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January 6, 2020

James McHenry
Director
Executive Office for Immigration Review
Department of Justice
5107 Leesburg Pike, Suite 2600
Falls Church, VA 22041

Dear Mr. McHenry,

We write to express concern about a speaking engagement policy issued by you on September 1, 2017, which prohibits certain employees of the Executive Office for Immigration Review ("EOIR") from speaking at public events in their personal capacities, and which requires that all other EOIR employees receive approval before doing so.[1] We recently obtained a copy of the Policy in response to a Freedom of Information Act request, and, after careful review of the Policy, we urge you to suspend it. As currently written, the Policy violates your employees' First Amendment right to speak in their personal capacities on matters of public concern, and it also violates the public's First Amendment right to hear them.

As the Policy itself observes, "[i]nterest in immigration law has grown exponentially over the last ten years," resulting in increased interest in "what [EOIR] does and specifically how Immigration Courts operate."[2] Because EOIR manages the adjudication of immigration cases, including administrative hearings, immigration court proceedings, and appellate review, its employees are uniquely positioned to help the public understand the immigration legal system, and they are frequently invited to speak about the system at public events. For example, as one immigration judge recently testified to Congress, many immigration judges "are active members of the legal and civil community who are sought out to speak in schools,

[1] Memorandum from James R. McHenry, Acting Director, Exec. Office for Immigration Review, to All of EOIR, Speaking Engagement Policy for EOIR Employees (Sept. 1, 2017) ("Policy"). Attached to this letter is a copy of the Policy.

[2] Policy at 1.

universities, and bar associations."[3] They enable "the community to better understand our Immigration Courts and their function in the community, helping to demystify the system and bring transparency about [EOIR] operations to the public."[4] The Policy you issued in 2017, however, dramatically limits the ability of immigration judges and other EOIR employees to speak in their personal capacities on exactly these topics.

The Policy imposes two key limitations on the ability of EOIR employees to speak at events in their personal capacities. First, it categorically prohibits certain EOIR employees—including all senior EOIR officials, members of the Board of Immigration Appeals, Deputy Chief Immigration Judges, and Assistant Chief Immigration Judges—from participating in speaking engagements in their personal capacities. Second, it requires that all other EOIR employees receive supervisory approval before speaking at an event in their personal capacities. This preapproval requirement applies whether or not the employees intend to speak on topics related to immigration. Supervisors decide whether a speaking engagement is, for purposes of the Policy, in an employee's personal capacity, and whether to approve the request.[5] After obtaining supervisory approval, employees who wish to speak about immigration-related topics must also request and receive approval from the Office of General Counsel and the Office of Communications and Legislative Affairs.

This Policy violates the First Amendment. Individuals do not relinquish their First Amendment right "as citizens to comment on matters of public interest" when they accept public employment.[6] Under Supreme Court precedent, a government regulation of public-employee speech is generally constitutional only if "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" outweighs "the interests of the [employee], as a citizen, in commenting on matters of public concern."[7] However, where, as here, a government

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[3] Statement of A. Ashley Tabaddor before Subcomm. on Border Security and Immigration, *Hearing on Strengthening and Reforming America's Immigration Court System* (Apr. 18, 2018), https://perma.cc/5TE3-2UZK.

[4] *Id.*

[5] If EOIR determines that a proposed speaking engagement must be undertaken in an employee's official capacity, then the engagement must in all cases be approved by the employee's supervisor as well as the Office of General Counsel and the Office of Communications and Legislative Affairs, and EOIR retains ultimate discretion to dictate the content of the employee's comments. *See* Policy at 2 (noting that EOIR reviews official-capacity speaking engagements to "ensure[]compliance with agency policies" and consistency with "EOIR's messaging").

[6] *Pickering v. Bd. of Ed*, 391 U.S. 563, 568 (1968).

[7] *Id.*

regulation preemptively restrains the speech of an entire class of public employees, the government "shoulders a correspondingly heavier burden."[8] The government must show "that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the actual operation of the Government."[9] The Supreme Court recently observed that this test "more closely resembles exacting scrutiny."[10]

In our view, the Policy fails that test. The interests of EOIR employees in engaging in, and the interest of the public in hearing, the speech restrained by the Policy are considerable. The Policy imposes a system of prior restraints that restricts EOIR employees from describing how new or proposed policies affect (or would affect) their ability to do their jobs, criticizing or supporting proposed reforms, and even simply explaining what EOIR does—all speech that "go[es] to the core of the freedoms the First Amendment was designed to protect."[11] The interests of potential audiences in hearing this speech is "manifestly great."[12] There is an ongoing national debate about the wisdom and fairness of recent changes to federal immigration policies, and about the effect of those changes on the immigration legal system.[13] EOIR employees should not be foreclosed from contributing their unique insights to this discussion.

While EOIR has an interest in "promoting the efficiency of the public services it performs through its employees," that interest cannot sustain the limitations on speech that the Policy imposes.[14] First, the Policy establishes a system of prior restraints by "chill[ing] speech before it happens."[15] As explained above, it does this in two ways: it imposes a blanket ban on

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[8] *Janus v. Am. Fed'n of State, County, & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2472 (2018) (internal quotation marks omitted).

[9] *United States v. Nat'l Treasury Emps. Union* (*NTEU*), 513 U.S. 454, 468 (1995) (internal quotation marks omitted).

[10] *Janus*, 138 S. Ct. at 2472.

[11] *Harman v. City of New York*, 140 F.3d 111, 118 (2d Cir. 1998).

[12] *Sanjour v. EPA*, 56 F.3d 85, 94 (D.C. Cir. 1995).

[13] *See* Michelle Hackman & Alicia A. Caldwell, *Tent Courts Open to Hear Immigration Cases Closed to the Public*, Wall St. J. (Sept. 11, 2019), https://perma.cc/WC99-CB75; Miriam Jordan, *In Court Without a Lawyer: The Consequences of Trump's 'Remain in Mexico' Plan*, N.Y. Times (Aug. 3, 2019), https://perma.cc/9LTV-A7PM; Nick Miroff & Maria Sacchetti, *Burgeoning Backlog of More Than 850,000 Immigration Cases Undercuts Trump Immigration Agenda*, Wash. Post (May 1, 2019), https://perma.cc/3W6S-2AGD.

[14] *Pickering*, 391 U.S. at 568.

[15] *NTEU*, 513 U.S. at 468.

personal-capacity speaking engagements by certain classes of EOIR employee, and it subjects all other employees to onerous preapproval requirements. Both facets of the Policy allow EOIR "to determine in advance what kind of speech will harm agency operations instead of punishing disruptive remarks after their effect has been felt."[16] As a result, both facets of the policy "run afoul of the general presumption against prior restraints."[17]

Second, the Policy's restrictions are not appropriately tailored to any legitimate interest EOIR may have in limiting the personal-capacity speech of its employees. Courts have consistently struck down policies imposing preapproval requirements or outright prohibitions on speech on the grounds that they fail to distinguish between speech "that reasonably could be expected to disrupt agency operations and speech that plainly would not."[18] The Policy's restrictions, which apply indiscriminately to all speaking engagements in an employee's personal capacity, violate exactly this principle. For example, the Policy would require an immigration judge to seek preapproval before speaking in her personal capacity about the history of immigration law in the United States, participating in a panel discussion about the effect of policy changes on the ability of judges to manage their caseloads, or even meeting with a troop of girl scouts about matters entirely unrelated to immigration. And, under the Policy, senior EOIR officials, members of the Board of Immigration Appeals, and senior immigration judges would be totally prohibited from engaging in those activites.

Third, the Policy's preapproval requirements lack any objective criteria that might cabin their application, vesting effectively unbridled discretion in EOIR to restrict speech on the basis of viewpoint.[19] In fact, the Policy is literally standardless. It requires preapproval but does not set out the standards that EOIR will apply in determining whether to grant approval. In addition, the Policy lacks the procedural safeguards the Supreme Court has generally required of prior restraints. For example, it does not include any

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[16] *Harman*, 140 F.3d at 119.

[17] *Id.*

[18] *See Moonin v. Tice*, 868 F.3d 853, 868 (9th Cir. 2017) (direct ban on speech); *see also Harman*, 140 F.3d at 124 (preapproval policy); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1186 (10th Cir. 2010) (direct ban on speech); *Crue v. Aiken*, 370 F.3d 668, 680 (7th Cir. 2004) (preapproval policy); *Barrett v. Thomas*, 649 F.2d 1193, 1199 (5th Cir. Unit A July 1981) (preapproval policy and direct ban on speech).

[19] *See Harman*, 140 F.3d at 121 (rejecting a preapproval policy that "lack[ed] objective standards to limit the discretion of the decision-maker"); *Moonin*, 868 F.3d at 867 (explaining that a policy leaving approval to the "unbounded discretion" of a supervisor "raise[d] the specter of arbitrary or viewpoint-discriminatory enforcement").

time limit for decision, or any process for appeal of a rejection.[20] Accordingly, nothing in the Policy would prevent an EOIR decision-maker from delaying their decision to render a speaking-engagement request moot.

While the Policy appears to include criteria for determining whether a speaking engagement is in an employee's personal or official capacity, these criteria are contradictory, and they effectively prohibit broad categories of protected speech. The Policy states that employees speak in their official capacities whenever they are "assigned to participate . . . or otherwise present information on behalf of the agency."[21] However, the Attachment to the Policy conflicts with that definition, giving examples for which the determination of speaking-engagement capacity turns, not on the capacity in which an employee will speak, but rather on the nature of the event they plan to attend. For example, the Attachment provides that national and regional conferences are categorically official-capacity speaking engagements, effectively barring EOIR employees from speaking in their personal capacities at such events.[22]

Fourth, EOIR must demonstrate "actual harm" to a legitimate governmental interest to justify the restrictions on speech that the Policy imposes,[23] but nothing in the Policy or (as far as we are aware) the public record indicates that the Policy was adopted to address such harms.

For these reasons, the Policy is unconstitutional, and we urge EOIR to immediately suspend it. We appreciate your attention to this matter and would be happy to discuss it with you.

Sincerely,

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Stephanie Krent
Alex Abdo
Knight First Amendment Institute at
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[20] *See Harman*, 140 F.3d at 120–21 ("[The policies] provide no time limit for review to ensure that commentary is not rendered moot by delay."); *Crue*, 370 F.3d at 679 ("[N]othing prevents [the athletic director] from delaying approval of [employees'] communications until the recruiting season is over.").

[21] Policy at 2.

[22] Policy, Attachment A.

[23] *NTEU*, 513 U.S. at 468.

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encl.: Memorandum from James R. McHenry, Acting Director, Exec. Office for Immigration Review, to All of EOIR, Speaking Engagement Policy for EOIR Employees (Sept. 1, 2017)

cc: Jill Anderson
General Counsel, Executive Office of Immigration Review

U.S. Department of Justice

Executive Office for Immigration Review

Office of the Director

5107 Leesburg Pike, Suite 2600
Falls Church, Virginia 22041

Director

September 1, 2017

MEMORANDUM TO: All of EOIR

FROM: James R. McHenry III
Acting Director

SUBJECT: Speaking Engagement Policy for EOIR Employees

Introduction

Interest in immigration law has grown exponentially over the past ten years. As a result, the public has become increasingly interested in hearing about, and understanding, what the agency does and specifically how Immigration Courts operate. Our Immigration Judges (IJs), along with senior EOIR officials and other staff, are frequently invited to speak on immigration law and policy at different events across the country. Depending on who is invited, who has issued the invitation, the forum and the topic of the discussion or presentation, a management determination must be made as to which capacity is most appropriate for the employee's participation on that specific occasion.

This Speaking Engagement Policy (Policy) and its attachment are intended to clarify the approval process an EOIR employee must follow to speak at an event, when a request or invitation for an appearance has been received by the employee or the Agency, including the proper determination of speaking engagement capacity. To that end, the following sets forth EOIR's policy on speaking engagements and the procedures employees must follow when requesting approval to speak at an event.

Approval Process

There are only two capacities in which an employee may participate in a speaking engagement: (1) official capacity; or (2) personal capacity. The agency will no longer use the status of "personal capacity with use of title and disclaimer," otherwise known as "PTD." An employee must first request and receive supervisory approval before participating in a speaking engagement. Supervisors will determine the capacity in which an employee is speaking.

After obtaining supervisory approval, all requests to speak in official capacity, and/or to speak about immigration-related topics must be reviewed by the Office of General Counsel (OGC) and the Office of Communications and Legislative Affairs (OCLA) via the headquarters speaking engagement team (SET). EOIR personnel should submit requests to the SET by completing the Speaking Engagement Form (see Appendix) and sending the completed form to EOIRspeakers@usdoj.gov. The form should be submitted no later than seven days before the scheduled event. For official capacity speaking engagements, submissions include presentation slides, hand out materials and talking points. This process not only ensures compliance with agency policies, but also allows OCLA to ensure that EOIR's messaging is consistent across official engagements.

I. Speaking in an Official Capacity

When an EOIR employee is assigned to participate as a speaker or panel participant or otherwise present information on behalf of the agency at a conference or other event, they are doing so in their official capacity. Any EOIR employee speaking at an event hosted by a Federal Department, Office, or Agency must speak in an official capacity. This includes speaking at naturalization ceremonies even when not administering the naturalization oath. Certain EOIR personnel may only speak in their official capacity. Those personnel include component heads and other senior EOIR officials, members of the Board of Immigration Appeals ("Board Members"), Deputy Chief Immigration Judges ("DCIJs") and Assistant Chief Immigration Judges ("ACIJs"). In contrast, some Immigration Judges may or may not be expected to speak in their official capacity, depending on the particulars of the speaking engagement. For IJs, they shall only engage in a speaking engagement in their official capacity if it involves a certain activity (See Attachment A) or if another Department of Justice or EOIR employee or official is appearing at the same event in an official capacity. Other employees may appear, and speak, at an event in their official capacity if it is part of their official duties or they have been assigned to do so by their supervisor.

If travel is required for an employee to speak in an official capacity, generally the employee may not accept reimbursement for travel and related expenses from any source other than the government. However, 41 C.F.R. Chapter 304 authorizes the Department (or the employee on the Department's behalf) to accept payment of travel expenses from a non-Federal source," but only "when specifically authorized to do so" and "only for official travel to a meeting."[1] Please note that EOIR has determined, as a matter of policy, that it will not accept any payment for the official travel of its employees by a non-Federal source that is considered a prohibited source for EOIR. A prohibited source is considered a person or entity who seeks official action from the agency, does business with the agency, appears before the agency, or is

[1] 41 C.F.R. § 304-5.3 further provides that reimbursement for travel from outside sources must not be authorized if the approving official determines that acceptance of the payment under the circumstances would cause a reasonable person with knowledge of all the facts relevant to a particular case to question the integrity of agency programs or operations. An employee who accepts travel from a non-Federal source in violation of 41 C.F.R. § 304-1.2 may be required to repay the amount of payment accepted from the non-Federal source and could be subject to additional penalties.

an organization a majority of whose members are described in this section.[2] As an adjudicatory body, EOIR should expect to be under constant scrutiny. EOIR employees must avoid all improprieties and the appearance of impropriety to ensure complete public confidence in the integrity of our agency. The acceptance of travel reimbursement for official duties from prohibited sources could undermine the public's confidence in the impartiality of EOIR's adjudicators. Likewise, under no circumstances may an EOIR employee receive a supplementation of salary (i.e. honorarium) from a non-Federal source for a speaking activity that is done in their official capacity.[3]

II. Speaking in a Personal Capacity

When an EOIR employee participates in a speaking engagement in a personal capacity, they are not appearing at an event as part of their official duties or on behalf of the agency. Therefore, they may not imply that EOIR is endorsing or sanctioning the speaking engagement, as it is considered an outside speaking activity. An EOIR employee may not use or permit the use of their official title or position to identify themselves in connection with the speaking activity unless it is included as one of several biographical details when such information is given to identify the individual in connection with the activity, provided that their title or position is given no more prominence than other significant biographical details. When one's official title is used in this manner, as part of an overall biographical sketch, a disclaimer is not required. Alternatively, in limited circumstances where an introduction does not include an overall biographical sketch, an IJ may be introduced using their title so long as they use an appropriate disclaimer at the beginning of their remarks in order to avoid the perception that they are appearing on behalf of the agency. Additionally, they may not permit the sponsoring organization to use their official title in the promotion of the event in which they are invited to speak.

The Speaking Engagement Form is not required to be submitted for an EOIR employee who is invited to discuss, in their personal capacity, a topic that is unrelated to immigration law issues, their official EOIR duties or position, or any agency programs and policies. Additionally, the issuer of the invitation cannot be a prohibited source. The form is required, however, for an EOIR employee who has been invited to discuss immigration related issues. Additionally, the employee must obtain supervisory approval to engage in the outside speaking activity before the form is submitted. As a reminder, no EOIR employee may receive compensation for any outside speaking activity that relates to their official duties.

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[2] 5 C.F.R. § 2635.203(d).

[3] 18 U.S.C. § 209.

If an EOIR employee is traveling to speak at an event in a personal capacity, the employee is not entitled to travel reimbursement by the agency. However, when traveling in a personal capacity, an EOIR employee may accept reimbursements for travel expenses from the entity that is sponsoring the activity.[4] On the other hand, employees offered travel reimbursement for mere attendance (as opposed to speaking on a panel) at a conference in a personal capacity must contact the Office of the General Counsel for a determination as to whether accepting the reimbursement of travel expenses is appropriate. OGC will apply the gift rules in deciding whether such employee may accept payment of these expenses. Factors that must be taken into consideration when applying the gift rules include the source and value of the reimbursement.[5]

Conclusion

This policy does not necessarily address every situation that may arise related to speaking engagements. It is intended to create a standard by which events may be evaluated. If questions arise regarding the application of this policy or the proper determination of a speaking capacity, please contact the Ethics Office at EOIR.Ethics@usdoj.gov or (703) 305-0322.

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[4] *Sanjour v. Environmental Protection Agency*, 56 F.3d 85 (D.C. Cir. 1995); 5 C.F.R. § 2635.807(a)(2)(iii)(D).
[5] 5 C.F.R. § 2635.201-205.

Attachment A

The Speaking Engagement Policy identifies the two capacities in which an EOIR employee may speak, when they are invited to participate in an event that involves immigration issues, relates to their official duties, or invited because of their official position at the agency. Because PTD will no longer be used, only Official and Personal Capacity are provided below with examples of appropriate events found within each category. Note that this is not an exclusive list, as some events, activities and forums may not be listed below.

Official Capacity

1. All senior EOIR officials, BIA Board Members, DCIJs and ACIJs shall only participate in speaking engagements in their official capacity.
2. For any event where at least one DOJ or EOIR official is participating officially, all EOIR participants must speak in their official capacity.
3. For any event where an inviter is a Federal government agency and the employee is asked to speak or present at a government event, the EOIR employee must speak in their official capacity.
4. National Conferences (e.g. AILA, FBA, etc.).
5. Regional Conferences.
6. Naturalization Ceremony, as guest speaker or to administer the oath.
7. Court Visit – when an outside group visits the Immigration Court and an IJ/EOIR official meets with the group at the court.
8. Any event where the topic of the discussion is the subject of pending litigation.
9. Pro Bono training – in association with EOIR's Office of Legal Access Programs.
10. EOIR Mock Hearing Program.
11. Recruiting for EOIR internship program.

Personal Capacity

1. Moot Court judge – not immigration related.
2. Commencement Speaker.
3. Career Day/Alumni Career Panel – to discuss full career path and experience.
4. Pro-bono training – not associated with EOIR's Office of Legal Access Programs.
5. Meeting with boy scouts or girl scouts.
6. Interview based on book written in personal capacity.
7. Teach university or law school immigration classes.