DEPORTED OVER A TYPO: MAKING SENSE OF THE BOARD OF IMMIGRATION APPEALS' NEWFOUND ADMINISTRATIVE POWER IN THE WAKE OF *PATEL V. GARLAND*

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INTRODUCTION

Congress transferred the Board of Immigration Appeals (BIA or the Board) from the Department of Labor (DOL) to the Department of Justice (DOJ) in its 1940 reorganization of the Immigration and Naturalization

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Services (INS).[1] The BIA is considered an "independent adjudicatory body" within DOJ and is accountable only to the Attorney General.[2] Headquartered in Great Falls, Virginia, the BIA reviews and rules on appeals brought by non-citizens facing deportation or removal from the United States following lower immigration court decisions.[3] Currently, twenty-three Appellate Immigration Judges compose the BIA, with the Attorney General responsible for all judicial appointments.[4]

The Attorney General also designates one judge to serve as Chairman of the Board.[5] The Chairman's enumerated duties are many, with perhaps the most important being "evaluat[ing] the performance of the Board" and "making appropriate reports and inspections," including taking corrective or disciplinary action when needed.[6] The Chairman also divides the remaining judges into three-member panels.[7] While these panels make many decisions, single judges will hear certain matters.[8] Decisions are final, unless the Attorney General chooses to review a matter.[9] Attorney General review of BIA decisions—controversial in its own right[10]—is rare, with the Attorney General selecting only a handful of cases for review each year.[11] The BIA's considerable administrative power has vexed courts at all levels.

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1. *Evaluation of the U.S. Immigration Court System: Pre-1983*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/evolution-pre-1983 (Apr. 30, 2015). *See also* Regulations Governing Departmental Organization and Authority, 5 Fed. Reg. 3,502, 3,503 (Sept. 4, 1940).

2. *Evaluation of the U.S. Immigration Court System: Pre-1983*, *supra* note 1.

3. EXEC. OFF. OF IMMIGR. REV., U.S. DEP'T OF JUST., BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL 1, 10 (2018) [hereinafter BIA PRACTICE MANUAL], https://www.justice.gov/eoir/page/file/1101411/download.

4. *Board of Immigration Appeals: Biographical Information*, U.S. DEP'T OF JUST. [hereinafter *BIA Biographical Information*], https://www.justice.gov/eoir/board-of-immigration-appeals-bios (Jan. 26, 2023).

5. *Id.*

6. 8 C.F.R. § 1003.1(a)(2) (2021).

7. § 1003.1(a)(3).

8. *See* BIA PRACTICE MANUAL, *supra* note 3, at 8 (noting that only cases that meet certain criteria are heard by the three-member panels).

9. *Board of Immigration Appeals: About the Office*, U.S. DEP'T OF JUST., [hereinafter *BIA About the Office*] https://www.justice.gov/eoir/board-of-immigration-appeals (Sept. 14, 2021).

10. *See* Laura S. Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766, 1773 (2010) (calling the Attorney General's review power "extraordinarily broad" while also being "almost wholly unconstrained by procedural safeguards"). In one instance, Attorney General Michael Mukasey referred a case to himself without offering any explanation as to why, and "after three months of silence" issued a sweeping opinion that overturned several procedural safeguards put in place to protect non-citizen litigants. *Id.*

11. *Id.* at 1767.

Enter *Patel v. Garland*, which the Supreme Court decided on May 16, 2022.[12] In *Patel*, the Court held that "[f]ederal courts lack jurisdiction to review facts found" by lower immigration courts and the BIA[13]; this fact-finding is used to determine whether a non-citizen is statutorily eligible to receive relief.[14] Following *Patel*, non-citizens cannot appeal to federal courts for review of the facts that led a court to deem them statutorily ineligible for relief, leaving life-or-death immigration decisions in the hands of immigration courts and the BIA only.[15] The lower immigration judge conducts most of the fact-finding, and the BIA awards significant deference to the lower judge's findings.[16] As discussed in Part III of this Comment, considerable problems have long plagued lower immigration courts, making the BIA's "rubber-stamping"[17] of immigration court findings troubling.

The Court's 5–4 decision in *Patel*[18] means BIA decisions on a non-citizen's eligibility for relief are now entirely unchecked, save for the statistically-minute chance that the Attorney General chooses to review a decision.[19] Making the BIA the ultimate arbiter for eligibility decisions is concerning, especially given the high-stakes nature of immigration proceedings; non-citizens often face dangerous situations when deported or removed to their native countries.[20]

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12. Patel v. Garland, 142 S. Ct. 1614 (2022).

13. *Id.* at 1627.

14. *Id.* at 1632 (Gorsuch, J., dissenting) (describing the "factual findings and legal analysis" that compose an eligibility determination).

15. *See generally id.* at 1627 ("we have no reason to resort to the presumption of reviewability").

16. *See* 8 C.F.R. § 1003.1(3)(i) (2021) (noting that "facts determined by the immigration judge . . . shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous").

17. *See* S. POVERTY L. CTR., THE ATTORNEY GENERAL'S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL 8 (2019) [hereinafter THE ATTORNEY GENERAL'S JUDGES] https://innovationlawlab.org/media/COM_PolicyReport_The-Attorney-Generals-Judges_FINAL.pdf (describing a pattern of "clearly biased immigration judge proceedings rubber-stamped by the Board of Immigration Appeals [(BIA)]").

18. *See generally Patel*, 142 S. Ct. at 1614 (the Chief Justice and Justices Thomas, Barrett, Alito, and Kavanaugh comprised the majority; with Justices Gorsuch, Breyer, Sotomayor, and Kagan dissenting).

19. *See* SARAH PIERCE, OBSCURE BUT POWERFUL: SHAPING U.S. IMMIGRATION POLICY THROUGH ATTORNEY GENERAL REFERRAL AND REVIEW, MIGRATION POL'Y INST. 7 (2021), https://www.migrationpolicy.org/sites/default/files/publications/rethinking-attorney-general-referral-review_final.pdf (noting that the Attorney General only chose seventeen cases for review from 2017–2021).

20. *See* Zoe Bouras, *"Deported to Danger" and the Reality of Deportation Proceedings in the United States*, IMMIGR. PROJECT (Feb. 12, 2020), https://www.immigrationproject.org/immigra

The *Patel* decision might be easier to stomach if America's lower immigration courts were effective and efficient arbiters of immigration cases—the lower courts hear the majority of immigration decisions, and only a small percentage of petitioners will appeal their cases to the BIA.[21] Unfortunately, lower immigration courts are drowning in an ever-increasing sea of cases, often leaving non-citizens to wait years before a resolution is reached.[22] Crowded dockets, however, are not the only problem: a concerning (and growing) body of research points to considerable bias within the immigration judge ranks, bias reflected by massive disparities in outcomes between various immigration courts.[23] The state of these lower courts, discussed in Part III of this Comment, highlights the severity of the *Patel* holding.

Writing for the minority in *Patel*, Justice Gorsuch did not mince words when characterizing the impact of the Court's decision, noting that "no court may correct even the agency's most egregious factual mistakes about an individual's statutory eligibility for relief . . . . [The Court's holding is] [o]ne at odds with background law permitting judicial review. And one even the government disavows."[24] Justice Gorsuch also scolded the majority for holding that "a federal bureaucracy can make an obvious factual error, one that will result in an individual's removal from this country, and nothing can be done about it . . . . It is a bold claim promising dire consequences for countless lawful immigrants."[25] While *Patel* may not have stolen the media

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tion-project-impact/deported-to-danger-and-the-reality-of-deportation-proceedings-in-the-united-states/ (describing the frequency in which individuals are deported by the United States back to "abusive and harmful environments").

21. *Compare* HOLLY STRAUT-EPPSTEINER, CONG. RSCH. SERV., R47077, U.S. IMMIGRATION COURTS AND THE PENDING CASES BACKLOG (2022) [hereinafter PENDING CASES BACKLOG] (finding, as of the first quarter of fiscal year 2022, that 578 immigration judges are tasked with reducing a backlog of 1.5 million cases), *with* Andrew R. Arthur, *Statistics Show Increased Circuit Court Approval of BIA Decisions*, CTR. FOR IMMIGR. STUD. (May 18, 2020), https://cis.org/Arthur/Statistics-Show-Increased-Circuit-Court-Approval-BIA-Decisions (noting that in the first two quarters of 2020, the BIA heard more than 13,000 appeals).

22. See Muzaffar Chishti & Julia Gelatt, *Mounting Backlogs Undermine U.S. Immigration System and Impede Biden Policy Changes*, MIGRATION POL'Y INST. (Feb. 23, 2022), https://www.migrationpolicy.org/article/us-immigration-backlogs-mounting-undermine-biden (finding that the average case completed in January 2022 had been pending for over two years).

23. *See* TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, ASYLUM DENIAL RATES BY IMMIGRATION COURT AND JUDGE (2020) [hereinafter ASYLUM DENIAL RATES], https://trac.syr.edu/immigration/reports/590/include/Judges.Denial.Rates.Infographic.TRAC.pdf (analyzing asylum decision data from 2014–2019 across fifty-nine American cities; average asylum denial rates ranged from just under thirty percent in some cities to over ninety percent in others).

24. Patel v. Garland, 142 S. Ct. 1614, 1631 (2022) (Gorsuch, J., dissenting).

25. *Id.* at 1627.

spotlight in the same way as other notable Supreme Court decisions, Justice Gorsuch's firm rebuke should pique the interest of even casual political observers. While most people living in the United States never worry about navigating the maze of immigration courts, millions of others do.[26]

The facts surrounding Patel's experience with the BIA give real meaning to Justice Gorsuch's frustrated sentiment. Pankajkumar Patel entered the United States unlawfully in the 1990s after leaving India along with his wife Jyotsnaben.[27] At the time of the Supreme Court's decision in May 2022, Patel had been in the United States for almost thirty years, and his children were all adults (and lawful permanent residents).[28] In 2007, Patel applied to the United States Citizenship and Immigration Services (USCIS) for an adjustment of his immigration status[29] pursuant to 8 U.S.C. § 1255, which authorizes such adjustments.[30]

USCIS denied Patel's request, citing the fact that years prior, Patel checked a box on a Georgia driver's license application falsely indicating that he was a United States citizen.[31] This misrepresentation made Patel statutorily ineligible for relief under § 1255(i)(2)(A).[32] Further, § 1182(a)(6)(C)(ii)(I) renders ineligible any non-citizen "who falsely represents . . . himself or herself to be a citizen of the United States for any purpose or benefit under . . ." state or federal law.[33] A few years later, the government began the deportation process against Patel.[34] The lower immigration judge, and later the BIA, found that despite the cloudy history concerning Patel's alleged misrepresentation, he was statutorily barred from even applying for an adjustment of his citizenship status.[35] Patel then petitioned the Eleventh Circuit to review the BIA's eligibility decision; the

26. *See* Steven A. Camarota & Karen Zeigler, *Immigrant Population Hits Record 46.2 Million in November 2021*, CTR. FOR IMMIGR. STUD. (Dec. 20, 2021), https://cis.org/Camarota/Immigrant-Population-Hits-Record-462-Million-November-2021 (estimating the number of non-citizens currently residing in the United States at around forty-six million).

27. *See* Rohini Kurup & Katherine Pompilio, *Supreme Court Rules in* Patel v. Garland, LAWFARE (May 17, 2022), https://www.lawfareblog.com/supreme-court-rules-patel-v-garland (noting that Mr. Patel entered the United States without inspection); *see also Patel*, 142 S. Ct. at 1619 (providing a timeline of Patel's immigration to the United States).

28. *See* Associated Press, *Supreme Court Rules Against Georgia Man in Immigration Case*, WABE (May 16, 2022), https://www.wabe.org/supreme-court-rules-against-georgia-man-in-immigration-case/ (discussing the immigration status of Patel's children).

29. *Patel*, 142 S. Ct. at 1619.

30. 8 U.S.C. § 1255(a), (j).

31. *Patel*, 142 S. Ct. at 1619–20.

32. § 1255(i)(2)(A).

33. § 1182(a)(6)(C)(ii)(I).

34. *Patel*, 142 S. Ct. at 1620.

35. *Id.*

Eleventh Circuit denied his petition, citing a lack of jurisdiction.[36] The Supreme Court granted certiorari, ultimately upholding the existing lack of judicial review for BIA fact-finding.[37] As such, no federal court has jurisdiction over even the most contentious of BIA eligibility decisions.[38]

By eliminating a non-citizen's access to the federal court system, the *Patel* majority ensured that most non-citizens navigating the immigration process will only appear before immigration judges, whether in lower courts or at the BIA level. Immigration judges are not Article III judges; they do not hold lifetime appointments.[39] This lack of lifetime appointment incentivizes decisionmaking aimed at securing the judge's seat by appeasing superiors and adjudicating in line with policies favored by the sitting administration.[40] Further, a non-citizen's chances of receiving legitimate due process from immigration courts may vary depending on factors such as the non-citizen's nationality[41]—one report found that immigration judges under pressure from their INS superiors executed an "intentional, class-wide summary denial" of Cubans and Haitians seeking asylum.[42] These problems further contribute to the widespread dysfunction that pervades immigration courts.[43]

Patel may indeed have been statutorily ineligible from obtaining his sought-after relief, but the facts of his case warranted judicial review. For one, Patel argued that checking the "citizen" box on the Georgia license application was a simple typo[44] — if Patel lacked the substantive intent to violate the statute he would not have been statutorily barred from relief.[45] It is possible that Patel simply claimed it was an error to help his chances of receiving relief; however, Patel was *already* eligible to receive a Georgia license, even if he did not check the box indicating that he was a citizen.[46] Under Georgia law, citizens with a pending request for an "adjustment of

36. *Id.* at 1620–21.

37. *Id.*

38. *Id.* at 1621, 1626–27.

39. *See* U.S. CONST. art. III, § 1 (life terms for certain judges).

40. *See* THE ATTORNEY GENERAL'S JUDGES, *supra* note 17, at 10 (describing decisions made by immigration judges that sought to satisfy "the priorities of their [Immigration & Naturalization Service (INS)] colleagues and supervisors, who sought to increase and streamline deportations").

41. *Id.*

42. *Id.*

43. *Id.* (describing the "widespread consensus" that "crippling problems" have existed within immigration courts since the 1980s).

44. Patel v. Garland, 142 S. Ct. 1614, 1619–20 (2022).

45. *Id.*

46. *See* Cyrus D. Mehta & Kaitlyn Box, *Ethical Dimensions of* Patel v. Garland, LEXISNEXIS (May 31, 2022), https://www.lexisnexis.com/LegalNewsRoom/immigration/b/insidenews/posts/ethical-dimensions-of-patel-v-garland (describing the process leading up to Patel's denial).

status" and an employment authorization document are eligible for a license.[47] Patel met both of those criteria, and thus his misrepresentation did not avail him of any benefit that he was not already eligible for.[48] Returning to the language of § 1182(a)(6)(C)(ii)(I), Patel therefore did not falsely represent himself "for any purpose or benefit" of the law.[49] He would receive the benefit regardless of the box he checked. Nonetheless, the Court deemed Patel statutorily ineligible for an immigration status adjustment.[50] Had Patel had access to judicial review, a judge not affiliated with the immigration system could elect to hear his case. The *Patel* decision, however, eliminates this as an option.

Patel's case is merely one of many thousands that the BIA reviews annually.[51] Cases like Patel's should warrant the option of federal court review. In 2021, the number of both lawful and undocumented non-citizen residents in the United States was estimated to be 46.2 million.[52] The BIA's decisions can result in life-or-death consequences for many people, as some deportees face death or other violence when forced to return to their native countries.[53] The number of non-citizens in the United States, the gravity of the decisions the BIA makes, and the lack of federal court review of eligibility decisions following *Patel* necessitate changes to the way the BIA conducts their increasingly powerful appellate reviews.

Part I of this Comment outlines the structure of the BIA process and the standards of review that the BIA employs when reviewing lower court decisions. Part II discusses the longstanding presumption for judicial review in administrative matters such as those handled by the BIA, and why it is problematic that the BIA's administrative power is now unchecked and free from any judicial review. Part III details the considerable dysfunction and xenophobia permeating through lower courts up to the BIA, demonstrating how stacked the deck is against non-citizens navigating the immigration court process. Part IV recommends two modifications to the BIA, both of which aim to increase equity for future non-citizens in situations like Patel's.

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47. *See id*; 8 U.S.C. § 1255(a) (delineating the adjustment of status process).

48. *Id.*

49. § 1182(a)(6)(C)(ii)(I).

50. *Patel*, 142 S. Ct. at 1616.

51. *See* Arthur, *supra* note 21 (noting that in the first two quarters of 2020, the BIA heard over 13,000 appeals).

52. Steven A. Camarota & Karen Zeigler, *Immigrant Population Hits Record 46.2 Million in November 2021*, CTR. FOR IMMIGR. STUD. (Dec. 20, 2021), https://cis.org/Camarota/Immigrant-Population-Hits-Record-462-Million-November-2021.

53. Bouras, *supra* note 20.

I. PRE-BIA & STATUS ADJUSTMENT PROCESS

When non-citizens challenge deportation or removal action, they begin in lower courts.[54] After navigating that lengthy and complex process, non-citizens may appeal an unfavorable ruling to the BIA.[55] While recent figures estimate that about 1.8 million cases are pending throughout immigration courts,[56] only a small percentage of that figure will reach the BIA.[57] Even though the BIA hears only a fraction of all immigration suits, backlog at the BIA level is still an issue; recent data show the number of pending BIA cases reached just over 82,000.[58] Further, a non-citizen's chances of obtaining a favorable judgment often depend on jurisdiction.[59] While data is only available for asylum decisions, the disparity between jurisdictions is alarming: New York immigration courts, for example, grant asylum for almost seventy-five percent of applicants, while Miami immigration courts grant asylum for only about fourteen percent of applicants.[60] Such a wide disparity is problematic and suggestive of inconsistent adjudication.

After navigating through the lower-level immigration courts, a non-citizen who has received an unfavorable ruling may then appeal to the BIA.[61] Following legislation passed in 2002,[62] the BIA does not review de novo certain aspects of the case it hears, meaning BIA judges afford an exceedingly high level of deference to the findings of lower immigration courts.[63]

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54. *See* EXEC. OFF. OF IMMIGR. REV., U.S. DEP'T OF JUST., IMMIGRATION COURT PRACTICE MANUAL 61 (2022), https://www.justice.gov/eoir/book/file/1528921/download.

55. *See id.* at 80.

56. Muzaffar Chishti & Julia Gelatt, *For Overwhelmed Immigration Court System, New ICE Guidelines Could Lead to Dismissal of Many Low-Priority Cases*, MIGRATION POL'Y INST. (Apr. 27, 2022), https://www.migrationpolicy.org/article/immigration-court-ice-guidelines.

57. Arthur, *supra* note 21.

58. EXEC. OFF. FOR IMMIGR. REV., ADJUDICATION STATISTICS (July 15, 2022), https://www.justice.gov/eoir/page/file/1248501/download.

59. TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, ASYLUM DECISIONS VARY WIDELY AMONG JUDGES AND COURTS — LATEST RESULTS (2020), https://trac.syr.edu/immigration/reports/590/.

60. *Id.*

61. *See generally* U.S. DEP'T OF JUST., OMB NO. 1125-0002, NOTICE OF APPEAL FROM A DECISION OF AN IMMIGRATION JUDGE (2019), https://www.justice.gov/eoir/file/eoir26/download (outlining the general process for immigration appeals).

62. 8 C.F.R. § 1003.1(d)(3) (2021).

63. *See id.*; AM. IMMIGR. COUNCIL, STANDARDS OF REVIEW APPLIED BY THE BOARD OF IMMIGRATION APPEALS PRACTICE ADVISORY 2 (2020) [hereinafter STANDARDS OF REVIEW], https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/standards_of_review_applied_by_the_board_of_immigration_appeals.pdf (discussing the changes brought about following the Department of Justice's 2002 regulatory overhaul).

A. Standards of Review

While the BIA does review de novo questions of "law, discretion, and judgment"[64], what "discretion" involves and what qualifies as "judgment" are controversial.[65] The BIA does not review fact-finding determinations made by lower immigration courts de novo.[66] Rather, the BIA applies a standard of "clear error" regarding previous fact-finding.[67] Save for any glaring errors, the BIA accepts as true all facts found by the lower immigration judge.[68] This, too, can be problematic. It was considered "factual" for example, that Patel was in violation of the eligibility statute following the Georgia license mishap despite considerable evidence that he lacked the substantive intent to violate the statute.[69] BIA judges may accept incorrect or contested facts found by lower immigration court judges if the facts do not rise to a clear error standard.[70] It was lower court fact-finding that led the BIA to determine that Patel was ineligible for relief, yet the BIA hardly gives such facts a second look absent a clear error.[71] Further, the sheer rate at which lower immigration judges must adjudicate the avalanche of cases appearing before them raises questions about the accuracy of their fact-finding.[72]

Most BIA proceedings consist of two distinct determinations. The first determination concerns the non-citizen's actual eligibility for the adjustment in the first place: whether a person meets the base-level criteria entitling them to the relief they seek.[73] This eligibility decision and its reviewability (or lack thereof) by federal courts, was at issue in *Patel*

64. § 1003.1(d)(3)(i).

65. *See* Patel v. Garland, 142 S. Ct. 1614, 1631 (2022) (Gorsuch, J., dissenting). Justice Gorsuch noted that courts may review step-one judgments regarding a petitioner's *eligibility* to receive relief but are statutorily deprived of jurisdiction to review step-two decisions determining, where relief is discretionary, whether to grant relief. *Id.* As Justice Gorsuch described in his dissent, the *Patel* majority considered the step-one decisions a judgement, rather than a discretionary decision. *Id.* This interpretation is the heart of the Supreme Court's *Patel* split.

66. *See* § 1003.1(d)(3)(i).

67. *Id.* "Clear error" and "clearly erroneous" are used interchangeably. *Compare id.* ("Facts . . . shall be reviewed only to determine whether the findings . . . are clearly erroneous."), *with* STANDARDS OF REVIEW, *supra* note 63, at 3 (referring to the "clear error standard").

68. § 1003.1(d)(3)(i).

69. *Patel*, 142 S. Ct. at 1620.

70. § 1003.1(d)(3).

71. *Id.*

72. PENDING CASES BACKLOG, *supra* note 21.

73. *See* 8 U.S.C. § 1255(a) (requiring that all non-citizens seeking a status adjustment be "eligible to receive an immigrant visa").

v. Garland.[74] However, most BIA cases are not adjudicated in typical courtroom settings.[75] Instead, the BIA conducts "paper reviews" of the cases before it with oral arguments the rare exception.[76]

Determining a non-citizen's statutory eligibility for relief is done through the aforementioned fact-finding process. As illustrated by the immigration court's fact-finding—which ultimately deemed Patel ineligible for relief— the fact-finding stage can be make-or-break for those seeking relief.[77] With the word "appeals" in its name, the BIA would seem a logical safeguard against potential errors in fact-finding conducted by lower immigration courts. The BIA's policy of deferring to the facts found by the lower court absent a clear error,[78] however, sets a high bar for someone seeking a second look at an immigration court's finding of facts. The decision made regarding Patel's statutory eligibility was not clearly erroneous—the immigration judge making the decision did not rely on false dates or some other easily identifiable black-and-white inaccuracy.[79] In fact, the Court's classification of Patel's misrepresentation as factual rests on shaky ground, given that Patel's supposed misrepresentation did not avail him of anything he was not already entitled to.[80]

B. Pitfalls and Predatory Laws

Other non-citizens are at risk of a fate similar to Patel's. For example, "Motor Voter" laws in multiple states allow Department of Motor Vehicles (DMV) employees to ask people if they would like to register to vote while at the DMV.[81] By law, DMV employees cannot discourage anyone from registering; even if someone is a non-citizen and would be registering to vote illegally, DMV

74. *See generally Patel*, 142 S. Ct. 1614 (deciding whether federal courts have the power to review eligibility determinations made by the BIA).

75. *BIA About the Office*, *supra* note 9 ("[The BIA] decides appeals by conducting a paper review" of most cases before it).

76. *Id.*

77. *Patel*, 142 S. Ct. at 1620 (describing the immigration court fact-finding that led to Patel being deemed statutorily ineligible to receive relief).

78. BIA PRACTICE MANUAL, *supra* note 3, at 7.

79. *See Patel*, 142 S. Ct. at 1627 (finding that federal courts lack jurisdiction to review facts found as part of discretionary-relief proceedings under Immigration and Nationality Act (INA)).

80. *Id.* at 1629 (Gorsuch, J., dissenting) (calling the BIA's determination that Patel misrepresented his status a "glaring factual error").

81. *The National Voter Registration Act of 1993*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/national-voter-registration-act-1993-nvra (July 20, 2022).

employees are forbidden from intervening.[82] Numerous documented instances exist of non-citizens registering to vote under "Motor Voter" laws and later being deported or threatened with deportation due to illegal voter registration,[83] despite DMV employees soliciting their registrations.[84] Non-citizens, especially those with limited English-speaking ability, face a constant risk of a small paperwork error serving as grounds for their deportation. Post-*Patel*, these individuals are forbidden from accessing judicial review, no matter how shoddy the lower court's fact-finding may have been.[85]

Another problem is that the BIA's clear error standard places much of the weight of the eligibility determination on the shoulders of the presiding immigration judge.[86] Concerningly, immigration court data and third-party reports call into question the ability of immigration judges to rule effectively and impartially due to implicit biases and backgrounds in immigration enforcement.[87] Not only that, but an eligibility determination merely opens the door for non-citizens to be *considered* for receiving relief.[88] Even when deemed eligible, non-citizens can be denied relief at the second determination for a number of reasons.[89] Understanding why the *Patel* holding is so problematic necessitates an inquiry into the longstanding history of judicial review of administrative proceedings, a history that the *Patel* majority chose to ignore.

II. JUDICIAL REVIEW'S PLACE IN *PATEL*

Patel, in his desire to have a federal court reexamine both the immigration court and BIA's decisions regarding his eligibility for relief, sought judicial

82. *See* Katie Kim & Lisa Capitanini, *Law Misleading Non-Citizens to Illegally Register to Vote: Attorney*, NBC 5 CHI. (June 15, 2017), https://www.nbcchicago.com/news/local/law-misleading-non-citizens-to-illegally-register-to-vote-attorney/17343/ (describing the predatory nature of Motor Voter laws).

83. *See, e.g.*, *id.* (noting one case where a mother of three faced deportation after illegally registering to vote under the "Motor Voter" law procedure).

84. *Id.*

85. *See Patel*, 142 S. Ct. at 1619.

86. *See In re* S-H-, 23 I & N Dec. 462, 465 (BIA 2002) (noting that the clearly erroneous standard of review "adds significant force to the Immigration Judge's decision and, concomitantly, makes it increasingly important for the Immigration Judge to make clear and complete findings of fact").

87. *See* Carrie Rosenbaum, Opinion, *Priorities and the State of Implicit Bias in Crimmigration*, REGUL. REV. (Apr. 13, 2022), https://www.theregreview.org/2022/04/13/rosenbaum-implicit-bias-in-crimmigration/ (describing the deeply embedded bias within immigration courts).

88. *See Patel*, 142 S. Ct. at 1625 ("The only judgment that can actually grant relief is what Patel describes as the 'second-step decision' whether to grant the applicant the 'grace' of relief from removal.").

89. 8 C.F.R. § 1003.2(a) (2021).

review. The *Patel* majority interpreted the language in § 1252(a)(2)(B)(i) as prohibiting judicial review on "any judgment regarding the granting of relief."[90] This interpretation deems the initial eligibility decision to be a "judgement regarding the granting of relief," thus precluding it from judicial review.[91] As Justice Gorsuch wrote, the phrase "any judgment regarding the granting of relief" does not "begin to do the work the majority demands of it."[92] The Court has noted that "granting relief" means supplying an actual "redress or benefit";[93] determinations on mere eligibility for receiving a benefit can be clearly distinguished from actual redressability.[94]

It was the majority's position in *Patel* that the term "regarding" broadened the scope of the statute to encompass all tangential decisions made leading up to an actual granting of relief.[95] Conversely, Justice Gorsuch asserted, "regarding" can just as easily be construed to restrict something rather than broaden it.[96] Gorsuch posed the following example, a request for books "regarding the American West": in that sense, "regarding" limits the scope of "books," rather than expands it.[97] In the same vein, the term "regarding" within § 1252(a)(2)(B)(i) can just as easily be read to limit the scope of the term "relief" to decisions that directly concern the granting of relief, rather than decisions that include mere *eligibility* for relief.[98] The majority's interpretation is reasonable, but the statute's language can certainly be read in multiple ways.

A. The Administrative Procedure Act and Its Aims

The Administrative Procedure Act's (APA's) guidelines for when judicial review is permitted in agency matters[99] further undercuts the *Patel* majority's position that judicial review is precluded by statute for the fact-finding that shapes the BIA's eligibility decisions. The Court has, in numerous past

90. 8 U.S.C. § 1252(a)(2)(B)(i); *Patel*, 142 S. Ct. at 1621.

91. *Id.*

92. *Patel*, 142 S. Ct. at 1630 (Gorsuch, J., dissenting).

93. *See, e.g.*, United States v. Denedo, 556 U.S. 904, 909–10 (2009) (citing Relief, BLACK'S LAW DICTIONARY (8th ed. 2004)).

94. *See* Immigr. & Naturalization Serv. (INS) v. St. Cyr, 533 U.S. 289, 290 (2001) (describing the difference between receiving relief and being made eligible to receive relief) (*superseded on separate grounds by statute*, Real ID Act, Pub. L. 109-13, 119 Stat. 302, 310 (codified as amended at 8 U.S.C. § 1252(a) (5))).

95. *Patel*, 142 S. Ct. at 1622.

96. *Id.* at 1632 (Gorsuch J., dissenting).

97. *Id.*

98. 8 U.S.C.§ 1252(a)(2)(B)(i).

99. CONG. RSCH. SERV., LSB10536, JUDICIAL REVIEW OF ACTIONS LEGALLY COMMITTED TO AN AGENCY'S DISCRETION (2020).

decisions, emphasized the APA's establishment of a "presumption of judicial review" for all agency matters.[100] This presumption applies unless "a particular statute precludes review of that action" or some other law leaves the action solely to an agency's discretion.[101] Of course, it was the majority's view in *Patel* that the statute did indeed bar review of eligibility determinations.[102] This view becomes difficult to accept, however, when considering the extenuating circumstances. First, judicial review of the BIA's actual decision to grant or deny relief has long been barred.[103]

Further barring judicial review from initial eligibility determinations then seems excessive, especially given the controversy that can surround eligibility decisions, as seen in the facts of *Patel*. As Justice Gorsuch discussed in his dissent, reading the statute prohibiting judicial review for "any judgment regarding the granting of relief" as precluding judicial review for even eligibility decisions is a stretch of statutory language.[104] A BIA eligibility determination is distinct from a relief determination. The eligibility determination concerns whether someone meets statutory requirements to potentially be considered for relief.[105] While leveraging and stretching otherwise ambiguous language is often necessary due to the vague nature of many statutes, the majority's chosen interpretation is troubling given the purpose it serves within the context of *Patel*: limiting a non-citizen's access to the court systems.

B. The Patel *Majority's Questionable Position*

Aside from the *Patel* majority engaging in statutory interpretation, the majority also cited the Attorney General's review power as an adequate check on BIA authority, leaving what Justice Barrett called "room for

100. *See* Ass'n of Data Processing Serv. Org. v. Camp, 397 U.S. 150, 156–57 (1970) (quoting H.R. REP. No. 79-1980, at 275(1946) on the presumption of judicial review in agency matters); *see also* Abbott Lab'ys v. Gardner, 387 U.S. 136, 140 n.2 (1946) (same).

101. 5 U.S.C § 701(a).

102. Patel v. Garland, 142 S. Ct. 1614, 1619 (2022).

103. *See* Shoba Sivaprasad Wadhia, *Justices Will Decide Scope of Judicial Review Over Certain Immigration Decisions*, SCOTUSBLOG (Dec. 3, 2021, 3:20 PM), https://www.scotusblog.com/2021/12/justices-will-decide-scope-of-judicial-review-over-certain-immigration-decisions/ (noting when in the BIA process judicial review is and is not permitted).

104. 8 U.S.C. § 1252(a)(2)(B)(i); *see Patel*, 142 S. Ct. at 1637 (Gorsuch, J., dissenting) (accusing the *Patel* majority of "read[ing] language out of the statute and collaps[ing] the law's two-step framework").

105. *See* 8 C.F.R. § 1003.1(d)(3)(v) (noting that "[t]he Board may affirm the [immigration court's] decision . . . on any basis supported by the record"); *see also* Jay v. Boyd, 351 U.S. 345 (1956) (holding that receiving relief from the BIA is "not a matter of right but a matter of grace").

mercy."[106] Given that the Attorney General rarely reviews BIA decisions,[107] this "mercy" hardly replaces the utility of judicial review for eligibility decisions. Justice Barrett also asserted that "federal courts have a very limited role to play" in the BIA's decisionmaking process.[108] Judicial review of eligibility determinations hardly undermines the BIA's status as final decisionmaker when it comes to granting relief, because the BIA's *actual* decision to grant or deny relief (separate from its preliminary eligibility determination) is not subject to judicial review.[109] Further, a BIA judge who feels denial of relief is clearly appropriate may skip the eligibility determination.[110]

Given the strong historical presumption of judicial review in agency matters[111] and the *Patel* majority's strained reading of the statutory language, the arguments against judicial review for eligibility determinations largely fail to hold water. Of course, the Supreme Court's decision is final. For the foreseeable future, eligibility determinations made by immigration courts (and later by the BIA) will not be subject to judicial review.[112] Aside from the *Patel* majority bucking precedent supporting judicial review in agency matters,[113] the holding becomes more concerning given the extent of the dysfunction and inequity plaguing lower immigration courts.[114]

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106. *Patel*, 142 S. Ct. at 1618.

107. *See* SARAH PIERCE, MIGRATION POL'Y INST., OBSCURE BUT POWERFUL: SHAPING U.S. IMMIGRATION POLICY THROUGH ATTORNEY GENERAL REFERRAL AND REVIEW 7 (2021) (noting that from 2017 to 2021, the Attorney General only chose seventeen cases).

108. *Patel*, 142 S. Ct. at 1618.

109. *See* 8 U.S.C. § 1252(a)(2)(B)(i).

110. *See* INS v. Bagamasbad, 429 U.S. 24, 25–26 (1976) (per curiam) (allowing a judge to issue a "discretionary denial of relief").

111. *See* Abbot Lab'ys v. Gardner, 387 U.S. 136, 140 n.2 (1946).

112. *See Patel*, 142 S. Ct. at 1618.

113. *See* Ass'n of Data Processing Serv. Org. v. Camp, 397 U.S. 150 (1970); *see also Abbott Lab'ys*, 387 U.S. at 136 (supporting judicial review in agency matters).

114. *See generally* Gregory Chen, *The Urgent Need to Restore Independence to America's Politicized Immigration Courts*, JUST SEC. (Nov. 12, 2020), https://www.justsecurity.org/73337/the-urgent-need-to-restore-independence-to-americas-politicized-immigration-courts/ (asserting that immigration courts "have suffered for years from underfunding, understaffing, and deep structural problems"); Eshani Pandya, *It's Time to Fix the Immigration Court System*, IMMIGR. IMPACT (Jan. 8, 2021), https://immigrationimpact.com/2021/01/08/fix-immigration-court-system/ (depicting the "[b]iased decision-making, a severe lack of legal representation, and little to no accountability" plaguing the immigration courts); Kate Morrissey & Lauryn Schroeder, *Who Gets Asylum? Even Before Trump, System was Riddled with Bias and Disparities*, L.A. TIMES (Aug. 24, 2020, 1:50 PM), https://www.latimes.com/california/story/2020-08-24/who-gets-asylum-trump-bias-disparities (describing the adversarial process of immigration court litigation).

III. A STACKED DECK

Bias and considerable backlog throughout the immigration court system further highlight the need for the BIA to make serious administrative changes to its decisionmaking process. The post-*Patel* BIA, with its heightened status as the final arbiter of almost all eligibility decisions, must account for the lack of equity non-citizens face even prior to their appearance before a BIA judge. While bias within the immigration court system has been a problem for decades,[115] the Trump Administration further tipped the scales against non-citizens navigating the process.[116] Since both lower immigration courts and the BIA are ultimately under the discretion of the Attorney General, an executive officer, immigration courts are often used to enact presidential agendas.[117] Further, the lack of lifetime appointment for both immigration court and BIA judges incentivizes judges to issue decisions they believe will appease their superiors.[118]

A. Immigration Court Day-to-Day

In 2020, the Associated Press visited several immigration courts across eleven American cities; what they found was "nonstop chaos."[119] A wealth of cases have been brought against immigration court judges in recent history alleging bias, bullying, and general hostility, among other transgressions.[120] Despite their title, immigration judges possess much less independence than their peers in Article III courts, who are given lifetime appointments.[121] Critics consider immigration judges to be employees of DOJ, arguing that

115. *See* THE ATTORNEY GENERAL'S JUDGES, *supra* note 17, at 1, 7, 11 (describing persistent issues throughout immigration courts dating back to the 1980s).

116. *See id.* at 7 (chronicling immigration judges' decisions in accordance with the INS and Attorney General's goal of increasing deportations).

117. *Id.*

118. *See id.* (immigration judges are "the Attorney General's delegates").

119. *See* Kate Brumbeck, Deepti Hajela & Amy Taxin, *AP Visits Immigration Courts Across US, Finds Nonstop Chaos*, ASSOCIATED PRESS (Jan. 19, 2020), https://apnews.com/article/courts-az-state-wire-tx-state-wire-ma-state-wire-ut-state-wire-7851364613cf0afbf67cf7930949f7d3 (describing the tumultuous day-to-day environment of lower immigration courts).

120. *See, e.g.*, Elias v. Gonzales, 490 F.3d 444, 451, 490 (6th Cir. 2007) (finding an immigration judge "inappropriately sarcastic" and had "appeared at times to badger petitioner"); Islam v. Gonzales, 469 F.3d 53, 55–56 (2d Cir. 2006) (noting the presiding immigration judge "repeatedly interrupted Islam when he spoke, did not always allow him to explain what he meant, and sparred and argued with him"); Abulashvili v. Att'y Gen., 663 F.3d 197, 199, 207 (3d Cir. 2011) (detailing that the immigration judge "completely took over the cross-examination for government's counsel, and thereby ceased functioning as a neutral arbiter").

121. *See* U.S. CONST. art. III, § 1 (appointing federal judges to life terms).

they are more concerned with enacting agendas than adjudicating fairly.[122] Quotas, aimed at reducing backlog among the courts, place serious parameters on a judge's ability to give each matter the attention it deserves.[123]

Further, many immigration judges have backgrounds that may raise questions about their ability to adjudicate fairly.[124] Often, appointees have spent their careers deporting people—backgrounds that are perhaps in contrast with the ability to adjudicate in an impartial manner.[125] In fact, "roughly three-fourths of immigration judges hired during the Trump Administration have prosecutorial experience, and many previously worked for Immigrations and Customs Enforcement (ICE) as trial attorneys who represented the government in removal proceedings."[126] A career dedicated to deporting people should be viewed as a clear conflict of interest for someone sitting on an immigration court bench. Instead, it appears to be something of a prerequisite.

Immigration court inequities are exacerbated because non-citizens have no *right* to counsel in these proceedings.[127] Among non-citizens facing removal, only thirty-seven percent were able to retain counsel to represent them.[128] Unsurprisingly, there exists a massive difference in outcomes between non-citizens who are able to retain counsel and those who are not.[129] For certain groups of non-citizens, the numbers demonstrate a far more dire situation: only ten percent of non-citizens living in "smaller cities" away from large urban areas were able to retain counsel for their proceedings.[130] The disadvantages to non-citizens do not stop there. Often, their chances of success depend on the judge assigned to their case with massive disparities in

122. *See* Mimi Tsankov, *Human Rights at Risk: The Immigration Courts Are in Need of An Overhaul*, A.B.A. HUM. RTS., Mar. 2020, at 12, 13 (describing the agenda that immigration judges are often appointed to uphold).

123. *Id.*

124. Andrew Cohen, Opinion, *Biden's New Immigration Judges Are More of The Same*, BRENNAN CTR. FOR JUST. (May 10, 2021), https://www.brennancenter.org/our-work/analysis-opinion/bidens-new-immigration-judges-are-more-same (describing the backgrounds of immigration court hires as "a litany of law enforcement job titles and military credentials").

125. *Id.*

126. *See* THE ATTORNEY GENERAL'S JUDGES, *supra* note 17, at 22 (highlighting the political motivations underlying the appointment of immigration court judges).

127. *See* INGRID EAGLY & STEVEN SHAFER, AM. IMMIGR. COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 1–2, 6 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

128. *Id.* at 2.

129. *Id.* at 3.

130. *Id.* at 10.

outcomes present even among judges working in the same court.[131] In one New York court, for instance, a judge issued denials ninety-five percent of the time, while another issued them only three percent of the time.[132] Such statistics suggest that receiving a favorable ruling can often be attributed to pure luck based on judicial assignments. They also highlight the questionable validity of immigration court fact-finding, fact-finding that the BIA reviews on appeal only if a clear error standard is met.[133]

B. A Slow-Moving Process

Backlog adds to the dysfunction of the immigration courts. The average wait-time for an immigration court hearing is 811 days—over two years.[134] In recent years, immigration judges have been hired at increased rates to account for this backlog, but questions have arisen as to the credentials of new hires: in 2019, for example, Trump Administration added twenty-eight new immigration judges, eleven of whom had no experience in immigration law.[135] Despite attempts to reduce the backlog by hiring new and sometimes unqualified immigration judges, the problem continues to worsen: 2021 figures pin the number of pending immigration cases at 1.8 million.[136] This backlog also stymies pro-bono attorneys' efforts to provide legal representation to non-citizens. Surveys of pro-bono attorneys consistently find that the biggest obstacle to providing pro-bono representation for non-citizens is the painfully slow pace at which cases move.[137] Many attorneys offering pro-bono services cannot commit to providing counsel to a non-citizen whose case may not progress for multiple years.[138] While the Executive Office for Immigration Review (EOIR) reprioritized dockets in 2014 to ensure that unaccompanied children and other vulnerable populations experience shorter wait times, other pressing matters such as

131. *See* Nolan Rappaport, Opinion, *The Systemic Problems with our Immigration Courts are Dire*, THE HILL (Nov. 1, 2020), https://thehill.com/opinion/immigration/523824-the-systemic-problems-with-our-immigration-courts-are-dire/ (looking at data for asylum decisions specifically); *see also* ASYLUM DENIAL RATES, *supra* note 23.

132. Rappaport, *supra* note 131.

133. *See* STANDARDS OF REVIEW, *supra* note 63, at 2–3.

134. Rappaport, *supra* note 131.

135. *Id.*

136. Chishti & Gelatt, *supra* note 56.

137. *See* HUM. RIGHTS FIRST, IN THE BALANCE: BACKLOGS DELAY PROTECTION IN THE U.S. ASYLUM AND IMMIGRATION COURT SYSTEMS 17 (2016) https://humanrightsfirst.org/wp-content/uploads/2022/11/HRF-In-The-Balance.pdf (surveying several pro-bono attorneys on the biggest obstacle preventing them from taking someone's case).

138. *Id.*

removals and deportations continue to stall for years.[139]

Despite reprioritizing dockets, courts have made little progress.[140] In 2021, 18,599 unaccompanied non-citizen minor cases had been pending in immigration courts for over five years; 48,542 had been pending for at least two years.[141] By contrast, in 2009, only nine cases of unaccompanied minors had been pending for over five years.[142] The unprecedented rise in these types of cases is problematic and overburdens the courts, possibly implicating the fairness of many adjudications.

These statistics offer a mere glimpse into the chaos that is the American immigration court system. Given these realities, it is increasingly necessary for the BIA to be a fair and equitable appellate level option for non-citizens. Following *Patel's* elimination of judicial review for BIA eligibility determinations,[143] BIA decisions have gained a new level of finality. This change in the BIA, coupled with the systemic problems present in lower immigration courts, necessitates reformation.

IV. RECOMMENDATIONS

This Part proposes two recommendations aimed at addressing the current condition of lower immigration courts and the BIA post-*Patel*. Both recommendations are within the Attorney General's power and would not require approval from Congress.[144]

A. Changing the Standard of Review

The BIA must change its standard of review of immigration court fact-finding from clear error to de novo. Section 1003.1(3)(ii) requires the BIA to review de novo all questions of "law, discretion, judgment and all other issues in appeals from decisions of immigration judges . . . ."[145] This provision should include fact-finding, and given the circumstances of *Patel*, the benefit of allowing de novo review of facts at the BIA level is clear. While this would increase both the length of status adjustment hearings and

139. *Id.*

140. *See* EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., PENDING UNACCOMPANIED NONCITIZEN CHILD (UAC) CASES (2022), https://www.justice.gov/eoir/page/file/1060871/download (showing the massive uptick in pending cases that has occurred in recent years).

141. *Id.* (figures current as of January 2023).

142. *Id.*

143. *See* Patel v. Garland, 142 S. Ct. 1614 (2022).

144. *See Executive Office for Immigration Review: About the Office*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/about-office (May 18, 2022) (the Attorney General's power to enact changes to the BIA at will).

145. 8 C.F.R § 1003.1(3)(ii) (2021).

the responsibility of the presiding BIA judges, this is a reasonable tradeoff. While more than 465 immigration judges occupy the lower courts,[146] there are only twenty-three BIA judges, each one individually selected by the Attorney General.[147] Given the prestige of a BIA seat, it is reasonable to expect the judges engage in fact-finding of their own, rather than relying entirely on the fact-finding of the immigration judge below them.

Fact-finding inquiries were indeed reviewed by BIA judges using a de novo standard until 2002, when Attorney General John Ashcroft issued new regulations changing BIA practices.[148] Attorney General Ashcroft justified the standard-of-review change by arguing that it would eliminate "the need for lengthy Board decisions that do little more than reiterate facts."[149] While Attorney General Ashcroft was correct that the regulation would decrease time spent by BIA judges reviewing the facts of certain matters, the decision now harms all present and future non-citizens falling victim to faulty fact-finding by lower immigration courts. Further, some considered Attorney General Ashcroft's BIA regulations to be motivated by politics rather than a desire to increase BIA efficiency.[150] Ironically, backlog is even more of an issue for the BIA today than it was in 2002 when Attorney General Ashcroft enacted those regulations.[151] What Attorney General Ashcroft hoped to accomplish by eliminating de novo review simply has not happened; what he did do, however, was open the door for instances such as Patel's to occur.

Calls to change the fact-finding standard of review from clear error to de novo are not new.[152] Long before the *Patel* verdict, critics highlighted the

146. Press Release, U.S. Dep't of Just., Executive Office for Immigration Review to Swear in 28 Immigration Judges, Bringing Judge Corps to Highest Level in History (Dec. 20, 2019), https://www.justice.gov/opa/pr/executive-office-immigration-review-swear-28-immigration-judges-bringing-judge-corps-highest.

147. 8 C.F.R § 1003.1(a)(1).

148. *See, e.g.*, § 1003.1(d)(3)(i) (stating that the BIA "will not engage in de novo review of findings of fact determined by an immigration judge" (emphasis omitted)).

149. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,886 n.6 (Aug. 26, 2002).

150. *See* T. Alexander Aleinikoff & David A. Martin, Opinion, *Ashcroft's Immigration Threat*, WASH. POST (Feb. 26, 2002), https://www.washingtonpost.com/archive/opinions/2002/02/26/ashcrofts-immigration-threat/4280d4c6-0932-47fa-9364-59d56f2dcfea/ (calling Attorney General Ashcroft's reforms a "real threat to the integrity of the immigration process and the independence of the board").

151. *See Immigration Court Backlog Tool*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, https://trac.syr.edu/phptools/immigration/court_backlog/ (last visited Feb. 7, 2022) (data updated periodically).

152. *See e.g.*, Scott Rempell, *The Board of Immigration Appeals' Standard of Review: An Argument*

increase in litigation caused by "ambiguities surrounding the proper application" of the BIA's varying standards of review for different aspects of a case.[153] Further, what actually constitutes facts and fact-finding can be a contentious issue, blurring the lines between what should be considered de novo and what should be reviewed by a standard of clear error.[154] Critics are wary of any appellate judges "mak[ing] grandiose assumptions about human nature simply because other judges have made such assumptions before."[155]

Post-*Patel*, it is now more important to change the standard of review from clear error to de novo. The BIA's power necessitates more safeguards; applying a de novo standard of review for facts found by lower immigration judges is an appropriate agency response to the *Patel* decision.[156]

B. Packing The Court

In addition to changing the standard of review, the Attorney General should issue new regulations that increase the number of permanent judges sitting on the BIA. The current BIA consists of twenty-three permanent judges and an occasional, temporary judge.[157] Considering the facts of Patel's matter and the BIA's excessive backlog, the BIA's claim to afford each case "the necessary time and consideration to ensure fairness" seems unrealistic. [158]

Prior to 2020, the BIA contained only twenty-one permanent judges; EOIR, recognizing the problem of judicial backlog, published an interim rule with requests for comments to increase the number of permanent judges to twenty-three.[159] In explaining the decision to add BIA seats, EOIR cited the

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for Regulatory Reform, 63 ADMIN. L. REV. 283 (2011) (highlighting the need to change the fact-finding standard of review, even pre-*Patel*, primarily due to the confusion caused by using varying standards of review); Jayanth K. Krishnan, *Facts versus Discretion: The Debate over Immigration Adjudication*, GEO. IMMIGR. L.J. (forthcoming 2023) (manuscript at 24), http://dx.doi.org/10.2139/ssrn.4206176 (proposing a model of review under which "even factual findings would be subject to de novo review").

153. Rempell, *supra* note 152, at 321.

154. *See* Michael Kagan, *Dubious Deference: Reassessing Appellate Standards of Review in Immigration Appeals*, 5 DREXEL L. REV. 101, 105 (2012) (stating that what constitutes law and what constitutes fact is "constantly unclear").

155. *Id.*

156. *See* Patel v. Garland, 142 S. Ct. 1614, 1627 (2022) (Gorsuch, J., dissenting) (critiquing the majority's holding).

157. *See* 8 C.F.R. § 1003.1(a)(1), (4) (2021).

158. *BIA Biographical Information*, *supra* note 4.

159. *See* Expanding the Size of the Board of Immigration Appeals, 85 Fed. Reg. 18,105 (Apr. 1, 2020) (seeking to revise 8 C.F.R. § 1003 in the wake of a large uptick in immigration cases). An agency may issue an interim rule when the "agency finds [] it has good cause to issue a final rule

"largest caseload both the immigration court system and the Board have ever seen," which EOIR expects to increase in coming years.[160] While EOIR was confident that the addition of two permanent BIA judges would help its stated goal of "maintain[ing] an efficient system of appellate adjudication,"[161] the present case backlog tells a different story.[162]

The rate at which BIA seats have been added has not kept up with the increase in cases heard by the BIA.[163] To address this deficiency, the BIA should appoint an additional twenty-two permanent judges raising the total number of judges to forty-five. Further, because the BIA splits judges into panels of three,[164] increasing the bench to forty-five judges would align well with this practice. Such an increase will serve a dual benefit: it will reduce backlog, thereby making a more efficient court and more expeditious process for all parties involved, and it will allow the BIA to give each matter the attention it deserves.

While adding twenty-two qualified members to the BIA's bench may appear to be a monumental undertaking, the process for appointing new judges is relatively streamlined.[165] The Attorney General ultimately selects new BIA members, but interested individuals must first apply for a "Board Member" position.[166] The required criteria for applicants is quite reasonable, especially given the prestige of the position: applicants must possess a Juris Doctorate, Master of Laws, or Bachelor of Laws; they must be barred in at least one U.S. state or territory, and they must have at least seven years of experience as a practicing attorney in litigation or administrative contexts.[167]

Of course, the financing of such an increase demands consideration: the salary for new hires, ranges from $132,606 to $174,500 per year.[168] The addition of twenty-two new BIA members at this salary is not an insignificant

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without first publishing a proposed rule . . . . [The rule] becomes effective immediately upon publication." *A Guide to the Rulemaking Process*, OFF. OF FED. REG., https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last visited Feb. 7, 2023).

160. 85 Fed. Reg. at 18,106.

161. *Id.*

162. *See* TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, IMMIGRATION COURT BACKLOG NOW GROWING FASTER THAN EVER, BURYING JUDGE IN AN AVALANCHE OF CASES (2022) HTTPS://TRAC.SYR.EDU/IMMIGRATION/REPORTS/675/ (providing data showing the BIA backlog's substantial increase in recent years).

163. *Id.*

164. 8 C.F.R. § 1003.1(a)(3) (2021).

165. *See Appellate Immigration Judge (Board Member)*, U.S. DEP'T OF JUST., https://www.justice.gov/legal-careers/job/appellate-immigration-judge-board-member (Sept. 21, 2018).

166. *Id.* The announcement for the "Board Member" position from the last round of appointments in 2018 remains on the DOJ website. *Id.*

167. *Id.*

168. *Id.*

financial investment. Put in context, however, this additional spending appears more than reasonable: the 2023 DOJ budget request asks for $11.7 billion dollars for the immigration court and federal correctional systems alone.[169] Further, the budget request specifically mentioned that of the $11.7 billion sought, $1.35 billion of that will be sent to EOIR "to reduce the backlog by hiring "more than 1,200 new staff, including approximately 200 immigration judges" over fiscal year 2022.[170] These are encouraging words that may indicate an increase to the BIA's bench is on the horizon. However, it has been common knowledge for many years that backlog presents a significant issue for immigration courts.[171] Only time will tell if the budget request will correlate to actual results.

Impartiality should be an important hiring criterion when adding new BIA judges. An inquiry into the backgrounds of the twenty-three current BIA judges raises concerns regarding bias. Two current BIA judges have held notable positions within ICE. [172] Multiple BIA judges have experience as prosecutors, including one judge who served as senior prosecutor for people incarcerated at Guantanamo Bay Prison.[173] Many BIA members were either permanent or temporary immigration judges at some level before joining the BIA.[174] Appointing judges with a background in immigration law makes sense, but choosing judges with a prosecutorial history may threaten the impartiality of the BIA. Studies show that judges with backgrounds in immigration enforcement afford relief at a rate lower than their peers without such backgrounds.[175] Increasing the size of the BIA's bench will only yield positive change if the right candidates are appointed.

CONCLUSION

Non-citizens seeking relief from a removal proceeding must plead their cases before immigration courts without a guaranteed right to legal

169. Fiscal Year 2023 Budget Request for the Department of Justice: Before the Subcomm. on Com., Just., Sci., & Related Agencies of the H. Comm. on Appropriations, 117th Cong. (2022) (statement of Merrick Garland, Attorney General, Department of Justice).

170. *Id.*

171. *See* TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, AS FY 2010 ENDS, IMMIGRATION CASE BACKLOG STILL GROWING (2010), https://trac.syr.edu/immigration/reports/242/ (showing the backlog was a serious problem in 2010: almost thirteen years later, the problem has only worsened).

172. *BIA Biographical Information*, *supra* note 4.

173. *Id.*

174. *Id.*

175. *See* Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 345–346 (2007) (highlighting how an immigration judge's background makes them susceptible to various forms of bias).

counsel.[176] They navigate a judicial system that has been repeatedly accused of bias.[177] Further still, non-citizens regularly wait years before any ruling is made,[178] living in a limbo filled with uncertainty and fear. It is past time for the Attorney General and the BIA to acknowledge this unfair reality and make substantive changes, especially in wake of the *Patel* decision. The implications of *Patel* are not "some small sideshow."[179]

Further, it is important to recognize the partisan roots that shaped the *Patel* holding. The *Patel* majority was comprised of five justices who have repeatedly ruled against non-citizens on such matters appearing before the Court.[180] While immigration policy is a polarizing issue, the plight of Pankajkumar Patel need not be political.

American idealism has long embraced the idea that the diversity of peoples and nationalities that form the distinct cultural makeup of the United States gives America much of its strength and uniqueness. Allowing non-citizens a better opportunity to contest unfairly adjudicated decisions is crucial to that strength. Reforming the BIA is a small but significant step in the right direction.

176. *See* 8 U.S.C. § 1229a(b)(4)(A) ("[T]he [non-citizen] shall have the privilege of being represented, at no expense to the Government, by counsel of the [non-citizen]'s choosing who is authorized to practice in such proceeding"); *see also* Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 554 (9th Cir. 1990) (finding that non-citizens have a due process right to obtain counsel of their choice at their own expense). *But see* § 1534(c)(1) (non-citizens facing removal on the grounds of terrorism "shall be entitled to have counsel assigned").

177. *See* THE ATTORNEY GENERAL'S JUDGES, *supra* note 17, at 8 (noting that several circuit court opinions accused EOIR of "a pattern of clearly biased immigration judge proceedings" in several circuit court opinions).

178. Rappaport, *supra* note 131.

179. Patel v. Garland, 142 S. Ct. 1614, 1636 (2022) (Gorsuch, J., dissenting).

180. *See generally Clarence Thomas on Immigration*, ON THE ISSUES, https://www.ontheissues.org/court/Clarence_Thomas_Immigration.htm (Mar. 21, 2022) (discussing Justice Thomas's past positions in five cases before the Supreme Court and a quote on issues involving non-citizens); *John Roberts on Immigration*, ON THE ISSUES, https://www.ontheissues.org/court/John_Roberts_Immigration.htm (Mar. 21, 2022) (providing Chief Justice Roberts' stances in four cases involving non-citizens); *Samuel Alito on Immigration*, ON THE ISSUES, https://www.ontheissues.org/Court/Samuel_Alito_Immigration.htm (Mar. 21, 2022) (showing Justice Alito's previous positions in six cases involving non-citizens).