Challenges to Judicial Independence and Administrative Law Update

2022 National Association of Administrative law Judiciary (NAALJ) conference

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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 sates. 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.

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- (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.

OPM proposed rules (2020)

- 85 FR 59207-01, 2020 WL 5594049(F.R.)
- PROPOSED RULES
- OFFICE OF PERSONNEL MANAGEMENT
- 5 CFR Parts 212, 213, 302, and 930RIN 3206-AN72
- **Administrative Law Judges**
- Monday, September 21, 2020

ACUS recommendations re ALJ's

- 84 FR 38927-01, 2019 WL 3715894(F.R.)
- NOTICES
- ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
- **Adoption of Recommendations**
- Thursday, August 8, 2019
- Recommendation 2019-2, Agency Recruitment and Selection of Administrative Law Judges addresses the processes and procedures agencies should establish for exercising their authority under **Executive Order 13,843 (2018)** to hire administrative law judges (ALJs). It encourages agencies to advertise ALJ positions in order to reach a wide pool of applicants, to publish minimum qualifications and selection criteria for ALJ hiring, and to develop policies for the review of ALJ applications.

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.

US v. Arthrex, Inc (141 S. Ct. 1970)(2021)1

- Excerpts from the syllabus of the court's opinion
- The question in these cases is whether the authority of Administrative Patent Judges (APJs) to issue decisions on behalf of the Executive Branch is consistent with the Appointments Clause of the Constitution. APJs conduct adversarial proceedings for challenging the validity of an existing patent before the Patent Trial and Appeal Board (PTAB). During such proceedings, the PTAB sits in panels of at least three of its members, who are predominantly APJs. 35 U.S.C. §§ 6(a), (c). The Secretary of Commerce appoints all members of the PTAB—including 200-plus APJs—except for the Director, who is nominated by the President and confirmed by the Senate. §§ 3(b)(1), (b)(2)(A), 6(a). After Smith & Nephew, Inc., and ArthroCare Corp. (collectively, Smith & Nephew) petitioned for inter partes review of a patent secured by Arthrex, Inc., three APJs concluded that the patent was invalid. On appeal to the Federal Circuit, Arthrex claimed that the structure of the PTAB violated the Appointments Clause, which specifies how the President may appoint officers to assist in carrying out his responsibilities. Art. II, § 2, cl. 2. Arthrex argued that the APJs were principal officers who must be appointed by the President with the advice and consent of the Senate, and that their appointment by the Secretary of Commerce was therefore unconstitutional. The Federal Circuit held that the APJs were principal officers whose appointments were unconstitutional because neither the Secretary nor Director can review their decisions or remove them at will. To remedy this constitutional violation, the Federal Circuit invalidated the APJs' tenure protections, making them removable at will by the Secretary.
- *Held*: The judgment is vacated, and the case is remanded.

US. V. Arthrex, Inc 2

- THE CHIEF JUSTICE delivered the opinion of the Court with respect to Parts I and II, concluding that the unreviewable authority wielded by APJs during inter partes review is incompatible with their appointment by the Secretary of Commerce to an inferior office. Pp. 1978 – 1986.
- (a) The Appointments Clause provides that only the President, with the advice and consent of the Senate, can appoint principal officers. With respect to inferior officers, the Clause permits Congress to vest appointment power "in the President alone, in the Courts of Law, or in the Heads of Departments." P. 1979.
- (b) In *Edmond v. United States*, 520 U.S. 651, 117 S.Ct. 1573, 137 L.Ed.2d 917, this Court explained that an inferior officer must be "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.*, at 663, 117 S.Ct. 1573. Applying that test to Coast Guard Court of Criminal Appeals judges appointed by the Secretary of Transportation, the Court held that the judges were inferior officers because they were effectively supervised by a combination of Presidentially nominated and Senate confirmed officers in the Executive Branch. *Id.*, at 664–665, 117 S.Ct. 1573. What the Court in *Edmond* found "significant" was that those judges had "no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id.*, at 665, 117 S.Ct. 1573.

US. V. Arthrex 3

- Such review by a superior executive officer is absent here. While the Director has tools of administrative oversight, neither he nor any other superior executive officer can directly review decisions by APJs. Only the PTAB itself "may grant rehearings." § 6(c). This restriction on review relieves the Director of responsibility for the final decisions rendered by APJs under his charge. Their decision—the final word within the Executive Branch—compels the Director to "issue and publish a certificate" canceling or confirming patent claims he had previously allowed. § 318(b).
- The Government and Smith & Nephew contend that the Director has various ways to indirectly influence the course of inter partes review. The Director, for example, could designate APJs predisposed to decide a case in his preferred manner. But such machinations blur the lines of accountability demanded by the Appointments Clause and leave the parties with neither an impartial decision by a panel of experts nor a transparent decision for which a politically accountable officer must take responsibility.

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- Even if the Director can refuse to designate APJs on *future* PTAB panels, he has no means of countermanding the final decision already on the books. Nor can the Secretary meaningfully control APJs through the threat of removal from federal service entirely because she can fire them only "for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a); see *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U.S. ——, ——, 140 S.Ct. 2183, ——, 207 L.Ed.2d 494. And the possibility of an appeal to the Federal Circuit does not provide the necessary supervision. APJs exercise executive power, and the President must be ultimately responsible for their actions. See *Arlington v. FCC*, 569 U.S. 290, 305, n. 4, 133 S.Ct. 1863, 185 L.Ed.2d 941.
- Given the insulation of PTAB decisions from any executive review, the President can neither oversee the PTAB himself nor "attribute the Board's failings to those whom he *can* oversee." *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 496, 130 S.Ct. 3138, 177 L.Ed.2d 706. APJs accordingly exercise power that conflicts with the design of the Appointments Clause "to preserve political accountability." *Edmond*, 520 U.S., at 663, 117 S.Ct. 1573. Pp. 1979 – 1989.

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- (c) History reinforces the conclusion that the unreviewable executive power exercised by APJs is incompatible with their status as inferior officers. Founding-era congressional statutes and early decisions from this Court indicate that adequate supervision entails review of decisions issued by inferior officers. See, *e.g.*, 1 Stat. 66–67; *Barnard v. Ashley*, 18 How. 43, 45, 15 L.Ed. 285. Congress carried that model of principal officer review into the modern administrative state. See, *e.g.*, 5 U.S.C. § 557(b).
- According to the Government and Smith & Nephew, heads of department appoint a handful of contemporary officers who purportedly exercise final decisionmaking authority. Several of their examples, however, involve inferior officers whose decisions a superior executive officer can review or implement a system for reviewing. See, *e.g.*, *Freytag v. Commissioner*, 501 U.S. 868, 111 S.Ct. 2631, 115 L.Ed.2d 764. Nor does the structure of the PTAB draw support from the predecessor Board of Appeals, which determined the patentability of inventions in panels composed of examiners-in-chief without an appeal to the Commissioner. 44 Stat. 1335–1336. Those Board decisions could be reviewed by the Court of Customs and Patent Appeals—an executive tribunal—and may also have been subject to the unilateral control of the agency head. Pp. 1983 – 1985.

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- (d) The Court does not attempt to "set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes." Edmond, 520 U.S., at 661, 117 S.Ct. 1573. Many decisions by inferior officers do not bind the Executive Branch to exercise executive power in a particular manner, and the Court does not address supervision outside the context of adjudication. Here, however, Congress has assigned APJs "significant authority" in adjudicating the public rights of private parties, while also insulating their decisions from review and their offices from removal. Buckley v. Valeo, 424 U.S. 1, 126, 96 S.Ct. 612, 46 L.Ed.2d 659. Pp. 1985 – 1986.
  THE CHIEF JUSTICE, joined by Justice ALITO, Justice KAVANAUGH, and Justice BARRETT, concluded in Part III that § 6(c) cannot constitutionally be enforced to the extent that its requirements prevent the Director from reviewing final decisions rendered by APJs. The Director accordingly may review final PTAB decisions and, upon review, may issue decisions himself on behalf of the Board. Section 6(c) otherwise remains operative as to the other members of the PTAB. When reviewing such a decision by the Director, a court must decide the case "conformably to the constitution, disregarding the law" placing restrictions on his review authority in violation of Article II. Marbury v. Madison, 1 Cranch 137, 178, 2 L.Ed. 60.
  The appropriate remedy is a remand to the Acting Director to decide whether to rehear the petition filed by Smith & Nephew. A limited remand provides an adequate opportunity for review by a principal officer. Because the source of the constitutional violation is the restraint on the review authority of the Director, rather than the appointment of APJs by the Secretary, Arthrex is not entitled to a hearing before a new panel of APJs. Pp. 1985 – 1988

Seila law LLC v. Consumer Financial Protection Bureau (140 S. Ct. 2183) 2020

- Excerpts from the syllabus of the court decision
- (c) The Court declines to extend these precedents to an independent agency led by a single Director and vested with significant executive power. Pp. 2000 – 2208.
- (1) The CFPB's structure has no foothold in history or tradition. Congress has provided removal protection to principal officers who alone wield power in only four isolated instances: the Comptroller of the Currency (for a one-year period during the Civil War); the Office of Special Counsel; the Administrator of the Social Security Administration; and the Director of the Federal Housing Finance Agency. Aside from the one-year blip for the Comptroller of the Currency, these examples are modern and contested; and they do not involve regulatory or enforcement authority comparable to that exercised by the CFPB. Pp. 2200 – 2203.
- (2) The CFPB's single-Director configuration is also incompatible with the structure of the Constitution, which—with the sole exception of the Presidency—scrupulously avoids concentrating power in the hands of any single individual. The Framers' constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections. In that scheme, individual executive officials may wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President. The CFPB's single-Director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual who is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is. The Director may *unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties. And the Director may do so without even having to rely on Congress for appropriations. While the CFPB's independent, single-Director structure is sufficient to render the agency unconstitutional, the Director's five-year term and receipt of funds outside the appropriations process heighten the concern that the agency will "slip from the Executive's control, and thus from that of the people." *Free Enterprise Fund*, 561 U.S., at 499, 130 S.Ct. 3138. Pp. 2202 – 2205.

Collins v. Yellen 141 S. Ct. 1761 (2021)

- Excerpts from the syllabus of the court opinion
- (b) The Recovery Act's for-cause restriction on the President's removal authority violates the separation of powers. In *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U. S. ——, 140 S.Ct. 2183, the Court held that Congress could not limit the President's power to remove the Director of the Consumer Financial Protection Bureau (CFPB) to instances of "inefficiency, neglect, or malfeasance." *Id.*, at ——, 140 S.Ct., at 2191. In so holding, the Court observed that the CFPB, an independent agency led by a single Director, "lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control." *Id.*, at —— – ——, 140 S.Ct., at 2192. A straightforward application of *Seila Law*'s reasoning dictates the result here. The FHFA (like the CFPB) is an agency led by a single Director, and the Recovery Act (like the Dodd-Frank Act) restricts the President's removal power. The distinctions Court-appointed *amicus* draws between the FHFA and the CFPB are insufficient to justify a different result. First, *amicus* argues that Congress should have greater leeway to restrict the President's power to remove the FHFA Director because the FHFA's authority is more limited than that of the CFPB. But the nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head. Moreover, the test that *amicus* proposes would lead to severe practical problems. Courts are not well-suited to weigh the relative importance of the regulatory and enforcement authority of disparate agencies. Second, *amicus* contends that Congress may restrict the removal of the FHFA Director because when the Agency steps into the shoes of a regulated entity as its conservator or receiver, it takes on the status of a private party and thus does not wield executive power. But the Agency does not always act in such a capacity, and even when it does, the Agency must implement a federal statute and may exercise powers that differ critically from those of most conservators and receivers. Third, *amicus* asserts that the FHFA's structure does not violate the separation of powers because the entities it regulates are Government-sponsored enterprises that have federal charters, serve public objectives, and receive special privileges. This argument fails because the President's removal power serves important purposes regardless of whether the agency in question affects ordinary Americans by directly regulating them or by taking actions that have a profound but indirect effect on their lives. Finally, *amicus* contends that there is no constitutional problem in this case because the Recovery Act offers only "modest" tenure protection. But the Constitution prohibits even "modest restrictions" on the President's power to remove the head of an agency with a single top officer. *Id.*, at ——, 140 S.Ct., at 2205. Pp. —— – ——.

OLC opinion in support of President Biden firing Social Security Commissioner

- Excerpts from the OLC opinion
- Constitutionality of the Commissioner of Social Security's Tenure Protection The President may remove the Commissioner of Social Security at will notwithstanding the statutory limitation on removal in 42 U.S.C. § 902(a)(3). The conclusion that the removal restriction is constitutionally unenforceable does not affect the validity of the remainder of the statute. July 8, 2021 MEMORANDUM OPINION FOR THE DEPUTY COUNSEL TO THE PRESIDENT You have asked about the scope of the President's constitutional authority to remove the Commissioner of the Social Security Administration ("SSA"), who by statute may be removed only for neglect of duty or malfeasance in office. See 42 U.S.C. § 902(a)(3). At the time Congress enacted the Commissioner's statutory protection from removal, this Office observed that the removal restriction presented a serious constitutional question, although we did not resolve whether the removal restriction was in fact unconstitutional. See Letter for Lloyd N. Cutler, Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel (July 29, 1994) ("1994 Dellinger Letter"). In Collins v. Yellen, 141 S. Ct. 1761 (2021), the Supreme Court recently concluded that a provision requiring "cause" for the removal of the Director of the Federal Housing Finance Agency ("FHFA") is unconstitutional. That case followed Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183 (2020), in which the Court held unconstitutional a similar statutory tenure protection conferred on the Director of the Consumer Financial Protection Bureau ("CFPB"). We think the best reading of Collins and Seila Law leads to the conclusion that, notwithstanding the statutory limitation on removal, the President can remove the SSA Commissioner at will.

Carr v. Saul 141 S. Ct. 1352 (2021)

- Excerpts from the syllabus of the court opinion

- Petitioners are six individuals whose applications for disability benefits were denied by the Social Security Administration (SSA). They each unsuccessfully challenged their respective adverse benefit determination in a hearing before an SSA administrative law judge (ALJ). The SSA Appeals Council denied discretionary review in each case. Thereafter, this Court decided *Lucia* v. *SEC*, 585 U.S. ——, 138 S.Ct. 2044, 201 L.Ed.2d 464, which held that the appointment of Securities and Exchange Commission ALJs by lower level staff violated the Constitution's Appointments Clause. Because the SSA ALJs who denied petitioners' claims were also appointed by lower level staff, petitioners argued in federal court that they were entitled to a fresh administrative review by constitutionally appointed ALJs. In each case, the Court of Appeals held that petitioners could not obtain judicial review of their Appointments Clause claims because they failed to raise those challenges in their administrative proceedings.
- *Held*: The Courts of Appeals erred in imposing an issue-exhaustion requirement on petitioners' Appointments Clause claims. Pp. 1357 – 1362…..

- (b) Even assuming that ALJ proceedings are comparatively more adversarial than Appeals Council proceedings, the question remains whether the ALJ proceedings here were adversarial enough to support the "analogy to judicial proceedings" that undergirds judicially created issue-exhaustion requirements. *Sims*, 530 U.S., at 112, 120 S.Ct. 2080 (plurality opinion). Pp. 1360 – 1362.
- (1) In the specific context of petitioners' Appointments Clause challenges, two considerations tip the scales decidedly against imposing an issue-exhaustion requirement. First, agency adjudications are generally ill suited to address structural constitutional challenges, which usually fall outside the adjudicators' areas of technical expertise. See, *e.g.*, *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 491, 130 S.Ct. 3138, 177 L.Ed.2d 706. Second, this Court has consistently recognized a futility exception to exhaustion requirements. See, *e.g.*, *Bethesda Hospital Assn. v. Bowen*, 485 U.S. 399, 405–406, 108 S.Ct. 1255, 99 L.Ed.2d 460. Both considerations apply fully here: Petitioners assert purely constitutional claims about which SSA ALJs have no special expertise and for which they can provide no relief. *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 73 S.Ct. 67, 97 L.Ed. 54, distinguished. Pp. 1360 – 1362.
- (2) The Commissioner's contention that petitioners cannot obtain new hearings because they did not "timely challenge" their adjudicators' appointments presumes what the Commissioner has failed to prove: that petitioners' challenges are, in fact, untimely. The Commissioner's reliance on *Ryder v. United States*, 515 U.S. 177, 115 S.Ct. 2031, 132 L.Ed.2d 136, and *Lucia*, 585 U.S., ——, 138 S.Ct. 2044, is misplaced, as neither decision had occasion to opine on what would constitute a "timely" objection in an administrative review scheme like the SSA's. Pp. 1361 – 1362.

West Virginia v. EPA (142 S. Ct. 2587) (2022) 1

- Excerpts from the syllabus of the court decision
- 2. Congress did not grant EPA in Section 111(d) of the Clean Air Act the authority to devise emissions caps based on the generation shifting approach the Agency took in the Clean Power Plan. Pp. ——— – ———.
- (a) In devising emissions limits for power plants, EPA "determines" the BSER that—taking into account cost, health, and other factors—it finds "has been adequately demonstrated," and then quantifies "the degree of emission limitation achievable" if that best system were applied to the covered source. § 7411(a)(1). The issue here is whether restructuring the Nation's overall mix of electricity generation, to transition from 38% to 27% coal by 2030, can be the BSER within the meaning of Section 111.
- Precedent teaches that there are "extraordinary cases" in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–160, 120 S.Ct. 1291, 146 L.Ed.2d 121. See, *e.g.*, *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. ———, ———, 141 S.Ct. 2485, 210 L.Ed.2d 856; *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324, 134 S.Ct. 2427, 189 L.Ed.2d 372; *Gonzales v. Oregon*, 546 U.S. 243, 267, 126 S.Ct. 904, 163 L.Ed.2d 748; *National Federation of Independent Business* v. *OSHA*, 595 U. S. ———, ———, 142 S.Ct. 661, 211 L.Ed.2d 448. Under this body of law, known as the major questions doctrine, given both separation of powers principles and a practical understanding of legislative intent, the agency must point to "clear congressional authorization" for the authority it claims. *Utility Air*, 573 U.S. at 324, 134 S.Ct. 2427. Pp. ——— – ———.

West Virginia v. EPA 2

- (b) This is a major questions case. EPA claimed to discover an unheralded power representing a transformative expansion of its regulatory authority in the vague language of a long-extant, but rarely used, statute designed as a gap filler. That discovery allowed it to adopt a regulatory program that Congress had conspicuously declined to enact itself. Given these circumstances, there is every reason to "hesitate before concluding that Congress" meant to confer on EPA the authority it claims under Section 111(d). *Brown & Williamson*, 529 U.S. at 160, 120 S.Ct. 1291.
- Prior to 2015, EPA had always set Section 111 emissions limits based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly, see, *e.g.*, 41 Fed. Reg. 48706—never by looking to a "system" that would reduce pollution simply by "shifting" polluting activity "from dirtier to cleaner sources." 80 Fed. Reg. 64726. The Government quibbles with this history, pointing to the 2005 Mercury Rule as one Section 111 rule that it says relied upon a cap-and-trade mechanism to reduce emissions. See 70 Fed. Reg. 28616. But in that regulation, EPA set the emissions limit—the "cap"—based on the use of "technologies [that could be] installed and operational on a nationwide basis" in the relevant timeframe. *Id.*, at 28620–28621. By contrast, and by design, there are no particular controls a coal plant operator can install and operate to attain the emissions limits established by the Clean Power Plan. Indeed, the Agency nodded to the novelty of its approach when it explained that it was pursuing a "broader, forward-thinking approach to the design" of Section 111 regulations that would "improve the *overall power system*," rather than the emissions performance of individual sources, by forcing a shift throughout the power grid from one type of energy source to another. 80 Fed. Reg. 64703 (emphasis ***2596** added). This view of EPA's authority was not only unprecedented; it also effected a "fundamental revision of the statute, changing it from [one sort of] scheme of ... regulation" into an entirely different kind. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231, 114 S.Ct. 2223, 129 L.Ed.2d 182.

West Virginia v. EPA 3

- The Government attempts to downplay matters, noting that the Agency must limit the magnitude of generation shift it demands to a level that will not be "exorbitantly costly" or "threaten the reliability of the grid." Brief for Federal Respondents 42. This argument does not limit the breadth of EPA's claimed authority so much as reveal it: On EPA's view of Section 111(d), Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in the basic regulation of how Americans get their energy. There is little reason to think Congress did so. EPA has admitted that issues of electricity transmission, distribution, and storage are not within its traditional expertise. And this Court doubts that "Congress ... intended to delegate ... decision[s] of such economic and political significance," *i.e.,* how much coal-based generation there should be over the coming decades, to any administrative agency. *Brown & Williamson*, 529 U.S. at 160, 120 S.Ct. 1291. Nor can the Court ignore that the regulatory writ EPA newly uncovered in Section 111(d) conveniently enabled it to enact a program, namely, cap-and-trade for carbon, that Congress had already considered and rejected numerous times. The importance of the policy issue and ongoing debate over its merits "makes the oblique form of the claimed delegation all the more suspect." *Gonzales*, 546 U.S. at 267–268, 126 S.Ct. 904. Pp. ——— – ———.
- (c) Given that precedent counsels skepticism toward EPA's claim that Section 111 empowers it to devise carbon emissions caps based on a generation shifting approach, the Government must point to "clear congressional authorization" to regulate in that manner. *Utility Air*, 573 U.S. at 324, 134 S.Ct. 2427. The Government can offer only EPA's authority to establish emissions caps at a level reflecting "the application of the best system of emission reduction ... adequately demonstrated." § 7411(a)(1). The word "system" shorn of all context, however, is an empty vessel. Such a vague statutory grant is not close to the sort of clear authorization required. The Government points to other provisions of the Clean Air Act—specifically the Acid Rain and National Ambient Air Quality Standards (NAAQS) programs—that use the word "system" or "similar words" to describe sector-wide mechanisms for reducing pollution. But just because a cap-and-trade "system" can be used to reduce emissions does not mean that it is the kind of "system of emission reduction" referred to in Section 111.

West Virginia v. EPA 4

- Finally, the Court has no occasion to decide whether the statutory phrase “system of emission reduction” refers *exclusively* to measures that improve the pollution performance of individual sources, such that all other actions are ineligible to qualify as the BSER. It is pertinent to the Court's analysis that EPA has acted consistent with such a limitation for four decades. But the only question before the Court is more narrow: whether the “best system of emission reduction” identified by EPA in the Clean Power Plan was within the authority granted to the Agency in Section 111(d) of the Clean Air Act. For the reasons given, the answer is no. Pp. ——— – ———.

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.