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Arguing for Insulation: How American and Canadian Legal Practitioners Can Bring Neutrality to Their Immigration Systems

Rafael Arturo Paz*

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I. INTRODUCTION

[A]s liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments . . . it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches.

—The Federalist Papers, No. 78¹

One principle that generally guides courts in the United States and Canada is the individual's right to a neutral magistrate.² For example, suppose that you are faced with the misfortune of being prosecuted for a crime. You face a tough prosecutor, but you trust the process to lead to a fair result. Soon, you realize that the judge is not as neutral as you once thought she was. Upon closer examination, you realize that the judge answers entirely to the governor of your state and retains very little protection from removal by the governor. As a result, you fear that the judge will determine your fate with an eye towards appeasing the *political* objectives of a *political* figure. Clearly, this hypothetical is anathema to the guiding principle of judicial neutrality. Or, rather, consider this hypothetical: You are standing in front of a judge, but this judge has not only been vocal against people in your same shoes, but has also been known to rule against people with your type of claim ninety-five percent of the time. Couple this with the fact that this judge serves a fixed term and is relying upon the graces of a political figure for reappointment when their term comes to an end. Both hypotheticals seem to be contrary to the principle of the separation of powers.

¹ THE FEDERALIST NO. 78, at 392-93 (Alexander Hamilton) (Ian Shapiro ed., 2009).

² See U.S. CONST. amend IV; Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 7 (U.K.).

Yet, the first hypothetical is the situation that immigrants find themselves dealing with in America,³ and the second is the situation that immigrants find themselves dealing with in Canada.⁴ In both systems, major questions have been raised regarding public trust and institutional bias against each nation's version of the Executive.⁵ Changing an entire system seems like a mammoth undertaking; are there any methods that normal legal practitioners can take in ensuring that immigration judiciaries maintain impartiality and insulation from the political agendas of political figures?

This Note will proceed to answer this question in multiple parts. In Part I, this Note will provide a brief background of both the Canadian and American immigration courts, particularly their composition. In Part II, this Note will briefly detail the civil service systems of both Canada and the United States and will highlight where each immigration judiciary resides within those frameworks. In Part III, this Note will argue that to reduce the purported bias and politicization of each respective judiciary, it is necessary for these systems to become further entrenched in their respective nation's civil service systems, rather than the "one foot in, one foot out" approach that is currently in force. In Part III, this Note will highlight the specific issues facing each system, as well as provide practical arguments that practitioners in the field can make to provide for such insulation within their civil service systems.

II. IMMIGRATION SYSTEMS

A. *Immigration and Refugee Board of Canada*

Enacted in 2001, the Immigration and Refugee Protection Act (IRPA) established the current Immigration and Refugee Board (IRB) of Canada.⁶ IRPA created a detailed structure of *who* makes

³ See Tal Kopan, *AG William Barr Promotes Immigration Judges with High Asylum Denial Rates*, SAN FRANCISCO CHRONICLE (Aug. 23, 2019, 8:09 PM), <https://www.sfchronicle.com/politics/article/AG-William-Barr-promotes-immigration-judges-with-14373344.php?psid=o3YbU>.

⁴ See Jacqueline Bonisteel, *Ministerial Influence at the Canadian Immigration and Refugee Board: The Case for Institutional Bias*, 27 REFUGEE J. 103, 105 (2010).

⁵ See Kopan, *supra* note 3; see also Bonisteel, *supra* note 4.

⁶ Immigration and Refugee Protection Act, S.C. 2001, c 27 (Can.).

up the IRB and *how* these members are appointed.⁷ The IRB is composed of the Refugee Protection Division, the Refugee Appeal Division, the Immigration Division, and the Immigration Appeal Division.⁸ This Note will focus mainly on the Refugee Protection Division, which handles asylum claims, because the risks of any political bias would be the most damaging here. Members of the IRB are appointed to their positions by “the Governor in Council, to hold office during good behavior for a term not exceeding seven years, subject to removal by the Governor in Council at any time for cause.”⁹ Although the statutory language is silent on any further details regarding appointment, the Cabinet subjects potential appointees to a rigorous vetting process.¹⁰ For example, potential board members undergo “written tests, [and] are screened and interviewed by IRB officials, external experts and panels . . . before being recommended by the Minister for appointment.”¹¹

B. *The Executive Office of Immigration Review*

The United States immigration judiciary is formally referred to as the Executive Office of Immigration Review (EOIR).¹² On January 9, 1983, Congress established the EOIR as an executive agency within the Department of Justice “to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation’s immigration laws.”¹³ According to the Code of Federal Regulations, these immigration judges are the literal representation of the Attorney General in all immigration proceedings.¹⁴ In other words, the Executive hires these judges through an internal process. As of 2018, President Trump has removed most civil service requirements, such as written exams, from the hiring of administrative law judges (ALJs), as immigration judges are classified

⁷ *Id.* §§ 151-53.

⁸ Immigration and Refugee Protection Act, S.C. 2001, c 27, § 151 (Can.).

⁹ *Id.* § 153(1)(a).

¹⁰ See Innessa Colaiacovo, *Not Just the Facts: Adjudicator Bias and Decisions of the Immigration and Refugee Board of Canada (2006-2011)*, 1 J. ON MIGRATION & HUM. SECURITY 122, 124 (2013).

¹¹ *Id.* at 124..

¹² *Executive Office of Immigration Review*, U.S. DEP’T OF JUST., <https://www.justice.gov/eoir> (last visited Sept. 16, 2020).

¹³ *Id.*

¹⁴ 8 C.F.R. § 1003.10 (2014).

under this category.¹⁵ The President has retained only one minimum standard for ALJ recruitment: possession of a license to practice law.¹⁶ In 2018, the Supreme Court in *Lucia v. SEC*¹⁷ effectively ruled that SEC ALJs are “officers” under the Appointments Clause, which may lead future attorneys general (if they presume ALJs to be “inferior” officers under the Appointments Clause) to believe that they are free to appoint these judges in any way they see fit so long as the constitutional minimum—a simple bar license—is met.¹⁸

Although appointments of immigration judges may now have very little, if any, criteria for hiring,¹⁹ are there removal protections for these judges? Could the Attorney General remove immigration judges that flout his or her policy objectives? Congress has provided ALJs a blanket protection from arbitrary removal, where ALJs can only be disciplined or removed for “good cause established and determined by the Merit System Protection Board.”²⁰ However, this protection is less secure than it seems. Some federal circuits have held that agencies can set the standards for the quality of decision-making that could establish removal “for cause.”²¹ Therefore, agency heads have vast discretion to remove ALJs because they can establish the criteria themselves. Nevertheless, Congress passed this law years before *Lucia*, indicating that this blanket protection may or may not be applicable to ALJs anymore and could even be rendered unconstitutional for the same reasons as the hiring criteria above.

C. *The Appointments Clause*

The Constitution vests the President of the United States with the power to appoint ministers that will help him or her with the power to execute the laws of the United States.²² The Constitution states that the President:

¹⁵ Exec. Order No. 13,843, 83 Fed. Reg. 32755 (July 10, 2018).

¹⁶ *Id.*

¹⁷ *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

¹⁸ Exec. Order No. 13,843, *supra* note 15.

¹⁹ *See id.*

²⁰ 5 U.S.C. § 7521(a).

²¹ *See Nash v. Bowen*, 869 F.2d 675, 676 (2d. Cir. 1989).

²² U.S. CONST. art. II, § 2, cl. 2.

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.²³

The text of this clause provides more questions than answers. Who are “Officers of the United States”? Who are “inferior Officers”? How does the clause define “Courts of Law” and “Heads of Departments”? Lastly, does the Constitution allow these officers to be appointed in another manner? The Supreme Court has attempted to answer some of these questions, albeit with little clarification.

The Court provided a definitive answer as to whether the Constitution is permissive of other manners of the appointment of officers.²⁴ In *Buckley v. Valeo*, the Court determined that the appointment of commissioners to the Federal Election Committee was in violation of the Appointments Clause because, in passing the Federal Election Campaign Act, Congress retained the power to appoint four of the six members of the commission.²⁵ The Court found that such a method of appointment violated the clause because the text was clear in establishing who may appoint officers—that is, the President.²⁶ Put differently, the Appointments Clause explicitly left Congress out of this equation, with the very narrow exception of seeking the advice and consent of the Senate for confirmations.²⁷ Therefore, the Court has made clear that the Appointments Clause is the only method of appointing officers.

Another question that the Court has provided some guidance on is what differentiates an “officer” and a simple “employee” of the

²³ *Id.*

²⁴ *See Buckley v. Valeo*, 424 U.S. 1 (1976).

²⁵ *Id.* at 125-26.

²⁶ *Id.* at 127

²⁷ *Id.*

Executive Branch.²⁸ In *Freytag v. Commissioner of Internal Revenue*, the Court held that special trial judges that help the Tax Court judges are indeed officers, and not mere employees, because “they perform more than ministerial tasks,”²⁹ and “they take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders.”³⁰ Therefore, the Court provided some rubric to examine whether one is an officer or employee, albeit slightly obscure. This determination would be further changed through the Court’s ruling in *Lucia v. SEC*,³¹ which will be discussed in further detail in another Part.

Finally, the Court has offered some guidance on the difference between a “principal” officer, which requires the advice and consent of the Senate, and an “inferior” officer, whose appointment is decided entirely by the “Heads of Departments” or “Courts of Law.”³² In *Morrison v. Olson*, the Court held that a judicially appointed independent counsel was an inferior officer rather than a principal officer because he can be removed by the Attorney General for cause, has inferior power to the Attorney General, and is appointed for a limited tenure with limited jurisdiction.³³ However, unsatisfied with the fact that such a rubric implies that every officer that is not a Cabinet member is inferior, the Court revisited the issue in *Edmond v. United States*.³⁴ The Court modified the test with a much more strict rubric, stating that inferior officers are those “whose work is *directed* and *supervised* at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.”³⁵ Such a ruling did not anticipate the Court’s decision in *Lucia*, which would offer a significant change to our understanding of where ALJs, particularly immigration judges, would be classified.

²⁸ See *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868 (1991).

²⁹ *Id.* at 881.

³⁰ *Id.* at 881-82.

³¹ See *Lucia*, 138 S. Ct. 2044.

³² See *Morrison v. Olson*, 487 U.S. 654 (1988).

³³ *Id.* at 671-72.

³⁴ See *Edmond v. United States*, 520 U.S. 651 (1997) (emphasis added).

³⁵ *Id.* at 663.

II. CIVIL SERVICE SYSTEMS

A. *The American Civil Service System*

Under Title V of the United States Code, executive agencies have the authority to “employ such number of employees of the various classes . . . as Congress may appropriate for from year to year.”³⁶ Employment under this Title is under the purview of the Office of Personnel Management (OPM) whose Director is responsible for “executing, administering, and enforcing . . . the civil service rules and regulations of the President and the Office and the laws governing the civil service”³⁷ as well as “aiding the President, as the President may request, in preparing such civil service rules as the President prescribes.”³⁸ Title V also generally prescribes how ALJs are to be appointed under the OPM.³⁹ Agencies that require formal proceedings under sections 556 and 557 “shall appoint as many ALJs as are necessary.”⁴⁰

Through the OPM, the President must provide rules that establish “open, competitive examinations for testing applicants for appointment in the competitive service which are practical in character and . . . relate to matters that fairly test the relative capacity and fitness of the applicants for the appointment sought.”⁴¹ Under the OPM regulations, ALJs are designated as positions within the competitive service⁴² and the Director of the OPM “shall prescribe the examination methodology in the design of each ALJ examination.”⁴³ Although the OPM has refused to undertake the whole hiring process for ALJs for other agencies, OPM does possess authority to

- (1) Recruit and examine applicants for ALJ positions, including developing and administering the ALJ examinations . . .
- (2) Assure that decisions concerning the appointment, pay, and tenure of ALJs in

³⁶ 5 U.S.C. § 3101 (1966).

³⁷ *Id.* § 1103(a)(5)(A).

³⁸ *Id.* § 1103(a)(7).

³⁹ *See id.* § 3105.

⁴⁰ *Id.*

⁴¹ *Id.* § 3304(a)(1).

⁴² 5 C.F.R. § 930.201(b) (2020).

⁴³ *Id.* § 930(201)(d).

Federal agencies are consistent with applicable laws and regulations; [and] (3) Establish classification and qualification standards for ALJ positions.⁴⁴

Nevertheless, although the ALJs are hired by their own agencies, the OPM statutorily retains the power to “determine . . . the level in which each administrative law judge position shall be placed and the qualifications to be required for appointment to each level.”⁴⁵

Congress afforded ALJs some level of statutory protection from at-will termination.⁴⁶ Under Title V of the United States Code, actions can be taken against ALJs by their respective agencies “only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.”⁴⁷ Such actions could consist of removals, suspensions, reductions in grade, reductions in pay, and/or a furlough of thirty days or less.⁴⁸ Only after this determination of good cause is removal of ALJs possible.⁴⁹ The implication of this is that “an agency other than the hiring agency is ultimately responsible for the ALJ’s tenure” because the hiring agency cannot remove an ALJ without a good cause determined by another agency.⁵⁰ However, such review by the Board becomes less clear with regard to exactly what standards the Board needs to use. Nevertheless, the circuits seem to indicate that the standards that ALJs must meet are set by the agencies themselves.⁵¹

Therefore, ALJs in the American context retain a significant amount of protections that are granted to members of the civil service, including independent recruitment and examination from OPM as well as protection through the Merit Board with the very key limit noted above.

⁴⁴ *Id.* § 930.201(e)(1-3).

⁴⁵ 5 U.S.C. § 5372(b)(2) (2020).

⁴⁶ *See id.* § 7521(a).

⁴⁷ *Id.*

⁴⁸ *Id.* § 7521(b)(1-5).

⁴⁹ *Id.*

⁵⁰ GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 315 (Thomson West, 8th ed. 2018).

⁵¹ *See id.*; *see also* Nash v. Bowen, 869 F.2d 675, 681 (2d Cir. 1989) (“[I]t was entirely within the Secretary’s discretion to adopt reasonable administrative measures in order to improve the decision-making process.”).

B. Location of Immigration Judges within the Civil Service

Although the Southern Poverty Law Center disputes the claim that American immigration judges are actually ALJs,⁵² the Department of Justice clearly refers to them as “administrative law judges”⁵³ and the Code of Federal Regulations asserts that they are “administrative judges” appointed by the Attorney General.⁵⁴ Because the Immigration and Nationality Act and the Code of Federal Regulations do not expressly nor implicitly indicate that the above civil service rules do not apply to immigration judges, the civil service rules and protections would apply to immigration judges as ALJs, at least prior to 2018.⁵⁵ After the Supreme Court’s 2018 decision in *Lucia*, the status of ALJs with regard to how they are hired and fired has been called into question and will be discussed later in this Note.⁵⁶ For now, this section will detail the status of the hiring of immigration judges prior to *Lucia*.

Prior to 2018, immigration judges were selected through a seven step hiring process as was the Attorney General’s right under 5 C.F.R. section 930.201(e).⁵⁷ Signed off by former Attorney General Alberto Gonzales in 2007, the first step in this process required between seven to nine immigration judges from among the Chief Immigration Judge, Deputy Chief Immigration Judges, and Assistant Chief Immigration Judges to “evaluate and recommend applications,” placing them in one of three categories: “Highly

⁵² *The Attorney General’s Judges: How the U.S. Immigration Courts Became a Deportation Tool* SOUTHERN POVERTY LAW CENTER (June 25, 2019), <https://www.splcenter.org/20190625/attorney-generals-judges-how-us-immigration-courts-became-deportation-tool> (“Immigration judges are not even ‘administrative law judges,’ whose authority derives from Article I of the Constitution and who conduct proceedings under the Administrative Procedure Act.”).

⁵³ *Meet the Administrative Law Judges*, U.S. DEP’T OF JUST., <https://www.justice.gov/eoir/meet-administrative-law-judges> (last visited Sept. 13, 2020) (“EOIR’s administrative law judges (ALJs) serve in the Office of the Chief Administrative Hearing Officer.”).

⁵⁴ 8 C.F.R. §1003.10(a).

⁵⁵ Lawson, *supra* note 50, at 315.

⁵⁶ *See Lucia v. SEC*, 138 S. Ct. 2044, 2044 (2018).

⁵⁷ Lee Liberman Otis, Memorandum for the Attorney General: Immigration Judge Hiring Process (March 29, 2007), *as reprinted in* Dana J. Boente, Memorandum for the Attorney General: Immigration Judge Hiring Process (April 4, 2007), at 6.

Recommend,” “Recommend,” and “Do Not Recommend.”⁵⁸ Thereafter, the Office of the Chief Immigration Judge (OCIJ) will then separate the applications into three preliminary tiers.⁵⁹ The applicants in the first tier must contain those applications where more than half of the initial evaluating judges categorized the application as “Highly Recommend.”⁶⁰ The second tier must contain applications where at least one evaluator categorized the application as “Highly Recommend.”⁶¹ The third tier contains only those applications that only received “Recommend” and “Do Not Recommend” categorizations.⁶² At the end of this step, the Director of the EOIR and the Chief Immigration Judge will once again review the applications in the second and third tiers “to determine whether any should be included in the first tier.”⁶³

In Step Two of the Gonzales Process, OCIJ begins contacting each applicant in the first tier, requesting a writing sample and work references.⁶⁴ Then, in Step Three, multiple three-member EOIR panels composed of either two Deputy Chief Immigration Judges or Assistant Chief Immigration Judges and one senior EOIR manager will begin conducting interviews with all applicants in the first tier.⁶⁵ After each interview, the panels will create packets on each interview, which include cover letters, resumes, and application materials.⁶⁶ In Step Four, the Chief Immigration Judge and the EOIR Director will choose the best three candidates based off of those packets.⁶⁷ Then, in Step Five, another three member panel that consists of the EOIR Director, a career member of the Senior Executive Service chosen by the Deputy Attorney General, and a non-career member of the Senior Executive Service will be established and “will interview as many of the three candidates as they think appropriate.”⁶⁸ This panel will then recommend one of these three applicants

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Otis, *supra* note 57, at 6.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

to the Deputy Attorney General, who, in turn, will recommend the applicant for the Attorney General for approval.⁶⁹ In Step Six, the Attorney General makes his or her final selection.⁷⁰ Finally, in Step Seven, after a background check, the applicant chosen receives an initial appointment and will proceed to complete the required training which includes an immigration law exam.⁷¹ After this training, the applicant is ready to begin hearing immigration cases.⁷²

However, this process underwent a significant change in 2017 when former Attorney General Jeff Sessions altered the Gonzales Process.⁷³ Aiming to “generally streamline and shorten the current process,” Sessions altered features of the process that he deemed to take too long to make a hiring decision.⁷⁴ In Gonzales’s First Step, Sessions chose to eliminate the duty of the Director of the EOIR and the Chief Immigration Judge in re-reviewing the second and third tiers for the purpose of ensuring that there were not any applicants that needed to be bumped up.⁷⁵ Another change, in Step Three, was Sessions’s mandate that the three-member panel interviews have a one-month deadline to be completed.⁷⁶ In Step Four, Sessions mandated that the EOIR Director select five applicants, instead of three, to “give more discretion to the panels at the next stage.”⁷⁷ At Step Five, rather than three panelists who would recommend a finalist, two members would take its place; they would have two weeks to make their decision.⁷⁸ Moreover, at this same step, Sessions authorized the concurrent establishment of one panel to fill more than one vacant position at a given time.⁷⁹ Finally, at Step Seven, the Attorney General is now authorized to provide the applicant a temporary appointment until they have received a full background check.⁸⁰

⁶⁹ Otis, *supra* note 57, at 6.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Dana J. Boente, Memorandum for the Attorney General: Immigration Judge Hiring Process (April 4, 2007).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Boente, *supra* note 73.

⁸⁰ *Id.*

In sum, the hiring of immigration judges changed from an in-depth, multi-layered review process of each applicant in the Gonzales Process to a streamlined and expedited version under the Sessions Process.

C. *Canadian Civil Service System*

The Canadian civil service system, officially known as the Canadian Public Service, is governed primarily by two significant pieces of legislation: The Public Service Employment Act (PSEA) and the Federal Public Sector Labour Relations and Employment Act (hereinafter “Labour Relations Act”).⁸¹ Under the PSEA, the Canadian Public Service is generally controlled by the Public Service Commission, who “has the exclusive authority to make appointments, to or from within the public service, of persons for whose appointment *there is no authority in or under any other Act of Parliament.*”⁸² The Commission’s objective when making hiring decisions is to hire exclusively on the basis of merit, which is achieved when “the person to be appointed meets the essential qualifications for the work to be performed”⁸³

Employees of the Canadian Public Service could be laid-off in accordance with regulations that the Commission has passed pursuant to its statutory authority.⁸⁴ Removals pursuant to a lay-off can only occur after a deputy head of the Commission

assess[es] the merit of the employees employed in similar positions or performing similar duties in the same occupational group and level within that part of the organization, and identify, in accordance with merit, the employees who are to be retained . . . and the remaining employees who are to be advised that their services are no longer required and are to be laid off.⁸⁵

⁸¹ See Public Service Employment Act, S.C. 2003, c 22, pmbl. (Can.); see Federal Public Sector Labour Relations Act, S.C. 2003, pmbl. (Can.).

⁸² See Public Service Employment Act, S.C. 2003, c 22, § 29(1) (Can.) (emphasis added).

⁸³ *Id.*

⁸⁴ *Id.* § 64(1).

⁸⁵ Public Service Employment Regulations, SOR/2005-334, § 21(1) (Can.).

Therefore, labor cuts are afforded a level of process where the Commission determines who is not absolutely essential according to their merit. However, the PSEA also provides protections to those in the Public Service who are removed from their appointed positions.⁸⁶ For example, if an appointee to the Public Service has her appointment revoked if there was “improper conduct that affected the selection of the person appointed or proposed for appointment,”⁸⁷ that appointee is statutorily provided with recourse to file a complaint asserting the unreasonableness of the revocation.⁸⁸ In fact, the PSEA provides recourse even to those that were not appointed but who were passed over for an appointment that was given to another if it were done as a result of an abuse of authority.⁸⁹

While the PSEA provides this recourse, the Labour Relations Act provides the specific methodology.⁹⁰ Established in 2013, the Labour Relations Board “administers the collective bargaining and grievance adjudication systems for the federal public sector” and is responsible for “resolving staffing complaints under the PSEA that are related to internal appointments and layoffs”⁹¹ This Board provides a trial-like hearing,⁹² where witnesses are summoned and compelled to give testimony⁹³; requires prehearing procedures take place⁹⁴; and allows compulsion of documents to be produced at any stage of the proceeding.⁹⁵ Furthermore, the Canadian Parliament has ordered that every decision of this Board “is not to be questioned or reviewed in any court,” with the exception of situations described in paragraph 18.1(4)(a), (b), or (e) of the Federal Courts

⁸⁶ Public Service Employment Act § 66.

⁸⁷ *Id.* § 67(1).

⁸⁸ *Id.* § 74.

⁸⁹ *Id.* § 77(1).

⁹⁰ See Federal Public Sector Labour Relations and Employment Act, S.C. 2013, c 40, § 20 (Can.)

⁹¹ *Mandate*, FEDERAL PUBLIC SECTOR LABOUR RELATIONS AND EMPLOYMENT BOARD, <https://pslreb-crtefp.gc.ca/en/about-us/mandate.html> (last updated Feb. 27, 2020).

⁹² See Federal Public Sector Labour Relations and Employment Act § 20.

⁹³ *Id.* § 20(a).

⁹⁴ *Id.* § 20(b).

⁹⁵ *Id.* § 20(f).

Act.⁹⁶ The Canadian Federal Court can review Board decisions when it:

- (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction; (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe; . . . [or] (e) acted, or failed to act, by reason of fraud or perjured evidence⁹⁷

Therefore, the Canadian Public Service is accorded a level of procedural protection from the Cabinet and Parliament through the complaint procedure and trial-like hearings that are statutorily afforded to Public Service employees and applicants.

D. *Location of IRB Members in the Public Service*

According to John Richards, former Chief Justice of the Federal Court of Appeal of Canada and current NAFTA adjudicator, the independence of a particular administrative tribunal is “determined by its enabling statute,” and the standard of independence depends “on the language of the statute under which the agency acts”⁹⁸ The enabling statute for IRB members, the IRPA, details how the Refugee Protection Division is appointed and removed, and how reliant they are on the PSEA.⁹⁹ IRPA states that members of the Refugee Protection Division are to be “appointed in accordance with the Public Service Employment Act.”¹⁰⁰ Therefore, these board members undergo “written tests, [and] are screened and interviewed by IRB officials, external experts and panels . . . before being recommended by the Minister for appointment.”¹⁰¹

⁹⁶ *Id.* § 34(1).

⁹⁷ Federal Courts Act, R.S.C. 1985, c F-7, § 18.1(4)(a), (b), (e) (Can.).

⁹⁸ John Richards, *Administrative Tribunals in Canada: An Overview* 8 (Nov. 2007), <http://www.aihja.org/images/users/ARCHIVES/docuthequedocs/EReportCanada2.pdf>.

⁹⁹ *Act, rules and regulations*, IMMIGRATION AND REFUGEE BOARD OF CANADA, <https://irb-cisr.gc.ca/en/legal-policy/act-rules-regulations/Pages/index.aspx> (Feb. 4, 2020).

¹⁰⁰ Immigration and Refugee Protection Act, S.C. 2001, c 27, § 169.1(2) (Can.).

¹⁰¹ Colaiacovo, *supra* note 10, at 124.

More important, however, are the protections that these members have with regard to removal from office. Unlike the provision asserting that appointments must be made pursuant to PSEA,¹⁰² IRPA makes no reference whatsoever in their provision on complaints and removals as being tied to the PSEA. Any disciplinary measures against a member of the board can only be taken on a “for cause” basis, particularly when a member “has become incapacitated from the proper execution of that office by reason of infirmity, has been guilty of misconduct, has failed in the proper execution of that office or has been placed, by conduct or otherwise, in a position that is incompatible with due execution of that office.”¹⁰³ Therefore, the Prime Minister of Canada does not have the power to remove a member of the board “at-will.” Furthermore, even after this good cause process to decide disciplinary measures, there must still be a process where fact-finding, mediation, and/or inquiries may be taken before termination.¹⁰⁴ However, given the statute’s silence, IRB members do not seem to be entitled to the Labour Relations Act hearing process.

III. ANALYSIS

A. *Problems Facing the Canadian System*

Members of the IRB, particularly the Refugee Protection Division, face serious problems with regard to public trust, which stem from their view of bias and lack of insulation from political objectives. This is especially apparent with the widely disparate asylum grant rates between different members’ jurisdictions.

In 2001, Dr. Lubomyr Luciuk, a former Board member of the Refugee Protection Division, wrote an opinion piece that was published in four major Canadian newspapers¹⁰⁵ entitled “How

¹⁰² See Public Service Employment Act, S.C. 2003, c 22, § 29(1) (Can.).

¹⁰³ Immigration and Refugee Protection Act § 176(2).

¹⁰⁴ *Id.* § 177(a-d).

¹⁰⁵ Brian Hill & Andrew Russel, *Man Nicknamed ‘Dr. No’ Because he Denied so Many Refugees*, GLOBAL NEWS (Feb. 5, 2019, 7:36 AM), <https://global-news.ca/news/4903246/immigration-refugee-board-dr-no-rehired-asylum-claims/>.

‘Refugees’ and Terrorists Get Into Canada.”¹⁰⁶ In his first two sentences, he claimed that the first lesson that refugee claimants must learn before they arrive is to “[b]e a liar.”¹⁰⁷ He claims that they lie about having no identity documents, are vague about who they are and where they are from, and feign crying.¹⁰⁸ If they follow these steps, Luciuk claims that achieving refugee status would be a simple cakewalk—“unless,” as he pointedly speculates, “you are an utter imbecile”¹⁰⁹ As if he has not already gotten to his point, he concludes that

If the IRB continues to operate as it has, then just about anyone and everyone who wants to get into Canada will Then our country will disappear, as surely as New York’s World Trade Center vanished in a holocaust perpetrated by the terrorists who exploited our lax immigration laws to worm their way amongst us.¹¹⁰

It was then no surprise then that Luciuk—or as he proudly named himself, “Dr. No”—would deny more than ninety percent of the asylum claims that he heard during his service as a member between 1996 and 1998.¹¹¹ In 2019, despite a review process of his performance those years, “Dr. No” was brought back in as a Board member as part of a Legacy Task Force, “a special group of retired refugee judges rehired to deal with a backlog of roughly 5,500 cases dating back to at least December 2012.”¹¹²

Luciuk is by no means a complete outlier in the obscenely disparate grant rates. Based off a comprehensive study of asylum grant rates of each Board member in 2006,¹¹³ the disparate granting rates

¹⁰⁶ Lubomyr Luciuk, *How “Refugees” and Terrorists Get into Canada*, <http://www.infoukes.com/newpathway/Page839.htm> (last visited Mar. 8, 2020).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Hill, *supra* note 105.

¹¹² *Id.*

¹¹³ Sean Rehaag, *Troubling Patterns in Canadian Refugee Adjudication*, 39 OTTAWA L. REV. 335, 349 (2007), <https://yorkspace.library.yorku.ca/xmlui/bitstream/handle/10315/9958/Rehaag-Troubling-Patterns.pdf?sequence=1>.

are more systemic. This study, published in the *Ottawa Law Review*, flagged the five Board members with the most extreme variations from the mean grant rate in those who grant and those who deny.¹¹⁴ Beginning with those of which were excessively positive in their grant rates, Susan Kitchner, out of 107 cases presented in 2006, granted 92.52% of those claims; Dominique Lederoq, out of eighty cases presented, granted 91.25% of those claims; and Gilles Ethier, out of 138 cases presented, granted 95.65% of those claims.¹¹⁵ On the other hand, the grant rates of the five most negative are much more shocking: Sarwanjit Randhawa, out of eighty-four cases presented, granted only 19.05% of those claims; Wilbert Wilson, out of seventy-two cases presented, granted only 16.67% of those claims; and Roger Houde, out of ninety cases, granted only 6.67% of those presented.¹¹⁶

What, then, do such disparate grant rates mean for the perception of the Board and general trust of that Board? Such large denial rates in excess of eighty to ninety percent breed an idea that some Board members may have made up their minds before the actual hearing itself. For example, University of Toronto law professor and former litigator for refugee claimants, Hilary Evans Cameron,¹¹⁷ asserts that refugees “must be presumed to be telling the truth until proven otherwise”¹¹⁸ as evidenced by the Canadian Charter of Rights and Freedoms.¹¹⁹

However, the Board is plagued with other valid criticisms as well. For instance, one study found that “members had difficulty administering and assessing the evidence, understanding the political and social conditions in other countries, interpreting administrative and international law and understanding the rules of politeness and decorum.”¹²⁰ That same study also found that rates of “cultural misunderstanding, prejudice and stereotyping” were significantly high

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 343.

¹¹⁶ *Id.*

¹¹⁷ Hilary Evans Cameron, UNIVERSITY OF TORONTO: CENTER FOR ETHICS, <https://ethics.utoronto.ca/hilary-evans-cameron/> (last visited Mar. 8, 2020).

¹¹⁸ Hill, *supra* note 105 .

¹¹⁹ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 11(d) (U.K.).

¹²⁰ Pia Zambelli, *Paradigm Shift: Towards a New Model for Refugee Status Determination in Canada*, 51 U.B.C. L. REV. 229, 240 (2018).

for members of the Board.¹²¹ Another criticism leveled against the IRB is its failure to develop a settled internal case law.¹²² In the United States, the BIA produces case law that the court itself relies upon and which attorneys refer to in all filings and hearings.¹²³ Because none of the Canadian Board hearings rely on such settled internal case law, some argue that this “suggest[s] a suboptimal level of engagement with the subject matter”¹²⁴

As a result of all of these criticisms, there is no surprise that the general public seems to have such a poor trust of Board members in general.¹²⁵ What possible options does Canada have in boosting public trust?

B. Argument for Insulation and Trust

Lawmakers and legal practitioners each have their part to play in achieving a better level of trust for the IRB. First, this section will focus on the *practical* arguments that legal practitioners in the field could make to not only invalidate potentially unfair results to their clients, but to also rehabilitate the image of the Board without resorting to the policy tools that lawmakers possess. Second, I will argue that lawmakers would better rehabilitate the image of the IRB by providing the level of removal protections that the Public Service has in the PSEA rather than its own statutory protections.

The key for rehabilitation through litigation is arguing attitudinal or institutional bias in direct violation of the common law and the Canadian Bill of Rights. A critical issue that many in the field seem to be faced with is the limited amount of judicial review that the Federal Court of Canada has over its decisions. While it is true that IRPA allows judicial review “with respect to any matter,”¹²⁶ the types of cases appealed to the Federal Court of Canada are limited by the Federal Courts Act.¹²⁷ Such appeals for judicial review to the

¹²¹ *Id.*

¹²² *Id.* at 241

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ See Brian Hill & Jamie Mauracher, *Refugee Judge Asks Woman Why Her Husband Wouldn't 'Just Kill' Her*, GLOBAL NEWS (last updated Nov. 29, 2019), <https://globalnews.ca/news/6214393/refugee-judge-asks-woman-why-husband-wouldnt-kill-her/>; Hill, *supra* note 105.

¹²⁶ Immigration and Refugee Protection Act, S.C. 2001, c 27 (Can.). § 72(1).

¹²⁷ ¹²⁷ Federal Courts Act, R.S.C. 1985, c F-7, § 18.1(4).

Federal Court are only permitted if at least one of six grounds previously mentioned is established.¹²⁸ These grounds face a notoriously high bar of tribunal wrongdoing that must have been met, such as anything related to proper jurisdiction¹²⁹ or a failure in “observ[ing] a principle of natural justice, procedural fairness or other procedure it was required by law to observe.”¹³⁰ Therefore, on its face, it seems like a refugee appealing their denial of entry would have a very difficult chance to have their case appealed to the Federal Court.

However, there is a body of law, rarely used in the field of IRB appeal, that could potentially prove useful in bringing about real independence and trust to the Canadian judiciary: the common law rule of *nemo iudex in sua causa debet esse*.¹³¹ Literally translated to “no man shall be a judge in his own cause,”¹³² the rule has come to be recognized as a doctrine against administrative bias, which could “render any administrative action void and thereby subject to successful judicial review.”¹³³ Because this has been recognized as a principle of natural justice,¹³⁴ and the Canadian Bill of Rights has expressly found that a “fair and public hearing by an independent and *impartial* tribunal” is a basic right,¹³⁵ practitioners would be able to argue that this is a valid ground of appeal to the Federal Court. This would be instrumental in minimizing the risk of Board member abuse of the likes of “Dr. No” while also increasing the level of trust since another set of independent eyes will be allowed to review the issue. Canadian common law has recognized two forms of bias that are relevant to the issue at hand: attitudinal bias and institutional bias.¹³⁶

While bias is typically found more often in the areas of pecuniary or institutional bias, attitudinal bias, being “in favour of a

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* § 18.1(4)(b).

¹³¹ DAVID P. JONES & ANNE S. DE VILLARS, PRINCIPLES OF ADMINISTRATIVE LAW 244 (CARSWELL, 1985).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Canadian Bill of Rights, S.C. 1960, c 44, § 2(f) (Can.).

¹³⁶ *Bias and Lack of Independence*, LAW ACCESS, <https://legalaccess.weebly.com/administrativenotes-2.html> (last visited Sep. 12, 2020).

particular outcome,” indeed happens and has been identified before through judicial review.¹³⁷ Generally, Canadian courts hold that the test for attitudinal bias is presence of an independence of mind.¹³⁸ According to a landmark case on this doctrine, *Bethany Care Centre v. United Nurses of Alberta*, the only way to succeed in a claim of attitudinal bias is to show that the adjudicator could not “form an honest conclusion regardless of his sympathies or loyalties[.]”¹³⁹ Furthermore, in *Franklin v. Minister of Town and Country Planning*, the British court did not find attitudinal bias;¹⁴⁰ however, the court crucially looked toward the previous language of the adjudicator under review, indicating that such language can be used as a basis of determining whether there was true independence of mind.¹⁴¹ Based on this case law, practitioners clearly have options when dealing with particular Board members. For example, when faced with Board members such as “Dr. No,” there is a significant chance of victory in a federal appeal when they have been very vocal that refugees are always liars or if they have indicated a strong proclivity against refugee entrance. Attitudinal bias can, and should, be argued if institutional trust and legitimacy is sought. Moreover, attitudinal bias could also be argued for those judges who have abysmally low grant rates (i.e. below ten percent) and who have those low grant rates against refugees from particular locations in the world. Although this is not conclusive evidence, the Federal Courts Act requires no such absolute burden of proof; in fact, they may choose to grant this relief “if it is satisfied” that such an instance is occurring.¹⁴²

Not only do practitioners have the option to argue attitudinal bias, but they also have the chance to argue institutional bias under this doctrine. The point of focus for such practitioners should be the reappointment process of Board members; while they are initially appointed for three year terms, these members “are eligible for re-appointment in the same or another capacity” when that term comes

¹³⁷ Jones, *supra* note 131, at 257. .

¹³⁸ *Id.*

¹³⁹ *Id.* at 258.

¹⁴⁰ *Id.* at 264.

¹⁴¹ *Id.*

¹⁴² Federal Courts Act R.S.C. 1985, c F-7, § 18.1(4).

to an end.¹⁴³ While such a reappointment process seems normal on its face because appointing a completely new person “takes between six and twelve months and \$100,000 to fully train a new member,”¹⁴⁴ how it is being done has raised some concerns of political bias. Board members are recommended for reappointment through an internal IRB Performance Review Committee, which is officially charged with “overseeing the appraisal process and providing to the Minister ‘at the end of a member’s term as advice on reappointment.’”¹⁴⁵ Given their expertise as to what works and what does not, it would be expected that the Minister would provide a significant level of deference to such a recommendation; in fact, the opposite seems to be the case. In the period of January 1, 2006 and March 31, 2009, out of eighty-nine Board members that were recommended for reappointment, the Governor-in-Council only reappointed forty-two percent of them.¹⁴⁶ Therefore, rather than reappointing individuals who have been found by their own agency to be competent, the Minister and Governor-in-Council chose the alternative of spending \$4,300,000 on training all of these new appointees and dozens of cumulative years of training for new appointees.¹⁴⁷ Because the IRB chairperson in that period, Jean Guy Fleury, intimated that “the Minister’s discretion over reappointments created a politicized process,”¹⁴⁸ it is quite possible to make an argument of institutional bias and thus form a basis of appeal to the Federal Court.

As a doctrine in Canadian law, the test for institutional bias in the administrative context is spelled out in *R v. Lippe*, which asks “whether a well-informed person would have a reasonable apprehension of bias in a substantial number of cases.”¹⁴⁹ More specifically, such an apprehension must be rooted deeply in a “reasonable person standard,” where the apprehension is “a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information.”¹⁵⁰ Just as

¹⁴³ Bonisteel, *supra* note 4, at 105.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *See id.*

¹⁴⁸ *Id.*

¹⁴⁹ Bonisteel, *supra* note 4, at 106.

¹⁵⁰ *Committee for Justice & Liberty v. Nat. Energy Bd.*, [1978] 1 S.C.R. 369, 394 (Can.).

in attitudinal bias, language by adjudicators or ministers is fair game in determining a reasonable apprehension.¹⁵¹ Practitioners may be able to argue institutional bias because, in the mind of a reasonable person, the combination of abysmally low grant rates for certain members, the public comments that Ministers have made in the past regarding the subject,¹⁵² and the low reappointment rate indicate that the institution has become so politicized as to render it incapable of providing an impartial tribunal under the Canadian Bill of Rights. Therefore, such a maelstrom of different factors could provide useful tools for the everyday practitioner to find the necessary review in Federal Court where a more independent set of eyes may provide the claimant a fairer day in court.

Finally, lawmakers themselves have the chance to improve upon this system by providing Board members with more protection against removal and disciplinary action; although this may not substantively affect levels of bias or politicization, this would at least provide some sort of boost in the national trust of the institution that the government is indeed committed to a fair and impartial tribunal for refugee claimants. The easiest route for lawmakers is to fully incorporate the IRB within the Public Service. Under IRPA, the IRB is not bound by the PSEA's removal protections because they are provided with their own removal provisions.¹⁵³ As mentioned before, some level of "good cause" must exist in order for disciplinary action to take place against Board members; however, they are not entitled to the complaint process that members of the Public Service have, that is, a trial-like hearing in front of the Federal Labour Relations Board.¹⁵⁴ Though in certain circumstances they may have the right to hearings, mediation, or investigations, they are not entitled to them as a right as members of Board.¹⁵⁵ Therefore, it seems that Board members could theoretically be removed with much less process than members of the Public Service. To increase the level of trust in its immigration institutions, Canadian lawmakers would do well in incorporating the PSEA protections here.

¹⁵¹ *Id.*

¹⁵² Hill, *supra* note 105.

¹⁵³ Immigration and Refugee Protection Act, S.C. 2001, c 27 §§ 176-177 (Can.).

¹⁵⁴ *See id.*

¹⁵⁵ *See id.*

By increasing the chances of federal judicial review and providing a much more insulated removal process, this combination of actions would provide at least a better level of trust in the institution, much like a scholarly article is given much more credence when peer reviewed.

C. *Problems Facing the American System*

1. General Public Image

The Executive Office of Immigration Review also deals with an unwelcome image and general lack of trust, particularly in major American media outlets. For example, in August 2019, Attorney General Barr appointed six immigration judges to the Board of Immigration Appeals.¹⁵⁶ While this is not usually a cause for concern, the impartiality of these judges was called into question when they were notorious for significantly high rates of asylum denial: well over eighty-five percent.¹⁵⁷ Three of these immigration judges have received strong complaints in the past: two have been selected from a court that has “drawn complaints of unfair proceedings from immigration attorneys and advocates”¹⁵⁸; the other has been known to have an extensive history of denying asylum claims to domestic violence victims.¹⁵⁹

Claims of impartiality, however, do not stop there. Also in August 2019, Barr proposed an interim rule under section 553 of the Administrative Procedure Act (APA)¹⁶⁰ that would give the director of EOIR, who is himself not an immigration judge, “the power to personally decide the longest-running cases.”¹⁶¹ Such plenary power wielded by an appointed political figure would no doubt imply that

¹⁵⁶ Tal Kopan, *AG William Barr Promotes Immigration Judges with High Asylum Denial Rates*, SAN FRANCISCO CHRONICLE (Aug. 23, 2019), <https://www.sfchronicle.com/politics/article/AG-William-Barr-promotes-immigration-judges-with-14373344.php?psid=o3YbU>.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ 5 U.S.C. § 553 (2019).

¹⁶¹ Stephen Dinan, *AG William Barr Announces Changes to Immigration Courts*, WASHINGTON TIMES (Aug. 23, 2019), <https://www.washington-times.com/news/2019/aug/23/william-barr-ag-announces-changes-immigration-cour/>.

immigration judges are not insulated. However, such politicization of the immigration judiciary is not specific to President Trump, despite its prevalence in the news; significant studies and scholarship have alleged that the George W. Bush Administration either condoned or encouraged hiring of immigration judges along political lines, illustrating the propensity of the Executive to use immigration judges for political objectives.¹⁶²

2. *Lucia v. SEC* and the Removal of Examinations

In 2018, concern over the bias and politicization of immigration judges reemerged after the Supreme Court ruling in *Lucia v. SEC*.¹⁶³ Before going into the facts and procedural posture of the case, it is important to note the unique structure of the SEC ALJ appointment process. The SEC has been given the authority by Congress to “enforce the nation’s securities laws.”¹⁶⁴ In hearing cases, the SEC typically has an ALJ conduct proceedings.¹⁶⁵ However, staff members, rather than the Commission itself, select the five ALJs that hear securities cases.¹⁶⁶ As part of their duties, SEC ALJs have the powers of “supervising discovery; issuing, revoking, or modifying subpoenas; deciding motions; ruling on the admissibility of evidence; administering oaths; hearing and examining witnesses; generally ‘[r]egulating the course of’ the proceeding and the ‘conduct of the parties and their counsel’; and imposing sanctions for ‘contemptuous conduct’ or violations of procedural requirements.”¹⁶⁷ In fact, SEC ALJs have authority “comparable to” a federal district judge.¹⁶⁸ After a hearing, the ALJ makes conclusions about “‘issues of fact

¹⁶² See Amy Goldstein & Dan Eggen, *Immigration Judges often picked based on GOP ties*, WASHINGTON POST (Jun. 11, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/10/AR2007061001229.html>; see also *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General*, U.S. DEPT. OF JUSTICE (Jul. 28, 2008), <https://www.justice.gov/opr/page/file/1206586/download>.

¹⁶³ See David Zaring, *Lucia Turns Out to Be Much Ado About Nothing*, THE REGULATORY REVIEW (July 12, 2018), <https://www.theregreview.org/2018/07/12/zaring-lucia-turns-out-much-ado-about-nothing/>.

¹⁶⁴ *Lucia v. SEC*, 138 S. Ct. 2044, 2049.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (citing *Butz v. Economou*, 438 U.S. 478, 513 (1978)).

[and] law,” and the appropriate penalties to impose.¹⁶⁹ Thereafter, the SEC may choose to review this decision “upon request or *sua sponte*,” or it can choose to not review the decision, where it will then become final and representative of the Commission’s intent.¹⁷⁰

In *Lucia*, the SEC initiated an administrative proceeding against Raymond Lucia, who owned and operated an investment company.¹⁷¹ The SEC alleged that he had used a “misleading slideshow presentation to deceive prospective clients” in marketing his new retirement savings strategy entitled “Buckets of Money.”¹⁷² After being charged by the SEC under the Investment Advisers Act, ALJ Cameron Elliot was assigned to hear Lucia’s case.¹⁷³ A nine-day trial proceeded with testimony and argument, and Judge Elliot determined that Lucia was in violation of the Investment Advisers Act, resulting in civil penalties of \$300,000 and “a lifetime bar from the investment industry.”¹⁷⁴ It should be noted that the SEC charged Elliot with making factual findings.¹⁷⁵ On appeal, Lucia argued that the hearing he was afforded in front of the ALJ was constitutionally invalid because the ALJs for the SEC are “Officers of the United States” and should thus be appointed only by the President, “Courts of Law,” or “Heads of Departments.”¹⁷⁶ Because the ALJ was not appointed by the Commission itself, a “Head[] of Department[],” but instead by SEC staff members, Lucia pointed out that Judge Elliot had no constitutional authority to hear his case.¹⁷⁷ On the other hand, the SEC argued that Lucia’s argument fails because these ALJs are not “Officers” but are “‘mere employees’—officials with lesser responsibilities who fall outside the Appointments Clause’s ambit.”¹⁷⁸ After the D.C. Circuit rejected Lucia’s argument, the Supreme Court of the United States granted certiorari on the issue of whether SEC ALJs are “Officers” or “mere employees.”¹⁷⁹

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 2049.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 2049-50.

¹⁷⁴ *Id.* at 2050.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

Reversing the D.C. Circuit, the Court cited three key cases that have previously dealt with Appointments Clause questions: *United States v. Germaine*,¹⁸⁰ *Buckley v. Valeo*,¹⁸¹ and *Freytag v. Commissioner*.¹⁸² In *Germaine*, the Court established that a requirement for being an “Officer” is that the individual “must occupy a ‘continuing’ position established by law to qualify as an officer.”¹⁸³ The Court easily found that SEC ALJs fall under this prong as they are statutorily set up as a continuing position.¹⁸⁴ In *Valeo*, the Court added that to be an “Officer,” the position must also “exercise significant authority pursuant to the laws of the United States.”¹⁸⁵ On this question, the Court has historically had trouble defining what “significant authority” means. In *Freytag*, the Court held that special trial judges that help the Tax Court judges are indeed officers and not mere employees because “they perform more than ministerial tasks. They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders.”¹⁸⁶ In other words, these tasks for Tax Court judges were dispositive in making them “Officers” rather than mere employees. Transplanting the standard that the *Freytag* Court used for much more independent Article I tax judges to Article II ALJs, the *Lucia* Court held that because SEC ALJs have the power to “ensure fair and orderly adversarial hearings” through the use of taking testimony, admitting or denying evidence, and other tasks of federal district court judges while also being given the power of finality when the SEC refuses to review the decision, SEC ALJs appropriately fall within the sphere of an “Officer” rather than a mere employee.¹⁸⁷ More specifically, the Court considered them to be inferior officers and must be appointed in accordance with the Appointments Clause.¹⁸⁸

The effect of this decision was by no means narrow; in fact, President Trump used this as a springboard for presidential policy. In

¹⁸⁰ *United States v. Germaine*, 99 U.S. 508 (1878).

¹⁸¹ *Buckley v. Valeo*, 424 U.S. 1 (1976).

¹⁸² *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868 (1991).

¹⁸³ *See United States v. Germaine*, 99 U.S. 508. 511.

¹⁸⁴ *Lucia*, 138 S. Ct at 2052.

¹⁸⁵ *Buckley*, 424 U.S. at 126.

¹⁸⁶ *Freytag v. Comm’r.*, 501 U.S. 868, 881-82.

¹⁸⁷ *Lucia*, 138 S. Ct at 2053-54.

¹⁸⁸ *Id.* at 2055.

Executive Order 13,843, released on July 10, 2018, President Trump indicated that the *Lucia* decision indicates that “at least some—and perhaps all—ALJs are ‘Officers of the United States’ and thus subject to the Constitution’s Appointments Clause, which governs who may appoint such officials.”¹⁸⁹ The President’s claims also call into question whether the competitive service selection procedures, including examinations, are still compatible with the Appointments Clause.¹⁹⁰ Therefore, to “reduce the likelihood of successful Appointments Clause challenges,” the President, pursuant to section 3302(1) of Title 5 of the U.S. Code, has ordered that competitive hiring rules and examinations be excepted for the selection and appointment of ALJs.¹⁹¹ Other than requiring the baseline rule that these ALJs have a license to practice law, the only requirements in selection “shall be made in accordance with such regulations and practices as the head of the agency concerned finds necessary.”¹⁹² In other words, the only requirements are those which the agency deems necessary to be qualified. No longer do the civil service competitive hiring rules have binding effect on these ALJs; in fact, unless there is a successful judicial challenge to this order, ALJs for each agency seem to be only subject to the whims of the hiring department, rather than a potentially more independent OPM.

Because immigration judges are ALJs and potentially subject to *Lucia*’s new understanding of ALJs as “Officers,” the possibility of further politicization of immigration is much higher since the Attorney General no longer needs to conduct examinations and, as was mentioned at the beginning of this Note, has the power to remove these judges at-will as is his or her right as a “Head[] of Department[.]” What options do practitioners have in (1) arguing against *Lucia*’s application to immigration judges, and (2) arguing for increased civil service protections of immigration judges?

D. *Arguments For Insulation*

In this Part, I will offer two potential arguments that could be made to either avoid or mitigate the consequences of *Lucia*’s affects on the immigration judiciary: (1) Although immigration judges are

¹⁸⁹ Exec. Order No. 13,843, 83 Fed. Reg. 32755 (July 10, 2018).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

“Officers,” they are *principal* offers rather than *inferior* officers, thereby affording them the insulation of a Senate confirmation process; and/or (2) *Lucia*’s scope does not extend to immigration judges because immigration judges are set up as direct representatives of the Attorney General rather than distinct positions within already independent executive agencies. This Note will argue that the second option is the most likely to succeed.

1. The Principal Officer Argument

This “Principal Officer” argument can be more aptly regarded as a “lean into the punch” strategy because it assumes that *Lucia* applies to the case at hand and therefore seeks to mitigate the result. The benefit of arguing principal officer status for immigration judges is that, if achieved, it would result in the requirement that the Senate confirm each immigration judge.¹⁹³ Such a result would lead to two branches of government signing off on the appointment, a form of insulation built within the Constitution.¹⁹⁴ A brief overview of the case law on this subject is worth repeating. In *Morrison v. Olson*, the Court held that there are four factors to consider in determining who is an inferior or principal officer: (1) the officer’s removability by a superior executive branch official; (2) the scope of the officer’s duties; (3) the scope of the officer’s jurisdiction; and (4) the tenure of the office at issue.¹⁹⁵ However, unsatisfied with the fact that such a rubric implies that every officer that is not a Cabinet member is inferior, the Court revisited the issue in *Edmond v. United States*.¹⁹⁶ The Court modified the test with a much more strict rubric, stating that inferior officers are those “whose work is *directed* and *supervised* at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.”¹⁹⁷

However, these cases were decided in a pre-*Lucia* world. Therefore, it is also worth noting how different circuits have adapted these cases after *Lucia*. It seems that circuits prefer the *Edmond* test rather

¹⁹³ U.S. CONST. art. II, § 2, cl. 2.

¹⁹⁴ *Id.*

¹⁹⁵ *Morrison v. Olson*, 487 U.S. 654, 670-72 (1988).

¹⁹⁶ *See Edmond v. United States*, 520 U.S. 651 (1997).

¹⁹⁷ *Id.* at 663 .

than the *Morrison* test in application.¹⁹⁸ In *Arthrex v. Smith & Nephew*, there was a patent dispute between both parties that was being heard by the Patent Trial Appeal Board (PTAB).¹⁹⁹ Arthrex argued that under the precedent established by *Lucia*, the PTAB ALJs selected under the competitive hiring rules and examination were unconstitutionally appointed under the Appointments Clause.²⁰⁰ On appeal, the Federal Circuit held that these judges were principal officers under the Appointments Clause and conducted an analysis under the *Edmond* test to determine this.²⁰¹ Considering the *Edmond* analysis to be a balancing test with no “exclusive criterion,” they viewed it as a three-prong determination: “(1) whether an appointed official has the power to review and reverse the officers’ decision; (2) the level of supervision and oversight an appointed official has over the officers; and (3) the appointed official’s power to remove the officers.”²⁰² It should be noted that the Federal Circuit considered the *Morrison* factors to be relevant under *Edmond*.²⁰³ If these prongs tip more in favor of autonomy for the officer, then an officer would be more likely to be a principal officer under *Edmond*.²⁰⁴ Because the Director of the PTAB cannot directly order a review of ALJ decisions and the lack of unfettered authority to remove these ALJs, the court determined that this was sufficient to render them principal officers.²⁰⁵

How would this translate to immigration judges? Under the review prong, the balancing scale tips slightly in favor being an inferior officer. Under 8 C.F.R. section 1003.1(h)(1), “the Board [of Immigration Appeals] shall refer to the Attorney General for review of its decision all cases that (i) the Attorney General directs the Board to refer to him; (ii) [t]he Chairman or a majority of the Board believes should be referred to the Attorney General for review.”²⁰⁶ Under this process known as “self-referral,” the Attorney General has

¹⁹⁸ *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1328-29 (Fed. Cir. 2019).

¹⁹⁹ *Id.* at 1325.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 1327-40.

²⁰² *Id.* at 1329.

²⁰³ *Id.* at 1334.

²⁰⁴ *See id.* at 1329.

²⁰⁵ *See Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1329.

²⁰⁶ 8 C.F.R. § 1003.1(h)(1)(i-ii) (2020).

the right to review any decision of the BIA.²⁰⁷ Although the Attorney General is not required to do this, it does lean in favor of inferiority under this prong. Under the supervisory prong, the balance weighs much more in favor of being principal officers. There is very little procedure on an immigration judge's day-to-day activity that is expressly provided by the Attorney General. Whatever policy does exist, a significant portion of that policy is for practitioners themselves seeking to represent clients or make motions.²⁰⁸ Under the removal prong, there is very little that can be argued here given the very uncertain nature of this after the President's Executive Order.²⁰⁹

Nevertheless, if *Morrison* is still taken into consideration when conducting an *Edmond* analysis, then the balance would tip much further in favor of being a principal officer. Considering the scope of the officer's duties, immigration judges have a pretty broad set of responsibilities: They take testimony, admit or deny evidence, order removals, and all other duties usually found within a full trial.²¹⁰ Although their jurisdiction is limited to immigration issues, this is by no means a small field, as evidenced by the over 900,000 cases currently pending as of the time of this writing.²¹¹ Finally, the tenure of these immigration judges have no definite limit of any kind; in fact, they serve until either they are removed at-will or for good cause (depending on how courts rule on their status as an officer).²¹²

Based off of this line of reasoning, at trial and at oral argument, going through this *Edmond* analysis could provide a way to mitigate the politicized dangers of at-will employment for immigration

²⁰⁷ Julie Menke, *Abuse of Power: Immigration Courts and the Attorney General's Referral Power*, 52 CASE W. RESV. J. INT'L L. 599, 609 (2020).

²⁰⁸ *Office of Policy*, EXEC. OFFICE OF IMMIGRATION REVIEW, <https://www.justice.gov/eoir/office-of-policy> (last visited on Mar. 10, 2020).

²⁰⁹ Exec. Order No. 13,843, 83 Fed. Reg. 32755 (July 10, 2018).

²¹⁰ 8 C.F.R. § 1003.10(b) (2014).

²¹¹ *Exec. Office for Immigration Review Adjudication Statistics: Pending Cases*, EXEC. OFFICE OF IMMIGRATION REVIEW (last updated Jan. 23, 2020), <https://www.justice.gov/eoir/file/1242166/download>.

²¹² See § 1003.10 (containing no provision for the removal of immigration judges); see also Catherine Y. Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1, 21 (2018) ("Lacking the robust protections of Article III judges or even ALJs, an immigration judge is defined as 'an attorney whom the Attorney General appoints' and who is 'subject to such supervision'").

judges by “leaning into the punch” and avoiding a complete politicized hiring. However, there are very real problems with this argument, aside from the uncertainties of trial. Firstly, making this argument sacrifices removal protections for non-political hiring. Because principal officers serve at the pleasure of the President or cabinet member, they can still be removed just as inferior officers can be. Second, non-political hiring is an assumption from this result; it does not consider that the Senate may be controlled by the same party as the President, rendering any gains from this argument futile. Third, appointments could be significantly drawn out to no end based on partisan politicking; in fact, the recent Kavanaugh confirmation process and the presidential cabinet appointments after President Trump’s inauguration indicate this as the new normal rather than a hiccup in history.²¹³ Finally, this last point can extend further; if the confirmation process is drawn out, that would mean that cases would be piling up with no officials hearing cases.

Although the arguments to designate principal officer status are convincing, in terms of outcome and policy, they fail to live up to standards of judicial economy and non-political removal. Thus, this Note recommends the next argument.

2. *Lucia* does not apply to the case at hand

While less technical, this argument employs the tools of analogizing and distinguishing the standards set up in *Freytag* and *Lucia*. While *Lucia* may have been decided correctly, this argument focuses on how *Lucia* just simply does not apply to immigration judges. The key to doing this is pointing out the very key differences between the positions in *Freytag* and *Lucia* with the position of immigration judges. In *Freytag*, the position in question was that of a Special Trial Judge (STJ).²¹⁴ STJs work under Tax Court judges.²¹⁵ The United States Tax Court is an Article I court established by Congress under the constitutional authority granted them to “constitute

²¹³ Jessica Yarvin & Daniel Bush, *Is the Hyper-Partisan Supreme Court Confirmation Process ‘The New Normal’?*, PBS NEWS HOUR (Sept. 13, 2018, 4:51 PM), <https://www.pbs.org/newshour/nation/is-the-hyper-partisan-supreme-court-confirmation-process-the-new-normal>.

²¹⁴ *Freytag v. Comm’r.*, 501 U.S. 868, 870.

²¹⁵ *Id.*

Tribunals inferior to the supreme Court.”²¹⁶ In other words, these judges do not answer to the executive, but rather to Congress, or whenever there is a need for judicial review, to the appropriate Court of Appeal. They can only be terminated “for inefficiency, neglect of duty, or malfeasance in office.”²¹⁷ Put differently, tax court judges, and by extension STJs, are very independent figures who have significant autonomy in their choices and with little consequences for particular decisions made that are lawful. Moreover, the SEC ALJs are within a similar status. Although they are an executive agency, they are considered an independent executive agency which is generally known to be those agencies where “Congress has given an agency’s top-level decision makers job security.”²¹⁸ These agencies are typically those multi-member agencies such as the Federal Reserve, the SEC, the Commodities and Futures Trading Commission, and the Federal Deposit Insurance Corporation.²¹⁹ In terms of decision making, these agencies retain significant discretion in policy choice because of the mere fact that they can only be removed based on some form of good cause.²²⁰

However, this level of independence cannot be made of immigration judges. In fact, as they stand at the moment, immigration judges legally are not independent in the most common use of the phrase. For instance, immigration judges actually represent the Attorney General in all immigration proceedings as adjudicators.²²¹ Theoretically, under the Immigration and Nationality Act, there is no specific requirement for immigration judges.²²² In other words, the immigration judges *are* the Attorney General in the simplest form. Of course, these judges take evidence, hear cases, and handle other trial-like activity.²²³ However, they only do so in lieu of the

²¹⁶ U.S. CONST. art. I, § 8, cl. 9.

²¹⁷ 26 U.S.C. § 7443(f).

²¹⁸ PAUL TUCKER, *UNELECTED: THE QUEST FOR LEGITIMACY IN CENTRAL BANKING AND THE REGULATORY STATE* 30 (Princeton Univ. Press, 2018).

²¹⁹ *Id.*

²²⁰ *See generally* TODD GARVEY & DANIEL J. SHEFFNER, CONG. RSCH. SERV., R45442, *CONGRESS’S AUTHORITY TO INFLUENCE AND CONTROLLED EXECUTIVE BRANCH AGENCIES* (2018) (explaining the rules and limitations on Congressional and Presidential capacity to remove executive agency members).

²²¹ 8 C.F.R. § 1003.10 (2019).

²²² 8 U.S.C. § 1101(b)(4).

²²³ *Id.* § 1003.10(b).

Attorney General;²²⁴ Congress did not separately task them to conduct these proceedings, and Congress did not provide them with the same removal protection in the same form as they did with the SEC, the Federal Reserve, and other independent executive agencies. Therefore, if and when a practitioner uses *Lucia* to argue that immigration judges are also inferior officers because of their significant authority to conduct these trials just like the STJs in *Freytag*, the clear response is to question the level of authority these judges really are exercising. As direct representatives of a principal officer, as a matter of law, there is not any significant authority that is being exercised without the consent of the Attorney General. Furthermore, this argument can be used offensively as well rather than defensively. In response to the Executive Order removing competitive hiring rules, practitioners seeking to bring those protections back in a binding way for immigration judges can make this argument and ensure that either the Sessions or the Gonzales method of immigration judge selection remains.

As previously stated, though there is not a whole lot of technical basis for this argument, the effectiveness of this argument is that there has yet to be a challenge to any agency that has not been an independent executive agency. As of the time of this writing, no challenge has been leveled at immigration judges and their validity. Therefore, if a challenge is to be made in the near future, this argument has both the benefit of (1) flipping *Lucia* on its head by highlighting how little legal significant authority immigration judges really possess, as well as (2) retaining both the appointment and removal protections from political influence.

V. CONCLUSION

After going over both the Canadian and American immigration adjudication systems, this Note first identified the significant problem of public trust and politicization that these institutions are facing in recent years, and identified the solution to this as being the need to entrench the respective immigration judiciaries within their civil service systems of appointment and removal. Thereafter, this Note

²²⁴ *Id.* § 1003.10(a).

sought to provide real, practical methods that could be used to achieve this goal.

In the Canadian system, the general public is struggling with how to handle IRB members without abysmally low asylum grant rates that may be fueled either by attitudinal or, worse, institutional bias. Because of the potential bias, practitioners could make arguments on the basis of common law precedents that have been used in the field of administrative law to ensure that these judges are insulated from political whims by increasing judicial review by Canadian Federal Courts. Furthermore, this Note also suggested that Canadian lawmakers fully integrate the features of removal protections that the Canadian Public Service normally receives in place of the weaker protections that the IRB currently has by statute.

In the American system, this Note highlighted the most recent conundrum facing the immigration courts in lieu of the Supreme Court decision in *Lucia*. Detailing the methodology used by the Court in *Lucia* in determining whether an official is an “Officer” under the Appointments Clause or a mere employee, this Note then provided two arguments that practitioners could make in the field to either defend against a challenge against the “employee” status of immigration judges or ensure that competitive hiring rules and examinations remain for immigration judge selection.

By setting forth these arguments, this Note has sought to solve the very hypothetical it began with. Entrenching an immigration judiciary further within the civil service system creates a level of comfort and job security that keeps judges from making decisions with one eye looking over their shoulders.