

Fighting the Tide – Challenges to Judicial Independence and Administrative Law Update

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Lucia v. SEC decision 1

- Lucia v. Securities Exchange Commission (June 21, 2018) 138 S. Ct. 2044. In this decision, the Supreme Court held that Administrative law judges (ALJ's) were Officers of the United States but did not require senatorial confirmation because they were "inferior Officers" that could be appointed by the President, courts of law, or department heads [U.S Const., Art. II, Section 2, Clause 2]. Lucia was subject to SEC sanctions following an administrative hearing before an SEC ALJ. That ALJ was not appointed by the Commission but by a subordinate official of the SEC. The supreme court reversed the SEC decision and remanded the case back to the SEC for a new hearing before a properly appointed ALJ.

Lucia Decision 2

- Prior to the Lucia decision, federal ALJ's were selected by agencies after qualifying for a civil service appointment under standards developed by the Office of Personnel Management. ALJ's were considered to be employees who held office in good standing and could not be removed from office except for good cause. ALJ's could challenge removals under hearing procedures administered by the federal Merit Systems Protection Board.
- The Lucia majority held that ALJ's were inferior officers because they occupied a continuing position established by law and they exercised significant authority pursuant to the laws of the United States.

Lucia Decision 3

- The supreme court decision in Lucia did not address the issue of removal of inferior officers (also called second tier officers for appointments clause purposes). However, the existing system for ALJ's provides a high degree of job security to protect the independence of ALJ decision making. This job security is similar to the good cause removal status for officers of the United States. This good cause status applies to Article Three judges who have life tenure and can only be removed from office by impeachment. Executive branch Officers of the United States (also called first tier officers) that can be appointed by the President of the United States but must be confirmed by the US Senate, fit into one of two categories.

Lucia Decision 4

- Cabinet officials (single agency head officials) like the secretary of State or Defense serve at the pleasure of the President. The primary court decision for this rationale was *Myers v. United States* (1926) 272 U.S. 52 holding that the Congress could not limit the President's removal power over Officers of the United States. However, independent regulatory agency officers (like the SEC commissioners in *Lucia*) can only be removed for good cause before their term in office ends based upon the decision *Humphrey's Executor v. United States* (1935) 295 U.S. 602. There are no similar court decisions addressing removal standards for inferior officers but there are some statutory limits on removal for specific officers and for ALJ's in their previous status as civil servants. This remains an unanswered question for now.

Lucia Decision 5

- Following the Lucia decision, President Trump issued an executive order requiring ALJ's to be selected by agency heads, and exempting those ALJ's from the merit based hiring process known as the competitive civil service. The Trump administration stated that the executive order implemented the holding of the Lucia case.
- Many leaders in the ALJ community as well as some members of Congress oppose the executive order and have expressed concerns that this new approach could impair an ALJ's ability to issue impartial decisions and to disagree with agency heads in particular cases. The pre Lucia approach emphasized the judicial model for ALJ independence whereas this executive order approach emphasizes the institutional model of agency decision making .

Lucia Decision 6

(Trump administration executive order)

- Executive Order 13843 of July 10, 2018 Excepting Administrative Law Judges From the Competitive Service By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 3301 and 3302 of title 5, United States Code, it is hereby ordered as follows:

Executive order 13843 1

- Section 1. Policy. The Federal Government benefits from a professional cadre of administrative law judges (ALJs) appointed under section 3105 of title 5, United States Code, who are impartial and committed to the rule of law. As illustrated by the Supreme Court's recent decision in *Lucia v. Securities and Exchange Commission*, No. 17–130 (June 21, 2018), ALJs are often called upon to discharge significant duties and exercise significant discretion in conducting proceedings under the laws of the United States. As part of their adjudications, ALJs interact with the public on issues of significance. Especially given the importance of the functions they discharge—which may range from taking testimony and conducting trials to ruling on the admissibility of evidence and enforcing compliance with their orders—ALJs must display appropriate temperament, legal acumen, impartiality, and sound judgment. They must also clearly communicate their decisions to the parties who appear before them, the agencies that oversee them, and the public that entrusts them with authority.

Executive order 13843 2

- Previously, appointments to the position of ALJ have been made through competitive examination and competitive service selection procedures. The role of ALJs, however, has increased over time and ALJ decisions have, with increasing frequency, become the final word of the agencies they serve. Given this expanding responsibility for important agency adjudications, and as recognized by the Supreme Court in *Lucia*, 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.

Executive order 13843 3

- As evident from recent litigation, Lucia may also raise questions about the method of appointing ALJs, including whether competitive examination and competitive service selection procedures are compatible with the discretion an agency head must possess under the Appointments Clause in selecting ALJs. Regardless of whether those procedures would violate the Appointments Clause as applied to certain ALJs, there are sound policy reasons to take steps to eliminate doubt regarding the constitutionality of the method of appointing officials who discharge such significant duties and exercise such significant discretion.

Executive order 13843 4

- Pursuant to my authority under section 3302(1) of title 5, United States Code, I find that conditions of good administration make necessary an exception to the competitive hiring rules and examinations for the position of ALJ. These conditions include the need to provide agency heads with additional flexibility to assess prospective appointees without the limitations imposed by competitive examination and competitive service selection procedures. Placing the position of ALJ in the excepted service will mitigate concerns about undue limitations on the selection of ALJs, reduce the likelihood of successful Appointments Clause challenges, and forestall litigation in which such concerns have been or might be raised. This action will also give agencies greater ability and discretion to assess critical qualities in ALJ candidates, such as work ethic, judgment, and ability to meet the particular needs of the agency. These are all qualities individuals should have before wielding the significant authority conferred on ALJs, and each agency should be able to assess them without proceeding through complicated and elaborate examination processes or rating procedures that do not necessarily reflect the agency's particular needs. This change will also promote confidence in, and the durability of, agency adjudications.

Executive order 13843 5

- Sec. 2. Excepted Service. Appointments of ALJs shall be made under Schedule E of the excepted service, as established by section 3 of this order.
- Sec. 3. Implementation. (a) Civil Service Rule VI is amended as follows: (i) 5 CFR 6.2 is amended to read:
- Schedule E. Position of administrative law judge appointed under 5 U.S.C. 3105. Conditions of good administration warrant that the position of administrative law judge be placed in the excepted service and that appointment to this position not be subject to the requirements of 5 CFR, part 302, including examination and rating requirements, though each agency shall follow the principle of veteran preference as far as administratively feasible.

Executive order 13843 6

- (ii) 5 CFR 6.3(b) is amended to read: (b) To the extent permitted by law and the provisions of this part, and subject to the suitability and fitness requirements of the applicable Civil Service Rules and Regulations, appointments and position changes in the excepted service shall be made in accordance with such regulations and practices as the head of the agency concerned finds necessary. These shall include, for the position of administrative law judge appointed under 5 U.S.C. 3105, the requirement that, at the time of application and any new appointment, the individual, other than an incumbent administrative law judge, must possess a professional license to practice law and be authorized to practice law under the laws of a State, the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court established under the United States Constitution. For purposes of this requirement, judicial status is acceptable in lieu of “active” status in States that prohibit sitting judges from maintaining “active” status to practice law, and being in “good standing” is also acceptable in lieu of “active” status in States where the licensing authority considers “good standing” as having a current license to practice law. This requirement shall constitute a minimum standard for appointment to the position of administrative law judge, and such appointments may be subject to additional agency requirements where appropriate.

Executive order 13843 7

- (iii) 5 CFR 6.4 is amended to read: Except as required by statute, the Civil Service Rules and Regulations shall not apply to removals from positions listed in Schedules A, C, D, or E, or from positions excepted from the competitive service by statute. The Civil Service Rules and Regulations shall apply to removals from positions listed in Schedule B of persons who have competitive status.

Executive order 13843 8

- (iv) 5 CFR 6.8 is amended to add after subsection (c): (d) Effective on July 10, 2018, the position of administrative law judge appointed under 5 U.S.C. 3105 shall be listed in Schedule E for all levels of basic pay under 5 U.S.C. 5372(b). Incumbents of this position who are, on July 10, 2018, in the competitive service shall remain in the competitive service as long as they remain in their current positions.

Executive order 13843 9

- (b) The Director of the Office of Personnel Management (Director) shall: (i) adopt such regulations as the Director determines may be necessary to implement this order, including, as appropriate, amendments to or rescissions of regulations that are inconsistent with, or that would impede the implementation of, this order, giving particular attention to 5 CFR, part 212, subpart D; 5 CFR, part 213, subparts A and C; 5 CFR 302.101; and 5 CFR, part 930, subpart B; and (ii) provide guidance on conducting a swift, orderly transition from the existing appointment process for ALJs to the Schedule E process established by this order.

Masterpiece Cakeshop decision 1

- Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission (June 4, 2018) 138 S. Ct. 1719. The U.S. Supreme Court reversed a decision of the Colorado Civil Rights Commission imposing penalties for discrimination against same sex couples on a baker who refused to make a wedding cake for that couple based upon religious objections to same sex marriage. The majority rationale was that members of the Commission made statements that illustrated hostility toward the religious views of the baker.

Masterpiece Cakeshop decision 2

- Excerpts from the syllabus of the courts decision in the Masterpiece Cakeshop case.
- [page 1720]“**Masterpiece Cakeshop, Ltd.**, is a **Colorado** bakery owned and operated by Jack Phillips, an expert baker and devout Christian. In 2012 he told a same-sex couple that he would not create a cake for their wedding celebration because of his religious opposition to same-sex marriages—marriages that **Colorado** did not then recognize—but that he would sell them other baked goods, *e.g.*, birthday cakes. The couple filed a charge with the **Colorado** Civil Rights Commission (Commission) pursuant to the **Colorado** Anti-Discrimination Act (CADA), which prohibits, as relevant here, discrimination based on sexual orientation in a “place of business engaged in any sales to the public and any place offering services ... to the public.” Under CADA's administrative review system, the **Colorado** Civil Rights Division first found probable cause for a violation and referred the case to the Commission. The Commission then referred the case for a formal hearing before a state Administrative Law Judge (ALJ), who ruled in the couple's favor. In so doing, the ALJ rejected Phillips' First Amendment claims: that requiring him to create a cake for a same-sex wedding would violate his right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed and would violate his right to the free exercise of religion. Both the Commission and the **Colorado** Court of Appeals affirmed. The supreme court held that The Commission's actions in this case violated the Free Exercise Clause.

Masterpiece Cakeshop decision 3

- [at page 1720-1721]
- “(a) The laws and the Constitution can, and in some instances must, protect gay persons and gay couples in the exercise of their civil rights, but religious and philosophical *1721 objections to gay marriage are protected views and in some instances protected forms of expression. See [Obergefell v. Hodges, 576 U.S. —, —, 135 S.Ct. 2584, 2594, 192 L.Ed.2d 609](#). While it is unexceptional that **Colorado** law can protect gay persons in acquiring products and services on the same terms and conditions as are offered to other members of the public, the law must be applied in a manner that is neutral toward religion. To Phillips, his claim that using his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation, has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. His dilemma was understandable in 2012, which was before **Colorado** recognized the validity of gay marriages performed in the State and before this Court issued [United States v. Windsor, 570 U.S. 744, 133 S.Ct. 2675, 186 L.Ed.2d 808](#), or *Obergefell*. Given the State's position at the time, there is some force to Phillips' argument that he was not unreasonable in deeming his decision lawful. State law at the time also afforded storekeepers some latitude to decline to create specific messages they considered offensive. Indeed, while the instant enforcement proceedings were pending, the State Civil Rights Division concluded in at least three cases that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages. Phillips too was entitled to a neutral and respectful consideration of his claims in all the circumstances of the case. Pp. 1727 – 1729.

Masterpiece Cakeshop decision 4

- [at page 1721] “(b) That consideration was compromised, however, by the Commission's treatment of Phillips' case, which showed elements of a clear and impermissible hostility toward the sincere religious beliefs motivating his objection. As the record shows, some of the commissioners at the Commission's formal, public hearings endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, disparaged Phillips' faith as despicable and characterized it as merely rhetorical, and compared his invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. No commissioners objected to the comments. Nor were they mentioned in the later state-court ruling or disavowed in the briefs filed here. The comments thus cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case.
- Another indication of hostility is the different treatment of Phillips' case and the cases of other bakers with objections to anti-gay messages who prevailed before the Commission. The Commission ruled against Phillips in part on the theory that any message on the requested wedding cake would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the cases involving requests for cakes depicting anti-gay marriage symbolism. The Division also considered that each bakery was willing to sell other products to the prospective customers, but the Commission found Phillips' willingness to do the same irrelevant. The State Court of Appeals' brief discussion of this disparity of treatment does not answer Phillips' concern that the State's practice was to disfavor the religious basis of his objection. Pp. 1728 – 1731.

Comments about this decision

- While the supreme court based its decision on the First amendment free exercise of religion clause, the due process right to an impartial decision maker that does not exhibit bias or hostility toward a party would also provide grounds for the court decision. Note that the biased comments were not made by the ALJ, but rather by Commission members who were no doubt appointed by the Governor of the State of Colorado. The commissioners who made these comments were probably not given judicial ethics training before they acted in an adjudicative capacity. The issues on the merits of this case are complicated and require the weighing of free exercise of religion rights versus statutory rights to be free of discrimination. Balancing those issues is beyond the scope of our discussion of this case today.

Judicial ethics standards

- **D.C. Rules of Jud. Conduct Rule 2.11**
- **Ethical standards for recusal by a judge**

- **CANON 2 A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL**
- **OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY**
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- **Rule 2.11 Disqualification .**
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- **(A) A judge shall disqualify himself or herself in a proceeding in which**
- **The judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:**
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- **(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of facts that are in dispute in the proceeding.**

28 U.S.C. Section 144

- § 144. Bias or prejudice of judge
- “Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.”
- “The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.”

28 U.S.C. Section 455(a), (b)(1) statutory standards for disqualification

- **(a)** Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
- **(b)** He shall also disqualify himself in the following circumstances:
- **(1)** Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

Goldberg v. Kelley 397 U.S. 254 (1970)

- “Finally, the decision maker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. [citations omitted]. To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on, [citations omitted], though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law. **And, of course, an impartial decision maker is essential.** [citations omitted]. We agree with the District Court that prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the determination under review.”(397 U.S. at 271-272).

Fisher v. State Personnel Board 1

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- 25 Cal.App.5th 1
- Court of Appeal, Third District, California.
- Richard Paul **FISHER**, Plaintiff and Appellant,
- v.
- [STATE PERSONNEL BOARD](#), Defendant and Respondent.

Fisher decision 2

- “While serving as an administrative law judge for the **State Personnel Board** (SPB), Richard Paul **Fisher** joined the law firm of Simas & Associates as “of counsel.” Simas & Associates specialized in representing clients facing administrative actions, including those heard by the SPB. Indeed, the Simas law firm represented a CalTrans employee in a high-profile case that was being heard before the SPB while **Fisher** was serving his dual roles. Unaware **Fisher** was working for the very law firm representing the CalTrans employee, the SPB administrative law judge hearing the high-profile case discussed the matter in a meeting attended by **Fisher** and even sent a draft opinion to her SPB colleagues, including **Fisher**. **Fisher**, however, never informed anyone at the SPB of his connection with the Simas law firm. **Fisher**’s connection with the law firm came to light only when another administrative law judge was asked about the matter during a local bar function. The SPB dismissed **Fisher** from his position as an administrative law judge.” (25 Cal. App. 5th 1, at 5)

Fisher decision 3

- The California court of appeal affirmed the decision of the lower court (the California Superior court) denying a petition for a writ of administrative mandate sought by a former state personnel board administrative law judge that challenged the Board's decision to adopt a decision of an ALJ (from the California central panel agency [Cal OAH) upholding the board dismissal of the former ALJ for misconduct related to outside employment at a law firm that violated the incompatible activities rules applicable to SPB ALJ's.