



THE PATHOS OF PATEL V. GARLAND

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By Stacy Caplow

There are many reasons for despair over the Supreme Court's technocratic decision in [Patel v. Garland](#) which strikingly depends on arguments advanced by an *amicus* rather than the Government. The decision effectively forecloses judicial review of fact-finding by immigration courts or agencies regardless of whether the fact-finding was unreasonable and produced an incorrect legal conclusion. In 1996, Congress did insulate certain specific discretionary decisions, which already have an almost impossible standard of review in most contexts and, by their nature are highly subjective, from judicial review. But, in *Patel*, the effort to protect the courts' dockets from revisiting a "matter of grace" shields incorrect, biased, ignorant, illogical, and indefensible fact-finding by low-level or quasi-judicial officials.

As Justice Gorsuch laments in his surprisingly critical and forceful dissent, life-altering consequences ensue based on the assessment of a single Immigration Judge, or worse immigration functionaries in local offices—in this case the deportation of a person whose ties to the U.S. were substantial and longstanding. He describes this an "assertion of raw administrative power."

Mr. Patel made a mistake—checked a wrong box which happens to be the worst wrong box possible: misrepresentation of U.S. citizenship. His mistake related to a Georgia driver's license not any immigration benefits. Apparently, he may even have been entitled to a license without being a citizen. More importantly, when his misrepresentation was discovered, Georgia declined to prosecute him, crediting his claim of mistake. That was the end of the road for his good luck.

Anyone familiar with the bureaucracy of the immigration system must cringe at Mr. Patel's misfortune at every stage thereafter. The Georgia decision

apparently was unpersuasive to immigration authorities who denied lawful permanent residence, and several years later, placed Mr. Patel into removal proceedings.

This is the first cringe: Why did USCIS seek his removal? Both the agency and then the ICE lawyers in Immigration Court had could have exercised discretion by declining to prosecute. His basis for removal was unlawful presence making him a low priority for deportation. The equities of his situation were in his favor.

The next cringe is geographical: While none of the reported decisions specify the jurisdiction of his removal proceedings or name the judge, as a Georgia resident he likely was venued in Atlanta Immigration Court where *every* judge has a denial rate over 90% in asylum cases. While his application for relief was Adjustment of Status, this astonishingly miserly grant rate reveals how immigrant-unfriendly the judge who decided that Mr. Patel was untruthful must have been.

From one of the most immigrant-hostile immigration courts, Patel's case eventually landed in the Eleventh Circuit, whose pro immigrant rulings are below average for all circuits.

The final cringe is ideological: Despite the Government's basic agreement with Patel's legal theory that the law permits judicial review in cases like his, the Court invited an *amicus* defense of the Eleventh Circuit's decision, enlisting a former law clerk of Justice Thomas. Then, early in its opinion the majority states "Amicus' interpretation is the only one that fits text and context." The outcome, however laboriously reasoned, was a foregone conclusion.

While Patel was found incredible by an Immigration Judge, the ramifications of this decision extend far beyond the 3,000 or so Adjustment of Status and the close to 3,000 Cancellation of Removal or related relief matters heard in Immigration Courts yearly, a small percentage of the overall caseload. Every day, multiple thousands of cases decided by USCIS never reach even Immigration Court let alone the Circuits. These agency determinations rarely are explained or justified. Bureaucrats—not judges—make life changing decisions invisibly, anonymously, and unaccountably.

This case has a sad ending for Mr. Patel personally. Maybe one of the nameless agency decision makers will be compassionate enough to exercise their

unlimited discretion now and defer deportation. He may not gain lawful status, but he can remain in the U.S. with his family and his community.

Patel shuts the door firmly and unequivocally, preventing independent review of fact-finding by Immigration Judges, however irrational and indefensible once the Board of Immigration Appeals has affirmed. This makes the need to populate the Immigration Court bench with independent, highly qualified, experienced, non-political unbiased individuals with appropriate temperament even more urgent. Perhaps this case will provide new impetus for reform such as Real Courts, Rule of Law Act of 2022 voted by the House Judiciary Committee in May just days before the Supreme Court's decision.

▣ ***Guest author Professor Stacy Caplow teaches immigration law at Brooklyn Law School where she has co-directed the Safe Harbor Project since 1997.***