DEX 1

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

NATIONAL ASSOCIATION OF IMMIGRATION JUDGES, affiliated with the International Federation of Professional and Technical Engineers, *Plaintiff,* v. JAMES R. MCHENRY III, in his official capacity as Director of the Executive Office for Immigration Review, *Defendant.*	Case No. 20-cv-731

I, JAMES MCHENRY, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that my testimony below is true and correct:

1. I am the Director of the Executive Office for Immigration Review (EOIR), a component within the Department of Justice (DOJ).
2. I have held the position of Director since January 2018. I was previously the Acting Director from May 2017 to January 2018. At EOIR I previously served as an Administrative Law Judge (ALJ) from November 2016 to May 2017 and as a Judicial Law Clerk/Attorney Advisor from October 2003 to September 2005.
3. Outside of EOIR, I worked for the Office of the Principal Legal Advisor (OPLA), Immigration and Customs Enforcement (ICE), Department of Homeland Security (DHS) from October 2005 to August 2014 as an Assistant Chief Counsel and, later, as a Senior Attorney. In that capacity I frequently represented DHS in immigration court proceedings

before multiple immigration judges, primarily in an immigration court in Atlanta, Georgia. I also served as a lead attorney for national security, denaturalization, and gang cases, anti-human trafficking operations, and worksite enforcement matters. Between 2010 and 2011, I also served a detail as a Special Assistant United States Attorney for the Criminal Division of the United States Attorney's Office for the Northern District of Georgia.

4. Between August 2014 and November 2016, I worked as an ALJ in the Social Security Administration.

5. As Director, I manage EOIR and its employees and am responsible for the supervision of each EOIR component in the execution of its respective duties in accordance with the law.[1]

6. As Director, I also have certain adjudicatory authorities over discrete classes of immigration cases.[2] I adjudicate all cases before me in an impartial and neutral manner.

7. My testimony in this declaration is based upon my experience with and personal knowledge of EOIR's operations, information obtained from records and systems maintained by EOIR, my experience as Director, my experience as an ALJ, my experience with and knowledge of DOJ policies, and publicly available statements or announcements.

8. I am testifying in this declaration to the best of my knowledge and understand that this declaration is for use in *National Association of Immigration Judges v. McHenry*, in which I am the named defendant, sued in my official capacity.

EOIR

9. EOIR contains three components responsible for immigration-related administrative adjudicatory proceedings conducted under the Immigration and Nationality Act (INA) and associated regulations. The three components are the Office of the Chief Immigration

[1] 8 C.F.R. § 1003.0(b).
[2] 8 C.F.R. §§ 1003.1(e)(8)(ii) and 1292.18.

Judge (OCIJ), the Board of Immigration Appeals (the Board), and the Office of the Chief Administrative Hearing Officer (OCAHO).

10. OCIJ oversees the operations of EOIR's immigration courts. OCIJ currently operates 69 immigration courts and immigration adjudication centers (IACs) in 29 states, Puerto Rico, and the Northern Mariana Islands.[3]

11. Immigration judges (IJs) at these courts and IACs preside over multiple types of proceedings, the most common of which are labeled removal proceedings.

12. Removal proceedings are conducted pursuant to section 240 of the INA. As of July 3, 2020, there were 1,198,316 pending cases in removal proceedings.

13. All cases in removal proceedings are initiated by DHS, and DHS generally retains prosecutorial discretion in determining whether to place an alien into removal proceedings. DHS initiates removal proceedings by serving a charging document, called a Notice to Appear (NTA), on an alleged alien and then filing the NTA with an immigration court. Once the NTA is filed with an immigration court, court personnel will create a record of proceeding (ROP) for the case. The NTA contains various information, including factual allegations and charges of removability based on alleged violations of either section 212 or 237 of the INA.[4]

14. In removal proceedings, DHS is represented by an attorney within OPLA. In removal proceedings, an alien has the privilege of being represented at no expense to the Government.[5] Most aliens in removal proceedings have attorney representation.

[3] https://www.justice.gov/eoir/eoir-immigration-court-listing
[4] 8 U.S.C. § 1229(a)(1).
[5] 8 U.S.C. § 1362.

15. Removal proceedings generally encompass two types of hearings: master calendar hearings and individual, or merits, hearings. Master calendar hearings are typically brief procedural hearings roughly analogous to initial appearances or arraignments in criminal proceedings. At a master calendar hearing, an IJ will provide multiple advisals to an alien, apprise the alien of the alien's rights in removal proceedings, go over the contents of the NTA, assess whether an unrepresented alien wishes to seek representation, provide a list of pro bono legal service providers to the alien, assess whether the alien may be eligible for any form of relief or protection from removal, including asylum, and if eligible, provide the alien with an opportunity to apply for such relief.[6] After providing the required advisals and depending on the specific facts of each case and how the alien wishes to proceed, an IJ may also take pleadings and determine removability at a master calendar hearing. The IJ may also rule on any motions that have been filed. Unless an alien decides to accept an order of removal or voluntary departure at the initial master calendar hearing or unless an immigration judge decides that the proceedings should be terminated, most removal cases encompass multiple master calendar hearings followed by one individual hearing.

16. Once an IJ has found an alien removable as charged and determined that the alien is prima facie eligible for a form of relief or protection from removal, the IJ will schedule an individual, or merits, hearing on the application for relief or protection. An individual hearing is roughly similar to a bench trial, and the IJ will consider the evidence submitted by the parties related to the alien's application. At the conclusion of the individual hearing, the IJ will typically render an oral decision, though in more complex cases, the IJ may reserve a decision and issue a written decision at a later date.

[6] 8 C.F.R. §§ 1240.10(a) and 1240.11(a)(2) and (c).

17. During removal proceedings, an IJ will first determine removability. If the IJ determines that the alleged alien is not removable as charged, the IJ will terminate the proceedings. If the IJ determines that the alien is removable as charged, then the IJ will consider whether the alien is eligible for any relief or protection from removal. At the conclusion of removal proceedings, if they have not been terminated, an IJ will issue an order of removal, an order of voluntary departure, an order allowing an alien to withdraw his or her application for admission to the United States, or an order granting relief or protection. Some orders may be issued in the alternative.
18. Both DHS and the alien may appeal adverse IJ decisions in removal proceedings to the Board.
19. In making determinations in removal proceedings, IJs are generally bound by circuit court precedent in the circuit in which they sit. They are also bound by any relevant injunctions or district court orders stemming from litigation over immigration laws and policies. IJs are frequently called upon to interpret federal court decisions or to apply rulings issued in cases that are still pending in federal court.
20. IJs frequently encounter sensitive information in adjudicating cases, including information about asylum claims and claims of battered spouses and children.
21. The Board operates as the administrative appellate tribunal for appeals of IJ decisions. It also hears a limited number of appeals of certain types of adjudications initially conducted by DHS. There are currently 20 appellate immigration judges (AIJs) on the Board.
22. OCAHO administers proceedings conducted by ALJs pursuant to 8 U.S.C. §§ 1324a, 1324b, and 1324c. Within OCAHO, the Chief Administrative Hearing Officer (CAHO)

hears appeals of ALJ decisions in cases heard under 8 U.S.C. §§ 1324a and 1324c. There are currently two ALJs at EOIR.

Immigration Judges

23. All IJs are appointed by the Attorney General (AG), are qualified to conduct special classes of proceedings, and are subject to supervision and the performance of duties as prescribed by the AG.[7]

24. IJs are considered to be inferior officers of the United States under the United States Constitution who exercise significant authority.[8] As at least one United States Court of Appeals has noted, in the course of discharging their duties, IJs represent the United States Government and exercise its authority *ex officio*.[9]

25. IJs are required to be impartial in their consideration of their duties.[10] Federal courts have repeatedly recognized both the significant authority they exercise and their absolute need for impartiality in the exercise of those duties.[11]

26. In light of their high level of authority, IJs are generally paid under a unique pay scale higher than the General Schedule scale that governs the pay of most federal employees; their precise salary is based on length of service and locality. Most IJs, regardless of whether they are in the bargaining unit represented by NAIJ or not, are paid according to that scale, under which their salaries are capped at Level III of the Executive Schedule,

[7] 8 U.S.C. § 1101(b)(4).
[8] *Hurtado v. Barr*, ---F. App'x--- (9th Cir. 2020); *Ramirez v. Barr*, ---F. App'x--- (9th Cir. 2020).
[9] *Islam v. Gonzales*, 469 F.3d 53, 55 (2d Cir. 2006).
[10] 8 C.F.R. § 1003.10(b).
[11] *E.g. Islam v. Gonzales*, 469 F.3d 53, 55 (2d Cir. 2006) ("[A]t the same time, as a judicial officer, an immigration judge has a responsibility to function as a neutral, impartial arbiter and must be careful to refrain from assuming the role of advocate for either party.")

currently $181,500.[12] By policy, IJs are not given bonuses based on their adjudicatory performance.

27. All IJs perform multiple duties as part of their job, though the most prominent is to adjudicate cases under the INA and associated regulations. Through their decision-making, IJs may also effectively bind the agency and, thus, establish agency policy.

28. IJs also frequently engage in speaking activities related to their position and title. These activities include, *inter alia*, speaking to stakeholder organizations and conducting model hearings and pro bono trainings.[13] Although not every IJ engages in speaking activities, IJs in general have carried out speaking engagement functions for many years, and they are an accepted and understood part of the duties of an IJ.

29. IJs have a significant public contact role, both presiding as IJs over hearings that are generally open to the public[14] and engaging in speaking activities.

30. IJs may be subject to discipline for misconduct, including suspension or termination. Although there is great public interest in the discipline of IJs for misconduct from both the media and stakeholder organizations such as the American Immigration Lawyers Association, EOIR employees typically refrain from publicly discussing matters of IJ misconduct at speaking engagements due to privacy concerns.

31. As of July 13, 2020, EOIR had 509 immigration judges: 471 Immigration Judges, 35 Assistant Chief Immigration Judges, one Deputy Chief Immigration Judge, one Principal Deputy Chief Immigration Judge, and one Chief Immigration Judge.

[12] Pub. L. 104-208, tit. III, subtit. F, § 371(c); https://www.justice.gov/eoir/page/file/1236526/download
[13] https://www.justice.gov/sites/default/files/eoir/legacy/2008/04/24/08-01.pdf
[14] 8 C.F.R. 1003.27.

The National Association of Immigration Judges (NAIJ)

32. Plaintiff NAIJ is the currently-recognized representative of a bargaining unit consisting of approximately 470 non-supervisory IJs within EOIR. The bargaining unit does not include any other EOIR personnel, including administrative support staff, judicial law clerks, attorney-advisors, supervisory IJs, AIJs, or ALJs.

33. According to NAIJ, IJs "work at a high level of independent fact-finding and decision making, like other trial judges in courts across the United States." Further, NAIJ has publicly stated that "[t]o label [IJs] as lower level DOJ employees is a gross mischaracterization of the independent functioning and decision making of an Immigration Judge."[15] NAIJ's view that IJs occupy high-level positions within EOIR is consistent with that held by EOIR and me.

34. According to NAIJ, part of the job duties of an IJ involves speaking to the public.[16] NAIJ's view that IJs' job duties may involve speaking to the public is likewise consistent with that held by EOIR and me.

35. EOIR concluded a collective bargaining agreement (CBA) with NAIJ effective October 15, 2006.[17] Article 8 of the CBA sets out a grievance process by which IJs, NAIJ, and EOIR can resolve workplace disputes.

36. NAIJ frequently engages in media communications on behalf of its members and routinely speaks to various organizations about EOIR, IJs, and immigration. I am not aware of any EOIR or DOJ policy that restricts or prohibits NAIJ from speaking publicly for IJs, though

[15] https://www.naij-usa.org/images/uploads/publications/NAIJ-position-paper-May-2016-classification-of-IJs_2.pdf
[16] https://knightcolumbia.org/content/immigration-judges-challenge-justice-department-speech-policy ("Part of the job of an immigration judge is to educate the public about the immigration courts and the role they play in society.").
[17] Three articles of the CBA were updated effective December 6, 2017.

federal law—*e.g.* laws related to privacy, confidentiality, national security and classified information, ethics, and labor relations—may limit some types of information NAIJ is permitted to disclose.

37. Although NAIJ is the currently-recognized bargaining unit representative for non-supervisory immigration judges, my experience and understanding are that not all bargaining unit members agree with NAIJ's positions on immigration matters and that some members who disagree do not voice disagreement in public for a due to concerns regarding the potential reaction of NAIJ.

38. In August 2019, DOJ filed a petition with the Federal Labor Relations Authority seeking to clarify the character of the bargaining unit of IJs represented by NAIJ. DOJ's position is that due to the policymaking character of IJ adjudications and decisions, IJs are management officials and, thus, excluded from bargaining unit coverage under federal law. As of July 13, 2020, that petition remains pending.

The Review Process for Speaking Engagement Requests

39. EOIR personnel in general, and IJs in particular, often receive invitations to speak at various events, particularly those related to immigration matters that implicate EOIR. Neither DOJ nor EOIR has any blanket or general prohibition or proscription on personnel speaking at any engagement in either a personal capacity or in an official capacity.

40. Like most federal agencies,[18] EOIR does have a process for reviewing and approving all speaking engagement requests by its employees to reduce the likelihood of, *inter alia*, violations of federal ethics laws, the disclosure of sensitive information, violations of DOJ

[18] *E.g.*, https://www.cdc.gov/about/speakers/requestSpeakers html; https://www.ssa.gov/agency/ask-for-a-speaker html

policies, violations of other applicable laws, and/or the possibility of prejudicing pending litigation or of prejudicing cases before an IJ pending adjudication.

41. To the best of my knowledge, IJs have *always* been subject to a review and prior-approval process for speaking engagements, at least since the time EOIR was established in 1983.

42. As a practical matter, speaking engagements for IJs typically involve time away from the bench, which may require the use of leave and require re-allocation of work to other employees, the commitment of official resources for travel, and the need for ethics advice to ensure compliance with relevant federal ethics standards and professionalism standards applicable to attorneys and judges. Consequently, employee speaking engagements necessarily require review and approval to some degree simply because of the ancillary effects of the engagement on operations and other employees, the need to ensure compliance with ethics and professionalism requirements, and the need to manage workload operations, including the approval of leave.

43. Although, to the best of my knowledge, review and prior-approval have always been understood as requirements for EOIR employee speaking engagements, those requirements have been memorialized through different means at various points since the establishment of EOIR in 1983.

A. The March 2008 Operating Policies and Procedures Memorandum

44. The first documented memorialization of a prior-approval requirement for a particular type of IJ speaking engagement of which I am aware occurred in March 2008, when EOIR issued Operating Policies and Procedures Memorandum (OPPM) 08-01, *Guidelines for Facilitating Pro Bono Legal Services*.[19] That OPPM required authorization and approval

[19] https://www.justice.gov/sites/default/files/eoir/legacy/2008/04/24/08-01.pdf

from EOIR for IJs who wished to participate in a model hearing program or a pro bono training program.

45. OPPM 08-01 remains in effect, and I am not aware of any previous grievance or challenge lodged by NAIJ as to OPPM 08-01 or to its requirement that IJs receive approval for speaking engagements related to model hearing programs or pro bono training opportunities. It is unclear to me whether NAIJ is now challenging OPPM 08-01 in its Complaint.

B. The Joint January 2011 EOIR-NAIJ Ethics and Professionalism Guide for IJs

46. The first documented memorialization of a general prior-approval requirement for IJ speaking engagements of which I am aware occurred in January 2011, when EOIR and NAIJ jointly issued an *Ethics and Professionalism Guide for Immigration Judges* (*Guide*) following a collaborative process between the two entities.

47. Article XXI of the *Guide* provides that "Immigration Judges must seek prior supervisory and ethics approval for written work and speeches."[20] Although the *Guide* distinguished between speaking engagements in an IJ's private capacity and those in an IJ's official capacity, it did not make any distinctions between the two capacities regarding the need for supervisory and ethics approval.

48. NAIJ formally agreed to the supervisory-approval requirement for "written work and speeches" by IJs contained in the *Guide*. The *Guide* remains in effect, and I am not aware of any previous grievance or challenge lodged by NAIJ as to the *Guide* or to its requirement

[20] https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf

that IJs receive "supervisory and ethics approval for written work and speeches." It is unclear to me whether NAIJ is now challenging the *Guide* in its Complaint.

49. The *Guide* did not outline any particular process for reviewing and obtaining approval for speaking engagements, leading to an *ad hoc* implementation of that requirement. Further, despite the clear dichotomy established in the *Guide* between personal capacity and official capacity, EOIR also recognized an informal third category of speaking engagements: speaking as an IJ as part of an IJ's duties, using the title of an IJ, and speaking on IJ and EOIR workplace matters and DOJ matters, but doing so in a personal capacity. My understanding is that this third category, commonly labeled PTD, was an anomaly within DOJ and not recognized by any other component. This hybrid designation led to confusion over whether IJs speaking as part of their duties, using their IJ titles when speaking, speaking about IJ duties and EOIR workplace matters, and speaking about DOJ immigration matters constituted official-capacity speech or not. In particular, the use of the official title "Immigration Judge" while speaking about IJ duties, EOIR workplace matters, and DOJ immigration matters was incongruent with speaking in a putatively personal capacity, and this incongruence caused confusion regarding whether an IJ was speaking officially or not.

C. The September 2017 Memorandum

50. In an effort to remind EOIR personnel of their ethical and professional responsibility obligations regarding speaking engagements and to standardize and simplify the approval process, on September 1, 2017, I issued a memorandum, *Speaking Engagement Policy for All EOIR Employees* (September 2017 Memorandum), which outlined a formal review and approval process for speaking engagement requests for EOIR personnel.

51. The September 2017 Memorandum did not rescind either OPPM 08-01 or the *Guide*, nor did it purport to proscribe or prohibit any speaking activities for any EOIR personnel, including IJs, in either a personal capacity or an official capacity. Rather, its primary purpose was to remind EOIR personnel of ethical and professional obligations associated with speaking engagement requests and to establish a consistent, uniform process for review and approval of such requests, consistent with longstanding policy that such requests were subject to review and approval—*e.g.* as outlined in OPPM 08-01 and the *Guide*.

52. The September 2017 Memorandum did formally eliminate the use of the confusing hybrid PTD category of speaking as an IJ as part of an IJ's duties, using the title of an IJ, and speaking on IJ and EOIR workplace matters and DOJ matters, yet doing so in a personal capacity.

53. Further, since some speaking engagement requests may be mislabeled, the September 2017 Memorandum also indicated that as part of the review, a supervisor would determine the appropriate capacity—personal or official—for a speaking engagement request based on the nature of the request.

54. The September 2017 Memorandum remains in effect, and it was reissued in January 2020 when EOIR introduced a new automated process for reviewing and approving speaking engagement requests.[21]

55. On September 13, 2017, I issued an email follow-up to the September 2017 Memorandum clarifying what activities qualified as "speaking engagements." The email was in response

[21] *See* ¶ 65, *infra*.

to questions received from employees regarding what was considered a speaking engagement for purposes of the September 2017 Memorandum.

56. The September 13, 2017 email clarified that one-on-one meetings, brief phone calls or in-person conversations about regular agency business, or phone calls with designated liaisons were not speaking engagements for purposes of the September 2017 Memorandum and, thus, were not subject to the review and approval process. It also indicated that participation in DOJ-sponsored events were not subject to the process outlined in the September 2017 Memorandum but did require supervisory approval. It also noted that the process outlined in the September 2017 Memorandum should be followed for requests related to, *inter alia*, the presentation of formal remarks, participation in a panel discussion, distribution of agency information, meeting with local chapters of national organizations, meetings by an EOIR employee with an organization that are open to the organization's membership, non-liaison meetings with personnel of another agency, meetings that were advertised by the group hosting them, and meetings with multiple organizations should go through the review process.

57. The September 13, 2017 email did not purport to proscribe any speaking activities for any EOIR personnel, including IJs, in either their personal or official capacities. Rather, it sought to clarify what type of event would be considered a speaking engagement for purposes of the September 2017 Memorandum.

D. May 2018 Memorandum of Understanding Between EOIR and NAIJ

58. On November 17, 2017, NAIJ contacted OCIJ with a request to discuss the September 2017 Memorandum. Between that date and approximately January 12, 2018, EOIR and NAIJ engaged in multiple discussions regarding that Memorandum. On March 29, 2018,

NAIJ filed a formal demand to bargain the September 2017 Memorandum, and the agency and EOIR commenced bargaining thereafter.

59. As the result of bargaining, in May 2018, EOIR and NAIJ entered into a Memorandum of Understanding (MOU) regarding the September 2017 Memorandum. The MOU addressed multiple issues of implementation of the September 2017 Memorandum as applied to bargaining-unit IJs represented by NAIJ. Based on its bargaining of and agreement to the MOU, I perceived NAIJ to have agreed to the September 2017 Memorandum at the time the MOU was issued. The MOU remains in effect, and I am unaware of any previous challenge to the MOU filed by NAIJ. It is unclear to me whether NAIJ is now challenging the MOU in its Complaint.

60. Pursuant to the MOU, EOIR provides to NAIJ every six months a summary of speaking engagement requests submitted by bargaining-unit IJs. As that summary excludes non-bargaining-unit IJs, it is not necessarily a complete list of all IJ speaking engagement requests.

61. On January 6, 2020, the Knight First Amendment Institute, which subsequently became co-counsel for NAIJ in this case, wrote a letter (January 2020 Letter) to EOIR alleging that the September 2017 Memorandum violated the First Amendment in two respects.[22] It first alleged that the September 2017 Memorandum categorically prohibited supervisory EOIR officials from speaking in their personal capacities. Second, it alleged that it violated the First Amendment to require EOIR employees to receive supervisory approval to speak in a personal capacity.

[22] https://knightcolumbia.org/documents/eoir-lette

62. The September 2017 Memorandum did not categorically prohibit supervisory EOIR officials from speaking in a personal capacity. Nevertheless, EOIR subsequently made that point explicit when I reissued the September 2017 Memorandum.[23] Further, because that issue affected only supervisory EOIR officials, it had no bearing on NAIJ, its bargaining unit, or this case.

63. The January 2020 Letter did not address or consider the facts that (1) participation in a personal-capacity speaking engagement held during normal work hours requires the use of leave from work and, thus, necessarily requires supervisory approval; (2) a personal-capacity speaking engagement request may raise concerns under applicable ethics laws or the *Guide* that warrant review and advice; (3) a speaking-engagement request may be misidentified as "personal capacity," when it is, in fact, an official-capacity request, and a review of such a request ensures that it is not mislabeled or mischaracterized; and (4) NAIJ had already agreed in 2011 through the *Guide*—on which it collaborated with EOIR and which EOIR and NAIJ jointly issued[24]—that it was appropriate for IJs to seek prior supervisory and ethics approval for written work and speeches without any noted exception for personal-capacity engagements.

64. Nevertheless, EOIR subsequently made the point explicit that genuine personal-capacity speaking engagement requests that raise no ethics concerns and occur outside of normal work hours will ordinarily be approved.[25]

[23] *See* ¶ 67, *infra*
[24] *See* ¶ 46, *supra.*
[25] *See* ¶ 69, *infra*.

E. The January 2020 Memorandum

65. In January 2020, EOIR launched an updated internal automated process for reviewing speaking engagement requests. On January 17, 2020, in conjunction with the launch of that automated process, I reissued the September 2017 Memorandum and restated EOIR's process for reviewing and approving speaking engagement requests (January 2020 Memorandum).

66. The January 2020 Memorandum did not purport to prohibit or proscribe any speaking activities for any EOIR personnel, including IJs, in either their personal or official capacities. It did not alter the 2018 MOU, the *Guide*, or OPPM 08-01, nor did it substantively alter the September 2017 Memorandum. And, as it made clear, it did not alter the process established by the September 2017 Memorandum; rather, it simply changed the mechanism for the process to a more automated form. Under both Memoranda, speaking engagement requests remain subject to supervisory and ethics review as they always have.

67. The January 2020 Memorandum did clarify that although most speaking requests for EOIR supervisors would, as a practical matter, likely be for official-capacity speaking, there was no prohibition on EOIR supervisors speaking in a genuinely personal capacity. Again, because the bargaining unit represented by NAIJ does not include supervisors, this clarification had no bearing on NAIJ, its bargaining unit, or this case.

68. The January 2020 Memorandum also clarified that the speaking engagement review process applied to written pieces for publication. That point was not explicit in the September 2017 Memorandum itself, but the September 2017 Memorandum did not alter or purport to alter the *Guide*, which did clearly indicate that the review and approval process applied to both written work and speaking engagements. Thus, the January 2020

Memorandum, consistent with the *Guide*, made explicit that the review process included written work as well as speaking engagements.

69. The January 2020 Memorandum further made clear that requests for genuinely personal-capacity speaking engagements, especially those occurring outside of normal working hours and, thus, not requiring the use of leave, would ordinarily be approved.

70. I am unaware of any grievance filed by NAIJ under the CBA regarding the January 2020 Memorandum nor am I aware of any challenge by NAIJ to the January 2020 Memorandum prior to the filing of the Complaint in this case.

71. Although the *Guide* memorialized in writing the distinction of speaking engagements between those in which EOIR personnel participate in an official capacity and those in which they participate in a personal capacity, my understanding is that distinction was well-established prior to 2011. That distinction was subsequently re-affirmed by the September 2017 Memorandum.

Official-Capacity vs. Personal-Capacity Speaking Engagement Requests

72. This distinction between official-capacity employee speaking engagements and personal-capacity employee speaking engagements is consistent with those employed by other government agencies,[26] including those handling immigration matters such as DHS[27] and the Department of State.[28]

73. As noted above, EOIR recognizes two categories of speaking engagement or outside-writing requests: official-capacity and personal-capacity requests.

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[26] https://handbook.tts.gsa.gov/fas-speaker-guide/
[27] https://www.dhs.gov/sites/default/files/publications/mgmt/public-affairs/mgmt-dir_110-02-public-speaking-opportunities_revision-00.pdf
[28] https://fam.state.gov/fam/03fam/03fam4170 html[29]
https://www.justice.gov/sites/default/files/eoir/legacy/2008/04/24/08-01.pdf

A. Official-Capacity Speaking Engagement Requests

74. A speaking engagement is in an official capacity if it meets one or more criteria drawn from Article XXI of the *Guide* and 5 C.F.R. § 2635.807(a)(2):

    a. it is part of an employee's duties;

    b. it involves the presentation of information on behalf of the agency;

    c. it deals with a matter to which the employee is assigned or has been assigned within the past year;

    d. the invitation was extended to the employee because of the employee's official title or position;

    e. the invitation was extended, directly or indirectly, by a person who has interests that may be substantially affected by the employee's official duties;

    f. there is a nexus between the employee's duties and the subject of the engagement or the sponsor of the engagement; and/or

    g. the engagement involves any ongoing or announced policy, program, or operation of DOJ.

75. Official-capacity speaking engagements expressly include conducting model hearings and pro bono trainings, which are part of an IJ's work duties.[29] Such activities have required authorization and approval by EOIR since at least 2008, if not also before.

76. Official-capacity speaking engagements also expressly include conducting naturalization ceremonies, which are also part of an IJ's work duties.[30]

77. Based on my experience, many speaking engagement invitations extended to IJs that are related to their duties as IJs and their involvement in immigration matters within DOJ

[29] https://www.justice.gov/sites/default/files/eoir/legacy/2008/04/24/08-01.pdf
[30] https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/07/97-8.pdf

constitute invitations to speak in an official capacity, regardless of how they are labeled. Such invitations include, *inter alia*:

a. requests by organizations for an IJ to speak because of the position and title as an IJ in order to add an imprimatur of official recognition or authority to the engagement;

b. requests by organizations to conduct training on immigration court procedures, which involves the presentation of information on behalf of the agency;

c. requests by organizations to speak on matters to which the IJ is assigned or has been assigned, including the adjudication of particular types of immigration cases, especially asylum cases;

d. requests by organizations to speak regarding policies, programs, or operations of DOJ—*e.g.*, pending immigration-related litigation related to asylum policies and regulations,[31] regulations and cases governing immigration court proceedings,[32] DOJ immigration court operations during the COVID-19 outbreak,[33] or DOJ immigration court operations related to the Migrant Protection Protocols (MPP)[34];

e. requests by organizations to conduct model hearing programs or provide pro bono training; and

f. requests by individuals or organizations, including attorneys and law school clinics, who have interests that are or would be substantially affected by the performance of the IJ's duties, including by those with cases pending before an IJ.

[31] *E.g. Barr v. East Bay Sanctuary Covenant*, 140 S.Ct. 3 (2019); *East Bay Sanctuary Covenant v. Barr*, ---F.3d--- (9th Cir. 2020).
[32] *E.g. Lopez v. Barr*, Dkt. 20-CV-01330 (D. Minn.).
[33] *E.g. Las Americas Immigrant Advocacy Center v. Trump*, ---F.Supp.3d--- (D.Ore. Apr. 2, 2020); *NIPNLG v. EOIR*, ---F.Supp.3d--- (D.D.C. Apr. 28, 2020); *Ali v. Barr*, ---F.Supp.3d--- (S.D.N.Y. Jun. 3, 2020).
[34] *E.g. Wolf v. Innovation law Lab*, 140 S.Ct. 1564 (2020); *Innovation Law Lab v. Wolf*, 951 F.3d 986 (9th Cir. 2020).

78. In fact, many speaking engagement invitations made to IJs, including the examples noted in the Complaint—*e.g.* speaking to law school clinics that bring cases before immigration courts, presiding over a mock immigration court hearing on an asylum application at a school, and speaking to the Practicing Law Institute about immigration and asylum—are made precisely because of the IJ's official title, position, and duties, and thus carry an invitation for the IJ to speak about his or her duties and cases in an official capacity, even if they are labeled otherwise.

79. Although many invitations extended to IJs to speak on topics related to their duties as IJs and their involvement in immigration matters within DOJ constitute official-capacity speaking invitations regardless of how they are labeled, neither EOIR nor DOJ has any type of blanket prohibition or proscription on IJs speaking in an official capacity. To the contrary, many IJs have spoken and continue to speak in an official capacity at events involving discussions of EOIR operations and immigration policies.

B. Personal-Capacity Speaking Engagement Requests

80. Speaking engagements that are not in an official capacity are considered to be in a personal capacity. To the best of my knowledge, personal-capacity speaking engagement requests by EOIR employees have also required approval for many years, as reflected in the *Guide*.

81. Neither EOIR nor DOJ has any prohibition or proscription on personal-capacity speaking engagements, except to the extent they may implicate ethics or professionalism concerns or time-and-attendance issues.

82. For example, a personal-capacity speaking request occurring during normal business hours requires the use of leave from work. Thus, a personal-capacity request may be denied if it requires the use of more leave than an employee has available, if the leave request is not

submitted in a timely manner, or if the employee's absence at a particular time is not operationally feasible due to deadlines, the agency's workload, or leave requests submitted by other employees.

83. Similarly, a personal-capacity request to speak by an employee while hosting a political fundraiser for a candidate for partisan political office and soliciting political contributions from another individual may be denied because it may be in violation of federal law or Section XXXI of the *Guide*.

84. Likewise, a personal-capacity request to speak to an organization of which an IJ is a member and that practices invidious discrimination based on race, sex, or religion may be denied because it would appear to violate Section X of the *Guide*.[35]

85. Requests to speak in a personal capacity are routinely granted, and I am unaware of any genuine personal-capacity request that has been denied unless it was due to an ethics or professionalism concern or the impact of a leave request. Although personal-capacity requests are routinely granted, they are nevertheless subject to review to ensure the request does not require the use of more leave than the employee has available or otherwise disrupts operations and does not implicate any ethics or professionalism issues.

86. Moreover, some official-capacity speaking engagement requests are erroneously labeled as personal-capacity requests, and reviewing all requests ensures that the requests are properly categorized.

87. Neither the September 2017 Memorandum nor the January 2020 Memorandum contains any prohibition or proscription on EOIR employees, including IJs, participating in speaking engagements in either a personal or an official capacity. At the same time, neither

[35] https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf

Memorandum altered EOIR's longstanding requirement of approval for employee speaking engagement requests, including the requirement agreed to by NAIJ in the *Guide* in 2011. Rather, the two Memoranda set forth the agency's review process for all employee speaking engagement requests, a process to ensure that all employee speaking engagements, especially those in an official capacity, comply with applicable law and policies, particularly those related to ethics and professionalism, media contacts, and disclosure of sensitive information. Neither the September 2017 Memorandum nor the January 2020 Memorandum imposed or established any substantive parameters regarding speaking engagements by EOIR personnel, including IJs, beyond existing statutes, regulations, and DOJ policies.

Ethics and Professionalism Considerations Applicable to Speaking Requests

88. Ethics statutes and government-wide federal ethics regulations govern ethical considerations related to EOIR employee speaking engagement requests. EOIR has no EOIR-specific ethics policy for employees in general beyond what is contained in relevant ethics statutes and regulations. EOIR and NAIJ did jointly agree to and issue the *Guide* in 2011, which both incorporates federal ethics regulations and establishes IJ-specific professionalism obligations. EOIR reviews requests for speaking engagements made by its employees, including IJs, to ensure compliance with ethics laws; it further reviews requests for speaking engagements made by IJs to ensure compliance with the *Guide*.

89. The most relevant ethics laws applicable to speaking engagement requests made by IJs are Public Law 76-252 (the Hatch Act), its subsequent amendments, and its implementing regulations, 5 C.F.R. parts 733 and 734; 18 U.S.C. § 209, regarding the supplementation of salary of a federal government employee by an outside source; the Standards of Ethical

Conduct for Employees of the Executive Branch (Standards), 5 C.F.R. part 2635; civil service regulations regarding federal government employee responsibilities and conduct, 5 C.F.R. part 735; DOJ-specific regulations supplementary to the Standards, 5 C.F.R. part 3801; DOJ-specific regulations regarding employee responsibilities, 28 C.F.R. part 45; and, federal employee travel regulations, 41 C.F.R. chapter 304.

90. The *Guide* incorporates these ethics laws and also provides additional professionalism provisions applicable to IJs related to acting in a neutral and detached manner, judicial temperament and professionalism, membership in organizations, competence, and *ex parte* communications.[36]

91. Through the CBA and the *Guide*, NAIJ agrees that IJs are bound by these laws and by the *Guide*. It is unclear to me whether NAIJ is now challenging the Guide and all of the laws listed in paragraph 89.

92. Based on my experience, many speaking engagement invitations made to IJs related to their duties as IJs and their involvement in immigration matters implicate potential ethics and professionalism concerns, which warrant review regardless of whether the requests are initially labeled as personal-capacity or official-capacity.

93. For example, invitations for speaking engagements for IJs frequently seek to use the title "Immigration Judge" to give the appearance of official government sanction or endorsement of the IJ's proposed remarks, raising issues under both Section XII of the *Guide* and 5 C.F.R. 2635.702(b).

94. Many invitations for speaking engagements for IJs involve questions of travel reimbursement or payment of registration fees which raise issues under federal travel

[36] https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf

regulations, 41 C.F.R. chapter 304, the federal ethics rules on gifts, 5 C.F.R. part 2635, subpart B, and section XXV of the *Guide*.

95. Many IJs have developed friendships with individuals who run the organizations who invite them to speak, including attorneys who appear before them in cases. Because many invitations for IJs to speak are to speak at events requiring some type of payment to the organization hosting the event, the IJ's interest in speaking will raise issues under Section XII of the *Guide* and under 5 C.F.R. § 2635.702(d) regarding the use of an official position to provide preferential treatment or to affect the financial interests of a friend. Additionally, requests for an IJ to speak made by a friend who also appears as an attorney before the IJ will raise issues under the same provisions.

96. Additionally, some speaking engagement requests reflect that some IJs wish to speak to only certain organizations, but not others, or wish to speak only to one type of party who appears before them, but not to all parties. Such requests may raise issues of impartiality under Section V of the *Guide* and under 5 C.F.R. § 2635.101(b)(8).

97. Some of these issues may also implicate similar state bar ethics and professionalism rules in the jurisdiction in which the IJ is licensed.

98. Because most speaking engagement requests for IJs—and nearly all such requests related to their duties as IJs and their involvement in immigration matters—potentially implicate ethics and professionalism concerns, especially regarding issues of impartiality and preferential treatment, a review process is necessary to ensure that EOIR can effectively advise IJs on these issues, regardless of whether the request is for a personal-capacity or an official-capacity engagement.

99. It is my understanding that DOJ, through the Departmental Ethics Office, has maintained a "same capacity" policy for several years for speaking engagements at which more than one DOJ employee will attend or speak. Under that policy, if more than one employee is attending or speaking at an engagement, then all employees must attend or speak in the same capacity. That policy remains in effect as reflected in the September 2017 Memorandum. I am unaware of any grievance filed by NAIJ under the CBA regarding the "same capacity" policy. It is unclear to me whether NAIJ is now challenging the "same capacity" policy in its Complaint.

Media Contacts and Disclosure of Sensitive Information

100. Policy regarding contact between the media and DOJ personnel, including IJs, is set by DOJ. EOIR has no EOIR-specific media contacts policy beyond what is set by DOJ, though EOIR reviews requests for media engagement made by its personnel through the regular speaking engagement request process to ensure compliance with DOJ policy.

101. Media contacts policy for DOJ personnel is generally set by the Office of Public Affairs (OPA) subject to the approval of DOJ leadership, including the Deputy Attorney General (DAG) and the AG.

102. OPA maintains longstanding policies generally precluding media comment by DOJ personnel on pending litigation. Further, by regulation, DOJ personnel associated with civil actions such as immigration cases "shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, which a reasonable person would expect to be disseminated by means of public communication if there is a reasonable likelihood that such dissemination will interfere with a fair trial and which relates to [*inter alia*] [t]he character, credibility, or

criminal records of a party, witness, or prospective witness. . . [a]n opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule. . . [or] [a]ny other matter reasonably likely to interfere with a fair trial of the action."[37] Thus, DOJ personnel, including IJs, are generally precluded from commenting on the many examples of immigration-law litigation pending in recent months, including litigation related to, *inter alia*, asylum policies and regulations applied by IJs, MPP cases which are heard by IJs, IJ work and immigration court operations during COVID-19, and an IJ's authority to administratively close a case.

103. OPA also maintains longstanding policies which generally coordinate official comments on DOJ actions by DOJ personnel. Based on my experience, OPA does not generally make IJs available for public media comment on DOJ immigration matters involving litigation or issues that are likely to come before an IJ adjudicating cases in order to ensure that IJ neutrality and impartiality are maintained. That policy is consistent with 28 C.F.R. § 50.2(c), 5 C.F.R. § 2635.101(b)(8) and other applicable ethics regulations, and the *Guide*.

104. Disclosure of information by EOIR personnel, including through speaking engagements, is governed by both federal law and policy set by DOJ. In addition to statutory disclosure restrictions generally applicable to all federal personnel—*e.g.* for classified information[38] or under the Privacy Act, as amended[39]—immigration law contains particular disclosure restrictions of specific importance to EOIR personnel,

[37] 28 C.F.R. § 50.2(c).
[38] In addition to 18 U.S.C. § 798, various Executive Orders, regulations, and EOIR OPPM 09-01, https://www.justice.gov/sites/default/files/eoir/legacy/2009/02/11/09-01.pdf, restrict the disclosure of classified information by EOIR employees, including IJs.
[39] 5 U.S.C. § 552a

including IJs, related to (1) applications for asylum,[40] (2) applications related to an alien's status as a victim of certain types of criminal activity, a victim of human trafficking,[41] and (3) applications related to legalization programs.[42] EOIR has no EOIR-specific information disclosure policies beyond those established by federal law or set by DOJ. EOIR reviews requests for speaking engagements made by personnel to ensure compliance with federal law and DOJ policy regarding the disclosure of information.

105. In November 6, 2017, the former DAG issued a memorandum revising DOJ's Confidentiality and Media Contacts Policy. The revised policy, *inter alia*, applies to all DOJ personnel, emphasizes the need for confidentiality in all DOJ work, requires all DOJ personnel to report contacts with the media, and makes clear that all DOJ personnel must obtain the approval of the relevant United States Attorney or Assistant Attorney General before communicating with the media about DOJ investigations.[43]

106. DOJ policies on media contacts and speaking engagements are also contained in the DOJ Justice Manual, which applies to all DOJ employees.[44]

107. The Justice Manual sets for policy on the disclosure of information connected to work by DOJ employees:

> DOJ personnel should presume that non-public, sensitive information obtained in connection with work is protected from disclosure, except as needed to fulfill official duties of DOJ personnel, and as allowed by court order, statutory or

[40] 8 C.F.R. § 1208.6
[41] 8 U.S.C. § 1367(a)(2)
[42] 8 U.S.C. §§ 1160(b)(6) and 1255a(c)(5)
[43] Memorandum for Heads of Department Components from Deputy Attorney General Rod Rosenstein, *Confidentiality and Media Contacts Policy* (Nov. 6, 2017).
[44] Justice Manual, § 1-7.001 *et seq.* ("The Department of Justice (DOJ) Confidentiality and Media Contacts Policy (the Policy) applies to all DOJ personnel, including employees, contractors, detailees, and task force partners.), available at https://www.justice.gov/jm/jm-1-7000-media-relations.

> regulatory prescription, or case law and rules governing criminal and civil discovery. Other than as necessary to fulfill DOJ official duties, disclosure of such information to anyone, including to family members, friends, or even colleagues, is prohibited and could lead to disciplinary action. Unauthorized disclosures of sensitive personal or proprietary information could lead to criminal prosecution or administrative action.[45]

108. The Justice Manual also requires that DOJ personnel report all media contacts related to a DOJ matter: "DOJ personnel must report to their designated media representative any contact with a member of the media about a DOJ matter."[46]

109. The Justice Manual also requires advanced approval of any communication by DOJ personnel with a member of the media relating to a pending case.[47]

110. Of particular importance for IJs in order to ensure they remain neutral arbiters, the Justice Manual makes clear that "DOJ personnel shall not make any statement or disclose any information that reasonably could have a substantial likelihood of materially prejudicing an adjudicative proceeding."[48]

111. The Justice Manual also makes clear, regarding speaking engagements by DOJ personnel, that "DOJ personnel must avoid making public statements that violate DOJ guidelines, regulations, or legal requirements, including those imposed by case law, applicable bar policies, and local court rules."[49]

112. I am unaware of any previous challenge by NAIJ to the Justice Manual.

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[45] Justice Manual § 1-7.100.
[46] Justice Manual § 1-7.210.
[47] Justice Manual §§ 1-7.400, 1-7.500, 1-7.600, 1-7.610, and1-7.700.
[48] Justice Manual § 1-7.600.
[49] Justice Manual § 1-7.700(C).

113. On September 24, 2019, the current DAG issued a new memorandum requiring the approval of all external communications from EOIR personnel by OPA, including, *inter alia*, public statements, communications to stakeholders, and communications to the media.[50] A subsequent memorandum confirmed the realignment of EOIR's external communication functions, including communications by EOIR personnel to the media, to OPA.[51]

114. In my experience, requests for media contacts with IJs originate with the media outlet, not with an IJ. I am not aware of any IJ submitting a request to speak to a media outlet or media representative in either a personal or official capacity since May 2017.

115. In my experience, *all* requests for media contacts for IJs generated by media outlets are for IJs to comment in an official capacity as an IJ and to comment on either workplace matters at EOIR—*e.g.*, EOIR personnel matters such as IJ discipline, EOIR policies or regulations, pending decisions by the Board, the AG, or other IJs, and, more recently, immigration courts and the COVID-19 outbreak—or pending DOJ litigation involving similar, if not identical, workplace matters—*e.g.*, regarding EOIR policies or regulations, decisions by the Board, the AG, or other IJs, and, more recently, immigration courts and the COVID-19 outbreak. I am not aware of any media inquiry seeking an IJ comment on an EOIR or DOJ matter simply as a private individual or seeking a comment from an IJ unrelated to the IJ's position, to cases heard by an IJ, to an ongoing EOIR workplace matter, or to ongoing DOJ litigation.

[50] Memorandum for EOIR Director and OPA Director from Deputy Attorney General Jeffrey Rosen, *Advance Clearance of External Communications* (Sept. 24, 2019).
[51] Memorandum for EOIR Director and Principal Deputy Assistant Attorney General, Office of Justice Programs, from Assistant Attorney General for Administration Lee Lofthus, *Realignment of Certain Public Affairs Functions* (Sept. 30, 2019).

116. Additionally, because many media-contacts requests would require IJs to comment on matters that come before them, especially regarding issues related to asylum and DOJ policies and regulations, they would raise ethics and professionalism concerns.

117. Further, many media-contacts requests would also require IJs to disclose potentially sensitive information, particularly information related to asylum cases or to personnel matters such as colleague discipline, which would raise concerns related to federal law and DOJ policies regarding the disclosure of such information.

118. Because all media-contacts requests for IJs relate to their duties as IJs and their involvement in immigration matters, those requests implicate ethics and professionalism concerns and concerns regarding the disclosure of sensitive information. Consequently, a review process is necessary to ensure that EOIR can effectively advise IJs on these issues and ensure compliance with relevant laws and policies.

119. It is unclear to me whether NAIJ is now challenging all of the statutes, regulations, and policies listed in paragraphs 100 through 118, including provisions related to, *inter alia*, asylum confidentiality, the Privacy Act, and the Justice Manual, as they apply to speaking engagements.

Other Laws Applicable to Speaking Engagement Requests by EOIR Employees

120. A number of other laws also potentially govern speaking engagements by EOIR employees. For example, federal labor-management and employee relations laws govern what IJs who are not members of the bargaining unit may say regarding NAIJ at a speaking engagement as well as what NAIJ may do toward IJs who are members of the bargaining unit and say certain things about NAIJ at a speaking engagement.[52]

[52] *E.g.* 5 U.S.C. § 7116.

121. Similarly, government contracting laws generally prohibit the disclosure of contractor bid, proposal, or source selection information.[53] Thus, EOIR employees, including IJs, may not generally discuss the competition for EOIR's interpreter contract or EOIR's efforts at space acquisition for new immigration courts even though those issues have been frequent topics of interest by multiple organizations in recent years.

122. It is unclear to me whether NAIJ is now challenging the applicability of the relevant federal labor-management and employee relations laws and federal contracting or acquisition laws, as they apply to speaking engagements.

Judicial Speaking Engagements

123. In my experience as both an ALJ and Director of EOIR, many judicial speaking-engagement invitations are extended because of the judge's official position and are for the judge to comment on matters related to the judge's work and employment. In other words, invitations for a judicial speaking engagement are frequently for a judge to speak because of the judge's official position and for the judge to speak on workplace matters related to the judge's adjudication of cases.

124. EOIR receives numerous official-capacity speaking engagement requests each year, including for myself and for IJs. Although EOIR strives to provide a speaker for all official-capacity speaking engagement requests, it does not guarantee a speaker for all engagements, and I am unaware of any requirement that EOIR must provide an official speaker in response to every invitation it receives.

125. I am also unaware of any requirement that EOIR provide only one specific individual to speak on behalf of the agency in an official capacity, and EOIR cannot

[53] *E.g.* 41 U.S.C. § 2102 and its implementing regulations.

guarantee any specific or particular official speaker for an engagement. Many organizations, however, seek to have only one particular individual speak on behalf of the agency and are unwilling to accept an official-capacity speaker from EOIR whom they did not choose. Consequently, although EOIR routinely makes IJs available for official-capacity speaking engagements, some organizations may reject a proposed speaker because they want only one IJ in particular. This insistence on one specific IJ to the exclusion of other available IJs also raises potential ethics and professionalism issues related to impartiality or preferential treatment if the organization or individual insisting on a specific IJ also has cases in front of that IJ.

126. Official-capacity speaking engagement requests may be denied for a number of reasons, including, *inter alia*, speaker unavailability, inadequate preparation time, ethics or professionalism concerns, cost of travel associated with the request, a determination that attendance at the engagement is not in the interest of the agency, or the likelihood of potential policy or legal violations associated with the engagement.

127. In addition, requests mislabeled as personal-capacity requests that are more accurately characterized as official-capacity requests may be denied for that reason, but may be resubmitted as official-capacity requests.

128. Official-capacity invitations directed to a specific IJ may also be denied due to, *inter alia*, the IJ's unavailability, the IJ's competing or conflicting workload demands, ethics or professionalism concerns raised by the relationship between the inviter and the invitee, or concerns about potential policy or legal violations (*e.g.*, a request for a specific IJ to speak about a case he or she decided)—but the agency may nevertheless accept the invitation and provide a different official speaker.

129. Genuine personal-capacity requests may be denied for operational reasons (*e.g.* time and attendance issues) or for ethics or professionalism concerns.

130. It is my understanding that most speaking engagement requests by EOIR personnel, including IJs, in either personal or official capacity are approved.

Assessment of Plaintiff NAIJ's Claims and Potential Harm

131. Although the precise scope of what NAIJ is challenging in its Complaint is unclear to me, acceptance of NAIJ's claims in any scope would have far-reaching and deleterious consequences on EOIR's ability to successfully manage and perform its operations, particularly its ability to manage the immigration court system and ensure that IJs continue to adjudicate cases in a fair and impartial manner.

132. Although NAIJ seeks an injunction against the September 2017 Memorandum and the January 2020 Memorandum only on behalf of the IJ members of its bargaining unit, those Memoranda apply to all EOIR employees—not just bargaining-unit IJs—and, based on NAIJ's Claims, there is no reason those Memoranda would continue to apply to other employees if they were enjoined for bargaining-unit IJs. In fact, doing so would create a situation in which some IJs were exempt from following the Memoranda (and all other applicable laws and policies) whereas other IJs—in addition to AIJs and ALJs—would not be. Because all IJs exercise the same adjudicatory authorities, all IJs, AIJs, and ALJs perform similar adjudicative duties, and all IJs, AIJs, and ALJs are high-level employees of the agency exercising significant authority, that distinction would be untenable. Consequently, NAIJ's Claims, if accepted, would require the rescission of both Memoranda as being applicable to all EOIR employees, not just bargaining-unit IJs.

133. Contrary to NAIJ's claims, no IJ is prohibited from speaking in either a personal or official capacity, and EOIR has no blanket proscription on an IJ speaking in either capacity. Rather, EOIR routinely grants speaking engagement requests in both capacities, including requests made by IJs. EOIR has over 500 IJs, including those represented by NAIJ, and they frequently speak on multiple matters in either their official or personal capacities, ranging from immigration law to historic homes. The 2017 and 2020 Memoranda represent the culmination of an incremental process to standardize and routinize the speaking engagement review process to ensure consistency and the provision of appropriate advice regarding compliance with applicable laws, regulations, and policies.

134. I am unaware of any harm or injury that has occurred to NAIJ or members of its bargaining unit since the issuance of the September 2017 Memorandum, particularly since (1) the approval process outlined in the September 2017 Memorandum is founded on the approval requirement noted in the *Guide* agreed to by NAIJ in 2011 and (2) the September 2017 Memorandum did not impose or establish any new, substantive policies regarding speaking engagements by EOIR employees beyond those already established by existing statutes, regulations, and policies. I am similarly unaware of any harm or injury that has occurred to NAIJ or members of its bargaining unit since the reissuance of the September 2017 Memorandum in the January 2020 Memorandum, as the January 2020 Memorandum made no substantive changes to the September 2017 Memorandum.

135. Neither the September 2017 Memorandum nor the January 2020 Memorandum imposed or established any substantive requirements regarding speaking engagements by EOIR employees, including IJs. Rather, the Memoranda established—and then automated—a process to ensure those substantive parameters which already exist in

statutes, regulations, and policies and which are listed in paragraph 136, are applied in a consistent manner.

136. I understand NAIJ's Complaint to challenge both the September 2017 Memorandum and its reissuance through the January 2020 Memorandum. It is unclear to me whether NAIJ is now challenging any other applicable laws or policies related to speaking engagements, compliance with which is required by the Memoranda. Thus, it is not clear to me whether NAIJ's Complaint challenges the application of, *inter alia*, OPPM 97-8; OPPM 08-01; the *Guide*; the MOU, Public Law 76-252, its subsequent amendments, and its implementing regulations; 5 C.F.R. parts 733 and 734; 18 U.S.C. § 209; the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. part 2635; 5 C.F.R. part 735; 5 C.F.R. part 3801; 28 C.F.R. part 45; 41 C.F.R. chapter 304; 28 C.F.R. § 50.2; Justice Manual §§ 1.7001 *et seq.*; the 2017 DAG Memorandum; the 2019 DAG Memorandum; DOJ's "same capacity" policy; 8 U.S.C. § 1367; 8 U.S.C. §§ 1160(b)(6) and 1255a(c)(5); 8 C.F.R. § 1208.6; 18 U.S.C. § 798; 5 U.S.C. § 552a; 5 U.S.C. § 7116; and, 41 U.S.C. § 2102 and its implementing regulations, to speaking engagement requests made by IJs.

137. If NAIJ is challenging these laws or policies, then the injunction sought by NAIJ would have a catastrophic impact on EOIR's operations and likely on operations throughout the United States Government. It would render inapplicable many, if not all, of the existing ethics requirements for IJs in the context of speaking engagements. It would also render inapplicable all of the professionalism provisions governing IJs, including provisions related to neutrality and *ex parte* communications, in the context of speaking engagements. It would allow EOIR employees, including IJs, to discuss the contents of

asylum applications or applications filed by battered spouses and children in a speaking engagement, potentially placing aliens at risk of harm. It would allow EOIR employees, including IJs, to speak only to certain groups and not to others, raising serious questions about ostensibly neutral and impartial adjudicators providing preferential treatment to certain individuals. It would allow EOIR employees, including IJs, to discuss sensitive personnel matters as part of a speaking engagement, including IJ discipline records, or to discuss bids for relevant contracts. It would allow EOIR employees, including IJs, to discuss ongoing litigation matters as part of a speaking engagement which may prejudice the parties in the litigation and may lead to accusations of bias or impartiality against an IJ. It would allow some IJs to speak about other IJs and about NAIJ as part of a speaking engagement, which would harm both collegiality and internal labor relations. Relatedly, it would also undermine labor-management relations and make overall management of the agency more difficult because the agency would be placed in an untenable position of either ignoring issues raised by its personnel because they are members but not representatives of the recognized bargaining unit or responding to issues raised by personnel who are members of the bargaining unit but whose positions are at odds with those of the recognized bargaining unit. It would encourage standardless and inconsistent training on immigration court procedures and *pro bono* representation, which would not improve the quality of representation in immigration proceedings. In short, the enjoining of these provisions would create a "free-for-all" atmosphere that would significantly undermine, if not destroy completely, the operation of immigration courts as neutral and impartial adjudicatory bodies.

138. EOIR has nearly 70 other adjudicators, including IJs, AIJs, and ALJs, who are not represented by NAIJ, but whose adjudicatory roles are largely indistinguishable from the IJs represented by NAIJ. Notably, AIJs are subject to a 2011 *Ethics and Professionalism Guide for Members of the Board of Immigration Appeals* that is identical to the *Guide* applicable to bargaining-unit IJs in all material respects.[54] The operation of adjudications conducted by those individuals, including cases heard by the Board and OCAHO, would be similarly affected by the enjoining the provisions listed in paragraph 136 in the context of speaking engagement requests.

139. If NAIJ's Complaint were construed to seek only the enjoining of an approval requirement for speaking engagement requests—which would require enjoining the two Memoranda, the *Guide*, the 2019 DAG Memorandum, portions of the Justice Manual, and any other extant DOJ policy requiring pre-approval for speaking—eliminating that requirement would make it operationally difficult, if not impossible, to provide appropriate and consistent advice to IJs and other EOIR employees regarding compliance with all of the substantive statutes, regulations, and policies listed in paragraph 136. Consequently, it would significantly increase the likelihood that an IJ would violate an ethics or professionalism rule (including those related to impartiality, neutrality, and not providing preferential treatment), disclose sensitive information (including information related to asylum applications), or prejudice adjudications or pending litigation. Moreover, it may actually have a chilling impact on speaking engagement requests due to this potential for violating one of these laws due to the lack of review; indeed, IJs may become less inclined to speak without a safe haven of review, advice, and approval due to the potential

[54] https://www.justice.gov/eoir/page/file/992726/download

disciplinary or civil or criminal liability consequences that may flow from violating one of the relevant laws during a speaking engagement.

140. Similarly, even if NAIJ's Complaint were construed to seek only the enjoining of the two Memoranda—and not the enjoining of an approval requirement or of any of the actual, substantive statutes, regulations, and policies applicable to speaking engagement requests listed in paragraph 136—eliminating the clear process in those Memoranda would make it operationally difficult, if not impossible, to provide appropriate and consistent advice to IJs and other EOIR employees regarding compliance with all of the substantive statutes, regulations, and policies listed in paragraph 136. Although without the Memoranda IJ speaking engagement requests would still remain subject to review and approval under the *Guide* and subject to all of the provisions in paragraph 136, the lack of any clearly-defined process for review and approval would likely lead to both inconsistent treatment of requests and, due to the *ad hoc* nature of the review, advice, and approval process, a greater likelihood of an IJ, during a speaking engagement, violating ethics or professionalism rules—including those related to impartiality, neutrality, and not providing preferential treatment—disclosing sensitive information, or prejudicing adjudications or pending litigation.

141. As Director, I receive invitations for speaking engagements related to EOIR, IJs, the immigration courts, and immigration law applied by the courts. Like IJs, I seek supervisory and ethics approval for all speaking engagement invitations I wish to accept. Like NAIJ, as Director, there are many topics related to EOIR, the immigration courts, and IJs that I would like to speak on without any review or constraint, and I recognize that if NAIJ's Claims are successful, the statutes, regulations, and policies outlined above may no

longer be applicable to me as well. Nevertheless, I also recognize that, like an IJ, I am a high-level government official whose speech, if allowed to range outside of well-established parameters with no review, may significantly affect the functioning of the agency and irreparably damage its ability to adjudicate cases. Like IJs, I believe the agency must operate in a fair, impartial, and efficient manner consistent with due process, and the extant statutes, regulations, and policies applicable to speaking engagements allow it to do so. In particular, the September 2017 Memorandum and the January 2020 Memorandum provide a process for considering speaking engagement requests for all EOIR employees that appropriately ensures the ability of agency employees to speak publicly on important matters without compromising the impartiality and decorum that is necessary for the agency to function as a fair tribunal.

Executed on July 20, 2020 in Falls Church, Virginia.

JAMES MCHENRY

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James McHenry