DEX 3

UNITED STATES DISTRICT COURT
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.	Civil Action No. 20-cv-731

DECLARATION OF DANIEL SWANWICK
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

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

1. I joined the Executive Office for Immigration Review ("EOIR") in September 2007 as a Judicial Law Clerk at the Headquarters Immigration Court. In July 2010 I became an attorney advisor at the Board of Immigration Appeals, the appellate adjudicatory component of EOIR.

2. I served as Attorney Advisor, Conduct and Professionalism, in the Office of the Chief Immigration Judge ("OCIJ") from October 2016 until May 2018, at which time the Conduct and Professionalism portfolio was moved to the Office of the Director.

3. I became Counsel to the Deputy Director in May 2018. In that capacity I served as the primary advisor to EOIR's Deputy Director on a broad range of legal and management issues. I managed all aspects of EOIR's program for handling complaints concerning Immigration Judges and members of the Board of Immigration Appeals. I was the point of contact for the Office of the Director on labor and employment matters. Of particular significance to this declaration, I participated in and led contract negotiations with the Immigration Judges' union regarding the 2017 speaking engagement policy.

4. From September 2018 until February 2019, I was detailed to the U.S. Attorney's Office for the Eastern District of Virginia ("EDVA") as a Special Assistant United States Attorney.

5. Since February 2020, I have been serving as a Temporary Board Member for the BIA.

6. I make this Declaration based on my own personal knowledge, on information contained in the records of EOIR, or information provided to me by EOIR employees.

7. After the Speaking Engagement Policy for EOIR Employees was issued in September 2017 I was involved in communications with the leadership of the National Association of Immigration Judges ("NAIJ"), which expressed concerns with and sought clarification of the September 2017 policy.

8. At an informal meeting with NAIJ leadership on November 30, 2017, to discuss the new Speaking Engagement Policy, NAIJ expressed its concern with what it believed to be a protracted length of time between the submission of speaking engagement requests and a final determination on the requests as a result of the new policy. On December 6, 2017, NAIJ submitted examples of such requests. Following the meeting, EOIR conducted a review of pending requests and identified approximately 5 IJ speaking engagement requests that had been submitted and required further action by the Speaking Engagements Team ("SET") or the requestor's Assistant Chief Immigration Judge ("ACIJ") supervisor.

9. I am aware that on January 12, 2018, then-Deputy Director Katherine Reilly sent newly appointed NAIJ President Ashley Tabaddor and Executive Vice President Amiena Khan a memorandum congratulating them on their appointments and reiterating the Agency's expectations with regard to their representational activities, including public speaking. On January 26, 2018, in response to Deputy Director Reilly's email and memorandum, NAIJ submitted a formal request for bargaining related to the September 17, 2017, speaking engagement policy. I worked on these issues at the Deputy Director's request.

10. In follow-up emails on February 6 and 16, 2018, NAIJ requested that EOIR commit to responding within five days to Immigration Judge speaking requests. If the request was not approved within five days, NAIJ asked for a commitment to provide the requestor

with a status report stating the reason for the delay and a date when the request would be finally adjudicated.

11. NAIJ additionally requested examples of materials that had been provided by IJs with speaking requests that had been approved.

12. NAIJ also sought EOIR's assurance that the September 17, 2017, speaking policy would not interfere with existing policies and practices governing model hearing programs and stakeholder meetings, and a re-evaluation of the September 17, 2017, policy to that effect.

13. On April 25, 2018, NAIJ submitted a Request for Information ("RFI") in accordance with 5 U.S.C. § 7114(b)(4) to Deputy Director Reilly to assist in its preparation for formal collective bargaining of the implementation of the September 17, 2017, policy. The RFI included the following requests:

    i. Please explain and provide copies of any and all documents and/or communications that are related to how the current procedure and policy on speaking engagements, including the criteria for approval or denial of requests to participate in a speaking engagement, operates and how that procedure and policy was developed.

    ii. Please provide copies of any and all documents and/or communications regarding requests for speaking engagements that have been made in the last seven months, including all the materials submitted to seek approval of a speaking engagement request and documentation as to whether these requests were approved, denied or are pending.

    iii. Please provide copies of any and all documents and communications in reference to the development of any policy permitting only management (ACIJs) to appear at speaking engagements on behalf of requestor IJs.

    iv. Please provide copies of any and all documents and communications in reference to modifying the Immigration Court Model Hearing Program (ICMHP) in relation to the speaking engagement policy, including any information related to a decision to exclude IJ participation in the ICMHP.

    v. Please provide copies of any and all documents and communications in reference to the modification of policy on Stakeholder meetings and conferences, including any decision to exclude IJs from attendance and participation in in Stakeholder meetings.

14. I was tasked by Deputy Director Reilly to review and respond to the NAIJ RFI on behalf of the Agency. On May 4, 2018, I responded to the RFI that the Agency had determined that NAIJ had failed to articulate the requisite particularized need for the information as mandated pursuant to *Department of the Air Force, Luke Air Force Base, and AFGE Local 1547,* DE-CA-15-0427 (2016). Notwithstanding, in response to Request 1, I noted that the information was available on EOIR's intranet and included a copy as an attachment to my response. I also stated that EOIR would provide an overview at the outset of the bargaining sessions scheduled for May 9, 2018 through May 11, 2018. Also as a courtesy, in response to Request 2, I also provided a list of the speaking engagement requests for March and April 2018, the SET response, and a tracking sheet. Requests 3, 4, and 5 did not require a response since it was determined that NAIJ had failed to articulate the requisite particularized need for the information as mandated by case precedent.

15. The bargaining between EOIR and NAIJ commenced on May 9, 2018, and concluded on May 10, 2018, resulting in the MOU which was signed by both parties. The signed MOU, which both parties agreed was binding, does not include a set deadline for adjudicating SET requests. (Exh A par. 5)

16. The MOU included a provision stating that "By June 30, 2018, the Agency will provide to NAIJ a list of factors that the Agency considers in assessing Immigration Judge speaking engagement requests and/or representative examples of types of speaking engagements that fall into each speaking capacity." (Exh. A par. 6).

17. On June 28, 2018, Deputy Director Reilly sent the "Guidelines for speaking requests 6.28.18" to NAIJ via email, noting in the accompanying email that as of that date the Guidelines were in draft form, that the Agency did not anticipate major changes, and that the Agency intended to publish the Guidelines on its intranet page. To the best of my knowledge and belief, EOIR received no comments, questions, suggestions, or perceived issues from NAIJ.

18. Revised guidelines were posted to EOIR's intranet page in October 2018, and the links to the guidelines were sent to all EOIR personnel by the EOIR Director, James McHenry, on October 30, 2018, in the Director's Spotlight November 2018. (Exhs. B, C).

Executed on July 20, 2020

DANIEL SWANWICK

Digitally signed by DANIEL SWANWICK
Date: 2020.07.20 18:56:10 -04'00'

Daniel Swanwick
Executive Office for Immigration Review

Exhibit A

MEMORANDUM OF UNDERSTANDING
REGARDING EOIR'S SPEAKING ENGAGEMENT POLICY

This Memorandum of Understanding (MOU) between the Executive Office for Immigration Review (hereinafter Agency or EOIR) and the National Association of Immigration Judges (NAIJ) (collectively, the Parties) sets forth the agreement between the Agency and NAIJ regarding specific procedures and considerations related to the implementation of EOIR's Speaking Engagement Policy, as it applies to Immigration Judges.

THE PARTIES AGREE THAT:

(1) Pursuant to 5 C.F.R. § 2635.807(b)(3), in connection with an Immigration Judge's teaching, speaking, or writing, an Immigration Judge may use or permit the use of a general term of address that is ordinarily used to address Immigration Judges.

(2) The supervising ACIJ will strive to notify the Immigration Judge within one (1) business day after he or she has sent the request to the SET. Following receipt of a timely, complete request, the SET will strive to respond to the request within five (5) business days. If the decision will be issued outside of the five (5)-day window, the requestor will be notified, when feasible.

(3) An Immigration Judge who does not receive a response to a speaking engagement request, or who has other questions or concerns about the status of a request, should contact the Immigration Judge's supervising ACIJ. NAIJ will establish a single point of contact to act as a liaison with a designated Agency representative concerning Immigration Judge speaking engagement requests. Any concerns not addressed by the supervising ACIJ will be brought to the Agency's attention through the NAIJ liaison.

(4) When the Agency denies a request of an Immigration Judge to participate in a speaking engagement, the Agency will provide the Immigration Judge with a reason for a denial.

(5) An Immigration Judge whose request to participate in a speaking engagement is denied can seek reconsideration of the denial of the request to an official designated by the Agency by resubmission of the request through the ACIJ. The Agency will strive to make a decision on the reconsideration within ten (10) business days of receipt.

(6) By June 30, 2018, the Agency will provide to NAIJ a list of factors that the Agency considers in assessing Immigration Judge speaking engagement requests and/or representative examples of types of speaking engagements that fall into each speaking capacity.

(7) The Agency will not consider protected bases in determining whether to grant or deny a speaking request.

(8) Every six (6) months, the Agency will provide to NAIJ a summary of Immigration Judge speaking engagement requests received by the SET. For each request, this summary will include the date the request was submitted, the requestor's supervisor, a description of the event, the date of the event, whether the request was approved or denied, and in which speaking capacity.

(9) Whenever a model hearing program is conducted in a local court, if a local Immigration Judge is not approved to participate in the program, the Agency will:

a. Allow Immigration Judges to submit input on topics and practices in the locality of the court.

b. Upon request by the local NAIJ representative to the supervisory ACIJ, the Agency will provide to NAIJ any materials provided to the public.

(10) The Parties agree that the terms of this Memorandum of Understanding are binding on both parties. The Parties maintain any applicable rights and obligations under labor law.

FOR THE AGENCY:

KATHERINE REILLY
Digitally signed by KATHERINE REILLY
DN: c=US, o=U.S. Government, ou=Dept of Justice, ou=EOIR, cn=KATHERINE REILLY, 0.9.2342.19200300.100.1.1=15001002972756
Date: 2018.05.10 17:59:45 -04'00'

Katherine H. Reilly — Date
Deputy Director

DANIEL SWANWICK
Digitally signed by DANIEL SWANWICK
DN: c=US, o=U.S. Government, ou=Dept of Justice, ou=EOIR, cn=DANIEL SWANWICK, 0.9.2342.19200300.100.1.1=15001000520583
Date: 2018.05.11 07:41:35 -04'00'

Daniel L. Swanwick — Date
Counsel to the Deputy Director

FOR THE UNION:

Amiena Khan 5-10-2018.

Amiena Khan — Date
Executive Vice President, NAIJ

Exhibit B

EOIR Guide to Speaking Engagement Requests

Introduction

On September 1, 2017, EOIR issued a Speaking Engagement Policy to clarify the approval process that employees must follow before speaking at an event. This policy established EOIR's Speaking Engagement Team (SET), which reviews and approves speaking engagement requests, and provides guidance to speakers. A speaking engagement may involve presenting formal remarks, participating in a work-related panel discussion, lecturing about immigration at a college or law school, speaking with law students at the immigration court, or representing EOIR at a meeting in front of representatives from more than one organization.

The SET process helps EOIR leadership track requests; ensure consistent, clear, and correct communication of agency policies and practices; and mitigate any disruption to accomplishing the EOIR mission that participation in speaking engagements may otherwise cause.

The SET is comprised of staff from the Communications and Legislative Affairs Division (CLAD) and the Ethics Office. The SET communicates through the EOIRspeakers@usdoj.gov email account. In addition to SET review, all official capacity speaking engagement requests receive final approval from a management official within the Office of the Director (OOD).

About this Guide

This document is intended to provide insight for both requestors and their supervisors on how the SET and OOD review speaking requests. Before tentatively approving and forwarding a speaking request to the SET, the requestor's supervisor should consider whether such tentative approval is in conformance with the guidance herein. **Section One** outlines the criteria considered in determining whether the speaking engagement would be in official or personal capacity.

Section Two outlines the questions a supervisor should consider before tentatively approving an official capacity speaking engagement and submitting it to the SET. Note that submitting the Requestor's Checklist to the SET is no longer required.

Section Three contains instructions—a standard operating procedure—for submitting speaking requests to the SET. Note that employees **do not** need to submit a speaking request for participation in an event or meeting in which they are 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 or policies, unless the request falls into one of the exceptions outlined in this guidance.

Section One

An EOIR employee who speaks publicly about matters related to his or her duties at EOIR, EOIR policies and programs, or immigration law and policy, generally does so in his or her official capacity. The table below indicates some of the factors considered in determining the appropriate speaking capacity of the requestor.

Determining Official and Personal Capacity	
Official Capacity	**Personal Capacity**
The following factors indicate that the speaker will be in official capacity: The speaker was invited because of his or her position at EOIR. The topic of the event is immigration-related. The topic of the event relates to the speaker's professional duties. The event is associated with the Office of Legal Access Programs. The event is a naturalization ceremony. The audience is comprised of representatives who may appear before an immigration court. The event is a professional or legal training conference. The event is held at the court or other EOIR location. The event is a recruiting event for EOIR or DOJ employment, fellowship, or internship opportunities. The event is an immigration-related mock hearing program. The event is sponsored by a governmental organization or a party that appears before the court. The event involves guest speaking for a college or law school class.	*The following factors indicate that the speaker will be in personal capacity:* The speaker was not invited because of his or her position at EOIR. The topic is unrelated to immigration, the speaker's duties, or DOJ matters. The topic is only about personal experience, which may include the speaker's career path. The event is a moot court event unrelated to immigration. The request involves teaching a semester-long class at a law school or college.

The majority of SET requests should be for **official capacity** engagements. Official capacity means that the requestor is speaking on behalf of the agency and as part of the requestor's official duties. Personal capacity requests generally only require supervisory approval and do not need to be submitted to the SET, subject to the following exceptions, which do require SET review:

- Act as a moot court judge in a non-immigration-related proceeding.
- Teach a semester-long university or law school class on a topic related to the requestor's official duties at EOIR (e.g., immigration law for an immigration judge or employment law for an employee and labor relations attorney).
- Career day, alumni career event, or commencement event where the requestor will speak about his or her career path.
- The person or organization inviting the requestor to speak is a prohibited source as defined in 5 C.F.R. § 2635.203(d).

Personal capacity speaking events that occur during the requestor's normal work hours are subject to annual leave approval, in addition to general supervisory approval and SET review, if applicable.

Section Two

In reviewing an **official capacity** speaking request, the SET considers the following questions:

- Does the purpose of the event align with EOIR's mission?
- Will the requestor's message at the event advance EOIR's mission?
- Does the requestor have knowledge and flexibility to convey an EOIR-specific message?
- Does the setting and purpose of the event align with the expertise of the requestor?
- Is participation in the event logistically practical and cost-effective?

If the answer to any of these questions is "no," the requestor likely will not be approved to speak at the event. Additional considerations include whether the event is open to the public, including press, and whether other EOIR employees are already approved to speak at the same event.

In addition, the SET considers the following questions when reviewing a request on behalf of a **non-supervisory immigration judge** to speak in official capacity:

- Does this event occur during normal work hours?

- Will attendance at the event require the judge to miss court time or reset cases?
- Will the audience consist of representatives who may appear before the court?
- Will the event likely involve topics of immigration policy, ongoing litigation to which EOIR is a party, issues of interest to other DOJ components or other federal agencies, or other matters most appropriately addressed by EOIR management?

If the answer to any of these questions is "yes," the requestor likely will not be approved to speak at the event.

Section Three

Advance planning by requestors and supervisors is essential to an efficient SET review process. The steps for preparing and submitting a SET request follow:

1. Requestor proposes a potential speaking engagement to his or her supervisor.

   Using the guidance presented in Section One and the Speaking Engagement Policy, the requestor's supervisor should make an initial determination regarding the appropriate speaking capacity for the requestor.

   If the request is for an official capacity speaking event, the supervisor should consult Section Two of this guide. A request deemed unlikely to receive SET approval based on the criteria should be denied at the supervisor level and not be submitted to the SET.

2. Requestor completes the request form and sends it to supervisor. A separate form is required for each event and each speaker.

3. The SET review process begins when the supervisor of the requestor submits the form and supporting information, as specified below, to EOIRspeakers@usdoj.gov. The email submission must come from the requestor's supervisor. Please also copy EOIR.Ethics@usdoj.gov when submitting the request. Note that the SET will not begin reviewing the speaking request until each item listed below is complete.

   3.1. The subject line of the email must be formatted as follows:

   Supervisor's last name – requestor's last name – event date – event city

   Example: Berkeley – Barnes – 10/18/2018 – Houston

   3.2. The body of the email must include:

   - Recommendation for official or personal capacity.
   - Statement of supervisory approval for the speaking engagement.

- Brief summary of the request that includes the requestor's name, title, component name and location, speaking engagement location, name of event, event date and time, event purpose.
- If a public audience or the media is expected to attend the event, describe how the requestor is prepared, such as prior experience or training, to handle the event's circumstances.
- State the desired response date. Note that the desired response date and the speaking engagement date are likely different.
- Submit the request at least seven working days prior to the date you desire a SET response. SET understands this lead time may not always be possible, but please plan accordingly.

3.3. Attach talking points, an outline of planned remarks, and a syllabus (as applicable), in the email submission. For any speaking engagement, proposed remarks must avoid legal interpretation or advice, or general opinions, about immigration. SET realizes that a complete presentation may not be ready weeks in advance of a speaking event, but the requestor should be aware that a complete slide deck, speech, or sufficiently detailed talking points may be required for SET review prior to the event.

- Presentation slides must be on the EOIR PowerPoint template with correct formatting.
- All remarks must be consistent with current EOIR messaging. Review available materials (e.g. press releases, fact sheets, and congressional testimony) or contact CLAD via PAO.EOIR@usdoj.gov for the most recent information.

3.4. If available, attach supplementary information – such as the invitation to speak – or provide a link to the event website or sponsoring organization. Including such information will facilitate an efficient review of the request.

4. After SET review and OOD approval, the SET will provide a response to the requestor's supervisor. The supervisor should convey the response to the requestor as appropriate. If the request is denied, the SET will provide the general reason for the denial in the message to the supervisor.

Exhibit C

From: EOIR Director (EOIR)
To: All of EOIR
Subject: Director"s Spotlight November 2018
Date: Tuesday, October 30, 2018 2:37:08 PM

Good afternoon,

As part of our continuing effort to enhance communications within EOIR, I would like to share some updates from the past few weeks to keep you informed about the important work your colleagues are doing around the agency.

Three weeks ago, I visited the immigration court in Orlando. I was impressed by the leadership and organization at the court, and I appreciate the comments I received from the judges, support staff, and law clerks there. EOIR leadership will continue to visit additional courts in the coming months.

The Office of Policy's Legal Education and Research Services (LERS) Division, in coordination with the Office of the Chief Immigration Judge (OCIJ), hosted a legal training program for more than 100 judicial law clerks from October 16 through 18, bringing the JLC corps to 258. The program covered a wide array of substantive immigration law and procedure topics. LERS is currently in the midst of training 16 new immigration judges who arrived for training October 29. Their arrival causes our total immigration judge corps to surpass 400 for the first time in EOIR's history. This training program will run through November 16 and includes substantive immigration law and procedure, as well as practical case and courtroom exercises. Additionally, OCIJ hosted seven new court administrators at headquarters for a training class from October 22 to November 2.

LERS will also be sending guidance soon to all immigration judges and attorneys on completing the Department of Justice's annual attorney professionalism training requirement. Be on the lookout for an email from LERS that will identify your designated component representative and include additional information.

Under the direction of the Chief of Staff, EOIR continues to undertake significant hiring efforts nationwide. During the week of October 8, EOIR's hardworking human resources team posted job announcements for court administrator, legal assistant, and new support services specialist vacancies under the new court staffing model. In the past month, OCIJ has hired 8 new court administrators and 21 legal specialists. Additionally, OCIJ is currently reviewing applicants for recent immigration judge and assistant chief immigration judge postings, the Board of Immigration Appeals (BIA) is reviewing applicants for six Board Member positions, and OCAHO is reviewing applicants for three Administrative Law Judge positions.

The Office of Information Technology (OIT) continues to make progress with the pilot deployment of the EOIR Courts & Appeals System (ECAS). OIT recently completed a pilot in Baltimore and the next pilot is planned for York, Pennsylvania in November. The ECAS pilot program launched at the San Diego Immigration Court in July and then at the Denver and Atlanta courts in August. OIT has also coordinated ECAS training sessions for the BIA. To date, more than 5,000 attorneys have registered to participate in ECAS, more than 7,000 documents have been uploaded, 2,651 eROPs have been created, and 145 EOIR users have been trained. To learn more, please visit the ECAS intranet site.

In addition, OIT worked with a group of immigration judges to design a new interface for Judicial Tools to better support master calendar hearings. This interface will help judges move more quickly through each case. It received final approval from OCIJ in early October, and OIT plans to deploy the functionality to all pilot courts starting in December.

The agency will undoubtedly continue to receive questions and comments about its many initiatives. To assist all agency personnel in navigating requests for comments, updated guidance is now available to EOIR staff for submitting speaking engagement requests. The Speaking Engagement Team (SET) process helps leadership to promote consistent, clear, and correct communication of agency policies and practices. The new Guide to Speaking Engagement Requests is on the intranet at https://eoirnet/sites/eoir/Pages/AgencyCommPlan.aspx. The guide clarifies differences between official and personal capacity speaking engagements and contains instructions for submitting speaking requests to the SET.

As a reminder, Veterans Day is approaching, and everyone in EOIR leadership is sincerely grateful for the sacrifice and bravery of each and every one of our employees who are military veterans. The Diversity Program would like to honor all EOIR veterans again this year with a photo display on the EOIR Intranet. If you wish to participate in this photo montage, please contact Kim Wilkins or respond to the email sent on October 23. All photos need to be submitted to EOIR.Diversity.Program@usdoj.gov by November 2.

Finally, I wish everyone and their families participating in Halloween activities this week a safe and fun holiday.

Sincerely,

James McHenry
Director