, pro se noncitizens, certain attorneys (for example, solo practitioners or those working at small nonprofits), and the public do not have ready access to Westlaw or Lexis. Finally, EOIR could exploit the provision allowing exclusion of decisions where redaction would

[331] NYLAG Settlement, *supra* note 110, ¶¶ 3–5 (emphasis added).

[332] *See supra* Section I.E.1; *see also* Chase, *supra* note 102 (noting the systemic issue of heavily redacted BIA decisions).

not prevent disclosure of a noncitizen's identity. It could likewise exploit the provision allowing the Board to argue that additional decisions should be excluded.

2. *The Board Should Post Unpublished Decisions in a Searchable Format Without Delay and Voluntarily Release Decisions Not Covered by the Settlement*

The Board should post all "past" and pilot project decisions without delay soon after the electronic reading room has been created (by October 2022, per the settlement), rather than disclosing according to the lengthy timelines in the settlement.[333] The Board should make every effort to post future unpublished decisions immediately after issuance. The Board should further voluntarily release past decisions that are available only in hard copy, decisions on interlocutory appeals, and pre-2016 decisions in a timely manner.[334] Finally, the Board should upload all decisions in a searchable format and in a database that supports key term searches.

The Administrative Conference of the United States (ACUS) similarly recommends that agencies disclose decisions in excess of the affirmative disclosure requirements of FOIA. Such disclosure provides insight into substantive law and models for private parties, particularly pro se individuals, to use during proceedings and increases public trust in the agency.[335] ACUS further provides agencies best practices for disclosure, including providing a search engine that allows individuals to filter decisions by case type or specific word or phrase.[336] EOIR should implement ACUS's recommendations when disclosing unpublished decisions.

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[333] In January 2023, shortly before publication of this Article, the EOIR launched its electronic reading room. *FOIA Public Access Link: Reading Room (Under Construction)*, EXEC. OFF. FOR IMMIGR. REV., https://foia.eoir.justice.gov/app/ReadingRoom.aspx [https://perma.cc/QJ3K-79E5]. While the reading room is currently marked as under construction, a preliminary review of the reading room indicates that it does not incorporate the recommendations made in this Article.

[334] This author acknowledges that making all decisions from 1940 to 2016 publicly available at once may be unduly burdensome given the sheer numbers of decisions issued during this period. NYLAG originally requested public disclosure of all decisions issued from November 1, 1996 (the date that the Electronic Freedom of Information Act Amendments of 1996 began requiring agencies to post final opinions in an electronic format) to the present. NYLAG Complaint, *supra* note 88, at 9. Disclosure of decisions from 1996 to the present could be a decent compromise if disclosure of all decisions since 1940 indeed proves too burdensome.

[335] ADMIN. CONF. OF THE U.S. ADMINISTRATIVE CONFERENCE RECOMMENDATION 2017-1: ADJUDICATION MATERIALS ON AGENCY WEBSITES, 3 (2017), https://www.acus.gov/recommendation/adjudication-materials-agency-websites-0 [https://perma.cc/9ZS4-3DTS].

[336] *Id.* at 4–5.

3. *The Board Should Minimally Redact Released Decisions*

In published opinions, the Board does not include the noncitizen's A number. And due to privacy regulations, the Board replaces the noncitizen's full name with a pseudonym in its asylum, withholding, and CAT decisions. But before releasing unpublished decisions in response to FOI requests, the Board engages in further, more extensive redactions. For example, in asylum decisions released to this author in response to FOIA requests, the Board redacted many facts relating to the claim.[337]

By contrast, unpublished decisions available at the LLIRC contain no redactions, but restricted decisions—which include asylum decisions—are not available at the LLIRC.[338] Similarly, the federal circuit courts do not redact *any* information in unpublished or published opinions concerning BIA appeals unless the underlying case was a published Board opinion relating to asylum, in which case the pseudonym assigned to the noncitizen is also used at the circuit court level.[339]

Balancing the need for privacy in sensitive cases, the public interest in access, and the burden of redaction, EOIR should redact only A numbers when disclosing most unpublished decisions.[340] For asylum, withholding, and CAT cases, EOIR should additionally redact personally identifiable information, as regulations require. EOIR should further redact personally identifiable information in other sensitive cases, including cancellation of removal or waiver cases in which health information (such as HIV+ status) is disclosed as part of the claim. But EOIR should not engage in the extensive redacting of facts that it does when it discloses decisions through FOIA. Such extensive redacting would be time-consuming for EOIR staff and may lead to delays in the release of unpublished decisions. This would undermine the goal of giving the public timely access to unpublished decisions. Such redactions are also unnecessary, as the BIA's published opinions relating to asylum, withholding, and CAT extensively discuss the facts of the claim and address privacy concerns by using a pseudonym only.

These recommendations are feasible, even if they may require additional funding. In fact, the Administrative Appeals Office (AAO), an agency that reviews appeals of DHS officers' decisions regarding

[337] *See supra* Section I.E.1.

[338] *Id*.

[339] *See* Nancy Morawetz, *A Better Balance for Federal Rules Governing Public Access to Appeal Records in Immigration Cases*, 69 HASTINGS L.J. 1271, 1304 (2018).

[340] If EOIR chooses this route, the immigration court and BIA practice manuals should be amended to not require parties to include the noncitizen's A number when citing to unpublished decisions. For their current full redaction policies, see IMMIGRATION COURT PRACTICE MANUAL 2020, *supra* note 115, § J-3, and BIA PRACTICE MANUAL 2022, *supra* note 77, § 4.6(d)(2).

immigration benefit requests, already follows many of these recommendations.[341] Most nonprecedential decisions of the AAO issued since 2005 are publicly available on its website and are searchable by key term.[342] The AAO redacts personally identifiable information and other sensitive material from nonprecedential decisions before the decisions are made public.[343]

Making most Board decisions publicly accessible also has benefits for the government itself. First, IJs will benefit from having greater access to searchable unpublished Board decisions to guide their decisions. This will make what happened in Mr. Uddin's case—where the IJ declared that he was aware of no BIA decision which considered whether the BNP constitutes a terrorist organization, although there were several—less likely.[344] Second, the quality of Board decisions will increase because Board members who know that their opinions are accessible by the public, scholars, advocates, and lawmakers will have an incentive to write reasoned decisions. This would reduce the number of appeals filed from Board decisions and cut down on the number of remands by the federal circuit courts of appeals, contributing to a more efficient immigration system. Third, providing noncitizens equal access to Board decisions will increase confidence in the Board's fairness to all parties.

The Board has not articulated its reasons for keeping unpublished decisions secret. The reason may be as simple as increased efficiency, allowing Board members to issue decisions quickly. But it may be darker. Perhaps the Board does not want noncitizens to have roadmaps to make persuasive arguments, or the Board does not want the public to see how little reasoning its decisions contain. Supporters of selective publication policies at the federal circuit courts advance some reasoning that could be applicable here. These arguments include efficiency concerns and the notion that nonprecedential decisions are necessary to maintain consistency in the law.[345] Neither argument outweighs the transparency and fairness concerns raised by the immigration shadow docket. Board members may feel pressure to write reasoned decisions because they know that even unpublished decisions will be accessible to the public, but those decisions need not be long or burdensome to write. And writing a careful decision may benefit the Board

[341] *See Administrative Appeals*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/administrative-appeals [https://perma.cc/RDF6-K668].

[342] *See AAO Non-Precedent Decisions*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/administrative-appeals/aao-decisions/aao-non-precedent-decisions [https://perma.cc/2ZTD-8AP2]. Decisions issued before 2005 can be requested through FOIA. *Id.*

[343] *Id.*

[344] Uddin v. Att'y Gen. of the U.S., 870 F.3d 282, 291 (3d Cir. 2017).

[345] Reynolds & Richman, *supra* note 17, at 1183–85.

by reducing the number of appeals and remands. There is also no evidence that more published decisions will create inconsistency in the law. In fact, this Article has shown that inconsistency is already rampant, and that many of the Board's shadow docket decisions conflict with each other.[346]

4. *Advocates Should Monitor Disclosure and Report Problems*

Given EOIR's past reluctance to disclose unpublished decisions and subterfuge when forced to disclose such decisions (for example, by redacting all useful information from decisions released in response to FOIA requests), I recommend that advocates remain vigilant as the NYLAG settlement unfolds. Advocates should closely monitor the Board's disclosure practices and report problems to NYLAG's counsel or EOIR leadership directly. Advocates should pay attention to issues including:

TABLE 2: CONSIDERATIONS FOR ADVOCATES

Issue	Considerations for Advocates
Comprehensive Release	Are all decisions released? Are decisions released in a timely manner? Advocates who have received unpublished decisions in their own cases should make sure that these decisions also appear in EOIR's electronic reading room, particularly if the decisions are notable in some way. If they are not, advocates should press EOIR to provide an explanation to determine if the failure to disclose was justified.
Redaction	Are decisions useful even with certain information redacted? What information appears to be redacted in decisions? Do redactions seem appropriate? Are decisions appropriately redacted to protect the identity of asylum seekers and others seeking humanitarian protection? Are non-asylum decisions that contain sensitive information redacted to protect the privacy of the noncitizen?
Substance of Decisions	Should certain decisions have been published as precedent? Is there an increase in AWOs and a decrease in brief orders or full opinions? If so, this could indicate bad faith on the part of the Board. Advocates should press EOIR to explain any changes in the type of decisions issued by the Board.
Quality of Opinions	Has the quality of decisions improved? Is the Board explaining its conclusions? Is it citing to precedent, regulations, or the INA to support its conclusions? Are decisions consistent? When decisions are inconsistent, is the Board providing reasons to support the differing results?
Format of Decisions	Does the electronic reading room allow for key-word searches of all unpublished decisions? Can decisions be filtered by case type? Are individual decisions released in a searchable format?

[346] *See supra* Section II.B.

Advocates should also pay attention to how Ijs and government lawyers are using unpublished decisions. For example, advocates should keep track of whether government attorneys use unpublished decisions that are not yet accessible to the public in their filings or while communicating with the court. This information could then be used to advocate for EOIR to post decisions publicly on a timelier basis.

B. Addressing Lack of Precedent

The Board's practice of issuing nearly all its decisions through the shadow docket as unpublished, nonprecedential opinions has hindered the development and understanding of immigration law and likely contributed to the well-documented disparities in its application by Ijs.[347] Moreover, in a 2018 article, *Invisible Adjudication in the U.S. Courts of Appeals*, Professors Michael Kagan, Rebecca Gill, and Fatma Marouf presented data that showed a wide body of immigration decisions of the federal circuit courts are "invisible," meaning these decisions are not only unpublished but are also unavailable and unsearchable on Westlaw and Lexis.[348] This data, combined with the finding in this Article that the BIA issues virtually all decisions as unpublished and many of these unpublished decisions are inaccessible to the public, leads to two revelations: (1) there is a true dearth of precedential immigration decisions from both the BIA and the federal circuit courts, and (2) a large portion of unpublished immigration decisions from both the BIA and the federal circuit courts are unavailable publicly.[349] This Section recommends reforms to address the lack of precedent guiding Ijs.

1. The Board Should Publish More Precedential Decisions

The Board should publish more decisions as precedent to truly fulfill its duty to provide "clear and uniform guidance . . . on the proper interpretation and administration of the [INA] and its implementing regulations."[350] Precedent benefits and guides the behavior of the public by explaining what

[347] *See supra* Section II.A.

[348] Kagan et al., *supra* note 29, at 685–86.

[349] These findings also suggest that federal court scholars should continue to question the appropriateness of selective publication policies of the federal circuit courts, at least with respect to immigration cases.

[350] 8 C.F.R. § 1003.1(d)(1) (2022). In an early study of asylum adjudications, Professor Deborah Anker similarly recommended that the BIA "should be required to publish and designate as precedents a significant portion of its decisions. Published decisions should include those which grant and deny asylum claims so that the public and the immigration judges have a more complete understanding of the BIA's guidelines." Anker, *supra* note 30, at 461. A comprehensive report on reforming the immigration system by the American Bar Association in 2019 similarly found that the Board issues too few precedents and recommended that it issue more. ABA 2019 UPDATE REPORT, *supra* note 38, UD 3-17 to UD 3-19, UD 3-30.

actions do or do not violate immigration laws. Precedent helps legislators by revealing a need to amend imprecise statutory language so that it is in line with desired immigration policy goals. Precedent helps Ijs and DHS officers more accurately apply immigration law and helps avoid inconsistencies across immigration decisions at the immigration court, DHS, and Board. Finally, precedent helps attorneys representing noncitizens more accurately explain the law to their clients and provide clients a better assessment of their chances on appeal. Every constituency—from the individual noncitizen to the broad voting public—needs more precedent.

More precedent, in turn, may positively impact the Board's caseload. The more the Board issues precedential opinions, the more immigration issues the Board will have authoritatively ruled on, and the easier it will be for attorneys to determine whether an appeal will be successful.[351] This should result in fewer appeals and fewer issues raised in those cases that are appealed.[352] A reduction in immigration appeals will further benefit federal circuit courts, where immigration cases continue to overwhelm dockets.[353]

2. Advocates Should Press for Publication of Significant Unpublished Board Opinions

The Board's practice manual specifically states that it entertains requests for publication of unpublished decisions.[354] Citing this provision, advocates should regularly review unpublished decisions the Board posts in its electronic reading room. When they believe a decision should have been published (whether because it announces new law or even applies existing law to a new factual circumstance, etc.), they should press the Board or the

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[351] Cappalli, *supra* note 22, at 769.

[352] *Id.*

[353] *See Federal Judicial Caseload Statistics 2021*, U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2021 [https://perma.cc/65PR-DGNY] ("Appeals of administrative agency decisions rose 18 percent . . . mostly due to growth in appeals of decisions by the Board of Immigration Appeals (BIA) . . . BIA appeals accounted for 85 percent of administrative agency appeals and constituted the largest category of administrative agency appeals filed in each circuit except the DC Circuit.").

[354] BIA PRACTICE MANUAL 2022, *supra* note 77, § 1.4(d)(2). Note, however, that in the same sentence, the Board states that "such requests are granted sparingly." *Id.* Advocates have requested that certain unpublished Board decisions be designated as precedent in the past with mixed results. For example, advocates requested that the Board publish the *Matter of A-D-* decision described in Section III.B.1.; however, the Board refused to do so. *Matter of Toboso-Alfonso*, a seminal BIA decision establishing that gay men can constitute a particular social group for purposes of asylum law, was initially issued as an unpublished decision in 1990. As a result of advocacy by Representative Barney Frank with Attorney General Reno, the decision was designated as precedent in 1994. Advocate, *supra* note 214; Dorothy A. Harbeck & Ellen L. Buckwalter, *Asking and Telling: Identity and Persecution in Sexual Orientation Asylum Claims*, 2 IMMIGR. L. ADVISOR 1, 2 (2008).

Attorney General to publish the decision or else explain why publication is not appropriate.

3. *Issue Guidance Through New Rules*

If the Board fails to develop the law through precedent, another option to create additional law is through agency rulemaking. While rulemaking is a slow process, it has the advantage of being more democratic because the public can provide input through the notice and comment procedure and the government must respond to public comments before publishing a final rule. For example, DHS and DOJ recently overhauled proposed regulations that amended procedures for considering certain protection claims. The dramatic revisions were prompted by thousands of public comments.[355] Although rulemaking is a more democratic option for clarifying immigration law, it has stalled and failed to answer important substantive immigration questions in the past.[356] The Board should not use rulemaking as an excuse to shirk its duty to build the law through precedent as it has done in the past.[357]

4. *EOIR Should Strike the Rule Discouraging Citations to Unpublished Opinions*

EOIR should join the federal circuit courts in striking the rule discouraging citations to unpublished Board opinions from the Immigration Court Practice Manual (ICPM) and the BIA Practice Manual. The ICPM explains that such citations are discouraged "because these decisions are not binding on the Immigration Court in other cases."[358] The BIA Practice Manual likewise "discourage[s]" parties from citing to unpublished decisions, which an earlier edition of the Practice Manual explains is

[355] *See* Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18,078, 18,090, 18,109 (Mar. 29, 2022).

[356] For example, rules for gender-based asylum claims were first proposed in December 2000 but have never been finalized. *See* Karen Musalo, *A Short History of Gender Asylum in The United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women's Claims*, 29 REFUGEE SURV. Q. 46, 58–59 (2010) (describing history of gender-based violence regulations in United States). Most recently, President Biden, through an Executive Order issued in February 2021, ordered the Attorney General and the Secretary of Homeland Security "to evaluate whether the United States provides protection for those fleeing domestic or gang violence in a manner consistent with international standard" and to issue regulations for particular social group asylum claims. The deadline of 270 days after the issuance of the Executive Order has passed with no regulations from the agencies. Exec. Order No. 14,010, 86 Fed. Reg. 8267 (Feb. 2, 2021).

[357] For years the Board failed to issue a precedential decision on whether there is a duress defense to the persecutor bar in favor of rulemaking; however, a rule was never promulgated. Evans, *supra* note 174, at 456–57, 456 n.13. The Board finally issued a precedential decision on the issue in 2018, nearly ten years after the Supreme Court remanded the issue to it.

[358] IMMIGRATION COURT PRACTICE MANUAL 2020, *supra* note 115, app. J-3.

"because these decisions are not controlling on any other case."[359] But despite these admonitions, Board members and Ijs themselves cite unpublished decisions to support their conclusions. The Board also announces new law in unpublished decisions, conclusively demonstrating their usefulness to parties.

Because Ijs and the Board members cite to unpublished decisions as if they do carry some weight, and because unpublished decisions do sometimes create new law, it is disingenuous for EOIR to discourage citations to these decisions because they are not "binding." The no-citation rules of the federal courts were supported by fairness reasons—the idea was that litigants who could not afford unpublished decisions would not be disadvantaged. This reason does not apply here. Because EOIR's rule is not a strict no-citation rule, but a discouraging rule, it does nothing to help the disadvantaged party. After all, government attorneys are merely discouraged from citing the decisions, and these attorneys ignore the rule and cite unpublished decisions.[360] Ultimately, the rule serves no legitimate purpose.

C. Addressing Problems with the Board's Decision-Making

As described in Section II.B, the Board's shadow docket decision-making is highly problematic: decisions are inconsistent, thinly reasoned (or completely devoid of reasoning), and filled with errors. It is therefore unsurprising that federal courts, advocates, and scholars alike have little faith in the Board's ability to issue fair and correct decisions. The following reforms will help improve the accuracy and consistency of Board decisions.

1. Expand Federal Court Jurisdiction to Review Board Decisions and Lower Standards of Review

Many Board decisions are not reviewable by the federal courts, and often where the courts do have jurisdiction, they must apply deferential standards of review.[361] Limited review and deference can make sense in certain circumstances. For example, when agencies have developed expertise in their field that federal courts do not possess, their judgment may carry weight. But this Article, along with scholarship on the Board over the years, has demonstrated grave problems with the Board's decision-making. Considering the serious consequences of Board decisions on the lives of noncitizens and their loved ones, Congress should expand federal court

[359] BIA PRACTICE MANUAL 2022, *supra* note 77, § 4.6(d)(2); BIA PRACTICE MANUAL 2021, *supra* note 114, app. J-2.

[360] For a list of example cases in which IJs and government attorneys have relied upon unpublished decisions to support their arguments, see *supra* note 116.

[361] *See supra* Section I.G.

jurisdiction over Board decisions and lower standards of review. These reforms will protect noncitizens against erroneous removal or prolonged detention by decreasing the likelihood that Board errors will go uncorrected. But Congress has failed to act on immigration issues for years, making a jurisdictional fix unlikely for the foreseeable future. The following reforms can be implemented by EOIR alone, without any legislation.

2. Develop a Quality Assurance System for Board Decisions

EOIR should develop a quality assurance (QA) system to ensure the accuracy and consistency of Board decisions. In response to criticism of inconsistencies across ALJ decisions, the Social Security Administration (SSA) implemented several strategies to monitor and improve the accuracy and consistency of decisions.[362] To help monitor the quality of decisions, the SSA uses a measure known as the "agree rate," which reflects the percentage of cases in which the Appeals Council (the final level of appeals within the SSA) concluded that the ALJ's decisions were supported by substantial evidence and contained no error of law or abuse of discretion.[363] The SSA also conducts several QA reviews, including reviews of decisions appealed by claimants, a random sample of cases in various stages of preparation, and a random sample of cases with a common characteristic that increases the likelihood of error.[364]

EOIR could likewise measure the rate at which federal circuit courts remand the decisions of each Board member because of errors in the decision. But remand rates alone provide a skewed perspective of the quality of Board members' decisions—not all cases are appealed, after all. Under the Trump Administration, EOIR implemented a remand metric rate that required that Ijs should not be remanded in more than fifteen percent of their appealed cases. As explained by the President of the National Association of Immigration Judges, "A judge who completes . . . 700 cases, has been appealed only twice and is remanded once, will be deemed to have a 50 percent remand rate and fail this metric. A judge who has been appealed one hundred times and is remanded 15 times will pass."[365] The remand rate does nothing to measure the accuracy of non-appealed decisions. For this reason, EOIR should not implement a performance metric based solely on remand

[362] U.S. GOV'T ACCOUNTABILITY OFF., SOCIAL SECURITY DISABILITY: ADDITIONAL MEASURES AND EVALUATION NEEDED TO ENHANCE ACCURACY AND CONSISTENCY OF HEARINGS DECISIONS 1–3 (2017).

[363] *Id.* at 31.

[364] *Id.* at 37–38.

[365] *The State of Judicial Independence and Due Process in U.S. Immigration Courts: Hearing Before the H. Comm. on the Judiciary & Subcomm. on Immigr. & Citizenship*, 116th Cong. 5 (2020) (statement of A. Ashley Tabaddor, President, National Association of Immigration Judges).

rates. Rather, calculation of the remand rate should be considered along with other quality control measures aimed at monitoring the consistency and accuracy of Board decisions. Like the SSA, EOIR should conduct QA reviews of a random sample of appealed decisions, decisions that were not appealed, draft decisions, and final decisions for consistency, accuracy, and sufficiency of legal reasoning.[366] EOIR should pay particular attention to reviewing decisions in cases with pro se noncitizens because studies have shown that unrepresented noncitizens have less favorable outcomes on appeal.[367] Cases in which the noncitizen sought humanitarian relief also deserve special attention because of the high stakes of those cases. Monitoring remand rates and conducting QA reviews at various stages will help EOIR understand whether additional review of certain Board members' decisions, guidance, or training is needed.

ACUS similarly recommends that agencies with adjudicative programs consider creating QA systems. ACUS's explanation of the benefits of QA is particularly relevant for EOIR in light of the problems highlighted by this Article:

> Through well-designed and well-implemented quality assurance systems, agencies can proactively identify both problems in individual cases and systemic problems, including misapplied legal standards, inconsistent applications of the law by different adjudicators, [and] procedural violations . . . . Identifying such problems enables agencies to ensure adherence to their own policies and improve the fairness (and perception of fairness), accuracy, inter-decisional consistency, timeliness, and efficiency of their adjudicative programs.[368]

When designing a QA system, EOIR should review ACUS's guidance for designing and implementing such a program, which includes recommendations for developing QA standards, personnel, the timing and process for QA review, data collection and analysis, the use of data and

[366] A FOIA request filed by this author for information relating to quality assurance reviews of draft or final Board decisions revealed that the Board currently does not conduct such review or at least does not maintain any documents describing such review. *See* Email from Joseph Schaaf, Supervisory Attorney Advisor (FOIA), Exec. Off. for Immigr. Rev., to Author (Aug. 13, 2021, 10:45 AM) (on file with author). ("This correspondence is in response to your . . . (FOIA) request . . . in which you seek BIA Quality Assurance/Review. A search of our records did not locate any records responsive to your request.").

[367] DEP'T OF JUSTICE, A TEN-YEAR REVIEW OF THE BIA PRO BONO PROJECT: 2002–2011, at 12 (2014), https://www.justice.gov/sites/default/files/eoir/legacy/2014/02/27/BIA_PBP_Eval_2012-2-20-14-FINAL.pdf [https://perma.cc/F3WG-37W4]. ("Comparing the percentage of favorable outcomes obtained by unrepresented [noncitizens] to those obtained by [noncitizens] represented by the Project, it appears that the Project's involvement tends to increase the likelihood of a favorable appellate outcome for a [noncitizen].").

[368] Quality Assurance Systems in Agency Adjudication, 87 Fed. Reg. 1715, 1722 (Dec. 16, 2021).

findings, public disclosure and transparency, and assessment and oversight.[369]

3. Review Board Decisions Regularly for Consistency

Board staff should regularly review Board decisions for consistency. Such review could take place during the QA reviews described above, or separately. EOIR should not rely solely on the Board's staff to identify inconsistent decisions but should invite IJs and immigration court staff to participate. EOIR should further enlist the public to help with this effort. Combining an internal effort to identify inconsistent decisions with a mechanism that allows the public to bring those decisions to light will inspire trust that EOIR's reform efforts are made in good faith.

4. Provide a Mechanism for the Public to Bring Inconsistencies to EOIR's Attention

The Ninth Circuit responded to allegations of inconsistencies between unpublished decisions and published precedent or other unpublished decisions by providing the public a mechanism to bring inconsistent decisions to the court's attention. The court distributed a memorandum to all district judges, bankruptcy judges, magistrate judges, lawyer representatives, senior advisory Board members, and law school deans within the Ninth Circuit, as well as other members of the academic community, seeking information on unpublished decisions that conflicted with other published or unpublished decisions. The memorandum was also posted on the court's website.[370] The court collected responses via email, fax, and a response form on the court's website.[371]

EOIR should similarly provide a mechanism for the public to bring inconsistent Board decisions to its attention. EOIR should make this a permanent effort, rather than a short-term effort as done by the Ninth Circuit, because scholars and practitioners have already documented many inconsistencies. DOJ should use this information once it is collected to

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369 *Id.* at 1723–24.

370 *Unpublished Judicial Opinions: Hearing Before the Subcomm. on Cts., the Internet, & Intell. Prop. of the H. Comm. on the Judiciary*, 107th Cong. 36 (2002) (statement of Alex Kozinski, J., United States Court of Appeals for the Ninth Circuit).

371 *Id.* According to then-Judge Kozinski, no inconsistent decisions were identified through this process. *Id.* However, in response to a survey question that asked federal circuit court judges how often an attorney has cited an unpublished decision that is inconsistent or difficult to reconcile with a published opinion, many judges (33 out of 122, or 27%) said that cited unpublished opinions are occasionally inconsistent, a few (19 out of 122, or 16%) said that cited unpublished opinions are never inconsistent, two judges (2%) said that such opinions are often inconsistent, and one judge (1%) said that such opinions are very often inconsistent. ROBERT TIMOTHY REAGAN, MEGAN DUNN, DAVID GUTH, SEAN HARDING, ANDREA HENSON-ARMSTRONG, LAURAL HOOPER, MARIE LEARY, ANGELIA LEVY, JENNIFER MARSH & ROBERT NIEMIC, FED. JUD. CTR., CITING UNPUBLISHED OPINIONS IN FEDERAL APPEALS 14 (2005).

decide if there is indeed a conflict and then take the appropriate remedial action.

5. Order En Banc Review of Inconsistent Decisions

There are at least two options to address inconsistencies that come to light. First, the Board currently has the authority to review any case en banc upon direction of the Chairman or by majority vote of the permanent members of the Board.[372] Although en banc review is "not favored," the Board's regulations specifically note that it is ordered "where necessary . . . to secure or maintain consistency of the Board's decisions."[373] Thus, one option is for the Chairman to direct en banc review in cases in which legitimate inconsistencies have been identified.

Second, the Attorney General has the power to certify any decision of the Board for review by themself (the "self-referral power").[374] The Attorney General could make it a policy to refer inconsistent Board decisions to themself and issue an opinion resolving the conflict. In fact, "In the first sixty years of its existence, the self-referral power . . . was deployed only to make technical corrections, such as . . . to resolve conflicting decisions of the BIA."[375] However, scholars have criticized the Attorney General's self-referral power, particularly after the Trump Administration, where it was "deployed . . . to upset policies that had been viewed by everyone—including DHS—as settled."[376] Scholars argue that the self-referral power is problematic because "[a]s a political appointee serving at the will of the president, the attorney general is subject to the changing winds of politics, and his primary duty is law enforcement, not adjudication."[377] Thus, en banc review upon the direction of the Board's Chairman may provide for more stable and accurate review of conflicting BIA decisions.

6. Limit Single Member Opinions and AWOs

EOIR should limit single member opinions and AWOs to purely procedural or ministerial issues. The Board should return to three-member panels with full written opinions for all other matters.[378] Written opinions should sufficiently explain the reasons supporting the decision, including, if

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[372] 8 C.F.R. § 1003.1(a)(5).

[373] *Id.*

[374] 8 C.F.R. § 1003.1(h)(1)(i).

[375] PECK, *supra* note 33, at 10.

[376] *See id.* at 11.

[377] *See id.* at 10.

[378] A comprehensive 2019 American Bar Association report on reforming the immigration system similarly recommended the return of three-member panel review for all cases unless the appeal is frivolous or there is obvious precedent controlling the issue. "Obvious precedent" is defined as the absence of conflicting authority. ABA 2019 UPDATE REPORT, *supra* note 38, at UD 3-28.

applicable, an explanation of why the decision departs from established precedent or other unpublished decisions on the matter. Before issuing any decision, the Board member or staff should review other unpublished decisions where the Board was confronted with the same issue to ensure that the current decision does not diverge. Where the decision is inconsistent with a previous Board decision, the Board member should ensure that the decision adequately explains why the outcome should be different in the present case.

One defense of AWOs and single member opinions is that they save time and effort, allowing the Board to move through its massive docket more quickly.[379] A requirement of full written opinions by three-member panels is not a requirement that the BIA issue lengthy opinions that require significant effort to write. A succinct and focused opinion that clearly states the Board's decision, adequately describes the Board's reasoning and the authorities that support it, and gives due consideration to the parties' arguments will suffice. Writing full, three member opinions will help improve the quality of Board opinions because the process of writing itself helps clarify the issues, refine reasoning, and catch errors. This in turn may save the Board time and reduce its docket. Parties are less likely to appeal if they believe that their case was fairly and correctly decided (most people would have trouble believing a single-member AWO of their appeal was fair), and the federal circuit courts are less likely to remand decisions that are supported by adequate reasoning and have no errors. Ultimately, confidence in the fairness of Board decisions and the competence of the Board by judges, advocates, noncitizens, and the public in general will grow.

D. Provide the Board Additional Funding to Support Reform

Ultimately, the above reforms can only be achieved if Congress increases funding and resources to the Board. In 2009, the Chairman of the Board estimated that the Board would need twenty-five members and 250 staff attorneys to return to three-member panels in all cases.[380] However, appeals have increased since then.[381] EOIR should re-evaluate the Board's staffing needs to return to three-member panels and full written opinions in all cases. Congress should increase funding to the Board to permit hiring additional Board members and staff attorneys based on EOIR's evaluation. The Board's current regulations permit only twenty-three permanent members, so DOJ will need to revise the Board's regulations if the Chairman determines that more than twenty-three members are needed. Alternatively,

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[379] *See, e.g.*, Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135, 56,137–38 (Oct. 18, 1999).

[380] CAVENDISH & RICH, *supra* note 278, at 34.

[381] U.S. DEP'T OF JUST., *supra* note 68.

the EOIR Director could appoint additional temporary Board members to meet the Board's staffing needs. This may be preferable because if the Board's permanent membership is expanded, en banc review may become unmanageable (temporary Board members do not participate in en banc review).[382]

EOIR will also need additional staff to assist in redacting unpublished Board decisions for disclosure to the public. To make this job easier, EOIR staff should first digitize all Board decisions, just as it did in the brief 2016 pilot project. Digitizing Board decisions will also allow the Board to conduct QA and consistency review of Board decisions more easily. As of February 2019, the EOIR FOIA Unit was staffed with just eighteen personnel, and many of these individuals work on purely administrative tasks.[383] EOIR should conduct an evaluation to determine the number of staff needed to redact unpublished decisions to ensure timely disclosure of unpublished decisions to the public.

CONCLUSION

Scholars have suggested that the appeals process exists for two primary reasons: to make law through precedent and to correct errors.[384] A properly functioning appellate process should therefore result in greater consistency in lower court decisions.[385] But the Board is not functioning properly as an appellate agency; it publishes precious few precedential decisions to guide IJs. Instead, most of the Board's decision-making happens in the form of unpublished, nonprecedential decisions—on the shadow docket.

The Board's shadow docket decision-making explains many of its failures. Seen in this light, studies demonstrating shocking disparities in grant rates across IJs are not surprising. Nor is a lack of precedent the only issue demonstrating appellate dysfunction at the BIA. This Article shows that the Board's shadow docket decisions frequently conflict with each other and are replete with errors. Rather than guiding IJs, correcting errors, and contributing to greater consistency in the application of immigration law, the BIA is creating greater confusion for IJs. It is contributing to the incoherence of immigration law and the inefficiency of the immigration system. Considering the profound consequences of Board decisions on the lives of noncitizens, their loved ones, and communities, this situation is deeply disturbing.

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[382] 8 C.F.R. § 1003.1(a)(4).

[383] *See* Schaaf February 2019 Declaration, *supra* note 101, ¶ 13.

[384] Hausman, *supra* note 183, at 1181–82.

[385] *Id.* at 1181.

This Article has explained how the Board's near-exclusive use of shadow docket decision-making contributes to the immigration system's deficiencies. Board members know that their decisions are unpublished, nonprecedential, and mostly inaccessible to the public. They have little incentive to write reasoned or consistent decisions—or any decisions at all. In fact, evidence shows that the Board frequently writes decisions without providing any support for its conclusions and without explaining why one case should have an outcome different from another with identical legal issues. Moreover, if the parties involved in an appeal are the only ones with access to the Board's decision, neither the public nor advocates can recognize inconsistencies across decisions and bring them to the attention of the Board or a federal circuit court. Decisions that lack reasoning or support also thwart circuit court review because judges cannot assess unsupported opinions and must remand them to the Board for further explanation.

Finally, if the public does not have access to most Board decisions, civic institutions cannot advocate for changes in the law or the way it is applied or interpreted. Transparency, fairness, consistency, and accountability are important values of American administrative law and are critical to the proper functioning and legitimacy of any administrative agency. Thus, the BIA is also failing as an administrative agency.

The Board should follow the lead of federal circuit courts of appeals, where inaccessible unpublished decisions and no-citation rules once flourished. It should make all unpublished opinions available to the public electronically on a timely basis, and it should eliminate the rule discouraging citations to these decisions. The Board should further publish more precedential decisions to truly fulfill its duty to "provide clear and uniform guidance to the [DHS], the immigration judges, and the general public on the proper interpretation and administration of the [INA] and its implementing regulations."[386] By enacting these reforms and others discussed in this Article, the Board could increase the transparency and accuracy of its own decisions. It could reduce inconsistency and errors in IJs' opinions. And most importantly, it could ensure that the nearly two million noncitizens currently in our immigration court system[387] are treated justly and receive the benefit of accurate, well-reasoned adjudication.

[386] 8 C.F.R. § 1003.1(d)(1).

[387] *See Backlog of Pending Cases in Immigration Courts as of Sep 2022*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php [https://perma.cc/MA5V-BQJZ] (showing a pending case load of 1,936,504).