Bennett Nuss (BN): Welcome to Season Five of *A Hard Look*, an administrative law podcast brought to you by the Administrative Law Review, Washington College of Law and American Bar Association. My name is Bennett Nuss, and I am the Senior Technology Editor of the Administrative Law Review and the host of *A Hard Look* for the 2023-2024 academic year supporting me in the booth is Anthony Aviza, our technology editor, who makes me sound far better than I otherwise deserve.

Additionally, I'd like to thank our predecessors, Senior Technology Editor Alexander Naum and Technology Editor Eva Pedersen for their work in developing the podcast last year, as well as the rest of the 2022-2023 Executive Board. We have big shoes to fill and we wish you all well.

Before we begin, please note that the positions, views and ideas advanced by speakers on this podcast are representative of themselves alone.Their positions cannot be fairly attributed to the Administrative Law review, Washington College of Law, the American Bar Association, nor any other organization to which the speakers may be affiliated.

The United States has always been a country disproportionately comprised of immigrants. Be they sailing to the colonies in 17th and 18th centuries, being a part of the waves of immigration in the 19th century from eastern Europe and Ireland, or coming through Ellis Island, like my grandparents did in the interwar period, and now coming to the United States from South and Central America, all of them sought a better life in the United States, and it's an enduring national narrative that the United States can provide that better life.

Immigrants and their US born Children make up 27% of the United States population as of 2022. And this percentage is only increasing; in 2010 this percentage only made up 20% of the population. Issues surrounding immigration are legal proceedings in nature, whether they be hearings at court for adjudication of asylum claims, permanent change of status or even visa programs.However, it is clear to even the most casual observer that the United States immigration infrastructure is under some considerable strain.

As of last year, there are almost 92,000 cases pending adjudication before the Board of Immigration appeals, Almost 390,000 visa applications and backlog at the time of recording, and over 2 million pending cases at Federal Immigration Court, despite an increase in clearance rate. It's clear that something needs to be done, and while some of the responsibility for immigration changes and reform lie with Congress, there's considerable room for intervention on the part of the executive branch, which is what brings our guest onto the show today.

Adam Pollock is a 3L here at American University, Washington College of Law. Originally from the Boston area, he moved to Central Ohio to attend Kenyon College, a small liberal arts school. After graduating from Kenyon, he moved to DC to attend the Washington College of Law. This will be his second year working on the Administrative Law Review and he serves on the editorial board as an articles, editor Adam's comment, deported over a typo was published in ALR volume 75.1 particularly looking at the current state of immigration courts and how this increasingly overburdened system can be reformed in the wake of a Supreme Court decision from 2021-2022 term *Patel v. Garland*. Thanks for coming on the show, Adam.

Adam Pollock (AP) Yeah, thanks Bennett for having me, and thanks Anthony as well. Happy to come on, flattered to offer my expertise, rather, quote unquote expertise, but I'm looking forward to talking to you guys.

(BN) For those that don't know, what is the BIA and what does it do?

(AP) As you mentioned briefly before, the BIA stands for the Board of Immigration Appeals, and as that name suggests, it's an appellate option for folks who have received an unfavorable ruling in the lower immigration courts. And usually you start out in lower immigration court unless you deal only with USCIS, U.S. Citizenship and Immigration Services, but that's sort of a separate branch. So,if you're somebody, you're an immigrant, I'll probably use the term noncitizen, who receives an unfavorable ruling in a lower immigration court. Usually that ruling is a denial of your asylum claim or a denial of your request to adjust your status, and you can appeal that decision. And when you appeal it, you go to the Board of Immigration Appeals or the BIA, the parent agency of it is the EOIR, the Executive Office of Immigration Review.

The BIA itself is made up of typically 23 permanent judges that will sit on the board of the BIA. Usually the cases themselves are just heard by one single ALJ, or administrative law judge. But occasionally there'll be panels of three. And contrary to what we think about like in a typical courtroom proceeding, most, but not all, of the BIA cases are, just done with paper reviews, meaning there's no oral arguments, there's not as much typical activity that you'd think of when you think of what goes on in the court. It's a lot of, a lot of paper reviews, aside from what you've indicated in terms of most of the litigation in an immigration court being done via paperwork.

(BN) What are the primary differences between immigration courts and how the BI A functions in terms of their appeals?

(AP) Sure. There's a few key differences, some of which we kind of touched on. But the obvious one is that the BIA is the appellate level where the lower immigration courts are sort of the ring below that. So, say you're charged with trespassing, this is a non immigration example, but if you're charged with trespassing, you're probably going to a state district court. Let's say you're found guilty there, you can appeal your conviction to some sort of state appellate court. In that example, the lower immigration court is the district court where you're charged and have a trial, and the BIA is the appellate court where you appeal the verdict. There's also a couple other important differences as we kind of mentioned, whereas in the lower immigration courts, it's more of the typical courtroom setting with oral arguments and more of the things you'd think about when you picture a typical courtroom. The BIA is again, more paper reviews, and less oral arguments, less of the sort of pomp and circumstance to use that term, that goes on in the lower immigration courts.So that's sort of the key difference is the appellate option, less involved in terms of attorneys, more just in the BIA judge's hands.

(BN) So if someone wanted to appeal a decision made by the Board of Immigration Appeals, what would they have had to do before the main controversy surrounding your Comment occurred?

(AP) Well, prior to *Patel v. Garland*, which is the case that I write a lot about in my comment, the idea was that individuals would be able to appeal "fact finding" determinations of the BIA, which is because the BIA standard of review for reviewing lower Immigration Court fact finding is a clearly erroneous standard, that often means you're usually appealing the facts found by the Immigration Court judge because it's unlikely for the BIA to find or overrule the facts that the Immigration Court did using that high bar, the clearly erroneous standard after *Patel*. This isn't an option anymore, and I should preface that fact finding has to do with the first stage of a BIA proceeding, there's two stages: there's the eligibility determination and the second stage is the actual grant or denial of relief and that wasn't reviewable to begin with.

(BN) So what are the current standards for how the BIA reviews immigration cases when appealed to them?

(AP) Through the research I did while I was writing in my comment, I found that the BIA splits up their proceedings or their review of the case into two separate determinations or quote stages. The first determination/stage is the eligibility determination, meaning "is this person even eligible to receive the relief that they want?" Turning back to Patel, the entire case concerned the eligibility decision. So, not even whether plaintiff, Patel, either should or should not have been granted relief, but whether he was in the first place eligible to be considered for relief. That's the first stage. The first determination is the eligibility determination.

(AP) But again, it's fact finding that's done mostly by the lower immigration court to determine whether or not someone is eligible to receive the relief that they want. And as we mentioned, the BIA uses that clear error standard to see if it's necessary or warranted to overturn the immigration courts eligibility determination. So following all that, assuming the immigration court deems you eligible to receive relief and assuming the BIA agrees, then you go to the second stage, which is the actual, "is this person going to receive relief or not"? So, an eligibility determination doesn't promise you anything. It merely confirms that you can be considered to receive relief, nothing is guaranteed after that.

(BN) So, in cases like Patel's, it's something along the lines of a double bar to entry in that you have to be eligible to relief before there's even a determination on whether you qualify for an adjustment status. Is that right?

(AP) Pretty much, Yeah. So you have that initial eligibility determination and as we'll get into more in the facts of Patel the Garland, that's no walk in the park. There's a lot of things that can render somebody ineligible. And then from there, it's still discretionary on the, on the court's part eligibility is just, it gets you in the door, but even after that, it's the court's call.

(BN) So looking at the specifics of a BIA hearing, do they do so like any other court or do they have unique procedures that make these kind of processes very distinct from a conventional immigration court?

(AP) Following modifications to the rules that were made by then Attorney General John Ashcroft back in 2002, the BIA doesn't review the fact finding determinations. And the eligibility decisions are de novo, which means anew, instead, again, with regards to the fact finding done by the lower immigration courts,

the BIA will use that clear error/clearly erroneous standard of review, you know, similar to a standard of review used by a lot of Article III appellate courts. So, this is a pretty high bar to clear, there has to be a clear error committed by the lower immigration judge for the decision made by the lower immigration judge to be overruled. And as mentioned, these BIA proceedings aren't done in typical courtroom settings. It's usually paper reviews. So there's a lot of deference to the decisions made by those lower immigration courts, and with this amount of deference, that raises questions regarding the propriety of some decisions.

(BN) Do you think it would be fair to say that there are equitable concerns pertaining to how the BIA conducts their processes?

(AP) I would say…I think, you definitely get more or perhaps closer attention paid at the BIA level than in a typical immigration court or courtroom. But if you look at the numbers, backlog is a pretty significant issue both at the lower immigration court level and at the BIA level. When there's such a mountainous pile up of cases, it's hard to in good confidence, feel that each specific case is getting the requisite attention, especially when you consider the gravity of some of the cases that nearly all of the cases that the BIA and the immigration courts are reviewing and, what's at stake in each of those.

(BN) And so looking at immigration cases and immigration appeals in general, what does the average experience look like for a potential immigrant going through immigration court?

(AP) I mean, obviously it varies from person to person, depending on who you are and what you're seeking, but I think in short it's messy. I think anyone who's worked in immigration law for even a very short period of time would probably attest to that the immigration court system being kind of messy and kind of chaotic. You know, there's asylum, there's visas/adjustment of status requests like what the one Patel was seeking. But for the uninitiated, we're talking about immigration courts. So separate from article three courts, not your local courthouse where you're going to dispute a traffic ticket or a divorce proceeding or something like that. This is an immigration court, they only hear immigration cases, the judges are just immigration judges. So it's very, it's insular, it's very much its own thing.

(BN) As we're comparing Article III courts or your more conventional courts which may be mandated by either the US Constitution or state constitutions to these more special executive branch created entities; what are the differences between a conventional trial court and an immigration court?

(AP) First, you know, there's no jury trials and obviously not every Article III proceeding or not all litigation are in Article III courts, you're not always going to a jury, but there are no juries typically in immigration courts. And probably most importantly, I think immigration judges and BIA judges who are also immigration judges, but just at a higher level, they aren't lifetime tendered. So they lose that independence that most article three judges have. I would point people to look into some of the documented reports of what goes on in immigration courts. Because I think they show that it can, at times at least, be a real zoo.

I think there's some pretty compelling examples of bad behavior from judges. And if you look at my comment, there's a bunch of articles cited that offer examples of this. But again, if you do lose in

immigration court, you can typically appeal to the BIA. So the immigration courts aren't always the end of the road, and I think that's a good thing.

(BN) So as your kind of comment speaks to, mostly you're mostly looking at a plaintiff who's looking to make a permanent change in their residency status. Do you know how that might look like under, under the current laws?

(AP) Sure. So, of course, I feel like I should preface this with you. Should anyone who is looking to do much of anything in an immigration court should consult with an immigration attorney. That should definitely be step one for anyone engaging with immigration courts in any way, but for an adjustment of status specifically, which is what the *Patel* plaintiff was seeking, that's something you're seeking when you're already physically present in the US and have been for some period of time.

There's a couple different forms of an adjustment of status. But typically these people are applying for lawful permanent residency aka a green card and as you'd expect, you have to be eligible to apply for that adjustment in the first place and eligibility for those green cards/that adjustment of status. It sort of varies a bit depending on what quote unquote category of immigrant you are; but usually even before you formally file for an adjustment of status, which you do, using a form called an I-485, you have to file what's called an immigrant petition. And again, those vary depending on sort of who you are and what exactly you're seeking.

You know, there's a form I-130 that's called a petition for an alien relative. A form I-589 is an application for asylum/withholding of removal, et cetera. But it does vary highly depending on what you're looking for.

(BN) Clearly, there's preliminary work that needs to be done for anyone who's seeking a permanent adjustment to their status. But once you've kind of determined what kind of relief you're looking for, what process do you have to go through to get that change of status actually, heard or finalized?

(AP) So typically, you'll file for that I-485 adjustment of status and you file that with the USCIS which again is United States Citizenship and Immigration Services. And when you do that, eventually they'll reach back out to you to set up biometrics, which is, your fingerprint, your biological data. Sometimes they'll want to conduct an interview with you, but it can all add that USCIS and immigration courts are not the same thing. USCIS is a part of the Department of Homeland Security,or it's a branch under the DHS excuse me. But immigration courts in the BIA itself are a part of the EOIR, the Executive Office for Immigration Review and that in turn is a sub agency of the Department of Justice.

So should you apply for an adjustment of status and be denied by us cis you're given an NTA, or a notice to appear, typically in an immigration court and that's usually what kicks off deportation proceedings. Other times you won't deal with the SAS at all and you're just be given an NTA from the outset. Usually if you, you know, arrive at a land border and you're apprehended, usually they'll just give you an NTA to go straight to immigration courts for these petitions that are actually heard and adjudicated before an immigration court or the BIA.

(BN) How long does it really take and what are the costs involved for someone that's going through that process?

(AP) It varies, depending on a number of factors, but undoubtedly, and almost without fail, it's a long process. And in my comment itself, there's a bunch of statistics that I cite that show that it's often multiple years even before people will receive, some sort of final decision or receive any, sort of finality as to whether or not they can stay in the United States. And that, as you'd expect, leaves people in limbo and you know, just think about it. If you file your initial application for, adjustment of status or an asylum request, you're just waiting and, you're present here in the US and you're trying to build a life and you're trying to work and there's bills to pay and stuff like that. But at the same time, you know, that that decision could, could come down and the government can make the decision that they're going to deport you. So it's a pretty tough dynamic that, you know, millions of people in the US find themselves in. And it's, it's definitely a tough way to *live*, right?

(BN) And these difficulties only seem to be expounding, which is in part what your comment on Patel V Garland is about. Do you mind just for the audience giving a brief recitation of the facts of Patel Garland, so they can kind of follow along with what we're discussing here?

(AP) Sure.

So the *Patel* plaintiff, Mr Patel, he came here originally from India back in the 19 nineties with his wife and he came here, he, he came illegally, that was never something that was in dispute, but he came here back in the nineties and he had been living here for quite a while at this point.

And then, so back in 2007, he applied to USCIS for an adjustment of status trying to make him and his wife lawful permanent residents. And again, at this point, when he did apply to USCIS he had been in the US, you know, for over a decade, he had children here. So he had established a life here and that's when he chose to apply to USCIS to become a lawful permanent resident, via permanent adjustment of status.

(BN) For those in the audience who may be unaware, permanent adjustment of status is a legal process where someone residing within the United States changes their residency status to a legal resident of the United States. But if this appeal for Mr Patel had gone without a hitch, we wouldn't be here talking about it. So what happened with his appeal here?

(AP) So USCIS, who he was dealing with initially, they denied at first his adjustment of status, and their reasoning was he was statutorily ineligible to receive relief to receive that adjustment. The reasoning that USCIS gave was that years earlier, Mr. Patel had checked a box on a Georgia driver's license application that stated he was a US citizen when he wasn't.

So he said he was a citizen on the application but he wasn't. Because of that, back in 2007, he gets that denial from USCIS and as we know, this is a slow moving process. It wasn't until a few years later that the government actually got around to beginning to deport him. And when that starts, that's when Patel goes into Immigration Court and tries again to renew his adjustment of status.

And you know, as we know, the Immigration Court denied that and then he appealed it to the BIA who denied it too.

(BN) Did us cis specifically cite a law that they were deporting him under when they first kind of got back to him.

(AP) Yes. So he was deemed ineligible for the adjustment of status because he was found to be in violation of 8 USC 1182(a)(6)(C)(2)(i). It's a mouthful, which renders ineligible any noncitizen who closely represents himself or herself to be a citizen of the United States for any purpose or benefit under you know, state or federal law, right?

(BN) And just to clarify these material misrepresentations of citizenship, they apply to basically any interaction with a government entity. Yeah, that's been my understanding at least any time, you know, typically this is in the immigration context, any time the government can prove that you've quote misrepresented or citizenship status in some way, such as what Patel did on that Georgia, driver's license application, that's what gets you in hot water.

(BN) So for someone who might support the USCIS's determination on Mr Patel's case, they might reason that, you know, Patel came here illegally, he lied on his driver's license application and then he was caught and deported. This isn't really a big deal and it's not controversial. So what's the issue with that kind of analysis?

(AP) And I think that's the valid knee jerk reaction to hearing this stuff. But so there's sort of two issues, right? And the first is that, so Patel's side of the story was that he had checked the box in error. That's what he said when you know, he first presented his case and obviously he may, he could have been lying.I mean, that's probably what you would say, right? That, "oh, well, it was an error."

But you know, the issue is that under the Georgia law at the time, Patel was actually already eligible to receive that driver's license because he was employed and he had a pending adjustment of status request at the time. So returning to the language of that long statute, we just mentioned him checking that citizenship box didn't actually avail him to quote any purpose or benefit that he wasn't already entitled to, he was already entitled to the Georgia application or excuse me, the Georgia, driver's license, he was eligible to receive it. So, even though he checked that citizen box, when he wasn't really a citizen that alone didn't make him ineligible for the driver's license again, he was already eligible for that.

(BN) Right. So, in your determination, as someone who has reviewed this case extensively, what do you think should have happened when Mr Patel's case went for review?

(AP) Well, I think, what should have happened is that Patel should have gotten what he wanted and that was judicial review, right? That was having an Article III court, whose judges are not immigration judges, hear his side of the story and hear the matter following the bias decision that he was ineligible for relief. So, you know, I think he should have had judicial review.

I think he could have gone to a non immigration court and explained his side of the story and whatever happened after that, so be it. But after this case, after Patel v. Garland, that's not an option for people like Patel who may find themselves in a similar situation.
(BN) Your answer there as to why you don't think that he received judicial review implicates the court's holding in Patel. Could you give the audience a really quick rundown of what that verdict entailed?

(AP) Yeah. So it's a little technical but the gist of it is that quote, federal courts lack jurisdiction to review facts found as part of discretionary relief proceedings under section 1255, and the other provisions enumerated in 8 USC 1252(A)(2)(B)(i). And that story of Patel's that I just recounted, the whole saga with the license application, that was all the lower immigration court fact finding that determined that, you know, he misrepresented his status on that application and thus he's ineligible. So we call these things facts, you know, factually, he misrepresented his status, factually, he is ineligible. But oftentimes there's more to it than that, right? I mean, these aren't facts like the sky is blue or we're talking right now in 2023. There's often some hotly contested aspects of it.

(BN) So, are you indicating that the lower court's fact finding may have been biased or compromised in some way?

(AP) No, I don't think so.

I mean, I'm not in this case specifically because, you know, I wasn't there and I didn't hear the proceedings, but I, I do know, that immigration courts and the judges that compose immigration courts have been accused many, many times of, of bias, whether that be, you know, subconscious bias or overt intentional bias. And again, these aren't, aren't things that I'm personally coming up with. There's a lot of studies that you can find dozens of different instances with a quick Google search and that'll and that'll render this, this stuff.

So, you know, the question becomes, can we really trust this "fact finding" to be truly impartial, you know, as it should be and whatever the answer to that may be after Patel, you know, Article III non immigration courts, they cannot review that fact finding. There's no judicial review here.

It's just not an option, even if the fact finding wasn't controversial, even if it was sort of more black and white, I still think that people should have the opportunity to appeal it to a, to a non or, or excuse me, to a non immigration to an article three court. I don't, you know, I think that should always be an opportunity for, people.

(BN) So you're kind of implicating some kind of neglect here on the part of the court. Are you advancing the view that these immigration judges aren't paying enough attention to the cases that come before them or that they're otherwise compromised or some other allegation like that?

(AP) Well, it's, you know, it's tricky. I think I'd begin by prefacing that. Immigration judge…the duties of an immigration judge are very difficult. They're stressful and it's a demanding job and I don't want to sit here and be like a self appointed Ivory Tower and, you know, point my finger about how flawed and how evil these immigration judges are. One, I'm not in a position to do that and it's not what I believe but

anyone, you know, lawyer, law student, whoever you are, can read a pretty extensive body of reports on things that have gone on in immigration courts and I think form your own conclusions from there.

(BN) So, just based on your review, I think it's pretty fair to say that you're not a big fan of this decision. Why, why is that?

(AP) Yeah, I mean, I think it's unfair.

It's probably the word I would use that kind of categorizes the crux of the decision in a word. I think it would be unfair. Obviously, you know, this, this was a Supreme Court case and Supreme Court justices are exponentially more intelligent and well reasoned than I am. But I don't think that insulates their analysis and their decisions from criticism. I think, you know, I think that always at any level of government, these things should be criticized and scrutinized.

But you know, when you, when you break it down, when you break down the facts of Patel and the holding of Patel, all that, the the majority here is really quote unquote, accomplishing if that's, that's the term you'd use is stripping judicial review for noncitizens who want it. And I think if you asked the majority, they would probably characterize their decision as, as bolstering the power of the, the bias of an administrative agency and interpreting statutory language as they see it. But I don't, you know, I don't think that tells the whole story and I don't think it's insulated from criticism.

And, you know, just like with many, many other Supreme Court opinions, past present and future, you can predict with a pretty good degree of accuracy, how each justice was going to rule just by knowing their political persuasions and by knowing the facts of the case.

(BN) So to your knowledge, are there other procedures similar to this appealing of a case to an article three court where there's a prohibition on judicial review from the appellate court?

I mean, I, well, I would say I would quote Justice Gorsuch who wrote the, the dissent in Patel, he was the only conservative justice to, to side with the, the dissenters and he, he characterized the majority's decision as quote, one at odds with background law permitting judicial review, quote, you know, as a general matter, judicial review of agency determinations is granted more liberally than it was in the Patel case. And in the majority opinion, they discuss, you know, at length why they're deciding the way they do. And Justice Barrett who offered who, excuse me, who authored the majority of his opinion says that quote, federal courts have a very limited role to play in an administrative scheme. Like, you know, this one, the BIA again, it's an administrative agency, it's part of an administrative agency and it is important, I think, that administrative agencies retain independence.

But in this case, I don't think that the role of federal courts in reviewing eligibility determinations was that big or that controlling to begin with. And I think that the negatives sort of outweighs the positives that are gonna come out of the majority's holding.
28:47

(BN) It really seems that the court here is grappling with the extent to which lower courts should be reviewing administrative decisions. But it seems here that the court is taking a strangely pro-administrative deference approach compared to their decisions in cases like West Virginia v. EPA and Biden v. Nebraska. What do you think accounts for that change here or is it merely an issue of resources and not being able to retry cases?

(AP) That's a good question. I mean, I think the obvious answer you talk about, you know, West Virginia v. EPA. In that case, I think it's fair to say that the more conservative stance on that issue was limiting the EPA's authority to regulate greenhouse gas emissions. And we are law students, we are not mathematicians, but the last I checked there were more conservative justices than liberal justices at the time the West Virginia decision came out and now. And obviously West Virginia was decided on strictly partisan lines.

The same principle was at play in Biden v. Nebraska. And even though that was a little more focused on the power of the Secretary of Education, specifically, but in both those instances, you see administrative power being limited.

And, then we've got Patel and now the BIA eligibility determinations aren't subject to judicial review, which again was the holding in Patel. And in Patel, just like in West Virginia and in Nebraska, the majority was composed of all conservative justices. So to say the quiet or really not so quiet part out loud, I think the court is ruling along partisan lines. Sometimes that means increased administrative deference or, you know, increased power to administrative agencies and other times that doesn't. And I think it depends on the issue and the facts underlying the issue. And that is, again, that's a large oversimplification of the work that the United States Supreme Court justices do. You know, they're some of the most intelligent and powerful people in the world and have a very, very, very important job. But, you know, if Vegas was offering odds on how certain justices would rule on certain issues prior to them actually ruling, I think a lot of us would bet on that and make a lot of money.

But, you know, to answer your original question, I think it is tough to draw broad conclusions about the Supreme Court or at least the current Supreme Court's general stance on administrative deference because I think the court is just prone to going either way, depending on the underlying facts of the issue and you know, other moving parts that vary from case to case.

(BN) So Justice Gorsuch also isn't a fan of this decision and he wrote the dissent in this case that you cite fairly extensively during your comment. What did you find so personally compelling about this dissent that you cite it to the degree that you do?

(AP) I mean, probably just his writing skill and his eloquence. We're all law students so we read, judicial opinions pretty much all day every day when we're doing school work and a lot of those are Supreme Court opinions.

Right–but, you know, I don't think I ever read an opinion or I, I should say a dissent, a dissenting opinion so closely and with as much kind of factual context and background as I did with this one. Justice Gorsuch stated things in such a way, you know so much more concisely and powerfully than I could have

and you can really feel his emotion come through at certain parts of the opinion. And, you know, we can go into some quotes that he had but it really gets scathing and it's pretty charged.

(BN) In terms of these kind of charged statements, do you have one that specifically, points out to you where he's really going with his descent?

(AP) Yeah–I mean, there's so many but I think there is one that I liked a lot was. He says, "today's majority acts on its own to shield the government from the embarrassment of having to correct even its most obvious errors, respectfully I dissent". He also says, "the majority's reasoning promises that countless future immigrants will be left with no avenue to correct even more egregious agency errors."

And when you spend a lot of time though, reading about a legal issue, you're definitely better able to appreciate how well and how effectively these justices can attack an issue and cut right to the heart of it. And it really is like some of the most powerful writing I've read–certainly some of the most powerful writing I've read in law school and, I think it's important to add that Justice Gorsuch is a conservative and that is not up for debate and he was willing to break partisan lines on this one.

And I think, I respect that. I think it's noble.

(BN) So on a less artistic note, what were the legal issues that Justice Gorsuch identified within the Patel decision that made him want to author that dissent?

(AP) So primarily it was, he was critiquing the majority's finding that what he dubs quote obvious errors of fact can't be reviewed by an article three Non-Immigration Court. And, you know, he basically scolds the majority for, for doing that; for eliminating judicial review for certain eligibility determinations that may have been grounded on these, his words, not mine "these obvious factual errors."

And then he also takes issue with the majority's interpretation of certain statutes. He says that, the majority's interpretation quote, doesn't he begin to do the work unquote that the majority is, is demanding that it do. So again, I mean, this is justice Gorsuch breaking partisan lines and he was the sole conservative justice among the, among the dissenters. But, you know, I think it's refreshing that he was the odd man out and you could tell it didn't sit right with him and he made that clear.
There's no denying that today's Supreme Court is such a hyperpartisan institution; so it's always good, you know, to, to hear people crossing lines like Gorsuch did here.

(BN) Right. So stepping out of the realm of the Supreme Court and theoretical, to some extent and down into the practical–can you think of a hypothetical factual error that based on the Patel decision would now be unreviewable?

(AP) Sure. So one example that I discuss a bit in my comment is about registering to vote.
So in many states, they have these things called motor-voter laws. So, you know, you'll go to the DMV and while you're there, they'll ask you if you want to register to vote; and by law, you know, these DMV, employees can't stop you, they can't discourage you in any way, shape or form from registering to vote.

So if you say, yep, sign me up, they're gonna register you.

And that's the case even if you're not a US citizen and even if you're be registering to vote illegally. So there's some instances, again, these are news articles that you can find, in my comment, but someone will be deported or threatened with deportation because they register to vote, quote on quote illegally.

And this is to say just as a side part that people don't register to vote illegally or that it's always a mistake. But sometimes it is, you know, and, and registering to vote when you're not legally permitted to do so is a serious offense. So, you know, you can think of the example where someone does that they're offered to register at the DMV. And they do so illegally. And then a few years later they go back to us cis or to an immigration court and they want an adjustment of status or something else. And then they're deemed ineligible to receive that because they registered to vote illegally. And that's, again, the fact finding that determines that, you know, they misrepresented their citizenship and they are not eligible for an adjustment.

But again, you know, there's often times more to the story than just "facts" like water freezes at 32 degrees. I mean, I think those facts are separate from a lot of the facts that render someone ineligible to receive relief. And ultimately oftentimes result in their deportation.

(BN) To some degree–and this is an epistemological question–in some respect. Facts when you're looking at the reviewing of these cases aren't merely that and can just be the ideological assessment of judges when they're put on these immigration cases.

(AP) I mean, I would say some facts, some facts are and some facts aren't. Like, up, is up and down, is down.But other things that are deemed facts are more contentious than that.

And again, from a big picture standpoint, Patel was only seeking judicial review of these facts and the ensuing eligibility determination by an article three court.

So, you know, remember the dissent, which again was offered by a conservative, Justice Gorsuch, they're not advocating for this hyper progressive immigration free-for-all that lets everybody in or anything even close to that. I don't think that's what anyone that is not happy with the Patel decision.
I don't think that's what they're advocating for. They're just advocating for a judicial review of an administrative agency's factual determinations.

That's all it is. And that's all it ever was realistically.

(BN) What's the impact of Patel on the everyday operation of the BIA when they're hearing immigration cases?

(AP) I think the short answer would be not much. It doesn't change the way that they, you know, run a shop, it doesn't change what they're doing on that day to day basis.

It really just makes the gravity of their decisions, especially those first stage eligibility decisions, much more important and much more impactful because they can't be reviewed later by an article three court.

So, you know, like when you talk about impact and the word impact, it's really more of a silent impact and it's not gonna be felt by the judges on the BIA or the judges on the lower immigration courts, but it's gonna be felt by future noncitizens that might be in a similar circumstance to Patel. And I think it's them, that will be getting a raw deal because of the holding here.

(BN) Considering that the impact is going to be giving weight to the fact finding that judges have when they're hearing these immigration appeals. Do you think that this decision is going to cause judges to think twice when they're making factual determinations in bi a cases or is that just something we can't know in short?

(AP) Yeah, I would agree with you that we can't know it. I mean, I think the, the optimistic answer is that these judges are already making these decisions with the utmost, gravity, and the utmost care.

And again, the backlog is such an issue that these judges are really forced to adjudicate at a really, really high pace that again, makes people skeptical that they're really able to adjudicate these things with the true time and care that each one really should get.

But I don't think it'll change the way these judges choose to adjudicate things.

And I think most of them, if not all, are already taking it extremely seriously; and nothing could really change their approach to it. And I think that's how it should be.

(BN) So as a part of every comment, the author provides some recommendations to alleviate or fix the problem that they've identified. And the first that you've noticed is changing the standard of review.

So in general, appellate courts review most issues DeNovo which means that a court is reviewing an issue without referring to the previous court's determinations; but, that's no longer the case in bi a appeals because they're using the previous court's facts finding. What can either Congress or the executive branch do to fix this standard of review.

(AP) Yeah. Well, you know, you mentioned de Novo review of the fact finding. And until 2002, the BIA was using a de novo standard of review for immigration court fact finding.

And then that's when then Attorney General John Ashcroft changed it.

And his justification was that allowing the BIA's judges to, to use the clear error standard instead of the De Novo standard would "eliminate the need for lengthy board decisions that do little more than reiterate facts" and you can see what his aims were, right. I mean, it, if they review it on a clear error standard, they're looking at it less carefully and it's definitely taking them less time than if they're doing a de novo review. And that was his justification. And, I think that's valid–but you definitely wanna, you know 21

years later in hindsight, ask if that was the right way to go about it as shown by Patel and the whole Georgia driver's license saga.

It's oftentimes it's not just reiterating a bunch of black and white facts. And, you know, I think as you said, one of my recommendations was, I think that the AG should change once again a standard of review to go back to a De Novo review of Immigration Court fact finding

(BN) And just as a clarifier, this kind of new De Novo review would be in place when the BIA hears an appeal.

(AP) Correct. Right. I mean, they would, they would hear the case but they would not defer to the fact finding and slash eligibility determination of the lower court because when something gets to the BIA, it's the lower court, the lower Immigration Court has already made a call and they're now reviewing that at the appellate level.

But, when it comes to fact finding and when it comes to the all important eligibility determinations, I think there's real value in changing that back to a de novo standard of review.

(BN) And I mentioned this in the introduction: according to the Congressional Research Service report from last year, there are almost 92,000 cases pending adjudication in the BIA which, presumably, has increased since then. Isn't Ashcroft's concern regarding litigation being drowned in fact finding motion and please, isn't that even more justified now, back when it was made in 2002.

(AP) I mean, a short answer would be, yeah. Yeah, I do. I mean, I believe you're right on that.

And when AG Ashcroft made that decision to change the standard of review, it wasn't as if backlog was an issue–it was back in 2002 and it still is an issue now. It's an even bigger issue now. But, in my opinion, if the facts of Patel are any indicator–and I don't think the facts of Patel are really a one off–Ashcroft's method of resolving the backlog by changing the standard of review wasn't really the best or most equitable way of going about it. And again–this is hindsight being 2020–I don't think that changing the standard of review, which the output of that change was placing a lot more trust in the hands of immigration judges in lower immigration courts and which as we've somewhat touched on, have some serious issues going on–I don't think placing that increased level of trust in their fact finding and their decisions is the best way to go about it.

(BN) So, should you propose changing of the standard of review, should that be done via rulemaking congressional legislation or some other method? Because if this change is done by rulemaking, it can be revoked as soon as a new administration who sees merit in Ashcroft's more utilitarian stance comes to the White House and then we're back to square one.

But on the other hand, asking Congress to make or take meaningful action on immigration has been a nonstarter since the mid-2000s.

And we've seen unified government from both major US political parties in several congressional sessions in the last decade, even. So, and this is an issue with administrative law in general, in what way can these administrative changes be meaningful, given that they are clearly needed to have even a semblance of due process for the people that arguably need it the most?

(AP) Yeah, I mean, another great question, another tough question.

But if I were to take a stab at that, you know, I would say agency rule making is probably the way to go about it. You know, the agency making the rules themselves. As you touched on, it has been difficult to get Congress to act on a lot of issues–immigration certainly being one–and, there's a million different reasons why that's the case.

But, you know, I do acknowledge that, you're right. There's always the next attorney general appointed by the next administration that's gonna decide to go back to the old way of doing things or some new way of doing things just like Ashcroft did back in 2002. And I think that's a possibility.

Absolutely, I think it could happen. Maybe it is likely to happen. But I don't think that really means that there's no point in making change or trying to make change now.

You know, in a perfect world, changes are made and things go smoothly and then the next AG or the next administration doesn't think that further changes need to be made, regardless of their political leanings because hey, maybe the agency is actually functioning well and things are going well and things are equitable but, you know, even more broadly, I think you're touching on a very real concern within administrative law generally: which is agencies somewhat being at the whim or at least being heavily influenced by the political leanings of the current administration in the oval office. And that again is probably a longer discussion for another day, but you definitely touched on a pretty big concern in administrative law, right?

(BN) Right. So, the second recommendation that you put in your comment is a kind of polemic statement saying that packing the court can be a way to fix issues with BIA appeals. Why do you think that is?

(AP) Yeah, I mean, obviously like quote-on-quote “packing the court” has a very negative connotation and rightfully so–I mean, we've seen a lot of that in recent years. I think above all else, I was just trying to get creative with the headers in my comment, hence the header “packing the court.”

But I didn’t mean pack the court in the traditional sense–as in, shove a bunch of justices onto a court or judges onto a court from my political ideology, so that the numbers will tilt a certain way. That's how we all understand packing the court, right?

I meant, however, pack the court in the sense that, just put more people on the BIA, you know, currently it's 23, I want them to put a lot more on so that cases can be adjudicated more carefully and that the wait times aren't as long. And I think that's warranted.

I mean, for one, the BIA has been expanded multiple times over the course of its history. It hasn't always been 23. It's been less than that and they've added to it. So it's not like adding more BIA judges is an unprecedented move.

And secondly, you know, we've talked a good amount about backlog. It's just a huge problem. And if you think about it, you know, when an administrative agency like the BIA is so backlogged, it's really hard to believe that each matter is getting the requisite time and attention.

I think it's just hard to assert in good faith that immigration cases, both in the lower immigration courts, really mainly in the lower immigration courts, but also at the BIA level, it's hard to feel that they're getting the requisite time and attention just because backlog is such an issue. And you know, like this isn't the court of small claims here. These are life and death cases that have life and death consequences. So, I think anything that can be done to increase the time and attention given to these cases and just reduce the stresses that backlog places on these judges who are doing a very, very hard job is something that should be explored and done.

So, I just think that more attention to these cases, more time, more care should be more of a priority than it is now.

(BN) But as has been the debate with court packing at the Supreme Court level or even at the appellate court level–is there a potential issue with administrations who may want to stack the deck for administrative courts with sympathetic judges to their immigration goals–whether it be an easier process for people who are applying for citizenship or permanent adjustment or a administration who be may be more hostile to these kind of procedures?

(AP) Yeah. You say, I think you said, is it a potential issue?

I mean, I think it's, I don't even think it's a potential issue. I think it's an issue.

When I was writing my comment, I found this report from a place called The Innovation Law Lab. And they did a report called “The Attorney General's Judges” and they sort of looked at how immigration courts and the judges that populated those benches had changed under the Trump administration.

I recommend the report to anyone interested, You can find it for free online, just look up “The Attorney General's Judges.”

But in it, they find that “Roughly 3/4 of immigration judges hired by the Trump administration have prosecutorial experience and many previously worked for ICE (Immigration and Customs Enforcement) as trial attorneys who represented the government in removal proceedings.

Three-fourths is a pretty significant number of immigration judges that have worked for ICE.

So, on one hand, it does make sense that immigration judges are people who have a background in immigration and immigration enforcement, right? I'm not saying that you should appoint a bunch of

immigration judges who used to be patent attorneys, right, for example.

But on the other hand, when you're populating the bench with these individuals who, for the vast majority, have spent their careers deporting people, really, and now they're all of a sudden supposed to adjudicate immigration cases in a completely unbiased way–I'm pretty skeptical of that. I think most people would be.

And again, this isn't me accusing any immigration judges of intentional bias or intentional xenophobia. I really just think that subconscious bias is unavoidable in this context.

So, you know, referring back to your question–I do think politicians and those people in power have an agenda when it comes to who they appoint to call the shots and administrative agencies, whether that's in, you know, immigration agencies or not. I think that is a pretty safe bet that they are politically influenced

(BN) Right. And we're kind of approaching a philosophical question here in that these kinds of problems call into question how a trier of law who is human, how they can't remain wholly insulated from political persuasions, especially if they've been specifically sponsored by openly political figures such as senators, presidents. In your opinion–and it's totally fair not to know–would a potential solution then be insulating administrative judge appointment from political processes in some fashion? Or is that just as impossible as separating more conventional judges from political concerns?

(AP) Yeah, great question. Again, in my opinion–in the perfect world, I think it would be great to insulate the appointment of all judges.You know, I don't care what context from political agendas or political persuasion.I also think, and I'm sure many people think this way too, that it'd be great if Supreme Court justices weren't appointed in such an entirely partisan way–again, we've seen so much of that recently. And I think that on its face the depoliticization of judicial appointments, I think that is a good thing.

I think a lot of us would agree that that's a good thing. Whether that's feasible, whether it could ever happen or how it would happen is a different story and probably a conversation for another day.

(BN) And, that's totally fair. Adam thanks so much for coming on to the podcast! It has been a pleasure. If any of our listeners want to reach out, where can they find you, Adam?

(AP) Thanks so much for having me. I really enjoyed it. If anyone wants to speak more about this stuff or just this stuff in general, You can reach me by email at AP9164A@american.edu or Adam Pollock on Linkedin or on Instagram @AdamPollock57. So please reach out. I am always learning new things about this stuff–I think it's fascinating stuff. I think it's important stuff even for people that don't want to pursue a career in immigration law. So if anyone wants to talk further, please, please reach out.

(BN) All right. And, if you want further reading on this subject, you can find Adam’s comment in the description as well as Patel v. Garland and some recommended reading.

Thank you so much for listening.

If you enjoyed the podcast, be sure to refer it to a friend and follow us on the platform of your choice. Until next time, my name is Bennett Nuss. This has been A Hard Look brought to you by the Administrative Law Review, the Washington College of Law and the American Bar Association. We'll see you next time.