

A Better Balance for Federal Rules Governing Public Access to Appeal Records in Immigration Cases

NANCY MORAWETZ*

In the first year of the Trump Administration, the courts played a critical role in reviewing and shaping federal immigration policy. When nonprofits and states filed prominent cases challenging the “travel ban,” the public could follow the court process in real time, as new filings were published on the web. But this access to filings is highly unusual for immigration cases. Due to Federal Rules promulgated in 2009, there are special restrictions on access to immigration filings that mean that filings in cases that are less prominent are impossible to access electronically. Thus, as immigration enforcement continues to ratchet up, there will be a huge difference in the ability of the public and affected individuals to monitor those cases that are sufficiently noteworthy to lead to high level press attention, as compared to the thousands of other cases in which the government seeks to detain and deport noncitizens. The difficulty in scrutinizing these cases is all the greater when noncitizens are detained in remote locations or away from places where they have access to counsel and advocacy organizations. This Article argues that the special rule restricting electronic access to immigration cases does a poor job of balancing competing concerns. The history of the rule shows little consideration of the range of immigration issues before the courts or the impact that the rule might have on the development of doctrine. Furthermore, the rule creates an odd mixture of privacy protection and public access that is poorly suited to any of the purported goals of the exception. The Article proposes changes to the Federal Rules of Civil Procedure and Appellate Procedure that would achieve a better balance between the public interest in overseeing matters before the courts and the privacy interests of litigants.

* Professor of Clinical Law, New York University School of Law. The Author gratefully acknowledges the helpful insights of Dan Capra about the development of the rule discussed in this Article; the comments of Anwen Hughes, Peter Markowitz, Trina Realmuto, Judith Resnik, Manny Vargas and Andrew Wachtenheim; the administrative assistance of Noelia Rodriguez; and the financial assistance of the Filomen D’Agostino and Max E. Greenberg Research Fund of New York University School of Law.

TABLE OF CONTENTS

INTRODUCTION.....	1272
I. PUBLIC AND PRIVATE INTERESTS IN IMMIGRATION PROCEEDINGS ...	1275
II. DEVELOPMENT OF THE FEDERAL RULE EXEMPTING IMMIGRATION CASES FROM ELECTRONIC ACCESS.....	1282
III. THE ODD BALANCE STRUCK BY THE IMMIGRATION EXCEPTION TO REMOTE ACCESS	1288
A. PROVIDING TOO LITTLE PRIVACY THROUGH THE REMOTE ACCESS RULE	1290
B. PROVIDING TOO MUCH SECRECY AND INADEQUATE PUBLIC OVERSIGHT	1294
1. <i>Secrecy in the Legal Issue Docket</i>	1295
2. <i>Lack of Oversight of Government Positions</i>	1298
IV. DEVELOPING A BETTER BALANCE.....	1300
A. REPEALING THE IMMIGRATION EXCEPTION IN THE FEDERAL RULES	1301
B. ALTERNATIVE MECHANISMS TO PROTECT SENSITIVE INFORMATION	1303
1. <i>Filing Under a Pseudonym</i>	1304
2. <i>Expanded Redaction Rules</i>	1305
3. <i>Limiting Access to the Administrative Record</i>	1307
4. <i>Sealing Records</i>	1308
C. ADOPTING LOCAL RULES AND PROCEDURES	1308
CONCLUSION	1310

INTRODUCTION

In the first year of the Trump Administration, the courts played a critical role in reviewing and shaping federal immigration policy. Nonprofits and states filed prominent cases challenging the “travel ban,”¹ and the public could follow the court process in real time, as new filings were published on the web;² however, this access to filings is highly unusual for immigration cases. Due to Federal Rules promulgated in 2009,³ there are special restrictions on access to immigration filings, making it impossible to access filings in less prominent cases

1. Exec. Order 13780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

2. See, e.g., *Litigation Documents & Resources Related to Trump Executive Order on Immigration*, LAWFARE, <https://lawfareblog.com/litigation-documents-resources-related-trump-executive-order-immigration> (last visited Apr. 21, 2018) (publishing the filings in all cases challenging the travel ban). It is unclear how these filings became public given the Federal Rule discussed in this Article. But it appears that everyone acknowledged the extreme public interest in the cases.

3. FED. R. CIV. P. 5.2(c); FED. R. APP. P. 25(a)(5).

electronically. Thus, as immigration enforcement continues to ratchet up,⁴ there will be a huge difference in the ability of the public and affected individuals to monitor those cases that are sufficiently noteworthy to lead to high level press attention, and the thousands of other cases in which the government seeks to detain and deport noncitizens. The greatest difficulty will be in the public's ability to scrutinize immigration cases when noncitizens are detained in remote locations or away from places where they have access to counsel and advocacy organizations.⁵ This Article argues that the special rules restricting access to immigration cases were misconceived, do not properly balance competing interests, and were premised on past technological limitations. Now more than ever, it is time to review these policies and assure a proper balancing of public access and protection of legitimate privacy interests.

Review of immigration cases is a substantial part of the work of the federal courts. It makes up nine percent of circuit court cases,⁶ leads to substantial splits in the circuit courts on the law, and occupies a steady part of the Supreme Court's docket.⁷ Such review also shapes the rules to be applied in hundreds of thousands of immigration court proceedings

4. Immigration arrests rose thirty-eight percent in the first three months of the Trump administration. See Caitlin Dickerson, *Immigration Arrests Rise Sharply as Agents Carry Out a Trump Mandate*, N.Y. TIMES, May 18, 2017, at A22.

5. See HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES (2009), <https://www.hrw.org/sites/default/files/reports/us1209webwcover.pdf>.

6. Agency appeals made up about nine percent of filings in the federal courts of appeals in the twelve months ending in December 2016. *Table B-1: U.S. Courts of Appeals—Cases Commenced, Terminated, and Pending, by Circuit and Nature of Proceeding During the 12-Month Period Ending December 31, 2016* (2016), <http://www.uscourts.gov/statistics/table/b-1/statistical-tables-federal-judiciary/2016/12/31>. This estimate applies a rule of thumb that eighty-five percent of appeals from agency orders involve immigration cases. See *Federal Judicial Caseload Statistics 2013*, U.S. CTS. <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2013> (last visited Apr. 21, 2018).

7. In 2017, The Supreme Court decided *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017) (classifying a statutory rape offense in which age 18 is the age of consent as an aggravated felony) and *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017) (discussing an equal protection challenge to discriminatory treatment of children of unwed fathers), and heard argument in *Lynch v. Dimaya*, Transcript of Oral Argument, *Lynch v. Dimaya*, No. 15-1498 (Jan. 17, 2017) (reargued in Transcript of Oral Argument, *Sessions v. Dimaya*, No. 15-1498 (Oct. 2, 2017)) (explaining the void for vagueness challenge to part of the crime of violence aggravated felony definition) and *Jennings v. Rodriguez*, Transcript of Oral Argument, *Jennings v. Rodriguez*, No. 15-1204 (Nov. 16, 2016) (challenging the prolonged detention of noncitizens challenging their removal). Both *Dimaya* and *Jennings* were restored to the calendar for re-argument in the 2017 Term. In 2016, the Court decided *Torres v. Lynch*, 136 S. Ct. 1619 (2016) (classifying a state arson offense as an aggravated felony that bars cancellation of removal). In 2015, the Supreme Court decided two immigration cases, see *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015) (classifying a state drug paraphernalia conviction as meeting a ground of deportability); *Mata v. Lynch*, 135 S. Ct. 2150 (2015) (discussing jurisdiction to consider motion to reopen).

each year,⁸ as well as countless agency determinations on admission, naturalization, detention without bond, and eligibility for discretionary relief.⁹ It is also the method by which the legality of new agency policies can be tested. Nonetheless, the Federal Rules promulgated in 2009 provide for these cases to operate with an unusual veil of secrecy prior to the publishing of court opinions. These rules have serious consequences. They keep advocates in the dark about which issues are before the courts and therefore hamper efforts to provide the best briefing; they provide no public access to positions that government lawyers have taken before the courts in related cases;¹⁰ they inhibit the ability of counsel to assist courts in consolidating cases that involve similar issues; and they interfere with efforts to obtain representation for litigants with strong claims. Such rules also seriously limit the ability of new organizations and the public at large to understand what is happening on the ground in immigration enforcement.

The limitation on access to information in immigration cases operates in a very peculiar way. Before a circuit panel decides a case, only the litigant's name and the docket listing are generally available through remote access, and it is extremely difficult for interested lawyers and organizations to know that a specific legal issue is pending before the court and to inform the court of related cases.¹¹ Once the case is decided, the opportunity to shape the legal decision is greatly diminished, and in many circuits, essentially foreclosed due to the courts' reluctance to take a case en banc.¹² Meanwhile, the courts may include highly personal details in an opinion tied to the name of the party, including accounts of rapes and beatings.¹³ In addition, the names of minors, which must be redacted in all other federal civil filings, may be included in the courts'

8. OFFICE PLANNING, ANALYSIS AND STATISTICS, EXEC. OFFICE IMMIGRATION REVIEW, FY 2016 STATISTICAL YEARBOOK A7 (2017) (providing annual statistics on immigration court cases). In FY 2016, there were a total of 328,112 new matters filed in immigration courts including 237,000 newly initiated removal proceedings. *Id.* at A7.

9. The Executive Office of Immigration Review applies a policy of intra-circuit acquiescence under which they apply the precedent set by each circuit to cases decided by the immigration courts within that circuit. *See, e.g., In re Carachuri-Rosendo*, 24 I. & N. Dec. 382, 394 (B.I.A. 2007), Interim Decision 3592, 2007 WL 4624548 (announcing interpretation of statute to be applied outside of circuits with contrary controlling authority); *In re Esquivel-Quintana*, 26 I. & N. Dec. 469, 476 n.7 (B.I.A. 2015), Interim Decision 3824, 2015 WL 170904 (noting different rule to be applied in Ninth Circuit based on circuit law).

10. FED. R. CIV. P. 5.2(c); FED. R. APP. P. 25(a)(5).

11. *See* FED. R. CIV. P. 5.2(c); FED. R. APP. P. 25(a)(5) (providing for publication of court orders and decisions on public websites while limiting remote access in immigration cases).

12. *See* Alexandra Sadinsky, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 FORD. L. REV. 2001, 2015–71 (2014) (discussing rare use of *en banc* procedures); *Ricci v. Destefano*, 530 F.3d 88 (2d Cir. 2008) (Mem.) (Katzmann, J., concurring in denial of rehearing based on “our Circuit’s longstanding tradition of general deference to panel adjudication”).

13. *See infra* Part III.

opinion.¹⁴ The information in the court opinion is then posted on both official and unofficial court websites and can be accessed easily through a basic web search based on the name of the party. For anyone who goes down to the courthouse to learn more about the case, even more information is available, including full social security and bank account numbers.¹⁵ The net result is a system that does not protect privacy, hampers public oversight and the considered development of the law, and creates a false illusion (prior to the courts' decisions) of privacy protection for those seeking court review.

This Article considers the nature of the public and private interests in access to immigration cases, traces the origins of the special rule for immigration cases, explores the effects of the special rule, and proposes changes that would achieve a better balance between privacy and access. Part I explores public and private interests in immigration proceedings prior to a court's decision. Part II demonstrates how the special rule for immigration cases was not initiated by immigrants or their advocates, but by the government lawyers who defend deportation orders in the federal courts. The history of the rule shows little consideration of the range of immigration issues before the courts, or the impact that the rule might have on the development of doctrine. It also shows that while privacy concerns were an important justification for the rule, the primary impetus was the government's concerns about its ability to redact administrative records to remove information that must be redacted in any other civil case. Part III explores how the immigration exception creates an odd mixture of privacy protection and public access that is poorly suited to any of the purported goals of the exception. Part IV proposes changes to the Federal Rules of Civil Procedure and Appellate Procedure. It also identifies interim changes that could be implemented by the federal circuits.

I. PUBLIC AND PRIVATE INTERESTS IN IMMIGRATION PROCEEDINGS

Debates about public access to court proceedings look at the balance between public interest in access and an individual's interest in maintaining privacy. These issues play out differently across different types of proceedings. For example, scholars have noted the extreme privacy interest in court records involving victims of domestic abuse, who have legitimate fears about their abusers having public access to

14. See *infra* Subpart III.A.

15. FED. R. CIV. P. 5.2(b) (exempting the record of an administrative proceeding from general civil redaction rules).

information about their whereabouts.¹⁶ Similarly, scholars have questioned the wisdom of allowing crime syndicates to be able to easily identify cooperators in criminal cases.¹⁷ For the most part, the federal rules presume that the public interest in access should dominate in virtually all situations. For example, after a brief period of treating criminal cases as private and outside remote access rules, the rule was revised to allow remote access to criminal records.¹⁸ Nonetheless, the separate treatment of immigration cases under existing rules raises the question about the nature of the public and private interests in this category of cases and whether they call for specialized treatment under the federal rules.

Immigration cases stand out in part because they are a large portion of the federal docket. Although the numbers of cases have declined in recent years, immigration cases remain nine percent of federal court of appeals cases.¹⁹ Indeed the case for special treatment in the existing remote access rules was based, in part, on the number of immigration cases before the courts.²⁰ But of course, a large number of cases could mean that the cases are all the more interesting to the public because they involve an important area of government lawmaking that should be fully transparent.²¹

The public interest in immigration cases can be separated into the interest in the legal development aspect of a case, meaning how it sets precedent for other cases or reflects how the law is applied to meet (or not meet) public policy objectives, and those aspects of cases that reveal individual facts about those facing deportation. The public may have a

16. See Natalie Gomez-Velez, *Internet Access to Court Records—Balancing Public Access and Privacy*, 51 LOYOLA L. REV. 365, 371 (2005) (discussing danger of online access for domestic violence victims).

17. See Caren Myers Morrison, *Privacy, Accountability, and the Cooperating Defendant: Towards A New Role for Internet Access to Court Records*, 62 VAND. L. REV. 921, 923 (2009) (arguing that access to cooperator agreements is in fundamental tension with a number of goals of the criminal justice system, including the integrity of criminal investigations, the accountability of prosecutors, and the security of witnesses).

18. Rule 49.1 of the Federal Rules of Criminal Procedure tracks the language of Rule 5.2 of the Federal Rules of Civil Procedure. The Judicial Conference's initial privacy policy for electronic access exempted criminal cases. See REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 49 (2001) (providing for an exemption from remote access for criminal cases with a proviso that the policy would be reviewed after two years).

19. See *supra* note 6.

20. See Civil Rules Advisory Comm. Minutes 18 (Oct. 28–29, 2004), www.uscourts.gov/sites/default/files/fr_import/CRAC1004.pdf (referring to a letter from Peter D. Keisler, Assistant Attorney General, to Judge Sidney A. Fitzwater, United States District Judge, dated October 15, 2004, which proposed limited remote access rule for immigration cases).

21. See *Judicial Conference Privacy Subcommittee, Conference on Privacy and Internet Access to Court Files*, 79 FORD. L. REV. 1 (2010) (comments of Hon. Reena Raggi) (noting that immigration “is an area of enormous public debate, reaching well beyond the judiciary.”) *Id.* at 43.

legitimate interest in both aspects, but the interest is different and should be considered separately. The law development aspect of a case has broad interest because it affects how other cases will be decided and the scope of laws governing deportation, detention, and access to immigration benefits. Because immigration cases generally go directly to the courts of appeals, every case has the potential to set legal precedent in a way that affects not only other cases in court, but also cases that are adjudicated at the agency level and governed by the law of that circuit. This is because immigration judges apply the law of the circuit where the case is heard. Once the circuit alters its precedent, that circuit rule will be applied to every case raising the issue within that jurisdiction.²²

The extent of law clarification and development in immigration cases is extraordinary. The Illegal Immigration and Immigrant Responsibility Act of 1996,²³ bars federal courts from considering a wide range of issues involving the application of discretion or the consideration of factual issues. Instead, judicial review is frequently limited to questions of law, constitutional questions,²⁴ or questions about the scope of any bars to judicial review.²⁵ By definition, those legal questions are not about the individual facts of the case, but instead about how cases that raises similar legal issues should be decided. Thus, whenever a court decides one of these issues, it is setting a precedent and making a decision about how similar cases should be decided by both courts and agency adjudicators in that circuit.

Consider, for example, ongoing litigation about which convictions constitute an “aggravated felony” under immigration law. These cases are common because the aggravated felony designation blocks most forms of discretionary relief.²⁶ If a lawful permanent resident fits the category, he

22. See, e.g., *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382, 394 (B.I.A. 2007), Interim Decision 3592, 2007 WL 4624548 (applying Fifth Circuit precedent in a case arising from an immigration court in the Fifth Circuit), *aff'd*, *Carachuri-Rosendo v. Holder, Jr.*, 570 F.3d 263 (5th Cir. 2009), *rev'd*, 560 U.S. 563 (2010); *In re Esquivel-Quintana*, 26 I. & N. Dec. 469, 476 n.7 (B.I.A. 2015), Interim Decision 3824, 2015 WL 170904 (refusing to apply Ninth Circuit precedent because immigration case was heard in the Sixth Circuit), *aff'd*, *Esquivel-Quintana v. Lynch*, 810 F.3d 1019 (6th Cir. 2016), *rev'd*, 137 S. Ct. 1562 (2017).

23. Pub. L. No. 104-208 Div. C, 110 Stat. 3009 (1996).

24. 8 U.S.C. § 1252(a)(2)(B)–(D) (2018).

25. See, e.g., *Mata v. Lynch*, 135 S. Ct. 2150 (2015) (concluding that courts may review error in denial of a motion to reopen that was denied as untimely); *Kucana v. Holder, Jr.*, 558 U.S. 233, 242, 253 (2010) (concluding that motions to reopen are not designated by state as within agency discretion and therefore judicial review is not barred under 8 U.S.C. § 1252 (a)(2)(B)); *Ortiz-Franco v. Holder, Jr.*, 782 F.3d 81, 87 (2d Cir. 2015), *cert denied*, 136 S. Ct. 894 (2016) (acknowledging circuit split on whether claims under the Convention Against Torture are subject to a jurisdictional bar and may only be reviewed for legal error).

26. Classification of a conviction as an aggravated felony serves as a bar to many forms of relief including cancellation of removal, 8 U.S.C. § 1229b(a)(3) (2018); asylum, 8 U.S.C. § 1158(b)(2)(B)(i) (2018); and voluntary departure, 8 U.S.C. § 1229c(b)(1)(C) (2018).

or she will not be allowed to have a hearing to present individual facts about length of residence on the country, military service, work history, family ties or other equities.²⁷

The federal courts have heard large numbers of cases regarding the scope of the aggravated felony category, including many cases that have reached the Supreme Court. For example, the Supreme Court has considered three cases on the scope of the drug aggravated felony category, each time ruling against the government.²⁸ It has also heard cases on the breadth of the category for sexual abuse of a minor,²⁹ whether the crime of violence category is void for vagueness,³⁰ and whether the arson category includes low level state arson offenses.³¹ Before each of these cases reached the Court, the circuit courts split on the proper rule. As a result, for long periods of time, people in some of those circuits were governed by a rule that was later rejected, and individuals were either granted or denied hearings in which they could present their individual equities due to the rule in their circuit. These cases, and how they developed, were plainly a matter of public interest.

The public interest in access to court proceedings is enhanced when that interest might influence the ruling of the court or otherwise affect public policy. With knowledge of cases that concern specific issues, advocates can provide the court with amicus briefing or otherwise assist the attorney whose case will decide a legal issue of broader interest. Without access, that is much more difficult. Consider, for example, the legal question whether an offer to sell a controlled substance should be categorized as an aggravated felony. This is an issue on which courts

27. *In re C-V-T*, 22 I. & N. Dec. 7 (B.I.A. 1998), Interim Decision 3342, 1998 WL 151434 (describing equitable factors for cancellation of removal and adopting caselaw under former section 212 of the Immigration and Nationality Act); *In re Marin*, 16 I. & N. Dec. 581, 584–85 (B.I.A. 1978), Interim Decision 2666, 1978 WL 36472 (explaining equitable factors under prior section 212(c)).

28. *Moncrieffe v. Holder, Jr.*, 133 S. Ct. 1678, 1688 (2013) (rejecting government's argument that a conviction under a statute that includes social sharing of marijuana is an aggravated felony drug trafficking crime); *Carachuri-Rosendo v. Holder, Jr.*, 130 S. Ct. 2577, 2586 (2010) (rejecting government's argument that a second conviction for drug possession should be treated as a drug trafficking aggravated felony); *Lopez v. Gonzales*, 549 U.S. 47, 60 (2006) (rejecting government argument that any state felony drug conviction is a drug trafficking aggravated felony even if it lacks any trafficking element).

29. *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017) (rejecting classification of California statutory rape offense in which the age of consent is 18 as an aggravated felony).

30. Transcript of Oral Argument, *Lynch v. Dimaya*, No. 15-1498 (Jan. 17, 2017) (reargued in October 2, 2017, see Transcript of Oral Argument, *Sessions v. Dimaya*, No. 15-1498 (Oct. 2, 2017) (void for vagueness challenge to ordinary cases analysis in crime of violence aggravated felony category, 8 U.S.C. § 1101(a)(43)(F)).

31. *Torres v. Lynch*, 136 S. Ct. 1619 (2016) (upholding classification of a state arson offense as an aggravated felony).

disagree and that has not yet been a subject of further review.³² In May 2012, a high-quality pro bono team submitted a brief that raised this question. But before that case was heard, the government moved to dismiss a later filed case raising the same issue. Because of the limited access rule, the pro bono lawyers were unaware that the later-filed case raised the same question as the one that they had fully briefed. The Second Circuit issued a decision in the later case without the benefit of the arguments developed in the initial case.³³ After the summary decision, amicus groups sought rehearing, but they lost the chance to influence the panel's original thinking and the panel stuck to the decision reached without full briefing or argument.³⁴ The second panel then followed the precedent set by the first panel.³⁵ It is possible the result would be the same, but surely there was a public interest in providing the best briefing to the court before it decided the question initially. Further, there was a clear imbalance with the government's attorneys having full access to the briefing in both cases while the immigrants, their lawyers, and amicus organizations were left in the dark until the initial decision was issued.

These are not isolated examples. Major legal questions are a routine aspect of immigration cases involving the proper classification of crimes

32. Compare *Davila v. Holder*, 381 F. App'x 413 (5th Cir. 2010) (offer to sell controlled substance is not an aggravated felony), with *Pascual v. Holder*, 723 F.3d 156 (2d Cir. 2013) (offer to sell controlled substance is an aggravated felony).

33. The dockets show that *Andrews* was the earlier case, filed on Nov. 23, 2011. No. 11-5449, Dkt. 1. The opening brief on the merits was filed by pro bono counsel on May 15, 2012, Dkt. 43. The government did not file a response to the *Andrews* brief until October 22, 2012 because it took the position that it did not need to respond until the Court ruled on Mr. Andrews' in forma pauperis motion. Dkt. 72; Letter of Claire Workman to William Dudley (Aug. 9, 2012), Dkt. 58. That same month, the government moved to dismiss *Pascual*, a case that raised the same legal issue and had been filed on July 16, 2012. No. 12-2798, Dkt. 1 (filing of petition for review); Dkt. 34 (motion to dismiss) (Aug. 1, 2012). Because this was a motion to dismiss, briefing on both sides was limited to 5200 words pursuant to Fed. R. App. P. 27. In contrast, the brief on the merits filed in *Andrews* was subject to regular rules, which in the Second Circuit allows a main brief of 14,000 words and a reply brief of 7000 words. See United States Court of Appeals for the Second Circuit Local Rule 32.1(a)(4). From the docket there is no sign that the *Pascual* panel was aware of the substantial opening brief that had been filed in *Andrews* or the fact that briefing was completed before the *Pascual* panel issued its decision. See *Pascual* Dkt. 70 (opinion dismissing case issue Feb. 13, 2013); *Andrews* Dkt. 74 (reply brief on merits filed on Nov. 15, 2012). Because of docket secrecy, there is no electronic access to determine if the government informed the *Pascual* panel that the same issue was being briefed on the merits in *Andrews* and there was no electronic access at the time for the pro bono team assembled in *Andrews* to check whether the issue was being raised in other cases. This Author has tracked down the government's brief in *Andrews* and it does not mention the *Pascual* case. See Brief for Respondent, *Andrews v. Holder*, Dkt. 72.

34. *Pascual*, 723 F.3d at 159 (rejecting after petition for rehearing argument that an offer to sell a controlled substance is a drug trafficking aggravated felony).

35. *Andrews v. Holder, Jr.*, 534 F. App'x 32, 34 (2d Cir. 2013) (following *Pascual* because en banc review was denied in *Pascual*). *Andrews* was represented pro bono by lawyers from Gibson, Dunn, and Crutcher.

for purposes of deportability or bars to relief from removal and the proper methodology for applying those rules to individual cases, as evidenced by the Supreme Court's steady docket of immigration cases raising circuit splits.

Cases that concern issues other than classification of crimes also raise important legal questions. For example, there is a clear split amongst circuits about whether a claim for protection under the Convention Against Torture³⁶ allows for judicial review of factual questions.³⁷ There are questions about how to define a social group for purposes of asylum law,³⁸ when a judge may require corroboration of evidence from a person fleeing persecution,³⁹ how to define a "particularly serious crime" that bars relief from persecution, and whether the courts may even review those questions.⁴⁰

Each of these legal issues shapes the scope and application of immigration law. The pleadings in these cases argue about what the law means and how it should be interpreted. The briefs from the government explain how the government reads the law and what arguments it can be expected to make in the cases. All of these materials are plainly a matter of interest both to other litigants and to the public at large.

Aside from law development, there may be a public interest in a particular case. This interest might be friendly to the litigant, or it may be hostile. For example, public attention may lead to greater support for an individual who is otherwise not drawing attention. In one case, the *New York Times* stumbled upon a very moving complaint from an immigrant in detention and was able to locate the individual and shine a light on the situation.⁴¹ Ultimately, the attention worked to the individual's benefit by allowing her to leave detention.⁴² Of course, such individualized attention can also be hostile, as in examples where the

36. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85; 8 C.F.R. § 1208.17(a) (2005).

37. *Ortiz-Franco v. Holder, Jr.*, 782 F.3d 81, 87 (2d Cir. 2005), *cert denied*, 136 S. Ct. 894 (2016) (acknowledging circuit split on whether claims under the Convention Against Torture are subject to a jurisdictional bar and may only be reviewed for legal error).

38. *See, e.g., Henriquez-Rivas v. Holder, Jr.*, 707 F.3d 1081, 1088 (9th Cir. 2013) (explaining that witnesses who testified against gang could constitute a particular social group).

39. *See, e.g., Hongting Liu v. Lynch*, 788 F.3d 737, 741 (7th Cir. 2015) (remanding because credible testimony can be sufficient to establish a claim without corroborating evidence).

40. *Estrada-Martinez v. Lynch*, 809 F.3d 886, 891 (7th Cir. 2015), *cert. denied*, 137 S. Ct. 39 (2016) (finding that particularly serious crime designation is not reviewable).

41. Nina Bernstein, *Mentally Ill and in Immigration Limbo*, N.Y. TIMES (May 3, 2009), <http://www.nytimes.com/2009/05/04/nyregion/04immigrant.html>.

42. *Conference on Privacy and Internet Access to Court Files*, 79 FORD. L. REV. 25, 26–27 (2010) (comments of David McCraw, V.P. and Asst. Gen'l Counsel, the N.Y. Times); Nina Bernstein, *Immigrant Finds Path Out of Maze of Detention*, N.Y. TIMES (Sept. 11, 2009), <http://www.nytimes.com/2009/09/11/nyregion/11mental.html>.

government faces criticism for not acting more aggressively to deport an individual who later commits a crime.⁴³

The private interests in immigration proceedings can also be weighty. Litigants have an interest in both their privacy and their personal and financial security. As with any other litigant, parties in immigration cases have an interest in protection from identity theft and other harms that can result from disclosure of their social security number or the numbers of their financial accounts. Similarly, they have an interest in protecting minors from disclosure of their names and birthdates. These privacy interests might seem obvious, but they are a reminder of the baseline privacy interests protected throughout most of the judicial system and which, as the next part explains, are not protected under current rules for immigrants pursuing their appeals.

There are also specific privacy interests in immigration cases. In cases that raise claims of persecution, the detailed facts about past abuse, including rape, beatings, torture, and other traumatic parts of a person's life, are front and center. These facts must be presented in great detail to persuade the fact-finder that the applicant for relief is credible.

Non-persecution-based claims may also involve deep factual records that include extensive detail about a person's criminal history, financial status, health history, family history, and other facts. Some of the health information may be highly private, such as a person's HIV or mental health status. Furthermore, in some cases, the health status of family members might be at issue. For example, some forms of relief require evidence about exceptional hardship to children or other family members. To establish these claims, immigrants present detailed medical information about young children or elderly parents that would otherwise be protected as private.

The information in immigration cases can also present serious security risks for the person seeking protection from deportation, family members and supporters. The essence of a persecution claim is that there are persons or groups that seek to cause real harm to the asylum applicant. Public disclosure of the asylum applicant's evidence about a threat or about past acts by the persecutors is inherently dangerous for the person who faces the persecution. Similarly, statements by those brave enough to support the asylum applicant can put those persons at real risk.

Thus, there are both serious private and public interests at stake in access to immigration records. The critical question is whether the

43. See, e.g., Miriam Jordan & Zusha Elinson, *San Francisco Killing Sparks Illegal Immigrant Detention Debate*, WALL ST. J. (July 6, 2015, 9:21 PM), <https://www.wsj.com/articles/san-francisco-killing-sparks-illegal-immigrant-detention-debate-1436230008>.

federal rules have developed an exception that is sensitive to the full range of concerns.

II. DEVELOPMENT OF THE FEDERAL RULE EXEMPTING IMMIGRATION CASES FROM ELECTRONIC ACCESS

The history of the exception for remote access in immigration cases does not reflect a careful balancing of the public and private interests at stake. Instead, this history shows that the rule drafters paid little attention to the public interest in immigration cases, the courts' interest in learning about related cases, the way that published court opinions might undo privacy protection after the fact, or each case's role as potential precedent for hundreds if not thousands of other cases.

The history of the federal rules on electronic access begins with a privacy policy adopted by the Judicial Conference of the United States in 2001. The policy announced that access to electronic files should be the same as access at the courthouse. At the same time, the Judicial Conference concluded that certain personal identifiers, such as full social security numbers and the names of minor children, should be redacted. The policy initially exempted criminal and social security cases, with the exemption for criminal cases scheduled for review in 2003. The Judicial Conference subsequently eliminated the exception for criminal cases.⁴⁴

The 2001 policy followed a serious debate about balancing privacy and access. Although court paper files with private information had traditionally been available to the general public at courthouses, electronic access meant that the records would be far more accessible. The Judicial Conference Committee on Court Administration and Case Management ("CACM") developed three options for consideration: (1) a public is public position that would treat public access the same whether it was physical access at the court or electronic access; (2) exclusion of sensitive information from both paper and electronic files; and (3) a middle ground that would provide access to the complete file at the courthouse but limit remote information.⁴⁵ After issuing a notice for public comment,⁴⁶ the committee held hearings. The Report of the CACM ultimately recommended the first option. It rejected the exclusion of

44. The Judicial Conference eliminated the exception for criminal cases in 2003. See REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 16 (2003), <http://www.uscourts.gov/about-federal-courts/reports-proceedings-2000-2009>. The Judicial Conference has adopted special rules on which aspects of a criminal case should be considered part of the public record. See *Judicial Conference Policy on Privacy and Public Access to Electronic Files* (Mar. 2008), U.S. CTS. <http://www.uscourts.gov/rules-policies/judiciary-policies/privacy-policy-electronic-case-files>.

45. Comm. on Court Admin. and Case Mgmt., Subcomm. on Privacy and Elec. Access to Court Files; Notice of Request for Public Comment, 65 FR 67016-03 (Nov. 8, 2000).

46. See Notices, Jud. Conf. of the U.S., 65 FR 67016-03 (Nov. 8, 2000).

information from court records because it would diminish access to documents that were accessible historically,⁴⁷ and it rejected the middle rule because it was too complicated and would encourage a cottage industry of businesses that would gather public information at the courts and then sell it for a profit.⁴⁸

One prominent exception in the 2001 rule was the exclusion of social security cases. Following the suggestion of the Social Security Administration as well as advocates for applicants for social security benefits,⁴⁹ the 2001 rule excluded social security cases from remote access on the grounds that they are of an “inherently different nature than other civil cases.” The CACM noted that social security cases are “the continuation of an administrative proceeding, the files of which are confidential until the jurisdiction of the district court is invoked, by an individual to enforce his or her rights under a government program.”⁵⁰ In addition, the committee noted that “all Social Security disability claims, which are the majority of Social Security cases filed in district court, contain extremely detailed medical records and other personal information which an applicant must submit in an effort to establish disability. Such medical and personal information is critical to the court and is of little or no legitimate use to anyone not a party to the case.”⁵¹ The Judicial Conference adopted the CACM suggestions.⁵²

The Judicial Conference revisited the privacy policy after Congress enacted the E-Government Act of 2002.⁵³ The statute sought to enhance access to government information, while protecting privacy and other important interests. The law required courts to develop websites to provide electronic information about cases, and directed the courts to allow electronic access to documents filed with the court unless they were sealed or fell within exceptions that would be promulgated by the Supreme Court.⁵⁴

To implement the E-Government Act, the Judicial Conference set up a special committee on privacy rules. That committee picked up the work

47. COMM. ON COURT ADMIN. AND CASE MGMT., REPORT ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES A7 (June 26, 2001).

48. *Id.*

49. See Comments Received by the Administrative Office of the United States Court in Response to Request for Comment on Privacy and Public Access to Electronic Cases, 20-21 (2001) (comments of Social Security Administration), 26 (comments of representative of the National Organization of Social Security Claimants).

50. COMM. ON CASE MGMT. AND COURT ADMIN., *supra* note 47, at A8.

51. *Id.*

52. Administrative Office of the U.S. Courts, *Judicial Conference Approves Recommendations on Electronic Case File Availability and Internet Use* (Sept. 19, 2001).

53. E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (2002).

54. *Id.* § 204.

that had been done prior to the E-Government Act in developing the 2001 Judicial Conference Privacy Policy. In an initial meeting in January 2004, the committee discussed the special provision for social security cases and explored why there was no similar provision for other cases with private information. The committee minutes indicate that the issue had been “fiercely debated” prior to adoption of the 2001 privacy policy. The minutes offer four rationales for the social security exception. First, that the cases are “solely individual matters involving a government agency.” Second, that they require “a meaningful amount of personal information to be included in court filings.” Third, that “the sealing of documents in each case would be burdensome” due to the number of cases. Fourth, that “the administrative record involved in social security cases would be too burdensome to scan in electronically for every case since those records are not currently available electronically.”⁵⁵ The committee agreed to create a template rule that would incorporate the substance of the 2001 privacy policy for consideration at subsequent meetings of the relevant rules committees.⁵⁶

In April 2004, the Department of Justice offered its views of the work on the E-Government Subcommittee.⁵⁷ It objected to applying the redaction rules to administrative records. It noted that social security and immigration records contain “voluminous administrative records” and that the “burden” on the agencies and government lawyers to redact information would be “substantial.”⁵⁸ It characterized social security and immigration records as “typically” requiring an inquiry into the specific facts of the individual. Although it referenced the rule that exempted social security cases it did not specifically propose that immigration cases be unavailable through remote access. Instead it focused on relieving the burden to redact administrative records. In its next meeting, the E-Government committee considered these views.⁵⁹ It decided to solicit further information from the Justice Department on what cases empirically should be categorized with Social Security cases.⁶⁰

55. Minutes, E-Government Subcommittee Meeting, in Scottsdale, AZ 5-6 (Jan. 14, 2004).

56. *Id.* at 8-9.

57. Letter from Peter D. Keisler, Assistant Atty. Gen., to Hon. Sidney A. Fitzwater, U.S. District Judge (Apr. 14, 2004) (on file with Author).

58. *Id.*

59. Minutes, E-Government Subcommittee Meeting, in Washington, D.C. (June 16, 2004).

60. Members of the Committee on Court Administration and Case Management initially objected to the suggestion that the social security exception be expanded to include immigration cases but suggested that it would be open to “a discussion of special treatment for immigration cases if it can be demonstrated that the volume of these cases is substantial and the information routinely filed should be protected.” Memorandum from Judges John W. Lungstrum, John G. Koeltl, James B. Haines, Jr. & Jerry A. Davis to Members of the E-Government Subcommittee (June 10, 2004) (on file with Author).

In its next correspondence, the Justice Department made out the case for the immigration exception: first, the federal court caseload in immigration cases had exploded; second, immigration case records typically include a great deal of private information; and third, redaction rules would impose an enormous burden. The Justice Department suggested that “at a minimum,” immigration cases be exempted for an initial period of seven years until the technology could be developed to perform the necessary redactions.⁶¹ CACM, which played a central role in the development of the 2001 privacy policy, responded with a compromise position that would “begin by exempting the administrative record in immigration cases from electronic filing until a system is perfected for redacting the administrative record.”⁶² The E-Government Committee submitted these proposals to the standing committees in charge of the relevant federal rules. The Committee on Civil Rules voted on three options: treating immigration cases like social security cases, treating them like other civil cases, or following the compromise suggestion from CACM. The committee voted to treat the immigration cases like social security cases.⁶³ That proposal became the recommendation of the Advisory Committee on the Federal Rules of Civil Procedure to the Standing Committee on Rules of Practice and Procedure, which announced it for public comment.⁶⁴

At the public comment stage, the CACM continued to press for revision of the immigration exception. CACM noted that there was an increase in immigration cases and that case files could include personal information. It proposed allowing remote access to the initiating documents that include the opinions of the Board of Immigration Appeals and the Immigration Judge and that the party filing the appeal be responsible for appropriate redactions.⁶⁵ This compromised position and others related to immigration cases are not discussed in the minutes of the June 2006 meeting that adopted an across the board exception for

61. Letter from Peter D. Keisler, Assistant Atty. Gen., to Hon. Sidney A. Fitzwater, U.S. District Judge (Oct. 15, 2004). Although privacy and concern for sensitive information were factors in its proposal, the Justice Department’s letters demonstrate that its primary concern was with the technological difficulty and burden of redacting large files. Two of its three reasons had to do with the burden that the agency would face in reaction. Most tellingly, its fall back proposal for a phase-in of the rules was directed to the issue of burden faced by the agency.

62. Minutes, Civil Rules Advisory Committee 22 (Oct. 28–29, 2004) (on file with Author).

63. *Id.* at 23.

64. Memorandum from Hon. Lee H. Rosenthal, Chair, Advisory Comm. on the Fed. Rules of Civil Procedure to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure 2-5 (May 27, 2003).

65. Letter from Hon. John R. Tunheim, Chief U.S. Dist. Ct. Judge, to Hon. David F. Levi, former U.S. Dist. Ct. Judge (Feb. 8, 2006).

immigration cases.⁶⁶ That proposal, with the special immigration rule, became the proposed federal rule recommended to the Supreme Court and reported by the Supreme Court to Congress.⁶⁷

Several years after promulgation of the immigration exception, the Judicial Conference Standing Committee on the Federal Rules revisited the privacy exemptions. A subcommittee chaired by Judge Reena Raggi examined whether changes should be made to the electronic filing rules. One specific topic for review was the exception for immigration cases. At a conference held at Fordham University, speakers spoke in favor and in opposition to the immigration exception.⁶⁸ In addition to speakers favoring greater access, the committee heard from an asylum advocate about the special need to protect the filings of asylum seekers. Eleanor Acer of Human Rights First discussed a series of special concerns in these cases. First, applicants might fear retaliation for their asylum claim if they are returned home. Second, they might fear retaliation against family members or colleagues who may be in the country of persecution. Third, the application requires the inclusion of very personal information about both the applicant and witnesses. She cautioned that public access could make people scared to provide information for fear of disclosure. Acer also noted that both international law and agency regulations offer assurance of privacy for asylum seekers.⁶⁹ Elizabeth Cronin, Director of Legal Affairs and Senior Staff Counsel at the Second Circuit, echoed the concern about highly private information appearing in immigration cases. She argued that “[t]he rule is not perfect, but it is an effort to balance those two competing interests [of access and privacy.]”⁷⁰ She noted that records are replete with private information, and that immigration judges testing credibility often pay attention to these details in their decisions. Cronin also expressed concern about the quality of practitioners in immigration cases and whether they could be trusted to perform the necessary redactions.⁷¹ One of the speakers favoring greater access, Professor Dan Kanstroom, also noted that some immigration cases include far more sensitive information than others, including information about asylum, and special visas for persons subjected to

66. Memorandum from Hon. Lee H. Rosenthal, Chair, Advisory Comm. on the Fed. Rules of Civil Procedure to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure (June 2, 2006).

67. Under the Rules Enabling Act, the rules of procedure for the courts must be reported to Congress by May 1 of any year and go into effect no earlier than the following December 1. 28 U.S.C. § 2074 (2010).

68. *Judicial Conference Privacy Subcommittee*, *supra* note 21, at 25–44.

69. *Judicial Conference Privacy Subcommittee*, *supra* note 21, at 32–35.

70. *Judicial Conference Privacy Subcommittee*, *supra* note 21, at 35–39.

71. *Judicial Conference Privacy Subcommittee*, *supra* note 21, at 35–39.

trafficking and criminal conduct. He argued that these cases deserved greater protection than was provided under the rules.⁷²

As asylum issues dominated the discussion, Mark Walters, the representative for the Justice Department, also emphasized confidentiality in asylum cases.⁷³ But he concluded where the Justice Department first started—with a concern about the manageability of a redaction scheme: “I want to sum up by saying that I think the ultimate goal, to reveal as much as possible online, is a worthy one. But practical realities mean we must wait for the technology that will make this reasonably possible.”⁷⁴

At the conference, Judge Raggi questioned the speakers about why there should be an exception for immigration cases but not other civil cases. She noted that there are many other cases with privacy interests where records are available, including some juror records.⁷⁵ She also noted that immigration is an area of enormous public debate. In response, the Justice Department spokesperson argued that the difference is “volume combined with a need for thorough redaction that distinguishes immigration cases.”⁷⁶

Later that year the subcommittee issued its report.⁷⁷ It concluded that the question of access in immigration cases required “a more nuanced approach.”⁷⁸ It urged further research and consultation with interested parties before any decision is made to abrogate the exemption for immigration cases. Mindful of the significant public interest in open access generally, and in immigration policy, in particular, the Subcommittee suggest[ed] that the current approach to immigration cases be subject to future review and possible modification.⁷⁹

In the seven years since the subcommittee’s report, no committee has revisited this issue.

The history of the immigration exception shows that it was initiated by the Justice Department, and that a primary motivation was the sheer difficulty of redacting records at a time of increasing volume of immigration cases. The history also shows recognition that the rule is out of step with other aspects of the civil rules and the primacy that the federal rules process has placed on public oversight of courts and court proceedings. Although the 2010 review identified a need for a more

72. *Judicial Conference Privacy Subcommittee*, *supra* note 21, at 27–31.

73. *Judicial Conference Privacy Subcommittee*, *supra* note 21, at 40.

74. *Judicial Conference Privacy Subcommittee*, *supra* note 21, at 41.

75. *Judicial Conference Privacy Subcommittee*, *supra* note 21, at 43.

76. *Judicial Conference Privacy Subcommittee*, *supra* note 21, at 43.

77. OPERATION OF THE FEDERAL PRIVACY RULES: A REPORT TO THE JUDICIAL CONFERENCE STANDING COMMITTEE ON THE RULES OF PRACTICE AND PROCEDURE BY THE SUBCOMMITTEE ON PRIVACY (DEC. 2010).

78. *Supra* note 21, at 38.

79. *Id.* at 23.

nuanced approach, there has been no ongoing attention to crafting such a solution.

III. THE ODD BALANCE STRUCK BY THE IMMIGRATION EXCEPTION TO REMOTE ACCESS

The final rule for access to immigration filings, as in effect since 2009, provides for an odd mix of privacy and public access that does not protect privacy and hampers orderly consideration of related cases and the development of legal arguments in immigration cases. This mix leads to strange results. Immigration cases are hard to know about in advance of a court opinion, but once a decision is issued, there is less privacy than in other civil cases. Petitioners also enjoy less privacy protection with respect to those interested in knowing information about their cases who are prepared to go to a courthouse. The rule is very hard to justify outside of its initial impetus—a concern with the practical difficulty of redacting filings as expressed in a vastly different technological era.

Under the special rule for immigration cases,⁸⁰ there is greater public access on one dimension and radically less access on another.

80. The rule is set forth in FED. R. CIV. P. 5.2 and adopted by reference in FED. R. APP. P. 25(a)(5). The relevant sections provide:

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

- (1) the last four digits of the social-security number and taxpayer-identification number;
- (2) the year of the individual's birth;
- (3) the minor's initials; and
- (4) the last four digits of the financial-account number.

(b) EXEMPTIONS FROM THE REDACTION REQUIREMENT. The redaction requirement does not apply to the following:

- (1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;
- (2) the record of an administrative or agency proceeding;
- (3) the official record of a state-court proceeding;
- (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;
- (5) a filing covered by Rule 5.2(c) or (d); and
- (6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255.

(c) LIMITATIONS ON REMOTE ACCESS TO ELECTRONIC FILES; SOCIAL-SECURITY APPEALS AND IMMIGRATION CASES. Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention, access to an electronic file is authorized as follows:

- (1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;
- (2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:
 - (A) the docket maintained by the court; and
 - (B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

Whereas there is no access to briefs, administrative records or other documents online through PACER, the electronic public access system for federal court documents,⁸¹ there is total access at the courthouse, even to sensitive information such as full social security numbers and the names of minors.⁸² The rule also creates a strange time dimension to remote information access. While the case is pending, the legal questions in the case, as well as all the facts of the case, are generally off limits through remote access (the one exception is if for some reason the court issues an interim order or opinion that recites details in the case).⁸³ But once the court issues its opinion, the legal questions are public, along with the court's analysis, which frequently involves discussion of the record. Because the record before the Court is the full record, sensitive information (such as a minor's name) or case details about threats of persecution can find their way into judicial opinions.⁸⁴

81. PACER refers to the Public Access for Court Electronic Records. Users must choose a username and password and pay a modest fee for access to filings. *See* PACER, <https://www.pacer.gov/> (last visited Apr. 21, 2018).

82. Under FED. R. CIV. P. 5.2(b)(2), the government is not required to redact personal information in agency cases.

83. *See* FED. R. CIV. P. 5.2(c)(2)(B).

84. *See, e.g., A. v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004) (listing child's name); *T. v. Holder, Jr.*, 776 F.3d 965 (8th Cir. 2015) (discussing son's psychological condition); *K. v. Holder, Jr.*, 587 F. App'x 323 (7th Cir. 2014) (listing child's name). Note that this Article departs from the convention of listing the full name of the party to a case so that it does not lead to even more possible web search hits that highlight these individuals.

The chart below illustrates this combination of privacy exposure and protection under the immigration exception:

	Courthouse	Remote Access by Nonparties through PACER	Opinions (via web browsers)
General rule	Full access <i>other than</i> full social security numbers, full financial account numbers, minor's full name and date of birth	Full access <i>other than</i> full social security numbers, full financial account numbers, minor's full name and date of birth	Full access <i>other than</i> full social security numbers, full financial account numbers, minor's full name and date of birth
Immigration cases	Full access <i>including</i> full social security numbers, full financial account numbers and full names of minors	No remote access unless a court orders otherwise, except for name, docket entries, and court orders	Full access (which sometimes includes full names of minor children and sensitive details of persecution)

The key question is whether the remote access rule strikes the correct balance between public access and privacy. This question requires careful consideration of the content of immigration cases and the kinds of risks that litigants face when information is public. It also requires a careful analysis of the public and private benefits that accrue from greater public scrutiny of both the government agency seeking deportation and the courts that review the legality of deportation and related immigration issues. The fact that the rule can be criticized in both ways (as it was at the Judicial Conference's 2010 symposium) does not mean it reflects a Goldilocks solution that is neither too private nor too public. The critical question is whether it strikes a balance that best accommodates these interests.

A. PROVIDING TOO LITTLE PRIVACY THROUGH THE REMOTE ACCESS RULE

In several respects, the remote access rule offers litigants insufficient protection of their privacy when they challenge an immigration decision in court. These problems are most acute in cases

involving persons fleeing persecution, but are present in a wide array of cases. Where privacy is compromised, that compromise becomes part of the cost of challenging agency action. And where that cost is too high (and potential litigants are aware of that cost), those who would seek to challenge removal orders can be expected to refrain from pursuing their right of judicial review, thereby allowing wrongful government conduct to go unchecked.

At a most basic level, the rule does not protect litigants from having their names attached to both the docket and the court's opinion. Both the docket and the opinion must be public by statute,⁸⁵ and the rules do not provide for redaction of the name of the party challenging the agency's action, which is instead handled through separate individualized requests to proceed by pseudonym. Once the information is in a court opinion, it is accessible to anyone with a web browser through the many sites, including government sites that reproduce court opinions.⁸⁶ Opinions are broadly available on the web, so a basic web search with the party's name will locate an opinion that provides at least some basic details about the person—such as the country from which they originated and, if they are deported, the basis of the deportation.

Connecting names with cases can have serious consequences. For example, in an asylum case, the opinion in the case will almost always list the country from which the person is fleeing. It might also list the names or organizations to which the person belonged, even if the court questions whether that information was known by the government.⁸⁷ Once the opinion is published, a government that might not have been aware of a person's political activities will have easy access to that information.

The public quality of opinions—as mandated by statute, also means that some very important details in the case will become public. A court deciding whether a person testified credibly will discuss testimony. An opinion discussing whether a particular government has knowledge of a

85. Section 205(a) of the E-Government Act mandated the creation of court web sites that include "Access to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format." E-Government Act of 2002, Pub. L. No. 107-347, § 205(a), 116 Stat. 2899, 2913 (2002).

86. There are many unofficial sites that reproduce opinions from these official sites. *See, e.g.*, JUSTIA, <http://law.justia.com/> (last visited Apr. 21, 2018); FINDLAW, <http://caselaw.findlaw.com/> (last visited Apr. 21, 2018); GOOGLE SCHOLAR, <http://scholar.google.com> (last visited Apr. 21, 2018); COURT LISTENER, <https://www.courtlistener.com> (last visited Apr. 21, 2018); CASETEXT, <https://casetext.com/> (last visited Apr. 21, 2018); LEAGLE, [http://www.leagle.com/](http://www.leagle.com;); <http://www.ecases.us/> (last visited Apr. 21, 2018).

87. *See, e.g.*, *C. v. Lynch*, No. 13-2470 (2d Cir. Aug. 28, 2015) (summary order) (stating that evidence did not show that the government from which the applicant feared persecution was aware of her political activities).

person's political activities, will discuss those activities. The very process of issuing a reasoned decision will mean that aspects of the case will be discussed. Such details may include important details about the nature of persecution including accounts of beatings,⁸⁸ rape,⁸⁹ and death threats,⁹⁰ as well as other personal information about where the person is from, the place to which they will be deported, the names of family members, and the specific groups from whom the person fears harm.⁹¹ Those details may also include the names of witnesses or small towns or villages where events took place. In a case where the individual wins protection in the United States, the opinion might lead to danger for those who provided information abroad. When the opinion does not lead to protection, it might cause danger to the person deported.

One might object that those deported, at least those whose claims have not been found credible, did not have a legitimate fear in the first place. But that misunderstands the nature of judicial review in immigration cases and the statutory limits on protection. Judicial review of some issues is plenary, but for other issues, review is limited to considering whether there was an abuse of discretion or a legal error. For example, in many asylum cases, the question is whether substantial evidence supports a decision that a person was not credible, or that the person had not put forward sufficient proof of an objective basis for fear of persecution.⁹² A court that upholds deportation in these circumstances is not finding that the person is not credible, but is instead finding that it was permissible to find that the person was not credible. The standard implies the very real possibility that some people with valid fears of persecution will not be protected through judicial review.

Furthermore, the legal standards for protection from removal based on a threat of persecution provide limited protection. For example, a common issue in these cases is whether the persecution can be attributed to government action or inaction. A person who fails to prevail on these grounds still faces persecution—it is just a persecution for which the laws do not provide protection. For example, in a case involving non-state actors, a court might find that a gang would target and harm the individual, but that it is not sufficiently tied to the government for that

88. *B.-M. v. Lynch*, 790 F.3d 787 (8th Cir. 2015).

89. *H. v. Atty. Gen.*, 2017 WL 4994491 (3d Cir. Nov. 2, 2017); *F.-J. v. Atty. Gen.*, 603 F. App'x 874, 875 (11th Cir. 2015); *L. v. Holder, Jr.*, 587 F. App'x 674, 676 (2d Cir. 2014) (summary order).

90. *R. v. Ashcroft*, 81 F. App'x 642, 644 (9th Cir. 2003).

91. *R.-P. v. Holder*, 599 F. App'x 233, 233–34 (5th Cir. 2015) (listing name of the gang the petitioner feared).

92. *See, e.g.*, *Rizk v. Holder*, 629 F.3d 1083, 1087 (9th Cir. 2011) (discussing substantial evidence standard); *Lin v. Mukasey*, 534 F.3d 162, 165 (2d Cir. 2002) (same); *Waranse v. Ashcroft*, 366 F.3d 889, 894 (10th Cir. 2004) (discussing need for objective and subjective fear); *Ahmed v. Ashcroft*, 348 F.3d 611, 618 (7th Cir. 2003) (same).

fact to permit relief.⁹³ Publicity about the name of the person challenging deportation, especially in an opinion that names the person and will be broadcast on the web, creates a real danger that the gang will be looking for the individual following deportation.

Although these problems may appear to be most acute in cases involving claims for asylum, they extend to other situations. A person deported based on a criminal conviction, for example, often faces danger in the country of deportation due to the stigmatization of deportees.⁹⁴ A public judicial opinion tied to the individual's name solidifies this danger. Even in cases where the person's past criminal history has been expunged or is sealed under American law, the peculiar rules of immigration practice (which treat expunged convictions as convictions)⁹⁵ means that that information will be made public in the country of deportation through an internet search of the individual's name.

Moreover, the absence of redaction can lead to less privacy at the opinion stage than in an ordinary civil case. For example, the general federal rule requires redaction of a minor's full name.⁹⁶ But in a case that is not subject to a redaction rule, the briefs will discuss the actual name of the minor and, not surprisingly, courts may issue opinions that include the full names of minors.⁹⁷

The public nature of the names of litigants also increases the danger that material redacted in ordinary civil cases will get into the hands of those who mean harm. Because the current rule excludes immigration and social security cases from redaction requirements at the courthouse, they leave these selected litigants vulnerable to substantial mischief if anyone is interested actually goes to the courthouse. Although limiting access to the courthouse might appear to assure "practical obscurity,"⁹⁸

93. *Compare* H.-A. v. Lynch, 784 F.3d 944 (4th Cir. 2015) (upholding withholding claim based on targeting by gang of nuclear family due to government unwillingness or inability to control private actors), *with* F.-J., 603 F. App'x at 875 (denying withholding in part because petitioner failed to show that torture by guerrillas would be with acquiescence of the government).

94. *See, e.g.*, Bernard Headley & Dragan Milovanovic, *Rebuilding Self and Country: Deportee Reintegration in Jamaica*, MIGRATION POL'Y INST. (Aug. 16, 2016), <http://www.migrationpolicy.org/article/rebuilding-self-and-country-deportee-reintegration-jamaica> (discussing unjustified stigmatization of deportees to Jamaica); David C. Brotherton & Luis Barrios, *Displacement and Stigma: The Social-Psychological Crisis of the Deportee*, 5 CRIME, MEDIA & CULTURE 29 (2009).

95. *See In re* S.R., 23 I. & N. Dec. 223 (B.I.A. 2002); N.-R. v. Holder, Jr., 646 F.3d 684 (9th Cir. 2011).

96. FED. R. CIV. P. 5.2(a).

97. *Supra* note 84.

98. The Supreme Court endorsed the concept of "practical obscurity" in a Freedom of Information Act (FOIA) case concerning access to rap sheets. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989) (noting that the government proposed the term). The Court found, in the FOIA context, that release of rap sheets would constitute an unwarranted invasion of privacy. The court noted that "there is a vast difference between the public records that might be found

that obscurity is not as great as might be assumed. With access to the electronic docket, someone who is looking for a person's case will be able to search the name and know that it is pending, and can then obtain the full file in the courthouse. As a result, the information can be made public at any time at any time, and if it is made public the litigant lacks even the basic protections that other litigants receive as to such information as social security numbers. Anyone who chooses to do harm to the individual by going to the courthouse can make use of the social security number to obtain a wide array of personal information, such as tax records, that could do greater harm than the information in a regular civil court file that redacts social security and financial account information. This danger is serious given the prominent role of social security numbers in identity theft.

If a case goes beyond the circuit stage, even more material is public as a matter of course. When a person petitions for a writ of certiorari to the Supreme Court and the Solicitor General responds to the petition, that response is available on a public website.⁹⁹ Moreover, that response may discuss details of the case.¹⁰⁰ The responses might discuss the degree to which issues were properly preserved below, even though the briefs below are not available to the public. Although most cases do not reach the stage of Supreme Court litigation, the very fact that briefs are available at a later stage of the litigation means that the protection that appears to be offered at the circuit stage is time limited.

Altogether, the privacy promised by the rules has two main shortcomings. Because the name of the person challenging removal is public, and important information about the case will be available on the web once the case is decided, current rules do not in fact offer "practical obscurity." Second, because redaction rules do not apply, material that would be protected in any other civil case is public, even if some of that information will only be available to those who go to the courthouse.

B. PROVIDING TOO MUCH SECRECY AND INADEQUATE PUBLIC OVERSIGHT

A serious consequence of the privacy rules is that they impede public oversight of the legal issues before the courts and the government's litigation positions. The rules effectively mean that the public is unaware

after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information." *Id.* at 764.

99. For all briefs filed by the Solicitor General's Office since 1985, see *Supreme Court Briefs*, <http://www.justice.gov/osg/supreme-court-briefs> (last visited Apr. 21, 2018).

100. See, e.g., Brief for the Respondent in Opposition at 4, *Djadjou v. Holder, Jr.*, No. 12-173 (4th Cir. 2011) (stating that the respondent was beaten, raped, and tortured during detention for participation in opposition party); Brief for the Respondent in Opposition at 3-4, *Rosario v. Holder, Jr.*, No. 10-1102 (2d Cir. 2010).

of the issues pending before the circuit courts until after a case is decided. This rule directly affects litigants who are unaware of related cases. It also affects courts since litigants cannot inform the court about related cases. In addition, by making briefs and other materials off limits, the rule undermines oversight of the courts and government litigators by scholars and organizations engaged in government oversight.

1. *Secrecy in the Legal Issue Docket*

While cases are pending prior to decision, the remote access rules provide public access to a case's docket entries and litigants' identities, but not public access to pending legal issues before the courts. Access to the "legal issue docket"—the docket of questions that courts might decide that have implications for other litigants—is limited to those who can get to the relevant courthouse, and are prepared to make repeated trips to the court to monitor issues in new cases. Similarly, access to legal positions and legal arguments—both as presented by government lawyers and by advocates from immigrants—is limited to those who physically go to the court to read these materials. These materials remain under a veil of "practical obscurity," which makes them theoretically accessible but difficult to access.

Practical secrecy in the legal issue docket has consequences for the coordination and development of arguments on cases that raise important legal questions. For litigants, practical obscurity means that it is harder to know about other cases presenting similar issues and how both government and other lawyers have presented issues. A brief will simply be less well written if it is prepared without information about what the government has argued in similar cases or how the best litigators have presented arguments on sophisticated legal issues.

If immigration cases followed undisputed legal standards and each case only applied the law to the facts (an image of immigration cases that was advanced by the proponents of the restricted remote access rule),¹⁰¹ that might not be a problem. But immigration cases are actually packed with many serious sophisticated legal questions. As an illustration of the depth and importance of the legal issues in immigration litigation in the federal courts, consider that during the time that the rules process took place—from 2004 through 2007—the Supreme Court decided seven immigration cases that addressed a wide range of issues, including who may be subjected to indefinite detention,¹⁰² what countries the

101. See Letter from Peter D. Keisler, Assistant Atty. Gen., to Judge Sidney A. Fitzwater, U.S. Dist. Ct. Judge at 3 (Oct. 15, 2004) (describing highly factual material submitted for discretionary relief).

102. *Clark v. Martinez*, 543 U.S. 371 (2005).

government can designate for deportation,¹⁰³ what criminal convictions require deportation,¹⁰⁴ who is subject to reinstatement of a removal order,¹⁰⁵ and the proper remedy when a circuit court reverses a removal order.¹⁰⁶ Before the immigration exception rule was promulgated, lawyers were able to access government briefs in district court and circuit cases and could see what positions the Department of Justice was taking on how to read the law. Lawyers were also able to view how other lawyers presented arguments in winning cases and to craft their arguments accordingly. Once the rules were put into place, it was no longer possible to get remote access even to the Board of Immigration Appeals (“BIA”) decisions that were the subject of a pending appeal so as to know what issues were pending before the courts, let alone the positions of government lawyers on issues of such importance.

The legal issue docket’s secrecy is one-sided: While immigrants, their lawyers and advocacy organizations have difficulty monitoring the issues pending before the courts and the arguments being made in those cases, government lawyers defending removal decisions have full access to the underlying materials. This imbalance follows from the fact that the government is represented throughout the courts by the Department of Justice, and typically the Office of Immigration Litigation.

Imbalanced and uninformed advocacy is a problem for courts, litigants, and litigants’ allies. Courts require parties to notify the court about related cases so that they can properly coordinate related decisions.¹⁰⁷ Yet immigration advocates are unable to fulfill this function unless they are in touch with lawyers with similar cases. As a result, it is not unusual for a court to receive extensive briefing in one case raising a question, while another case presenting the same question proceeds to argument and decision with a much poorer presentation.

Courts have a clear interest in getting the best briefing before they decide important legal issues. In circuits that have a robust en banc process, better advocacy at the panel stage (before the issues are announced through a panel opinion) might obviate the need for en banc review because the panel decision can better account for all relevant arguments. In circuits that have a very weak en banc process, better

103. *Jama v. Immigration & Customs Enft*, 543 U.S. 335 (2005).

104. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007); *Lopez v. Gonzalez*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

105. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006).

106. *Gonzales v. Thomas*, 547 U.S. 183 (2006).

107. For example, in the Second Circuit, litigants must file Form C-A which asks whether there is another case pending that “[i]nvolves an issue that is substantially similar or related to an issue in this petition or application.” See United States Court of Appeals for the Second Circuit Agency Appeal Pre-Argument Statement (Form C-A), http://www.ca2.uscourts.gov/clerk/case_filing/forms/pdf/Form%20C-A%20rev%2012-1-13.pdf (last visited Apr. 21, 2018).

briefing at the panel stage can protect the circuit from announcing precedent based on poor argumentation, and then awaiting the lengthy system of Supreme Court review before altering its position.

These problems are more acute in immigration cases, where the circuit courts are the first layer of judicial review, than they are in cases such as social security actions, where cases only reach the circuit after a decision in the district courts. Because immigration cases typically start in the circuit courts,¹⁰⁸ every case filing is potentially one in which the circuit will announce a new precedent. Once such a precedent is announced, it will apply to all immigration decisions at the agency level in that circuit, including thousands of cases at the immigration judge and board of immigration appeals stages. Furthermore, some cases will serve as precedents that govern the length of criminal sentences that will be imposed by district court judges within that circuit.¹⁰⁹ In contrast, social security cases are filed in district court and only bind the litigants in that particular case. If a social security case is appealed and might become circuit precedent, there is probably a district court opinion available that sets out the issues and allows both litigants and interested parties to know in advance about a case that could set precedent. No such safeguards exist for identifying important immigration cases at the courts of appeals.

Recent immigration cases before the Second Circuit—which eschews en banc hearings—illustrate the problem with awaiting a judicial opinion before there is public notice of the issues before the Court. Consider *Vartelas v. Holder*,¹¹⁰ in which the Supreme Court ultimately reversed the Second Circuit. In the proceedings before the Second Circuit, the attorney for the petitioner did not submit any reply brief, which is standard procedure for adequate representation in a circuit court case. Once the circuit issued its opinion, an interested amicus group sought to persuade the circuit court to hear the case en banc.¹¹¹ The court rejected the request for rehearing, in accordance with

108. 8 U.S.C. § 1252(a)(1) (2016).

109. For example, the “aggravated felony” term in immigration law has extensive implications for district court cases in which liability for criminal penalties or eligibility for naturalization turns on whether a conviction should be classified as an “aggravated felony.” See, e.g., 8 U.S.C. § 1326 (2016) (enhanced penalty for reentry if the defendant has been previously convicted of an aggravated felony); 8 U.S.C. § 1253(a)(1) (2016) (enhanced penalty for failure to depart if convicted of an aggravated felony); *Chan v. Gantner*, 374 F. Supp. 2d 363 (S.D.N.Y. 2005) (denying naturalization due to an aggravated felony conviction).

110. 132 S. Ct. 1479 (2012).

111. Amicus Curiae, *Vartelas v. Holder, Jr.*, No. 09-0649 (2d Cir. Nov. 8, 2010) (motion for leave to file amicus by the Immigrant Defense Project).

the Second Circuit's longstanding reluctance to hear cases en banc.¹¹² As a result, cases before the administrative agency continued to be decided under the circuit's precedent until the Supreme Court invalidated the circuit court decision. The circuit court might have reached the same result with a reply brief and amicus submissions, but better submissions may have reduced the chance of that result.

Similarly, the Second Circuit recently split with other circuits on the standard for deportability for a crime of child abuse.¹¹³ In the case that led to the split, the individual immigration lawyer was from out of town and notified the court that he would rest on the papers. The case raised a very important question that arises in many other cases, and would have easily attracted pro bono counsel able to argue the case, or interested amici, had anyone been aware that it was pending. Once the decision was issued, amici supported a petition for rehearing en banc. As with *Vartelas*, the court denied en banc review. In an opinion concurring in the denial of rehearing, Judge Lohier noted that "[t]his appeal represents yet another example of bad briefing in an immigration case leading to an unhappy result for the petitioner."¹¹⁴ While the court proceeded to clarify that there would be other issues petitioners could raise that are specific to New York statutes, the court stood by its decision on the broader issue, which was the subject of the circuit split. The Supreme Court denied certiorari in that particular case, but the split in the circuits continues.¹¹⁵ Meanwhile, immigration courts in the Second Circuit will apply a rule that was adopted with mediocre advocacy and without the benefit of expert amicus submissions.

2. *Lack of Oversight of Government Positions*

Limitations on remote access also curtail essential oversight of government activity. The government, as a litigator, takes positions about how statutes and regulations should be interpreted. Its positions may be of substantial public interest. Yet remote access offers the public a view only of aspects of the government's positions through the filter of how a court describes those positions in an opinion. It is difficult to tell whether the government has taken conflicting positions in cases raising

112. *Vartelas v. Holder, Jr.*, No. 09-0649 (2d Cir. Jan. 4, 2011) (denying a rehearing en banc); *Ricci v. Destefano*, 530 F.3d 88, 89 (2d Cir. 2008) (Mem.) (Katzmann, J., concurring in denial of rehearing based on "our Circuit's longstanding tradition of general deference to panel adjudication").

113. *Florez v. Holder, Jr.*, 779 F.3d 207 (2d Cir. 2015) (splitting with *Ibarra v. Holder, Jr.*, 736 F.3d 903, 910 (10th Cir. 2013)).

114. *Florez v. Holder, Jr.*, No. 14-874, 18a (2d Cir. July 13, 2015) (Lohier, J., concurring in denial of rehearing).

115. Compare *Ibarra v. Holder, Jr.*, 736 F.3d at 903 (rejecting BIA's broad definition of child abuse), with *Florez v. Holder, Jr.*, 779 F.3d at 207 (upholding BIA's broad definition of child abuse).

similar issues or whether it is fairly portraying its positions in more public fora.

The aftermath of the government's position in *Nken v. Holder*¹¹⁶ offers a dramatic example of this problem. In *Nken*, the Office of the Solicitor General assured the Supreme Court that a person who won an appeal before the court of appeals would be able to return to the United States. When the Freedom of Information Act ("FOIA") litigation led to a highly critical district court opinion holding that representation extremely inaccurate,¹¹⁷ the Office of the Solicitor General sent a letter to the Supreme Court apologizing for the statement and assuring the Court that the agency adopted new procedures and going forward, courts of appeals would be informed of those procedures (which provided only for the return of some successful litigants).¹¹⁸ Many years later, after advocates suspected that the government was not living up to this promise of candor in the courts of appeals, advocates tracked down government briefs at selected courthouses to prove that point.¹¹⁹ But this process of government oversight was very difficult and cumbersome. As a result, more than a year passed before there was any attention to the conflict between the promises to the Supreme Court and the government's representations to the courts of appeals.

More generally, restricted access creates an imbalance in immigration cases. Because the government is in the unique position of knowing which cases raise similar issues, it can quietly resolve cases for individuals whose cases are well litigated, while leaving other litigants and pro se parties without access to the best arguments. For example, it is not unusual for the government to offer to settle an individual case in which there has been amicus involvement. But the very same issue may arise in another case that will move forward to argument and may lead to a precedent without the court benefiting from the broader perspective of interested *amici*.¹²⁰

Practical obscurity for government submissions also makes it difficult for the public to have access to government claims about

116. 556 U.S. 418 (2009).

117. Nat'l Immigration Project of the Nat'l Lawyers Guild v. U.S. Dep't of Homeland Sec., 842 F. Supp. 2d 720, 730 (S.D.N.Y. 2012) (granting summary judgment for plaintiffs on release of the e-mail communications that were the basis of the OSG statement).

118. Letter from Michael R. Dreeben, Deputy Solicitor Gen., U.S. Dep't of Justice, to William K. Suter, Clerk, Supreme Court of the U.S. (Apr. 24, 2012), http://www.nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/OSG%20Letter%20to%20Supreme%20Court,%20Including%20Attachments%20-%20April%2024%202012.pdf.

119. Nancy Morawetz, *Convenient Facts: Nken v. Holder, the Solicitor General, and the Presentation of Internal Government Facts*, 88 N.Y.U. L. REV. 1600, 1662–63 (2013) (describing the government's post-apology submissions related to *Nken*).

120. Interview with Manuel Vargas, Immigrant Defense Project (July 14, 2017).

government policies and procedures. In yet another example related to the plight of immigrants who are deported prior to a final order in their cases, the Eleventh Circuit ordered the government to show cause why an immigrant with a pending petition for review and request for a stay had been deported despite an assurance to the court that no such deportation was planned.¹²¹ The Court's show cause order is available as part of the public docket but the government's response is not. All that is visible, is the Court's satisfaction with the government's promises,¹²² however, without knowing what those promises were, it is difficult to keep the government to its promises.

The problem of oversight is particularly serious in a field where between thirty-four percent and forty percent of litigants are pro se.¹²³ Practical obscurity makes it very hard for independent organizations to see what positions the government has taken in these pro se cases, and to step up and take on cases where the government is not being forthright¹²⁴ or the issues are not well presented by a pro se litigant.

Altogether, the immigration exception makes little sense. It hobbles the ability of lawyers and pro se litigants to understand the legal arguments presented in similar cases, hobbles the consolidation of cases raising similar legal issues, and interferes with courts receiving the best arguments and impairing the adversary process. It does not provide the protection to litigants it appears to promise and might even lead to greater disclosure of sensitive information. And it fails to account for the importance of names in directing malicious parties towards the persons who are most vulnerable. While it does succeed in offering some "practical obscurity" for information that is in court records but not in the ultimate court opinion, it is a rough tool that is not well designed to achieve that objective.

IV. DEVELOPING A BETTER BALANCE

The debate over access to immigration court records is part of a larger debate about the degree to which courts should make records

121. See *GS v. Holder*, No. 15-10136 (10th Cir. July 2, 2015) (ordering government to show cause why sanctions should not be imposed due to removal in violation of a stay).

122. See *GS v. Holder*, No. 15-10136 (10th Cir. July 24, 2015) (stating "[w]e accept the government's representations, supported by affidavits, that the events leading to Mr. [S]'s improper removal were the result of human error and there was no intent to demonstrate contempt for the Court or its authority.").

123. The Administrative Office of the Courts reports that in 2014, there were 6927 agency appeals, of which 2363, or 34% were pro se. It further reports that 86% of the agency appeals are from the BIA. *U.S. Courts of Appeals—Judicial Business 2014*, U.S. CTS., <http://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2014> (last visited Apr. 21, 2018). If all of the pro se cases involved appeals of immigration matters, the percent of pro se cases would be forty percent.

124. Morawetz, *supra* note 119, at 1619–46.

available through remote access and the implications of public information for basic privacy. Scholars and court officials struggle with the implications of easy access to personal information and the fear that electronic access to court records compromises privacy and increases the danger of identity theft.¹²⁵ Solutions that completely protect privacy are at odds with the public's interest in monitoring court proceedings. Meanwhile, solutions that value the public's right to know can have devastating consequences for individuals who are forced to compromise their privacy, and, at times, their security, when they access their right to judicial branch review.

This Article argues that courts could achieve a better balance for immigration cases by developing and requiring adherence to a more refined set of redaction rules (including the use of pseudonyms for litigants). Such targeted rules would allow practical access to agency opinions, briefs, and other legal materials that signal whether the court is presented with an important question and how arguments around that question are framed. Perhaps most important would be rules that allow for the redaction of full names, which are the most likely route to public revelation after an opinion is released. Through redaction rules, courts could achieve greater public participation in court proceedings and greater accountability for those who make arguments before the courts. Redaction rules would also provide more permanent and secure protection of privacy than the current rules, which allow for any information to be placed in a judicial opinion. Although redaction rules are not perfect, they provide a route to balance in lieu of the current rules' all or nothing approach. Although more costly to the goals of public scrutiny, a rule could also provide limited access to the administrative record so as to retain the advantage of the "practical obscurity" of those records. In addition, for cases where there is truly a security risk or a very serious privacy issue, courts can make use of traditional mechanisms, such as sealing a record to protect the highly vulnerable.

A. REPEALING THE IMMIGRATION EXCEPTION IN THE FEDERAL RULES

The case for repealing the special immigration rule is powerful, especially if alternate safeguards can be developed to better serve privacy concerns. None of the original rationales for the rule stands up to scrutiny

125. See, e.g., Gomez-Velez, *supra* note 16; Peter W. Martin, *Online Access to Court Records—From Documents to Data, Particulars to Patterns*, 53 VILL. L. REV. 855 (2008); Peter A. Winn, *Judicial Information Management in an Electronic Age: Old Standards, New Challenges*, 3 FED. CTS. L. REV. 135 (2009); Elizabeth Judge, *Enabling Access and Reuse of Public Sector Information in Canada: Crown Commons Licenses, Copyright, and Public Sector Information*, in FROM "RADICAL EXTREMISM" TO "BALANCED COPYRIGHT": CANADIAN COPYRIGHT AND THE DIGITAL AGENDA (Michael Geist ed., 2010).

under current conditions. Policy concerns surrounding the rule are better addressed through alternative mechanisms.

First, the rule is totally at odds with the overall thrust of the Federal Rules of Civil Procedure, which recognize the value of public access to court proceedings both as a value in itself and as a value that leads to better court processes and decisions.¹²⁶ In virtually every other legal arena, including criminal cases, bankruptcy cases, employment cases, and general civil cases, the courts eschew efforts to shield scrutiny of how the courts operate.

Second, the analogy to social security cases is poor. Unlike social security cases, immigration cases arise in the circuit courts where precedent decisions bind both the court and agency actors in thousands of cases. Allowing such a lawmaking role to take place in secrecy is at odds with basic principles of open government that were at the heart of the E-Government Act and the general procedures for access to court filings.

Third, secrecy in immigration cases blocks access to better lawyering and better amicus support in appropriate cases. The courts are ill-served by a system in which they do not receive the best arguments and in which better briefed cases are settled while more poorly briefed cases proceed to decisions that may establish precedent. A system that leaves resolution of important legal questions to the en banc process and cert petitions virtually guarantees that the wrong rule will be applied for years before the legal system is able to rectify a decision that reached a result on poor briefing.

Fourth, the concerns about administrative burden that prompted the original rule have waned in importance. The redaction burden today is not the same as the claimed burden in 2004: specifically, the number of cases dropped considerably.¹²⁷ More importantly, the technological ability to redact filings is far greater today than it was in 2004. New electronic filing rules in the Second Circuit, for example, require that every document filed be text searchable.¹²⁸ In sharp contrast, at the time that the Judicial Conference adopted the special rule for social security

126. See FED. R. CIV. P. 5.2 (creating presumption of access absent individualized orders).

127. In 2009, when the rules were enacted, immigration cases made up almost twenty-three percent of the federal court of appeals docket. See Table B-1, *supra* note 6 (see *supra* note 1, on the rule of thumb that eighty-five percent of administrative appeals involve immigration cases). In contrast, today, immigration cases make up about nine percent of the docket. Table B-1, *supra* note 6. In absolute numbers (again using the eighty-five percent rule of thumb) the annual number of immigration petitions for review dropped from 11,926, in 2009, to 7187, in 2016, so that the current number is 60% of the number of petitions than at the time the rule was adopted.

128. See *Uploading the PDF Document*, U.S. CT. APPEALS 2D CIR., http://www.ca2.uscourts.gov/clerk/case_filing/electronic_filing/how_to_use_cmecf/uploading_the_PDF_document.html (last visited Apr. 21, 2018) (requiring all pdf submissions to be text searchable).

cases, administrative records had to be scanned manually at the clerk's office. Indeed, the government itself acknowledged at the time of its 2004 proposal that technological changes would ease the burden of redactions. Its proposal offered as an alternative to a ban on remote access a seven-year phase in period for adapting to new technology.¹²⁹ That period would have expired in 2011, had it been adopted. Redaction might not be simple, but parties have adapted over time to the courts' requirements for redaction in comparable cases.¹³⁰ Furthermore, if redaction were truly impossible, the appropriate solution would not be to make this special class of petitioners vulnerable of public access to highly private information, as they currently are when any member of the public can read the un-redacted record (including social security numbers and other identifiers) at the courthouse.

Fifth, special concerns about asylum seekers are ill-served by the existing rule. Asylum seekers who need privacy are not helped by a system that allows their names and the facts of their claims to be fully public at the time of the court's decision and direct those who are interested to completely un-redacted filings at the courthouse. To the extent the courts wish to protect the privacy of litigants and there are powerful reasons to do so in some immigration cases, the remote access rule is poorly designed to accomplish that goal. Rules that gave litigants methods to protect their privacy on a permanent basis and made clear what information would remain in the public realm would be far more protective.

B. ALTERNATIVE MECHANISMS TO PROTECT SENSITIVE INFORMATION

This Article proposes four mechanisms that courts could employ to better protect the privacy of asylum seekers and other litigants who require greater privacy in their court cases. Each of these mechanisms could be implemented without the immigration exception and each would better protect the privacy of litigants. These mechanisms are (1) pseudonymous filing, (2) expanded redaction, (3) limited access to administrative records, and (4) where appropriate, motions to seal.

129. *See supra* note 56.

130. *See, e.g.*, *Nash v. Life Ins. Co. of N. Am.*, 2010 WL 2044935 (S.D. Cal. 2010) (rejecting argument that redaction of 4500 pages of record would be burdensome); *Lohr v. UnitedHealth Grp., Inc.*, 2013 WL 4500692, at *2 (M.D.N.C. Aug. 21, 2013) ("While it may be burdensome for the parties to comply with Federal Rule of Civil Procedure 5.2, the Court finds that any burden to the parties does not overcome the strong presumption in favor of access to court records.") (internal quotation marks omitted).

1. *Filing Under a Pseudonym*

One oddity of the remote access rule is that its authors paid little attention to how the agency balances privacy and access. One promising model—which is used by the Executive Office of Immigration Review (“EOIR”) in published asylum cases—is to use pseudonyms. Through the use of pseudonyms, the agency can make the legal reasoning of its opinions public while shielding information that allows for easy identification of the asylum seeker.

The EOIR practice in asylum cases grows out of special agency rules regarding privacy in asylum cases. Asylum claims at the agency are filed on a form that promises privacy protection (although not is the case goes to court).¹³¹ Agency regulations include similar promises of privacy protection.¹³² Because of these privacy rules, the BIA does not publish names of asylum seekers in its published precedent opinions. It also appears that the agency does not distribute unpublished asylum decisions to secondary publishers such as Lexis and Westlaw.¹³³ Thus, the agency’s policy is to provide protection to asylum seekers in published cases by using pseudonyms in published cases and closing access to decisions in unpublished cases. The policy does not work perfectly in practice (the agency does provide Westlaw and Lexis access to the files of persons who seek reopening to seek asylum) but the general policy does seek to honor the promise of privacy, even if that promise is qualified as only applying at the agency level.

The agency model for protecting asylum seekers when their cases go to Court carries forward to judicial review of published agency asylum cases. Those cases, like the underlying agency cases, are named after the parties’ initials. When a court issues an opinion about the case, the asylum seeker continues to be known through initials. A web search of court opinions will not reveal the person through his or her full name. Of course, other details in the case might be recognizable—especially details regarding the claimed persecution, but the opinion is far less likely to

131. The instructions for filing an application for asylum state: “The information collected will be used to make a determination on your application. It may also be provided to other government agencies (Federal, State, local, and/or foreign) for purposes of investigation or legal action on criminal and/or civil matters and for issues arising from the adjudication of benefits. However, no information indicating that you have applied for asylum will be provided to any government or country from which you claim a fear of persecution. Regulations at 8 C.F.R. sections 208.6 and 1208.6 protect the confidentiality of asylum claims.” Form I-589: Application for Asylum and for Withholding of Removal, DEP’T HOMELAND SECURITY, <https://www.uscis.gov/i-589> (last visited Apr. 21, 2018).

132. 8 C.F.R. §§ 208.6, 1208.6 (2016).

133. The agency only follows its policy of not distributing unpublished decisions with some cases. This even for those who have not filed in court, there is public access to cases where a person seeks reopening to file an asylum claim.

garner attention with respect to the applicant if it does not include that person's name.

The pseudonym model would have to be extended to provide similar protection in petitions for review. In practice, the vast majority of asylum seekers who take their cases to court lose the benefit of the agency privacy policy as to their names. Most agency cases do not result in a published precedent opinion. In fiscal year 2014, for example, the BIA disposed of 30,822 cases.¹³⁴ As a comparison, in 2014, the BIA issued twenty-nine precedent opinions and redacted the names in ten cases related to asylum issues.¹³⁵ Meanwhile, over six thousand immigration appeals were filed in the federal courts.¹³⁶ As a result, only a miniscule percentage of petitioners to the court of appeals benefit from privacy as to their name. For example, while the petitioner from the BIA's decision in *Matter of N-A-M*,¹³⁷ a case involving the proper application of the particularly serious crime bar to withholding of removal, benefited from having a disguised name, no similar benefit was provided to the petitioner in *Gao v. Holder*,¹³⁸ whose case turned on whether *Matter of N-A-M* was correctly decided.¹³⁹

It would not be difficult to improve privacy through the use of pseudonyms. The courts could allow cases to be filed by pseudonym on a general basis in immigration cases, or specifically in cases involving claims of persecution. This revision should apply not just to those seeking asylum, but also to others whose case files include sensitive information, such as HIV status. Alternatively, the Executive Office of Immigration Appeals could extend its pseudonym policy beyond the very limited set of cases where publication of a precedent opinion leads to use of a pseudonym. If BIA opinions used pseudonyms or initials, then a web search of the individual's name would not turn up the court's decision granting or denying the right to relief from deportation.

2. Expanded Redaction Rules

A second possibility is to expand the use of redactions. Even with a pseudonym, an opinion can include a lot of personal detail that could compromise the asylum seeker. Decisions that have the caption redacted

134. U.S. DEP'T OF JUSTICE, OFFICE OF PLANNING, ANALYSIS, & TECH., FY 2014 STATISTICS YEARBOOK Q1 (2015).

135. The precedent decisions are collected at <http://www.justice.gov/eoir/precedent-decisions-volume-26> (last visited Apr. 21, 2018).

136. See *supra* note 1.

137. *N-A-M v. Holder, Jr.*, 587 F.3d 1052 (10th Cir. 2009) (affirming in part *Matter of N-A-M*, 24 I. & N. Dec. 336 (B.I.A. 2007)), *cert. denied*, 562 U.S. 1141 (2011).

138. 595 F.3d 549 (4th Cir. 2010), *cert denied* 562 U.S. 1141, 1134 (2011).

139. *Id.* at 545–55.

can include details that a persecutor would recognize. For example, in *Matter of A-R-C-G-*, the decision provides the dates that the asylum seeker traveled, her age at the time of marriage, her country of origin, descriptions of the specific abuse she suffered at the hands of her husband, and the year in which her first child was born.¹⁴⁰ The initials used to describe the case include four letters, making her more identifiable than a person identified through one or two letters. Nonetheless, the fact that her name does not appear on the decision offers a measure of privacy from those who would search for her name.

For asylum cases, one could imagine targeted redaction in particular cases that would be related to the specific dangers that a person faces. For example, if a person expresses fear of a gang, the name of the gang or the name of the particular people who have issued threats could be redacted. Redaction rules could also extend to aspects of a case that would reveal important information about the case and create danger for the litigant. Currently the federal rules allow courts to order alternative redactions, but there is no common procedure by which that would happen. But a court could, for example, issue an order in each immigration case allowing the party to identify other highly sensitive information, such as the name of the party who the person fears, or other such information, so that the court's opinion does not have the unfortunate effect of increasing the danger faced by a person challenging a removal order. Through such a mechanism, litigants could ask to redact the name of a gang, or rapist or other person who might later wreak revenge.

Such tailored redaction could protect a litigant from dangerous disclosures in the court's opinion. For example, in one summary order in an immigration case, the decision lists not just the individual's name, but the organization that she took part in in her home country. The court did not question her membership in that political organization. Instead it concluded that the documents did not establish that the home government was aware of the political activities.¹⁴¹ But of course the decision itself broadcasts that fact to anyone who has access to the web and searches for the individual's name, country of origin or the specific political organization. If the name was redacted in the administrative record, the decision would carry forward that redaction and the

140. 26 I & N Dec. 388 (B.I.A. 2014).

141. In order not to compound the problem of linking this individual's name to the facts alleged, it is cited here only by docket number and without reference to the country of origin. *Cui v. Lynch*, No. 13-2470, at 6 (2d Cir. Aug. 28, 2015) (summary order deny petition for review).

individual would not be as compromised by the very process that considered her asylum claim.¹⁴²

3. *Limiting Access to the Administrative Record*

The Courts could also protect privacy by limiting access to the administrative record of the agency. As proposed by the CACM back in 2004, this compromise would increase the “practical obscurity” of the exhibits in the administrative record, while providing access to the agency’s decisions, and legal briefing. The CACM originally proposed that this approach be phased in until the agency was able to implement the necessary redaction technology. A rule limiting access to administrative records while providing access to legal briefs and other litigation materials also provides a model for shielding the more detailed private information in the case record, while allowing greater access to the issues being litigated in the courts.

Limiting access to administrative records poses a far tougher set of questions than pseudonyms or redactions. While it would undoubtedly lead to greater protection of personal information—including material such as detailed witness affidavits, and tax and bank statements—it would also reduce the transparency of court proceedings. Consider, for example, a case in which the question is whether the party waived an argument in the agency process. It is hard to evaluate whether that is valid or how it is being applied without seeing the record. Or consider a case where the question is whether the government met its burden of proof in establishing that a conviction meets the aggravated felony definition. Without seeing the documents, it is very difficult to evaluate what proof was before the immigration court and how it applied the burden of proof. Or consider a case in which the issue is whether the immigration judge denied the individual due process. Without access to the administrative record, it is almost impossible to assess whether such a claim is substantial. Thus, limiting access to the administrative record has real costs in terms of the ability of pro bono counsel and possible amicus groups to identify worthy cases for representation and amicus involvement, thereby undermining the very values of public access that underlie the E-Government Act.

But making the administrative record less accessible—for example, by continuing the current system of limited remote access—would decrease easy access to more personal information while allowing greater access to the legal positions of the government and the legal issue docket

142. Consider also the decision in *DC v. Lynch*, No. 12-3832 (2d Cir. Aug. 28, 2015) (rejecting “changed circumstances” for asylum applicant based on religious conversion, but announcing that religious conversion in an opinion including the person’s name).

before the court. As the CACM recognized in the rulemaking process, there can be a special rule for the administrative record without closing off access to the issues and arguments pending before the courts.

4. *Sealing Records*

In some cases, privacy and security concerns may be so strong that the appropriate course is to close off all filings from public access. A sealing mechanism does not require a rule change since courts already have the power to seal appropriate cases.¹⁴³ But the courts' power to seal is important to recognize in the debate over the proper scope of the remote access rule. The remote access rule operates to limit practical access to all cases. Such an across the board rule is less important when parties may seek special relief in cases that warrant closing off the public's access to matters pending before the courts.

C. ADOPTING LOCAL RULES AND PROCEDURES

While a change to the Federal Rules requires a multistage review process, the circuit courts could improve transparency in immigration litigation on a faster schedule by employing their power to adopt local rules and procedures. Indeed, courts have adopted a wide array of special circuit-based rules and procedures for immigration cases due to their importance as a part of the docket. A special rule or procedure to further transparency of the court's docket is a fitting addition to these rules.

Local rules and procedures have proliferated in immigration cases. For example, in the Second Circuit, the Court has adopted a "non-argument" calendar for certain immigration cases.¹⁴⁴ These cases do not proceed to regular merits panels. Instead, they are considered by special merits panels that do not hear argument and in which judges issue their decisions sequentially rather than simultaneously. The Second Circuit has also adopted a special set of briefing guidelines in which parties set their briefing date when they receive the administrative record and are automatically allowed up to ninety days, instead of the time period for briefing set in the rules. The Second Circuit has also adopted a special "Jacobson remand" rule that provides for tolling of the briefing while the parties consider a particular type of remand and sets forth procedures the government must follow if it will later seek the removal of the individual.¹⁴⁵ In the Ninth Circuit, the Court issued a

143. See, e.g., *Sealed Petitioner v. Sealed Respondent*, No. 14-60697 (5th Cir. July 15, 2016).

144. See Hon. Jon O. Newman, *The Second Circuit's Expedited Adjudication of Asylum Cases: A Case Study of a Judicial Response to an Unprecedented Problem of Caseload Management*, 74 *Brook. L. Rev.* 429, 433 (2008).

145. *In re Immigration Petitions for Review Pending in the United States Court of Appeals for the Second Circuit*, No. 12-4096 (2d Cir. Oct. 16, 2012).

standing order that provides a temporary stay in any immigration case.¹⁴⁶ The Third Circuit also promulgated a general standing order for temporary stays in immigration cases.¹⁴⁷ These circuit specific orders respond to the urgency of deportation in immigration cases, the volume of cases, and the courts' experience with methods for processing this set of cases.

Just as they issue other special orders and procedures, individual circuits could take advantage of their power, under Rule 5.2(c) to "order otherwise" as to redactions in appropriate cases. Currently, a party would have to identify the question and ask a court to order otherwise as to redactions. Those parties who would most benefit from public access, such as petitioners whose lawyers are not properly framing the issues in their cases, or who are pro se, are the least likely to even consider asking a court to order otherwise as to redactions.

An individual circuit court could instead create a procedure that either sets forth an alternative general rule, or an alternative default rule (with an option for the party to request that the court proceed under the current Federal Rule). Such an alternative rule could require redaction pursuant to the regular rules of the federal rules, and provide for remote access of all documents (or of all documents other than the administrative record).

A court could also institute a standing procedure instead of a rule. For example, the court could adopt a procedure that requires a party to show cause (or express a view) why the court should not "order otherwise" in the individual case and allow the materials to be subject to the regular redaction rules of the federal rules. Such a procedure would provide an opportunity to consider whether there is need for a case to proceed essentially in secret prior to the opinion. A party might well prefer the protection of the standard civil rule, which would limit access to material that is redacted as a matter of course, such as social security numbers, and would ensure that certain private information did not appear in the opinion. If the circuit's alternative rule provided for pseudonyms, parties might conclude that they are more concerned about web searches based on their names than access to documents through PACER.

Another possibility would be for courts to make individual determinations to remove a case from the general immigration rule when the case is the subject of a possible precedent. For example, cases on the

146. *General Orders*, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, 65 (Dec. 2017) http://cdn.ca9.uscourts.gov/datastore/uploads/rules/general_orders/General%20Orders.pdf.

147. STANDING ORDER REGARDING IMMIGRATION CASES, THIRD CIRCUIT COURT OF APPEALS (2015), <http://www.ca3.uscourts.gov/sites/ca3/files/BIA%20Standing%20Order%20final.pdf>.

non-argument calendar in the Second Circuit are generally presumed not to raise issues that would be controversial. If one judge deems the case worthy of argument, it is moved to the argument calendar, and could result in a precedent opinion. When the court makes such a move to an argument calendar it could order that the remote access limitation be lifted so that there can be appropriate oversight of the arguments before the court issues an opinion and further briefing by amici or appointed counsel, if appropriate. This approach could assure some public notice of a possible precedent decision. It would not, however, offer a method for providing those on the non-argument calendar with access to the pro bono resources and amicus assistance that would help identify meritorious issues that are worthy of closer review.

These local remedies are of course constrained by the current federal rules, however, they provide some opportunity to coordinate cases with related issues and assure increased oversight of an important share of the federal court docket during the inevitably lengthy process of reviewing the federal rules.

CONCLUSION

Built on false premises, the immigration exception to the federal rules strikes an odd balance between privacy and public access. From the beginning, the authors of the rules misunderstood the common legal issues that arise in immigration cases, or their important role in setting precedent for both district court and agency decisionmakers. Conceiving of the cases and being fact based and *sui generis*, they ignored both the public's and litigants' interest in knowing the legal issues pending before the courts and the positions taken by the government and other litigants. As a result, circuit courts decide important legal issues without proper briefing. Those decisions immediately affect other litigants in ways that are totally unlike social security cases, which the drafters presumed were analogous. Meanwhile the rules do a poor job of protecting privacy interests. They do not protect the single most important aspect of privacy—the name of the litigant connected to the issues in the case. Instead, once a case is decided, a simple internet search can reveal detailed personal facts. In addition, immigrant litigants have fewer protections in record searches at courthouses, where there is public access to their social security numbers and the names of minor children. The final justification for the rules—the sheer difficulty of doing required redactions—has waning force as courts require that all filings be text searchable. It is time that these poorly conceived rules be repealed or replaced with a more finely tailored set of rules that properly balance the interests in public access and privacy.