THE IMMIGRANT STRUGGLE FOR EFFECTIVE COUNSEL: AN EMPIRICAL ASSESSMENT

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Recently, in Department of Homeland Security v. Thuraissigiam, *the Supreme Court upheld 8 U.S.C. § 1252(e)(2), a statutory provision placing restrictions on certain noncitizens from seeking habeas review in the federal judiciary. The Court focused on the Constitution's Suspension Clause, but it also discussed the Due Process Clause, declaring that there was no violation there either.*

One question which flows from this decision is whether the federal courts will soon be precluded from hearing other types of claims brought by noncitizens. Consider ineffective assistance of counsel petitions, which in the immigration law context are rooted in the Due Process Clause. Some circuit courts of appeals have held that a specific agency within the Department of Justice—the Board of Immigration Appeals—has the sole, final decision-making authority on these claims. Other circuit courts, in contrast, have stated that because IAC petitions are constitutional in nature, noncitizens are entitled to take BIA decisions to Article III appellate courts.

As this study shows, statutory text, precedent, and the inscrutability of many of the BIA's rulings support the notion that the federal circuit courts should retain jurisdiction in these cases—even given Thuraissigiam. *By creating a unique dataset containing 1,615 cases, this study empirically evaluates those publicly available ineffective assistance of counsel judgments delivered by the BIA. The results reveal that the BIA's holdings often are summarily issued and lack detailed explanation, with the government prevailing in most instances. With the stakes so high, it is imperative that Article III circuit courts are able to independently review*

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these ineffective assistance cases, especially before the finality of a negative immigration order takes effect.

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I. INTRODUCTION

On June 25, 2020, the Supreme Court of the United States handed down its decision in *Department of Homeland Security ("DHS") v. Thuraissigiam*.[1] The case garnered national attention.[2] Writing for the majority, Justice Samuel Alito held that certain noncitizens who had been placed in expedited removal hearings could not seek habeas review in the federal courts.[3]

In this particular case, Vijay Thuraissigiam was a Sri Lankan national who had applied for asylum in the U.S.[4] He was arrested and detained just after he "crossed the southern border without inspection or an entry document at around 11:00 PM one night in January 2017."[5] In his appearance in front of an asylum officer, Thuraissigiam did not state that he feared persecution upon return to Sri

1. *See generally* 140 S. Ct. 1959 (2020).

2. Adam Liptak, *Supreme Court Says Rejected Asylum Seekers Have No Right to Object in Court*, N.Y. TIMES (June 25, 2020), E**rror! Hyperlink reference not valid.**https://www.nytimes.com/2020/06/25/us/supreme-court-asylum-habeas.html [https://perma.cc/7YRK-6ULU].

3. *Thuraissigium*, 140 S. Ct. at 1988. For an important book on the history of habeas, see generally PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010). *See also* NANCY J. KING & JOSEPH L. HOFFMANN, HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT vii (2011).

4. *See Thuraissigiam*, 140 S. Ct. at 1967.

5. *Id.*

Lanka.[6] The officer, and then later an immigration judge, rejected his asylum application, finding that "he had offered no evidence that could have made him eligible for asylum (or other removal relief)."[7]

As DHS prepared to execute the removal order, Thuraissigiam filed a habeas motion in the federal courts.[8] A federal judge rejected his claim, holding that 8 U.S.C. § 1252(e)(2) precluded the federal courts from intervening.[9] On appeal, the Ninth Circuit overruled the district court and found that this statutory provision not only violated the Constitution's Suspension Clause but Thuraissigiam's Fifth Amendment due process rights as well.[10]

At the Supreme Court, however, Justice Alito rejected the Ninth Circuit's approach and instead found that the district court had correctly analyzed the issues.[11] His majority opinion was signed by four other members of the Court (Chief Justice Roberts and Justices Gorsuch, Kavanaugh, and Thomas),[12] while Justices Breyer and Ginsburg concurred.[13] Justice Sotomayor wrote the dissent, which Justice Kagan joined.[14]

The heart of Justice Alito's opinion focused on how, in his view, § 1252(e)(2) did not violate the Suspension Clause.[15] As Justice Alito argued, neither British historical precedent nor early American case law showed that noncitizens were entitled to habeas relief in the courts.[16] In fact, Justice Alito cited an 1892 case, *Nishimura Ekiu v. United States*, which he saw as direct evidence that the federal courts actually *could* restrict a noncitizen's petition for habeas review.[17]

6. Liptak, *supra* note 2.

7. *Thuraissigiam*, 140 S. Ct. at 1968 (discussing how Thuraissigiam "lacked a 'credible' fear of persecution," as defined by 8 U.S.C. § 1225(b)(1)(B)(v)).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 1988.

12. *Id.*

13. *Id.*

14. For background on this case, see generally Liptak, *supra* note 2.

15. According to the Suspension Clause, "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2; *see also Thuraissigiam*, 140 S. Ct. at 1963. This statutory provision is part of the INA (§242(e)), but it came into being as part of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").

16. *Thuraissigiam*, 140 S. Ct. at 1971 (focusing "around the time of the adoption of the Constitution").

17. *Id.* at 1977 (indeed noting specifically that the Court in this case found that the Immigration Act of 1891 was constitutional and that the Suspension Clause was not relevant here). As Justice Alito wrote: "What is critical for present purposes is that the Court did not hold that the Suspension Clause imposed any limitations on the authority of Congress to restrict the issuance of writs of habeas corpus in immigration matters." *Id.* Justice Alito then went further by stating that "[w]hen we look to later finality era cases, any suggestion of a Suspension Clause foundation becomes even less plausible. None of those decisions mention the Suspension Clause or even hint that they are based on that provision, and these omissions are telling." *Id.* at 1979. Instead, in *Nishimura Ekiu*, he found that the Habeas Corpus Act of 1867 was the relevant law for whether the federal courts could restrict habeas petitions. *Id.* at 1962. And the Court was also not persuaded that two other cases from the 2000s, cited by *Thuraissigiam*, were on point either. *Id.* at 1981. The two cases were *Immigration & Nationality Services v. St. Cyr*., 533 U.S. 289 (2001) and *Boumediene v. Bush*, 553 U.S. 723 (2008). Regarding the former, Justice Alito held that the issue there involved whether a writ could be issued during a deportation case, not an

The final section of Justice Alito's opinion then dealt with whether this statutory provision violated the respondent's due process rights, as the Ninth Circuit had held.[18] Justice Alito concluded that even though Thuraissigiam was within the United States when he was arrested, he had not established enough ties to the country to be able to invoke this Fifth Amendment protection.[19]

It is this due process point upon which this Article focuses. While Justice Alito examined this issue only briefly,[20] what he did say raises concerns.[21] For example, his reading of past case law indicates that full due process rights for "foreigners"[22] extends primarily to those who have become naturalized citizens or who are lawful permanent residents ("LPRs"). According to Justice Alito, seen in any other light, due process becomes "meaningless,"[23] especially if the same kinds of protections can be extended to people like Thuraissigiam, who have simply "set foot on U.S. soil,"[24] or who have not been admitted legally into the country.[25]

Such a proposition, however, has two potentially enormous and worrying implications. First, if taken to its logical conclusion, Justice Alito's argument would undo a string of established case law that has long recognized that noncitizens—beyond those who are LPRs—are entitled to due process protection.[26]

Second, and relatedly, there is currently a heated circuit split on a significant immigration law question: namely, whether the federal courts have jurisdiction to hear claims of ineffective assistance of counsel ("IAC") made by noncitizens applying for *discretionary relief*, such as asylum.[27] There are those

inadmissibility/exclusion case, as was the situation here. *Thuraissigiam*, 140 S. Ct. at 1981 (citing *St. Cyr*, 533 U.S. at 300). Regarding the latter, Justice Alito noted that no immigration issue was even of focus there. *Id.* (citing *Boumediene*, 553 U.S. at 779).

18. The excellent podcast, Strict Scrutiny, hosted by Professors Leah Litman, Melissa Murray, and Kate Shaw produced a show dedicated to *Thuraissigiam* following the release of the Supreme Court's decision on June 29, 2020. Their guest that day was Professor Anil Kalhan. *See* Strict Scrutiny, *Thanks for the Footnote*, STRICT SCRUTINY, at 10:25 (June 29, 2020), https://strictscrutinypodcast.com/podcast/thanks-for-footnote/ [https://perma.cc/ZA6H-26PL].

19. *Thurassigiam*, 140 S. Ct. 1959 at 35–36.

20. In a 36-page opinion, his discussion on due process takes up just seven paragraphs. *See id.* at 1981–83. *See also* Michael C. Dorf, *Justice Alito's Opinion in Dep't of Homeland Security v. Thuraissigiam Reveals Why "Custody" in the Narrow Sense Should Not Be a Requirement for Habeas*, DORF ON LAW (June 25, 2020, 8:46 PM), http://www.dorfonlaw.org/2020/06/justice-alitos-opinion-in-dept-of.html [http://perma.cc/E8XU-Z9YC].

21. For a perspective on this point, see Amanda L. Tyler (@profamandatyler), TWITTER (June 25, 2020, 3:29 PM), https://twitter.com/profamandatyler/status/1276251176682438657 [https://perma.cc/EEU6-NHVH].

22. *Thuraissigiam*, 140 S. Ct. at 1982 (quoting Ekiu v. United States, 142 U.S. 651, 660 (1892)).

23. *Id.*

24. *Id.*

25. For a very critical take on the decision, see Ahilan Arulanantham, (@ahilan_toolong), TWITTER (Jun. 25, 2020, 3:27 PM), https://twitter.com/ahilan_toolong/status/1276250672007012352 [https://perma.cc/UML4-469B].

26. *See, e.g.*, Elliott Young, *SCOTUS's Thuraissigiam Decision Is a Threat to All Undocumented Immigrants*, HISTORY NEWS NETWORK (July 19, 2020), https://historynewsnetwork.org/article/176454 [https://perma.cc/DV7Z-74XE].

27. As this study will discuss in detail, under the INA, there are four main types of discretionary relief: asylum, cancellation of removal, voluntary departure, and adjustment of status.

circuits that have held that a specific agency within the Department of Justice—the Board of Immigration Appeals ("BIA"or "Board")—has the sole, final decision-making authority.[28] Other circuits, in contrast, have stated that because IAC petitions in immigration law are rooted in the Fifth Amendment and are constitutional in nature, noncitizens are entitled to take BIA decisions to Article III appellate courts.[29] To conclude otherwise, according to this reasoning, would leave these individuals, most of whom are *non-LPRs*, subject to the whims of an agency that is inherently political.[30]

As this study argues, statutory text, precedent, and, in particular, the inscrutability of many BIA decisions supports the notion that the federal courts should retain jurisdiction in IAC cases—even given *Thuraissigiam*. By creating a unique dataset containing 1,615 cases, which covers the period from 1988–2020,[31] this study empirically evaluates every publicly available IAC/discretionary relief judgment delivered by the BIA. In doing so, the analysis draws upon David Hausman's landmark research, which found that "immigration judges who deport more immigrants than their court's average"[32] "rarely"[33] see their orders reviewed, let alone reversed, by the BIA.[34] As Hausman explains, the BIA simply has not intervened enough on behalf of noncitizens, nor has it served as a check on the "harshness"[35] of these immigration judges.

A key takeaway also noted by Hausman is that noncitizens who lack lawyers, from "the [very] beginning of their proceedings,"[36] tend not to appeal, and when they do, they lose. Building on Hausman's work, this Article offers a new layer of analysis by revealing that, even when lawyers are present, there can still be major disadvantages that noncitizens have within the immigration appellate process. Adding to the problem: the BIA's holdings often are summarily issued and opaque, with noncitizens losing on IAC claims about four out of every five times.[37] Thus, with the stakes so high—where the outcomes for

28. *Cf.* R. Parker Sheffy & Geoffrey A. Hoffman, *Appellate Exceptionalism?: The Troubling Case of Immigration Decisions' Continued Precedential Effect Even After Circuit Court Vacatur*, 2020 U. ILL. L. REV. ONLINE 129, 129–30 (2020), https://www.illinoislawreview.org/online/appellate-exceptionalism/ [https://perma.cc/L6CC-GM63].

29. *Id.*

30. For a powerful study arguing that expedited removals leave noncitizens without an opportunity to search for effective counsel, which then leads to higher rates of deportation (including for children) and violates due process, see generally David Hausman & Jayashri Srikantiah, *Time, Due Process, and Representation: An Empirical and Legal Analysis of Continuances in Immigration Court*, 84 FORDHAM L. REV. 1823 (2016).

31. 1988 was the year that the BIA formally recognized ineffective assistance of counsel in Matter of Lozada, 19 I. & N. Dec. 637 (BIA 1988). For a detailed discussion of this case, see *infra* Subsection II.B.1.

32. *See* David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177, 1179 (2016).

33. *Id.* at 1207.

34. *Id.*; *see also id.* at 1179.

35. *Id.* at 1190.

36. *Id.* at 1207.

37. The data on this point is presented in Part IV. Note, regarding Hausman's study, it is a *tour de force*, in terms of understanding the workings of immigration judges and the appeals process. His dataset includes "just under five million [immigration court] cases," *id.* at n.4, which he obtained through a Freedom of Information Act ("FOIA") request. His study contrasts "harsher judges" with "generous judges," where the latter often

noncitizens can range from detention to deportation—it is imperative that an Article III appellate court be able to independently review these IAC cases, especially before the finality of a negative immigration order takes effect.

This study shall proceed in the following manner: Part II will discuss how immigration adjudication works in the United States. Subsequently, this Article provides an overview of the way due process rights for noncitizens have been treated by the federal courts. Thereafter, this Article provides a description of how certain federal appellate courts today are affirmatively limiting noncitizens from having their IAC cases heard.

Part III then presents the counter approach taken by another group of federal appellate courts. In fact, in April 2020, the Third Circuit issued the most comprehensive judgment to date on this subject, embracing the position that noncitizens must be able to appeal IAC claims from the BIA to an Article III circuit court.[38] Part IV then offers empirical and statistical evidence to support this argument.

Part V concludes by urging the BIA to act with greater transparency. It calls upon the federal appellate courts to demand more clarity from the BIA on how and why it repeatedly sides with the government in IAC-related litigation. The bottom line is that the due process rights of noncitizens matter. With their lives and liberty hanging in the balance, noncitizens who have lawyers deserve competent legal assistance, as well as the opportunity to seek redress when they do not receive it.

II. THE INTERSECTION OF IMMIGRATION COURTS AND ARTICLE III COURTS

A. Structure, Operation, and Due Process

For the purposes of this study, there are a few salient points to note regarding how immigration law is administered in the United States.[39] First, the initial adjudicative forum where noncitizens appear is referred to as the "immigration court," which is located within the Department of Justice ("DOJ")

"hesitate to issue removal orders [right away and] also allow immigrants far more time to find a lawyer." *Id.* at 1179. In these situations, as he finds, "[b]ecause immigrants with a lawyer are far more likely to appeal, cases decided by generous judges [at the immigration court level] are thus more often reviewed and reversed." *Id.* On this point, however, it may also be the case that the "win-rate" on appeal is more because of lawyers screening and then deciding to take certain cases over others, which determines whether or not the noncitizen is likely to succeed. Hausman certainly recognizes this point, *see, e.g.*, *id.* at 1202, but for more detailed work on lawyer-screening (in other contexts), see generally HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES (2004); Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact*, 80 AM. SOCIOLOGICAL REV. 909 (2015). Hausman's other key finding is that "when the government appeals—which it does more than ten times less frequently than immigrants—the BIA more often reverses the decisions of generous judges than those of harsher judges." Hausman, *supra* note 32, at 1180.

38. *See* Calderon-Rosas v. Att'y Gen. United States, 957 F.3d 378 (3d Cir. 2020).

39. For a brief history discussing this literature on how these courts have evolved over the years, as well as accompanying citations, see generally Jayanth K. Krishnan, *Judicial Power—Immigration-Style*, ADMIN. L. REV. (forthcoming 2021).

and is presided over by an immigration judge.[40] Immigration judges, however, are not covered under the Administrative Procedure Act.[41] Rather, they are officials who work within the DOJ and whose positions exist because of regulations prescribed by the Attorney General.[42]

Second, sitting atop these immigration courts, as an appellate body, is the BIA, which is also located within the DOJ.[43] The BIA has "23 Appellate Immigration Judges,"[44] and although historically it heard cases in panels of three, today it can have just one judge presiding.[45] And, as will be discussed in more detail in Part IV, BIA decisions, particularly affirmances, can be issued without a written opinion, and even when there is a penned judgment, frequently it is extremely short—often no more than a few paragraphs.[46]

Third, notwithstanding the IAC debate, "[m]ost BIA decisions are subject to judicial review in the federal courts"[47]—mainly, the federal circuit courts of

40. *See* Hausman, *supra* note 32, at 1191–97. The states in which these DOJ immigration courts are located include: "Arizona | California | Colorado | Connecticut | Florida | Georgia | Hawaii | Illinois | Kentucky | Louisiana | Maryland | Massachusetts | Michigan | Minnesota | Missouri | Nebraska | Nevada | New Jersey | New Mexico | New York | North Carolina | Northern Mariana Islands | Ohio | Oregon | Pennsylvania | Puerto Rico | Tennessee | Texas | Utah | Virginia | Washington." *EOIR Immigration Court Listing*, DEP'T OF JUST. (Oct. 29, 2021), https://www.justice.gov/eoir/eoir-immigration-court-listing [https://perma.cc/H89R-T7XM].

41. *See, e.g.*, Krishnan, *supra* note 39; *see also* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 11 (2015); *EOIR Guidance on the Meaning of the Judicial Robe Worn by Immigration Judges*, MYATTORNEYUSA: THE LAW OFFICES OF GRINBERG & SEGAL, PLLC, http://myattorneyusa.com/eoir-guidance-on-the-meaning-of-the-judicial-robe-worn-by-immigration-judges (last visited Mar. 3, 2022) [https://perma.cc/C9DW-H344].

42. *See* Krishnan, *supra* note 39; *see also* Hausman, *supra* note 32, at 1199 n.79, 1218–20 (challenging the conventional wisdom that the way immigration judges hear cases is random). The Immigration and Nationality Act sets forth the statutory authority for the Attorney General to appoint and oversee such judges. *See* 8 U.S.C. § 1101(b)(4) (2021). For decades, immigration judges worked within a DOJ agency—Immigration and Naturalization Services. But after the September 11, 2001 attacks, adjudication and citizenship/naturalization matters were split between the DOJ and the newly created DHS, with the immigration courts staying within the former. *See* Kirsten Bickelman, *Unfinished Business: How "Split Authority" over U.S. Asylum Adjudications Highlights the Need to Relocate the Immigration Court System to the Department of Homeland Security*, 9 LEGIS. & POL'Y BRIEF 57, 58 (2020); *see also* Krishnan, *supra* note 39 (observing that, beginning in 1983, immigration courts worked within the Executive Office of Immigration Review ("EOIR"), which was a body within the DOJ). After the Homeland Security Act (2002) was passed, which reorganized the immigration system, the EOIR stayed within the DOJ and thus so did the immigration courts. *See* Homeland Security Act of 2002, 6 U.S.C. § 521 (2021); T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, MARYELLEN FULLERTON & JULIET P. STUMPF, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 235–69 (8th ed. 2016). For the regulation making this change regarding the EOIR, see 8 C.F.R. § 1003 (2020).

43. *See Organization Chart*, U.S. DEP'T OF JUST.: EXEC. OFF. OF IMMIGR. REV. (Jan. 27, 2015), https://www.justice.gov/eoir/organization-chart [https://perma.cc/896R-X3XL].

44. *See Board of Immigration Appeals*, U.S. DEP'T OF JUST.: EXEC. OFF. OF IMMIGR. REV. (Sept. 14, 2021), https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/68HF-5G52].

45. *See* Hausman, *supra* note 32, at 1202–07 (discussing the reforms that took place in 2002 during the George W. Bush presidency).

46. There are other aspects of the BIA worth mentioning, including that it "does not conduct courtroom proceedings—it decides appeals by conducting a 'paper review' of cases. On rare occasions, however, the BIA hears oral arguments of appealed cases, predominately at [its] headquarters [in Falls Church, Virginia]." *Board of Immigration Appeals*, *supra* note 44. In addition, although the vast majority of appeals come from the DOJ's immigration courts, it "has been given nationwide jurisdiction to hear appeals from certain decisions rendered . . . by district directors of the Department of Homeland Security (DHS) in a wide variety of proceedings in which the Government of the United States is one party and the other party is an alien, a citizen, or a business firm." *Id.*

47. *Id.*

appeals. Because the BIA is a DOJ forum, its rulings can first be reviewed, and overturned, by the Attorney General. But even where the Attorney General reverses, those cases are still generally reviewable by a federal appellate court.[48] The particular appellate court that hears the appeal is determined by the circuit in which the original immigration court hearing occurred.[49]

In terms of due process, following the above-mentioned 1892 judgment in *Nishimura Ekiu*, the Supreme Court heard a series of cases which sought to establish the parameters of this Fifth Amendment protection. For example, in *Yamataya v. Fisher*, the Court declared that noncitizens indeed have due process rights in deportation proceedings, although the threshold the government needed to meet was held to be quite low.[50] By the mid-1900s, the Court set a *de facto* dividing line between noncitizens seeking admission (who were granted very little due process protection in a proceeding), and those who had lawfully entered and subsequently resided as permanent residents (who were given enhanced rights in a proceeding).[51]

Yet, this distinction was not always adhered to in a strict manner. In an important 1953 case known as *Shaughnessy v. Mezei*, the Court upheld the Attorney General's exclusion of an LPR, despite objections in two separate dissenting opinions that the noncitizen's procedural and substantive due process rights were violated.[52] (*Mezei* was cited in *Thuraissigiam* by Justice Alito, as well as by Justice Sotomayor in her dissent.)[53] Yet the principle that LPRs were, in fact, entitled to greater due process protections did subsequently reemerge. In

48. *See id.* In fact, a recent, well-documented instance of the Attorney General reversing was in *Matter of A-B-*, 27 I. & N. Dec. 316, 346 (A.G. 2018), https://www.justice.gov/eoir/page/file/1070866/download [https://perma.cc/42VL-ZY6B]. For a discussion of this point, see Karen Musalo, *Restore Asylum for Women Fleeing Abuse and Death*, L.A. TIMES (Nov. 22, 2019, 3:00 AM), https://www.latimes.com/opinion/story/2019-11-22/asylum-immigration-women-violence-congress [https://perma.cc/Y9D6-UY2L].

49. *See* Jayanth K. Krishnan, *Lawyers for the Undocumented: Addressing a Split Circuit Dilemma for Asylum-Seekers*, 82 OHIO ST. L.J. 163, 167 (2021); *see also* Mica Rosenberg, Reade Levinson & Ryan McNeill, *They Fled Danger at Home to Make a High-Stakes Bet on U.S. Immigration Courts*, REUTERS (Oct. 17, 2017, 1:00 PM), https://www.reuters.com/investigates/special-report/usa-immigration-asylum/ [https://perma.cc/UQ39-QJWA]. Note, the one general exception to this point involves habeas petitions, like that in the *Thuraissigiam* case. Those matters are typically heard first by federal district courts. *See* AM. IMMIGR. COUNCIL: LEGAL ACTION CTR., INTRODUCTION TO HABEAS CORPUS (2008), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/lac_pa_0406.pdf [https://perma.cc/ADV3-BZVF].

50. *See* Yamataya v. Fisher (*The Japanese Immigrant Case*), 189 U.S. 86, 101 (1903). In that case, the Court upheld the government's minimal set of procedures, "even though she had had no formal hearing, alleged that she could neither speak nor understand English, and claimed that she was unaware of the nature of the proceedings." ALEINIKOFF ET. AL, *supra* note 42, at 522.

51. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 547 (1950) (holding that a noncitizen who sought to invoke her right to enter via the War Brides Act, which would have allowed her special treatment to enter the U.S. because she was married to an American veteran, could have her entry denied by the Attorney General); *c.f.*, Kwong Hai Chew v. Colding, 344 U.S. 590, 603 (1953) (holding that a lawful permanent resident seeking to enter the U.S. could not be detained and excluded without proper notice and without the opportunity to challenge the charges).

52. *See* Shaughnessy v. United States *ex rel* Mezei, 345 U.S. 206, 215–16 (1953) (holding that the government had legitimate national security grounds for keeping Mezei detained and excluded). Note, ultimately, he was "paroled" into the country, but he "was not formally admitted." *See* ALEINIKOFF ET. AL, *supra* note 42, at 534.

53. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1980–83, 2011–13 (2020).

Rosenberg v. Fleuti, and even more prominently in *Landon v. Plasencia*, the Court reaffirmed the notion that when seeking to re-enter the country, LPRs would be treated differently than those arriving for the first time.[54]

While safeguards for LPRs have evolved over the years, what is the due process situation regarding the millions of noncitizens who are not permanent residents but who are here legally? What about those who are undocumented? In her dissent in *Thuraissigiam*, Justice Sotomayor spent time discussing these questions. Although much of her nearly forty-page opinion focuses on the Suspension Clause,[55] she also argues forcefully that all noncitizens have a panoply of due process rights that must be respected by the government.[56]

Justice Sotomayor is not unaware that the Court has long adhered to the "plenary power doctrine" in showing deference to governmental decisions on noncitizens, especially those who are seeking admission.[57] For her, there are bare minimum requirements to which all individuals present within the country are entitled—and that were *not* afforded to Thuraissigiam in his case.[58] From the Court's 1886 decision in *Yick Wo v. Hopkins* to its 2001 *Zadvydas v. Davis* decision, due process has applied "to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."[59] Precedent illustrates that these protections have extended to those who are here lawfully—as well as to the undocumented.[60] And, despite the majority's contention that the federal courts were affirmatively stripped of entertaining petitions brought by someone like Thuraissigiam,[61] Justice Sotomayor succinctly observed that just because Congress passed a law "in the immigration context does not [automatically] dictate the scope of the Constitution."[62] Nor does it somehow limit the Court's previous interpretations of the Due Process Clause.[63]

54. *See* Rosenberg v. Fleuti, 374 U.S. 449, 462 (1963); Landon v. Plasencia, 459 U.S. 21, 33 (1982). For a slight variation of this point, however, compare Kerry v. Din 576 U.S. 86, 101 (2015) (holding that due process was not violated when a naturalized U.S. citizen's nonresident, noncitizen husband was denied entry into the country). The U.S. citizen had petitioned for the entry of her husband under 201(b)(2)(A)(i) of the INA. *Id.* at 89. The case was a plurality opinion, with a concurrence by Justice Kennedy who held that enough due process was afforded to the citizen by way of the notice that she received. *Id.* at 102.

55. *See Thuraissigiam*, 140 S. Ct. at 1993–2015 (Sotomayor, J., dissenting) (discussing, in particular, how the majority misinterpreted precedent and the history that accompanied the writ of habeas).

56. *Id.* at 2012.

57. *Id.* at 2011–12.

58. *Id.* at 1995 (noting that the process "did not provide him a meaningful opportunity to establish his claims, that the translator and asylum officer misunderstood him, and that he was not given a 'reasoned explanation' for the decision.").

59. *Id.* at 2012 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)). For a well-known debate over whether *Yick Wo* was really about due process, see Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts About Yick Wo*, 2008 U. ILL. L. REV. 1359, 1359–60 (2008) (arguing that *Yick Wo* was mainly about treaty guarantees, rather than constitutional rights). *C.f.* David E. Bernstein, *Revisiting Yick Wo v. Hopkins*, 2008 U. ILL. L. REV. 1393 (2008) (challenging Chin on his thesis).

60. *See Thuraissigiam*, 140 S.Ct. at 2012 (Sotomayor, J., dissenting) (citing Zadvydas v. Davis, 533 U. S. 678, 693 (2001)).

61. *Id.* at 1211 (noting through 8 U.S.C. § 1252(e)(2)).

62. *Id.* at 1213.

63. *Id.*

Yet only one other member of the Court (Justice Kagan) signed onto Justice Sotomayor's dissent. For Justice Sotomayor, though, there was a broader concern, which related to whether the majority's decision would now be used as the basis for limiting the due process rights of *non-LPR noncitizens* in other areas aside from habeas.[64]

B. A Circuit Split Along IAC and Due Process Lines

1. Background

In *Thuraissigiam*, the respondent was precluded from moving the federal courts to hear his habeas petition, in part, because he was deemed not to have an accompanying due process right to do so.[65] But what might this holding mean where the argument is that the noncitizen's representing lawyer provided ineffective assistance? Especially since such a claim frequently involves those who are not LPRs and is inextricably tied to the Due Process Clause, is such a petition now judicially unreviewable?

As it turns out, several federal courts of appeals had already weighed in on this matter even before *Thuraissigiam*. But before discussing these different approaches, it is helpful to set the stage for how IAC claims tend to occur within the immigration courts. The first point to remember is that immigration has long been seen as civil, not criminal.[66] Cases dating back to *Fong Yue Ting* have held that immigration sanctions, such as deportation or exclusion from the country,

64. *Id.* at 2013. Justice Sotomayor seems in almost disbelief that Justice Alito's opinion was limited to the facts of this case. ("Where [the majority's] logic must stop, however, is hard to say. Taken to its extreme, a rule conditioning due process rights on lawful entry would permit Congress to constitutionally eliminate all procedural protections for any noncitizen the Government deems unlawfully admitted and summarily deport them no matter how many decades they have lived here, how settled and integrated they are in their communities, or how many members of their family are U.S. citizens or residents.") *Id.* Justice Sotomayor does not make explicit reference, in this part of her discussion, to the 1996 immigration law, but a point about it is worth mentioning. That law reconfigured how entry into the country would be treated. Prior to 1996, those who "entered without inspection" ("EWIs"), upon arrest, were placed into deportation hearings, which had greater due process protections than inadmissibility hearings. (These were the same hearings that LPRs would be placed into if the government sought to deport them.) Such enhanced protections would include being able to: generally, have the proceeding open to the public; make habeas appeals; challenge final orders on appeal; present witnesses, evidence, and documents; and review and question the government's evidence and witnesses. After 1996, however, "the most important statutory line is now admission . . . rather than entry." *See* ALEINIKOFF ET. AL, *supra* note 42 at 535. What this means is that, today, someone who is not lawfully admitted, regardless of time spent here, upon arrest for being in the country illegally, would be placed into what is now called a "removal proceeding." The individual would be deemed "inadmissible," as if the person was arriving at the border for the first time without proper documentation. And, additionally, there would be far fewer due process protections available if the government sought to remove the person. Note, deportation hearings also now fall under the removal proceeding classification, although for those who were admitted with authorized documentation, they are afforded the protections described above for LPRs, if the government seeks to remove them. *See id.*

65. *Thuraissigiam*, 140 S. Ct. at 1983 (majority opinion).

66. *See, e.g.*, What Every Lawyer Needs to Know about Immigration Law, A.B.A. (June 2017), https://www.americanbar.org/news/abanews/publications/youraba/2017/june-2017/immigration-law-basics-every-lawyer-should-know/ [https://perma.cc/3Z7U-96JB].

are not considered criminal punishment.[67] As such, arguments that noncitizens deserve similar protections that criminal defendants receive have generally not been recognized.[68]

One especially pronounced difference between an immigration and criminal proceeding is that there is no right to a government-appointed lawyer in the former.[69] What does exist is 8 U.S.C. § 1362, which states that noncitizens "shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings."[70] In 1988, the BIA issued a landmark judgment regarding legal representation in the immigration context.

In *Matter of Lozada*, the Board held that although noncitizens were not entitled to a government-appointed lawyer, if they did hire one, then that individual was under an obligation to provide effective assistance.[71] The Board went on to state that receiving competent representation was a right embedded within the Due Process Clause.[72] Furthermore, certain substantive and procedural elements within the noncitizen's motion to reopen on IAC grounds had to be satisfied in order to prevail.[73]

Substantively, two criteria had to be met. First, the lawyer's representation had to be "deficient"[74] in nature. According to the Board, the noncitizen could meet this requirement by showing that a competent lawyer would have acted in a different manner.[75] Second, the lawyer's actions must have resulted in

67. *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893). For work that has sought to challenge this notion, see generally Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417 (2011); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346 (2014); Robert Pauw, *A New Look at Deportation as Punishment: Why At Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305 (2000).

68. *But see* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (holding that laws permitting "indefinite detention of an alien would raise a serious constitutional problem . . . [and that such] government detention . . . [is unconstitutional] unless the detention is ordered in a *criminal* proceeding with adequate procedural protections").

69. *See* Eagly & Shafer, *supra* note 41, at 1.

70. *See* 8 U.S.C. § 1362.

71. *See* Matter of Lozada, 19 I. & N. Dec. 637, 638 (BIA 1988).

72. *Id.* (citing for support: Magallanes-Damian v. INS, 783 F.2d 931 (9th Cir. 1986); Paul v. INS, 521 F.2d 194 (5th Cir. 1974); Ramirez-Durazo v. INS, 794 F.2d 491 (9th Cir. 1986); Lopez v. INS, 775 F.2d 1015 (9th Cir. 1985); Mohsseni Behbahani v. INS, 796 F.2d 249 (9th Cir. 1986); Matter of Santos, 19 I. & N. Dec. 105 (BIA 1984)).

73. *Matter of Lozada*, 19 I. & N. at 637; *see also* KRISTIN MACLEOD-BALL & BETH WERLIN, AMERICA IMMIGRATION COUNCIL, PRACTICE ADVISORY: SEEKING REMEDIES FOR INEFFECTIVE ASSISTANCE OF COUNSEL IN IMMIGRATION CASES 2 (2016) [hereinafter PRACTICE ADVISORY] (noting this "decision and its requirements have been repeatedly challenged, both by noncitizens and advocates who have contended that the requirements are applied too stringently and by the Department of Homeland Security which has argued that the relief afforded in *Matter of Lozada* is too expansive. *Lozada*, however, generally has withstood these challenges and remains binding in immigration court proceedings").

74. *See* PRACTICE ADVISORY, *supra* note 73, at 3; *see also Matter of Lozada*, 19 I. & N. at 638–40 (BIA 1988).

75. *See* PRACTICE ADVISORY, *supra* note 73, at 4–5 (giving various examples such as not informing the noncitizen about a hearing date; not submitting proper evidence; not requesting the proper type of relief; advising

prejudice to the noncitizen.[76] As the American Immigration Council has remarked: "The prejudice standards differ somewhat from circuit to circuit, but often involve consideration of whether there is a 'reasonable likelihood' or 'reasonable probability' that the result of [the] proceedings would have been different but for counsel's performance."[77]

The decision in *Lozada* came after a major Supreme Court case was decided just a few years earlier. In *Strickland v. Washington*, the Court established that legal representation had to be both deficient and prejudicial in order to make a successful IAC claim under the Sixth Amendment.[78] Michael Vastine has shown the links between *Strickland* and *Lozada's* Fifth Amendment analysis, and how the former clearly influenced the Board's ruling in the latter.[79] As Professor Vastine writes, however, *Lozada* "also went a step further . . . by creating additional procedural requirements, specific to the immigration context, for establishing an ineffective case prior to presenting the matter to the courts for review."[80]

For example, procedurally, the Board held that the noncitizen needed to file an affidavit listing the facts of the case and affirming that there was an agreement of representation between the lawyer and noncitizen.[81] Also, notice to the lawyer that a complaint was pending had to be provided, as well as an opportunity for the lawyer to respond to the charge.[82] And, the noncitizen was required to file the complaint with the relevant "disciplinary authorities."[83]

The final background point to mention is that IAC claims at the immigration court and BIA tend to arise in matters of discretionary relief, of which there are four types. (Note, a noncitizen's request for such relief often is invoked once the individual "is found to be removable."[84]) Cancellation of

to forgo an appeal without justification; not filing a timely appeal; exerting undue influence to take a deal that is not in the best interests of the noncitizen; and acting in a way that does not preserve a form of relief to the noncitizen).

76. *See Matter of Lozada*, 19 I. & N. at 638–40.

77. *See* PRACTICE ADVISORY, *supra* note 73, at 4–5 (also noting that along with "these two substantive requirements, *when* the ineffectiveness occurred and *by whom* it was committed may be relevant to whether the Board or an immigration judge (IJ) will grant a motion to reopen").

78. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984).

79. *See generally* Michael S. Vastine, *Is Your Client Prejudiced? Litigating Ineffective-Assistance-of-Counsel Claims in Immigration Matters Arising in the Eleventh Circuit*, 62 U. MIA. L. REV. 1063 (2008).

80. *Id.* at 1083. In this piece, Prof. Vastine also connects the Supreme Court's opinion in *Wiggins v. Smith* to this discussion of *Lozada. See id.* at 1072–75; *see also* Wiggins v. Smith, 539 U.S. 510 (2003). For further discussion on these points, see generally Note, *A Second Chance: The Right to Effective Assistance of Counsel in Immigration Removal Proceedings*, 120 HARV. L. REV. 1544 (2007).

81. *See* Matter of Lozada, 19 I. & N. Dec. 637, 639 (BIA 1988).

82. *Id.*

83. *Id.* (noting that if no complaint was filed, there had to be an explanation for this decision).

84. *See* U.S. DEP'T OF JUST., FORMS OF RELIEF FROM REMOVAL 1 (2004) [hereinafter FORMS OF RELIEF], https://www.justice.gov/sites/default/files/eoir/legacy/2004/08/05/ReliefFromRemoval.pdf [https://perma.cc/294T-8N6X].

removal is one important form of discretionary relief.[85] Both LPRs and non-LPRs can seek this benefit, although the requirements differ between the two.[86]

A second category is asylum, whereby if the noncitizen can demonstrate that persecution will ensue, or that there is a well-founded fear of being persecuted, if forced to return home, the individual will be allowed to remain in the U.S.[87] It is worth noting that asylum petitions frequently are accompanied by two additional claims.[88] One relates to a request for the deportation to be withheld, which is a separate statutory assertion under the Immigration and Nationality Act ("INA").[89] The other is a claim based on being allowed to remain in the country, per the provisions within the Convention against Torture ("CAT"), to which the U.S. is a signatory.[90] These latter two claims, however, are not considered discretionary forms of relief (like asylum), because if the noncitizen satisfies the criteria of withholding of deportation or the CAT, the government *must* grant the noncitizen's request to stay.

Third, there is adjustment of status, which is a form of discretionary relief that allows a noncitizen who is in the United States on a temporary basis to move into the LPR category.[91] And finally, there is voluntary departure, which permits a noncitizen to leave the country, cost-free to the government, with the possibility

85. *See* 8 U.S.C. § 1229(b).

86. I am grateful to Ingrid Eagly for raising to me whether there might be a difference in the reversal/win rates at the BIA between LPRs and non-LPRs. In re-reviewing the BIA's judgments after her inquiry, unfortunately I discovered that they often do not say what the immigration status of the noncitizen is. While I suspect the vast majority are indeed non-LPRs, based on my assumption that the BIA would normally go out of its way to recognize if one was an LPR, the lack of precision in the opinions prevented me from making such a firm conclusion. Typically, the opinions will open up with this type of language: "The respondent, a native and citizen of [insert country] . . . ." In terms of requirements for being awarded cancellation of removal, for LPRs, the noncitizen must have been an LPR for five years and resided continuously in the country for seven years and must not have "been convicted of an aggravated felony." For non-LPRs, the noncitizen must have resided continuously for ten years, been deemed to have "good moral character," not been convicted of a removable crime, and show "that removal would result in exceptional and extremely unusual hardship" to a spouse, children, or parents. *See id.*

87. Note, a person outside of the U.S. can look to qualify as a refugee through the U.N. High Commissioner for Refugees and must satisfy, under U.S. law, 8 U.S.C. § 1101(a). If the individual arrives at the border or is already inside the country and has been, or has a well-founded fear of being, persecuted on the basis "of race, religion, nationality, membership in a particular social group, or political opinion," then they can apply for asylum directly under 8 U.S.C. § 1158. Two related, landmark studies on asylum provide some of the best analysis of this subject to-date. *See generally* Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007); JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM (2009).

88. Once again, I am grateful to Ingrid Eagly for noting this point to me. *See* Ingrid Eagly, Steven Shafer, and Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CAL. L. REV. 785, 865–66 (2018). For a key treatise in this area, see generally DEBORAH ANKER, LAW OF ASYLUM IN THE UNITED STATES (2016). *See also* Ramji-Nogales, Schoenholtz & Schrag, *supra* note 87, at 308–09; RAMJI-NOGALES, SCHOENHOLTZ & SCHRAG, *supra* note 87, at 13–14.

89. *See* 8 U.S.C. 1231(b)(3)(A) (noting that "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion").

90. *See Convention Against Torture and Other Cruel. Inhuman Or Degrading Treatment or Punishment*, art. 3, Apr. 18, 1988, S. Treaty Doc. No. 100–20, p. 20, 1465 U. N. T. S. 114.

91. *See* 8 U.S.C. § 1255(a).

of returning in the future.[92] Over the years, there has been some question as to whether voluntary departure should be considered together with the other three types of removal.[93] Since the BIA, federal courts, and the INA, however, treat it as a form of discretionary relief, it is included as one of the four types in this study.

IAC can become an issue in the discretionary relief context where, after the noncitizen loses on one or more of these substantive grounds, a complaint is filed charging that the lawyer acted in an ineffective manner. Depending on the circuit, that complaint "can be raised on direct appeal to the Board,"[94] or it must be presented as a motion to reopen to the immigration judge first.[95] (Generally, a new lawyer is retained to argue the IAC claim.[96]) From there, the question is: once the BIA makes a ruling on this complaint, should that decision be reviewable by the federal courts? It is here where the circuits are split.

2. Why the Federal Courts Should Not Be Involved: The Argument

Over the years, the various federal appellate courts have heard a range of matters relating to IAC.[97] On the specific issue of whether a charge of ineffective

92. *Id.*; *see* 8 U.S.C. § 1229(c). As the Justice Department has stated for noncitizens considering whether to take voluntary departure: "If this is your first removal: [the time bar to return is] 5 years. If after April 1, 1997, you have been in the U.S. unlawfully for 1 year or more prior to the time you are removed: [the time bar to return is] 10 years. (Note for this bar, in order to come back before the 10 years, you need to apply for a "hardship waiver" rather than advanced consent. . . .) If you have been removed in the past: [the time bar to return is] 20 years. If you have been convicted of an aggravated felony: [the time bar is] forever." FLORENCE IMMIGRANT & REFUGEE RTS. PROJECT, INC., HOW TO APPLY FOR VOLUNTARY DEPARTURE 4–5 (2011), https://www.justice.gov/sites/default/files/eoir/legacy/2013/01/22/Voluntary%20Departure%20-%20English%20%2813%29.pdf [https://perma.cc/8KE2-9DEZ].

93. My thanks again to Ingrid Eagly on this point. In one of its publications, the EOIR "classifies it [voluntary departure] as a separate outcome for statistical purposes and does not count it as either relief or an order of removal." U.S. DEP'T OF JUST.: EXEC. OFF. OF IMMIGR. REV., STATISTICS YEARBOOK, 4 n.2 (FY 2018), [hereinafter STATISTICS YEARBOOK], https://www.justice.gov/eoir/file/1198896/download [https://perma.cc/JQ85-ZAH2]. The EOIR in a different publication, dating back to 2004, however, officially lists voluntary departure as its first form of discretionary relief, stating that it "is the most common form." FORMS OF RELIEF, *supra* note 84. Moreover, as stated, the federal courts, the BIA, and the INA see it as a form of relief as well.

94. *See* PRACTICE ADVISORY, *supra* note 73, at 1 n.3 (noting that the Second and Ninth Circuits allow for direct appeal).

95. *Id.*

96. For an important finding on this point more generally, see Hausman, *supra* note 32, at 1180. Hausman argues "that immigrants without lawyers almost never appeal." *Id.* Also note that the IAC-claims of focus for this study revolve around discretionary relief claims, because that is the issue upon which the circuits are split. It is certainly true that IAC may occur in the immigration context in other types of situations, but because that is not where the debate lies between the federal courts of appeals, those cases were not part of the study.

97. *See, e.g.*, Saakian v. INS, 252 F.3d 21, 24 (1st Cir. 2001) (holding that a lawyer's advice to a noncitizen about not needing to appear at an immigration hearing, which then led to a deportation order *in abstentia*, constituted IAC); *c.f.* Anin v. INS, 188 F.3d 1273, 1277 (11th Cir. 1999) (ruling that a lawyer who fails to notify a client about needing to appear at an immigration hearing that then results in a deportation order *in abstentia* will not be deemed ineffective, if it was a staff member of the lawyer's office who was responsible for the lack of notification to the noncitizen). Two BIA cases decided before these decisions served as a crucial backdrop. In *Matter of Grijalva*, 21 I. & N. Dec. 472, 474 (BIA 1996), the Board held that missing an immigration hearing

lawyering during a discretionary relief petition is reviewable by the federal courts, the Eighth and Eleventh Circuits have been the most pronounced in saying no. Dating back to 1999, the Eleventh Circuit held in *Mejia-Rodriguez v. Reno* that because a noncitizen's "actual chances of receiving such discretionary relief are too speculative, and too far beyond the capability of judicial review,"[98] the court simply was not in a position to question the BIA's conclusion.

In this case, Mejia-Rodriguez had been convicted of drug possession and conspiracy.[99] He entered a plea of no contest in a Florida state court, served his sentence, and then was brought in front of an immigration court as the government sought to deport him.[100] Before the immigration judge, Mejia-Rodriguez argued that his criminal lawyer did not advise him of the adverse immigration consequences of taking a no contest plea.[101] He lost and was ordered removed.[102]

Mejia-Rodriguez subsequently filed a motion to reopen based on ineffective assistance he said he received during the immigration hearing.[103] His contention was that his lawyers took a "frivolous legal position,"[104] by arguing to the immigration court that it had no basis to deport him.[105] Rather, according to Mejia-Rodriguez, his lawyers should have asked the immigration court for mercy—namely, for discretionary relief in the form of cancelling his removal.[106] The immigration judge, however, found no merit in this IAC petition.[107] Thereafter, the BIA affirmed, and as stated above, the Eleventh Circuit refused to intervene.[108] Judicial review by the federal courts was inappropriate, the Eleventh Circuit held, because being denied "a purely discretionary 'act of grace'"[109] was not a violation of the Fifth Amendment.

In 2003, the Eighth Circuit used the same rationale to deny a noncitizen his IAC petition.[110] There, the argument was that during the deportation hearing, the lawyer failed to raise the possibility that the noncitizen might qualify for adjustment of status, and instead only pursued voluntary departure.[111] Because the Eighth Circuit also adhered to the rationale that this relief was discretionary,

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that results in a deportation order *in abstentia*, because of IAC, can be the basis of a motion to reopen if filed within the 180-day guidelines. (*Grijalva* did not involve a discretionary relief claim.) But where the motion is filed beyond this time period, there would be no exception made, even where there is IAC. *See* Matter of A-A-, 22 I. & N. Dec. 140, 143–44 (BIA 1998).

98. *See* Mejia-Rodriguez v. Reno, 178 F.3d 1139, 1148 (11th Cir. 1999).

99. *Id.* at 1141.

100. *Id.*

101. *Id.* (The Supreme Court's 2010 case of *Padilla v. Kentucky* will be discussed shortly).

102. *Id.*

103. *Id.* at 1143.

104. *Id.* at 1145.

105. *Id.* (pleading no contest in a criminal case to drug possession does not make a noncitizen immune from deportation).

106. *Id.*

107. *Id.* at 1143.

108. *Id.* at 1149.

109. *Id.* at 1148. Note, in the case, the court refers to this form of discretionary relief as "suspension of deportation." The framing of this category today is recast as "cancellation of removal."

110. *See* Nativi-Gomez v. Ashcroft, 344 F.3d 805, 808–09 (8th Cir. 2003).

111. *Id.* at 807.

the noncitizen was found to have had no due process interest that needed to be protected.[112] And the Fifth and Sixth Circuits have similarly arrived at the same conclusion in parallel cases before their respective courts.[113]

These rulings were made with the Supreme Court's 1991 decision in *Coleman v. Thompson* serving as the backdrop.[114] The question in that case involved whether an individual convicted of a felony could argue ineffective assistance of counsel on appeal after his request for habeas relief was denied by a lower level state court.[115] The Supreme Court held that because there was no constitutional right to counsel in habeas proceedings, there then could not be a claim specifically for IAC.[116] While *Coleman* dealt with whether such a Sixth Amendment right exists in a criminal law case,[117] its influence was noticeable on how the Fifth, Sixth, Eighth, and Eleventh Circuits analyzed IAC in the due process/immigration context.

The other key Supreme Court decision highlighting the nexus between IAC, criminal law, and the rights of noncitizens was *Padilla v. Kentucky*.[118] In that case, the Court held that a lawyer must inform a noncitizen of potentially adverse immigration consequences that might result from pleading guilty to a crime.[119] Failure to do so amounted to IAC and a violation of the Sixth Amendment.[120]

For the federal appeals courts discussed above, their decisions were made prior to *Padilla*. But even if *Padilla* had been available precedent, these courts likely would have found their rulings more akin to *Coleman*. What *Padilla* did,

112. *Id.* at 808–09 (citing the Supreme Court's criminal law decision, Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981), as part of its justification). For a decision that reaffirmed this holding, see Guerra-Soto v. Ashcroft, 397 F.3d 637, 640–41 (8th Cir. 2005). Beyond just matters relating to IAC, the Eighth Circuit, five years later, in 2008, broadened this point further by noting that when the BIA refuses to grant a discretionary form of relief, that is not a basis under which a noncitizen can appeal. *See* Pinos-Gonzalez v. Mukasey, 519 F.3d 436, 441 (8th Cir. 2008). For a similar type of ruling from the Eleventh Circuit, see Scheerer v. U.S. Att'y Gen., 513 F.3d 1244, 1253 (11th Cir. 2008).

113. *See, e.g.*, Assaad v. Ashcroft, 378 F.3d 471, 474–75 (5th Cir. 2004); Huicochea-Gomez v. INS, 237 F.3d 696, 700 (6th Cir. 2001). Also, see one case from the Seventh Circuit, Dave v. Ashcroft, 363 F.3d 649 (7th Cir. 2004). As the next Part discusses, however, this Seventh Circuit case appears as an anomaly, because there are other decisions from this court that point in the opposite direction.

114. *See* Coleman v. Thompson, 501 U.S. 722, 722 (1991).

115. *Id.* at 722, 725 (the state lower court noted that the lawyer filed the motion in an untimely manner—thirty-three days instead of within thirty days—and thus denied the motion).

116. *Id.* For a discussion of this point, see ALEINIKOFF ET. AL, *supra* note 42, at 940–42 (highlighting how the Board in *Matter of Assaad* held that the Supreme Court's judgment did "not apply in removal proceedings and conflicts with *Lozada*. The BIA distinguished the Fifth Amendment due process underpinnings of ineffective assistance of counsel claims in removal proceedings"). *Id.* at 941. The authors then proceed to discuss how there was wrestling between the Bush Administration's DOJ and the Obama Administration's DOJ in how to apply *Coleman* to noncitizens. Initially, *Matter of Assaad* and *Matter of Lozada* were overruled by Bush AG Michael Mukasey (in *Matter of Compean*), but then Obama AG, Eric Holder, reinstated both *Matter of Assaad* and *Matter of Lozada*, which is currently the situation as of this writing. *See id*.

117. *Id.*

118. *See* 559 U.S. 356, 356 (2010). For two thoughtful discussions of this case, see generally Ingrid V. Eagly, *Gideon's Migration*, 122 YALE L.J. 2282 (2013); Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394 (2013).

119. *See* sources cited *supra* note 118.

120. *See* sources cited *supra* note 118.

however, was affirmatively acknowledge that a removal order in an immigration proceeding is "particularly severe."[121] This recognition was significant. Indeed, perhaps being so influenced, certain later courts (namely, the Third Circuit, discussed below) have taken an alternative and, in fact, more coherent approach about the role the federal judiciary should play when reviewing IAC/discretionary relief claims.

III. THE RIGHT AND OBLIGATION TO REVIEW

A. Circuit Courts in Favor

Even earlier than the 1999 *Mejia-Rodriguez* decision, which found against the noncitizen who claimed IAC, a 1994 case from the Second Circuit came out the other way. In *Rabiu v. INS*, the court heard an appeal from a Nigerian citizen who had sought a "waiver of deportation."[122] The noncitizen had been ordered removed following a narcotics conviction, but his waiver request had been denied by an immigration judge.[123] On appeal to the BIA, the noncitizen claimed IAC, arguing that the lawyer had "failed to file the relief papers and did not inform Rabiu that he did not intend to"[124] do so. The BIA affirmed the lower court order.[125]

On appeal, the Second Circuit reversed.[126] It held that even though the petition was for discretionary relief, fundamental fairness required that Rabiu receive competent legal representation under the Due Process Clause.[127] Moreover, the court stated that only Article III courts have the power to hear constitutional questions, and then explicitly said that "the BIA does not have jurisdiction to adjudicate the issue of ineffective assistance of counsel."[128]

In 2008, the Second Circuit reaffirmed this principle in *Omar v. Mukasey*.[129] Other federal appeals courts have also adhered to this same reasoning. For example, in *Hernandez v. Reno*,[130] the First Circuit ruled that even where there does not appear to be a "due process violation in [the noncitizen's] original proceedings,"[131] it still retained jurisdiction—and could vacate a

121. *See* 559 U.S. 356, 365–66 (2010) (also noting that, as such, a *Strickland* analysis is required in situations where criminal law and immigration law intersect).

122. This claim was filed at the time under INA 212(c). *See* Rabiu v. INS, 41 F.3d 879, 881 (2d Cir. 1994).

123. *Id.* at 880.

124. *Id.* at 881.

125. *Id.*

126. *Id.*

127. *Id.* at 882.

128. *Id.* (citing and distinguishing Arango-Aradondo v. INS, 13 F.3d 610 (2d Cir. 1994), which held that although jurisdiction on such issues rests with Article III courts, "for prudential reasons the ineffectiveness claim should be heard in the first instance by the BIA").

129. 517 F.3d 647, 650 (2d Cir. 2008) (holding that even though this was an IAC/cancellation of removal case, which it had the power to review, there was ultimately no ineffective assistance by the representative of the noncitizen, who happened not to be a lawyer but instead was a "non-attorney immigration consultant").

130. *See* Hernandez v. Reno, 238 F.3d 50, 55–56 (1st Cir. 2001).

131. *Id.* at 57.

deportation order—on IAC grounds, where it was found that the lawyer did not exhaust all reasonable remedies during the merits phase of the case.[132]

Additionally, the Seventh Circuit has ruled that a lawyer's concession that adversely affects the noncitizen's immigration status, made in front of an immigration judge, without prior consultation with the client, amounts to ineffective assistance.[133] In that case, the noncitizen had been ordered removed based on a criminal sexual abuse conviction. The state court judge, however, recommended that he not be deported, which under then existing law prevented DHS "from using a conviction as a basis for removing"[134] the individual. This judicial recommendation, though, came "outside the 30–day post-sentencing window specified in the . . . statute[,]"[135] which the lawyer, during the immigration phase, bizarrely conceded rendered the noncitizen removable.[136] The Seventh Circuit held that this concession was improper and prejudicial, because the lawyer had not discussed this issue with the client either before or after the proceeding.[137] As such, the case was remanded.[138]

And the Ninth Circuit has repeatedly handed down opinions in IAC/discretionary relief cases. The court has not hesitated to boldly reaffirm its power to review, even in situations where it has ultimately ruled against the noncitizen.[139] To be sure, the Ninth Circuit has found that a "'heavier burden of proof' [exists] in establishing ineffective assistance of counsel under the Fifth Amendment than under the Sixth Amendment."[140] Nevertheless, the court continues to see *Strickland* as the guiding principle to follow in immigration cases involving IAC—regardless of whether or not the relief sought is discretionary.[141]

132. *Id.* at 54. In this case, the noncitizen's lawyer opted not to pursue an appeal of a deportation order (from a drug conviction) to the federal appellate court because he thought it was "hopeless and that it was more useful for Hernandez to defer any clear-cut affirmance and in the meantime accumulate 'equities.'" *Id.* at 53. Even though the First Circuit agreed that this was most likely a correct calculation, the failure of the lawyer to exhaust all remedies, especially when it was "doubtful that Hernandez would endorse this" approach, rendered the assistance by the lawyer to be ineffective. *Id.*

133. *See* Solis-Chavez v. Holder, 662 F.3d 462, 463–64 (7th Cir. 2011).

134. *Id.*

135. *Id.* (citing the statute known as "JRAD"–judicial recommendation against deportation).

136. *Id.* at 465.

137. *Id.* at 467, 469 (noting that while the precise date of when the JRAD was issued was outside the thirty day window, due to the "oversight of a busy state trial judge, . . . the statute is silent on whether the expiration of that time limit eliminates the court's authority to enter a JRAD").

138. *Id.* at 464; *see also* Zambrano-Reyes v. Holder, 725 F.3d 744, 751 (7th Cir. 2013) (affirming the notion that if IAC is raised as a constitutional matter that the federal courts have jurisdiction). Here, the court found while it could indeed hear the matter, the noncitizen did not have a valid claim and thus rejected his IAC petition.

139. *See, e.g.*, Fernandez v. Gonzales, 439 F.3d 592, 602 (9th Cir. 2006) (holding that "in motion to reopen cases in which an independent claim such as ineffective assistance of counsel is at issue, we have jurisdiction to determine whether a petitioner was prejudiced" before ultimately denying the petition); *see also* Guan v. Barr, 925 F.3d 1022, 1033 (9th Cir. 2019).

140. *See* Torres-Chavez v. Holder, 567 F.3d 1096, 1100 (9th Cir. 2009) (quoting Magallanes-Damian v. INS, 783 F.2d 931, 933 (9th Cir. 1986)).

141. *See, e.g.*, Mohammed v. Gonzales, 400 F.3d 785, 793 (9th Cir. 2005); Iturribarria v. INS, 321 F.3d 889, 899–900 (9th Cir. 2003); Salazar-Gonzalez v. Lynch, 798 F.3d 917, 921 (9th Cir. 2015); United States v. Lopez-Chavez, 757 F.3d 1033, 1042 (9th Cir. 2014); Blanco v. Mukasey, 518 F.3d 714, 722 (9th Cir. 2008);

Then, in 2020, the Third Circuit issued one of the most exhaustive opinions on this subject to-date. That judgment is discussed next.

B. The Calderon-Rosas *Decision*

Sergio Calderon-Rosas and his wife were undocumented immigrants who had been living in Pennsylvania since 2001.[142] Their three children were U.S. citizens, and by all accounts, they were a quiet, law-abiding family who were well-liked within the community.[143] In 2018, Calderon-Rosas was arrested for driving under the influence. The charges were thereafter dropped, but the government still sought to deport him.[144] Unfortunately, the lawyer Calderon-Rosas hired "was ill suited to the task: He would soon be disbarred for 'multiple violations of the Rules of Professional Conduct in seven separate client matters' amounting to a 'troubling pattern of neglect.'"[145]

In Calderon-Rosas's case, the lawyer did not produce relevant evidence at the immigration hearing, did not communicate with his client, and showed a complete lack of interest in the seriousness of the situation at hand.[146] Not surprisingly, the two forms of discretionary relief that Calderon-Rosas sought—asylum and cancellation of removal—were denied by the immigration judge.[147]

On appeal to the BIA, Calderon-Rosas, now with a new lawyer, asked to have his case remanded on IAC and general due process grounds.[148] Finding that he was not ultimately prejudiced by his lawyer's conduct, however, the BIA rejected the request and ordered Calderon-Rosas removed.[149]

At the Third Circuit, there were two questions that confronted the court. First, did it have jurisdiction to hear the case? And second, could Calderon-Rosas assert IAC and a due process violation, given that the relief he was seeking was discretionary?[150] Regarding the first, under 8 U.S.C. § 1252(a), the court found that it clearly had jurisdictional authority.[151] It cited subsection (2)(D), which states that "constitutional claims or questions of law raised upon a petition for

Hernandez v. Mukasey, 524 F.3d 1014, 1017 (9th Cir. 2008); Santiago-Rodriguez v. Holder, 657 F.3d 820, 835–36 (9th Cir. 2011); Nehad v. Mukasey, 535 F.3d 962, 972 (9th Cir. 2008); Correa-Rivera v. Holder, 706 F.3d 1128, 1130–34 (9th Cir. 2013); Morales Apolinar v. Mukasey, 514 F.3d 893, 895–97 (9th Cir. 2008).

142. *See* Calderon-Rosas v. Att'y Gen., 957 F.3d 378, 381–82 (3d Cir. 2020)

143. *Id.*

144. *Id.* at 382.

145. *Id.* (quoting from Off. of Disciplinary Couns. v. Grannan, No. 197 DB 2016, slip op. at 83 (Pa. Sup. Ct. Disciplinary Bd. Apr. 3, 2019)).

146. *Id.*

147. *Id.* at 382–83 (noting that the asylum application was deemed "abandoned" because the lawyer failed to follow through with the application requirements, and the cancellation of removal petition was rejected because, even though Calderon-Rosas had children with health conditions who would suffer greatly if the father was deported, the lawyer never brought evidence to the immigration judge to show that this would be the case).

148. *Id.* at 383.

149. *Id.*

150. *Id.* at 383–84.

151. *Id.*

review [and] filed with an appropriate court of appeals"[152] gives that court the power to adjudicate.

On the second question, the court drew a set of logical connections to make its point. While it was true that Congress provided the DOJ with discretion to offer four types of relief from removal, it did not do so without any constitutional "parameters."[153] Even in discretionary relief hearings, due process has long been required.[154] And since IAC is rooted in the Constitution's Due Process Clause, the court concluded that it could review this claim as well.[155]

Substantively, the court then went further. In this case, Calderon-Rosas had applied for cancellation of removal. Yet, his lawyer failed to submit crucial documentation pertaining to the extreme hardship deportation would have on Calderon-Rosas's children who were in poor health.[156] Had the representation not been deficient in this regard, the court held that Calderon-Rosas would not have been prejudiced at the BIA, which had ruled against him.[157] Therefore, the court found that he was "entitled to a new hearing on his cancellation application."[158]

In sum, the Third Circuit decided to anchor its opinion in statutory text *and* procedural and substantive due process. Indeed, had it not been for the court's intervention, Calderon-Rosas would have been deported, without any chance of showing how truly ineffective his lawyer was.[159]

152. *See* 8 U.S.C. § 1252(a)(2)(D); *see also Calderon-Rosas*, 957 F.3d at 383 (noting that the Third Circuit will "review [the district court's] legal rulings de novo and [the BIA's] factual findings for substantial evidence").

153. *Calderon-Rosas*, 957 F.3d at 384 (citing Marincas v. Lewis, 92 F.3d 195, 203 (3d Cir. 1996) to note that it "long ago recognized that due process claims can be asserted by petitioners seeking discretionary relief because "Congress instructed the Attorney General to establish an asylum procedure," and "[w]hen Congress directs an agency to establish a procedure . . . it can be assumed that Congress intends that procedure to be a fair one").

154. *Id.* at 385 (although noting that the extent to which it applies certainly varies. *See, e.g.*, Reno v. Flores, 507 U.S. 292, 306 (1993); Zadvydas v. Davis, 533 U.S. 678, 693 (2001); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953); Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950)).

155. *Calderon-Rosas*, 957 F.3d at 384–86.

156. *Id.* at 382–83.

157. *Id.* at 383.

158. *Id.* at 388–89. It is important to note that Calderon-Rosas also brought an asylum claim to the Third Circuit. The court declined to grant this petition, however, noting that while the lawyer's actions were deficient in filing the application, it saw no evidence of prejudice. And it reviewed two other IAC/procedural due process appeals from Calderon-Rosas. These involved allegations that the lawyer failed to advise him on how to submit tax returns properly, which were then messily submitted to the immigration judge, and that he did not provide an interpreter for his client's hearing. Once again, the court found no prejudice or any due process violation. *See id.* at 389.

159. Although slightly tangential, but not completely so, see generally the work on legal malpractice by HERBERT M. KRITZER & NEIL VIDMAR, WHEN LAWYERS SCREW UP (2018). As they discuss, legal malpractice is distinct from IAC, of course, as it is a civil claim that can result in monetary damages in favor of the wronged client. Kritzer and Vidmar, however, argue that clients often do not bring malpractice claims against lawyers because lawyers do not have means to pay out (*e.g.*, they lack insurance, in particular), and it is difficult to find other lawyers to take on these cases on behalf of aggrieved clients. Kritzer and Vidmar have interesting data specifically on immigration malpractice cases, *id.* at 103, 133–34, but their general conclusions are that unless systemic change is made in how the legal profession operates, mistreated clients will likely not see any difference in terms of lawyer-accountability. Kritzer and Vidmar do suggest possible proposals for state bar associations to consider, including: mandating insurance for lawyers, mandating disclosure of complaints lawyers receive,

The question that is begged, however, is whether the ruling Calderon-Rosas received *at the BIA level* is typical or anomalous. Otherwise put, how do noncitizens who file IAC claims in discretionary relief cases generally do in front of the Board? Particularly in those circuits that do not permit noncitizens to bring appeals to an Article III court, frequent BIA-denials could have life-altering consequences.[160] The next Part empirically assesses this issue, with the findings pointing to why the approach taken by the First, Second, Seventh, Ninth, and, most recently, Third Circuit is one that all federal appeals courts should follow.[161]

IV. IAC CASES AT THE BIA: DATA COLLECTION & METHODS: INITIAL RESULTS

In order to assess how claimants have fared at the BIA on IAC/discretionary relief claims, the process involved several steps set forth in the Appendix. In short, it was first important to determine the sheer volume of cases that have regularly appeared in front of the BIA. A 2010 study notes that since the immigration system was overhauled in 2002, the Board, for the next eight years (until 2010), on average, "resolved between 30,751 and 46,046 appeals per year."[162] The latest data from the DOJ tracks the number of cases completed (*i.e.*, resolved), starting in fiscal year ("FY") 2014, and going through fiscal year 2018. Figure 1 below shows the results.

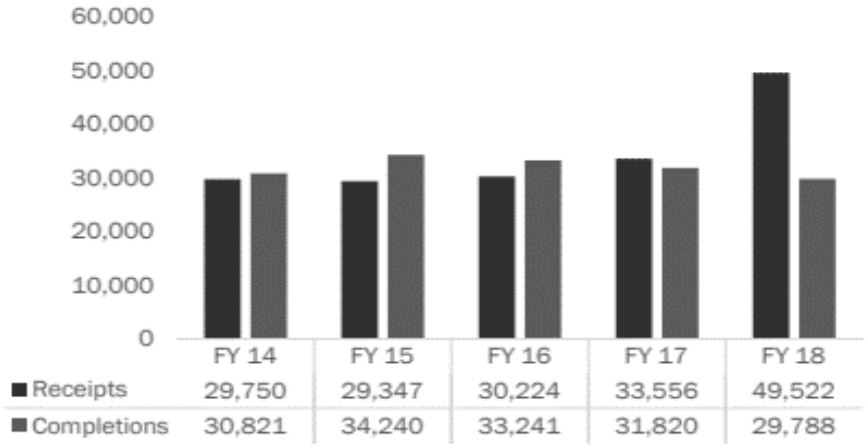
lengthening the statute of limitations to make a malpractice claim, reimagining how we think about the legal concept of "causation" of harm to the client, and establishing alternative forums to adjudicate malpractice claims that are faster, cheaper, and do not require the aggrieved client to have a lawyer to file the motion.

160. A reasonable question to ask at this point is what the success rate is for noncitizens who seek a review at the federal circuit court level (in those jurisdictions that allow for appeals). This point is addressed in the concluding Part of this Article.

161. There is an additional point that is worth mentioning, although it may be seen as somewhat tangential. In *Reyes Mata v. Lynch*, 135 S. Ct. 2150 (2015), a noncitizen appealed a removal order issued by an immigration judge. The Board dismissed the matter for failing to comply with a requirement that a legal brief be submitted with the petition. The noncitizen obtained new counsel, argued that the previous lawyer was ineffective, and filed a motion to reopen, acknowledging that, although the deadline had passed, exceptional circumstances (*i.e.*, IAC) were present, thus permitting the BIA to make an exception to the deadline, if it so wished. The BIA denied this request, saying that while it had the power to grant the exception, the noncitizen did not suffer prejudice from IAC and would have been deported anyway. Moreover, it refused to open the matter *sua sponte*, even though it had authority to do so under a DOJ regulation (C.F.R. 1003.2(a)). Subsequently, the Fifth Circuit said it had no authority to review the matter; however, the Supreme Court, in an 8-1 decision, disagreed. Citing *Kucana v. Holder*, 558 U.S. 233 (2010), the Court held that circuit courts have jurisdiction to decide whether the deadline should be equitably tolled and whether BIA-*sua sponte* judgments can stand. In fact, even presupposing the lack of jurisdiction on the latter, which several circuit courts had followed, this did not mean the same outcome should occur regarding the former. The Third Circuit, however, in *Calderon-Rosas*, did not cite *Reyes Mata*. Perhaps the reason is because the issue resulting in the circuit split here has turned on what the circuit courts should do regarding an IAC-discretionary/due process-constitutional issue, rather than what was seen in *Reyes Mata*. Nevertheless, if the Supreme Court takes up this current circuit split, it may look to *Reyes Mata* for guidance.

162. *See* Laura S. Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration of Appeals Decisions*, 85 N.Y.U. L. REV. 1766, 1767 n.7 (2010).

FIGURE 1: TOTAL BIA CASES RECEIVED AND COMPLETED[163]



As can be seen, within this timespan, 2018 had the fewest number of cases resolved (29,788) while 2015 had the most (34,240).[164]

Figure 2 next shows the DOJ's latest statistics that run from FY 2008 through FY 2020, and which just focus on "[a]ppeals from completed removal, deportation, exclusion, asylum-only, and withholding proceedings."[165]

163. Figure 1 is extracted from the U.S. Department of Justice. STATISTICS YEARBOOK, *supra* note 93, at 35. Also, for complementary data, see Hausman's important research. Hausman, *supra* note 32, at 1189–96. His dataset includes cases from a time period spanning "between the early 1990s and February 28, 2014[,]" *id.* at 1189, although for methodological purposes, he restricts the "database to cases in which the Notice to Appear was issued between January 1, 1998, and August 31, 2004." *Id.* As he reports, "[t]he government filed 4941 appeals during this period and won 1922 of them (38.9%); immigrants, by contrast, filed 80,225 appeals and won 5,863 of them (7.3%)." *Id.* at 1196 n.67.

164. *See supra* Figure 1.

165. U.S. DEP'T OF JUST. EXEC. OFF. FOR IMMIGR. REV. ADJUDICATION STAT.: CASE APPEALS FILED, COMPLETED, AND PENDING 1 (2021), https://www.justice.gov/eoir/page/file/1248501/download [https://perma.cc/H5SR-HSWP].

FIGURE 2: EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ADJUDICATION STATISTICS: CASE APPEALS FILED, COMPLETED, AND PENDING[166]
(DATA THROUGH 10/13/2020)

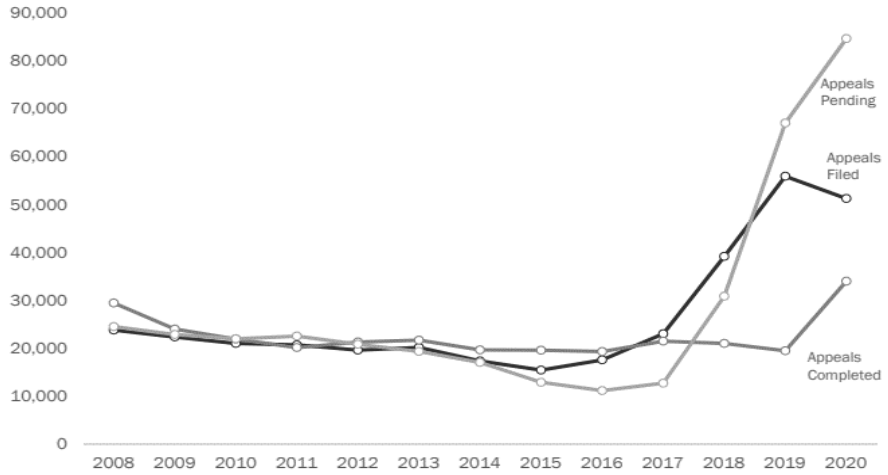


TABLE 1

Fiscal Year	Case Appeals Filed	Case Appeals Completed	Case Appeals Pending (End of FY)
2008	23,784	29,433	24,494
2009	22,338	23,977	22,855
2010	20,986	21,899	21,942
2011	20,688	20,121	22,509
2012	19,586	21,278	20,817
2013	20,160	21,666	19,311
2014	17,329	19,627	17,013
2015	15,423	19,569	12,867
2016	17,547	19,286	11,128
2017	23,007	21,454	12,681
2018	39,153	20,987	30,847
2019	55,907	19,448	67,014
2020	51,250	33,975	84,673

The data here reveal a few interesting trends. First, for this particular subset of appeals, the year 2020 saw the largest number completed, by over 13,000, from 2019.[167] Second, the number of cases pending increased by close to 17,000 between 2019 and 2020.[168] Indeed, the graph shows a steep upward slope in this

166. *Id.* I am grateful to Ingrid Eagly for her insights on how best to think about BIA case-completion and case-pending rates.

167. *See supra* Table 1 and Figure 2.

168. *See supra* Table 1 and Figure 2.

regard starting in 2018.[169] And beginning in 2018, there was a noticeable increase in appeals filed with the BIA.[170] (Figure 2's statistics cover until October 13, 2020. Once the data are compiled through the end of December 2020, the final tally will almost surely exceed the 55,907 sum from 2019, given that, on average, more than 5,000 appeals have been filed per month in 2020.)

Without more information, it is hard to know for sure what explains the increase in "appeals filed" in Figure 2. One theory is that while 2017 was the first year of the Trump presidency, it was 2018 when the Administration's stricter immigration policies really took effect.[171] If, starting that year, we assume there were more removal and exclusion orders issued against noncitizens by the immigration courts, this might then account for the increase in appeals to the BIA. This uptick would likely also explain the growth in the number of pending cases. To be sure, this theory would need to be confirmed by further information that is currently not publicly available, but on its face, it certainly seems to be a plausible explanation.

A. Where the BIA's Cases Are Stored

There are three main databases where the BIA's cases can be located: the Board's own website, Lexis, and Westlaw. Within all three of these repositories, just a percentage of the BIA's cases appear. (The DOJ makes the decision of which cases go into which database.) For instance, using 2002 as a starting point—the year when the BIA's adjudication process was revamped—and going until the end of 2020, 543 cases were published on the agency's website.[172] On Lexis, from the beginning of 2002 through 2020, there were 97,805 cases available.[173] On Westlaw, the number was 9,290.[174]

During almost the same period—2002 through 2018 (the last year that the DOJ has complete statistics)—the total number of cases that the BIA resolved

169. *See supra* Figure 2.

170. *See supra* Table 1 and Figure 2.

171. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (involving a 5-4 decision that upheld the President's ban on immigration from certain, predominantly Muslim countries).

172. *See Agency Decisions*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/ag-bia-decisions (last visited Mar. 3, 2022) [https://perma.cc/G4T4-4T4B] (calculating the first case in January of 2002 that begins with #3461 and going through case #4003, December 17, 2020). The sum is 543. In fact, between June 1958 (when the site first compiles cases) and December 17, 2020, just 3,065 decisions were published. *See id.* This number was derived from the first case that was listed, which was labeled as case 939 and going through the last case that was listed, which was 4,003. After checking each case to ensure that the numbers continued consecutively, the sum, again, was 3,065.

173. The way the search on Lexis was conducted was by doing a date restriction between January 1, 2002, and December 31, 2020. Then, the following search terms were included: Board and not administrative appeals office or administrative appeals unit. For a further explanation of why this phrasing of the search had to be done this way, see the Appendix.

174. Here, because the Westlaw database only included BIA cases and not ones from the AAO, (see the Appendix), the search term that was used was simply the word "Board," in order to make the search as expansive as possible. The same date restrictions used in the Lexis search were used here as well.

was 658,105, or an average of 38,712 cases per year.[175] If we assume this latter number is approximately how many cases were decided in 2019 and 2020, respectively, the overall sum resolved by the BIA is increased to 735,529. This would mean that Lexis contains 13.3% of the total amount while Westlaw has 1.3% of the total.[176]

From there, a series of steps were taken to compile, in particular, a comprehensive list of IAC/discretionary relief cases from Lexis and Westlaw going back to the 1988 *Lozada* decision.[177] In Lexis, there were 1,287 cases, and Westlaw had 979 cases. (As of this writing, the BIA's website contained only seven such cases since 1988. Since these cases were in both Lexis and Westlaw, it was not necessary to rely on this BIA site for this study.[178])

The author and his faculty administrative assistant then each compared the Lexis list with the one from Westlaw to see where there was overlap and where each database had its own unique set of cases. Figure 3 highlights this finding.

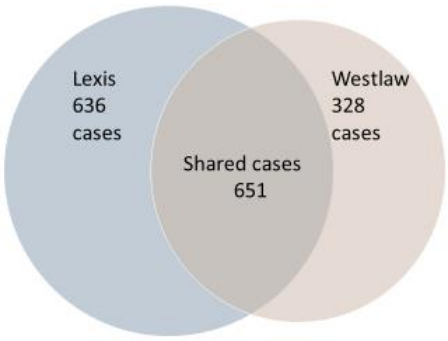
175. The data relied on for cases resolved by the BIA for years 2002 through 2005 can be found at S2 here: FY 2005 STATISTICAL YEAR BOOK, U.S. DEP'T OF JUST. (Feb. 21, 2006), https://www.justice.gov/sites/default/files/eoir/legacy/2008/04/18/fy05syb.pdf [https://perma.cc/D2WQ-CPAV]. The data relied on for cases resolved by the BIA for years 2006 through 2008 can be found at S2 here: FY STATISTICAL YEAR BOOK, U.S. DEP'T OF JUST. (Mar. 2009), https://www.justice.gov/sites/default/files/eoir/legacy/2009/03/27/fy08syb.pdf [https://perma.cc/SCX9-GYNQ]. The data relied on for cases resolved by the BIA for years 2009 through 2013 can be found at Q1 here: FY STATISTICS YEARBOOK, U.S. DEP'T OF JUST. (Apr. 2014), https://www.justice.gov/sites/default/files/eoir/legacy/2014/04/16/fy13syb.pdf [https://perma.cc/D27A-D9Z3]. And the data relied on for cases by the BIA for years 2014 through 2018 draws upon the numbers listed above in Figure 1 in the text. Note, there are some discrepancies in the data provided by the BIA in the first two links in this note, as they relate to the years 2004 and 2005. The first link reports that the BIA in 2004 resolved 48,707 cases and 46,355 cases in 2005. The second link says that 48,698 cases were resolved in 2004 and 46,338 cases in 2005. It is unclear why there were these differences, but this paper uses the data from the first link for 2004 and 2005 in the tabulation.

176. The calculation for Lexis would be 97,805 divided by 735,529; for Westlaw, it would be 9,920 divided by 735,529.

177. The Appendix also describes the methodology used to arrive at these tallies.

178. These BIA cases include: Matter of Cruz-Garcia, 22 I. & N. Dec. 1155 (BIA 1999); Matter of B-B-, 22 I. & N. Dec. 309 (BIA 1998); Matter of A-A-, 22 I. & N. Dec. 140 (BIA 1998); Matter of Lei, 22 I. & N. Dec. 113 (BIA 1998); Matter of N-K- & V-S-, 21 I. & N. Dec. 879 (BIA 1997); Matter of Rivera, 21 I. & N. Dec. 599 (BIA 1996). If *Lozada* is included, which is on the BIA site, the number then moves to seven. Note, the BIA listed three ineffective assistance cases: Matter of Compean, Bangaly & J-E-C-, 25 I. & N. Dec. 1 (A.G. 2009); Matter of Assaad, 23 I. & N. Dec. 553 (BIA 2003); Matter of Grijalva, 21 I. & N. Dec. 472 (BIA 1996). But none of these dealt with specific issues relating to discretionary relief. *See Agency Decisions*, *supra* note 172.

FIGURE 3: IAC/DISCRETIONARY RELIEF CASES



Cases in Lexis database: 636 + 651 = 1,287; Cases in Westlaw database: 328 + 651 = 979

As the illustration shows, there was commonality between the two databases for 651 cases.[179] Thus, Lexis's 1,287 cases consisted of this number plus its own 636 distinct cases, while Westlaw's 979 cases were the sum of its own 328 cases plus the shared 651 cases. The final number of unique cases in the database used for this study was ***1,615*** (651+ 636+ 328). With this tally, there was no double-counting of cases.[180]

B. Findings Based on Analysis of the Claims Made

BIA judgments, on rare occasion, can be several pages long, but more frequently they are much shorter in nature (*i.e.*, one-to-two pages).[181] As such, over the course of three months (June 2, 2020–August 31, 2020), the author read every one of the 1,615 opinions. The cases were then categorized by the substantive type of discretionary relief claim in which the noncitizen argued that there was IAC. 1,328 cases had only one claim pursued. In 245 cases, the noncitizen requested two forms of discretionary relief. And in forty-two cases, three discretionary relief claims were involved. There were no cases with all four claims litigated.[182]

179. *See supra* Figure 3.

180. For replicability purposes, please contact the author who can share the list of cases that were identified, separated (by database), coded, and analyzed for this project.

181. Indeed, as stated above in the text, there are situations when the BIA will issue what is simply referred to as an affirmance without opinion ("AWO"). This initiative was launched by then Attorney General, John Ashcroft in 2002, as a means of streamlining what he saw was a delay-ridden, "[u]nsustainable system." *See* John D. Ashcroft & Kris W. Kobach, *A More Perfect System: The 2002 Reforms of the Board of Immigration Appeals*, 58 DUKE L J. 1992, 1994 (2009). For a critical evaluation of this program, see Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1639 (2010).

182. Again, per *supra* note 180, for replicability purposes, please contact the author who can share the list of cases that were identified, separated, coded, and analyzed for this project. There were six combinations of the category with two-claims (asylum/cancellation of removal; asylum/voluntary departure; asylum/adjustment of status; cancellation of removal/voluntary departure; cancellation/adjustment of status; voluntary departure/adjustment of status). There were four combinations of the category with three claims (asylum/cancellation of removal/voluntary departure; asylum/cancellation of removal/adjustment of status; cancellation of removal/voluntary departure/adjustment of status; asylum/voluntary departure/adjustment of status).

Each of these cases were then coded as either 0 or 1. Where the noncitizen's claim of ineffective assistance of counsel was denied or dismissed by the BIA, a value of 0 was assigned. Conversely, where the case was ordered to be remanded for reconsideration by the immigration judge, a value of 1 was given.[183] Table 1 provides a summary of the results.

TABLE 1

General Success Rate of IAC Claims		
Case Outcome	Frequency	Percent
Unsuccessful	1,274	78.89%
Successful	341	21.11%
Total	1,615	100%

As the findings highlight, in almost eight out of ten cases, the noncitizen lost at the BIA.[184] This first table assesses the overall success rate in the aggregate. Table 2, however, examines the success rate per discretionary claim.

TABLE 2

Claim Type Combinations	Win Rates (%)	n
1. Asylum	20.3%	256
2. Cancellation of Removal	24.4%	402
3. Voluntary Departure	12.0%	200
4. Adjustment of Status	22.8%	470
5. Asylum + Cancellation of Removal	22.2%	18
6. Asylum + Voluntary Departure	13.8%	29
7. Asylum + Adjustment of Status	23.7%	38
8. Cancellation of Removal + Voluntary Departure	20.5%	39
9. Cancellation of Removal + Adjustment of Status	6.5%	31
10. Voluntary Departure + Adjustment of Status	27.8%	90
11. Asylum + Cancellation of Removal + Voluntary Departure	0.0%	5
12. Asylum + Cancellation of Removal + Adjustment of Status	12.5%	8
13. Cancellation of Removal + Adjustment of Status + Voluntary Departure	26.3%	19
14. Asylum + Adjustment of Status + Voluntary Departure	20.0%	10
15. Asylum + Cancellation of Removal + Voluntary Departure + Adjustment of Status	0.0%	0

183. In situations where multiple claims were involved, as long as at least one of these claims was remanded on the basis of IAC, it was given a score of 1. Also, in order to validate the accuracy of the author's 0-1 scores for these cases, the technique of "inter-rater reliability" was used. The author's faculty administrative assistant was asked to go through each of the cases independently and to cast scores on the outcomes of the IAC claims. Where they differed, the author went through each of those cases and made determinations on whether the case should be a 0 or a 1. For the sake of transparency and replicability, these final tabulated coding results are available by contacting the author.

184. *See supra* Table 1.

The results show that for three of these claims—asylum, cancellation of removal, and adjustment of status—noncitizens were successful at the BIA only between 20.3% and 24.4% of the time.[185] The win rate for voluntary departure claims was even lower at 12%.[186]

One reason to explain the comparatively lower result for voluntary departure may be tied to the fact that it is a relatively easier form of relief to obtain than the other three. Voluntary departure can often be acquired without legal representation.[187] Furthermore, it does not require a detailed showing of facts or the crafting of sophisticated legal arguments.[188] As long as one has not committed an aggravated felony or is a national security threat, and concedes removability, makes no other request for relief, assumes the associated travel costs to depart the country, and forgoes all appeals, then a voluntary departure petition can be filed.[189]

Therefore, when a noncitizen claims that this form of relief was lost because of IAC, the BIA might be less inclined to buy the argument on appeal, reasoning that the immigration judge found other grounds—aside from poor lawyering—as the basis for denying the request. Otherwise put, blaming the denial of this request on counsel's misdeeds may simply not be persuasive to the Board.[190]

Next, what happens when the noncitizen brings more than one claim in a petition to the BIA? Table 2 shows that there were no cases where all four claims

185. *See supra* Table 2.

186. Note, voluntary departure, if granted by the immigration judge or the BIA, allows for a noncitizen to return to the U.S. at some later point in time. There are those who claim that voluntary departure, despite its name, is not voluntary at all. Rather, as the argument goes, the noncitizen has been backed into a corner where this type of relief is the only, best option available. *See, e.g.*, AM. IMMIGR. COUNCIL, VOLUNTARY DEPARTURE: WHEN THE CONSEQUENCES OF FAILING TO DEPART SHOULD AND SHOULD NOT APPLY 1 (2017), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/voluntary_departure_when_the_consequences_of_failing_to_depart_should_and_should_not_apply.pdf [https://perma.cc/E7GV-LH7M].

187. *See* FLORENCE IMMIGRANT & REFUGEE RTS. PROJECT, INC. *supra* note 92, at 2 (noting that "[d]epending on when you ask for voluntary departure, you may be able to ask DHS or the immigration judge for voluntary departure. You do not need to file any particular forms or papers").

188. *Id.* at 11–12.

189. For an important discussion of this form of relief, see Hausman, *supra* note 32, at 1192 n.60, 1198 n.75. Such a petition can be made at the initial master calendar hearing in front of the immigration judge. A request can also be made during the removal hearing, which would occur in an agreement struck between the DHS and the noncitizen. And at the end of the removal hearing, a request can be made as well. *See* Lauren Gearty, *Voluntary Departure: Who Is Eligible?*, NOLO, https://www.nolo.com/legal-encyclopedia/voluntary-departure-who-is-eligible.html (last visited Mar. 3, 2022) [https://perma.cc/KD8L-65HX]; *see also* 8 U.S.C. § 1229c.

190. Another possibility for why succeeding on voluntary departure claims may be statistically lower than on the others perhaps relates to how these cases were coded. In examining the BIA judgments where the phrase "voluntary departure" was picked up by Westlaw or Lexis, the petition by the noncitizen often was simply presented as an omnibus "motion to reopen." In the situations where the BIA dismissed the case, it was not unusual to see the Board allow the noncitizen to be granted the "privilege" of voluntary departure, even though there had been no request made on this particular ground. In these circumstances, these cases were coded as a 0, because the noncitizen did not have an opportunity to proceed with the desired IAC claim, and instead had the voluntary departure option imposed upon the noncitizen by the Board.

were pursued, and IAC was being argued.[191] Otherwise, the remaining win rates for the combined claim-petitions ranged from 0% to 27.8%.[192]

One curious finding that does emerge relates again to voluntary departure. Notwithstanding the five cases in Table 2 where asylum, cancellation of removal, and voluntary departure were pursued together (where the win rate was 0%), in examining the other combined claims, where voluntary departure was present, the win rate was actually greater than when voluntary departure was a claim by itself.[193] For example, when an IAC assertion was made in a petition that had cancellation of removal, adjustment of status, *and voluntary departure* in it, the win rate was 26.3%.[194] In cases where asylum, adjustment of status, and voluntary departure were together, the win rate was 20%.[195] And in two-claim petitions, where voluntary departure was paired with, respectively, asylum, cancellation of removal, or adjustment of status, the win rates were, correspondingly, 13.8%, 20.5%, and 27.8%—again, all greater than when voluntary departure was by itself.[196]

What might explain these outcomes? Because the BIA's opinions are routinely parsimonious, it is difficult to know for sure. The most we can say is that the data seem to suggest that the noncitizen who wishes to bring an IAC claim—and seek voluntary departure—best do so generally as part of a two or three-claim petition.

Next, are the differences between any of Table 2's win rates statistically significant? Table 3, below, is a symmetrical matrix that shows the results. (A symmetrical matrix is defined as a rectangular array of numbers that is arranged into rows and columns where the "transpose of [the] matrix is equal to itself."[197])

191. *See supra* Table 2.

192. *See supra* Table 2.

193. *See supra* Table 2. Of course, since the combination with all four claims has no cases, this statement is inapplicable to this situation.

194. *See supra* Table 2.

195. *See supra* Table 2.

196. *See supra* Table 2.

197. For a discussion, see *Symmetric Matrix*, STAT TREK, https://stattrek.com/statistics/dictionary.aspx?definition=symmetric_matrix (last visited Mar. 3, 2022) [https://perma.cc/76U7-ED9A]; *Definition of Matrix*, CENT. CONN. STATE UNIV., https://chortle.ccsu.edu/vectorlessons/vmch13/vmch13_2.html (last visited Mar. 3, 2022) [https://perma.cc/HKA4-87G9].

TABLE 3: DIFFERENCES (% POINTS) BETWEEN WIN RATES OF CLAIM TYPE COMBINATIONS IN IAC CASES

	1	2	3	4	5	6	7	8	9	10	12	13
1. Asylum												
2. Cancellation of Removal	4.1%											
3. Voluntary Departure	**-8.3%**	**-12.4%**										
4. Adjustment of Status	2.5%	-1.6%	**10.8%**									
5. Asylum + Cancellation of Removal	1.9%	-2.2%	10.2%	-0.5%								
6. Asylum + Voluntary Departure	-6.5%	-10.6%	1.8%	-9.0%	-8.4%							
7. Asylum + Adjustment of Status	3.4%	-0.7%	11.7%	0.9%	1.5%	9.9%						
8. Cancellation of Removal + Voluntary Departure	0.2%	-3.9%	8.5%	-2.3%	-1.7%	6.7%	-3.2%					
9. Cancellation of Removal + Adjustment of Status	**-13.9%**	**-17.9%**	-5.5%	**-16.3%**	-15.8%	-7.3%	**-17.2%**	-14.1%				
10. Voluntary Departure + Adjustment of Status	7.5%	3.4%	**15.8%**	5.0%	5.6%	14.0%	4.1%	7.3%	**21.3%**			
12. Asylum + Cancellation of Removal + Adjustment of Status	-7.8%	-11.9%	0.5%	-10.3%	-9.7%	-1.3%	-11.2%	-8.0%	6.0%	-15.3%		
13. Cancellation of Removal + Adjustment of Status + Voluntary Departure	6.0%	1.9%	14.3%	3.5%	4.1%	12.5%	2.6%	5.8%	19.9%	-1.5%	13.8%	
14. Asylum + Adjustment of Status + Voluntary Departure	-0.3%	-4.4%	8.0%	-2.8%	-2.2%	6.2%	-3.7%	-0.5%	13.5%	-7.8%	7.5%	-6.3%

NOTE: Statistically significantly differences (p<.05) are denoted by highlighted yellow bold face. Case type #11, from Table 2, is omitted because it perfectly predicts failure. Case type #15, from Table 2, is omitted because there were no cases for this combined claim type.

*And, there is no column 14 because the difference between that column and row 14 is zero. Standard practice is to omit this column from the matrix in order to preserve its symmetrical nature.

Key for columns:

1 = Asylum
2 = Cancellation of Removal
3 = Voluntary Departure
4 = Adjustment of Status
5 = Asylum + Cancellation of Removal
6 = Asylum + Voluntary Departure
7 = Asylum + Adjustment of Status
8 = Cancellation of Removal + Voluntary Departure
9 = Cancellation of Removal + Adjustment of Status
10 = Voluntary Departure + Adjustment of Status
12 = Asylum + Cancellation of Removal + Adjustment of Status
13 = Cancellation of Removal + Adjustment of Status + Voluntary Departure

To begin, a few points of context are worth mentioning. First, the columns in Table 3 only have the numbers in the headings, rather than spelling out each of the claims in words. This was done because of space limitations and is standard practice with a symmetrical matrix. Thus, column "1" stands for asylum, column "2" stands for cancellation of removal, and so on. Second, claim-type #11 from Table 2 is omitted from the rows and columns in Table 3, because it had a 0% win rate; and claim type #15 from Table 2 is also not present in Table 3 because there were no cases for this particular combination.[198] Third, it was also unnecessary to place claim type #14 as a column heading in Table 3, because the difference between that and row #14 is zero. Standard practice is to omit this type of column from the matrix in order to preserve its symmetrical nature. Otherwise, all of the other claim types from Table 2 are replicated in Table 3.

How should the data in Table 3 be interpreted? Of the differences listed, only nine out of seventy-eight were statistically significant—or about 11.5%.[199] Among the single discretionary relief claims, three instances of differences were statistically significant: a voluntary departure petition with an IAC claim was 8.3

198. *See supra* Table 3. Claim #11 from Table 2 was asylum + cancellation of removal + voluntary departure and claim #15 was all four claims. *See supra* Table 2.

199. *See supra* Table 3.

percentage points *less likely* to succeed than an asylum petition with an IAC claim.[200] A voluntary departure petition with an IAC claim was 12.4 percentage points *less likely* to succeed than a cancellation of removal petition with an IAC claim.[201] And a voluntary departure petition was 10.8 percentage points *less likely* to succeed than an adjustment of status petition with an IAC claim.[202]

Yet, perhaps the most revealing and statistically significant set of findings relates to when a noncitizen pursues an IAC claim through a joint cancellation of removal and adjustment of status petition. Such a petition to the BIA was significantly less likely to succeed when compared to several other claim-types.[203]

Additionally, even when there was no statistical significance, it is worth noting that a joint cancellation of removal and adjustment of status petition was considerably less likely to succeed compared with the other remaining claim-types, in terms of *magnitude of difference*.[204] (Indeed, recall from Table 2 that the overall win rate of a joint cancellation of removal and adjustment of status petition was only 6.5%.)[205]

Why might an IAC argument with this particular combination be viewed so skeptically by the BIA? One answer may relate to the difficulty of adjusting one's status to that of a lawful permanent resident (LPR), which was introduced above in Part II.[206] In order to adjust, there must be an LPR visa category into which the noncitizen can fit.[207] Imagine a scenario where the noncitizen has legitimate grounds to cancel the removal, but where there is not an LPR visa for which the noncitizen qualifies, or the annual national quota for that visa has

200. *See supra* Table 3.

201. *See supra* Table 3.

202. The inverse of these findings is also true. Namely, an asylum petition was 8.3 percentage points more likely to succeed than a voluntary departure claim; a cancellation of removal claim was 12.4 percentage points more likely to succeed than a voluntary departure claim; and an adjustment of status petition was 10.8% more likely to succeed than a voluntary departure claim. *See supra* Table 3.

203. For example, this particular combination petition was: 13.9 percentage points *less likely* to succeed than just an asylum petition with an IAC claim; 17.9 percentage points *less likely* to succeed than just a cancellation of removal petition with an IAC claim; 16.3 percentage points *less likely* to succeed than just an adjustment of status petition with an IAC claim; 17.2 percentage points *less likely* to succeed than a joint asylum and adjustment of status petition with an IAC claim; and 21.3 percentage points *less likely* to succeed than a joint voluntary departure and adjustment of status petition with an IAC claim. *See supra* Table 3.

204. For example, this two-claim joint petition was 5.5 percentage points less likely to succeed than voluntary departure. It was 15.8 percentage points less likely to succeed than asylum and cancellation of removal. It was 7.3 percentage points less likely to succeed than an asylum and voluntary departure petition. It was 14.1 percentage points less than cancellation of removal and voluntary departure. It was 6 percentage points less likely to succeed than an asylum, cancellation of removal, and adjustment of status joint petition. It was 19.9 percentage points less likely to succeed than cancellation of removal, voluntary departure, and adjustment of status. And it was 13.5 percentage points less likely to succeed than an asylum, voluntary departure, and adjustment of status joint petition. *See supra* Table 3.

205. *See supra* Table 2.

206. *See* Subsection II.B.1; 8 U.S.C. § 1255.

207. One can gain LPR status (or a green card) through different visa options based on family relationships, employment relationships, being deemed a special immigrant, or refugee or asylee, or a victim of human trafficking or abuse, or through another type of category. For more information, see *Green Card Eligibility Categories*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/green-card/green-card-eligibility-categories (last visited Mar. 3, 2022) [https://perma.cc/4LUH-HQDJ].

already been filled. Even if an ineffective assistance argument has been asserted, the BIA may dismiss the matter altogether, on the grounds that the noncitizen has not been able to obtain a proper LPR visa.[208]

Then there is another theory: that cancellation of removal and adjustment of status are seen as highly drastic attempts to reverse the government's findings against the noncitizen. Here, not only is the noncitizen pleading to invalidate an already arrived-at removal decision made by the government, but then, additionally, there is a further request to be placed into a lawful immigration category that would allow the noncitizen to stay permanently. The Board might be extremely dubious that an ineffective lawyer would have caused the noncitizen to lose on these two grounds at the initial immigration court proceeding.

C. Contextualizing the Results

The presentation above has intentionally avoided normative claims about whether the outcomes and win-rates in noncitizen IAC/discretionary relief cases are "too high" or "too low." The reason is simple: if such an assertion were to be made, the natural question would be—compared to what? One obvious analog would be to the situation in criminal law. A few years back, Michael Heise, Nancy King, and Nicole Heise published a study surveying the success rates of criminal appeals in various jurisdictions.[209] As they note, one study "found an overall defense win rate of approximately 20%,"[210] in the intermediate courts of appeals within five separate states. Another paper revealed that "16.4% of all appeals were resolved in the defendant's favor,"[211] within the state of Iowa's intermediate court of appeals. While a third study reported that "25% of defendants' direct appeals, but only 17% of defendants' post-conviction appeals, resulted in corrections or reversals in the Tennessee Court of Criminal Appeals."[212]

208. I am grateful to Ingrid Eagly's insight on this angle. One point to consider, however, is to refer back to Table 3 and note that when an IAC/adjustment claim was brought on its own, it actually was statically more likely to prevail over a combined cancellation and adjustment petition by 16.3 percentage points. *See supra* Table 3. It very well may be that only those noncitizens who are confident about prevailing on an IAC claim and have a visa in hand that can be adjusted into, are those who decide they do not need to combine their substantive claim with any others. Thus, they bring these adjustment petitions singularly. And this then may explain the higher success rates accordingly.

209. *See* Michael Heise, Nancy J. King & Nicole A. Heise, *State Criminal Appeals Revealed*, 70 VAND. L. REV. 1939, 1940 (2017).

210. *Id.* at 1941–42 (citing JOY A. CHAPPER & ROGER A. HANSON, NAT'L CTR. FOR STATE CTS., UNDERSTANDING REVERSABLE ERROR IN CRIMINAL APPEALS: FINAL REPORT (1989), https://cdm16501.contentdm.oclc.org/digital/collection/criminal/id/1 [https://perma.cc/DV28-EF49]).

211. *Id.* at 1942 (citing Tyler J. Buller, *Public Defenders and Appointed Counsel in Criminal Appeals: The Iowa Experience*, 16 J. APP. PRAC. & PROCESS 183 app. C at 242 tbl.1 (2015)).

212. *Id.* (citing Daniel J. Foley, *The Tennessee Court of Criminal Appeals: A Study and Analysis*, 66 TENN. L. REV. 427, 433 (1999)). The distinction between direct appeals and post-conviction appeals is worth noting here. The direct appeal, procedurally, comes after the trial, where the defendant has been convicted. Usually, at the state level, the steps involve going to the intermediary court of appeals, then to the state Supreme Court, and then to the U.S. Supreme Court. (The latter two courts generally have discretionary jurisdiction, notwithstanding

Heise, King, and Heise also discuss the literature on win rates at the "state courts of last resort."[213] For example, they reference Eisenberg and Miller's well-known research, which shows "reversal rates of 49% for noncapital criminal cases accepted for review when appeal required permission and 28% for cases appealed of right."[214] And as for their own findings, Heise, King, and Heise's data indicate that there is a "14.9% favorable decision rate in first appeals of right"[215] and a 2.8% "rate of favorable decisions"[216] "[i]n courts of last resort, among all cases decided in [their] sample."[217] (As they point out, for cases that were discretionarily granted review, there was a 44.9% favorable rate.[218])

At one level, some of these criminal appeals' numbers appear comparable to the IAC/discretionary relief win rates for noncitizens. But not all of them are. Moreover, when compared to IAC claims in the criminal context, in particular, there is variation here as well. For example, Emily West found that 81% of IAC claims in post-conviction appeals were denied within her sample set.[219] Nancy King's individual work highlights that the win "rates for . . . [IAC] claims by all prisoners are estimated to be roughly 1%-5% for non-capital cases generally in state court, and far less than that in federal habeas proceedings."[220] And another report discusses how "half of all habeas corpus petitions filed in state courts allege ineffective assistance of counsel; [yet] only about 8 percent of them are successful."[221]

death penalty cases.) If these appeals are denied, then the conviction becomes final, and thereafter collateral review begins, whereby the defendant can raise claims in state court in a "post-conviction" manner. This process is typically called state habeas, and IAC is typically part of this process. Such an appeal can travel up the state courts, and if they fail, then they can start back at the federal district court level and move up the federal judicial ladder thereafter. My thanks to Tung Yin for explaining this process to me. *See generally* KING & HOFFMANN, *supra* note 3; Ryan W. Scott, *Inter-Judge Sentencing Disparity after Booker: A First Look*, 63 STAN. L. REV. 1, 1 (2010); Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to* Teague v. Lane *and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 AM. J. CRIM. L. 203, 205 (1998).

213. Heise, King, & Heise, *supra* note 209, at 1942.

214. *See id.* at 1943 (citing Theodore Eisenberg & Geoffrey P. Miller, *Reversal, Dissent, and Variability in State Supreme Courts: The Centrality of Jurisdictional Source*, 89 B.U. L. REV. 1451, 1474–75 fig. 1, 1497 (2009)). Heise, King, and Heise, in this section, cite the "State Courts Statistics Project . . . [which has provided] helpful data on state criminal appeals." *Id.*

215. *Id.* at 1965.

216. *Id.*

217. *Id.*

218. *Id.*

219. *See* EMILY M. WEST, COURT FINDINGS OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN POST-CONVICTION APPEALS AMONG THE FIRST 255 DNA EXONERATION CASES 3 (2010), https://www.innocenceproject.org/wp-content/uploads/2016/05/Innocence_Project_IAC_Report.pdf [https://perma.cc/YSN5-2AEJ].

220. *See* Nancy J. King, *Judicial Review: Appeals and Post-Conviction Proceedings*, in EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD (Allison D. Redlich et al. eds., 2014) (citing B.L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011)); *see also* Nancy J. King, *Enforcing Effective Assistance After* Martinez, 122 YALE L.J. 2428, 2446 (2013); Nancy J. King, *Non-Capital Habeas Cases After Appellate Review: An Empirical Analysis, An Empirical Analysis*, 24 FED. SENT'G REP. 308, 317 (2012).

221. *See* Chandra Bozelko, *A Bad Defense Lawyer Cost Me Six Years of Freedom. I'm Still Waiting on My Appeal 12 Years Later.*, NBC NEWS: THINK (Dec. 5, 2019, 3:37 AM), https://www.nbcnews.com/think/opinion/bad-defense-lawyer-cost-me-six-years-freedom-i-m-ncna1094306 [https://perma.cc/CFR6-3L7C].

Given that we do not know the outcomes of all of the cases that the BIA hears—because the DOJ only discloses a select set—it is difficult to have a sense of what the comprehensive IAC/discretionary win rates are. But remember, there are no circumstances under which the government pays for the legal representation of the noncitizen during the immigration adjudication phase. Accordingly, it is hard to imagine that an ordinary noncitizen who is in the midst of being removed would needlessly spend money on a new lawyer—especially to make an ineffective assistance assertion against a previous lawyer—unless there was a genuine belief that the claim had merit. (Similarly, for lawyers who take on such IAC immigration cases on a pro bono basis, they too would likely be reluctant to pursue this type of appeal if they believed it was frivolous.) With how inherently political the Board has become, it is even legitimate to wonder whether the percentage of noncitizen-wins cited above actually depicts an inflated reality.

Therefore, in order to mitigate against speculation (in either direction), it is essential that the Justice Department make available all of the BIA's IAC/discretionary relief cases dating back to *Lozada*. Until the full universe of these cases and the accompanying win-rate data are released, principles of equity demand that noncitizens have the opportunity to be heard in front of an independent Article III circuit court as part of the right-to-appeal process.

V. CONCLUSION

This study has sought to accomplish three key objectives. First, in light of the Supreme Court's June 2020 decision in *Thuraissigiam*, it has explored how Justice Alito's cursory discussion of due process could nevertheless have serious, adverse consequences for noncitizens—in cases well beyond expedited removal.

Second, and relatedly, this study has described how there is currently a circuit split involving whether the federal courts of appeals have jurisdiction to adjudicate IAC claims in discretionary relief cases. Some circuits have held that because these petitions are not based on entitlements but rather on discretionary assistance, noncitizens have no right to a hearing in an Article III court. By contrast, other circuits have rejected this argument and have more persuasively noted that because IAC in immigration law is rooted in a constitutional claim of due process, the federal courts are obliged to hear such appeals.

The third objective has been to empirically examine the success rates of noncitizens who pursue IAC/discretionary relief claims in front of the BIA. As the previous Part details, about 80% of the time, the government wins against the noncitizen.

Taken together, the lessons from this study will hopefully prompt the Supreme Court to resolve the differences between the federal appellate courts, if it decides to grant *cert* in the future. Furthermore, the doctrinal analysis, along with the data and findings, may also be of use to immigration lawyers who are contemplating whether to litigate an IAC claim on behalf of aggrieved clients who suffered from previously poor representation. In fact, it is interesting to

think about how a lawyer might arrive at this determination. Tables 1–3 from above amass statistics from the two main legal databases—Lexis and Westlaw. But most lawyers, of course, do not have access to both services. If a lawyer subscribes to just one, might the success rates of IAC/discretionary relief claims vary depending upon which database is being reviewed? Consider Table 4.

TABLE 4: WIN RATES BY DATABASE FOR NONCITIZENS IN IAC CASES

	Lexis	Westlaw	*n* Lexis	*n* Westlaw
1. Asylum	20.2%	19.4%	238	98
2. Cancellation of Removal	24.1%	26.5%	295	260
3. Voluntary Departure	10.6%	12.7%	160	126
4. Adjustment of Status	20.6%	23.0%	369	322
5. Asylum + Cancellation of Removal	23.5%	16.7%	17	6
6. Asylum + Voluntary Departure	15.4%	23.1%	26	13
7. Asylum + Adjustment of Status	18.2%	28.6%	33	14
8. Cancellation of removal + Voluntary Departure	18.5%	25.0%	27	24
9. Cancellation of removal +Adjustment of status	9.1%	5.3%	22	19
10. Voluntary Departure + Adjustment of status	27.5%	26.8%	69	71
11. Asylum + Cancellation of Removal + Voluntary Departure	0.0%	0.0%	4	3
12. Asylum + Cancellation of Removal + Adjustment of status	12.5%	0.0%	8	4
13. Cancellation of Removal + Voluntary Departure + Adjustment of status	22.2%	35.7%	9	14
14. Asylum + Voluntary Departure + Adjustment of Status	20.0%	20.0%	10	5
15. Asylum + Cancellation of Removal + Voluntary Departure + Adjustment of Status	0.0%	0.0%	0	0
TOTAL	20.0%	22.3%	1,287	979

The data show the win rates, per claim, *per database*. Recall that Lexis had 1,287 cases, Westlaw contained 979 cases, and the number of shared cases between the two was 651. Running a chi-square (x^2) test, the results indicate that none of the differences between the databases are statistically significant. In other words, irrespective of whether a lawyer is using Lexis or Westlaw to devise a litigation strategy, the conclusion is the same: overall, the odds of winning are about two in ten. As each database shows, when pursuing one or a combination of these relief claims, the BIA has sided, far more often than not, with the government and against the noncitizen.

To close, this study has strongly called upon the DOJ to release all of the IAC/discretionary cases that have been decided by the BIA. In reality, though, it is unlikely that such a request will be granted. But even if it were, it would still be crucial that independent, Article III circuit courts retain the ability to review such cases on appeal. To be sure, there may be some who will argue that it is first important to know what the success rates are for IAC appeals in the federal courts, before deciding whether such cases should travel beyond the BIA. And this study could serve as the foundation for those scholars looking to investigate this question.[222]

At the same time, however, that particular issue is somewhat beside the point. As it stands now, in circuits where no appeal-right is recognized, the odds

222. *See* Hausman *supra* note 32 at 1196–97, where he discusses the specific issue of whether federal appeals courts are "successful . . . . at promoting uniformity" among lower-level immigration courts. Hausman spends a great deal of time, in the beginning of his article, addressing this concept of uniformity—by which he is referring to ways that appellate courts (i.e., the BIA or the circuit courts) can reduce the disparities that exist in judgments made by inferior courts, or otherwise put, to make them more consistent. *Id.* at 1181–86. As he finds, "[p]etitions for review of final removal orders [in the circuit courts] are rare events, and reversal of the BIA's decisions is even rarer. Before the 2002 streamlining at the BIA, fewer than 5% of all cases resulted in a petition for review, and of those, fewer than 1 in 10 resulted in a remand. In other words, remands by a court of appeals occurred in fewer than 1 in 200 cases." *Id.* at 1196.

of prevailing in one of these respective federal appellate courts is *zero*. On the other hand, in those circuits that do allow for appeals, there exists at least a chance that a noncitizen's motion to reopen on ineffective lawyering grounds will be successful.[223] For these courts, they are guided by the notion that equity requires that noncitizens have an opportunity to be heard in an independent forum. Thus, out of respect for fairness and due process, this study concludes by urging that all federal circuit courts embrace this position, and that they do so sooner rather than later.

APPENDIX

In order to arrive at the final tallies for IAC/discretionary relief cases in both the Lexis and Westlaw databases, the following steps were taken. First, regarding Lexis, as of this writing, the database initially shows that the number of rulings involving the issue of IAC in the discretionary relief context, since *Lozada*, is 1,893.[224] Lexis combines the decisions made by the BIA with those adjudicated by the Administrative Appeals Office ("AAO"), (formerly known as the Administrative Appeals Unit ("AAU")), which is a body located within the DHS. As other research has discussed, the AAO is a completely separate, almost secretive-like forum that falls outside the jurisdiction of the DOJ.[225] Two separate Lexis reference attorneys did not have an explanation for why the company combines the opinions in this way.

As a result, with the assistance of one of these attorneys, the author was able to construct a search within the Lexis database that excluded judgments from the AAO, while also focusing on IAC claims made at the BIA, for cases of asylum, voluntary departure, cancellation of removal, and adjustment of

223. Even applying Hausman's figures, *id.* at 1196, that is still better than no chance at all. And moreover, there is the perception of having an independent Article III court review such an appeal that is important as well.

224. In order to arrive at this number in Lexis, the following steps were taken. First, as stated above (in the following sentences after this footnote in the text), because Lexis combines the AAO cases with the BIA ones, the search had to take the form of the following commands: ineffective assistance of counsel *and* asylum *or* cancellation of removal *or* voluntary departure *or* adjustment of status *and not* administrative appeals office *or* administrative appeals unit *or Padilla or* state conviction *or* post-conviction. (Note, with Lexis, quotations are not needed or used to connect search terms together.) Second, excluded from this search, as can be seen by the Lexis exclusionary phrase of "and not," were IAC claims involving state-based criminal cases. In these matters, the noncitizen had brought a motion to vacate a judgment post-conviction in a state criminal court. In the subsequent immigration case, the mentioning of IAC was made in the context of referring to the merits-claim of that state court proceeding. Because the IAC claim at the BIA, in this situation, was made only in referential passing, these cases were excluded from the search. One will also note that "*Padilla*" is listed as a term to exclude in the Lexis search. The reason relates to the Supreme Court's 2010 decision in *Padilla v. Kentucky*, where it was held that a noncitizen had a right to know of the possible collateral immigration consequences from pleading guilty in a criminal proceeding. 559 U.S. 356, 374 (2010). The Court held that it was the duty of the representing lawyer to make the noncitizen aware of these potential ramifications. *Id.* Because the goal was to exclude *Padilla*-related cases (for the reason just mentioned), it was included as a term following the "and not" phrase. *Id.* Finally, as stated above, which cases are included in Lexis (or Westlaw), and when they are released, are decisions made by the Department of Justice. As reference attorneys from both databases told me, a case may be added months or even years later, so the data presented here reflects what was present in the two databases at the time they were collected.

225. *See* Krishnan, *supra* note 39, at 133–34.

status.[226] A secondary issue, however, then emerged. After filtering out the AAO cases, instead of listing the results by the names of the respective BIA cases (e.g., *In re Jose-Maria Cantu-Martinez*[227]), the vast majority had this identifying marker:

BIA & AAU Non-Precedent Decisions; Copyright missing, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

To determine whether there were any AAU (or AAO) cases among this group, the author went through each of the 1,893 decisions and confirmed that indeed only BIA cases were present. As a Lexis representative subsequently conceded, this labeling was a cataloging mistake that should not have been present.[228]

Next, while combing through each of these cases, the author noticed that there were situations where the phrase "ineffective assistance of counsel" was mentioned in the case but was not an issue of litigation or adjudication. Those cases were excluded and subtracted from the set of 1,893 cases. Additionally, many cases were duplicated within the generated output list. These redundancies were redacted by hand, but to ensure an accurate count, the author asked his administrative assistant to remove any of the repeats that she observed. Ultimately, a total of 606 cases—comprising those where IAC was not an issue plus any duplicates—were removed, resulting in a final tally of 1,287 Lexis cases.

The author then went to Westlaw and conducted a parallel search of IAC claims made within the four types of discretionary relief categories.[229] Here, the results initially yielded 1,084 cases, with extraneous and repeat cases present as well. The author followed the same methodological steps above, and once these cases were redacted, the sum was reduced to 979 published cases.

Finally, it is important to recognize that virtually all of the cases that were used in this database involved unpublished/non-precedential decisions from the BIA. As of this writing, on Lexis, there were only nineteen cases that the Board categorized as precedent worthy since 1988 (the year *Lozada* was decided).[230] In Westlaw the number was eighteen since 1988.[231] Except for one case, the two

226. See Heise, King & Heise, *supra* note 209, at 1942.

227. This was the first case listed in chronological order from the most recent case to least recent.

228. The conversation with this Lexis representative took place on July 19, 2020.

229. In order to accomplish this within Westlaw, the search in the Westlaw-BIA database was inputted as: adv: "ineffective assistance #of counsel" & asylum "voluntary departure" "cancellation #of removal" "adjustment #of status" % Padilla "state conviction" "post-conviction." Excluded from this search, as can be seen by the Westlaw exclusionary symbol of "%," were IAC claims involving state-based criminal cases and *Padilla*-related cases, per the reasons provided in the discussion for the search done within Lexis.

230. Lexis allows for the user to search for precedent-only decisions, which are separated from non-precedent opinions.

231. In order to do the Westlaw search to find precedent-only decisions, (because there is no way to separate from non-precedent decisions), the following search was used: adv: "ineffective assistance #of counsel" & asylum "voluntary departure" "cancellation #of removal" "adjustment #of status" % Padilla "state conviction" "post-conviction" % "THIS IS #AN UNPUBLISHED DECISION."

databases matched, in terms of having these precedent cases available to the public.[232]

232. The one case that Lexis had that Westlaw did not was: *In re* Khurram Jehangir Khanl, 2007 BIA LEXIS 60, A78 442 144 (June 15, 2007).