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SECRET LAW AT THE BOARD OF IMMIGRATION APPEALS

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INTRODUCTION

> "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*[1]

Imagine a court system where it appears that judges decide cases by the flip of a coin and decisions are hidden from the public. The average American would find the idea of such arbitrary and secret decision-making repugnant because it conflicts with basic values of transparency, fairness, and accountability central to the American legal system. The average American would be surprised to learn that the Board of Immigration Appeals ("BIA" or "Board"), the Justice Department's appellate immigration agency that reviews decisions of immigration judges (IJs) and officers of the Department of Homeland Security (DHS), subjects thousands of noncitizens to such decision-making each year. Decisions of the Board frequently conflict with each other—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. The average American would be even more disturbed to learn that because Congress stripped the federal courts of jurisdiction over most immigration cases, the BIA is the final arbiter of most immigration questions. An appeal to the BIA is often a noncitizen's last opportunity to seek review of their case.

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

A real example of a noncitizen whose life was impacted by the BIA's seemingly arbitrary and secret decision-making best illustrates the problem this Article highlights and seeks to redress: In Bangladesh, Mr. Uddin was a member of the Bangladesh National Party ("BNP"), one of two major political parties in the country.[2] On several occasions, Mr. Uddin alleged that he was harmed by members of the Awami League, the political party that was in power.[3] 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.[4] As a result of this persecution, Mr. Uddin fled to the United States.[5] When 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.[6] 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.[7] The 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 therefore Mr. Uddin's membership in the group barred him from relief under the INA's terrorism bar.[8] Mr. Uddin appealed the decision to the BIA, but the Board, in an unpublished decision, affirmed the IJ's decision after finding that the BNP was indeed a Tier III organization.[9] Unbeknownst to Mr. Uddin, in several other unpublished decisions, the BIA held the exact opposite: that the BNP was *not* a Tier III terrorist organization,[10] and therefore membership in the party did not bar the granting of immigration relief. The Board did not acknowledge or attempt to distinguish these cases in the opinion deciding Mr. Uddin's fate.

Mr. Uddin's case is not an outlier. Inconsistent decision-making is a recurring issue at the BIA. Given the high stakes of Board decisions—a removal order means permanent banishment from the United States and separation from family, and the noncitizen may be detained during the

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[2] *Uddin v. Att'y Gen. United States*, 870 F.3d 282, 285 (3d Cir. 2017), as amended (Sept. 25, 2017).
[3] *Id.* at 285-86.
[4] *Id.* at 286.
[5] *Id.*
[6] *Id.*; INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B).
[7] *Uddin v. Att'y Gen. United States*, 870 F.3d 282, 286 (3d Cir. 2017), as amended (Sept. 25, 2017).
[8] *Id.*
[9] *Id.* at 288.
[10] *Id.* at 291.

pendency of removal proceedings—such inconsistency is deeply concerning. This Article theorizes that the culprit causing inconsistent decision-making at the BIA may be the secrecy of the vast majority of Board decisions. The underlying Board decision in Mr. Uddin's case was unpublished and non-precedential. This is not unusual. In fact, of the approximately 30,000 decisions the Board issues each year, only 20-30, or 0.001%, are published and precedential. The unpublished decisions of the BIA are largely inaccessible to the public and the Board makes no accommodations to provide noncitizens in removal proceedings or their lawyers greater access to unpublished decisions. Further inequity is caused by the fact that lawyers representing the government in removal proceedings do have access to these decisions, as do IJs and members of the BIA. Although the Board discourages citations to its unpublished opinions in briefs filed by parties and in its own opinions, IJs and the Board itself frequently cite to these decisions to support their arguments and decisions.

When attempting to find unpublished Board decisions for this Article, this author experienced first-hand the difficulty of accessing unpublished opinions and the extremely limited availability of these decisions. Accessing unpublished Board decisions submitted by the government to the Third Circuit in Mr. Uddin's case on PACER was unsuccessful as the government filed the submission under seal. Freedom of Information Act (FOIA) requests filed with the Board were denied as too burdensome. A trip to the Executive Office for Immigration Review's (the DOJ agency within which the Board is located) Law Library and Immigration Research Center led only to a discovery that the Board classifies most unpublished decisions as "restricted" and does not make restricted decisions available to the public.

Setting aside fairness concerns, the Board's use of unpublished, non-precedential decisions to dispose of most cases and the skewed access to these decisions presents serious concerns for the development of immigration law. Because the Board is the final arbiter of most immigration questions and immigration decisions of the federal circuit courts of appeal are only followed by immigration courts within each circuit, the Board is best situated to provide guidance as to the meaning of often complicated and vague statutory language and to ensure uniformity and consistency in the application of immigration law across the nation. In fact, the Board's own regulations charge it with this duty. By publishing only 20-30 precedential decisions a year, the Board has all but abandoned this duty. This has resulted in stunted development and understanding of immigration law, and well-documented disparities in its application by IJs. Furthermore,

because only lawyers representing the government in immigration cases have access to unpublished decisions, the government can shape immigration law in its favor by choosing to settle cases that it does not want to reach the circuit courts.

The use of unpublished, non-precedential decisions is not unique to the BIA. The federal courts of appeal have long issued decisions as non-precedential, and scholars have long criticized the practice; however, the BIA's practice, as described below, is far more problematic, and in contrast, has received little attention by scholars. 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.[11] Following this resolution, individual circuits developed rules providing for publication only when certain circumstances exist, such as when an opinion announces a new rule of law.[12] Many circuit courts subsequently adopted rules forbidding citations to unpublished opinions.[13] Non-precedent decisions quickly dominated and now make up 87% of appellate court decisions.[14]

While judges supported selective publication and no citation rules for cost, timesaving, and fairness reasons,[15] scholars overwhelmingly

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[11] Federal Judicial Center, Citing Unpublished Opinions in Federal Appeals 2 (2005).

[12] *Id*. Some circuits modeled their rules after the *Standards for Publication of Judicial Opinions*, which provided for publication only when: "the opinion establishes a new rule or law or alters or modifies an existing rule; or the opinion involves a legal issue of continuing public interest; or the opinion criticizes existing law; or the opinion resolves an apparent conflict of authority." 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, 1176 (1978).

[13] Federal Judicial Center, Citing Unpublished Opinions in Federal Appeals 2 (2005).

[14] *See* https://www.uscourts.gov/sites/default/files/data_tables/jb_b12_0930.2020.pdf.

[15] *See, e.g.,* Alex Kozinski & Steven Reinhardt, Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions, available at http://www.nonpublication.com/don't%20cite%20this.htm; Hon. Boyce F. Martin, Jr., In Defense of Unpublished Decisions, 60 Ohio St. L.J. 177 (1999) (article written by then Chief Judge of the Sixth Circuit in support of unpublished decisions); Hon. Philip Nichols, Jr., Selective Publication of Opinions: One Judge's View, 35 Am. U. L. Rev. 909 (1986) (article written by a senior judge of the Fifth Circuit in support of selective publication of judicial opinions and no-citation rules). Support of selective publication policies at the federal appellate courts was rooted in practical concerns about the physical ability of courts to publish hard-copies of decisions, the time wasted by judges writing opinions in straightforward cases that did not create new law given growing dockets, costs to the bar relating to acquiring and storing law reporters and researching case law, and overwhelming law-finding devices. William L. Reynolds & William M. Richman, The Non-Precedential Precedent---Limited Publication and No Citation Rules in the United States Courts of

condemned the practice. Critics argued that selective publication policies created a body of "secret law" and encouraged unscrupulous behavior by judges.[16] Studies by scholars demonstrated that courts were creating new law in unpublished decisions,[17] and that conflict between unpublished and published decisions existed.[18] Fairness concerns were not alleviated by no-citation rules 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.[19] Scholars writing after the use of electronic caselaw databases became common stressed that technology eliminated the cost, timesaving, and fairness concerns originally motivating these rules.[20] This debate eventually led to the creation and approval of Federal Rule of Appellate Procedure 32.1, which bars federal appellate courts from prohibiting or restricting the citation of unpublished federal judicial opinions issued on or after January 1, 2007.[21] Rule 32.1 largely ended the debate about selective publication policies by creating a sense of

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Appeals, 78 Colum. L. Rev 1167, 1169 (1978); Richard B. Cappalli, The Common Law's Case Against Non-Precedential Opinions, 76 Southern Calif. Law Rev. 755, 755-57 (2003). Finally, supporters argued that non-precedent decisions were necessary to maintain consistency and cohesiveness in the law. 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, 1184-85 (1978); Richard B. Cappalli, The Common Law's Case Against Non-Precedential Opinions, 76 Southern Calif. Law Rev. 755, 757 (2003). The subsequent no-citation rules were supported for at least two reasons: First, if parties were allowed to cite to unpublished decisions any cost and timesaving benefits of selective publication policies would be destroyed. A market would develop for these decisions and lawyers would find it necessary to purchase and monitor unpublished decisions to provide competent representation. Judges, aware of this market, would feel pressured to write careful decisions. 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, 1186-87 (1978); Richard B. Cappalli, The Common Law's Case Against Non-Precedential Opinions, 76 Southern Calif. Law Rev. 755, 757 (2003). Second, fairness concerns motivated no-citation rules so that litigants who could not afford unpublished decisions would not be disadvantaged. *Id.*

[16] 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, 1200-01 (1978).

[17] *See* Kirt Shuldberg, Comment, Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals, 85 Cal. 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").

[18] 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 n.139 (1978).

[19] *Id*. at 1196.

[20] Richard B. Cappalli, The Common Law's Case Against Non-Precedential Opinions, 76 Southern Calif. Law Rev. 755, 757 (2003)

[21] FRAP 32.1.

transparency in circuit court decision-making and diffusing worries about arbitrary decisions.[22]

However, in a 2018 article, *Invisible Adjudication in the U.S. Courts of Appeals*, 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 also unavailable and unsearchable on Westlaw/Lexis.[23] This data combined with the finding in the present article that the BIA issues nearly all of its decisions as unpublished and most of these unpublished decisions are completely inaccessible to the public lead to two revelations: 1) 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 completely unavailable publicly. This presents serious concerns for the development of immigration law and suggests 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.

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 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, respondents appearing before the immigration courts are generally far more vulnerable than petitioners in circuit courts---they are all noncitizens, often unrepresented, and more likely to be unfamiliar with the American legal system, to have lower incomes, and limited English proficiency. Third, unpublished BIA decisions are more inaccessible to the public than unpublished decisions of the circuit courts. Unpublished decisions of the circuit courts are usually available through traditional legal research conducted on Westlaw/Lexis, and, in some cases, publicly available on the court's website.[24] Despite the active debate between judges and scholars

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[22] *Cf.* Michael Kagan, Rebecca Gill & Fatma Marouf, Invisible Adjudication in the U.S. Courts of Appeals, 106 Geo. L.J. 683, 685-86 (2018) (authors' data shows "that there is a wide body of invisible immigration decision making occurring in the circuit courts, producing decisions that are truly unpublished, not merely designated as nonprecedents").

[23] *Id*. at 685-88.

[24] For example, the Ninth Circuit, which receives the largest number of immigration appeals, posts both published and unpublished opinions on its website. See https://www.ca9.uscourts.gov/memoranda/.

about the validity and consequences of limited publication and no citation rules of the federal circuit courts, no scholarship critically examines the consequences of similar policies at the BIA. This Article fills that void.

Part I provides background on the BIA, including a discussion of its selective publication policy and how little access the public has to unpublished decisions. Part II provides a definition of "secret law" and explains why unpublished opinions of the Board qualify as such. Part III explores problems with secret law at the BIA, starting with a discussion of the consequences of the overwhelming use of non-precedential, unpublished decisions on the development of immigration law, and then describing three practical problems with the Board's use of unpublished decisions: (1) inconsistent decision-making in cases that logically should have the same outcome, (2) low quality opinions, and (3) increased risk of legal errors. Part III closes by exploring other potential explanations for these problems and by explaining why the BIA must implement reforms to address the harms caused by secret law. Part IV recommends reforms to increase transparency and fairness at the Board and improve the quality and accuracy of Board decisions, and tackles anticipated counterarguments. These reforms can help the Board achieve its own goal of uniform and accurate application of immigration law and restore confidence in the competence and legitimacy of the agency.

I. THE BOARD OF IMMIGRATION APPEALS

The Board is the highest administrative body charged with interpreting and applying immigration law.[25] The BIA reviews decisions of IJs and, in certain circumstances, of the DHS.[26] The Board was created through regulations issued by the Attorney General (AG) and has never been recognized by statute.[27] Although the BIA is an administrative body, members of the BIA are not administrative law judges, whose authority derives from Article I of the Constitution and who conduct proceedings under the Administrative Procedure Act. Rather, Board members are merely "attorneys appointed by the [AG] to act as the [AG's] delegates in the cases that come before them."[28] BIA members thus do not have the same insulation from political influence and decisional independence that ALJs

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[25] EOIR, Board of Immigration Appeals: Biographical Information (April 8, 2021), https://www.justice.gov/eoir/board-of-immigration-appeals-bios.
[26] 8 C.F.R. § 1003.1 (b), (d).
[27] Aleinikoff et al, Immigration and Citizenship: Process and Policy, 834 (9th ed. 2021).
[28] 8 CFR § 1003.1 (a).

enjoy. This has allowed the executive branch to meddle in Board decisions and to engage in political hiring and firing of Board members.

A. Reforms of the BIA

In 1999, AG 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. Most importantly, single permanent Board members were now permitted to affirm an IJ's decision on their own and without issuing an opinion.[29] 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.[30] Finally, AG Reno increased the size of the Board to 23 members. 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.'"[31]

Despite the documented success of Reno's reforms, in 2002, AG Ashcroft announced controversial plans to further streamline the BIA's decision-making.[32] These rules "fundamentally changed the nature of the BIA's review function and radically changed the composition of the Board."[33] To support the reforms, Ashcroft cited not only the backlog, but "heightened national security concerns stemming from September 11."[34] The reforms included making single-member decisions for the overwhelming majority of cases the norm and three-member panel decisions rare, making summary affirmances common, and reducing the size of the Board from 23 members to 11.[35] A subsequent study found that Ashcroft removed those Board members with the highest percentages of rulings in favor of noncitizens.[36] As a result of the purge, outcomes at the BIA became significantly less favorable to noncitizens.[37]

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[29] 64 Fed. Reg. 56135, 56141 (Oct. 18, 1999).
[30] 64 Fed. Reg. 56135, 56141-56142 (Oct. 18, 1999).
[31] Miller, Keith, Holmes, Immigration Judges and U.S. Asylum Policy 109-110.
[32] Stephen H. Legomsky, Restructuring Immigration Adjudication, 59 Duke L.J. 1635, 1668 (2010).
[33] Miller, Keith, Holmes, Immigration Judges and U.S. Asylum Policy 111.
[34] *Id.*
[35] 67 Fed. Reg. 54878 (Aug. 26, 3003); Miller, Keith, Holmes, Immigration Judges and U.S. Asylum Policy 109-110-111.
[36] Peter J. Levinson, The Facade of Quasi-Judicial Independence in Immigration Appellate Adjudications 9 (2004).
[37] Stephen H. Legomsky, Restructuring Immigration Adjudication, 59 Duke L.J. 1635, 1670 n. 163 (2010) (collecting sources).

In 2006, AG Gonzales announced additional reforms "to improve the performance and quality of work" of IJs and Board members.[38] The most significant change was the introduction of performance evaluations for IJs and Board members, which include an assessment of whether the member adjudicates appeals within a certain time-frame after assignment.[39] Scholars have argued 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 favor the government."[40]

During the Trump administration, Board membership was once again transformed. Board members whose appointments pre-dated the Trump administration were reassigned after refusing buyout offers[41] and the Board was expanded to add new members.[42] Most of the new Board members appointed under the Trump administration previously served as IJs and had some of the highest asylum denial rates in the country.[43]

B. Current Procedures and Case Load

Under current regulations the Board should consist of 23 members.[44] 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.[45] Currently, the Board consists of 23 permanent members and 4 temporary members.[46]

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[38] Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals, https://www.justice.gov/archive/opa/pr/2006/August/06_ag_520.html.
[39] U.S. Dep't of Justice, EOIR, Performance Appraisal Record: Adjudicative Employees.
[40] Miller, Keith, Holmes, Immigration Judges and U.S. Asylum Policy 117.
[41] Tanvi Misra, CQ Roll Call, DOJ 'reassigned' career members of Board of Immigration Appeals (June 9, 2020), https://www.rollcall.com/2020/06/09/doj-reassigned-career-members-of-board-of-immigration-appeals/.
[42] 85 Fed. Reg. 18105 (expanding board from 21 to 23 members); 83 Fed. Reg 8321 (expanding board from 17 to 21 members).
[43] For example, Board member Couch had a denial rate of 93.3% and Cassidy 99%. See https://trac.syr.edu/immigration/reports/judgereports/00394CHL/index.html; https://trac.syr.edu/immigration/reports/judgereports/00004ATD/index.html.
[44] 8 CFR § 1003.1 (a).
[45] 8 CFR § 1003.1 (a).
[46] EOIR, Board of Immigration Appeals: Biographical Information (Dec 6, 2021), https://www.justice.gov/eoir/board-of-immigration-appeals-bios.

All 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 seven narrow circumstances for three-member review.[47] The single member "shall" issue an Affirmance Without Opinion (AWO) if they determine that certain circumstances exist.[48] If the single member determines 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.[49] Currently, most BIA decisions are brief orders written by single members.[50]

The Board may review any case en banc, or reconsider en banc any case that has been considered or decided by a three-member panel upon direction of the Chairman or by majority vote of the permanent members of the Board.[51] 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."[52]

The BIA receives and decides a staggering number of appeals each year. Since 2017, it has received nearly 30,000 appeals each year (and often much more than that) and it has also completed nearly 30,000 appeals each year.[53] Despite this seeming balance, the BIA's backlog has ballooned. In

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[47] 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 CFR § 1003.1(e)(5); or (vii) the need to resolve a complex, novel, unusual, or recurring issue of law or fact. 8 CFR § 1003.1 (e)(6).

[48] The Board Member "shall" issue an AWO if they find "that the underlying IJ decision was correct; that any errors in the decision under review were harmless or nonmaterial; and that (A) the 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) the factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case." 8 CFR § 1003.1(e)(4).

[49] 8 CFR § 1003.1(e)(5).

[50] American Bar Ass'n, 2019 Update Report: Reforming the Immigration System 20 (March 2019) ("[S]hort opinions by single members of the Board continue to be the predominant form of BIA decision making.").

[51] 8 CFR § 1001.3 (a)(5).

[52] 8 CFR § 1001.3 (a)(5).

[53] EOIR, Adjudication Statistics: BIA All Appeals Filed, Completed, Pending (July 8, 2021), https://www.justice.gov/eoir/page/file/1248501/download. These statistics relate only to appeals from completed removal, deportation, exclusion, asylum-only, and withholding-only

FY 2020, 51,300 appeals were filed with the BIA and 33,974 appeals were completed by the Board.[54] However, 84,769 appeals remaining pending in the Board's backlog.[55]

C. *BIA's Selective Publication Policy*

1. Published Decisions

The Board's regulations mandate that the Board "through precedent, 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."[56] Precedential decisions are designated by a majority vote of the Board's permanent members.[57] Regulations permit the Board to consider the following factors, among others, in determining whether to publish a precedential decision:

(i) Whether the case involves a substantial issue of first impression;
(ii) Whether the case involves a legal, factual, procedural, or discretionary issue that can be expected to arise frequently in immigration cases;
(iii) 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;
(iv) Whether the case involves a conflict in decisions by immigration judges, the Board, or the federal courts;
(v) Whether there is a need to achieve, maintain, or restore national uniformity of interpretation of issues under the immigration laws or regulations; and
(vi) Whether the case warrants publication in light of other factors that give it general public interest.[58]

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proceedings. *Id.*
[54] EOIR, Adjudication Statistics: BIA All Appeals Filed, Completed, Pending (July 8, 2021).
[55] *Id.*
[56] 8 CFR § 1003.1(d)(1).
[57] 8 CFR § 1003.1.
[58] 8 CFR § 1003.1(g)(3). Similarly, the BIA Practice Manual 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." BIA Practice Manual 1.4 (d)(i)(A)

These decisions bind the Board, IJs, DHS officers, attorneys representing the government, and respondents in future cases unless the Board's decision is modified or overruled by the Board itself, the AG, or Congress.[59] Precedential board decisions overturned by a federal circuit court are still followed in other circuits.

2. Unpublished Decisions: Restricted v. Non-Restricted

Most BIA's decisions are non-precedential and unpublished.[60] Unpublished decisions while binding on the parties in the case, are not binding on IJs, respondents, or the government in future cases or considered precedent in other cases.[61] Unpublished decisions are largely unavailable to the public, as discussed further below.[62]

The BIA divides unpublished decisions into "restricted" and "non-restricted" decisions.[63] The Board does not publicly share how it classifies decisions and has never sought public input on the matter; however, this author obtained an internal EOIR memorandum through FOIA that describes "restricted" decisions. According to this memorandum, "restricted" decisions cover a wide swathe of BIA decisions. Restricted decisions include, 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.[64] Employees of the BIA's Clerk's Office also have independent authority to classify other decisions as "restricted."[65]

While EOIR's memorandum does not explain the reasoning behind making certain unpublished decisions restricted, the classification may be rooted in privacy concerns for sensitive cases. Asylum, withholding of removal, and CAT cases involve allegations of serious past harm or fear of

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[59] 8 C.F.R. § 1003.1.
[60] BIA Practice Manual 1.4 (d)(i); American Bar Association Commission on Immigration Report to The House of Delegates 3.
[61] *New York Legal Assistance Grp. v. Bd. of Immigr. Appeals*, 987 F.3d 207, 210 (2d Cir. 2021); BIA Practice Manual 1.4(d)(ii)
[62] *New York Legal Assistance Grp. v. Bd. of Immigr. Appeals*, 987 F.3d 207, 209 (2d Cir. 2021).
[63] Winograd, 2.
[64] 2021-27335 FOIA Response. Some restricted decisions are available on Westlaw/Lexis because they were mistakenly placed in the LLIRC or the attorney representing the respondent shared the decision. (Email 10/26/2021).
[65] Winograd, 4. Independent determinations made by the Clerk's Office are often incorrect. *Id.*

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 cannot fully explain the restricted v. non-restricted distinction for unpublished decisions for two reasons: First, certain restricted decisions do not involve sensitive matters. Second, when the Board publishes decisions covering any restricted subject other than asylum, withholding, or CAT cases, it does not do anything to protect the identity of the noncitizen.

D. Access to BIA Decisions

Precedential Board decisions are published and available electronically in a searchable format on the EOIR website[66] and on Westlaw/Lexis, but public access to unpublished decisions is far more limited. Attorneys representing the government in immigration court have access to unpublished BIA decisions as do Board members and IJs.[67] In the past, IJs had access to a BIA case database that allowed them to search for BIA decisions if they knew the alien registration number ("A number") of the respondent. However, they were not able to search for decisions by key-term, making access to this database of limited utility to them. Recently, IJs were given the ability to search BIA decisions by key-term.[68]

Attorneys representing noncitizens and the public have extremely limited access to unpublished decisions. Except for a few "frequently requested" unpublished decisions posted on the EOIR website (as required by FOIA),[69] the BIA does not make unpublished decisions available electronically.[70] Some unpublished decisions are available in *hard copy* at the EOIR's publicly accessible Law Library and Immigration Research Center (LLIRC) in Falls Church, Virginia. However, as this author learned during a research trip, only unrestricted decisions are available at the

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[66] *See* Agency Decisions, https://www.justice.gov/eoir/ag-bia-decisions (last visited July 13, 2021).

[67] NYLAG Complaint § 22; author's conversation with former immigration judge.

[68] Author off-record conversation.

[69] https://www.justice.gov/eoir/frequently-requested-foia-records

[70] *New York 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* UCLA Law Library, https://libguides.law.ucla.edu/c.php?g=183356&p=1208993 (last visited June 1, 2021); Internet Archive's "Wayback Machine," https://web.archive.org/web/20120831051104/http:/www.justice.gov:80/eoir/vll/intdec/indexnet.html (last visited June 1, 2021).

LLIRC. The BIA does not make restricted decisions available to the public at all.[71] Because of the unrestricted/restricted distinction, the Immigrant and Refugee Appellate Center (IRAC) estimated that less than 6% of unpublished decisions issued since 2011 are available at the LLIRC.[72]

There is no index or filing system for the vast majority of unpublished decisions at the LLIRC, making finding relevant decisions extremely time-consuming. Most decisions at the LLIRC are organized by month and year only.[73] The only way to find decisions on a particular topic is to leaf through them one by one. The BIA provides old "indexed" decisions at the LLIRC that are organized by subject. Attorneys or members of the public can look through index cards labeled by subject to locate relevant BIA decisions. However, these decisions are of limited utility because of their age.

Individuals may also access some unpublished decisions through non-official sources. Lexis/Westlaw both have databases that include unpublished BIA decisions that they located at the LLIRC.[74] IRAC maintains an online index of unpublished BIA decisions that individuals can purchase.[75] IRAC further posts "noteworthy" unpublished decisions for free online "to promote consistency in decision-making and to benefit attorneys with similar cases."[76] Finally, advocates sometimes share redacted copies of unpublished decisions received in their cases through list-servs or online.[77]

As a last resort, individuals may file FOIA requests with EOIR for unrestricted or restricted unpublished decisions. However, as this author learned, obtaining unpublished BIA decisions through FOIA is fraught with difficulties because decisions are not centrally located in one electronic database, are mostly not electronically searchable by key term, and because EOIR often heavily redacts released decisions. BIA decisions are located within three locations: (1) the agency's internal ShareDrive viewable through a web interface called "eDecisions"; (2) one or more of 18 Federal Records Centers (FRCs) (long-term storage facilities) geographically located throughout the contiguous United States; and (3) the 62

[71] Author's conversation with a BIA law librarian on August 3, 2018.
[72] Winograd, 2.
[73] Author's experience when visiting the LLIRC on August 3, 2018.
[74] NYLAG Complaint § 20.
[75] http://www.irac.net/unpublished/index-2/. The current edition of IRAC's index includes 4,000 decisions.
[76] https://www.irac.net/unpublished/
[77] *See, e.g.,* New York Immigration Lawyers, Unpublished BIA Decisions, https://www.nyimmigration.org/biaunpubs.

Immigration Courts geographically located throughout the United States and its territories.[78] The eDecisions database does not contain copies of all BIA decisions.[79] Crucially, the eDecisions database is searchable through a limited set of queries, including alien number of the noncitizen, date range, IJ name, the city in which the immigration court sits, and appeal type; the database is *not* searchable by key terms or words.[80] Further, most of the scanned decisions within the database are not electronically searchable or redactable.[81]

In early 2016, the EOIR General Counsel initiated a pilot project to redact and release a subset of unpublished Board decisions.[82] The purpose of the project was to assess the feasibility of a discretionary release of unpublished decisions.[83] Less than a year after beginning, the pilot project was placed on hold.[84] Because EOIR can digitally search this small subset of decisions, it sometimes asks FOIA requesters to limit requests for BIA decisions on specific topics to the decisions redacted as part of this project.

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. 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. However, in one instance where this author agreed to limit a FOIA request to the timeframe covered by the pilot project, her request was granted.

E. Citation Rules of EOIR

1. Rules v. Reality

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[78] Joseph Schaaf Decl. 18.
[79] *Id*. at 19. From FY 1997 through FY 2017, the database contains approximately 83% of the total number of BIA decisions for this period. *Id*. 21. The rest of the decisions for this period are available only in hard copy at one the 18 FRCs or one of the 62 Immigration Courts. *Id*.
[80] Joseph Schaaf Decl. 20; Shelley O'Hara Email 07/10/2019.
[81] Joseph Schaaf Decl. 22.
[82] *Id*. at 5.
[83] *Id*.
[84] *Id*. at 7.

The BIA Practice Manual "discourage[s]" parties from citing to unpublished decisions "because these decisions are not controlling on any other case."[85] Citations to unpublished decisions are likewise "discouraged" by the immigration court "because these decisions are not binding on the Immigration Court in other cases."[86] Despite this language, IJs and attorneys representing the government have regularly relied upon unpublished decisions to support their arguments.[87] Furthermore, now that IJs can search BIA decisions by key-term, they will likely cite (or, at the very least, use the reasoning of) unpublished decisions even more frequently.

The BIA Style Manual similarly "discourage[s]" paralegals and staff attorney who draft Board opinions from citing to unpublished decisions "because these decisions are not controlling on any other case;" however, it acknowledges that sometimes such citations may be "necessary."[88] In numerous decisions, the BIA has referenced and relied upon unpublished decisions.[89] 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.[90] The BIA further relies internally on

[85] BIA Practice Manual 4.6 (d)(ii), J-2.
[86] Immigration Court Practice Manual J-3.
[87] *See, e.g., In re 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 ...."); *In re 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 ...."); *In re 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[.]"); *In re 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."); *Matter of A-*, 9 I. & N. Dec. 302, 310 (BIA 1961) ("In *Matter of V—*, unreported, cited by the Service representative in oral argument . . .").
[88] BIA Style Manual 6.2 (b)(ii).
[89] *See, e.g., Matter of A-C-M-*, 27 I&N Dec. 303, 307-10 (BIA 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."); *In re 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."); *In re 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 ....").
[90] *Matter of A-C-M-*, 27 I&N Dec. 303, 307-10 (BIA 2018).

unpublished "indexed decisions."[91] EOIR previously maintained "indexed decisions" issued from 1996 to 2001 on its website but it has since removed the decisions.[92] 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."[93] Logically the Board must have used these decisions to guide its decision-making in unpublished and published opinions.

F. Review of BIA Decisions

BIA decisions are reviewable judicially, although Congress has substantially limited the nature and scope of judicial review of immigration cases over the years. The federal circuit courts have exclusive jurisdiction over BIA appeals.[94] Circuit courts may review the following BIA decisions:

- Final orders of removal, including findings of removability and denials of applications of relief.
- Denials of motions to reopen or motions to reconsider.
- Denials of asylum in asylum-only proceedings.[95]

Federal circuit courts are barred from reviewing most immigration cases, including, for example:

- Discretionary decisions regarding detention or release, including the grant, revocation, or denial of bond or parole.[96]
- Final orders of removal against individuals who have been convicted of certain crimes.[97]

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[91] Kurzban's Immigration Law Sourcebook, 1436 (14th ed) ("In addition to the BIA's published interim decisions, the BIA also relies internally on unpublished 'indexed decisions.'").

[92] *See* UCLA Law Library, https://libguides.law.ucla.edu/c.php?g=183356&p=1208993 (last visited June 1, 2021).

[93] Internet Archive's "Wayback Machine," https://web.archive.org/web/20120831051104/http:/www.justice.gov:80/eoir/vll/intdec/indexnet.html (last visited June 1, 2021) (emphasis added).

[94] New York State Bar Ass'n, The Continuing Surge in Immigration Appeals in the Second Circuit: The Past, The Present and The Future 5 (2020).

[95] Dree K. Collopy, Asylum Primer: A Practical Guide to U.S. Asylum Law and Procedure 981.

[96] INA § 236(e), 8 USC § 1226(e).

[97] INA § 242(a)(2)(C), 8 USC § 1252(a)(2)(C).

- Discretionary decisions other than granting asylum.[98]
- Decisions denying asylum because the IJ found the applicant faced certain bars to asylum.[189]
- Decisions to grant or deny certain waivers.[99]
- Decisions relating to voluntary departure, cancellation of removal, or adjustment of status under INA § 245.[100]

Congress preserved review of constitutional claims and questions of law in the federal circuit courts.[101] Federal circuit courts may also review the scope of a bar to judicial review; for example, whether a crime or offense constitutes an "aggravated felony" bar to review.

The courts review constitutional issues, questions of law, and the BIA's legal conclusions de novo,[102] but must defer to reasonable interpretations of the INA and regulations the BIA administers.[103] In contrast, courts cannot overturn an administrative finding of fact in an immigration case unless "any reasonable adjudicator would be compelled to the contrary."[104] Where the court has jurisdiction to review a discretionary judgment, it reviews the decision for an abuse of discretion, which generally assesses whether the decision was arbitrary, irrational, or contrary to law.[105]

II. SECRET LAW

The term "secret law" was coined during congressional hearings on the FOIA,[106] and one of the goals of the act was to prevent the development of such law.[107] At first blush it may seem obvious what the term means, but a precise definition is required to determine whether the BIA is indeed creating secret law, particularly because both "secret" and "law" can be defined in many ways and because of the public's natural repugnance towards secret law.[108]

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[98] INA § 242(a)(2)(B)(ii), 8 USC § 1252(a)(2)(B)(ii)
[99] INA § 212(i), 8 USC 1182 (i); INA § 242(a)(2)(B)(i), 8 USC § 1252(a)(2)(B)(i).
[100] INA § 242(a)(2)(B)(i), 8 USC § 1252(a)(2)(B)(i).
[101] INA § 242(a)(2)(D), 8 USC § 1252(a)(2)(D).
[102] 3 Immigration Law Service 2d § 15:14.
[103] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 839 (1984).
[104] INA § 242(b)(4)(B), 8 U.S.C. § 1252(b)(4)(B).
[105] 3 Immigration Law Service 2d § 15:14.
[106] Brennan Center for Justice, The New Era of Secret Law 14 (2016).
[107] 2 Administrative Law § 7.05 (2020).
[108] BCJ, 8.

A. What is "secret law"?

"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."[109] Jonathan Manes in the article *Secret Law* defines "secret" as "not officially made available to the general public."[110] Dakota Rudesill in the article *Coming to Terms with Secret Law*, defines "secret" as "classified or otherwise withheld from the public."[111] For purposes 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; and thus, is closest to dictionary definition (b). I have added accessibility to the definition because disclosing laws in a manner that is not accessible to most of the public, is not all that much different than keeping them completely "secret." That "secret" does not refer to absolute secrecy is commonly understood, as demonstrated by dictionary definition (b).[112]

"Law" is more complex to define. Although the BIA is not an Article III court, its decisions are judicial in nature and a common refrain is that judges do not make law. But judges do interpret the law and their interpretations are binding on lower courts, and in this way become part of the law. Similarly, when the BIA, the highest administrative body charged with interpreting immigration law, 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 likely uncontroversial to say that the BIA's precedential decisions interpreting the INA, like judicial opinions, are a type of "law."

But how does one determine if a non-precedential decision constitutes "law"? Jonathan Manes, when examining a very different type of potentially "secret law" – internal executive branch texts relating to national security – argues that "internal administrative texts constitute 'law' if they articulate rules or principles of general applicability that are regarded by the relevant

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[109] Dictionary.com, "Secret," https://www.dictionary.com/browse/secret (last visited June 3, 2021).

[110] Jonathan Manes, Secret Law, 106 Geo. L.J. 803, 813 (2018).

[111] Dakota S. Rudesill, Coming to Terms with Secret Law, 7 Harv. Nat'l Sec. J. 241, 249 (2015).

[112] *See also* Manes 803, 813.

officials as binding on their conduct."[113] The focus of Manes' test is on the *social function* of the administrative text, not the name the text has been assigned (e.g., "directive," "rule," "opinion," etc).[114] Dakota Rudesill describes "law" as "legal authorities that require compliance."[115] 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."[116] To summarize, the binding nature of a decision, or in other words whether it requires compliance, can indicate whether or not it is law. 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, here, when considering a different type of potentially secret law – unpublished BIA decisions – the relevant consideration is not how the BIA classifies the decision (published/precedential v. unpublished/non-precedential), but the content of these decisions and whether the BIA treats these decisions like it treats precedential decisions (where it creates "law").

B. Are unpublished BIA decisions "secret law"?

Using the above definition of "secret law," unpublished decisions of the BIA are "secret" because the BIA does not make its unpublished decisions accessible to the public. The fact that the EOIR has posted a few "frequently requested" unpublished decisions on its website (as required by FOIA) and makes some non-restricted unpublished decisions available to the public at the LLIRC does not impact the analysis. The BIA has issued nearly 30,000 decisions (and often much more than that) a year since 2017. Making a few "frequently requested" unpublished decisions available on EOIR's website, and a small number of unpublished decisions available at the LLIRC, still leaves thousands of decisions unavailable to the public. Moreover, to access these decisions, one must physically go to the LLIRC and review hard-copies. Practically speaking this hurdle makes even the unpublished decisions available at the LLIRC inaccessible to most of the public. Members of the public who are most likely to want access to unpublished decisions – noncitizens in removal proceedings – are similarly shut out. EOIR does not have any special access provisions for these noncitizens or even for noncitizens who are detained pending their removal proceedings or those who simply are not able to travel to the LLIRC (immigration courts and offices are located throughout the country). The

[113] Manes 810-1.
[114] *Id.* at 811.
[115] Rudesill 241, 249.
[116] *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382-83 (D.C. Cir. 2002) (citations omitted).

fact that unpublished decisions are available to the noncitizen involved in the case and that attorneys representing the government in removal proceedings have access to unpublished decisions, similarly, does not impact the analysis as the public remains shut out.

When the federal circuit courts were accused of creating "secret law" through unpublished opinions, some judges vehemently disagreed that the decisions were "secret."[117] 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.[118]

In contrast, the BIA does not make its unpublished decisions "very broadly available to the public at little cost." The Board posts only a handful of unpublished opinions on its website, and it has removed from its website previously available "indexed" unpublished opinions. While some non-restricted and restricted BIA decisions are available on Westlaw/Lexis and through IRAC's service, most restricted BIA decisions, which cover a range of important topics, are completely unavailable to anyone other than the parties involved in the underlying case. Therefore, unlike non-precedential

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[117] Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 107th Cong. 5 (2002) (statement of Samuel A. Alito, Jr., Judge, United States Court of Appeals for the Third Circuit); Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 107th Cong. 10-12 (2002) (statement of Alex Kozinski, Judge, United States Court of Appeals for the Ninth Circuit).

[118] Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 107th Cong. 5 (2002) (statement of Samuel A. Alito, Jr., Judge, United States Court of Appeals for the Third Circuit).

opinions of the federal circuit courts, non-precedential opinions of the BIA are for the most part "secret."

Whether unpublished decisions can be viewed as "law" is a more challenging question, but ultimately, for the reasons described below, these decisions do qualify as law. Using the Manes and Rudesill 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 is bound by and must comply with the Board's decision. The attorney representing the government 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 attorneys representing the government or noncitizens in other cases. In other words, when focusing 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.

However, unpublished decisions may be law even though the BIA designates these decisions as "non-precedential" and therefore non-binding in other cases because, as discussed above, what 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, we need to examine unpublished decisions themselves and how the BIA treats them. By looking at these factors, it becomes clear that unpublished decisions can be law.

First, the BIA is creating precedent/law in non-precedential cases. It is hard to believe that of the 30,000 cases that the Board issues every year, only 20-30 meet the criteria for publication. The case of Mr. Uddin described in the introduction is illustrative. When Mr. Uddin appealed the Board's decision, the Third Circuit created a rule requiring leadership authorization of "terrorist activity" for an IJ to classify an organization 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."[119] 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 these non-precedential cases referenced by the Third Circuit,

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[119] *Uddin v. Att'y Gen. United States*, 870 F.3d 282, 290 (3d Cir. 2017), as amended (Sept. 25, 2017).

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 only "some" Board cases where the IJ did not make a finding as to leadership authorization, the Board remanded to the IJ); and (5) an issue where there is a need to maintain national uniformity, all of which are criteria for publishing a decision as precedent.[120]

In another case, the BIA considered whether an applicant's youthful status created an extraordinary circumstance excusing the one-year filing deadline for asylum.[121] This issue was so novel that the BIA solicited supplemental briefing from the parties and amici.[122] The BIA made numerous novel holdings in the decision, including defining "minor" for purposes of the one-year bar as someone who is under 18 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," and enumerating various factors that the IJ should consider when making that decision.[123] Despite the novelty of the legal questions and that they are likely to recur given the large numbers of minors seeking asylum, the BIA did not publish the decision. Because the decision was secret, some advocates grappling with the very issues the decision addressed were unaware of it. These two cases are not the only instances of the Board creating law in unpublished decisions, immigration lawyers have pointed out other times where it created new law but nevertheless issued an unpublished decision.[124] Given the sheer number of unpublished decisions issued each year there are likely many decisions creating new law that advocates do not know about.

Second, in practice, the BIA has repeatedly 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[125] includes a quantitative limitation.[126] The BIA found that the bar has no such

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[120] 8 CFR § 1003.1(g)(3).
[121] *A-D-*, AXXX-XXX 526, at 2 (BIA May 22, 2017).
[122] *A-D-*, AXXX-XXX 526, at 2 (BIA May 22, 2017).
[123] *A-D-*, AXXX-XXX 526, at 7 (BIA May 22, 2017).
[124] *See, e.g.*, Jason Dzubow, The Asylumnist, The BIA on Firm Resettlement (June, 22, 2017), https://www.asylumist.com/2017/06/22/the-bia-on-firm-resettlement-2/ (describing unpublished decision where BIA provided new guidance about the firm resettlement bar).
[125] INA § 212(a)(3)(B)(iv), 8 U.S.C. § 1182(a)(3)(B)(iv).
[126] *Matter of A-C-M-*, 27 I. & N. Dec. 303, 306 (B.I.A. 2018).

limitation.[127] Importantly, in reaching its conclusion, the BIA referenced "several nonprecedential decisions" in which it found that "material support" included de minimis support, including activities "such as fundraising, making payments of money, providing food and shelter, and performing physical labor."[128] In *Matter of A-*, another precedential decision, the BIA, after citing to a string of unpublished decisions, itself explained that non-precedential decisions are relevant although "all unreported" because "they demonstrate a firmly established administrative practice and, therefore, cannot be ignored."[129]

Finally, the BIA previously acknowledged that it used certain unpublished decisions internally as guidance, and, in fact, indexed these decisions and made them publicly available on its website and at the LLIRC. A leading immigration source book therefore instructed lawyers that "such decisions, though unpublished, should be referenced and may provide guidance regarding the BIA's treatment of key issues."[130] IJs also recognize that unpublished BIA decisions (indexed or not) provide crucial guidance of how the BIA interprets the law and have referenced such decisions in their opinions, as have TAs in their submissions to the immigration court and BIA, and lawyers representing noncitizens (when they can find such decisions).

Taking all of this together, unpublished Board opinions are "secret" and do sometimes create "law."

III. THE PROBLEMS WITH SECRET LAW AT THE BIA

Scholars and advocates have written extensively about the problems secret law presents in other contexts,[131] this Part explores problems with secret law at the BIA specifically. This Part first discusses the consequences of non-precedential, unpublished decisions on the development of immigration law. It then describes three practical problems caused by the BIA's use of unpublished decisions: (1) inconsistent decision-making in cases that logically should have the same outcome, (2) low quality opinions, and (3) increased risk of legal errors. This Part concludes by exploring other

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[127] *Id.* at 308.
[128] *Id.* at 303, 310.
[129] *Matter of A-*, 9 I. & N. Dec. 302, 310 (BIA 1961).
[130] Kurzban's Immigration Law Sourcebook 1436 (14th Ed.).
[131] *See, e.g.,* Manes 814-24; BCJ, 15-22 (discussing philosophical, constitutional, and practical concerns stemming from secret law).

potential explanations for these three problems and by discussing why the BIA must create reforms to address the problems caused by secret law.

A. Consequences on the Development of Immigration Law

The fact that most BIA decisions are unpublished, non-precedential decisions has serious consequences on the development of immigration law and on the immigration system as a whole. The lack of precedent from the Board interpreting, expanding, and applying the law hampers the ability of immigration adjudicators to accurately apply the law, advocates and the public from understanding the law, and policy and law makers 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—remands by the BIA and the circuit courts are not unusual—that leaves noncitizens in protracted states of limbo and some in prolonged detention. I will draw here on the rich literature criticizing the rise of non-precedential decisions at the federal circuit courts of appeal.

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 face. The complexity and difficulty of applying immigration law is not imaginary. Many scholars have written about the intricacy immigration law.[132] Even federal circuit courts have discussed the challenges that they have faced when interpreting immigration law. The Ninth Circuit described immigration law as "'second only to the Internal Revenue Code in complexity'" and a "labyrinth" that only a lawyer can thread.[133] Because immigration law is so complex, precedent interpreting and applying it will not only benefit IJs, attorneys, and noncitizens appearing before them, but it will also benefit the public and policy and law makers. For example, through precedent policy makers can determine whether our immigration laws are meeting desired immigration policy outcomes.

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[132] Lawrence Baum, Judicial Specialization and the Adjudication of Immigration Cases, 59 Duke L.J. 1501, 1508-14 (2010).

[133] *Castro-O'Ryan v. U.S. Dep't of Immigr. & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (internal citation omitted) (quoting Elizabeth Hull, Without Justice for All 107 (1985)).

A body of law cannot develop without precedent interpreting, expanding, and applying the law to different factual circumstances.[134] In the realm of immigration law, Congress has left much to the interpretation of IJs. For example, central to asylum law is the concept of "persecution." If a noncitizen has suffered harm (or fears future harm) in their home country that rises to the level of "persecution," they may be eligible for asylum. Despite the importance of the term, it is neither defined by statute nor regulation. IJs must examine case law finding persecution occurred or did not occur under different factual circumstances and attempt to analogize (or distinguish) the harm the asylum seeker in the present case suffered to these other cases. Without precedent, IJs would have little to guide their application of the statutory term. While consulting legislative history and examining other sources of law (e.g., international law) may prove fruitful, neither would be as helpful as precedential decisions from the Board interpreting and applying the law. In the case of "persecution," the BIA has issued some precedential decisions defining the term, which have been supplemented by numerous decisions of the federal circuit courts. However, this is not true for many other statutory terms.

Precedent is useful to give meaning to the often imprecise statutory language of the INA.[135] 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."[136] To return to the "material support" bar, while the INA explains that "material support" includes providing "a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons . . . , explosives, or training,"[137] the statue left many questions unanswered. Other than the support listed in the statute, what kind of support qualifies? How much support is required to trigger the bar? Has a woman who was kidnapped by guerillas and forced to cook, clean, and wash clothes for them provided "material support"? Most of the public 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 added to the INA in 2001, the Board remained silent as to these questions for a long time. Pending legal guidance on these questions, the Asylum Office began placing on "hold" asylum

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[134] *See generally* Cappalli 761-68.
[135] Lawrence Baum, Judicial Specialization and the Adjudication of Immigration Cases, 59 Duke L.J. 1501, 1509 (2010).
[136] *Yuen Sang Low v. Att'y Gen. of U. S.*, 479 F.2d 820, 821 (9th Cir. 1973).
[137] INA § 212(a)(3)(B)(iv), 8 U.S.C. § 1182(a)(3)(B)(iv).

applicants who reported many different kinds of voluntary and involuntary interactions with armed groups.[138] 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 indeed a defense to the material support bar.[139] A number of IJs agreed with this interpretation.[140] But in late 2004 and early 2005, lawyers representing the government began arguing that the bar applied to any noncitizen who had given anything to a terrorist organization, regardless of whether the noncitizen did so involuntarily.[141] 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[142] and, in 2018, it issued a precedential decision declaring that there is no de minimis exception to the bar.[143] 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.[144] 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."[145] Here too, the INA does not define the standard.[146] 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.[147] These decisions provide only 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.[148] Given the fact-intensive inquiry and the variety of factual circumstances immigration adjudicators encounter, precedential opinions simply applying the standard to different

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[138] Hum. Rts. First, Denial and Delay: The Impact of the Immigration Law's "Terrorism Bars" on Asylum Seekers and Refugees in the United States 27 (2009).
[139] *Id.*
[140] *Id.* at 28.
[141] *Id.*
[142] *Matter of M-H-Z-*, 26 I. & N. Dec. 757, 761–64 (B.I.A. 2016).
[143] *Matter of A-C-M-*, 27 I. & N. Dec. 303, 306 (B.I.A. 2018).
[144] Cappalli 755, 763.
[145] INA § 240A(b)(1).
[146] Eva Marie Loney, Syncing Law With Psychology: Redefining Cancellation of Removal Hardship, 3 AILA L.J. 95, 98 (April 2021).
[147] *Matter of J-J-G-*, 27 I&N Dec. 808 (BIA 2020); *Matter of Calderon-Hernandez*, 25 I&N Dec. 885 (BIA 2012); *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002).
[148] Eva Marie Loney, Syncing Law With Psychology: Redefining Cancellation of Removal Hardship, 3 AILA L.J. 95, 98 (April 2021).

factual situations would help develop the law and guide those seeking to understand and apply it. As explained by Richard Cappalli in *The Common Law's Case Against Non-Precedential Opinions*:

> 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.'[149]

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 only the BIA can rule on such cases; Congress has stripped the federal courts from jurisdiction to review decisions about cancellation.[150]

Precedent can help immigration law expand when new factual circumstances not addressed by the bare words of the INA are encountered and lead to rule exceptions.[151] The INA bars noncitizens who have participated in the persecution of others from receiving nearly all immigration benefits. 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?[152] What about women kidnapped by Boko Haram in Nigeria who were forced to

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[149] Cappalli 768-769.
[150] INA § 242(a)(2)(B)(i), 8 USC § 1252(a)(2)(B)(i).
[151] Cappalli 755, 765.
[152] Kate Evans, Drawing Lines Among the Persecuted, 101 Minn. L. Rev. 453, 454 (2016).

carry ammunition and lure targets into ambushes?[153] The BIA failed to rule on this question in a precedential opinion, but in 2009, the question finally reached the Supreme Court in *Negusie v. Holder*. 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.[154] Despite this mandate, the BIA failed to issue a precedential decision on the issue for years.[155] 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."[156] Finally in 2018, nearly 10 years after the Supreme Court's remand, the BIA recognized a narrow duress exception to the persecutor bar.[157]

Finally, precedent is crucial for creating uniformity in immigration law. Given the imprecise statutory language and the lack of guidance from Congress as to the meaning of crucial statutory terms, without precedent to guide decision-making, IJs may apply the law in wildly inconsistent ways. Dramatic disparities have been documented in immigration law. One well-known study described shocking disparities in asylum grant rates across IJs,[158] which continue to exist to this day.[159] A more recent study found large disparities in relief rates (the rate at which an IJ grants relief from removal) in general across IJs.[160] This study found that in an average

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[153] *Id.*
[154] *Negusie v. Holder*, 555 U.S. 511, 517, 129 S. Ct. 1159, 1164, 173 L. Ed. 2d 20 (2009).
[155] Kate Evans, Drawing Lines Among the Persecuted, 101 Minn. L. Rev. 453, 456 (2016).
[156] *Id.*
[157] *Matter of Negusie*, 27 I. & N. Dec. 347, 347–63 (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. *Matter of Negusie*, 28 I. & N. Dec. 120, 120–21 (A.G. 2020). AG Garland recently certified the *Negusie* decision to himself, likely to reinstate the duress exception.
[158] *See generally* Jaya Ramji-Nogales, Andrew I. Schoenholtz, Philip G. Schrag, Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform (2009); Jaya Ramji-Nogales, Andrew I. Schoenholtz, Philip G. Schrag, Refugee Roulette: Disparities in Asylum Adjudication, 60 Stanford L. Rev. 295 (2007). Because of limitations in the Board's record-keeping, 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. More recent scholarship has found significant disparities in relief rates (the rates at which IJs allow immigrants to remain in the United States) in general across IJs. David Hausman, The Failure of Immigration Appeals, 164 U. Pa. L. Rev. 1177, 1186–87 (2016).
[159] TRAC Immigration, Asylum Outcome Continues to Depend on the Judge Assigned (2017) https://trac.syr.edu/immigration/reports/490/ (last visited July 1, 2021);TRAC Immigration, Asylum Denial Rates Continue to Climb (2020) https://trac.syr.edu/immigration/reports/630/ (last visited July 1, 2021).
[160] Failure of Immigration Appeals 1187.

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.[161] These disparities are more than three times larger than disparities across federal judges in decisions about whether to send a criminal defendant to prison.[162] BIA precedent interpreting immigration standards would help reduce such disparities by providing IJs authoritative guidance on the law.

The BIA is best 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. In addition, because of *Chevron* deference, the federal courts must defer to Board interpretations of the INA when the statute is silent or ambiguous,[163] which, as described above, is often. In comparison, IJs in all jurisdictions must follow the precedential decisions of the BIA and the Board is the final arbiter of most immigration matters.[164] 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 20-30 of the approximately 30,000 decisions it issues a year as precedential. Assuming 30 precedential decisions a year, the Board publishes as precedential a mere 0.001% of its decisions. This is far less than the number of precedential opinions issued by the federal circuit courts, which scholars found alarming.[165] 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.

B. Practical Consequences of Secret Law

1. Problem 1: Inconsistent Decision-making

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[161] *Id.*
[162] *Id.*
[163] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984).
[164] The BIA cannot review a determination by an IJ that a noncitizen failed to establish a credible fear of persecution in expedited removal.
[165] Cappalli 76 ("Whatever the justification, the number of non-precedential opinions currently outnumber by far the ones that count as authority, reaching a four-to-one ratio in the federal circuits as a whole.").

When decisions are secret, decision-makers can apply the law in an unfair manner.[166] A review of decisions from the federal circuit courts reveals that the BIA regularly issues inconsistent decisions in cases that should logically have the same outcome. Crucially, the BIA 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 some reasoned explanation. 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.

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.[167] 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.[168] 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.[169] This persecution included beating him so severely that he required stitches to his face, breaking his leg, threatening him with death, and ultimately burning his home down.[170] As a result of this persecution, Mr. Uddin fled Bangladesh and entered the United States without inspection in 2013.[171] When he was placed in removal proceedings in 2016, he 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.[172] During the entire pendency of Mr. Uddin's removal proceedings and appeals, he was detained.

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.

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[166] BCJ, 20.
[167] INA § 241(b)(3)(A), 8 U.S.C § 1231(b)(3)(A).
[168] *Uddin v. Att'y Gen. United States*, 870 F.3d 282, 285 (3d Cir. 2017), as amended (Sept. 25, 2017).
[169] *Id.* at 285-86.
[170] *Id.* at 286.
[171] *Id.*
[172] *Id.* Uddin also filed for asylum and relief under CAT. He eventually conceded that he was ineligible for asylum because his application was untimely.

Uddin was a willing member of the party.[173] 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 found 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.[174] Mr. Uddin filed a petition for review with the Third Circuit.

The Third Circuit held that a group qualifies as a Tier III terrorist organization only if leaders of the organization authorized the terrorist activity committed by its members.[175] 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.[176] Therefore, the Court remanded the case to the Board to address this issue.[177] The Court based its ruling partially on the Board's *own reasoning* in "the mine-run" of cases that it has reviewed concerning the BNP's status as a Tier III organization.[178] 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."[179]

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."[180] This led the Court to order the government to submit all Board opinions from 2015-2017 addressing the terrorism bar as it applies 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

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[173] *Id.*
[174] *Id.* at 288.
[175] *Id.* at 289–90.
[176] *Id.*
[177] *Id.*
[178] *Id.* at 290.
[179] *Id.*
[180] *Id.* at 291.

> 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.[181]

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, but nevertheless 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."[182] Even more concerning to the Court was the IJ's statement that "he was aware of no BIA or circuit court decision to date which has considered whether the BNP constitutes a terrorist organization," although at the time of his decision, there were several such decisions.[183] 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.[184] Altogether, the Court declared this "a troubling state of affairs."[185]

b. Case Example 2: *Andrews v. Barr*

In *Andrews v. Barr*, the Second Circuit reviewed a decision of the BIA denying Mr. Andrews' motion to reopen his removal proceedings. Mr. Andrews was born in Guyana and arrived in the United States in 1982 at the age of 17 as a lawful permanent resident.[186] In the United States, he worked for the City of New York from 1995 to 2009.[187] He eventually married and raised five children with his wife.[188] His wife and four of his children are U.S. citizens.[189]

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[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] Petitioner's Opening Brief, 4.
[187] *Id.*
[188] *Id.*
[189] *Id.*

After Mr. Andrews' brother was murdered in 1989, he developed a drug dependency.[190] He later successfully completed rehabilitation and maintained his sobriety from 1993 through 2006.[191] In 2006, he relapsed after his family was left destitute because of a cousin's mismanagement of money his wife invested in a family business.[192] On February 24, 2009, Mr. Andrews was arrested and charged under New York Penal Law § 220.31 (criminal sale of a controlled substance in the fifth degree).[193] In September 2009, the government initiated removal proceedings against Mr. Andrews because of this conviction.[194] The government charged him as removable pursuant to 8 USC § 1227(a)(2)(A)(iii) for having an "aggravated felony" conviction and 8 USC § 1227(a)(2)(B)(i) for having a conviction for a controlled substance offense.[195]

At an immigration court hearing in 2010, Mr. Andrews' attorney conceded that his conviction was an aggravated felony.[196] This concession made Mr. Andrews both removable and ineligible for cancellation of removal.[197] 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.[198] In 2011, the IJ denied him each form of relief, but made clear that he would have granted him cancellation of removal if it were not for the perceived aggravated felony bar.[199] 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.[200]

Mr. Andrews pursued all avenues of appeal. 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.[201] He argued that because of ineffective counsel, he lost his chance to pursue cancellation of removal.[202] The Board denied relief after finding that Mr. Andrews was not prejudiced

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[190] *Id.*
[191] *Id.*
[192] *Id.* at 5.
[193] *Id.*
[194] *Id.*
[195] *Id.* at 5-6.
[196] *Id.* at 6.
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] *Id.* at 7.
[201] *Id.*
[202] *Id.*

by his original attorney's conduct.[203] Mr. Andrews filed a petition of 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.[204]

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.[205] In 2017, the Second Circuit in *Harbin v. Sessions,* a precedential decision, held that N.Y. Penal Law § 220.31 is not an "aggravated felony" under the INA and therefore does not bar an application for cancellation of removal.[206]

Based on *Harbin*, Mr. Andrews promptly filed a motion for reconsideration with the BIA.[207] He argued that he was entitled to equitable tolling of the normal 30-day deadline to file such a motion because he had diligently pursued all avenues of relief and filed his motion within 30 days of the dispositive change in law.[208] The Board denied his motion.[209] The Board's decision stated that Mr. Andrew's motion was more properly characterized as a motion to reopen but in any case, it was untimely, and reopening was not warranted.[210] The Board failed to explain why reopening was not warranted.

Mr. Andrews filed a petition for review in the Second Circuit.[211] 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."[212] 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."[213] Ultimately, the Court found that Board's decision which "in a single line" stated that Mr. Andrews was not entitled to equitable tolling,

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[203] *Id.*
[204] *Id.* at 7-8.
[205] *Id.* at 8.
[206] *Harbin v. Sessions*, 860 F.3d 58, 61 (2d Cir. 2017).
[207] Petitioner's Opening Brief, 9.
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.* at 10.
[212] *Andrews v. Barr*, 799 F. App'x 26, 27 (2d Cir. 2020).
[213] *Id.* at 28.

was an abuse of discretion because it lacked any rational explanation for denying Mr. Andrews the relief he sought.[214]

c. Case Example 3: *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.[215] Mrs. Vassell is a citizen of Jamaica and became a lawful permanent resident in 1990.[216] In 2013, she plead guilty to "theft by taking" in violation of Georgia Code § 16–8–2. [217] 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.[218] An "aggravated felony" under the INA includes a "theft offense."[219] 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.[220] A state offense is a match with a generic federal offense only if a conviction of the state offense necessarily involves commission of the generic federal offense.[221] Generic theft is "the taking of, or exercise of control over, property *without consent* whenever there is criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent."[222] The IJ in Mrs. Vassell's removal proceedings held that "theft by taking" in violation of Georgia Code § 16–8–2 was "a theft offense" as that term is used in the INA and therefore Mrs. Vassell was deportable.[223] The BIA first reversed the IJ, holding that Georgia's "theft by taking" offense is not generic theft because it doesn't require "lack of consent of the victim."[224] The government asked the BIA to reconsider and upon reconsideration, the BIA

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[214] *Id.* at 26, 27.
[215] *Vassell v. U.S. Att'y Gen.*, 839 F.3d 1352, 1355 (11th Cir. 2016).
[216] *Id.*
[217] *Id.* at 1355-56.
[218] INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii).
[219] INA § 101(a)(43)(G), 8 U.S.C. 1101(a)(43)(G).
[220] *Vassell v. U.S. Att'y Gen.*, 839 F.3d 1352, 1356 (11th Cir. 2016).
[221] *Id.*
[222] *Id.* (emphasis added).
[223] *Id.* at 1356.
[224] *Id.*

held that Georgia "theft by taking" *does* require lack of consent of the victim.[225] The BIA therefore ordered Mrs. Vassell removed to Jamaica.[226]

The Eleventh Circuit granted Mrs. Vassell's petition in part because her case was not the only one in which the BIA decided whether § 16–8–2 was a "theft offense" as that term is used in the INA, and in every other case the BIA ruled that § 16–8–2 was *not* a "theft offense."[227] These unpublished decisions included decisions that were older than the Mrs. Vassell's case, as well as newer decisions.[228] In those decisions the BIA invoked the exact reasoning Mrs. Vassell asked the Eleventh Circuit to apply.[229] The government failed to point to BIA orders deciding the issue the other way. Ultimately, the "government [gave] no explanation for why Mrs. Vassell must be deported for her § 16–8–2 conviction but [another respondent] can't be deported for his."[230] Such poor decision writing is a common problem at the BIA and is described further below.

2. Problem 2: Low Quality Decisions

When decisions are secret, decision-makers have little incentive to write reasoned opinions.[231] When reviewing unpublished board opinions, the federal circuit courts frequently point out significant deficiencies such as the opinion was devoid of any or provided only cursory analysis,[232]

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[225] *Id.*
[226] *Id.*
[227] *Id.* at 1364.
[228] *Id.*
[229] *Id.*
[230] *Id.*
[231] BCJ, 53.
[232] *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) (BIA failed to provide any analysis to support statement that serious nonpolitical crime bar had no duress exception); *Precetaj v. Sessions*, 907 F.3d 453, 458 (6th Cir. 2018) (BIA abused its discretion in denying petitioner's motion to reopen in two-sentences that did not provide sufficiently detained analysis for its conclusion); *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 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 Board failed to adequately explain its decision finding that noncitizen's proposed particular social group was not cognizable and there was no nexus); *Madrigal v. Holder*, 716 F.3d 499, 509 (9th Cir. 2013) ("Without analysis, the BIA

concluded that any torture Tapia Madrigal is likely to suffer would not be with the consent or acquiescence of a public official. The BIA failed to state with sufficient particularity and clarity the reasons for this decision and so does not provide an adequate basis for this court to conduct its review." (internal quotation marks and citation omitted)); *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."); *Yan Yun Ye v. Att'y Gen. of U.S.*, 383 F. App'x 113, 115 (3d Cir. 2010) (finding BIA's one-sentence explanation of why the fugitive disentitlement doctrine applied to noncitizen's case was insufficient); *Xi Que Li v. Att'y Gen. of U.S.*, 336 F. App'x 140, 143 (3d Cir. 2009) ("[G]iven the BIA's lack of analysis and cursory discussion of the evidence Li submitted, we will grant the petition for review, vacate the BIA's order, and remand for further proceedings consistent with this opinion . . ."); *Ping Chen v. U.S. Dep't of Just.*, 247 F. App'x 308, 310 (2d Cir. 2007) ("We agree with the petitioner that the BIA abused its discretion in denying her motion with only a conclusory statement that did not reference the evidence in the record."); *Ray v. Gonzales*, 439 F.3d 582, 590 (9th Cir. 2006) ("We are unpersuaded that the BIA's cursory review of Ray's appeal is sufficient."); *Zhao v. U.S. Dep't of Just.*, 265 F.3d 83, 96 (2d Cir. 2001) (remanding in part because of the cursory nature of the Board's decision); *Anderson v. McElroy*, 953 F.2d 803, 806 (2d Cir. 1992) ("[T]he BIA's cryptic order denying the stay . . . is devoid of any reasoning and thus also is an abuse of discretion.").

inexplicably departed from established precedent,[233] failed to consider key factors of the petitioner's claim or the record as a whole,[234] or contained only summary or conclusory statements.[235] Such decisions do not give

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[233] *See, e.g., Facundo v. Garland*, No. 18-71661, 2021 WL 2182137, at *2 (9th Cir. May 28, 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."); *Yan Rong Zhao v. Holder*, 728 F.3d 1144, 1148 (9th Cir. 2013) (BIA failed to follow its own precedent when evaluating evidence in asylum case involving China's family planning policy); *Jimenez v. Holder*, 378 F. App'x 676, 678 (9th Cir. 2010) (BIA failed to follow its own precedent when evaluating petitioner's application for cancellation of removal); *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); *Brezilien v. Holder*, 569 F.3d 403, 414 (9th Cir. 2009) (BIA conducted its own fact-finding in violation of its own regulations); *Corado v. Ashcroft*, 384 F.3d 945, 947–48 (8th Cir. 2004) (BIA failed to follow 8th Circuit and its own precedent regarding death threats as persecution); *Liu v. Ashcroft*, 58 F. App'x 596 (5th Cir. 2003) (remanding because the Board failed to address its precedential decision *In re C-Y-Z-* although both cases were factually very similar); *Zhao v. U.S. Dep't of Just.*, 265 F.3d 83, 93 (2d Cir. 2001) (remanding in part because Board failed to explain why it did not follow its precedential decision *In re C-Y-Z-*, which had many parallels to the present case); *Diaz-Resendez v. I.N.S.*, 960 F.2d 493, 498 (5th Cir. 1992) ("The Board abused its discretion by inexplicably departing from established precedent and failing to actually consider and meaningfully address the positive equities and favorable evidence when reaching its decision.").

[234] *See, e.g., Ajayi v. Att'y Gen. of 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 (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." (internal quotation marks and citation omitted)); *Yousefi v. U.S. I.N.S.*, 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 v. U.S. Dep't of Just.*, 265 F.3d 83, 96–97 (2d Cir. 2001) ("[T]he Board failed to address all the factors relevant to petitioner's claim . . . "); *Anderson v. McElroy*, 953 F.2d 803, 806 (2d Cir. 1992) (BIA failed to consider the record as a whole).

[235] *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) (BIA's conclusory statement that the harm noncitizen suffered did

noncitizen's assurance that their appeal was decided by a neutral decision-maker who considered their arguments and came to the correct legal outcome.

Federal circuit court judges have issued scathing indictments of the board's decision-making. The Seventh Circuit in an opinion authored by Judge Richer A. Posner once wrote that the adjudication of immigration cases "has fallen below the minimum standards of legal justice."[236] Similarly, Judge Jon O. Newman of the Second Circuit testified before the Senate that when reviewing BIA decisions, "the courts of appeals often lack the reasoned explication that is to be expected of a properly functioning administrative process."[237] Judge John M. Walker, Jr., also of the Second Circuit, testified that, "One of my court's problems with the BIA is that it rarely seems to adjudicate the outstanding legal issues in a case . . ."[238]

While the above criticisms by federal circuit court judges were leveled closer in time to the streamlining reforms when remands to the BIA were higher than they are now,[239] a review of recent circuit court opinions reveals that fundamental problems with inadequate board decision-making persist.[240] 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 Department of State's human rights and religious freedom reports.[241] A motion to remand for consideration of new evidence must show that the evidence is material and was previously unavailable.[242] The petitioner sought relief under CAT based of his fear that he would be tortured if he was forced to return to Iraq in part because he is Christian.[243] Despite recognizing that the new evidence the petitioner presented on appeal might help with his argument that Iraqi

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not rise to the level of persecution insufficient to permit meaningful review); *Hang Zhou Guo v. Gonzales*, 187 F. App'x 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." (internal quotation marks and citation omitted)).

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

[237] Jon O. Newman, US Circuit Judge, Second Circuit Court of Appeals, Statement before the Senate Committee on Judiciary 8 (Apr. 3, 2006).

[238] John M. Walker, Jr., US Circuit Judge, Second Circuit Court of Appeals, Statement before the Senate Committee on Judiciary 3-4 (Apr. 3, 2006).

[239] Appleseed 39 ("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.").

[240] See supra notes 232-235.

[241] *Marqus v. Barr*, 968 F.3d 583, 592 (6th Cir. 2020).

[242] *Id.*

[243] *Id.* at 587.

Christians are at risk of detention and torture, the BIA denied the petitioner's motion. [244] The BIA's decision stated nothing more than a "bald" statement that the petitioner's new evidence was insufficient to meet his burden of proof to establish his claim.[245] 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."[246] 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.[247] The Sixth Circuit found that it was "clear" that the new evidence "could be significant" to the petitioner's claim, but ultimately concluded that without any "real analysis" by the BIA, it could not meaningfully review the decision and remanded the case for the BIA to either explain or change its position on the new evidence.[248]

3. Problem 3: Increased Risk of Errors

When decisions are secret, the risk that the decision-maker will commit legal errors increases.[249] 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[250] and many have limited English proficiency.[251] Thus, only the government's position may be adequately briefed before the board. 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.

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[244] *Id.* at 593.
[245] *Id.*
[246] *Id.*
[247] *Id.*
[248] *Id.*
[249] BCJ, 21.
[250] Ingrid Eagly & Steven Shafer, Am. Imm. Council, Access to Counsel in Immigration Court 6 (Sept. 2016) ("Nationally, only 37 percent of all immigrants secured legal representation in their removal cases.").
[251] EOIR, Statistical Yearbook FY2018, 18 ("In parallel to the many nationalities that come before IJs, there are similarly hundreds of languages in which hearings are conducted.").

Here too, a review of federal circuit court decisions reveals numerous instances of remands to the BIA because the Board applied the incorrect legal standard.[252] In many of these cases, the Board issued an AWO of an IJ decision where the IJ committed obvious legal errors.[253] The

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[252] *See, e.g., Soto-Soto v. Garland*, No. 20-70587, 2021 WL 2386385, at *4 (9th Cir. June 11, 2021) (remanding to BIA with order to grant noncitizen relief after finding that BIA applied the wrong standard of review); *Acosta-Peralta v. Wilkinson*, 848 F. App'x 686, 688 (9th Cir. 2021) (BIA applied incorrect legal standard when evaluating CAT claim); *Arita-Deras v. Wilkinson*, 990 F.3d 350, 354 (4th Cir. 2021) (BIA applied the incorrect legal standard for determining past persecution); *Ponce-Elias v. Garland*, 843 F. App'x 935, 937 (9th Cir. 2021) (BIA applied the incorrect legal standard when it concluded petitioner was not entitled to protection under CAT); *Hernandez v. Barr*, 830 F. App'x 804, 806 (9th Cir. 2020) (BIA applied incorrect legal standard when evaluating CAT claim); *Montero-Cabrera v. Barr*, 833 F. App'x 451, 453 (9th Cir. 2020) (BIA failed to follow Ninth Circuit precedent concerning persecution); *Salado-Alva v. Barr*, 777 F. App'x 205, 208 (9th Cir. 2019) (BIA applied wrong standard when determining whether petitioner was prima facie eligible for a hardship waiver); *Pablo Lorenzo v. Barr*, 779 F. App'x 366, 373–74 (6th Cir. 2019) (BIA failed to properly evaluate evidence of changed country conditions under the applicable evidentiary standards and applied the wrong legal standards when evaluating the claim); *Sanchez v. Sessions*, 894 F.3d 858, 864 (7th Cir. 2018) (BIA applied the wrong standard when evaluating petitioner's claim of ineffective assistance of counsel); *Martin-Calmo v. Sessions*, 718 F. App'x 554, 555 (9th Cir. 2018) (BIA applied wrong standard to withholding of removal claim); *Alimbaev v. Att'y Gen. of United States*, 872 F.3d 188, 190 (3d Cir. 2017) (BIA misapplied the clear error standard when reversing the IJ's finding that petitioner's testimony was credible); *Galdames v. Sessions*, 687 F. App'x 605, 606 (9th Cir. 2017) (BIA applied incorrect standard to petitioner's withholding of removal claim); *Hernandez-Ramos v. Sessions*, 686 F. App'x 385, 388 (9th Cir. 2017) (BIA applied incorrect legal standard to petitioner's motion to reopen); *Ramos v. Lynch*, 636 F. App'x 710, 711 (9th Cir. 2016), *as amended* (Feb. 18, 2016) (BIA applied incorrect standard to petitioner's withholding of removal and CAT claims); *Solodovnikova v. Att'y Gen. of U.S.*, 555 F. App'x 136, 141 (3d Cir. 2014) (BIA and IJ failed to engage in 3-part inquiry in order to dismiss a claim based on lack of corroboration); *Weiwei Chen v. Holder*, 549 F. App'x 567, 570–71 (7th Cir. 2013) (BIA failed to apply the correct standard when evaluating petitioner's persecution claim); *Mendez-Vargas v. Holder*, 436 F. App'x 733, 736 (9th Cir. 2011) (BIA applied incorrect standard to petitioner's ineffective assistance of counsel claim); *Marmorato v. Holder*, 376 F. App'x 380, 386 (5th Cir. 2010) (BIA applied incorrect standard to evaluate CAT claim); *Stewart v. Holder*, 362 F. App'x 518, 523 (6th Cir. 2010) (remanding so that BIA can apply correct standard to petitioner's motion to reopen); *Gonzalez-Rios v. Mukasey*, 289 F. App'x 206, 208–09 (9th Cir. 2008) (BIA applied incorrect legal standard to deny petitioner's motion to remand and to deny petitioner relief); *Silva-Rengifo v. Atty. Gen. of U.S.*, 473 F.3d 58, 70 (3d Cir. 2007), *as amended* (Mar. 6, 2007) (remanding an *en banc* BIA decision because it "adopted an incorrect legal standard in requiring official "consent" or "actual acquiescence" rather than willful blindness as set out in the Convention's implementing regulations").

[253] *Cantarero Castro v. Att'y Gen. of United States*, 832 F. App'x 126, 129, 132 (3d Cir. 2020) (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

authors of a study on BIA decision-making conducted shortly after the streamlining procedures went into effect similarly found, "federal courts are describing obvious errors committed by the BIA: errors that would be comic, if they were not so tragic."[254]

Obvious errors in BIA decision-making persist to this day. For example, in *Cantarero Castro v. Att'y Gen. of 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."[255] First, the IJ erred by finding that persecution cannot be established when the persecutors are motivated by criminal intent.[256] This statement ignored a basic tenet of asylum law that persecutors may have "mixed motives" for harming a petitioner, so long as a protected characteristic was "one central reason" for their harmful conduct.[257] 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 homophobia is a wide-spread problem in Honduras.[258] At the very least, the Court explained that the IJ should have provided an 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.[259] Third, the IJ erred when denying the petitioner's political opinion claim because the petitioner did not identify a political opinion that he holds.[260] 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.[261] The IJ did not

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glossed over the question whether tolling might apply"); *Irasoc v. Mukasey*, 522 F.3d 727, 730 (7th Cir. 2008) (BIA adopted and affirmed IJ decision applying incorrect legal standard to petitioner's past persecution claim); *Rafiq v. Gonzales*, 468 F.3d 165, 166 (2d Cir. 2006) (BIA adopted and affirmed IJ decision that applied the wrong legal standard to petitioner's CAT claim); *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 787 (9th Cir. 2004) (BIA affirmed without opinion an IJ decision applying incorrect standard to petitioner's CAT claim).

[254] Dorsey & Whitney, 41.

[255] *Cantarero Castro v. Att'y Gen. of United States*, 832 F. App'x 126, 129 (3d Cir. 2020).

[256] *Id.* at 131.

[257] *Id.* at 129, 131.

[258] *Id.* at 132.

[259] *Id.*

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

[261] *Id.* at 133.

acknowledge that the standard under the law is disjunctive ("willing or able") and failed to address evidence on the record indicating that despite the government's efforts, it was *unable* to control homophobic violence.[262] The BIA's decision to affirm the IJ's decision in this case without an opinion is shocking 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 nature of board decisions. This section will outline four other potential theories and explain why each of these theories does not completely explain the problems with the board's decision-making.

First, the sheer number of appeals that the BIA receives and decides a year may explain why the board so often issues inconsistent decisions. As described above, since 2017 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 23 members, the maximum permitted by current regulations. This means that at a minimum (using 30,000 decisions and 23 members, and assuming single member opinions), each member is responsible for deciding 1,304 appeals a year. Consistency across this staggering number of decisions may be impossible to achieve. In fact, the Social Security Administration, an agency that receives comparable levels of cases,[263] has also been accused of inconsistent decision-making.[264] Although perfect consistency may be impossible to achieve, that does not mean that the board should not strive to reach some level of consistency in its decisions; in fact, it has been encouraged to do so by numerous federal circuit court decisions described above. The Board itself describes its role as "ensuring that the immigration laws receive . . . *uniform* application"[265] and its regulations permit it to review cases en banc "to secure or maintain consistency of the Board's decisions,"[266] but inconsistencies repeatedly occur. This suggests that something more may be at play such as hidden nature of unpublished decisions, which naturally encourage Board members

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[262] *Id.*

[263] Jonah B. Gelbach, David Marcus, Rethinking Judicial Review of High Volume Agency Adjudication, 96 Tex. L. Rev. 1097, 1104 (2018).

[264] Gelhorn & Byse, 1045; J. Mashaw, W. Schwartz, P. Verkuil, C. Goetz & F. Goodman, Social Security Hearings and Appeals: A Study of the Social Security Administration Hearing System (1978).

[265] EOIR, Board of Immigration Appeals: Biographical Information (April 8, 2021), https://www.justice.gov/eoir/board-of-immigration-appeals-bios (emphasis added).

[266] 8 CFR § 1001.3 (a)(5).

to give less time, attention, and care to cases where it does not intend to issue a precedential decision.

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, when the BIA finds that the BNP is a Tier III organization in one case, but finds that it is not 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 a noncitizen provided more proof that the BNP is not a Tier III organization in one case than a 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 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 is acting 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 they have limited access to unpublished decisions.

Third, the sheer number of appeals, the small number of board members in comparison, and the streamlining reforms, all in combination, may explain the inconsistency in decisions as well as the low-quality of board decisions and frequent legal errors committed by the board. Given the number of appeals in comparison 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.[267] Under these conditions, inconsistencies, poorly written decisions, and legal errors will naturally flourish. In fact, in the same breath that Judges Newman and Walker criticized the BIA's decision-making, they also acknowledged that the stream-lining procedures, the small number of board members (at that time there were only 11), and the

[267] DOJ Cost Study.

lack of resources at the BIA were to blame.[268] A study of BIA decision-making after the streamlining procedures were implemented similarly attributed errors to these reforms.[269] But even if these factors are at play (which is probable), the fact that the board's decisions are not published likely exacerbates problems with its decision-making because board members are aware that they face little public accountability for inconsistency or errors in their decisions. While the board does release decisions to the parties that does little to alleviate accountability concerns because the party most harmed by a bad decision is the respondent who is a non-citizen, and as such has very little political influence.

Fourth 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.[270] 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.[271] Inconsistencies too could be explained by single board member opinions. As described above, a well-known study described shocking disparities in asylum grant rates across IJs.[272] The study found that IJs who had worked for DHS in an immigration enforcement capacity were less likely to grant asylum than other IJs without that experience, while IJs who had worked for non-profit organizations were more likely to grant asylum than other IJs without that experience.[273]

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[268] Jon O. Newman, US Circuit Judge, Second Circuit Court of Appeals, Statement before the Senate Committee on Judiciary 2 (Apr. 3, 2006); John M. Walker, Jr., US Circuit Judge, Second Circuit Court of Appeals, Statement before the Senate Committee on Judiciary 2 (Apr. 3, 2006).

[269] Dorsey & Whitney, 6-7.

[270] See, e.g., Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 FR 56135, 53139 (Oct. 18, 1999) ("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 . . .").

[271] John R.B. Palmer et. al., 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, 5 (2005).

[272] *See generally* Jaya Ramji-Nogales, Andrew I. Schoenholtz, Philip G. Schrag, Refugee Roulette: Disparities in Asylum Adjudication, 60 Stanford L. Rev. 295 (2007). Because of limitations in the Board's record-keeping, 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. More recent scholarship has found significant disparities in relief rates (the rates at which IJs allow immigrants to remain in the United States) in general across IJs. David Hausman, The Failure of Immigration Appeals, 164 U. Pa. L. Rev. 1177, 1186–87 (2016).

[273] Jaya Ramji-Nogales, Andrew I. Schoenholtz, Philip G. Schrag, Refugee Roulette: Disparities in Asylum Adjudication, 60 Stanford L. Rev. 295, 347 (2007).

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.[274] 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 because over the years the BIA has become a more uniformly conservative body.[275]

D. Why Change is Necessary

The BIA should implement reforms to remedy the problems created by secret law highlighted above because (1) errors in decision-making have profound consequences on the lives of noncitizens and their family; (2) errors, inconsistent decisions, lack of reasoning in decisions, and skewed access to unpublished decisions raise serious questions of fairness and consistency, important administrative law values; (3) secrecy thwarts years of efforts by Congress to promote transparency and openness in the administrative state, and undermines political accountability and judicial review; and (4) ultimately secret law harms the Board itself.

Errors in BIA decision-making have profound consequences on the lives of noncitizens and their family. An erroneous removal order can lead to permanent banishment, separation from family, and, in the case where the noncitizen has applied for humanitarian protection such as asylum, serious harm, torture, or death of the noncitizen. Because many noncitizens are detained pending their removal proceedings, errors committed by the BIA may also result in prolonged detention. Due to limitations on judicial review, errors committed by the BIA may be unreviewable by federal circuit courts or those courts may be required to apply a deferential standard of review, increasing the likelihood of erroneous removal.

The Supreme Court has stated that a fair trial in a fair tribunal is a basic requirement of due process that applies just as much to administrative adjudications as it does to courts.[276] Therefore, it is no surprise that considerations of "fairness" or "fair procedure" appear frequently in

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[274] 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).
[275] See supra Part II.A. This trend may be changing. Recently, AG Garland appointed a well-known advocate for immigrants, Andrea Saenz, to the Board.
[276] *Withrow v. Larkin*, 421 U.S. 35, 46 (1975).

discussions about administrative agencies. While there is no authoritative definition of what qualifies as fair procedure, scholars of administrative law have evaluated agency procedures for fairness based on whether the procedures incorporate dignity, equality, and whether individuals impacted by government action are satisfied with the procedures provided in their cases.[277] Fairness in administrative law also relates to accuracy.[278] Agencies should strive to achieve results that are accurate under the law. To give the agency legitimacy, an agency's decisions must not only be accurate, but they must also be *perceived* as accurate by parties.[279] Parties appearing before an agency must feel that they have been given a fair opportunity to be heard by a neutral decisionmaker, and that the decisionmaker has given their case appropriate consideration and come to the correct legal outcome.

Central to fairness is consistency. In administrative law, "consistency is, or should be, assured and erratic agency action avoided, by assigning agency action to published rules and standards."[280] Consistency also relates to distributive justice and requires that like cases be treated alike.[281] When an agency treats one party differently than another for the same conduct, courts require that the agency provide a reasoned justification for the disparate treatment.[282] Similarly, when an agency fails to follow its own precedent, courts require the agency to explain why.[283] By requiring that agencies follow their own precedent and treat like cases alike, or provide a reasoned explanation for not doing so, courts can check arbitrary agency action.[284]

The unequal access to unpublished Board decisions presents serious fairness concerns. The government already has an advantage in immigration court because 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. Moreover, as discussed in Part

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[277] Jerry 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); Paul Verkuil, A Study of Informal Adjudication Procedures, 43 U.Chi.L.Rev. 739 (1976); Alfred C. Aman & William T. Mayton, Administrative Law 127-29 (3d. ed 2014).
[278] Alfred C. Aman & William T. Mayton, Administrative Law 128 (3d. ed 2014).
[279] *Id.*
[280] *Id.*
[281] *Id.*
[282] *Id.* at 248.
[283] Lawrence Zelenak, Should Courts Require the Internal Revenue Service to be Consistent?, 38 Tax L. Rev. 411, 412 (1985).
[284] Gelhorn & Byse 1041.

II.A., reforms of the BIA's decision-making, changes in its membership, and the institution of performance evaluations tied to productivity have also tilted outcomes in the government's favor. Denying noncitizens equal access to unpublished Board decisions further stacks the odds against the noncitizen. While those noncitizens represented by attorneys may be able to access some unpublished decisions through Westlaw/Lexis, pro se noncitizens—who constitute most noncitizens in removal proceedings—are seriously disadvantaged. And no noncitizen, whether represented or not, has access to restricted unpublished decisions. To noncitizens involved in immigration proceedings and the public, this situation will seem unfair at best and insidious at worst.

Given the significance of Board decisions, noncitizens appearing before the Board should feel that their cases have been carefully and thoroughly reviewed by a neutral decision-maker. Brief orders and AWOs by single board members that provide little or no reasoning to support the outcome provide noncitizens little comfort that their appeal has been fairly adjudicated. Oral argument is also rarely ordered at the BIA, removing another opportunity for noncitizens to make sure that the Board heard their arguments. The sense of unfairness is heightened in circumstances where the BIA departs from established precedent or where its legal conclusions are inconsistent with an unpublished decision. When one noncitizen is granted an untimely motion to reopen to pursue immigration relief, but another noncitizen who files such a motion using the exact same legal argument is denied that opportunity without any explanation, the noncitizen deprived of relief will naturally feel that the Board is acting unfairly. In the words of *Judulang*, the noncitizen does not know whether the Board simply flipped a coin to decide whose motion to grant and whose to deny.

By keeping most of its decisions hidden from the public and making even those decisions that are publicly available difficult to access, the BIA is thwarting years of efforts by Congress to promote greater transparency and openness in the administrative process and violating the spirit of FOIA. Transparency and openness are hallmarks of modern American administrative law.[285] However, "[w]hile American administrative law today provides probably the greatest opportunity for public participation and the greatest transparency in the administrative process of any nation, this is not what it looked like in earlier periods."[286] In fact, prior to 1935

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[285] William Funk, Public Participation and Transparency in Administrative Law – Three Examples as an Object Lesson, 61 Admin. L. Rev. 171, 171 (2009).
[286] *Id.* at 172.

agencies were not even required to publish their regulations.[287] The transparency and openness that characterizes the modern American administrative state was shaped by a series of congressional action aimed at increasing public access to agency documents that culminated in the FOIA. As described by one court, FOIA's affirmative disclosure obligations "represent[] a strong congressional aversion to 'secret (agency) law.'"[288] Despite this aversion, the Board produces thousands of unpublished decisions a year and sometimes goes on to use these opinions to support future decisions, all the while discouraging parties from citing to these decisions themselves. EOIR may be doing more than just violating the spirit of FOIA by keeping unpublished decisions from the public. A recent lawsuit alleges that by doing so EOIR is violating its affirmative obligation under the FOIA to "make available for public inspection in an electronic format ... final opinions ... [and] orders, made in the adjudication of cases."[289]

Unpublished decisions undermine political accountability and judicial review by federal courts of appeal. Because unpublished BIA decisions are largely inaccessible to the public, the public is unaware of how the BIA is interpreting immigration law and thus cannot petition their representatives to amend the law in response to unpublished decisions. Representatives themselves may be unaware of how the BIA is interpreting immigration law in unpublished decisions and may be similarly thwarted from legislating to correct misinterpretations of the law, unintended consequences of statutory language, or otherwise to amend immigration law in response to the BIA's interpretation. Similarly, unpublished decisions undermine review by the federal courts of appeal. In *Uddin*, confronted with some evidence of inconsistent decision-making in the Tier III context, the Court had to request the government to produce all other relevant BIA decisions so that it could properly evaluate the BIA's decision-making in this area. The low quality of unpublished BIA decisions similarly thwarts judicial review. As explained by the Third Circuit 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."[290] The BIA is thus largely insulated from political

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[287] *Id.*
[288] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975) (quoting Kenneth Culp Davis, The Information Act: A Preliminary Analysis, 34 U. CHI. L. REV. 761, 797 (1967)).
[289] 5 U.S.C. § 552(a)(2).
[290] *Valarezo-Tirado v. Att'y Gen. of United States*, No. 20-1705, 2021 WL 3136905, at *4 (3d Cir. July 15, 2021) (emphasis added).

accountability for decisions made in unpublished opinions and the lack of reasoning in these decisions hinders judicial review.

Finally, secret law has harmed the BIA's own mandate of ensuring uniform, accurate, and consistent application of the immigration laws. Instead, secret law has contributed to inconsistent and error-prone decision-making, and an overall inefficient immigration system. This has led to "profound cynicism and distrust" of the BIA by courts, scholars, and advocates alike.[291] Ultimately, these actions hurt the BIA because it is not viewed as a legitimate or competent appellate body. The next Part will discuss reforms the BIA should implement that will help rehabilitate its reputation.

IV. RECOMMENDATIONS

This section proposes reforms to ensure transparency, fairness, and consistency in Board decision-making. These reforms may help re-establish the legitimacy of the agency. Because the Board's secret decision-making has so eroded the faith that judges, scholars, and advocates have in the competence and accuracy of Board decisions, it is important to stress that reforms will take time to rehabilitate the Board's reputation.

A. *Increasing Transparency and Fairness at the Board*

1. Provide Greater Public Access to Unpublished Opinions

The Board should make brief orders written by single-members and full opinions written by three-member panels available to the public. Rather than locating these opinions physically at the LLIRC as is current practice for non-restricted unpublished decisions, the Board should provide the decisions electronically on its website. This will ensure that all members of the public have equal access to Board decisions. The Board should further abolish the distinction between restricted and non-restricted decisions and make all unpublished decisions publicly available on its website. Restricted decisions cover a wide range of important immigration relief of interest to the public and noncitizens with immigration cases, including asylum, cancellation of removal, bond, and waiver decisions. It is likely that some of these decisions are restricted because of the sensitive nature of the claims and privacy concerns. Limited redactions or the use of the pseudonyms, as described below, can easily remedy these concerns.

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[291] Appleseed 39.

In published opinions, the Board does not include the noncitizen's A number and, due to privacy regulations relating to asylum cases, replaces the noncitizen's full name with a pseudonym in asylum decisions. Before releasing unpublished decisions in response to FOIA requests, the Board engages in extensive redactions. For example, for asylum cases the Board redacts the noncitizen's A number, name, and many facts relating to the claim. Unpublished decisions available at the LLIRC contain no redactions (but remember that asylum decisions are "restricted"). Similarly, the federal circuit courts of appeal 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.[292]

In response to litigation alleging that EOIR violated its affirmative obligations under FOIA by not making unpublished decisions electronically available and requesting that EOIR disclose all decisions from April 1, 1997 to present, EOIR argued that doing so would be unduly burdensome. According to a supervisor working in the FOIA unit, "the burden of redaction alone would span approximately 26.5 years, or 6.7 years . . . to accomplish."[293] To reduce the burden on EOIR, one option is to make disclosure of unpublished decisions a forward-looking policy, requiring that EOIR redact and make available online all future unpublished decisions but not decisions issued prior to the policy going into effect. But choosing this route would not address the inequity created by skewed access to unpublished decisions. Noncitizens in removal proceedings or with cases before DHS would remain at a disadvantage because IJs, attorneys representing the government, and Board members would still have access to all unpublished decisions. EOIR could address this concern by barring citations to unpublished decisions, but this too is an imperfect solution because having access to the reasoning, arguments, and language in unpublished decisions (even if they cannot cite to them) may still give attorneys representing the government an advantage over noncitizens. The better solution is to address the burdens of redaction through limited redaction and increasing funding to hire additional staff members to aid with redactions, as described below.

Balancing the need for privacy in sensitive cases, the public interest in access, and the burden of redaction, EOIR should redact only A numbers

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[292] *See* Nancy Morawetz, A Better Balance for Federal Rules Governing Public Access to Appeal Records in Immigration Cases, 69 Hastings L.J. 1271 (2018).
[293] Schaf Decl. 30.

when disclosing most unpublished decisions. If EOIR chooses this route, the immigration court and BIA practice manuals should be amended to not require parties to include the respondent's A number when citing to unpublished decisions.[294] For asylum cases, EOIR should additionally redact personally identifiable information, as required by regulation. EOIR should further redact personally identifiable information in other sensitive cases, such as cancellation of removal or waiver cases where health information (e.g., HIV+ status) is disclosed as part of the claim. EOIR should not engage in the extensive redacting of facts that it does when it discloses asylum decisions through FOIA. Such extensive redacting would be time-consuming for EOIR staff and would 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 clearly unnecessary as the BIA's published opinions relating to asylum extensively discuss the facts of the claim and address privacy concerns by using a pseudonym only.

The recommendations made here are feasible, although they may require additional funding, as described below. In fact, the Administrative Appeals Office (AAO), an agency that reviews appeals of USCIS officers' decisions regarding immigration benefit requests, already follows many of these recommendations.[295] Most non-precedent decisions of the AAO issued since 2005 are publicly available on its website and are searchable by key term.[296] The AAO redacts personally identifiable information and other sensitive material from non-precedent decisions before the decisions are made public.[297]

Making Board decisions publicly accessible has benefits for the government itself: First, 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. Ultimately, this should reduce the number of appeals filed of Board decisions and the number of remands by the federal circuit courts of appeals, contributing to a more efficient immigration system. Second, providing noncitizens equal access to Board decisions will help

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[294] ICPM J-3; BIA Practice Manual J-2.
[295] *See* https://www.uscis.gov/administrative-appeals/administrative-appeals.
[296] *See* https://www.uscis.gov/administrative-appeals/aao-decisions/aao-non-precedent-decisions. Decisions issued before 2005 can be requested through FOIA. *Id.*
[297] *See* https://www.uscis.gov/administrative-appeals/aao-decisions/aao-non-precedent-decisions.

rehabilitate the Board's reputation by increasing confidence in the Board's interest in fairness to all parties.

The Board has not articulated its reasons for keeping most decisions secret. However, reasons could include that the Board does not want respondents to have roadmaps to make persuasive arguments, does not want the public to see how little reasoning its decisions contain, and because it increases efficiency by allowing Board members to quickly issue decisions. If one looks at the reasons articulated by supporters of selective publication policies at the federal circuit courts, the reasons that could apply here include efficiency concerns, and that non-precedent decisions are necessary to maintain consistency in the law. The only legitimate concerns are those relating to efficiency and consistency in the law and neither outweighs the transparency and fairness concerns on the other side. First, as more fully discussed below, if Board members are pressured to write reasoned decisions because they know that even unpublished decisions will be accessible to the public, that does not mean that the decision must be long or burdensome to write and writing a careful decision may benefit the Board by reducing the number of appeals and remands. Second, there is no evidence that more published decisions will create inconsistency in the law, in fact, this Article has shown the opposite: that many of the Board's secret decisions conflict with each other.

2. Publish More Precedential Decisions

The BIA 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." Precedent benefits and guides the behavior of the public by explaining, for example, what actions do or do not violate immigration laws. Precedent helps legislators by, for example, revealing a need to amend imprecise statutory language so that it is in line with desired immigration policy goals. Additional precedent will help IJs more accurately apply immigration law and help avoid inconsistencies across immigration decisions at both the immigration court and Board. Finally, additional precedent will help attorneys representing noncitizens more accurately explain the law to their clients and provide clients a better assessment of their chances on appeal. This, in turn, may have a positive impact on the Board's case load. The greater the Board precedent, 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. This should result in less appeals and less issues raised in those cases that are appealed.

A reduction of immigration appeals will also benefit many federal circuit courts where immigration cases continue to overwhelm dockets.

3. Strike Rule Discouraging Citations to Unpublished Opinions

Like the federal circuit courts, EOIR should strike 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." The BIA Style Manual similarly discourages those drafting Board opinions from citing to unpublished decisions "because these decisions are not controlling on any other case." Despite these admonitions, Board members and IJs themselves regularly cite unpublished decisions to support their conclusions. There is also evidence of the Board announcing new law in unpublished decisions, demonstrating their usefulness to parties. Because IJs and the Board members cite to unpublished decisions as if they do carry some weight and 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 also supported for fairness reasons so 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. Therefore, it does nothing to help the disadvantaged party because attorneys representing the government are merely discouraged from citing the decisions, and evidence shows that these attorneys ignore the rule and regularly cite unpublished decisions. Ultimately, the rule seems to serve no legitimate purpose.

B. Ensuring Accuracy and Consistency of Board Decisions

1. Quality Assurance Reviews

EOIR should implement quality assurance reviews to ensure the accuracy and consistency of Board decisions. In response to criticism concerning inconsistencies across ALJ decisions, the SSA implemented several strategies to monitor and improve the accuracy and consistency of ALJ decisions. To help monitor the quality of ALJ 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.[298] The SSA also conducts several quality assurance 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.[299]

Like an "agree rate," EOIR could 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 can provide a skewed perspective of the quality of Board members' decisions. Under the Trump administration, EOIR implemented a remand metric rate that required that IJs should not be remanded in more than 15 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."[300] Moreover, the remand rate does nothing to measure the accuracy of non-appealed decisions. For this reason, EOIR should not implement a performance metric that requires Board members to have a remand rate less than a certain percentage. 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 quality assurance 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.[301] 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,[302] and cases where the noncitizen sought humanitarian relief because of the high-stakes of those cases. Monitoring remand rates and conducting quality

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[298] Gov't Accountability Office, Social Security Administration: Additional Measures and Evaluation Needed to Enhance Accuracy and Consistency of Hearings Decisions 36 (2017).
[299] *Id*. at 39-43.
[300] Statement of Judge A. Ashley Tabaddor, President National Association of Immigration Judges 5 (Jan. 29, 2020).
[301] 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.
[302] Dep't of Justice, Exec. Office for Imm. Rev., A Ten Year Review of the BIA Pro Bono Project 12 ("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.").

assurance reviews of decisions at various stages will help EOIR understand whether additional review of certain Board members' decisions, guidance, or training is needed.

2. 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. Written opinions should sufficiently explain the reasons supporting the decision, including, if applicable, an explanation of why the decision departs from established precedent or other unpublished decisions on the matter. Prior to issuing any decision, the board member or a staff attorney should review other unpublished decisions where the board was confronted with the same issue to ensure that the current decision does not conflict. Where the decision is inconsistent with a previous board decision, the board member or staff attorney should reconsider the decision or ensure that the decision adequately explains why the outcome is different in the present case.

A defense of AWOs and single member opinions is that they save time and effort and allow the Board to move through its massive docket more quickly.[303] However, 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 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 because 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 circuit court judges, advocates, noncitizens, and the public in general will grow.

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[303] *See, e.g.,* Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 FR 56135, 53137-56138 (Oct. 18, 1999).

3. Catching Inconsistencies Across Board Decisions

a. Review Decisions Regularly for Consistency

EOIR staff attorneys should regularly review Board decisions for consistency. Such review could take place during the quality assurance reviews described above, or separately. To preserve limited government resources, EOIR should be mindful not to duplicate efforts. While having multiple layers of review like the SSA may be tempting, the GAO found that some of the SSA's quality assurance reviews were needlessly duplicative.[304] Finally, EOIR should not rely solely on their own review to identify inconsistent decisions but should invite the public to help with this effort, as described below. Combining an internal effort to identify inconsistent decisions with a mechanism that allows the public to bring such decisions to light will prove that EOIR's attempts to reform are made in good faith.

b. Provide Mechanism for Public to Bring Inconsistencies to the Board'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.[305] Responses were collected by e-mail, fax, and a response form on the court's website.[306] The Board should similarly

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[304] Gov't Accountability Office, Social Security Administration: Additional Measures and Evaluation Needed to Enhance Accuracy and Consistency of Hearings Decisions, 40 (2017) ("We found that reviews conducted by the four entities have resulted in similar findings, raising questions about the efficiency of these reviews").

[305] Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 107th Cong. 14 (2002) (statement of Alex Kozinski, Judge, United States Court of Appeals for the Ninth Circuit).

[306] *Id.* According to Judge Kozinski, no inconsistent decisions were identified through this process. *Id.* However, in response to a survey question that asked federal circuit courts of appeal 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

provide a mechanism for the public to bring inconsistent Board decisions to its attention. Because many inconsistencies have already been documented, the Board should make this a permanent effort, rather than a short-term effort as done by the Ninth Circuit. Once information is collected through public input or through the Board's own efforts, the Board should decide if there is indeed a conflict and take the appropriate remedial action described below.

c. When Inconsistencies Come to Light

There are two options to address inconsistencies that come to light either through the Board's own efforts or by the public. 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.[307] 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."[308] Thus, one option is for the Chairman to direct en banc review in cases where legitimate inconsistencies have been identified. Second, the AG has the power to certify for review any decision of the Board (the "self-referral power"). The AG 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."[309] However, scholars have criticized the AG'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."[310] Scholars argue that the self-referral power is problematic because "[a]s a political appointee serving at the will of the president, the [AG] is subject to the winds of politics, and his primary duty is law enforcement, not adjudication."[311] Thus, because AGs are not experts in immigration, are subject to political pressures, and change every administration (and may not maintain the same policies as their predecessor), en banc review upon the direction of the Board's Chairman

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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, et. al, Federal Judicial Center, Citing Unpublished Opinions in Federal Appeals 14 (2005).

[307] 8 CFR § 1001.3 (a)(5).

[308] *Id.*

[309] The Accidental History of U.S. Immigration Courts 10.

[310] *Id.*

[311] *Id.*

may provide for more stable and accurate review of conflicting BIA decisions.

C. Providing 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 25 board members and 250 staff attorneys to return to three-member panels in all cases.[312] However, in FY 2009, the Board received 22,338 appeals, whereas in FY 2020 the Board received 51,266 appeals.[313] Based on this increase in appeal filings, the Chairman of the Board 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 the Chairman's evaluation. The Board's current regulations permit only 23 permanent members, so DOJ will need to revise the Board's regulations if the Chairman determines that more than 23 members are needed. Alternatively, additional temporary board members could be hired 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).

In addition to more Board members and staff attorneys, EOIR will 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 as it did in the brief 2016 pilot project. Digitizing Board decisions will also allow the Board to conduct quality 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.[314] 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

[312] Appleseed 40.
[313] Exec. Office for Immigration Review, Adjudication Statistics: Case Appeals Filed, Completed, and Pending (April 19, 2021).
[314] Schaf. 03/2019 Decl. 13.

Scholars have suggested that the appeals process exists for two primary reasons: to make law through precedent and to correct errors.[315] A properly functioning appellate process should therefore result in greater consistency in lower court decisions.[316] This Article demonstrates that the Board is not functioning properly as an appellate agency partly because it publishes so few precedent decisions to guide IJs. Thus, studies by scholars demonstrating shocking disparities in grant rates across IJs are not surprising. The lack of precedent is not the only issue demonstrating appellate dysfunction at the BIA: This Article further shows that the Board *itself* frequently issues decisions that conflict with each other and that are replete with errors. Rather than guiding IJs, correcting errors, and contributing to greater consistency in the application of immigration law, the BIA is instead creating greater confusion for IJs, and contributing to the inefficiency of the immigration system.

This Article has demonstrated that the secrecy of BIA's decisions is likely contributing to the above issues. Because Board members know that their decisions are not publicly accessible, they have little incentive to write reasoned or consistent decisions (or any decisions at all) and, in fact, evidence shows that the Board frequently writes decisions without providing any support for its conclusions or explanation for why one case should have an outcome different from another when the legal issues in the two cases are identical. Moreover, if the parties involved in an appeal are the only ones with access to the Board's decision, it is impossible for the public and difficult for advocates to recognize inconsistencies across decisions and bring them to the Board or a federal circuit court's attention. Decisions that lack reasoning or support also thwart circuit court review because judges cannot assess such opinion and must remand them to the Board for further explanation. Finally, if the public does not have access to most Board decisions, they cannot petition their representatives to clarify or correct the law. Transparency, fairness, consistency, and accountability are generally considered important values of American administrative law and are believed to be 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 appeal, where inaccessible unpublished decisions and no-citation rules once flourished, and make all unpublished opinions available to the public in an electronic and searchable format and should further eliminate the rule

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[315] Failure of Immigration Appeals 1181.
[316] *Id.*

discouraging citations to these decisions. These reforms and others proposed by this Article will benefit countless noncitizens by increasing the transparency and accuracy of Board decision-making and reducing inconsistency and errors in both IJ and Board opinions. The reforms will further rehabilitate the Board's legitimacy and reputation by increasing confidence in the competence of the agency and fairness of its decisions. Finally, the reforms serve the Board's own goal of accurate and uniform application of our nation's immigration laws.