20-1868

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

NATIONAL ASSOCIATION OF IMMIGRATION JUDGES, affiliated with the International Federation of Professional and Technical Engineers,

Plaintiff–Appellant

v.

JAMES R. MCHENRY, III, in his official capacity as Director of the Executive Office for Immigration Review,

Defendant–Appellee

On appeal from the United States District Court for the Eastern District of Virginia — No. 1:20-cv-00731-LO-JFA (O'Grady, J.)

JOINT APPENDIX

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APPEAL,STAYED

U.S. District Court
Eastern District of Virginia - (Alexandria)
CIVIL DOCKET FOR CASE #: 1:20-cv-00731-LO-JFA

National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers v. James R. McHenry, III, in his official capacity as Director of the Executive Office for Immigration Review
Assigned to: District Judge Liam O'Grady
Referred to: Magistrate Judge John F. Anderson
Case in other court: 4th CCA, case manager Michael Radday,, 20-01868
Cause: 28:2201 Constitutionality of State Statute(s)

Date Filed: 07/01/2020
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff

National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers

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Date Filed	#	Docket Text
07/01/2020	1	Complaint (Filing fee $ 400, receipt number 0422-7278084.), filed by National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers. (Attachments: # 1 Civil Cover Sheet Civil Cover Sheet)(Glasberg, Victor) (Entered: 07/01/2020)
07/01/2020	2	EXHIBIT *Attachment 1 to Complaint* by National Association of Immigration Judges,

		affiliated with the International Federation of Professional and Technical Engineers.. (Glasberg, Victor) (Entered: 07/01/2020)
07/01/2020	3	EXHIBIT *Attachment 2 to Complaint* by National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers.. (Glasberg, Victor) (Entered: 07/01/2020)
07/01/2020	4	EXHIBIT *Attachment 3 to Complaint (Parts 1 & 2)* by National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers.. (Attachments: # 1 Attachment 3 (Pages 5-7))(Glasberg, Victor) (Entered: 07/01/2020)
07/01/2020	5	Motion to appear Pro Hac Vice by Alexander Abraham Abdo and Certification of Local Counsel Victor M. Glasberg Filing fee $ 75, receipt number 0422-7278334. by National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers. (Glasberg, Victor) (Entered: 07/01/2020)
07/01/2020	6	Motion to appear Pro Hac Vice by Stephanie Clara Krent and Certification of Local Counsel Victor M. Glasberg Filing fee $ 75, receipt number 0422-7278351. by National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers. (Glasberg, Victor) (Entered: 07/01/2020)
07/01/2020	7	Motion to appear Pro Hac Vice by Ramya Krishnan and Certification of Local Counsel Victor M. Glasberg Filing fee $ 75, receipt number 0422-7278377. by National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers. (Glasberg, Victor) (Entered: 07/01/2020)
07/01/2020	8	Proposed Summons by National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers. (Glasberg, Victor) (Entered: 07/01/2020)
07/01/2020	9	MOTION for Preliminary Injunction by National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers. (Glasberg, Victor) (Entered: 07/01/2020)
07/01/2020	10	Memorandum in Support re 9 MOTION for Preliminary Injunction filed by National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers. (Glasberg, Victor) (Entered: 07/01/2020)
07/01/2020	11	Declaration re 9 MOTION for Preliminary Injunction , 10 Memorandum in Support *Declaration of Laura Lynch* by National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers. (Glasberg, Victor) (Entered: 07/01/2020)
07/01/2020	12	Declaration re 9 MOTION for Preliminary Injunction , 10 Memorandum in Support *Declaration of A. Ashley Tabaddor* by National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers. (Attachments: # 1 Exhibit Exhibit A, # 2 Exhibit Exhibit B, # 3 Exhibit Exhibit C, # 4 Exhibit Exhibit D, # 5 Exhibit Exhibit E, # 6 Exhibit Exhibit F, # 7 Exhibit Exhibit G, # 8 Exhibit Exhibit H, # 9 Exhibit Exhibit I, # 10 Exhibit Exhibit J, # 11 Exhibit Exhibit K, # 12 Exhibit Exhibit L, # 13 Exhibit Exhibit M)(Glasberg, Victor) (Entered:

		07/01/2020)
07/01/2020	13	NOTICE by National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers re 9 MOTION for Preliminary Injunction , 11 Declaration, 12 Declaration,, 10 Memorandum in Support *Notice of Intent to Set Hearing Date* (Glasberg, Victor) (Entered: 07/01/2020)
07/01/2020	14	NOTICE by National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers re 9 MOTION for Preliminary Injunction *Proposed Order* (Glasberg, Victor) (Entered: 07/01/2020)
07/01/2020	15	CERTIFICATE OF SERVICE by National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers re 9 MOTION for Preliminary Injunction , 13 NOTICE, 12 Declaration,, 14 NOTICE, 10 Memorandum in Support (Glasberg, Victor) (Entered: 07/01/2020)
07/01/2020		Initial Case Assignment to District Judge T. S. Ellis, III and Magistrate Judge John F. Anderson. (dvanm,) (Entered: 07/01/2020)
07/01/2020		Notice of Correction re 8 Proposed Summons. The filing user has been notified to file summons for the US Attorney and Attorney General. (dvanm,) (Entered: 07/01/2020)
07/01/2020	16	Proposed Summons *William Barr* by National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers. (Glasberg, Victor) (Entered: 07/01/2020)
07/01/2020	17	Proposed Summons *Civil Process Clerk, U.S. Attorney's Office* by National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers. (Glasberg, Victor) (Entered: 07/01/2020)
07/01/2020	18	Summons Issued as to James R. McHenry, III, in his official capacity as Director of the exeecutive Office for Immigration Review, U.S. Attorney and U.S. Attorney General NOTICE TO ATTORNEY: Print out two electronically issued summons and one copy of the attachments for each defendant to be served with the complaint. (Attachments: # 1 Notice)(dvanm,) (Entered: 07/01/2020)
07/01/2020	19	Notice of Hearing Date set for July 31, 2020 re 9 MOTION for Preliminary Injunction , 10 Memorandum in Support (Glasberg, Victor) (Entered: 07/01/2020)
07/01/2020		Case Reassigned to District Judge Liam O'Grady. District Judge T. S. Ellis, III no longer assigned to the case. (rban,) (Entered: 07/01/2020)
07/01/2020	20	CERTIFICATE of Service *Supplemental* re 9 MOTION for Preliminary Injunction , 11 Declaration, 19 Notice of Hearing Date, 13 NOTICE, 12 Declaration,, 14 NOTICE, 10 Memorandum in Support, 15 Certificate of Service, by Victor Michael Glasberg on behalf of National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers (Glasberg, Victor) (Entered: 07/01/2020)
07/06/2020		Set Deadlines as to 9 MOTION for Preliminary Injunction . Motion Hearing set for 7/31/2020 at 10:00 AM via **Teleconference**before District Judge Liam O'Grady. (clar,) (Entered: 07/06/2020)

07/08/2020	21	SUMMONS Returned Executed by National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers James R. McHenry, III, in his official capacity as Director of the exeecutive Office for Immigration Review served on 7/2/2020, answer due 8/31/2020 (Glasberg, Victor) Modified to correct answer due date on 7/9/2020 (dvanm,). (Entered: 07/08/2020)
07/08/2020	22	SUMMONS Returned Executed by National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers (Glasberg, Victor) (Entered: 07/08/2020)
07/08/2020	23	SUMMONS Returned Executed by National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers James R. McHenry, III, in his official capacity as Director of the exeecutive Office for Immigration Review served on 7/6/2020, answer due 8/31/2020 (Glasberg, Victor) Modified to correct answer due date on 7/9/2020 (dvanm,). (Entered: 07/08/2020)
07/09/2020	24	NOTICE of Appearance by Catherine M. Yang on behalf of James R. McHenry, III, in his official capacity as Director of the exeecutive Office for Immigration Review (Yang, Catherine) (Entered: 07/09/2020)
07/09/2020	25	Consent MOTION for Extension of Time to File Response/Reply as to 9 MOTION for Preliminary Injunction by James R. McHenry, III, in his official capacity as Director of the exeecutive Office for Immigration Review. (Attachments: # 1 Proposed Order) (Yang, Catherine) (Entered: 07/09/2020)
07/09/2020	26	ORDERED that Defendant's motion is GRANTED; and Defendant shall file his response to Plaintiff's motion for preliminary injunction by July 20, 2020. Signed by District Judge Liam O'Grady on 07/09/2020. (dvanm,) (Entered: 07/09/2020)
07/20/2020	27	Memorandum in Opposition re 9 MOTION for Preliminary Injunction filed by James R. McHenry, III. (Attachments: # 1 DEX 1, # 2 DEX 2, # 3 DEX 3, # 4 DEX 4, # 5 DEX 5)(Yang, Catherine) (Entered: 07/20/2020)
07/27/2020	28	Reply in Support re 9 Motion For A Preliminary Injunction filed by National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers. (Glasberg, Victor) Modified on 7/29/2020 (aott,). (Entered: 07/27/2020)
07/27/2020	29	Declaration *Supplemental Declaration of A. Ashley Tabaddor* by National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers. (Attachments: # 1 Exhibit Exhibit N, # 2 Exhibit Exhibit O) (Glasberg, Victor) (Entered: 07/27/2020)
07/31/2020	30	Minute Entry for proceedings held before District Judge Liam O'Grady:Motion Hearing held on 7/31/2020 re 9 MOTION for Preliminary Injunction filed by National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers. Plaintiff appeared through Victor Glasberg and Ramya Krishnan. Defendant appeared through Catherine Yang and Kevin Hancock. Counsel present arguments. Court takes matter under advisement. (Court Reporter S. Wallace.)(awac,) (Entered: 07/31/2020)

08/06/2020	31	ORDER denying 9 Motion for Preliminary Injunction. Signed by District Judge Liam O'Grady on 8/6/2020. (awac,) (Entered: 08/07/2020)
08/07/2020	32	NOTICE OF APPEAL by National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers. Filing fee $ 505, receipt number 0422-7341608. (Glasberg, Victor) (Entered: 08/07/2020)
08/10/2020	33	Transmission of Notice of Appeal to US Court of Appeals re 32 Notice of Appeal (All case opening forms, plus the transcript guidelines, may be obtained from the Fourth Circuit's website at www.ca4.uscourts.gov) (dvanm,) (Entered: 08/10/2020)
08/10/2020		Assembled INITIAL Electronic Record Transmitted to 4CCA re 32 Notice of Appeal (dvanm,) (Entered: 08/10/2020)
08/12/2020	34	USCA Case Number 20-1868 4th CCA, case manager Michael Radday, for 32 Notice of Appeal filed by National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers. (dvanm,) (Entered: 08/12/2020)
08/13/2020	35	MOTION to Stay *Consent Motion to Stay Proceedings Pending Appeal* by National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers. (Attachments: # 1 Certificate of Service, # 2 Proposed Order)(Glasberg, Victor) (Entered: 08/13/2020)
08/14/2020	36	Waiver of re 35 MOTION to Stay *Consent Motion to Stay Proceedings Pending Appeal Waiver of Hearing* by National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers (Glasberg, Victor) (Entered: 08/14/2020)
08/14/2020	37	ORDER granting 35 Motion to Stay. It is further ORDERED that the parties shall file a joint status report within fourteen days of the issuance of a mandate from the U.S. Court of Appeals for the Fourth Circuit. Signed by District Judge Liam O'Grady on 08/14/2020. (dvanm,) (Entered: 08/14/2020)
08/15/2020	38	TRANSCRIPT of proceedings for dates of 7-31-20, before Judge Liam O'Grady, re 34 USCA Case Number Court Reporter Scott Wallace, Telephone number 202-277-3739. **NOTICE RE REDACTION OF TRANCRIPTS:The parties have thirty(30) calendar days to file with the Court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript will be made remotely electronically available to the public without redaction after 90 calendar days. The policy is located on our website at www.vaed.uscourts.gov *Does this satisfy all appellate orders for this reporter? y* Transcript may be viewed at the court public terminal or purchased through the court reporter before the deadline for Release of Transcript Restriction. After that date, it may be obtained from the court reporter or through PACER. Redaction Request due 9/14/2020. Redacted Transcript Deadline set for 10/15/2020. Release of Transcript Restriction set for 11/13/2020.(wallace, scott) (Entered: 08/15/2020)**

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Complaint (ECF 1), filed July 1, 2020

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISON

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,

Serve:
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Director
Executive Office for Immigration Review
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William P. Barr
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Defendant.

Civil Action No. 20-cv-731

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Introduction

1. This lawsuit challenges a policy of the Executive Office for Immigration Review ("EOIR") that imposes an unconstitutional prior restraint on immigration judges who wish to speak or write publicly in their personal capacities. The policy applies regardless of what immigration judges plan to speak about, their intended audience, or the forum in which they wish to share their views. Judges who violate the policy face a range of disciplinary sanctions, including reprimand, suspension, and even removal from the federal service.

2. For years, EOIR permitted immigration judges to speak in their personal capacities on issues relating to immigration, so long as they provided a disclaimer that they were not speaking on behalf of the agency. Judges often spoke at schools, universities, and bar associations about the immigration courts and their function within them. Their efforts educated the public about the immigration courts and made the immigration system more transparent.

3. In recent years, however, the agency has taken steps that have strictly limited the ability of immigration judges to speak publicly in their personal capacities. On September 1, 2017, EOIR's Director issued a policy that imposed a preapproval requirement on all judges who wish to speak at public events in their personal capacities (the "2017 Policy"). On January 17, 2020, the Director replaced this policy with a still more restrictive one (the "2020 Policy"). Under this new policy, which remains in force today, immigration judges are categorically prohibited from speaking in their personal capacities about immigration law or policy or about EOIR programs or policies. On all other topics, immigration judges may speak publicly only if they obtain EOIR's prior approval. These new restrictions apply to all public speaking and writing as well as to communications with members of the news media.

4. EOIR issued the 2020 Policy at a time of intense scrutiny of the nation's immigration system. President Trump made immigration a signature issue of his presidential campaign, and his administration has made sweeping changes to the immigration court system. For example, the Justice Department has instituted case completion quotas for immigration judges, restricted the ability of immigration judges to close cases administratively or grant continuances, and reassigned judges from their home dockets to prioritize the disposition of cases involving migrants who apply for asylum from Mexico. There is significant public interest in these changes and in their effects on the independence of immigration judges and the process afforded migrants who appear before them. Immigration judges are uniquely positioned to inform the public on these issues, but the 2020 Policy prevents them from doing so.

5. In recent months, immigration judges have also been prevented from commenting on the impact of the COVID-19 pandemic on the immigration courts and detained immigrants. Despite repeated calls that they be temporarily closed, nearly all of the nation's sixty-nine immigration courts and adjudication centers have remained open for proceedings involving detained immigrants. EOIR recently announced its intention to resume hearings for non-detained immigrants and to suspend interim rules allowing for the filing of certain court documents via email. These changes have already had, and will continue to have, profound implications for public health, but few immigration judges have felt free to speak out. As officers of the National Association of Immigration Judges ("NAIJ"), a handful of immigration judges have been able to speak out in their capacities as union representatives, given federal labor-law protections for union speech about employee working conditions. But hundreds more remain silenced.

6. The 2020 Policy imposes a prior restraint in violation of the First Amendment. As the Supreme Court has repeatedly held, people do not surrender their free-speech rights when they

accept government employment. They retain their rights, as citizens, to speak on matters of public importance, and the government can silence them only if it can show that its interest in doing so outweighs the employees' interests in speaking and the public's interest in hearing what they have to say.

7. The government cannot satisfy this test here. The interests of immigration judges in engaging in the speech restrained by the Policy is substantial, and so is the public's interest in hearing it. There is an ongoing national debate about the wisdom and fairness of recent changes to immigration laws and policies and about the effect of those changes on the immigration court system. Immigration judges have unique insights to contribute to this discussion. While EOIR has a legitimate interest in promoting the efficiency of the services it performs through its employees, the 2020 Policy is not appropriately tailored to that interest. It imposes a sweeping prohibition on personal-capacity speech about immigration or the agency itself, as well as an onerous preapproval process on all other personal-capacity speech. These restrictions apply even where the speech in question could not reasonably be expected to disrupt EOIR's operations. Moreover, the agency's preapproval requirement lacks the procedural safeguards generally required of prior restraints. For example, it does not include criteria that would appropriately cabin the discretion of EOIR officials or a definite time limit for decision.

8. NAIJ is a non-partisan, non-profit, voluntary association of immigration judges and the recognized representative of all non-managerial immigration judges for the purposes of collective bargaining. NAIJ brings this challenge on behalf of its members, who were injured by the 2017 Policy and continue to be injured by the 2020 one. Numerous members of NAIJ have been denied approval to speak about immigration-related topics in their personal capacities. Some have failed to receive a timely decision or any decision whatsoever. Still others have been chilled

from even submitting requests to participate in speaking engagements. NAIJ respectfully requests that the Court declare that the 2020 Policy is unlawful and enjoin the government from enforcing it.[1] Unless the Policy is enjoined, it will continue to prevent immigration judges from speaking publicly in their personal capacities about matters of immense public concern.

Jurisdiction and Venue

9. This Court has jurisdiction over Plaintiff's claims pursuant to 28 U.S.C. § 1331 and the U.S. Constitution.

10. This Court has authority to issue declaratory and injunctive relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202, and this Court's inherent equitable jurisdiction. The Court also has authority to award costs and attorneys' fees pursuant to 28 U.S.C. § 2412.

11. Venue is proper in this Court under 28 U.S.C. § 1391(b)(2) and (e)(1). A substantial part of the events giving rise to this claim occurred in this district, and the Defendant is an officer of the United States sued in his official capacity.

Parties

12. Plaintiff NAIJ is a labor organization that represents all immigration judges employed by EOIR throughout the United States and its territories. NAIJ is affiliated with the International Federation of Professional and Technical Engineers. In 1979, NAIJ was designated as the collective bargaining representative for all non-managerial immigration judges. As of the date of filing, there are approximately 460 immigration judges located in sixty-seven immigration courts and two adjudication centers. NAIJ's mission is to promote the independence of immigration judges and to enhance the professionalism, dignity, and efficiency of the nation's

[1] NAIJ's understanding is that the 2020 Policy supersedes the 2017 Policy and that the 2017 Policy is no longer operative. To the extent that the 2017 Policy remains operative, NAIJ challenges its constitutionality as well.

immigration courts. To accomplish its goals, NAIJ officers conduct public education campaigns, provide testimony at Congressional oversight hearings, represent immigration judges in disciplinary hearings, and file formal and informal grievances with EOIR. These officers have been permitted to do these things without seeking EOIR's prior approval because NAIJ is a union and federal labor law protects a union's right to present its views to "appropriate authorities," including Congress and the press. 5 U.S.C. § 7102.[2] NAIJ represents the interests of immigration judges with respect to EOIR's speaking engagement policies. As discussed further below, in 2018, NAIJ negotiated a memorandum of understanding with EOIR that addressed the application of those policies to immigration judges. Immigration judges have also contacted NAIJ officers for assistance when their speaking engagement requests have gone unanswered or when they have received denials they consider unfair.

13. Defendant James R. McHenry III is the Director of EOIR. EOIR is an agency of the federal government within the Department of Justice and is located in Falls Church, Virginia. Defendant McHenry has authority over all EOIR policies and practices, including those challenged here. Plaintiff sues him in his official capacity only.

Facts

I. Immigration Judges and the Immigration Court System

14. Immigration judges are judicial officers that exercise the authority of the U.S. Attorney General. Their primary responsibility is to serve as neutral and impartial arbiters in the immigration court system. They are also active members of the legal and civic communities, and have for many years contributed to public understanding of immigration law and policy through

[2] In August 2019, the Department of Justice filed a petition to decertify NAIJ as a union. If that petition is successful, NAIJ officers will no longer qualify for this statutory protection.

speaking engagements, including at the invitation of bar associations, schools, universities, and other institutions.

15. As Immigration Judge A. Ashley Tabaddor, the president of NAIJ, has testified to the Senate, these two roles are closely related. When immigration judges are active in their communities, they "help the community better understand . . . Immigration Courts and their function in the community, helping to demystify the system and bring transparency." And "[p]ublic access and understanding of what courts do is essential to build the understanding and trust needed for the [immigration] judicial system to function smoothly."

16. Interest in the immigration court system has grown in recent years, particularly as President Trump has made immigration enforcement a signature issue of his administration. At the direction or encouragement of the President, the Justice Department has introduced a series of changes to the immigration court system. For example, the Attorney General has subjected immigration judges to case completion quotas and other performance benchmarks; limited their ability to close cases administratively and grant continuances; given EOIR's Director the authority to overrule their decisions; issued hiring policies that give political appointees greater influence in the selection of new judges; and required certain judges to conduct hearings via videoconference at temporary tent facilities along the U.S.–Mexico border as part of the Trump Administration's "Remain in Mexico" program. The Justice Department has justified many of these changes as necessary to address the backlog in the nations' immigration courts; as of December 2019, the number of pending cases topped one million.

17. These changes have received considerable congressional and news attention. In January 2020, the House Subcommittee on Immigration and Citizenship held a public hearing on the impact of the changes on "judicial independence and due process in U.S. immigration courts."

The hearing followed extensive news and media interest in the state of the courts. For example, the *Associated Press* visited almost a dozen immigration courts in the fall of 2019 and reported "nonstop chaos." Journalists observed that "[f]requent changes in the law and rules for how judges manage their docket make it impossible to know what the future holds when immigrants finally have their day in court." A story published in the *Wall Street Journal* reported concerns that "the unique conditions of tent courts deny migrants due process by depriving them of meaningful access to lawyers or interaction with judges, making the set up essentially a rubber stamp for deportation." And a story published by the *Guardian* reported that although the tent court it visited in Brownsville, and others in Laredo, "are now technically open to the public, their operations remain shrouded in opacity."

18. In the midst of the current pandemic, interest in the immigration courts has also focused on how they should address the risk of COVID-19 transmission. While much of the country has observed strict social-distancing policies to reduce the spread of the novel coronavirus, most immigration courts remain open for hearings, at least for those involving detained migrants. There is continuing public concern about the safety of detained migrants, and of the immigration judges, attorneys, and court staff who must attend court to ensure their cases move forward. For example, NAIJ, the American Federation of Government Employees (which represents immigration prosecutors), and the American Immigration Lawyers Association have repeatedly called on EOIR to order the emergency closure of all immigration courts, as have members of Congress. As recently as June 23, 2020, senators wrote to EOIR's Director expressing concern about EOIR's decision to resume hearings involving non-detained migrants at several immigration courts across the country. As the senators explained, that decision "could affect the health of all people in the courts, as well as the fairness of the proceedings in those cases."

II. History of EOIR's Policies on Public Speaking and Writing

19. Prior to 2017, immigration judges routinely spoke at local and national conferences, guest lectured at universities and law schools, and participated in immigration-law trainings—all in their personal capacities. While approval was required, immigration judges routinely received that approval. Judges would submit a request to their supervising Assistant Chief Immigration Judge ("ACIJ"). If the ACIJ approved the request, they would forward it to EOIR's Ethics office, which would then offer ethics guidance. Judges were generally permitted to use their official titles to identify themselves in connection with their speaking or writing, so long as they also included a disclaimer stating that the views presented were their own and not those of EOIR. EOIR described this kind of speech as "personal capacity with use of title and disclaimer" or "PTD."

20. EOIR's 2017 Policy, however, strictly limited the ability of judges to speak at public events in their personal capacities, with or without a disclaimer. EOIR's 2020 Policy goes even further. The policy prohibits judges from publicly speaking or writing in their personal capacities about immigration and EOIR, and requires them to seek agency approval before publicly speaking or writing about any other matter of public concern. While the 2020 Policy appears to supersede the 2017 Policy, the 2020 Policy does not state this clearly, and in fact purports to reissue the 2017 one.

A. The 2017 Policy

21. On September 1, 2017, the Director of EOIR issued a memorandum titled "Speaking Engagement Policy for EOIR Employees" (the "2017 Policy"), which prohibited Deputy Chief Immigration Judges ("DCIJs") and ACIJs from participating in speaking engagements in their personal capacities, and which required all other immigration judges to

receive approval before doing so.[3] The preapproval requirement applied regardless of whether an immigration judge intended to speak on topics related to immigration. Under the policy, immigration judges who wished to speak in their personal capacity were required to submit a request to their supervisor, who decided whether a speaking engagement would be undertaken in the judge's personal capacity (as defined by the policy) and whether to approve the request. Immigration judges who planned to speak on immigration-related topics or whose requests were reclassified as official capacity then had to seek approval from the Office of General Counsel and the Office of Communications and Legislative Affairs through a centralized "speaking engagement team" known as the "SET." The only judges exempted from this process were officers of NAIJ who under federal labor law are guaranteed the ability to engage in union speech related to working conditions.

22. The 2017 Policy applied to requests "to speak at an event." Although the policy itself did not define the term "event," EOIR seemed to define it broadly. An email sent by EOIR's Director on September 13, 2017 observed that a "good metric" for whether a "speaking engagement" required review was "whether you will be speaking with more than one non-DOJ person about EOIR" or at an event for which "a group external to DOJ is sending out notice of the event." The email also stated that "any phone calls, emails, or visits from the news media or Congress should be directed to [the Office of Communications and Legislation Affairs]." Subsequent EOIR communications confirmed the agency's position that the policy applied to any contact with the press.

23. Although the 2017 Policy included criteria for determining whether a speaking engagement was in an employee's official or personal capacity, the criteria were contradictory.

[3] A true and correct copy of the 2017 Policy is attached hereto as Attachment 1.

The policy stated that a speaking engagement would be in an employee's official capacity when they were "assigned to participate . . . or otherwise present information on behalf of the agency," and that the speaking engagement would be in an employee's personal capacity "when they are not appearing at an event as part of their official duties or on behalf of the agency." An attachment to the 2017 Policy, however, gave examples for which the determination of speaking-engagement capacity turned not on the capacity in which an employee would speak, but rather on the nature of the event they planned to attend. For example, the attachment provided that EOIR employees could speak at national and regional conferences only in their official capacities, effectively banning employees from speaking in their personal capacities at such events.

24. The 2017 Policy did not specify objective criteria that would cabin the discretion of the officials who ruled on speaking-engagement requests. Under the terms of the policy, those officials could approve or deny speaking-engagement requests for any reason or no reason at all. Nor did the policy include deadlines for decision.

B. The 2018 Memorandum of Understanding Between NAIJ and EOIR

25. After the 2017 Policy was issued, NAIJ entered into negotiations with EOIR to clarify the specific procedures and considerations that would apply to immigration judges seeking preapproval to speak publicly. In May 2018, NAIJ and EOIR executed a memorandum of understanding (the "2018 MOU") which remains in effect.[4] The 2018 MOU was intended to offer immigration judges greater certainty regarding the preapproval process. It has failed, however, to do so.

26. The 2018 MOU imposes nonbinding time limits for some steps in the preapproval process. It does not impose any time limit (even an aspirational one) for decisions by supervisors,

[4] A true and correct copy of the 2018 MOU is attached hereto as Attachment 2.

but it does require supervisors to "strive to" notify immigration judges within one day of approving a request and forwarding it to the centralized speaking engagement team. The MOU requires the speaking engagement team to then "strive to" respond to the request within five days. If the speaking engagement team expects its review to take longer than five days, it must notify the requesting judge "when feasible."

27. The 2018 MOU requires EOIR to provide immigration judges with reasons for denials of requests. The MOU also requires EOIR to provide NAIJ with "a summary of Immigration Judge speaking engagement requests received by the [speaking engagement team]" every six months. The MOU provides that, for each request, the summary should 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 [the requestor's] speaking capacity."

28. The 2018 MOU also stated that, by June 30, 2018, EOIR would provide NAIJ "a list of factors that [EOIR] considers in assessing Immigration Judge speaking engagement requests and/or representative examples of types of speaking engagement requests that fall into each speaking capacity."

29. On June 28, 2018, EOIR sent NAIJ a draft "Guide to Speaking Engagement Requests," which included guidance related to speaking requests made by EOIR employees. Although EOIR informed NAIJ that the guide would soon be finalized and published to EOIR's intranet so that all employees (including immigration judges) could access it, neither a draft nor a final version of the document is available on the intranet.

30. While EOIR has so far produced the biannual summary reports required by the MOU, it has routinely failed to meet the MOU's nonbinding time limit for speaking-engagement-team review. For example, on April 24, 2018, an immigration judge submitted a request to

participate in a Practicing Law Institute panel in her personal capacity. Hearing no response from the speaking engagement team, she resubmitted the request on May 14, 2018. An NAIJ representative contacted EOIR on the judge's behalf two weeks later. On June 19, the judge submitted the request for the third time, and finally, on June 22, 2018, the speaking engagement team acknowledged that it had received the request. One month later, and just three days before the panel was supposed to occur, the judge's request was denied. On February 6, 2019, another immigration judge sought permission to speak to a seventh-grade class about asylum on March 8, 2019. His ACIJ approved the request that day and forwarded it to the speaking engagement team. Hearing no response, on February 25, 2019, the judge followed up and learned that the request was still pending with the centralized speaking engagement team. He followed up again on March 6, and learned that the speaking engagement team was planning to deny the request. He cancelled the middle school visit but never received a final decision. The following month, he reached out to a member of the speaking engagement team, hoping that if he learned the reason for its denial, he could modify the presentation and reschedule the visit. To date, the judge has never heard back.

31. Indeed, although EOIR is required to provide immigration judges with reasons for denials, in many instances it has not done so. As a result, immigration judges often do not learn the reasons why their requests have been denied, as in the instances above.

C. The 2020 Policy

32. On December 6, 2019, the Knight First Amendment Institute at Columbia University (the "Knight Institute") received a copy of the 2017 Policy in response to a Freedom of Information Act request. On January 6, 2020, the Knight Institute wrote an open letter to EOIR's Director urging him to suspend the 2017 Policy. The Institute explained that the policy violated EOIR employees' First Amendment right to speak in their personal capacities on matters of public concern and the public's First Amendment right to hear them.

33. EOIR did not respond to the Knight Institute's letter. On January 17, 2020, however, EOIR's Director issued a memorandum titled "Submission and Processing of Requests for Speaking Engagements" (the "2020 Policy").[5] The stated purpose of the 2020 Policy is "[t]o announce the establishment of a new automated speaking engagement request portal and to restate EOIR's established policy on speaking engagements." Although the 2020 Policy purports to "reissu[e]" without "substantively alter[ing]" the 2017 Policy, it is significantly more restrictive than its predecessor in several important ways.

34. First, the 2020 Policy extends to written publications, and not just to public speaking. While the 2017 Policy defined "speaking engagement" as "speak[ing] at an event," the 2020 Policy defines it to include "written pieces intended for publication." As with the 2017 Policy, the 2020 Policy does not expressly state that it applies to press contacts, but EOIR continues to require immigration judges to seek preapproval before media interviews.

35. Second, the 2020 Policy prohibits immigration judges from publicly speaking or writing in their personal capacities about immigration or EOIR. It does this by dramatically expanding EOIR's definition of "official capacity" speaking engagements. The 2020 Policy provides that a speaking engagement is in an employee's official capacity for purposes of the policy whenever it "relate[s] to immigration law or policy issues, the employee's official EOIR duties or position, or any agency programs and policies," or when the employee "has been invited [to speak] because of the[ir] official duties or position." The policy thus bars immigration judges from speaking in their personal capacities about any topic related to immigration law or policy or EOIR—regardless of who invited them to speak, the forum, and whether they intend to use their title.

[5] A true and correct copy of the 2020 Policy is attached hereto as Attachment 3.

36. Third, the 2020 Policy institutes additional layers of review and, therefore, creates further opportunities for delay. Under the 2017 Policy, immigration judges were required to seek supervisory approval for all speaking engagements, and to seek higher-level approval for official-capacity speaking engagements and personal-capacity speaking engagements related to immigration. By contrast, the 2020 Policy subjects all requests—regardless of speaking capacity or content—to four levels of review. Judges must initially seek approval from their supervisor. If the supervisor approves, the request is forwarded to the centralized speaking engagement team, which under the 2020 Policy consists of representatives from the Office of Policy, the Office of the General Counsel, and the Office of the Director. While that review is ongoing, the request is also reviewed by the EOIR's Ethics Program, a team that does not approve or reject requests but instead "offers guidance to ensure that speakers do not experience an ethical dilemma." If the speaking engagement team approves the request, their recommendation—along with any guidance from the Ethics Program—is sent back to the supervisor, who makes the final decision about whether the judge can speak or write. In cases involving speeches, written pieces, or other prepared material, the supervisor may condition approval on making certain changes.

37. In all other respects, the 2020 Policy is similar to the 2017 one. The 2020 Policy requires immigration judges to obtain preapproval for all public speaking, including communications with the press, unless they are officers of NAIJ and plan to engage in union speech related to employee working conditions. The policy does not include narrow, objective, and definite criteria for deciding whether to approve personal-capacity speaking requests. For example, the policy provides that personal-capacity requests will be denied unless they are "genuinely personal capacity," but, as explained above, EOIR's policy is that all speech relating to immigration or the agency is official capacity. The policy also provides that personal-capacity

requests are reviewed for compliance with "applicable law and agency policies" and "consistency in EOIR's communications." In addition, the policy does not include a definite deadline for decision. The policy states that it does not "alter, or purport to alter," the 2018 MOU, and so it leaves in place the MOU's aspirational time limits for speaking-engagement-team review.

III. Harms to Immigration Judges and the Public

38. Recent changes to immigration law and policy, the state of the immigration court system, and the role of immigration judges are all of immense public interest. After the 2017 Policy went into effect, however, immigration judges were routinely denied permission to speak publicly in their personal capacities about immigration and many were chilled from even seeking permission to do so. The 2020 Policy goes even further—it flat out prohibits immigration judges from speaking or writing publicly in their personal capacities about immigration or EOIR. This denies the public their unique insights into matters of urgent and ongoing public debate.

A. Immigration Judges Have Been Prevented from Speaking about Matters of Public Concern in their Personal Capacities

39. As explained above, immigration judges often spoke at local and national conferences, guest lectured at universities and law schools, and participated in immigration-law trainings before 2017. While they were required to seek supervisory approval, they generally got it. After the 2017 Policy went into effect, however, immigration judges who wished to speak about immigration were required to seek two levels of approval rather than one, and those who sought approval often did not get it or else failed to receive a timely decision.

40. Requests relating to speaking engagements that immigration judges had undertaken for years in their personal capacities were suddenly denied. For example, in March 2018, an immigration judge submitted a request to speak at the immigration law clinic at his alma mater, something he had done annually, with EOIR's approval, since the clinic's inception. In an email

forwarding the request to the speaking engagement team, the judge's supervisor described him as "an outstanding candidate to conduct the speaking engagement." The team denied the immigration judge's request, eventually explaining that "[b]ecause your topic concerned immigration court matters, and you were invited to speak because of your position as an immigration judge, personal capacity is not allowable." According to them, speaking engagements related to immigration were official capacity and had to be handled by EOIR "management officials" to ensure consistency in the agency's messaging: "[I]mmigration is always a topic of great interest and debate, and many employees are understandably unprepared to present the Department's official view when presented with thorny questions and topics." By contrast, "[m]anagement officials, as part of their official duties, are routinely briefed on ongoing litigation and the Department's position on sensitive topics."

41. EOIR repeatedly confirmed that position in rejecting requests by immigration judges to speak in their personal capacities about immigration. For example, in April 2018, the speaking engagement team denied an immigration judge's request to speak to a Harvard Law School class "due to the nature of the topic (asylum claims involving children)."

42. That same month, a different immigration judge submitted a request to participate in her personal capacity on a Practicing Law Institute panel on immigration and recent developments in asylum law. Months later, and only three days before the panel was scheduled to take place, the speaking engagement team rejected her request because "the nature of the event calls for official capacity and supervisory immigration judges should represent EOIR at events such as this one." EOIR rejected the request even though the judge had participated in her personal capacity on the same panel the previous year.

43. In September 2019, another immigration judge sought approval to speak in her personal capacity to an immigration class at her former law school via Skype. Her supervisor approved the request. One day before she was scheduled to attend class, however, the speaking engagement team denied the request, explaining that the topic was "too closely related to [the judge's] official duties to permit participation in her personal capacity." The team also explained that appearing in an official capacity was not appropriate because it was not clear "[the judge's] participation would advance [EOIR]'s interests."

44. In other cases, EOIR delayed its decision or failed to provide one, effectively denying the request to speak. For example, as described above, in February 2019, an immigration judge asked for permission to speak in a personal capacity to a seventh-grade class about immigration and asylum law. Although he received supervisory approval, he did not receive a response from the speaking engagement team for a full month. Finally, two days before the event, the judge's supervisor told him informally that the team was planning to deny the request. The judge cancelled the visit, but the speaking engagement team never sent a formal denial or explained its decision. The judge followed up in April, and again in May, explaining that he was "still hopeful to do the talk, even if it means changing my presentation to address whatever concerns exist." To date, the judge has not received a response.

45. Although EOIR sometimes granted approval to speak in a personal capacity about immigration-related issues, its approach was seemingly inconsistent and arbitrary. For example, EOIR approved a May 2018 request from an immigration judge who wished to speak about immigration and removal proceedings before the Missouri Catholic Conference, but in February 2019 it denied a request to speak about immigration at a synagogue. EOIR approved an October

2018 request to participate in a moot court at Tulane Law School, but denied a September 2018 request to preside over a mock removal hearing at Columbia Law school.

46. For those reasons, even before the 2020 Policy was enacted, many immigration judges came to believe that it was futile to submit requests to speak publicly about immigration in their personal capacities. Under the 2020 Policy, immigration judges are simply prohibited from speaking or writing publicly in their personal capacities about issues related to immigration law or policy or EOIR's policies and programs. The only avenue for judges to speak publicly about immigration or EOIR is to do so in their official capacities, but those who speak in their official capacities are constrained to recite the agency's talking points.

47. EOIR has warned judges that failure to comply with its speaking-engagement policies may result in disciplinary action, including reprimand, suspension, and even removal from the federal service. In trainings, EOIR emphasizes that judges must seek approval before speaking to any kind of group, in any forum, on any topic. Further, EOIR tracks compliance with this requirement. For example, one judge was emailed by an EOIR official after the official found a conference schedule that announced the judge's participation in a panel; the official told the judge that she was required to submit a request for preapproval.

B. The Public Has Been Denied the Opportunity to Hear from Immigration Judges Who Would Have Otherwise Spoken in their Personal Capacities

48. There is an important public debate about recent changes to immigration law and policy and their effects on immigration courts and the migrants who appear before them. Many immigration judges wish to contribute to this debate, but the public has been deprived of their unique insights. Professional associations, law school clinics, and other organizations that used to routinely host immigration judges at their events are generally no longer able to do so. Many recognize the futility of inviting judges who are not representatives of NAIJ. Others have stopped

inviting immigration judges to speak altogether. The effect is to deny the public access to insights about how recent changes to immigration law and policy are working in practice, and to create the perception that EOIR employees uniformly support the administration's policies.

49. In October 2019, four clinical legal professors wrote an article in *Slate* describing the impact of the 2017 Policy on their ability to get immigration judges to speak to their students. The professors—Laila L. Hlass of Tulane Law School, Elora Mukherjee of Columbia Law School, Carrie L. Rosenbaum of the Golden Gate University School of Law, and Maureen Sweeney of the University of Maryland Francis King Carey School of Law—noted that in past years judges had routinely visited their classes to speak about immigration law and policy, but that recently things had changed:

> [A]lmost all have declined [invitations]. They've told us they can't speak with our classes even on their days off, even in their personal capacities, without prior clearance and approval from high-level supervisors—approval that is increasingly difficult to obtain.

50. Advocacy and professional organizations that once hosted immigration judges at events have also been affected. For example, organizations like the Federal Bar Association, the American Immigration Lawyers Association ("AILA"), the Practicing Law Institute, and Human Rights First report no longer being able to rely on the expertise of immigration judges at their events or trainings. Some of these organizations have simply given up on inviting active immigration judges, and have instead turned to retired ones.

51. AILA and its thirty-nine local chapters routinely hold a range of events, including conferences and continuing legal education classes. Many of these events are open to the public. In past years, immigration judges frequently spoke at these events. Since EOIR issued the 2017 Policy, however, immigration judges have generally declined requests to attend. Many chapters have simply stopped extending invitations.

52. The experience of AILA's South Florida chapter is illustrative. Prior to 2017, immigration judges met with members of the community at chapter events at least four or five times a year—judges sat on panels at the chapter's annual conference, participated in the chapter's monthly CLE training events for its members, and joined pro bono training programs for corporate attorneys. But in 2017, immigration judges began rejecting invitations or else stopped responding to them altogether. Immigration judges have not attended any chapter events since 2017.

53. In an effort to fill the void left by active immigration judges, AILA and some of its local chapters have relied on retired immigration judges to participate in educational conferences and other events. In April 2020, for example, AILA organized an online panel discussion on recent developments in immigration litigation. The staff member responsible for the event had hoped to invite active immigration judges but, believing that extending an invitation would be futile, she invited only retired judges.

54. News reports about issues relating to immigration courts similarly include only the perspectives of retired immigration judges, immigration judges who can speak by virtue of their union positions, or immigration judges representing the official positions of EOIR. Active immigration judges who may have different perspectives cannot speak to members of the press. Even in the midst of the COVID-19 crisis, immigration judges cannot conduct press interviews about their personal experiences. Some judges have expressed their views to NAIJ officers, but have declined to speak publicly for fear of retaliation.

First Cause of Action

55. The 2020 Policy violates the First Amendment because it imposes a system of prior restraint on the speech of immigration judges, because it is not appropriately tailored to any legitimate government interest, and because it fails to include adequate procedural safeguards.

Second Cause of Action

56. To the extent it remains operative, the 2017 Policy also violates the First Amendment because it imposes a system of prior restraint on the speech of immigration judges, because it is not appropriately tailored to any legitimate government interest, and because it fails to include adequate procedural safeguards.

Third Cause of Action

57. The 2020 Policy is void for vagueness under the First and Fifth Amendments because it invites arbitrary and discriminatory enforcement, and because it fails to give immigration judges fair notice of what standards will be applied in reviewing their requests for preapproval.

Fourth Cause of Action

58. To the extent it remains operative, the 2017 Policy is also void for vagueness under the First and Fifth Amendments because it invites arbitrary and discriminatory enforcement, and because it fails to give immigration judges fair notice of what standards will be applied in reviewing their requests for preapproval.

Prayer for Relief

Plaintiff respectfully requests that this Court:

1. Declare that the 2020 Policy violates the First and Fifth Amendments to the Constitution;

2. To the extent the 2017 Policy remains operative, declare that the 2017 Policy violates the First and Fifth Amendments to the Constitution;

3. Enjoin Defendant and his officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the injunction, from continuing to enforce the 2020 Policy;

4. To the extent the 2017 Policy remains operative, enjoin Defendant and his officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the injunction, from continuing to enforce the 2017 Policy;

5. Award Plaintiff its reasonable costs and attorneys' fees in this action; and

6. Grant Plaintiff such other relief as this Court may deem just and proper.

Dated: July 1, 2020

Respectfully submitted,

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**pro hac vice* application forthcoming

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Attachment 1 to Complaint (ECF 2), filed July 1, 2020

ATTACHMENT 1

U.S. Department of Justice

Executive Office for Immigration Review

Office of the Director

5107 Leesburg Pike, Suite 2600
Falls Church, Virginia 22041

Director

September 1, 2017

MEMORANDUM TO: All of EOIR

FROM: James R. McHenry III
Acting Director

SUBJECT: Speaking Engagement Policy for EOIR Employees

Introduction

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

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

Approval Process

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

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

I. Speaking in an Official Capacity

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

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

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

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

II. Speaking in a Personal Capacity

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

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

[2] 5 C.F.R. § 2635.203(d).

[3] 18 U.S.C. § 209.

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

Conclusion

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

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

Attachment A

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

Official Capacity

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

Personal Capacity

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

Attachment 2 to Complaint (ECF 3),

filed July 1, 2020

ATTACHMENT 2

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 H. Reilly
Deputy Director

Date

Daniel L. Swanwick
Counsel to the Deputy Director

Date

FOR THE UNION:

Amiena Khan
Executive Vice President, NAIJ

5-10-2018.
Date

Attachment 3 to Complaint (ECF 4), filed July 1, 2020

ATTACHMENT 3

OOD

Effective: January 2020

SUBMISSION AND PROCESSING OF REQUESTS FOR SPEAKING ENGAGEMENTS

PURPOSE:	To announce the establishment of a new automated speaking engagement request portal and to restate EOIR's established policy on speaking engagements and the procedures employees must follow when requesting approval to speak at outside engagements
OWNER:	Office of the Director
AUTHORITY:	18 U.S.C. § 209; 5 CFR § 2635.201-205, 2635.807(a)(2)(iii)(D); 8 CFR § 1003.0(b)(1); 41 CFR Chapter 304;
CANCELLATION:	None

In conjunction with the launch of an updated speaking engagement team (SET) webpage and automated request form, the Office of the Director is reissuing the September 1, 2017 memorandum outlining the speaking engagement process. The reissued memorandum does not substantively alter the original memorandum, though it does clarify some points that have occasionally caused confusion.[1]

I. Introduction

Our agency's stakeholders and other members of the public continue to be interested in hearing about, and understanding, what the agency does and specifically how immigration courts operate. Our immigration judges, members of the Board of Immigration Appeals, and administrative law judges, along with senior EOIR officials and other staff, are frequently invited to speak or write on immigration law and policy at different events across the country. Depending on who is invited, who has issued the invitation, the forum, and the topic of the

[1] The reissued memorandum also does not alter, or purport to alter, the Memorandum of Understanding between EOIR and the National Association of Immigration Judges executed in May 2018.

discussion or presentation, a determination must be made as to which capacity is most appropriate for the employee's participation on that specific occasion.

On September 1, 2017, a memorandum was issued to outline the speaking engagement[2] process and provide clarity regarding the decision-making process. Since that time, the Office of Policy has worked to implement an online process to provide for more certainty and clarity surrounding the submission, tracking, and delineation of responsibility of each request. This memorandum does not change the approval process; rather, the changes are only to the mechanism by which approval is sought. To that end, the following sets forth details of the revised mechanism to carry out EOIR's established policy on speaking engagements and the procedures employees must follow when requesting approval to speak.

II. Approval Process

There are only two capacities, which are further described below in sections III and IV, in which an employee may participate in a speaking engagement: (1) official capacity or (2) personal capacity. It is the nature of the engagement, based on the totality of the circumstances that determines the appropriate capacity—the label given by either the inviter or the invitee is not dispositive. An employee who has been invited to participate in a speaking engagement related to immigration law or policy issues, the employee's official EOIR duties or position, or any agency programs and policies, or who has been invited because of the employee's official duties or position, has been invited in an official capacity regardless of how the invitation is labeled. All such requests must be approved by EOIR or the Department of Justice, and invitees should submit a request to participate via the new speaking engagement portal located on EOIR's intranet page. The request should be submitted no later than two weeks before the scheduled event. Submissions should include presentation slides and hand out materials if applicable and complete talking points at a minimum (*i.e.*, an outline, overview, or set of abbreviated talking points is an insufficient submission).

Requests to speak in a personal capacity are also subject to review through the SET process to determine whether they involve genuinely personal capacity events, whether there are any ethics concerns with the engagement, and whether the engagement will disrupt EOIR operations by requiring the employee to miss work.[3] Requests that are for genuinely personal capacity engagements that raise no ethics concerns and occur outside of the requester's normal EOIR work schedule will ordinarily be approved.[4]

All requests, regardless of capacity, must comply with applicable law and agency policies, including all ethics laws, the Hatch Act, any applicable ethics and professionalism guides or rules, Department regulations in title 28 of the Code of Federal Regulations, the Justice Manual, and any

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[2] For purposes of this memorandum, "speaking engagement" includes written pieces intended for publication in any print or online media.

[3] Requests for annual leave to speak in a genuinely personal capacity at an event that does not raise any ethics concerns, like all requests for annual leave, remain subject to supervisory approval.

[4] Although most invitations to speaking engagements for senior executive managers at EOIR are necessarily invitations to speak in an official capacity, there is no blanket prohibition on senior executive managers speaking in a personal capacity if the engagement is a genuinely personal capacity event that does not implicate any ethics issues or disrupt EOIR operations.

other applicable EOIR or Department policies. Further, all employees, especially all non-supervisory adjudicators, seeking approval of a speaking engagement request in either capacity are reminded of the importance of maintaining impartiality and avoiding the appearance of impropriety, favoritism, or preferential treatment.

A. Supervisor Review

The new speaking engagement request form is housed on an internal portal that automates the speaking request process and allows an employee to easily upload information related to their proposed speaking engagement. Once submitted, the portal automatically sends the form to the employee's first-line supervisor for review. Supervisors will receive notification from the SET portal to review the form and related materials so the supervisors may determine whether the request should move forward in the review process. If the request is incomplete or the supervisor does not approve of the requested engagement, the supervisor will deny the request via the portal and provide an explanation for the denial. If the denial is made based on an incomplete or vague submission, the employee may resubmit a request including the necessary information. If the request passes the supervisor's review, the supervisor will approve the request in the portal and it will be routed to the headquarters speaking engagement team (SET) for further review.

B. SET Review

After initial supervisory review and approval, requests must be reviewed by the SET, which consists of the Office of Policy, the Office of the General Counsel (OGC), and the Office of the Director. This process ensures compliance with both the law and agency policy and consistency in EOIR's communications. If the SET determines that an employee's request to speak is inappropriate, a recommendation for a denial with an explanation will be sent to the employee's supervisor via the portal. If the SET determines that the request to speak is appropriate, a recommendation for approval will be sent to the employee's supervisor.

C. Ethics Review

The OGC Ethics Program (Ethics) will receive and review any SET requests that have been recommended for approval. Ethics neither approves nor denies requests to speak, but offers guidance to ensure that speakers do not experience an ethical dilemma. If Ethics reviews a request and has guidance to provide to an employee, Ethics will submit its comments to the employee and supervisor via the speaking engagement portal.

D. Final Review

After the SET and Ethics review the request, the employee's supervisor will make the final decision concerning approval or denial of the request and inform the employee of the supervisor's decision. The supervisor will also advise the employee of any guidance that has been offered by Ethics. If circumstances surrounding the speaking event change, the requesting employee should convey such changes to the supervisor, who should consult with the SET via EOIR.Speakers@EOIR.USDOJ.GOV to determine whether the employee's participation is still advisable. Note that communication via email should be only for approved requests or troubleshooting – all requests and resubmissions must be submitted through the portal.

III. Speaking in Official Capacity

When an EOIR employee is assigned to participate as a speaker or panel participant or otherwise present information on behalf of the agency at a conference or other event, the employee is doing so in an official capacity. Any EOIR employee speaking at an event hosted by a Federal Department, Office, or Agency, or at an event featuring representatives from other Departments, Offices, Agencies or members of Congress, must speak in an official capacity. This includes speaking at naturalization ceremonies even when not administering the naturalization oath.

If travel is required for an employee to speak in an official capacity, generally the employee may not accept reimbursement for travel and related expenses from any source other than the government. However, 41 C.F.R. Chapter 304 authorizes the Department (or the employee on the Department's behalf) to accept payment of travel expenses from a non-Federal source, but only "when specifically authorized to do so" and "only for official travel to a meeting."[5] Please note that EOIR has determined, as a matter of policy, that it will not accept any payment for the official travel of its employees by a non-Federal source that is considered a prohibited source for EOIR. A prohibited source is considered a person or entity who seeks official action from the agency, does business with the agency, appears before the agency, or is an organization a majority of whose members are described in this section.[6] As an adjudicatory body, EOIR should expect to be under constant scrutiny. EOIR employees must avoid all improprieties and the appearance of impropriety to ensure complete public confidence in the integrity of our agency. The acceptance of travel reimbursement for official duties from prohibited sources could undermine the public's confidence in the impartiality of EOIR's adjudicators. Likewise, under no circumstances may an EOIR employee receive a supplementation of salary (e.g., an honorarium) from a non-Federal source for a speaking activity that is done in an official capacity.[7]

IV. Speaking in a Personal Capacity

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

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[5] *41 C.F.R. § 304-5.3 further provides that reimbursement for travel from outside sources must not be authorized if the approving official determines that acceptance of the payment under the circumstances would cause a reasonable person with knowledge of all the facts relevant to a particular case to question the integrity of agency programs or operations. An employee who accepts travel from a non-Federal source in violation of 41 C.F.R. § 304-1.2 may be required to repay the amount of payment accepted from the non-Federal source and could be subject to additional penalties*

[6] *5 C.F.R. § 2635.203(d).*

[7] *18 U.S.C. § 209.*

Additionally, the employee may not permit the sponsoring organization to use the employee's official title in the promotion of the event in which the employee is invited to speak.

If an EOIR employee is traveling to speak at an event in a personal capacity, the employee is not entitled to travel reimbursement by the agency. However, when traveling in a personal capacity, an EOIR employee may accept reimbursements for travel expenses from the entity that is sponsoring the activity.[8] On the other hand, employees offered travel reimbursement for mere attendance (as opposed to speaking on a panel) at a conference in a personal capacity must contact Ethics for a determination as to whether accepting the reimbursement of travel expenses is appropriate. Ethics will apply the gift rules in deciding whether such employee may accept payment of these expenses. Factors that must be taken into consideration when applying the gift rules include the source and value of the reimbursement.[9] In either circumstance, the agency highly encourages consulting their supervisor to ensure the employee's evaluation of the engagement is in line with the agency's.

Please remember that the issuer of the invitation cannot be a prohibited source, and no EOIR employee may receive compensation for any outside speaking activity that relates to their official duties.

V. Conclusion

This policy does not necessarily address every situation that may arise related to speaking engagements. It is intended to restate and clarify a standard by which events may be evaluated. If questions arise regarding the application of this policy or the proper determination of a speaking capacity, please contact the Speakers Inbox at EOIR.Speakers@EOIR.USDOJ.GOV.

[8] *Sanjour v. Environmental Protection Agency*, 56 F.3d 85 (D.C. Cir. 1995); 5 C.F.R. § 2635.807(a)(2)(iii)(D).
[9] 5 C.F.R. § 2635.201-205.

Attachment A

The Speaking Engagement Policy identifies the two capacities (Official and Personal) in which an EOIR employee may speak when the employee is invited to participate in an event that involves immigration issues, relates to the employee's official duties, or is invited because of the employee's official position at the agency. Official and Personal Capacity designations are provided below with examples of appropriate events found within each category. Note that this is not an exclusive list, as some events, activities and forums may not be listed below.

Official Capacity

1. For any event where at least one DOJ or EOIR official is participating officially, all EOIR participants must speak in their official capacity.
2. For any event where an inviter is a Federal government agency and the employee is asked to speak or present at a government event, the EOIR employee must speak in their official capacity.
3. Immigration Conferences or similar events where the subject is immigration (including litigation)
4. Meetings with Stakeholders
5. Naturalization Ceremony, as guest speaker or to administer the oath
6. Court Visits by Outside Groups
7. Pro Bono training related to immigration
8. EOIR Mock Hearing Program
9. Recruiting for EOIR internship program

Personal Capacity

1. Moot Court judge - not immigration related
2. Commencement Speaker
3. Career Day/Alumni Career Panel - to discuss full career path and experience
4. Meeting with Boy Scouts or Girl Scouts or similar organizations
5. Interview based on book written in personal capacity
6. Speaking at a book club or hobbyist meeting

Declaration of Laura Lynch (ECF 11), filed July 1, 2020

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 LAURA LYNCH

I, Laura Lynch, hereby declare and state as follows:

1. I am a Senior Policy Counsel for the American Immigration Lawyers Association ("AILA.). I am over the age of eighteen. I have personal knowledge of the facts stated in this declaration, and, if called to testify, I could and would competently do so under oath.

Background

2. AILA is a national association of more than 15,000 attorneys and law professors who practice and teach immigration law. Founded in 1946, it is a non-partisan, not-for-profit organization. Our members provide legal representation to, among others, U.S. families seeking permanent residence for close family members, U.S. business and industries seeking foreign workers, foreign students, entertainers, athletes, and asylum seekers.

3. AILA's mission is to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of our members. To further this goal, we engage in advocacy before

Congress, the judiciary, federal agencies, and the media on immigration-related issues; we promote the delivery of competent, ethical, and lawful immigration services; and we increase the knowledge and professionalism of our members by providing continuing legal education (CLE) and technical support.

4. In addition to our national organization, AILA supports thirty-nine local chapters throughout the United States. Each of these local chapters is a separately run organization with its own bylaws and leadership. The chair of each local chapter is on AILA.s Board of Governors.

5. I work in AILA's national office ("AILA National"), which is based in Washington D.C. AILA National staff advance the organization's policy and advocacy objectives through a number of methods, including researching the impact of existing immigration regulations, policies, and procedures on our members; communicating regularly with members through different channels to get more information about how these policies and procedures are being implemented; identifying common threads in their experiences; relaying these trends to relevant stakeholders within the legislative and executive branches; and lobbying for sensible legislative and policy immigration reforms that will promote efficient and effective representation of noncitizens.

6. To understand the effects that policies and procedures promulgated by immigration agencies have on our members, my team and I regularly communicate with AILA's local chapter leaders and volunteers, solicit information from members directly through online forms asking for case examples, and call and email with individual members. The issues that local leadership and volunteers raise inform my communication and advocacy efforts at the national level. Communication with local chapter leaders and volunteers also informs AILA's educational trainings, events, and resources that are shared with the legal community.

The effects of the Executive Office for Immigration Review's 2017 and 2020 speaking-engagement policies on AILA and its members

7. AILA organizes educational conferences and events at both the national and local level. For example, local AILA chapters regularly organize luncheons, dinners, pro bono trainings, and community events like essay contests. Many of these events are open to both members and non-members. The purpose of these conferences is to educate AILA members and share best practices across the legal community.

8. For years, immigration judges regularly participated at these events in their personal capacities and discussed issues related to immigration courts and their role as immigration judges. These events educated attendees about recent developments in immigration law, policy, and practice. They also helped build public confidence in and understanding of the immigration courts and their procedures. For example, sitting immigration judges spoke at AILA conferences on immigration court best practices and recent trends in immigration enforcement. They participated in AILA-sponsored panel presentations on trial advocacy skills, legal ethics, and the representation of vulnerable populations in removal proceedings. They also participated in AILA chapter luncheons and dinners intended to foster conversations between the bench and the bar.

9. In late 2017, I learned that .he Executive Office for Immigration Review ("EOIR") had issued a new policy on speaking engagements. Around the same time, local AILA chapters began reporting to AILA National that immigration judges were withdrawing their participation from previously scheduled speaking engagements for fall AILA conferences. In addition to no longer participating in conferences, immigration judges also began rejecting invitations to participate in local AILA meetings, pro bono trainings, and community events. It quickly became known within the AILA community that immigration judges were generally no longer permitted

to participate in AILA and other immigration-related events unde` EOIR's ne. speaking-engagement policy.

10. The experience of AILA's South Florida chapter is illustrative of the experience of that local AILA chapters throughout the country have reported to AILA National. South Florida chapter members reported to me that prior to 2017, immigration judges met with members of the community at AILA events at least four or five times a year—active judges sat on panels at the chapter's annual conference, participated in the chapter's monthly CLE training for its members, and joined the chapter's pro bono training programs to encourage corporate attorneys to represent children and asylum seekers. But in 2017, immigration judges began rejecting invitations or else stopped responding to them altogether. Since then, South Florida chapter members have reported to me that immigration judges have not attended any chapter events, and that chapter leaders now understand that inviting immigration judges to attend is a futile exercise.

11. Other chapters have also reported to me that there has been a marked shift in immigration judge participation. For example, an AILA member explained to me that immigration judges used to participate in an annual spring conference hosted by AILA's Texas chapter and to conduct CLE trainings at chapter meetings two or three times per year. In 2017, however, immigration judges began declining the chapter's invitations to participate in events, stating that they did not have permission to attend. By 2018, chapter leaders stopped inviting immigration judges to events altogether.

12. I learned from the AILA Philadelphia Chapter that one former immigration judge, now an AILA Philadelphia member, spoke at AILA CLE trainings virtually every year for nearly nineteen years. In the spring of 2018, the judge's request to speak at an AILA-sponsored CLE training was denied, and the judge was told by his Assistant Chief Immigration Judge that EOIR

would no longer approve immigration judge participation in CLE events. Following this rejection, the judge did not seek permission .o speak at any AILA events, and stopped accepting the chapter's invitations. The judge retired in January 2020.

13. In an effort to fill the void left by active immigration judges, AILA National and some AILA chapters have relied on retired immigration judges participate in educational conferences and other events. For example, earlier this year I planned an online panel discussion for AILA National on recent developments in immigration litigation. Ideally, I would have included sitting immigration judges on the panel. Based on the experiences of AILA National and local AILA chapters, however, I knew that inviting sitting immigration judges to participate would be futile, and we instead relied on retired immigration judges.

14. While our members value the contributions of retired immigration judges, retired judges may not be as familiar with recent developments in immigration law and policy. For example, those judges may not be as familiar with recent decisions by the Justice Department to limit the ability of immigration judges to administratively close cases or grant continuances, and to reassign judges from their home dockets to prioritize the disposition of cases involving migrants who apply for asylum from Mexico. They may also be less familiar with EOIR's response to the COVID-19 pandemic, including the steps it has taken (or failed to take) to limit the risk of transmission in immigration courts and detention facilities. These topics are of immense importance to our members and the public. By restricting the ability of active immigration judges to talk about them, EOIR's recent speaking-engagement policies harm AILA's ability to facilitate an open dialogue about the immigration legal system.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 30th day of June 2020.



Laura Lynch

Declaration of A. Ashley Tabaddor with Exhibits A–M (ECF 12–12-13), filed July 1, 2020

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

NATIONAL ASSOCIATION OF IMMIGRATION JUDGES, affiliated with 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 A. ASHLEY TABADDOR

I, A. Ashley Tabaddor, hereby declare and state as follows:

1. I am the current President of the National Association of Immigration Judges ("NAIJ.), a role I have served in since 2017. I have served as an officer of NAIJ for the past eight years and as a local representative prior to that. I am over the age of eighteen. I have personal knowledge of the facts stated in this declaration and, if called to testify, I could and would competently do so under oath.

2. I have worked in immigration enforcement and adjudication throughout my legal career. I served as a summer legal extern for the Immigration Court in Lost Angeles in 1996. I graduated from the University of California, Hastings College of the Law in 1997. From 1997 to 2000, I worked in the Office of the Chief Immigration Judge. In 2000, I became a trial attorney for the Office of Immigration Litigation within the Department of Justice. I stayed in that role until 2002, when I became an Assistant U.S. Attorney for the Central District of California in Los

Angeles. In 2005, I became an immigration judge, and have served in that role for almost fifteen years.

NAIJ

3. Immigration judges are employed by the Executive Office for Immigration Review ("EOIR"), a component of the Department of Justice ("DOJ"). Under delegated authority from the Attorney General, immigration judges adjudicate immigration cases according to the nation's immigration laws. There are approximately 460 immigration judges working in the United States.

4. NAIJ is a non-partisan, non-profit voluntary association of immigration judges. Founded in 1971, NAIJ's mission is to promote the independence of immigration judges and to enhance the professionalism, dignity, and efficiency of the immigration courts. In 1979, NAIJ was designated as the recognized representative for collective bargaining for all non-managerial immigration judges. In 2000, NAIJ affiliated with the International Federation of Professional and Technical Engineers (IFPTE) and accordingly is also known as "IFPTE Judicial Council 2."

5. NAIJ officers further the interests of immigration judges by negotiating on their behalf with EOIR, by representing them in disciplinary hearings, by filing formal and informal grievances with EOIR, by speaking to members of the press about working conditions for immigration judges, and by testifying before Congress. NAIJ officers are permitted to do these things without seeking EOIR's prior approval because NAIJ is a union and federal labor relations law protects a union's right to present its views publicly and to appropriate authorities, including Congress and the press.

6. In January 2018, I received a memorandum from EOIR confirming the longstanding understanding and agreement between EOIR and NAIJ that NAIJ representatives are not required to seek preapproval for press interviews or public speaking when speaking on behalf of the union. A true and correct copy of that memorandum is attached hereto as **Exhibit A**.

7. In August 2019, DOJ filed a petition to decertify NAIJ. If the petition is successful, NAIJ officers will no longer be able to speak in our representative capacities without EOIR's prior approval.

EOIR's Speaking Engagement Policies Prior to 2017

8. Prior to 2017, immigration judges often participated in speaking engagements in their personal capacities. While approval was required, immigration judges routinely received that approval. Judges would submit a request to their supervising Assistant Chief Immigration Judge ("ACIJ"). If the ACIJ approved the request, they would forward it to EOIR's Ethics office, which would then offer ethics guidance. Judges were generally permitted to use their official titles to identify themselves in connection with their public speaking, so long as they also included a disclaimer that they were speaking in their personal capacities and not as employees of EOIR. EOIR described this kind of speech as "personal capacity with use of title and disclaimer" or "PTD."

9. During this time, immigration judges regularly spoke at local and national conferences, guest lectured at universities and law schools, participated in immigration-law trainings, and spoke to local community groups, all in their personal capacities. For example, before assuming my current role as NAIJ President, I spoke in my personal capacity at over fifty events hosted by organizations such as the Coalition of Iranian Entrepreneurs, the Los Angeles County Bar Association, the Iranian American Bar Association, the Public Affairs Alliance of Iranian Americans, the Iranian American Women's Leadership Conference, the Orange County Bar Association, Kids in Need of Defense, the Pacific Council on International Policy, and academic institutions including the University of California at Los Angeles, Southwestern Law School, and the University of California, Hastings School of Law. In 2012, I participated in a White House Roundtable with Iranian-American Community Leaders. To the best of my

recollection, prior to 2017, all of my requests to participate in personal-capacity speaking engagements were approved.

10. To my knowledge, the participation of immigration judges in personal-capacity speaking engagements during this time did not cause any harm to EOIR's operations, nor did the agency assert that it did. To the contrary, it promoted public understanding of and confidence in the immigration courts system.

The 2017 Speaking Engagement Policy

11. On September 1, 2017, the Director of EOIR issued a memorandum titled "Speaking Engagement Policy for EOIR Employees" (the "2017 Policy"). I received a copy of the memorandum along with EOIR's other employees. Attached hereto as **Exhibit B** is a true and correct copy of the 2017 Policy.

12. The 2017 Policy required immigration judges to receive EOIR approval before participating in a speaking engagement. Under the policy, immigration judges who wished to speak in their personal capacity were required to submit a request to their ACIJ, who decided whether a speaking engagement would be undertaken in the judge's personal capacity (as defined by the policy) and whether to approve the request. Immigration judges who planned to speak on immigration-related topics or whose requests were reclassified as official capacity then had to seek approval from the Office of General Counsel and the Office of Communications and Legislative Affairs through a centralized "speaking engagement team" known as the "SET."

13. On September 13, 2017, EOIR's Director sent an email to all EOIR employees addressing what qualifies as a speaking engagement. The email stated, among other things, that "any phone calls, emails, or visits from the news media or Congress should be directed to [the Office of Communications and Legislation Affairs]." Attached hereto as **Exhibit C** is a true and correct copy of that email.

14. Subsequent EOIR communications confirmed the agency's position that the 2017 Policy applied to any contact with the press.

NAIJ's Negotiations with EOIR and the 2018 Memorandum of Understanding

15. After the 2017 Policy was issued, NAIJ entered into negotiations with EOIR to clarify the specific procedures and considerations that would apply to immigration judges seeking preapproval to speak publicly. At no point during the course of these negotiations did EOIR assert that speech by immigration judges had interfered with EOIR's operations.

16. In May 2018, NAIJ and EOIR executed a Memorandum of Understanding (the "2018 MOU"), which remains in effect. The 2018 MOU was intended to offer immigration judges greater certainty regarding the preapproval process, but has failed to do so. Attached hereto as **Exhibit D** is a true and correct copy of the 2018 MOU.

17. Although the 2018 MOU sets aspirational time limits for some steps in the preapproval process, these time limits are frequently not met. For example, the 2018 MOU requires the SET to "strive to" respond to speaking-engagement requests within five days, but I have learned that many immigration judges have not received a response within that time frame. In some instances, judges have had to wait months for a response, and many have received a response only after repeated and persistent follow-up.

18. The 2018 MOU also requires that EOIR provide reasons for any denial of a speaking-engagement request. However, I have learned of many instances in which immigration judges did not receive formal denials of their requests and only learned informally through their supervising ACIJs that the SET had denied or planned to deny the requests. These immigration judges did not receive reasons for the denials of their requests.

19. The 2018 MOU requires EOIR to provide NAIJ with "a summary of Immigration Judge speaking engagement requests received by the SET" every six months. NAIJ has received these biannual summaries. The summaries, however, offer limited insight into preapproval process. For example, the summaries do not track the time taken to review requests, whether the requests were reclassified from personal capacity to official capacity, or EOIR's reasons for denying requests. Attached hereto as **Exhibit E** are true and correct copies of the summaries NAIJ has received, spanning May 1, 2018 to April 29, 2020.

20. The 2018 MOU also stated that, by June 30, 2018, EOIR would provide NAIJ with "a list of factors that [EOIR] considers in assessing Immigration Judge speaking engagement requests and/or representative examples of types of speaking engagement requests that fall into each speaking capacity." By email dated June 28, 2018, EOIR sent NAIJ a draft "Guide to Speaking Engagement Requests," which included a list of questions for ACIJs and the SET to consider when reviewing speaking-engagement requests by EOIR employees generally. The email stated that EOIR intended to publish the guide on the agency's intranet once it was finalized. To my knowledge, neither the draft nor a final version of the document is available on the intranet. Attached hereto as **Exhibit F** is a true and correct copy of the email.

The 2020 Policy

21. On January 17, 2020, the Director of EOIR issued a memorandum titled "Submission and Processing of Requests for Speaking Engagements" (the "2020 Policy"). I received a copy of the memorandum along with EOIR's other employees. Attached hereto as **Exhibit G** is a true and correct copy of the 2020 Policy.

22. The 2020 Policy applies whenever an immigration judge wishes to speak or write publicly. The policy categorically prohibits immigration judges speaking or writing publicly in their personal capacities about immigration or EOIR. The policy also subjects all requests—

regardless of speaking capacity or content—to four levels of review. Judges must initially seek approval from their ACIJs. If the ACIJ approves the request, the ACIJ forwards the request to the SET. While that review is ongoing, the request is also reviewed by the EOIR's Ethics Program, which neither approves nor denies requests but instead offers ethics guidance. If the SET approves the request, its recommendation—along with any advice from the Ethics Program—is sent back to the supervisor, who makes the final decision about whether the judge can speak or write. In cases involving speeches, written pieces, or other prepared material, the supervisor may condition approval on making certain changes.

23. Since issuing the 2020 Policy, EOIR has continued to require immigration judges to seek approval before communicating with the press.

The Effect of EOIR's Policies on Speech by Immigration Judges

24. Many immigration judges have contacted NAIJ to complain about their experiences with EOIR's speaking-engagement policies.

25. I have learned from these contacts that, after the 2017 Policy was issued, requests by immigration judges to speak publicly in their personal capacities about immigration were frequently denied. Immigration judges were told by EOIR that speaking engagements related to immigration were, by definition, "official capacity" and should be handled by "management officials" to ensure consistency in the agency's messaging. This included speaking engagements that immigration judges had undertaken for years without issue.

26. I also learned that many immigration judges were not receiving decisions approving or denying their speaking engagement requests within a reasonable period of time. In some instances, immigration judges did not receive a formal decision at all. NAIJ has occasionally

intervened on an immigration judge's behalf in order to press for the resolution of a pending request.

27. Attached hereto as **Exhibit H** is a true and correct copy of a series of emails from March 2018 denying an immigration judge's request to speak to students participating in a law school clinic.

28. Attached hereto as **Exhibit I** is a true and correct copy of a series of emails from March 2018 denying an immigration judge's request to speak at a law school class about asylum claims and children.

29. Attached hereto as **Exhibit J** is a true and correct copy of a series of emails from April through July 2018 denying an immigration judge's request to participate in a Practicing Law Institute continuing legal education seminar.

30. Attached hereto as **Exhibit K** is a true and correct copy of a series of emails from September 2018 denying an immigration judge's request to speak to an immigration class at a law school.

31. Attached hereto as **Exhibit L** is a true and correct copy of a series of emails from February through May 2019 informally denying an immigration judge's request to speak to a seventh-grade class.

32. Over time, many immigration judges came to believe that it was futile to submit requests to speak about immigration in their personal capacities, and submitted fewer speaking-engagement requests. The 2020 Policy has succeeded in discouraging immigration judges even further. As noted above, this policy categorically prohibits immigration judges from speaking or writing publicly in their personal capacities about immigration or EOIR.

33. Accordingly, immigration judges who wish to speak about these topics fear facing retaliation should they do so. EOIR has warned immigration judges that failure to comply with its speaking-engagement policies may result in disciplinary action, including reprimand, suspension, and even removal from the federal service. In trainings, including the initial ethics trainings all judges must attend, EOIR has emphasized the requirement to seek preapproval before publicly speaking or writing regardless of topic or forum. I am aware that EOIR tracks compliance with this requirement, for example, by trolling the web. For example, one judge was emailed by an EOIR official after the official found a conference schedule that announced the judge's participation in a panel; the official told the judge that she was required to submit a request for preapproval. Attached hereto as **Exhibit M** is a true and correct copy of this email.

34. I know of many immigration judges who wish to educate the public about the immigration legal system and their position within it. For example, many judges wish to speak at local and national conferences, guest lecture at universities and law schools, and contribute to legal trainings about these topics. These judges believe that seeking approval to engage in this speech would be futile, and fear that if they speak without approval, they will be disciplined for violating the 2020 Policy.

35. I also know of many immigration judges who wish to offer their own opinions—including critiques—of EOIR's policies and practices. For example, many immigration judges have contacted NAIJ to express concern about EOIR's decision to keep immigration courts open in the midst of the current COVID-19 pandemic. Some of these judges wish to share their concerns publicly but declined to so for fear of retaliation. For instance, some judges have declined requests to conduct press interviews regarding the agency's response to the pandemic. Another judge

agreed to offer a statement for inclusion in a press release issued by NAIJ, but insisted that they be quoted anonymously.

36. I know of many immigration judges who wish to write publicly about issues relating to immigration and about EOIR. Under the 2020 Policy, however, EOIR has the authority to prevent them from publishing, or to condition approval on making changes to the content of their work. Many immigration judges have chosen not to seek out writing opportunities because the 2020 Policy gives EOIR complete control over whether, and what, immigration judges can write.

37. Finally, I know of immigration judges who wish to speak or write about issues unrelated to immigration law or policy. For example, some judges have been asked to speak about their own professional histories and career paths before students or civic groups. Some of these judges have declined invitations to speak at these events because of the difficulties inherent in seeking the agency's preapproval.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 30th day of June 2020.

Judge A. Ashley Tabaddor

EXHIBIT A

U.S. Department of Justice

Executive Office for Immigration Review

Office of the Director

5107 Leesburg Pike, Suite 2600
Falls Church, Virginia 22041

January 12, 2018

Immigration Judge A. Ashley Tabaddor
President
National Association of Immigration Judges

Immigration Judge Amiena Khan
Executive Vice President
National Association of Immigration Judges

RE: Press Contacts and Use of Agency Resources

Dear Judges Tabaddor and Khan,

Congratulations on your recent election to officer positions within the National Association of Immigration Judges (NAIJ). The Agency looks forward to continuing to work with you in your NAIJ representational capacities. Below is a summary of some of the Agency's expectations with regard to your representational activities.

A. Contacts with the Press

The Agency acknowledges that, as officers of NAIJ, you have certain freedoms with respect to representing the interests of NAIJ to the public and press. However, such representational freedoms are not unlimited. You must take into consideration the following factors, particularly when communicating with the press/media regarding matters related to the Department of Justice.

1. Appropriate Representatives

It is incumbent upon NAIJ to keep the Agency informed regarding which immigration judges have representative roles in the union. Please ensure that your list of NAIJ representatives is kept up to date and includes an explanation of each immigration judge's representative role. Immigration judges who are not acting as representatives of NAIJ are not afforded the same protections to present the views of NAIJ to the press and public.

2. Notice to EOIR Regarding Press/Media Contacts

On September 1, 2017, EOIR issued a Speaking Engagement Policy that clarified the roles and responsibilities of various EOIR personnel involved in the speaking engagement process. In the interest of not inappropriately interfering in the right of NAIJ representatives to speak on behalf of NAIJ, immigration judges who speak to the public or press/media in their capacities as NAIJ representatives historically have not been required to seek ethics advice or other permission from the Agency prior to speaking. The Agency will continue to exclude immigration judges who speak to the public or press/media in their capacities as NAIJ representatives from following the speaking engagement approval procedures outlined in the Speaking Engagement Policy.[1] Please note that immigration judges who speak to the public or press in their capacities as NAIJ representatives are always speaking in their personal capacities,[2] and not officially on behalf of EOIR.

Although EOIR will not require NAIJ to receive approval for speaking engagements involving the press/media, EOIR will require NAIJ representatives to report all media contacts pursuant to Deputy Attorney General Rod J. Rosenstein's November 6, 2017 memorandum entitled "Confidentiality and Media Contacts Policy," (Attachment 1). Mr. Rosenstein's memorandum, which added language to the United States Attorney Manual (USAM) at 1-7.000, *et seq*., states that the policy contained therein apples to all DOJ personnel. Section 1-7.210 of the USAM now requires all DOJ personnel to report to their designated media representative any contacts with members of the media about DOJ matters. Pursuant to this requirement, NAIJ representatives must report all media contacts regarding DOJ matters to EOIR's designated media representative, Nathan Berkeley, within two business days of the media contact. NAIJ representatives must report to whom the contact was made, the date of the contact, and the general nature of the contact with the media.

3. Subject Matter

As discussed in Mr. Rosenstein's memorandum, much of DOJ's work involves non-public, sensitive matters. As such, USAM section 1-7.100 now states that "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 regulatory prescription, or case law and rules governing criminal and civil discovery."

The Department's interest in protecting non-public information exists alongside the union's right to present its views to "appropriate authorities," as prescribed in the Federal Service Labor-Management Relations Statute, at 5 U.S.C. § 7102:

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[1] Please be aware that NAIJ representatives who would like to speak in their capacities as immigration judges (e.g. at a pro bono model hearing program) must follow the Agency's Speaking Engagement Policy to gain approval prior to the speaking engagement.

[2] Although NAIJ representatives are not required to seek ethics advice from the Agency's ethics office prior to speaking on behalf of NAIJ, NAIJ representatives, like all federal employees, are required to follow the Standards of Ethical Conduct for Employees of the Executive Branch. As new NAIJ representatives, you are encouraged to seek ethics guidance in advance of speaking engagements to ensure that you are familiar with ethics guidelines on speaking in your personal capacities.

> Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—
>
> (1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities . . . .

The Federal Labor Relations Authority (FLRA) interprets "appropriate authorities" to include the press, and unions may publicize labor disputes or issues that have a direct bearing on conditions of employment. *See, e.g., Bureau of Prisons Fed. Corr. Inst. and Am. Fed'n of Gov't Emps.*, 17 F.L.R.A. 696, 710-11 (1985); *U.S. Dep't of Veterans Affairs Med. Ctr. Jamaica Plain, Mass. and Fraternal Order of Police*, 50 F.L.R.A. 583, 586 (1994) (citing *Dep't of the Navy, Naval Facilities Eng'g Command, W. Div. San Bruno, Cal. and Nat'l Fed'n of Fed. Emps.*, 45 F.L.R.A. 138, 148-49, 155 (1992)). However, a union's right to present its views is not absolute. *Camp Smedley D. Butler*, 29 F.L.R.A. at 1081 (citing *Bureau of Prisons*, 17 F.L.R.A. at 697). For example, statements to the media are not protected if the statements are disloyal or disruptive of discipline. *See U.S. Forces Korea/Eighth U.S. Army and Nat'l Fed'n of Fed. Emps.*, 17 F.L.R.A. 718, 728 (1985) (citing *NLRB v. Local 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464 (1953); *Southwestern Bell Tel. Co. and Commc'ns Workers of America*, 200 N.L.R.B. 667 (1972)). Importantly, § 7102 does not protect communications to outside parties that jeopardize the institution's mission or safety. *U.S. Penitentiary Admin. Maximum Florence, Colorado and AFGE*, DE-CA-90530, F.L.R.A. Rep. No. 16, 6 (2000) (citing *Bureau of Prisons*, 17 F.L.R.A. at 696-97). Moreover, the Statute does not protect comments that constitute flagrant misconduct or are of "an outrageous or insubordinate nature . . . ." *Naval Facilities Engineering Command*, 45 F.L.R.A. at 156. To determine whether conduct constitutes protected activity or flagrant misconduct, "the Authority balances the employee's right to engage in protected activity, which 'permits leeway for impulsive behavior, . . . against the employer's right to maintain order and respect for its supervisory staff on the jobsite.'" *AFGE v. SSA Valrico, Fla.*, 59 F.L.R.A. 767, 770 (2004) (citing *Dep't of Def. Def. Mapping Agency Aerospace Ctr. St. Louis Mo. and Nat'l Fed'n of Fed. Emps.*, 17 F.L.R.A. 71, 80 (1985)).

While it is fairly clear that, subject to the caveats discussed above regarding disloyal and disruptive statements and statements that jeopardize safety or the Agency's mission, the union may express its *views* to the media, there is no case law to suggest that the union may publicize non-public agency *information* that representatives only know in their capacity as Agency employees. For example, publicizing a labor dispute that union officials are aware of due to their status as union officials is different from union officials publicizing non-public, sensitive Agency information that they are privy to because of their status as Agency employees. Due to the sensitive nature of the work of the Department in general, and EOIR in particular, NAIJ representatives must be cognizant of this distinction and take care not to release non-public, sensitive Agency information to the public or press.

4. Use of Disclaimers

When NAIJ representatives interact with the media, they must follow the procedures outlined in the April 7, 2015 Memorandum of Understanding (MOU) between the Agency and NAIJ regarding the issuance of appropriate disclaimers (Attachment 2).[3] Pursuant to this MOU, NAIJ representatives must give the following disclaimer when speaking on behalf of NAIJ:

> "I am speaking as [relevant position with NAIJ] of the National Association of Immigration Judges and not as an official of the United States Department of Justice."

When providing written statements, NAIJ representatives must provide the following written disclaimer:

> "The author is the [relevant position with NAIJ] of the National Association of Immigration Judges. The views expressed here do not necessarily represent the official position of the United States Department of Justice, the Attorney General, or the Executive Office for Immigration Review. The views represent the author's personal opinions, which were formed after extensive consultation with the membership of NAIJ."

Please familiarize yourselves with the MOU in order to ensure that NAIJ representatives provide the appropriate disclaimers when interacting with the press/media.

B. <u>Use of Agency Resources for Representational Activities</u>

In general, NAIJ's rights and limitations on the use of Agency time and resources to engage in representational activities are outlined in the collective bargaining agreement, particularly in Articles 4, 5, and 6. However, the following information should also be noted.

1. Use of Government E-mail/iPhones

Pursuant to Article 6.1.e., NAIJ representatives will have "access to the electronic mail system to facilities communications between the Association and Immigration Judges regarding representational matters." Moreover, the Agency has agreed to provide Agency iPhones to the President and Vice President of NAIJ. However, please be aware that there is no expectation of privacy in the use of government computers or computer systems, including iPhones, and the use of departmental computer systems constitutes consent to monitoring and disclosure of information stored on or transiting the departmental computer system. *See, e.g.*, Section 3.e-f. DOJ Order 2740.1A, Use and Monitoring of DOJ Computers and Computer Systems. (Attachment 3). While EOIR has no objective to intercept communications between NAIJ and the bargaining unit (or NAIJ and its counsel), such communications may be captured incidental

[3] The MOU is also available on the EOIR Intranet at https://eoirnet/sites/eoir/OCIJ/AdministrationandPolicy/Union/executed%20MOU_naij.pdf

to searches related to discovery and/or Freedom of Information Act (FOIA) requests, or for other authorized purposes as described in Section 3.f of DOJ Order 2740.1A.

2. Use of Government Employee Time

NAIJ cannot solicit EOIR employees to perform duties, such as legal research, for NAIJ on government time. The Standards of Ethical Conduct for Employees of the Executive Branch state that "an employee shall not encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those required in the performance of official duties or authorized in accordance with law or regulation." 5 C.F.R. § 2635.705(b). Even though law clerks and legal assistants are not in a superior-subordinate relationship with immigration judges, immigration judges are in a position of power and authority over these employees. To ask such employees to use official time or government resources (such as government-provided computers and legal research databases) to do work on behalf of NAIJ would be inappropriate and may constitute a violation of 5 C.F.R. § 2635.702(a), use of public office for private gain. ("An employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that is intended to coerce or induce another person, including a subordinate, to provide any benefit, financial or otherwise, to himself or to friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity.")

* * *

Please do not hesitate to reach out to the appropriate Agency authorities (*e.g.*, the Ethics Office, the Communication and Legislative Affairs Division, and/or OCIJ management) if you have any questions or concerns regarding your responsibilities with respect to this memorandum.

Sincerely,

Katherine H. Reilly

Katherine H. Reilly
Acting Deputy Director

Cc: MaryBeth Keller
Chief Immigration Judge

EXHIBIT B

U.S. Department of Justice

Executive Office for Immigration Review

Office of the Director

5107 Leesburg Pike, Suite 2600
Falls Church, Virginia 22041

Director

September 1, 2017

MEMORANDUM TO: All of EOIR

FROM: James R. McHenry III
Acting Director

SUBJECT: Speaking Engagement Policy for EOIR Employees

Introduction

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

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

Approval Process

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

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

I. Speaking in an Official Capacity

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

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

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

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

II. Speaking in a Personal Capacity

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

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

[2] 5 C.F.R. § 2635.203(d).

[3] 18 U.S.C. § 209.

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

Conclusion

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

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

Attachment A

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

Official Capacity

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

Personal Capacity

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

EXHIBIT C

Cole, Samuel B. (EOIR)

From: EOIR Director (EOIR)
Sent: Wednesday, September 13, 2017 7:42 AM
To: All of EOIR
Subject: Defining "Speaking Engagement"

Follow Up Flag: Follow up
Flag Status: Flagged

Good morning.

Following the agency strategic communications plan and speaking engagement policy recently released, we have received some questions regarding what qualifies as a "speaking engagement." To answer some of those questions, please see the additional guidance below.

One-on-one meetings or phone calls with designated liaisons are not speaking engagements and do not require approval through the Speaking Engagement Team (SET). In addition, phone calls or brief in-person conversations about regular agency business do not require such approval.

Conversely, in any instance in which you will present formal remarks, participate in a panel discussion, or distribute agency information in your official capacity, the request should go through the SET. Similarly, meetings with local chapters of national organizations, meetings involving EOIR employees that are open to an organization or chapter's membership, or non-liaison meetings with general personnel of another agency are considered speaking engagements and should go through the SET. Any meeting that is advertised by the group hosting the meeting should go through the SET. In any instance in which you will meet with a liaison from more than one organization (e.g. DHS; AILA; CLINIC), the request should also go through the SET.

Participation in DOJ events, such as trainings or conferences at the National Advocacy Center, do not need to go through the SET, but do require supervisory approval.

In short, one-on-one meetings with designated liaisons and phone calls about regular agency business do not go into the SET, but most other types of meetings outside of DOJ will. In addition to the information provided through the SET forms, a good metric would be whether you will be speaking with more than one non-DOJ person about EOIR or whether a group external to DOJ is sending out notice of the event. If so, it likely needs to go through the SET.

If you are unsure whether to submit your event for SET review, please contact your supervisor. Beyond that, please contact the Office of Communications and Legislative Affairs (OCLA) at 703-305-0289. Of course, any phone calls, emails, or visits from the news media or Congress should be directed to OCLA at the number above or at PAO.EOIR@usdoj.gov.

For your easy reference, please see https://eoirnet/sites/eoir/Pages/AgencyCommPlan.aspx to access the previously emailed documents about the Communications Plan.

James McHenry
Acting Director

EXHIBIT D

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 H. Reilly
Deputy Director

Date

Daniel L. Swanwick
Counsel to the Deputy Director

Date

FOR THE UNION:

Amiena Khan
Executive Vice President, NAIJ

5-10-2018.
Date

EXHIBIT E

Requestors Supervisor	Event Start Time	Request Submitted	Event Topic	Requesting Employee	Status: Approved, Denied, Incomplete Request	Capacity: Official or Personal
Simmons, Theresa (EOIR)	8/26/20 17:00	4/29/20 13:15	Immigration Law Class	Golparvar, Kuyomars Q. (EOIR)	Approved	Personal
Johnson-Papillo, Carrie (EOIR)	6/20/20 9:00	4/16/20 11:23	Trial Skills Class taught in condensed form	Harbeck, Dorothy (EOIR)	Approved	Personal
Johnson-Papillo, Carrie (EOIR)	9/14/20 18:00	4/16/20 11:10	Trial Skills	Harbeck, Dorothy (EOIR)	Approved	Personal
Scala, Theresa M. (EOIR)	5/2/20 12:00	4/9/20 12:46	IJ application process and asylum law	Phan, Christopher (EOIR)	Approved	Personal
Weil, Jack (EOIR)	8/24/20 0:00	4/7/20 10:10	Immigration Law	Morley, Steven A. (EOIR)	Approved	Personal
Owen, Sirce E. (EOIR)	4/21/20 12:00	3/11/20 7:30	Asylum Training - Mock Hearing	Baird, Michael P. (EOIR)	Denied	Official
Sanchez, Jose A. (EOIR)	4/4/20 9:00	3/4/20 16:38	Nature, scope and timing of immigration proceedings. Law and practice under the INA.	O'Sullivan, Maureen (EOIR)	Denied	Personal
Martinez, Hugo R. (EOIR)	3/20/20 10:00	3/2/20 15:11	Immigration Basic	Fowler, Kelley (EOIR)	Denied	Personal
Martinez, Hugo R. (EOIR)	3/18/20 7:30	2/28/20 12:57	Constitutional Law/Legal Profession	Schools, Shelly (EOIR)	Approved	Personal
Martin, Clay Nelson (EOIR)	4/3/20 14:00	2/25/20 17:05	Accomplishments of Alumna	Martinez, Elizabeth (EOIR)	Denied	Official
Martinez, Hugo R. (EOIR)	3/20/20 10:00	2/21/20 14:57	Immigration Law Basics	Fowler, Kelley (EOIR)	Denied	Official
Martin, Clay Nelson (EOIR)	4/3/20 14:00	2/21/20 12:31	Accomplishments of Alumna	Martinez, Elizabeth (EOIR)	Approved	Personal
Rooyani, Rodin (EOIR)	3/5/20 18:30	2/18/20 14:55	Immigration Court Process	Jasso, Jaime (EOIR)	Approved	Personal
Rooyani, Rodin (EOIR)	5/27/20 20:00	2/13/20 17:47	Teaching weekly course entitled "Immigration Law and Crimes"	Costa, Philip Joseph (EOIR)	Approved	Personal
McNulty, Sheila (EOIR)	3/11/20 18:30	2/12/20 18:05	Empowered Women Empower Women	Peyton, Jennifer I. (EOIR)	Approved	Personal
Paul, Nancy J. (EOIR)	2/21/20 13:00	2/10/20 16:54	Basics of Immigration	Kelly, Wynne P. (EOIR)	Approved	Personal
Jones, David M. (EOIR)	2/11/20 18:00	2/4/20 9:32	How are laws made	Vargas-Padilla, Nelson (EOIR)	Approved	Personal
Laurent, Scott (EOIR)	3/17/20 0:00	2/3/20 16:45	Tribal Court Management	Burke, Brian H. (EOIR)	Approved	Personal
Sanchez, Jose A. (EOIR)	4/4/20 10:00	1/17/20 10:05	Immigration Law Basics	O'Sullivan, Maureen (EOIR)	Approved	Official

Requesting Supervisor	Requesting Employee	Submit Date	Event and Audience	Capacity: Official or Personal	Event Date	Status: Approved, Denied, Incomplete Request
ACIJ Sheila McNulty	IJ John Siemietkowski	1/4/20	Speak at the Texas Bar construction law conference	Personal	3/5/20	Approved
ACIJ James Grim	IJ Pedro Espinal	12/18/19	Address a group of local judges at the Puerto Rico Judicial Academy	Official	2/26/20	Approved
ACIJ Sheila McNulty	IJ Dorothy Harbeck	12/17/19	Teach a weekend law school class at UDC durig the summer	Personal	7/1/20	Approved
ACIJ Sheila McNulty	IJ Dorothy Harbeck	12/12/19	Teach a class at Rutgers University School of Law	Personal	Spring Semester 2020	Approved
ACIJ Sanchez	IJ Lincoln Jalelian	12/10/19	Participate in class at Boston University School of Law	Personal	Spring Semester 2020	Approved
ACIJ Theresa Scala	IJ Richard Zanfardino	12/9/19	Master calendar hearing observation	Official	2/12/20	Approved
ACIJ Daniel Weiss	IJ James Nugent	12/5/19	Teach a class at SMU Dedman School of Law	Personal	1/9/20	Approved
ACIJ Theresa Scala	IJ John Odell	11/8/19	Brown bag lunch with Pierce County Superior Court	Personal	One day in Spring 2020	Denied
ACIJ Sheila McNulty	IJ Dorothy Harbeck	11/5/19	Teach a class at Seton Hall during a winter session	Personal	1/1/20	Conditionally Approved
ACIJ Jose Sanchez	IJ Daniel Morris	10/31/19	AILA monthly meeting in Connecticut	Personal	11/14/19	Denied
ACIJ Jose Sanchez	IJ Philip Verrillo	10/31/19	AILA monthly meeting in Connecticut	Personal	11/14/19	Denied
ACIJ Rico Bartolomei	IJ Christine Bither	10/31/19	Discuss Basics of Immigration Law at San Diego State	Personal	11/14/19	Denied
ACIJ Jose Sanchez	IJ Michael Straus	10/31/19	AILA monthly meeting in Connecticut	Personal	11/14/19	Denied
ACIJ Irene Feldman	IJ Richard Phelps	10/16/19	Guest speak at a law class at University of Arizona	Official	11/6/19	Denied
ACIJ Philip Montante	IJ Steven Connelly	10/15/19	Guest teach a class at State University of New York at Buffalo	Personal	10/24/19	Approved
ACIJ Jose Sanchez	IJ Maureen O'Sullivan	10/10/19	Teach a class on asylum law at Suffolk University Law School	Personal	11/12/19	Denied
ACIJ Jose Sanchez	IJ Paul Gagnon	10/2/19	Mock bond hearing		10/22/19	Denied
ACIJ Sheila McNulty	IJ Dorothy Harbeck	10/1/19	Teach deposition skills in a weekend program for NITA	Personal	11/16-11/17	Approved

Requesting Supervisor	Requesting Employee	Submit Date	Event and Audience	Capacity: Official or Personal	Event Date	Status: Approved, Denied, Incomplete Request
ACIJ Sheila McNulty	IJ Dorothy Harbeck	10/1/19	Teach deposition skills in a weekend program for NITA	Personal	11/16-11/17	TBD
ACIJ Sheila McNulty	IJ Jennifer Peyton	9/17/19	Speak at Case Western Reserve University School of Law	Personal	10/2/19	Denied
ACIJ Daniel Weiss	IJ Emmett Soper	8/23/19	Speak at Judicial Clerkship and internship conference about EOIR clerkships	Official	10/5/19	Approved
ACIJ Joy Lampley	IJ Angela Munson	8/21/19	Speak about patriotism at a historic home	Personal	10/24/19	Approved
ACIJ Sheila McNulty	IJ Noel Brennan	7/31/19	Give lecture at Georgetown Law Center	Personal	10/7/19	Request withdrawn
ACIJ James Grim	IJ Victoria Ghartey	7/31/19	Participate in a local naturalization ceremony as a guest speaker	Official	9/5/19	Request withdrawn
ACIJ David Jones	IJ David Koelsch	7/31/19	Teach a class at Catholic University school of law	Personal	8/2019 - 12/2019	Approved
ACIJ Sheila McNulty	IJ Mimi Tsankov	7/30/19	Teach a class at Fordham law school	Personal	9/2019 - 5/2020	Approved
ACIJ Lisa Luis	IJ Richard Jamadar	7/3/19	Speak about the use of credible and reasonable fear materials in removal proceedings	Official	8/30/19	Denied
ACIJ McNulty	IJ Dorothy Harbeck	7/2/19	Teaching Immigration trial skills at Columbia University Law school	Personal	9/9 - 12/3/19	Incomplete Request
ACIJ Jose Sanchez	IJ Maureen O'Sullivan	7/1/19	Present Immigration Law Basics at the fall educational conference for the Probate and Family Court of Massachusetts	Personal	10/24/19	Denied
ACIJ Rico Bartolomei	IJ Catherine Halliday-R	6/11/19	Teach business law online at Santa Monica College	Personal	9/2019 - 8/2020	Approved
ACIJ Jack Weil	IJ Kuyomars Golparvar	6/6/19	Attend and give remarks at Naturalization Ceremony	Personal	6/27/19	Request withdrawn
ACIJ Daniel Daugherty	IJ Christopher Greer	6/5/19	Give presentation on mission of Immigration Court and the duties of an immigration judge at SJ Quinney School of Law LLM Program	Official	6/28 or 6/29	Denied
ACIJ Lisa Luis	IJ Samuel Brown	6/4/19	Give presentation on estate planning/wills/power of attorney for Church seniors	Personal	6/20/19	Approved
ACIJ Amy C. Hoogasian	IJ Riedthaler Williams	5/8/19	Grade and teach online course for Liberty University	Personal	multiple dates	Approved
ACIJ Sheila McNulty	IJ Franklin Loprest	5/2/19	Speak on panel at New York State Unified Court System's Franklin H. Williams Judicial Commission and discuss immigration consequences of New York State criminal activity	Official	6/13/19	Denied
ACIJ Rodin Rooyani	IJ Phil Costa	4/29/19	Adjunct teaching at Southwestern Law School	Personal	6/5-7/10	Approved
ACIJ Philip Montante	IJ Walter Ruehle	4/8/19	Speak about best practices for handling asylum claims in Immigration Court in front of Onondaga County Bar	Official	5/3/19	Denied
ACIJ Sheila McNulty	IJ Oshea Spencer	4/1/19	Talk at kindergarten career day about being a judge	Personal	5/10/19	Approved

Speaking Engagement Team (SET) Log
IJ Requests - May 2018 to October 2018

Requesting Supervisor	Requesting Employee	Submit Date	Event and Audience	Capacity: Official or Personal	Event Date	Status: Approved, Denied, Incomplete Request
ACIJ Rodin Rooyani	IJ Phil Costa	4/29/19	Adjunct teaching at Southwestern Law School	Personal	6/5-7/10	TBD
ACIJ Philip Montante	IJ Walter Ruehle	4/8/19	Speak about best practices for handling asylum claims in Immigration Court in front of Onondaga County Bar	Official	5/3/19	Denied
ACIJ Sheila McNulty	IJ Oshea Spencer	4/1/19	Talk at kindergarten career day about being a judge	Personal	5/10/19	Approved
ACIJ Jack Weil	IJ Steven Morley	3/18/19	Teach refugee and asylum law course at Drexel	Personal	Fall Semester 2019	Approved
ACIJ Scott Laurent	IJ Kevin Riley	3/13/19	Speak at LA County Bar about career path	Personal	3/30/19	Approved
ACIJ Amy C. Hoogasian	IJ Jeremiah Johnson	3/7/19	USF career panel - speaking about path as an asylum officer to IJ	Personal	3/28/19	Approved
ACIJ Irene Feldman	IJ Paul Habich	2/13/19	ACIJ not recommending that he receive authorization to attend/speak at a bar meeting	Official	2/22/19	No further action by SET needed
ACIJ Jack Weil	IJ Golparvar and IJ Hartye	2/13/19	Social event for law students and judges at various levels to interact in a professional setting; not specific to immigration law	Personal	2/19/18	Approved
Elisa Sukkar	IJ Denise Lane	2/7/19	Speak about career and accomplishments at Black History Month event sponsored by Florida International University	Personal	2/20/19	Approved
ACIJ Sheila McNulty	IJ Samuel Cole	2/6/19	Teach a class on immigration and asylum to 7th graders	Personal	TBD	Denied
ACIJ Daniel Weiss	IJ Dean Tuckman	2/1/19	Speak at a judicial conference about the interplay between judicial decisions in criminal cases and removal proceedings.	Official	9/11/19	
ACIJ Nancy Paul	IJ Dorothy Harbeck	2/1/19	Teach a course at UDC NEW on trial skills	Personal	7/1/19	Approved
ACIJ Daniel Weiss	IJ Brock Taylor	2/1/19	Speaking at a synagogue about immigration and types of applicants at 7 pm event	Personal (should be official?)	2/13/19	Denied
ACIJ Sheila McNulty	IJ Mark Jebson	1/29/19	Teach immigration law at University of Detroit, Mercy School of Law	Personal	6/1/19	Approved
ACIJ Kevin Mart	IJ Rebecca Holt	12/11/18	Participate in a panel about immigration and the courts with Inns of Court in Memphis; 6 pm event	Official	2/12/19	Approved
ACIJ Shelia McNulty	IJ Sam Cole	12/6/18	Teach trial advocacy class at Loyola Law School	Personal	1/9/18	Approved
ACIJ Weiss	IJ Jacinto Palomino	11/29/18	Participate in panel discussion about immigration court functions for a law firm-sponsored function in Santa Fe	Personal (should be official)	1/16/19	Denied
ACIJ Nancy Paul	IJ Dorothy Harbeck	11/21/18	Teach a class at Rutgers University School of Law	Personal	1/2/19	Approved
Chuck Adkins-Blanch	IJ Thomas Snow	11/14/18	Present an overview of immigration court procedures	Official	3/18/19	Denied
ACIJ Daniel Weiss	IJ Xiomara Davis Gumbs	11/2/18	To teach a course in immigration law as an adjunct faculty member at the SMU Dedman School of Law	Personal	1/14/19	Approved

Speaking Engagement Team (SET) Log
IJ Requests - May 2018 to October 2018

Requesting Supervisor	Requesting Employee	Submit Date	Event and Audience	Capacity: Official or Personal	Event Date	Status: Approved, Denied, Incomplete Request
ACIJ Kevin Mart	IJ Rebecca Holt	10/26/18	speak to a university class about career choices	Personal	10/29/18	Approved
ACIJ Kevin Mart	IJ Angela Munson	10/25/18	critique moot court participants at Tulane Law School	Personal	11/07/218	Approved
ACIJ Hoogasian	IJ Jeremiah Johnson	10/10/18	speak at the Human Rights Advocates educational event, 5:30 p.m., at the USF Law School	Personal	11/1/18	Approved
ACIJ Weil	IJ Lisa Dornell	10/10/18	speak about Practice and Procedure in U.S. Immigration Courts to University of Maryland law students; 2 p.m. event	Personal	11/6/18	Denied
ACIJ Weil	IJ David Crosland	10/2/18	speak about civil rights to a University of Alabama law school class	Personal	11/14/18	Approved
ACIJ Daugherty	any IJ	9/28/18	open request by the Legal Aid Society for an IJ to preside at mock removal hearing at Columbia Law School Externship class	Official	11/28/18	Denied
ACIJ Scott Laurent	IJ Jose Penalosa	9/28/18	speak to incoming 2019 law students as part of duties on alumni board of ASU Sandra Day O'Connor School of Law	Personal	10/19/18	Approved
ACIJ Daugherty	IJ Mimi Tsankov	9/21/18	blanket request to speak in president-elect role at FBA	Personal	TBD	Ethics determined SET guidance not needed
ACIJ Weil	IJ Golparvar	9/18/18	Speak about immigration law career at Widener law school	Official	10/23/18	Approved
ACIJ Mart	IJ Michael Baird	9/14/18	speak to law school class at Georgia State U about the role of an immigration judge at 6 pm (afterhours)	Official	10/23/18	Approved
ACIJ Nadkarni	IJ Emmett Soper	9/11/18	lunchtime panel discussion at Asian Pacific American Bar Association Educational Fund conference to give minority law students information on judicial clerkships and internships	Personal	10/13/18	Approved
ACIJ Loprest	IJ Brigitte LaForest	8/3/18	speaking at a college commencement personal life as an immigrant and commitment to public service. The goal is to inspire the graduates.	Personal	12/1/18	Approved
ACIJ Kevin Mart	IJ Randall Duncan	8/2/18	Speak at Rotary Club of Newnan, Ga. During a lunch meeting; giving an overview of personal career path	Personal	10/5/18	Approved
ACIJ McNulty	IJ Maureen O'Sullivan	8/1/18	Speak at pro bono training about representing asylum seekers at Portland, Maine law offices, during the morning on a Friday	Personal	9/21/18	Denied
ACIJ McNulty	IJ Fujimoto	8/1/18	appear at the DePaul Legal Clinic and discuss immigration court best practices. The event is scheduled after 5 p.m.	Official	8/22/18	Denied
ACIJ Loprest	IJ Tom Mulligan	7/30/18	Teach intro to immigration law at City University, New York	Personal	8/15/18	Approved
ACIJ Jack Weil	IJ David Koelsch	7/27/18	teach immigration law at Catholic U	Personal	8/30/18	Approved
ACIJ Jack Weil	IJ Lisa Dornell	7/27/18	a pro bono liaison meeting at the Baltimore Immigration Court	Official	10/25/18	Approved
ACIJ Nancy Paul	IJ Justin Howard	7/23/18	speak about general court issues at the Johnson County Bar Association's Executive Director (Kansas)	Official	9/28/18	Denied
ACIJ Loprest	IJ Mimi Tsankov	7/17/18	speak at a public forum at Fordham Law about law student opportunities in Immigration Court	Personal? (should be official)	8/1/18	Incomplete Request
ACIJ Loprest	IJ Mimi Tsankov	6/22/18	Practicing Law Institute event. IJ proposes to participate in teaching private attorneys how to represent respondents in court removal proceedings	Personal	7/26/18	Denied
ACIJ Loprest	IJ Mimi Tsankov	6/20/18	teach class on immigration law at Fordham University Law School	Personal	1/1/19	Approved
ACIJ Loprest	IJ Mimi Tsankov	6/20/18	conduct a speaking engagement at the New York Immigration Court - encourage attorneys to consider taking part in pro bono activities	Official	tbd	Approved
ACIJ Kevin Mart	IJ Joe LaRocca	6/20/18	speak before the Louisiana Immigration Working Group in New Orleans at 4 p.m.	Official	8/22/18	Denied
ACIJ Loprest	NY court staff	6/8/18	request for New York Immigration Court to host summer interns from Human Rights First	Official	6/25/18	Approved
ACIJ Bartolomei	IJ Catherine Halliday-Roberts	5/30/18	teach business law online at Santa Monica College	Personal	9/1/18	Approved
ACIJ Martin	IJ Anibal Martinez	5/25/18	provide general inforamtion about juvenile/detained UAC docket at a stakeholders meeting sponsored by HHS/ORR; other speakers from CBP, ICE, VERA, and LOP providers; 1 p.m. at ORR shelter in San Antonio	Official	6/22/18	Denied
ACIJ Weil	IJ Slavin	5/22/18	attend the Baltimore Pro Bono Stakeholders Meeting during lunch hour	Official	6/7/18	Approved
ACIJ Jack Weil	IJ Carle	5/15/18	Teach immigration law at Villanova	Personal	8/1/18	Approved

Speaking Engagement Team (SET) Log
IJ Requests - May 2018 to October 2018

Requesting Supervisor	Requesting Employee	Submit Date	Event and Audience	Capacity: Official or Personal	Event Date	Status: Approved, Denied, Incomplete Request
ACIJ Jack Weil	IJ Golparvar	5/15/18	teaching two immigration-related courses at George Washington University Law School in personal capacity	Personal	4/1/18	Approved
ACIJ Amy C. Hoogasian	IJ Ila Deiss	5/11/18	Speak at an immigration ceremony. IJ requested administrative leave and no cases are being reset	Official	7/12/18	Approved
ACIJ Hoogisan	IJ Ramirez	5/9/18	speak at a naturalization ceremony	Official	9/6/18	Approved
ACIJ Nancy Paul	IJ Justin Howard	5/1/18	basic presentation about immigration and removal proceedings at Missouri Catholic Conference in Jefferson City, MO on a Saturday	Personal	10/6/18	Approved

EXHIBIT F

Tuesday, June 30, 2020 at 23:18:08 Eastern Daylight Time

Subject: Speaking Engagement Bargaining Follow-Up
Date: Thursday, June 28, 2018 at 5:31:42 PM Eastern Daylight Time
From: Reilly, Katherine (EOIR)
To: Khan, Amiena (EOIR), Slavin, Denise (EOIR), Morley, Steven A. (EOIR)
CC: Tabaddor, A. Ashley (EOIR), Scheinkman, Rena (EOIR), Swanwick, Daniel (EOIR)
Attachments: Guidelines for speaking engagement requests 6-28-18.pdf

Dear Judges,

On May 10, 2018, the Agency and Union entered into a Memorandum of Understanding Regarding EOIR's Speaking Engagement Policy ("MOU"). Paragraph (6) of the MOU states 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 engagement that fall into each speaking capacity."

Attached please find a guide that the Agency intends to publish on the intranet so that all employees (including IJs) will have a better understanding of the factors the Agency considers in assessing speaking engagement requests and the types of speaking engagements that fit into official and personal capacities. While this guide is marked "draft," it is near completion and significant changes are not anticipated prior to publication on the intranet.

Thank you,

Katherine

_____

Katherine H. Reilly
Deputy Director
U.S. Department of Justice
Executive Office for Immigration Review
703-605-1280

EXHIBIT G

OOD

Effective: January 2020

SUBMISSION AND PROCESSING OF REQUESTS FOR SPEAKING ENGAGEMENTS

PURPOSE:	To announce the establishment of a new automated speaking engagement request portal and to restate EOIR's established policy on speaking engagements and the procedures employees must follow when requesting approval to speak at outside engagements
OWNER:	Office of the Director
AUTHORITY:	18 U.S.C. § 209; 5 CFR § 2635.201-205, 2635.807(a)(2)(iii)(D); 8 CFR § 1003.0(b)(1); 41 CFR Chapter 304;
CANCELLATION:	None

In conjunction with the launch of an updated speaking engagement team (SET) webpage and automated request form, the Office of the Director is reissuing the September 1, 2017 memorandum outlining the speaking engagement process. The reissued memorandum does not substantively alter the original memorandum, though it does clarify some points that have occasionally caused confusion.[1]

I. Introduction

Our agency's stakeholders and other members of the public continue to be interested in hearing about, and understanding, what the agency does and specifically how immigration courts operate. Our immigration judges, members of the Board of Immigration Appeals, and administrative law judges, along with senior EOIR officials and other staff, are frequently invited to speak or write on immigration law and policy at different events across the country. Depending on who is invited, who has issued the invitation, the forum, and the topic of the

[1] The reissued memorandum also does not alter, or purport to alter, the Memorandum of Understanding between EOIR and the National Association of Immigration Judges executed in May 2018.

discussion or presentation, a determination must be made as to which capacity is most appropriate for the employee's participation on that specific occasion.

On September 1, 2017, a memorandum was issued to outline the speaking engagement[2] process and provide clarity regarding the decision-making process. Since that time, the Office of Policy has worked to implement an online process to provide for more certainty and clarity surrounding the submission, tracking, and delineation of responsibility of each request. This memorandum does not change the approval process; rather, the changes are only to the mechanism by which approval is sought. To that end, the following sets forth details of the revised mechanism to carry out EOIR's established policy on speaking engagements and the procedures employees must follow when requesting approval to speak.

II. Approval Process

There are only two capacities, which are further described below in sections III and IV, in which an employee may participate in a speaking engagement: (1) official capacity or (2) personal capacity. It is the nature of the engagement, based on the totality of the circumstances that determines the appropriate capacity—the label given by either the inviter or the invitee is not dispositive. An employee who has been invited to participate in a speaking engagement related to immigration law or policy issues, the employee's official EOIR duties or position, or any agency programs and policies, or who has been invited because of the employee's official duties or position, has been invited in an official capacity regardless of how the invitation is labeled. All such requests must be approved by EOIR or the Department of Justice, and invitees should submit a request to participate via the new speaking engagement portal located on EOIR's intranet page. The request should be submitted no later than two weeks before the scheduled event. Submissions should include presentation slides and hand out materials if applicable and complete talking points at a minimum (*i.e.*, an outline, overview, or set of abbreviated talking points is an insufficient submission).

Requests to speak in a personal capacity are also subject to review through the SET process to determine whether they involve genuinely personal capacity events, whether there are any ethics concerns with the engagement, and whether the engagement will disrupt EOIR operations by requiring the employee to miss work.[3] Requests that are for genuinely personal capacity engagements that raise no ethics concerns and occur outside of the requester's normal EOIR work schedule will ordinarily be approved.[4]

All requests, regardless of capacity, must comply with applicable law and agency policies, including all ethics laws, the Hatch Act, any applicable ethics and professionalism guides or rules, Department regulations in title 28 of the Code of Federal Regulations, the Justice Manual, and any

[2] For purposes of this memorandum, "speaking engagement" includes written pieces intended for publication in any print or online media.
[3] Requests for annual leave to speak in a genuinely personal capacity at an event that does not raise any ethics concerns, like all requests for annual leave, remain subject to supervisory approval.
[4] Although most invitations to speaking engagements for senior executive managers at EOIR are necessarily invitations to speak in an official capacity, there is no blanket prohibition on senior executive managers speaking in a personal capacity if the engagement is a genuinely personal capacity event that does not implicate any ethics issues or disrupt EOIR operations.

other applicable EOIR or Department policies. Further, all employees, especially all non-supervisory adjudicators, seeking approval of a speaking engagement request in either capacity are reminded of the importance of maintaining impartiality and avoiding the appearance of impropriety, favoritism, or preferential treatment.

A. Supervisor Review

The new speaking engagement request form is housed on an internal portal that automates the speaking request process and allows an employee to easily upload information related to their proposed speaking engagement. Once submitted, the portal automatically sends the form to the employee's first-line supervisor for review. Supervisors will receive notification from the SET portal to review the form and related materials so the supervisors may determine whether the request should move forward in the review process. If the request is incomplete or the supervisor does not approve of the requested engagement, the supervisor will deny the request via the portal and provide an explanation for the denial. If the denial is made based on an incomplete or vague submission, the employee may resubmit a request including the necessary information. If the request passes the supervisor's review, the supervisor will approve the request in the portal and it will be routed to the headquarters speaking engagement team (SET) for further review.

B. SET Review

After initial supervisory review and approval, requests must be reviewed by the SET, which consists of the Office of Policy, the Office of the General Counsel (OGC), and the Office of the Director. This process ensures compliance with both the law and agency policy and consistency in EOIR's communications. If the SET determines that an employee's request to speak is inappropriate, a recommendation for a denial with an explanation will be sent to the employee's supervisor via the portal. If the SET determines that the request to speak is appropriate, a recommendation for approval will be sent to the employee's supervisor.

C. Ethics Review

The OGC Ethics Program (Ethics) will receive and review any SET requests that have been recommended for approval. Ethics neither approves nor denies requests to speak, but offers guidance to ensure that speakers do not experience an ethical dilemma. If Ethics reviews a request and has guidance to provide to an employee, Ethics will submit its comments to the employee and supervisor via the speaking engagement portal.

D. Final Review

After the SET and Ethics review the request, the employee's supervisor will make the final decision concerning approval or denial of the request and inform the employee of the supervisor's decision. The supervisor will also advise the employee of any guidance that has been offered by Ethics. If circumstances surrounding the speaking event change, the requesting employee should convey such changes to the supervisor, who should consult with the SET via EOIR.Speakers@EOIR.USDOJ.GOV to determine whether the employee's participation is still advisable. Note that communication via email should be only for approved requests or troubleshooting – all requests and resubmissions must be submitted through the portal.

III. Speaking in Official Capacity

When an EOIR employee is assigned to participate as a speaker or panel participant or otherwise present information on behalf of the agency at a conference or other event, the employee is doing so in an official capacity. Any EOIR employee speaking at an event hosted by a Federal Department, Office, or Agency, or at an event featuring representatives from other Departments, Offices, Agencies or members of Congress, must speak in an official capacity. This includes speaking at naturalization ceremonies even when not administering the naturalization oath.

If travel is required for an employee to speak in an official capacity, generally the employee may not accept reimbursement for travel and related expenses from any source other than the government. However, 41 C.F.R. Chapter 304 authorizes the Department (or the employee on the Department's behalf) to accept payment of travel expenses from a non-Federal source, but only "when specifically authorized to do so" and "only for official travel to a meeting."[5] Please note that EOIR has determined, as a matter of policy, that it will not accept any payment for the official travel of its employees by a non-Federal source that is considered a prohibited source for EOIR. A prohibited source is considered a person or entity who seeks official action from the agency, does business with the agency, appears before the agency, or is an organization a majority of whose members are described in this section.[6] As an adjudicatory body, EOIR should expect to be under constant scrutiny. EOIR employees must avoid all improprieties and the appearance of impropriety to ensure complete public confidence in the integrity of our agency. The acceptance of travel reimbursement for official duties from prohibited sources could undermine the public's confidence in the impartiality of EOIR's adjudicators. Likewise, under no circumstances may an EOIR employee receive a supplementation of salary (e.g., an honorarium) from a non-Federal source for a speaking activity that is done in an official capacity.[7]

IV. Speaking in a Personal Capacity

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

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[5] *41 C.F.R. § 304-5.3 further provides that reimbursement for travel from outside sources must not be authorized if the approving official determines that acceptance of the payment under the circumstances would cause a reasonable person with knowledge of all the facts relevant to a particular case to question the integrity of agency programs or operations. An employee who accepts travel from a non-Federal source in violation of 41 C.F.R. § 304-1.2 may be required to repay the amount of payment accepted from the non-Federal source and could be subject to additional penalties*

[6] *5 C.F.R. § 2635.203(d).*

[7] *18 U.S.C. § 209.*

Additionally, the employee may not permit the sponsoring organization to use the employee's official title in the promotion of the event in which the employee is invited to speak.

If an EOIR employee is traveling to speak at an event in a personal capacity, the employee is not entitled to travel reimbursement by the agency. However, when traveling in a personal capacity, an EOIR employee may accept reimbursements for travel expenses from the entity that is sponsoring the activity.[8] On the other hand, employees offered travel reimbursement for mere attendance (as opposed to speaking on a panel) at a conference in a personal capacity must contact Ethics for a determination as to whether accepting the reimbursement of travel expenses is appropriate. Ethics will apply the gift rules in deciding whether such employee may accept payment of these expenses. Factors that must be taken into consideration when applying the gift rules include the source and value of the reimbursement.[9] In either circumstance, the agency highly encourages consulting their supervisor to ensure the employee's evaluation of the engagement is in line with the agency's.

Please remember that the issuer of the invitation cannot be a prohibited source, and no EOIR employee may receive compensation for any outside speaking activity that relates to their official duties.

V. Conclusion

This policy does not necessarily address every situation that may arise related to speaking engagements. It is intended to restate and clarify a standard by which events may be evaluated. If questions arise regarding the application of this policy or the proper determination of a speaking capacity, please contact the Speakers Inbox at EOIR.Speakers@EOIR.USDOJ.GOV.

[8] *Sanjour v. Environmental Protection Agency*, 56 F.3d 85 (D.C. Cir. 1995); 5 C.F.R. § 2635.807(a)(2)(iii)(D).
[9] 5 C.F.R. § 2635.201-205.

Attachment A

The Speaking Engagement Policy identifies the two capacities (Official and Personal) in which an EOIR employee may speak when the employee is invited to participate in an event that involves immigration issues, relates to the employee's official duties, or is invited because of the employee's official position at the agency. Official and Personal Capacity designations are provided below with examples of appropriate events found within each category. Note that this is not an exclusive list, as some events, activities and forums may not be listed below.

Official Capacity

1. For any event where at least one DOJ or EOIR official is participating officially, all EOIR participants must speak in their official capacity.
2. For any event where an inviter is a Federal government agency and the employee is asked to speak or present at a government event, the EOIR employee must speak in their official capacity.
3. Immigration Conferences or similar events where the subject is immigration (including litigation)
4. Meetings with Stakeholders
5. Naturalization Ceremony, as guest speaker or to administer the oath
6. Court Visits by Outside Groups
7. Pro Bono training related to immigration
8. EOIR Mock Hearing Program
9. Recruiting for EOIR internship program

Personal Capacity

1. Moot Court judge - not immigration related
2. Commencement Speaker
3. Career Day/Alumni Career Panel - to discuss full career path and experience
4. Meeting with Boy Scouts or Girl Scouts or similar organizations
5. Interview based on book written in personal capacity
6. Speaking at a book club or hobbyist meeting

EXHIBIT H

Subject: Fwd: FW: Speaking Engagement Request
Date: Monday, June 29, 2020 at 10:11:04 AM Eastern Daylight Time
From: Samuel Cole
To: Ramya Krishnan, Stephanie C Krent, Alexander A Abdo

Immigration Judge Samuel B. Cole
Director of Communications
National Association of Immigration Judges
312/399-6794 (personal cell)
Twitter: @Imm_Judges_NAIJ
www.naij-usa.org

---------- Forwarded message ---------
From: **Cole, Samuel B. (EOIR)** <Samuel.B.Cole@usdoj.gov>
Date: Mon, Jun 29, 2020 at 9:10 AM
Subject: FW: Speaking Engagement Request
To: samuel.cole.naij@gmail.com <samuel.cole.naij@gmail.com>

****

Samuel B. Cole

United States Immigration Judge

From: Travieso, Frank (EOIR) <Frank.Travieso@EOIR.USDOJ.GOV>
Sent: Sunday, June 28, 2020 8:27 PM
To: Cole, Samuel B. (EOIR) <Samuel.Cole@EOIR.USDOJ.GOV>
Subject: FW: Speaking Engagement Request

From: Speakers, EOIR (EOIR) <EOIR.Speakers@EOIR.USDOJ.GOV>
Sent: Tuesday, March 27, 2018 7:34 AM
To: Travieso, Frank (EOIR) <Frank.Travieso@EOIR.USDOJ.GOV>

Cc: Laurent, Scott (EOIR) <Scott.Laurent@EOIR.USDOJ.GOV>; Speakers, EOIR (EOIR) <EOIR.Speakers@EOIR.USDOJ.GOV>
Subject: RE: Speaking Engagement Request

Judge Travieso:

We are writing to clarify the decision to decline your March 12 request to give an educational presentation to the Loyola Immigrant Justice Clinic's law students with a focus on immigration court etiquette for attorneys and related matters. We certainly understand that this decision was unexpected as you have been providing the same presentation for a number of years.

As a threshold matter, let us address that your request (and undoubtedly your previous requests) indicated that you intended to speak in your personal capacity with title and disclaimer (PTD). It appears that an old version of the request form was used because PTD was eliminated when we announced the new speaking engagement process in September 2017. Personal capacity and official capacity are the only two categories available. Because your topic concerned immigration court matters, and you were invited to speak because of your position as an immigration judge, personal capacity is not allowable.

In general, official capacity speaking engagements should be handled by EOIR management officials when practicable. As you know, immigration is always a topic of great interest and debate, and many employees are understandably unprepared to present the Department's official view when presented with thorny questions and topics. Management officials, as part of their official duties, are routinely briefed on ongoing litigation and the Department's position on sensitive topics and, therefore, are in the best position to address the questions and topics that might arise in official capacity speaking engagements.

Another reason why the Agency sends management officials to official capacity speaking engagements is to present a consistent, nationwide message to all EOIR stakeholders and the public. As part of the management team, ACIJs and DCIJs have a nationwide perspective of immigration court procedures and overarching policy matters. To the extent we can convey information in a consistent manner, we reduce the possibility of perpetuating concepts such as "local rules" or judge-based procedures. As an Agency, we strive to ensure that policies, processes, and procedures are consistent across the immigration court system.

Moreover, you requested to speak at an immigration law clinic whose students presumably practice in immigration court. When a speaking request comes from a party who appears in immigration court, we prefer that management officials, who spend considerably less time hearing cases, are the approved speakers. In this way, we hope to minimize the appearance that any practitioner or group of practitioners has a close relationship with a sitting judge. For example, if you had asked to give a guest lecture at your alma mater to students who are not practicing in immigration court, this particular issue would have presented less of a concern.

Thank you.

Speaking Engagement Team

From: Travieso, Frank (EOIR)
Sent: Friday, March 23, 2018 10:24 AM
To: Speakers, EOIR (EOIR) <EOIR.Speakers@EOIR.USDOJ.GOV>
Cc: Laurent, Scott (EOIR) <Scott.Laurent@EOIR.USDOJ.GOV>
Subject: FW: Speaking Engagement Request

Respectfully, I would appreciate an explanation for the denial of my request to speak in my personal capacity. I have been addressing the law clinic at my alma mater since its inception, and my requests were always approved. My presentations were well-received, and promoted pro bono representation. I would gladly address any deficiencies in my request. Thank you.

From: Speakers, EOIR (EOIR)
Sent: Wednesday, March 21, 2018 8:08 AM
To: Laurent, Scott (EOIR) <Scott.Laurent@EOIR.USDOJ.GOV>
Cc: Speakers, EOIR (EOIR) <EOIR.Speakers@EOIR.USDOJ.GOV>
Subject: RE: Speaking Engagement Request

ACIJ Laurent – You or another ACIJ may attend (in official capacity). The Office of the Director does not approve IJ Travieso for this engagement. If you decide to attend, please seek DCIJ Maggard's approval and have him include your talking points in his submission to this mailbox for review.

Thank you,

Speaking Engagement Team

From: Laurent, Scott (EOIR) [mailto:Scott.Laurent@EOIR.USDOJ.GOV]
Sent: Monday, March 12, 2018 12:24 PM
To: EOIRspeakers@usdoj.gov; EOIR, Ethics (EOIR) <Ethics.EOIR@EOIR.USDOJ.GOV>
Subject: FW: Speaking Engagement Request

Please notify asap whether Judge Travieso can attend. While I am aware of our new policy discouraging judges from participating in these types of speaking engagements, I will note that Judge Travieso has conducted this seminar in the past and given his almost 12 years of experience on the bench, he is an outstanding candidate to conduct the speaking engagement.

Scott Laurent

ACI

From: Travieso, Frank (EOIR)
Sent: Monday, March 12, 2018 7:39 AM
To: Laurent, Scott (EOIR) <Scott.Laurent@EOIR.USDOJ.GOV>
Subject: Speaking Engagement Request

Judge Laurent,

Attached, please find a speaking engagement request. The professor of the Loyola immigration law clinic has asked me once again to speak to her students, just as I did last year. Thank you for your time and consideration.

Frank M. Travieso

Immigration Judge

Executive Office for Immigration Review

300 N. Los Angeles St., Room 4330

Los Angeles, CA 90012

(213) 576-4738

EXHIBIT I

From: Speakers, EOIR (EOIR)
To: McNulty, Sheila (EOIR)
Cc: Speakers, EOIR (EOIR); EOIR, Ethics (EOIR)
Subject: FW: Speaker Form April 2018.doc
Date: Wednesday, April 04, 2018 11:22:00 AM
Attachments: Speaker Form April 2018.doc
Supervisor"s Checklist [redacted] BOS (002).docx

Good morning, ACIJ McNulty.
Please decline this speaking engagement due to the nature of the topic (asylum claims involving children).
Thank you,
Speaking Engagement Team

From: McNulty, Sheila (EOIR)
Sent: Friday, March 23, 2018 5:46 PM
To: EOIR, Ethics (EOIR) <Ethics.EOIR@EOIR.USDOJ.GOV>; Speakers, EOIR (EOIR) <EOIR.Speakers@EOIR.USDOJ.GOV>
Subject: FW: Speaker Form April 2018.doc
Good afternoon,
Attached please find the request from Judge [redacted]. I approve of this request.
Thank you,
SMN

EOIR Ethics - Speaking Engagement/Event Request Form

INSTRUCTIONS:

1. You must obtain your supervisor's written (email) approval to participate in the event prior to submitting this form.
2. You must completely fill-out this request form and email it along with the supervisory approval and any supporting documents to the Ethics Office.
3. **Fax and hard copy submissions will no longer be accepted**. Email supervisory approval, this request form, and supporting documents to EOIR.Ethics@usdoj.gov .

The Ethics Office will respond to your request via email. If you have questions, you may contact the Ethics Office at EOIR.Ethics@usdoj.gov or by calling (703) 305-0322.

- Multiple events require separate request forms.
- The Ethics Program requires a minimum of seven days notice before the event.
- All EOIR attendees must attend the event in the same capacity.

Your name: [redacted]

Your title: Immigration Judge

Your component: Boston Immigration Court

Work phone: [redacted]

Work location: Boston Immigration Court

Supervisor's name: Assistant Chief Immigration Judge Sheila McNulty

Speaking capacity (Personal, Personal w/title and disclaimer (PTD), or Official): Personal

Event date(s)/time and location:
April 16, 2018, 5-7 pm, Harvard Law School, Cambridge Massachusetts

What is the nature of the event?
It is a small law school class of approximately 18 students. The class is about asylum cases for children.

What organization issued the invitation or is sponsoring the event?
Harvard Immigration and Refugee Clinical Program of the Harvard Law School

What is the topic of your presentation? Case law and issues in asylum claims which involve children

Will you distribute any written material incident to your speaking engagement? No

Revised 2-2015

EOIR Ethics - Speaking Engagement/Event Request Form

If yes, describe the material and attach it to this submission.

Who is the anticipated audience? 18 students

Who are the other anticipated speakers? None

Will there be food or refreshments served as part of the event? Please give the estimated food cost and food description: No

Is there a fee to attend? Please give the amount of the fee: None

Are you planning to attend the event in addition to speaking? N/A

If so, were you offered a reduced or waived fee to attend? No

If so, what is the value of the savings?

Has the organization offered you any compensation for the event (i.e. CLE credit, speaker's fee, etc.)?
No

Has the organization offered to reimburse you for the costs of attendance (airfare, lodging, mileage, parking, etc.)?
No

Will there be any fundraising at the event?
No

Will the event have Press/Media coverage?
No

Please add any additional information:

Revised 2-2015

Supervisor's Checklist	**YES**	**NO**
Is EOIR participation advantageous and practical?	☒	☐
Does the event's intended message align with EOIR messaging?	☒	☐
AND If not, will the event consider an EOIR-specific message?	☐	☐
Is the requesting speaker the correct speaker for the event and message (e.g. consider current demands of the immigration court; whether there is a notable performance or conduct issue; whether person is a SME)	☒	☐

If you answer "no" to any of the above, the SET is unlikely to recommend approval for this speaking engagement.

Is the event open to the public?	☐	☒
Is the event open to the press?	☐	☒

If you answer "yes" to either of the above, please again consider whether the requestor is the appropriate speaker for the event and message.

Has the SET approved other EOIR speakers for this event?	☐	☒
AND If so, would the already approved speaker(s) meet the need?	☐	☐

If you answer "yes" to both of the above, please again consider whether this request is appropriate.

Is the message consistent with EOIR messaging?	☒	☐
AND If not, is the message able to be refined?	☐	☐

If you answer "no" to any of the above, the SET is unlikely to recommend approval for this speaking engagement.

EXHIBIT J

Tsankov, Mimi (EOIR)

From: Tsankov, Mimi (EOIR)
Sent: Thursday, July 26, 2018 11:14 AM
To: Cheng, Mary (EOIR); Loprest, Jr., F. James (EOIR)
Cc: james.loprest@usdoj.gov
Subject: RE: Speaking engagement for IJ Tsankov for July 26th.

Dear Judge Cheng,

Thank you for the follow-up.

Mimi Tsankov
Immigration Judge
New York Immigration Court (Varick Street Detained)
201 Varick Street, Room 1140
New York, New York 10014
Mimi.Tsankov@usdoj.gov
(212) 620-6279 Main Line
(646) 638-5703 Chambers Line

From: Cheng, Mary (EOIR)
Sent: Wednesday, July 25, 2018 9:26 AM
To: Tsankov, Mimi (EOIR) <Mimi.Tsankov@EOIR.USDOJ.GOV>; Loprest, Jr., F. James (EOIR) <F.James.LoprestJr@EOIR.USDOJ.GOV>
Cc: Cheng, Mary (EOIR) <Mary.Cheng@EOIR.USDOJ.GOV>
Subject: RE: Speaking engagement for IJ Tsankov for July 26th.

Dear Judge Tsankov,

I have been informed that your request for reconsideration has been denied.

Mary Cheng
Deputy Chief Immigration Judge

From: Tsankov, Mimi (EOIR)
Sent: Tuesday, July 24, 2018 11:23 AM
To: Cheng, Mary (EOIR) <Mary.Cheng@EOIR.USDOJ.GOV>; Loprest, Jr., F. James (EOIR) <F.James.LoprestJr@EOIR.USDOJ.GOV>
Subject: RE: Speaking engagement for IJ Tsankov for July 26th.

Dear Judge Cheng and Judge Loprest,

I request that the SET team reconsider this decision and designate me to speak in an official capacity. This request has been pending since April 24, 2018. Given the extraordinary delays in responding to my request, my notification of such a couple of days before the event, as well as the damage that will occur in failing to show up for a program that is scheduled for Thursday, I would appreciate reconsideration.

Sincerely,

Mimi Tsankov

Mimi Tsankov
Immigration Judge
New York Immigration Court (Varick Street Detained)
201 Varick Street, Room 1140
New York, New York 10014
Mimi.Tsankov@usdoj.gov
(212) 620-6279 Main Line
(646) 638-5703 Chambers Line

From: Cheng, Mary (EOIR)
Sent: Monday, July 23, 2018 5:33 PM
To: Tsankov, Mimi (EOIR) <Mimi.Tsankov@EOIR.USDOJ.GOV>; Cheng, Mary (EOIR) <Mary.Cheng@EOIR.USDOJ.GOV>
Cc: Loprest, Jr., F. James (EOIR) <F.James.LoprestJr@EOIR.USDOJ.GOV>
Subject: Speaking engagement for IJ Tsankov for July 26th.

Judge Tsankov,

The SET has informed me that your request to speak in your personal capacity on July 26th at the PLI has not been approved. I have been informed that the nature of the event calls for official capacity and supervisory immigration judges should represent EOIR at events such as this one. Thank you.

Mary Cheng
Deputy Chief Immigration Judge

Tsankov, Mimi (EOIR)

From: Swanwick, Daniel (EOIR)
Sent: Monday, June 25, 2018 6:36 PM
To: Tsankov, Mimi (EOIR)
Subject: RE: speaking engagement requests without responses

It's my pleasure, Judge Tsankov.

Best,
Dan

Daniel L. Swanwick
Counsel to the Deputy Director, EOIR, DOJ
703-605-1381

From: Tsankov, Mimi (EOIR)
Sent: Monday, June 25, 2018 10:02 AM
To: Swanwick, Daniel (EOIR) <Daniel.Swanwick@EOIR.USDOJ.GOV>; Morley, Steven A. (EOIR) <Steven.Morley@EOIR.USDOJ.GOV>
Cc: Scheinkman, Rena (EOIR) <Rena.Scheinkman@EOIR.USDOJ.GOV>
Subject: RE: speaking engagement requests without responses

Dear Daniel,

Thanks for the update and follow-through!

MET

Mimi Tsankov
Immigration Judge
New York Immigration Court (Varick Street Detained)
201 Varick Street, Room 1140
New York, New York 10014
Mimi.Tsankov@usdoj.gov
(212) 620-6279 Main Line
(646) 638-5703 Chambers Line

From: Swanwick, Daniel (EOIR)
Sent: Friday, June 22, 2018 12:50 PM
To: Morley, Steven A. (EOIR) <Steven.Morley@EOIR.USDOJ.GOV>; Tsankov, Mimi (EOIR) <Mimi.Tsankov@EOIR.USDOJ.GOV>
Cc: Scheinkman, Rena (EOIR) <Rena.Scheinkman@EOIR.USDOJ.GOV>
Subject: RE: speaking engagement requests without responses

All the requests have now been submitted to the SET. Thank you again for your patience, and for raising these issues with us.

Daniel L. Swanwick

Counsel to the Deputy Director, EOIR, DOJ
703-605-1381

From: Morley, Steven A. (EOIR)
Sent: Thursday, June 21, 2018 4:41 PM
To: Swanwick, Daniel (EOIR) <Daniel.Swanwick@EOIR.USDOJ.GOV>; Tsankov, Mimi (EOIR) <Mimi.Tsankov@EOIR.USDOJ.GOV>
Cc: Scheinkman, Rena (EOIR) <Rena.Scheinkman@EOIR.USDOJ.GOV>
Subject: RE: speaking engagement requests without responses

Thank you for the update on these matters and I am pleased that they have been located and will be resolved shortly.

SAM

Immigration Judge
Philadelphia Immigration Court
900 Market Street
Suite 504
Philadelphia, PA 19107
215-656-7000

From: Swanwick, Daniel (EOIR)
Sent: Thursday, June 21, 2018 4:36 PM
To: Morley, Steven A. (EOIR) <Steven.Morley@EOIR.USDOJ.GOV>; Tsankov, Mimi (EOIR) <Mimi.Tsankov@EOIR.USDOJ.GOV>
Cc: Scheinkman, Rena (EOIR) <Rena.Scheinkman@EOIR.USDOJ.GOV>
Subject: RE: speaking engagement requests without responses

Good afternoon Judges Morley and Tsankov,

Thank you for your patience. Requests (2) and (3) below have been located and submitted to the SET. Request (1) will be submitted shortly. Please do not hesitate to contact me with any additional questions.

Sincerely,
Dan

Daniel L. Swanwick
Counsel to the Deputy Director, EOIR, DOJ
703-605-1381

From: Morley, Steven A. (EOIR)
Sent: Friday, June 15, 2018 4:08 PM
To: Swanwick, Daniel (EOIR) <Daniel.Swanwick@EOIR.USDOJ.GOV>
Cc: Scheinkman, Rena (EOIR) <Rena.Scheinkman@EOIR.USDOJ.GOV>; Tsankov, Mimi (EOIR) <Mimi.Tsankov@EOIR.USDOJ.GOV>
Subject: RE: speaking engagement requests without responses

Hello Mr. Swanwick

I am following up on your email. Have you been able to discern the status of Judge Tsankov's speaking requests? In particular, I note that one of them is a request for teaching pursuant to 5 CFR 2635.807(a)(3). The reason that teaching requests were not specifically addressed in the MOU is the agency's commitment to following all regulations. I am particularly concerned about the delay in this request.

I appreciate your response at you earliest convenience.

SAM

Steven A. Morley
Immigration Judge
Executive Office for Immigration Review
900 Market Street, Suite 504
Philadelphia, PA 19107
Tel. 215-656-7000

From: Swanwick, Daniel (EOIR)
Sent: Tuesday, June 05, 2018 3:23 PM
To: Morley, Steven A. (EOIR) <Steven.Morley@EOIR.USDOJ.GOV>
Cc: Scheinkman, Rena (EOIR) <Rena.Scheinkman@EOIR.USDOJ.GOV>; Tsankov, Mimi (EOIR) <Mimi.Tsankov@EOIR.USDOJ.GOV>
Subject: RE: speaking engagement requests without responses

Good afternoon Judge Morley,

Thank you for your message. I will look into this matter, and someone will be in touch with Judge Tsankov soon.

Sincerely,
Dan

Daniel L. Swanwick
Counsel to the Deputy Director, EOIR, DOJ
703-605-1381

From: Morley, Steven A. (EOIR)
Sent: Tuesday, June 05, 2018 2:12 PM
To: Scheinkman, Rena (EOIR) <Rena.Scheinkman@EOIR.USDOJ.GOV>; Swanwick, Daniel (EOIR) <Daniel.Swanwick@EOIR.USDOJ.GOV>
Cc: James.Loprest@eoir.usdoj.gov; Tsankov, Mimi (EOIR) <Mimi.Tsankov@EOIR.USDOJ.GOV>
Subject: speaking engagement requests without responses

Dear Ms. Scheinkman and Mr. Swanwick-

I am writing to you in my capacity as the single point of contact concerning a delayed response to a speaking request pursuant to Paragraph 3 of the MOU regarding speaking engagement requests. I understand that the Agency has yet to specifically identify a point of contact for this purpose, but I believe your familiarity with the

issues is a good basis to approach you with these concerns. There are 3 delayed responses, all from Judge Mimi Tsankov.

(1) PLI (Practicing Law Institute) – scheduled for July 26, 2018 – Request was initially sent on April 24, 2018 and resent on May 11, 2018. Given that this was after the MOU was executed by the parties on May 10, 2018, it is well beyond the five business days of paragraph 2 and without explanation of the delay. I understand that paragraph 2 is not a mandatory response time of 5 days, but this is about a month without any information. In keeping with the goal of transparency I hope that there will be a prompt resolution, and if denied, with a reason.
(2) A request to teach at Fordham Law School spring 2019 a course titled "International Law and Justice". This was sent to ACIJ Judge Loprest on March 20, 2018. SET could not find the request on reminder on April 13, 2018 and asked Judge Tsankov to fill out the form for submission to SET. It is still pending. As we discussed during negotiations, teaching a course is governed by a specific regulation and the agency reaffirmed its commitment to abide by all regulations.
(3) Federal Pro Bono Fair – Judge Tsankov was contacted by Laura Klein of PRAO to be part of the pro bono program. There does not seem to be a specific date set but this request has been pending since originally made on October 12, 2017. The hope was for Judge Tsankov to be part of this in May or early June 2018. Judge Khan contacted you – Ms. Scheinkman - on April 11, 2018 to which you responded that "We're looking into this matter and will be in touch as soon as we have something to share." It is now about seven weeks since that email.

I can furnish some email chains on these matters if that is helpful, but rather than inundating you all at once with that, I would appreciate your looking into these matters for Judge Tsankov and responding promptly to her.

Thank you.

SAM

Steven A. Morley
Immigration Judge
Executive Office for Immigration Review
900 Market Street, Suite 504
Philadelphia, PA 19107
Tel. 215-656-7000

Tsankov, Mimi (EOIR)

From: Tsankov, Mimi (EOIR)
Sent: Wednesday, June 20, 2018 4:05 PM
To: Khan, Amiena (EOIR)
Subject: FW: Ethics Request - PLI July 26, 2018
Attachments: FW: Ethics Request - PLI July 26, 2018

FYI – I just resent this one to Judge Loprest.

Mimi Tsankov
Immigration Judge
New York Immigration Court (Varick Street Detained)
201 Varick Street, Room 1140
New York, New York 10014
Mimi.Tsankov@usdoj.gov
(212) 620-6279 Main Line
(646) 638-5703 Chambers Line

From: Loprest, Jr., F. James (EOIR)
Sent: Wednesday, June 20, 2018 2:47 PM
To: Tsankov, Mimi (EOIR) <Mimi.Tsankov@EOIR.USDOJ.GOV>
Subject: RE: Ethics Request - PLI July 26, 2018

Aha! Thanks, Mimi!

This is the mysterious PLI request. I must admit, I do not recall ever seeing this. But that does not mean I did not squirrel it away somewhere and lost track of it. Let me get it to the SET ASAP.

Thanks again.

James

Tsankov, Mimi (EOIR)

From: Tsankov, Mimi (EOIR)
Sent: Wednesday, June 20, 2018 2:25 PM
To: Loprest, Jr., F. James (EOIR)
Subject: FW: Ethics Request - PLI July 26, 2018
Attachments: program schedule.Defending Immigration Removal Proceedings 2018.docx; Requestor form to supervisor.docx; Requestor's Checklist.docx

FYI: Please see attached.

Mimi Tsankov
Immigration Judge
New York Immigration Court (Varick Street Detained)
201 Varick Street, Room 1140
New York, New York 10014
Mimi.Tsankov@usdoj.gov
(212) 620-6279 Main Line
(646) 638-5703 Chambers Line

From: Tsankov, Mimi (EOIR)
Sent: Tuesday, June 19, 2018 10:18 AM
To: Loprest, Jr., F. James (EOIR) <F.James.LoprestJr@EOIR.USDOJ.GOV>
Cc: Tsankov, Mimi (EOIR) <Mimi.Tsankov@EOIR.USDOJ.GOV>
Subject: FW: Ethics Request - PLI July 26, 2018

Dear Judge Loprest,

Per your email of today, I am resubmitting this request for you to resent to the SET Team.

Thanks so much.

Mimi

Mimi Tsankov
Immigration Judge
New York Immigration Court (Varick Street Detained)
201 Varick Street, Room 1140
New York, New York 10014
Mimi.Tsankov@usdoj.gov
(212) 620-6279 Main Line
(646) 638-5703 Chambers Line

From: Tsankov, Mimi (EOIR)
Sent: Monday, May 14, 2018 1:08 PM
To: Loprest, Jr., F. James (EOIR) <F.James.LoprestJr@EOIR.USDOJ.GOV>
Subject: FW: Ethics Request - PLI July 26, 2018

Dear Judge Loprest,

Per your request of May 11, 2018, I am resubmitting this request for you to resend to the SET Team.

Thanks,

MET

Mimi Tsankov
Immigration Judge
New York Immigration Court (Varick Street Detained)
201 Varick Street, Room 1140
New York, New York 10014
Mimi.Tsankov@usdoj.gov
(212) 620-6279 Main Line
(646) 638-5703 Chambers Line

From: Tsankov, Mimi (EOIR)
Sent: Tuesday, April 24, 2018 6:11 PM
To: Loprest, Jr., F. James (EOIR) <F.James.LoprestJr@EOIR.USDOJ.GOV>
Cc: Tsankov, Mimi (EOIR) <Mimi.Tsankov@EOIR.USDOJ.GOV>
Subject: Ethics Request - PLI July 26, 2018

Dear Judge Loprest,

Attached and below, please find an ethics speaking request for a program at PLI on July 26, 2018.

Thank you for your time. I look forward to hearing from you.

Sincerely,

Mimi

Mimi Tsankov
Immigration Judge
New York Immigration Court (Varick Street Detained)
201 Varick Street, Room 1140
New York, New York 10014
Mimi.Tsankov@usdoj.gov
(212) 620-6279 Main Line
(646) 638-5703 Chambers Line

From: Ilizabeth Hempstead [mailto:ihempstead@pli.edu]
Sent: Tuesday, April 17, 2018 4:41 PM
To: Tsankov, Mimi (EOIR) <Mimi.Tsankov@EOIR.USDOJ.GOV>
Subject: RE: Requestor form to supervisor

Dear Judge Tsankov,
We actually now have an additional speaker for the segment: Dree Collopy, in addition to the two I listed below. The segment is 90 minutes long so this should be fine (and I hope you agree). I have attached the program schedule for your information.
If you have any questions, please do not hesitate to let me know.

Liz

Ilizabeth Gonchar Hempstead
Program Attorney
1177 Avenue of the Americas | New York, NY 10036
212-590-8867 | Fax: 212-221-1265
ihempstead@pli.edu

PLI PRACTISING LAW INSTITUTE
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On Tue, Mar 6, 2018 at 1:02 PM, Ilizabeth Hempstead <ihempstead@pli.edu> wrote:

Dear Judge Tsankov,

Attached is our PLI faculty form for this year's program and also the form you sent me, with portions filled out. Please note I did not fill out the introductory portions. In addition, I did not list all anticipated speakers because we are still sorting that out. We have invited Mark von Sternberg (so I listed him) and we anticipate inviting Lenni Benson but haven't yet and I can update you once I get replies. I also entered that you would not be attending the rest of the program because that is what you had on last year's form – but we would be glad to have you attend any of the program, so you may want to change that. And I see that the form has changed a bit from last year – so I tried to answer it even when the questions were different from last year's questions. Finally, I have not attached our full program schedule because we are still developing it. I hope to have it finalized in the next two weeks and will send it when it is done.

Please let me know if you have any questions.

Best regards,

Liz

Ilizabeth Gonchar Hempstead

Program Attorney

1177 Avenue of the Americas | New York, NY 10036

212-590-8867 | Fax: 212-221-1265

ihempstead@pli.edu

<image001.png>

www.pli.edu | 800.260.4754

Defending Immigration Removal Proceedings 2018
July 26
New York City

AGENDA

Morning Session:

9:00
Opening Remarks
Parisa Karaahmet

9:15
Immigration and Recent Developments in Asylum Law
- Establishing the required elements of asylum and withholding of removal
- Pitfalls for applicants such as firm resettlement; the one-year filing deadline; obtaining supporting documentation
- Convention Against Torture (CAT): distinguishing it from asylum and withholding
- Recent adjudication trends in asylum case law, including the evolving definition of "social group"

Lori K. Adams, Dree Collopy, Thomas W. Vanasse, Additional Speaker Invited

10:45
Networking Break

11:00
Representing Children in Removal Proceedings and Immigration Relief for Victims of Crime or Abuse
- Special Immigrant Juvenile Status (SIJS)
  - state level issues
  - federal level issues
- U and T visas
- Violence Against Women Act (VAWA) claims

Deborah Lee, Cristina Romero, Wendy Wylegala

12:15
Ethical Issues and Immigration Law
- Duty of competence
- Duty of candor vs. protecting client confidences
- Conflicts of interest
- Filing meritorious claims

Robert E. Juceam, Eve Stotland, Additional Speaker Invited

1:15
Lunch

Afternoon Session:

2:15
Cancellation of Removal and Representing the Criminal Defendant in Immigration Removal Proceedings

- Cancellation of removal for non-lawful permanent residents, how to establish exceptional/extremely unusual hardship
- Definition of conviction under INA 101(a)(48)(A)
- Inadmissible vs. removable – what is the distinction and how does it impact your client's case?
- Cancellation of removal for lawful permanent residents, how to establish eligibility
- Definition of aggravated felony, is relief still available?
- How to pursue post-conviction remedies

Cheryl R. David, Linda Kenepaske, Joanne Macri

3:45
Networking Break

4:00
The Evolving Landscape for the Immigration Practitioner

- Latest regarding DACA individuals and status in the United States
- Developments regarding Temporary Protective Status (TPS)
- Developments in removal practice
- Government enforcement priorities

Barbara Camacho, Cyrus D. Mehta, Victoria Neilson

5:00
Adjourn

Faculty

Chair

Parisa Karaahmet
Fragomen, Del Rey, Bernsen & Loewy, LLP
New York City

Lori K. Adams
Managing Attorney, Refugee Representation Program
Human Rights First
New York City

Barbara Camacho
Pro Bono Counsel
Fragomen, Del Rey, Bernsen & Loewy, LLP
New York City

Dree Collopy
Benach Collopy LLP
Washington, DC

Cheryl R. David
The Law Office of Cheryl R. David, LLC
New York City

Robert E. Juceam
Fried Frank Harris Shriver & Jacobson LLP
New York City

Linda Kenepaske
Law Office of Linda Kenepaske PLLC
New York City

Deborah Lee
Senior Staff Attorney, Immigration Intervention Project
Sanctuary for Families
Brooklyn, NY

Joanne Macri
Chief Statewide Implementation Attorney
New York State Office of Indigent Legal Services
Albany, NY

Cyrus D. Mehta
Cyrus D. Mehta & Partners PLLC

New York City

Victoria Neilson
Training and Legal Support Senior Attorney
Catholic Legal Immigration Network, Inc. (CLINIC)
Silver Spring, MD

Cristina Romero
Staff Attorney, Immigration Law Unit
The Legal Aid Society
New York City

Eve Stotland
Director, Legal Services Center
The Door
New York City

Thomas W. Vanasse
Law Office of Thomas W. Vanasse, PLLC
New York City

Wendy Wylegala
Deputy Director for Legal Technical Assistance
Kids in Need of Defense (KIND)
New York City

Program Attorney: Ilizabeth Hempstead

EOIR Ethics - Speaking Engagement/Event Request Form

INSTRUCTIONS:

Please review the Speaking Engagement Team (SET) instructions prior to submitting this form to your supervisor. Upon providing preliminary approval, your supervisor should submit all relevant materials to EOIRspeakers@usdoj.gov.

The SET, which consists of staff from the Office of Communications and Legislative Affairs and the Office of the General Counsel, will review the submitted package and respond via email to the supervisor with a recommendation regarding your participation. If you have questions regarding the ethics regulations, you may contact the Ethics Office at EOIR.Ethics@usdoj.gov or by calling (703) 305-0322. If you have any questions regarding communications or EOIR messaging, you may contact the Office of Communications and Legislative Affairs at PAO.EOIR@usdoj.gov.

- Multiple events require separate request forms.
- Each speaker requires a separate form, even if multiple employees are participating in the same event.
- If multiple EOIR speakers request to speak at the same event, each must speak in the same capacity as the others.
- Official capacity requests requires the review of all statements the speaker wishes to make. Speakers may not deviate from or expand upon approved talking points. Submission for personal capacity does not necessarily exempt you from submitting talking points. The SET may ask to review your planned remarks.

Your name/title: Mimi Tsankov, Immigration Judge

Your component: EOIR/OCIJ

Work location/phone: New York, NY 646.638.5703

Supervisor's name: ACIJ James Loprest

Speaking capacity (Official or Personal): Personal

Event date(s)/time and location:
July 26, 2018; 9:15-10:45am

What organization issued the invitation or is sponsoring the event?

Practising Law Institute (PLI)

Revised 11-2017

EOIR Ethics - Speaking Engagement/Event Request Form

What is the nature of the event (conference, seminar, lecture, etc.)?

Continuing Legal Education (CLE) program for lawyers
Defending Immigration Removal Proceedings 2018 July 26, 9-5,
specifically, the Asylum Panel entitled: Immigration and Recent
Developments in Asylum Law 9:15-10:45am
PLI, 1177 6th Ave -- at the corner of 45th Street and Sixth Avenue,
New York, New York

What is the topic of your presentation?

The description of the segment is below.

9:15 Immigration and Recent Developments in Asylum Law

- Establishing the required elements of asylum and withholding of removal
- Pitfalls for applicants such as firm resettlement; the one-year filing deadline; obtaining supporting documentation
- Convention Against Torture (CAT): distinguishing it from asylum and withholding
- Recent adjudication trends in asylum case law, including the evolving definition of "social group"

Will you distribute any written material incident to your speaking engagement?

I will not be preparing materials. PLI offers a digital course book in conjunction with the program. PLI is likely to have a piece written by Mark von Sternberg.

If yes, describe the material and attach it to this submission.

Who is the anticipated audience?

Lawyers, those seeking CLE credit, those who practice immigration law, and those looking for pro bono immigration opportunities

Who are the other anticipated speakers?

Dree Collopy, Tom Vanasse, Lori Adams

Will there be food or refreshments served as part of the event?

Yes

If yes, please give the estimated food cost (per person) and food description:

Revised 11-2017

EOIR Ethics - Speaking Engagement/Event Request Form

PLI offers snacks and coffee and soda to attendees (PLI estimates $8). It offers a faculty lunch to speakers if they would like to attend (PLI estimates $37.). There is no requirement to attend lunch but PLI offers it so that the speakers can discuss the program if they would like to.

Is there a fee to attend?

There is no fee to attend this program. It is offered for free.

If yes, please give the amount of the fee: N/A

Are you planning to attend the event in addition to speaking?

I plan to participate as a speaker only.

If so, were you offered a reduced or waived fee to attend? N/A

If so, what is the value of the savings? N/A

Has the organization offered you any compensation for the event (speaker fee)?

No. PLI does not offer compensation to the speakers. PLI offers CLE credit to both attendees and speakers.

Has the organization offered to reimburse you for travel expenses (airfare, lodging, mileage, parking, etc.)?

No

Will there be any fundraising at the event?

There will be no fundraising at this event.

Please add any additional information:

EXHIBIT K

Parr, Abigail (SF)

From: Tabaddor, A. Ashley (EOIR) <Ashley.Tabaddor@usdoj.gov>
Sent: Monday, December 16, 2019 12:34 PM
To: Tough, Margaret (SF)
Subject: FW: request to speak

From: Peyton, Jennifer I. (EOIR) <Jennifer.Peyton@EOIR.USDOJ.GOV>
Sent: Monday, December 16, 2019 12:32 PM
To: Tabaddor, A. Ashley (EOIR) <Ashley.Tabaddor@EOIR.USDOJ.GOV>
Subject: FW: request to speak

From: McNulty, Sheila (EOIR) <Sheila.McNulty@EOIR.USDOJ.GOV>
Sent: Tuesday, October 1, 2019 3:30 PM
To: Peyton, Jennifer I. (EOIR) <Jennifer.Peyton@EOIR.USDOJ.GOV>
Subject: Fwd: request to speak

Well, I guess you were right....sorry.
Guess I couldn't persuade them...

Sent from my iPad

Begin forwarded message:

> **From:** "Speakers, EOIR (EOIR)" <EOIR.Speakers@EOIR.USDOJ.GOV>
> **Date:** October 1, 2019 at 3:26:11 PM CDT
> **To:** "McNulty, Sheila (EOIR)" <Sheila.McNulty@EOIR.USDOJ.GOV>, "Speakers, EOIR (EOIR)" <EOIR.Speakers@EOIR.USDOJ.GOV>, "EOIR, Ethics (EOIR)" <Ethics.EOIR@EOIR.USDOJ.GOV>
> **Subject: RE: request to speak**
>
> ACIJ McNulty,
>
> This request is denied. The topic is too closely related to Judge Peyton's official duties to permit participation in her personal capacity, and she does not qualify for the regulatory exception for teaching in a personal capacity because she is guest-lecturing, not teaching a semester-long course.
>
> Further, appearing in an official capacity is not appropriate because it is not clear that Judge Peyton is the right speaker for the event, or that her participation would advance the Agency's interests.
>
> However, based on this submission, it would be appropriate for a management official to participate in this engagement.
>
> Thank you,
>
> Speaking Engagement Team

From: McNulty, Sheila (EOIR) <Sheila.McNulty@EOIR.USDOJ.GOV>
Sent: Tuesday, September 17, 2019 6:37 PM
To: Speakers, EOIR (EOIR) <EOIR.Speakers@EOIR.USDOJ.GOV>; EOIR, Ethics (EOIR) <Ethics.EOIR@EOIR.USDOJ.GOV>
Cc: Peyton, Jennifer I. (EOIR) <Jennifer.Peyton@EOIR.USDOJ.GOV>
Subject: FW: request to speak

Good afternoon,
Please find the attached request to speak from Judge Peyton at the law school she previously taught at.
Thank you,
ACIJ McNulty

From: McNulty, Sheila (EOIR)
Sent: Tuesday, September 17, 2019 6:25 PM
To: Peyton, Jennifer I. (EOIR) <Jennifer.Peyton@EOIR.USDOJ.GOV>
Subject: RE: request to speak

Judge –
I approve of this request.

From: Peyton, Jennifer I. (EOIR) <Jennifer.Peyton@EOIR.USDOJ.GOV>
Sent: Tuesday, September 17, 2019 5:14 PM
To: McNulty, Sheila (EOIR) <Sheila.McNulty@EOIR.USDOJ.GOV>
Subject: request to speak

ACIJ:

A professor from my former law school has requested me to speak, over skype, to the immigration class of 21 students on 10/2. This is in a personal capacity.

I've attached the Speaking Request Form.

At your convenience, can you please review and provide your thoughts?

Thank you!

JP

EXHIBIT L

Wednesday, March 11, 2020 at 11:10:42 PM Eastern Daylight Time

Subject: Fwd: FW: SET request
Date: Wednesday, March 11, 2020 at 1:56:32 PM Eastern Daylight Time
From: Samuel Cole
To: Alexander A Abdo, Ashley Tabaddor, Ramya Krishnan, Stephanie C Krent

---

Immigration Judge Samuel B. Cole
Director of Communications
National Association of Immigration Judges
312/399-6794 (personal cell)
Twitter: @Imm_Judges_NAIJ
www.naij-usa.org

---------- Forwarded message ---------
From: **Cole, Samuel B. (EOIR)** <Samuel.B.Cole@usdoj.gov>
Date: Wed, Mar 11, 2020 at 12:55 PM
Subject: FW: SET request
To: samuel.cole.naij@gmail.com <samuel.cole.naij@gmail.com>

****

Samuel B. Cole

United States Immigration Judge

From: Cole, Samuel B. (EOIR)
Sent: Tuesday, May 21, 2019 3:45 PM
To: Ruffino, Lou (EOIR) <Lou.Ruffino@EOIR.USDOJ.GOV>
Subject: RE: SET request

Lou, I'm following up again on this.

SBC

Samuel B. Cole

Immigration Judge

Chicago Immigration Court

536 S. Clark St., Suite 340

Chicago, Illinois 60605

From: Ruffino, Lou (EOIR) <Lou.Ruffino@EOIR.USDOJ.GOV>
Sent: Monday, April 08, 2019 2:31 PM
To: Cole, Samuel B. (EOIR) <Samuel.Cole@EOIR.USDOJ.GOV>
Subject: RE: SET request

Hi Sam:

I did not see any communication back to you in all of the places I had expected to see it. I do know, however, that the "Speakers Mailbox" was down for a number of weeks. So, I am now checking with my colleagues to see whether SET communications may have been housed elsewhere during that time.

Thanks!

Lou

From: Cole, Samuel B. (EOIR) <Samuel.Cole@EOIR.USDOJ.GOV>
Sent: Wednesday, April 03, 2019 3:59 PM
To: Ruffino, Lou (EOIR) <Lou.Ruffino@EOIR.USDOJ.GOV>
Subject: RE: SET request

Hello Lou! I heard from my ACIJ several weeks ago that the SET request referenced below was going to be denied. And so I canceled my talk to the 7th graders. But I never actually received a formal response denying my request. Honestly, I'm still hopeful to do the talk, even if it means changing my presentation to address whatever concerns exist.

What can you tell me?

SBC

From: Cole, Samuel B. (EOIR)
Sent: Wednesday, March 06, 2019 9:42 AM
To: Ruffino, Lou (EOIR) <Lou.Ruffino@EOIR.USDOJ.GOV>
Subject: RE: SET request

I'm supposed to talk to the 7th graders on Friday. Any decision yet?

From: Ruffino, Lou (EOIR) <Lou.Ruffino@EOIR.USDOJ.GOV>
Sent: Tuesday, February 26, 2019 4:25 PM
To: Cole, Samuel B. (EOIR) <Samuel.Cole@EOIR.USDOJ.GOV>
Subject: RE: SET request

YW!

From: Cole, Samuel B. (EOIR) <Samuel.Cole@EOIR.USDOJ.GOV>
Sent: Tuesday, February 26, 2019 3:57 PM
To: Ruffino, Lou (EOIR) <Lou.Ruffino@EOIR.USDOJ.GOV>
Subject: RE: SET request

Thanks Lou!

SBC

Samuel B. Cole

Immigration Judge

Chicago Immigration Court

536 S. Clark St., Suite 340

Chicago, Illinois 60605

From: Ruffino, Lou (EOIR) <Lou.Ruffino@EOIR.USDOJ.GOV>
Sent: Tuesday, February 26, 2019 6:58 AM
To: Cole, Samuel B. (EOIR) <Samuel.Cole@EOIR.USDOJ.GOV>
Subject: SET request

Hi IJ Cole:

Please know that your request is being reviewed. Please also know that we expect to have a response this week.

Please call or email me if you have any questions or need additional information.

Thanks!

Lou Ruffino

Acting Chief

OP-Communications and Legislative Affairs Division

703/756-8382

Subject: Fwd: FW: speaking engagement 3/8
Date: Wednesday, March 11, 2020 at 2:04:44 PM Eastern Daylight Time
From: Samuel Cole
To: Ramya Krishnan, Stephanie C Krent, Alexander A Abdo, Ashley Tabaddor

---

Immigration Judge Samuel B. Cole
Director of Communications
National Association of Immigration Judges
312/399-6794 (personal cell)
Twitter: @Imm_Judges_NAIJ
www.naij-usa.org

---------- Forwarded message ---------
From: **Cole, Samuel B. (EOIR)** <Samuel.B.Cole@usdoj.gov>
Date: Wed, Mar 11, 2020 at 1:04 PM
Subject: FW: speaking engagement 3/8
To: samuel.cole.naij@gmail.com <samuel.cole.naij@gmail.com>

****

Samuel B. Cole

United States Immigration Judge

From: McNulty, Sheila (EOIR) <Sheila.McNulty@EOIR.USDOJ.GOV>
Sent: Wednesday, March 6, 2019 4:47 PM
To: Cole, Samuel B. (EOIR) <Samuel.Cole@EOIR.USDOJ.GOV>
Subject: RE: speaking engagement 3/8

Sam,

According to Lou Ruffino, the request is going to be denied. He says the decision from the SET mailbox will be forthcoming but for some reason the mailbox functionality isn't working. As soon as it is functioning they'll get the message to you, but I wanted to let you know so you can let the school know.

Feel free to call me if you want…

Sorry,

Sheila

From: Cole, Samuel B. (EOIR) <Samuel.Cole@EOIR.USDOJ.GOV>
Sent: Wednesday, March 06, 2019 4:31 PM
To: McNulty, Sheila (EOIR) <Sheila.McNulty@EOIR.USDOJ.GOV>
Subject: RE: speaking engagement 3/8

No flu I don't think. Just an annoying virus.

_____

Samuel B. Cole

Immigration Judge

Chicago Immigration Court

536 S. Clark St., Suite 340

Chicago, Illinois 60605

From: McNulty, Sheila (EOIR) <Sheila.McNulty@EOIR.USDOJ.GOV>
Sent: Wednesday, March 06, 2019 3:18 PM
To: Cole, Samuel B. (EOIR) <Samuel.Cole@EOIR.USDOJ.GOV>
Subject: RE: speaking engagement 3/8

No I haven't – I have a feeling they may be looking over your hypos or something b/c I don't know why it would take this long.

I'll send Katherine an email asking for an update.

Take it easy---did you get the flu?

Sheila

From: Cole, Samuel B. (EOIR) <Samuel.Cole@EOIR.USDOJ.GOV>
Sent: Wednesday, March 06, 2019 3:11 PM
To: McNulty, Sheila (EOIR) <Sheila.McNulty@EOIR.USDOJ.GOV>
Subject: RE: speaking engagement 3/8

Hey Sheila. I'm back today. Feeling so so, but have survived so far.

Have you heard anything about the speaking engagement? It's this Friday.

From: McNulty, Sheila (EOIR) <Sheila.McNulty@EOIR.USDOJ.GOV>
Sent: Monday, February 25, 2019 5:15 PM
To: Cole, Samuel B. (EOIR) <Samuel.Cole@EOIR.USDOJ.GOV>
Subject: Re: speaking engagement 3/8

Hi Sam,

I checked and it is still pending- Dep Director K. Reilly says she will have an answer this week.

Thanks

Sheila

On Feb 25, 2019, at 3:39 PM, Cole, Samuel B. (EOIR) <Samuel.Cole@EOIR.USDOJ.GOV> wrote:

> Hey Sheila! Glad you loved Colombia. Sounds like a wonderful trip. (I want to hear more about the cocktail tours.)
>
> Question about my speaking engagement request. Have you heard a response about my 7th grade speaking engagement? It's now set for 3/8/19 and I want to give warning to the folks at the middle school if there's going to be any issues.
>
> Gracias.
>
> Sam
>
> _____
>
> Samuel B. Cole
>
> Immigration Judge
>
> Chicago Immigration Court
>
> 536 S. Clark St., Suite 340

Chicago, Illinois 60605

From: McNulty, Sheila (EOIR) <Sheila.McNulty@EOIR.USDOJ.GOV>
Sent: Friday, February 22, 2019 2:01 PM
To: Peyton, Jennifer I. (EOIR) <Jennifer.Peyton@EOIR.USDOJ.GOV>; Cole, Samuel B. (EOIR) <Samuel.Cole@EOIR.USDOJ.GOV>; DeAngelis, Kathryn L (EOIR) <Kathryn.DeAngelis@EOIR.USDOJ.GOV>; Fujimoto, James R. (EOIR) <James.Fujimoto@EOIR.USDOJ.GOV>; Giambastiani, Jennie (EOIR) <Jennie.Giambastiani@EOIR.USDOJ.GOV>; Lang, Elizabeth G. (EOIR) <Elizabeth.Lang@EOIR.USDOJ.GOV>; McKenna, Patrick M. (EOIR) <Patrick.McKenna@EOIR.USDOJ.GOV>; Rosche, Robin J. (EOIR) <Robin.Rosche@EOIR.USDOJ.GOV>; Salovaara, Kaarina (EOIR) <Kaarina.Salovaara@EOIR.USDOJ.GOV>; Saltzman, Eva S. (EOIR) <Eva.Saltzman@EOIR.USDOJ.GOV>
Cc: Defoe, Craig (EOIR) <Craig.Defoe@EOIR.USDOJ.GOV>
Subject: RE: Next week for IJ Defoe

Good afternoon all,

Back from the beautiful country of Colombia! Wow! Just gorgeous! I highly recommend it to anyone looking for wonderful warm weather, historic easy walking tours, cocktail tours, great people and beautiful ocean views!

I just want to take a moment to thank Jenna for planning the marathon 3 week court observations for our newest IJ Craig. Typically one week is it, and then the IJs are off for FC and more training. So this was an exceptionally long observation period, and I thank you all as well for participating with the observations and making time to demonstrate and discuss things with Craig.

We wish you well, Judge Defoe in the coming weeks at FC and in Boston- you'll do great!

March 15 will be here before you know it, and then it's official! 2 weeks in Boston will get you some great real time training, and we look forward to seeing you back here as a full-fledged member of the Chicago Immigration Court!

Safe travels, best of luck, and make sure you come back!

Sheila

From: Peyton, Jennifer I. (EOIR) <Jennifer.Peyton@EOIR.USDOJ.GOV>
Sent: Friday, February 15, 2019 7:47 AM
To: Cole, Samuel B. (EOIR) <Samuel.Cole@EOIR.USDOJ.GOV>; DeAngelis, Kathryn L (EOIR) <Kathryn.DeAngelis@EOIR.USDOJ.GOV>; Fujimoto, James R. (EOIR) <James.Fujimoto@EOIR.USDOJ.GOV>; Giambastiani, Jennie (EOIR)

<Jennie.Giambastiani@EOIR.USDOJ.GOV>; Lang, Elizabeth G. (EOIR) <Elizabeth.Lang@EOIR.USDOJ.GOV>; McKenna, Patrick M. (EOIR) <Patrick.McKenna@EOIR.USDOJ.GOV>; McNulty, Sheila (EOIR) <Sheila.McNulty@EOIR.USDOJ.GOV>; Peyton, Jennifer I. (EOIR) <Jennifer.Peyton@EOIR.USDOJ.GOV>; Rosche, Robin J. (EOIR) <Robin.Rosche@EOIR.USDOJ.GOV>; Salovaara, Kaarina (EOIR) <Kaarina.Salovaara@EOIR.USDOJ.GOV>; Saltzman, Eva S. (EOIR) <Eva.Saltzman@EOIR.USDOJ.GOV>
Cc: Defoe, Craig (EOIR) <Craig.Defoe@EOIR.USDOJ.GOV>
Subject: Next week for IJ Defoe

Good morning ---

I'm scheduling IJ Defoe for next week's observation week. Please let me know if you have any cases where you may dictate an oral decision at the conclusion of testimony.

RJR, I'd like to provide IJ Defoe with an opportunity to observe you, as you are the one remaining IJ he has not observed. Please let me know if that would work, and what days you prefer.

Finally, IJ Defoe's email is on this message.

Thanks!

JP

Tuesday, June 30, 2020 at 22:59:41 Eastern Daylight Time

Subject: FW: Speaking engagement request
Date: Monday, May 11, 2020 at 9:27:53 AM Eastern Daylight Time
From: Ramya Krishnan
To: Stephanie C Krent, Alexander A Abdo

--
Ramya Krishnan
Pronouns: she, her
Staff Attorney
Knight First Amendment Institute at Columbia University
475 Riverside Dr. | New York, NY 10115
ramya.krishnan@knightcolumbia.org| (646) 745-8506

From: Samuel Cole <samuel.cole.naij@gmail.com>
Date: Monday, May 11, 2020 at 9:17 AM
To: Ramya Krishnan <ramya.krishnan@knightcolumbia.org>
Subject: Fwd: FW: Speaking engagement request

Here's my ACIJ's original response approving it.

_____
Immigration Judge Samuel B. Cole
Director of Communications
National Association of Immigration Judges
312/399-6794 (personal cell)
Twitter: @Imm_Judges_NAIJ
www.naij-usa.org

---------- Forwarded message ---------
From: **Cole, Samuel B. (EOIR)** <Samuel.B.Cole@usdoj.gov>
Date: Mon, May 11, 2020 at 8:15 AM
Subject: FW: Speaking engagement request
To: samuel.cole.naij@gmail.com <samuel.cole.naij@gmail.com>

From: McNulty, Sheila (EOIR) <Sheila.McNulty@EOIR.USDOJ.GOV>
Sent: Wednesday, February 06, 2019 4:35 PM
To: Cole, Samuel B. (EOIR) <Samuel.Cole@EOIR.USDOJ.GOV>
Subject: RE: Speaking engagement request

Sam,
I will approve this request and forward it to the SET with my approval.
Thanks,
Sheila

From: Cole, Samuel B. (EOIR) <Samuel.Cole@EOIR.USDOJ.GOV>
Sent: Wednesday, February 06, 2019 4:03 PM
To: McNulty, Sheila (EOIR) <Sheila.McNulty@EOIR.USDOJ.GOV>
Subject: Speaking engagement request

Sheila, Here's a request for a speaking engagement, almost identical to what was approved in December 2017. It's for the 7th graders at the Deerfield middle school.

_____

Samuel B. Cole
Immigration Judge
Chicago Immigration Court
536 S. Clark St., Suite 340
Chicago, Illinois 60605

EOIR Ethics - Speaking Engagement/Event Request Form

INSTRUCTIONS:

1. You must complete this Speaking Engagement Request form.
2. Your supervisor must complete the SET Supervisor's Checklist prior to submitting this form.
3. Per the new speaking policy, the **supervisor should forward the package in full** (the Speaking Engagement Request form, SET Supervisor Checklist, supervisor approval email and any supporting documents) to EOIR.Ethics@usdoj.gov **AND** EOIR.Speakers@usdoj.gov no later than two weeks prior to the desired response date.

The Speaking Engagement Team, which consists of staff from the Office of Communications and Legislative Affairs and the Office of the General Counsel, will review the package and respond via email to the supervisor with a recommendation regarding your participation. If you have questions regarding the ethics regulations, you may contact the Ethics Office at EOIR.Ethics@usdoj.gov or by calling (703) 305-0322. If you have any questions regarding communications or EOIR messaging, you may contact the Office of Communications and Legislative Affairs at EOIR.Speakers@usdoj.gov.

- Multiple events require separate request forms.
- Each speaker requires a separate form, even if multiple employees are participating in the same event.
- If multiple EOIR speakers request to speak at the same event, each must speak in the same capacity as the others.
- Official capacity requests requires the review of all statements the speaker wishes to make. Speakers may not deviate from or expand upon approved talking points.

Your name/title: Samuel B. Cole, Immigration Judge

Your component: EOIR, Chicago Immigration Court

Work location/phone: Chicago, Illinois 312-697-5784

Supervisor's name: ACIJ Sheila McNulty

Speaking capacity (Official or Personal): Personal

Event date(s)/time and location: TBD in February or March 2019

What organization issued the invitation or is sponsoring the event? It's teaching 7th graders at the Caruso Middle School in Deerfield, Illinois, which is a public school

What is the nature of the event (conference, seminar, lecture, etc.)? Teaching class for a day to 7th graders.

What is the topic of your presentation? Immigration and asylum law.

Revised 2-2017

EOIR Ethics - Speaking Engagement/Event Request Form

Will you distribute any written material incident to your speaking engagement? Yes

If yes, describe the material and attach it to this submission. See attached

Who is the anticipated audience?

7th graders

Who are the other anticipated speakers?

No one

Will there be food or refreshments served as part of the event? No.

If yes, please give the estimated food cost (per person) and food description:

Is there a fee to attend? It's a public school.

If yes, please give the amount of the fee:

Are you planning to attend the event in addition to speaking? Not applicable.

If so, were you offered a reduced or waived fee to attend?

If so, what is the value of the savings?

Has the organization offered you any compensation for the event (speaker fee)? No.

Has the organization offered to reimburse you for travel expenses (airfare, lodging, mileage, parking, etc.)? No.

Will there be any fundraising at the event? No.

Please add any additional information: I'm going to give a very short talk about what asylum is and how visitors to the United States generally require a visa. Finally the class will be divided into asylum-seekers and government attorneys for an asylum exercise. The materials are attached below. I've invented a country and asylum scenario that the kids will use to conduct a mini-asylum hearing.

Revised 2-2017

EOIR Ethics - Speaking Engagement/Event Request Form

Written Materials:

Asylum Exercise
Revised February 2019

Directions for Individual Seeking Asylum

Your name is Louis Touré. You are 19 years old. You were born in the **Republic of Granea** on the West coast of Africa. You speak French, the official language of Granea.

Your father Moussa was a major political figure in Granea. He was the regional head of the **opposition** political party and organized protests against the government. Because of this, he received numerous death threats and was frequently arrested by the government but released after a short detention. You were not politically active but did attend some rallies.

Four months ago, armed members of the Granean Special Security Services arrested your father and 17-year-old brother when they were having dinner at your family home in the nation's capital city. You were not at home because you were playing football (soccer) with your friends and lost track of time. When you returned home, your mother told you that your father and brother had been taken by the state security services. She said that the people who took them had also asked about you by name.

You hid in the basement of a neighbor's house that night. The following day, the official Granean state news agency reported that your father and brother had both been sentenced to death for treason. That night, your mother gave you all the cash the family had hidden in the house and told you to flee. You took only the clothes on your back. With the help of a smuggler, you left Granea and flew to Brazil. From there, you traveled by bus, boat, and foot through Colombia, Panama, Costa Rica, Nicaragua, Honduras, Guatemala, and Mexico. You paid the smuggler $7500 to get you to the United States.

Finally, after travelling through Mexico, you walked up to the San Ysidro Port of Entry in San Diego, California, and told the border officer that you were seeking asylum because you were afraid to return to Granea. You were then taken into immigration custody, where you have remained for the past three months. You have not spoken with any of your family members since you left Granea and still don't know whether your father and brother are dead or alive.

You have appeared before an Immigration Judge on two previous occasions. The last time, you filed your application for asylum. You speak only French, but the asylum application must be completed in English. So, a volunteer from a religious organization who visited you in detention and spoke some French helped you complete the form. You think (hope) that it is entirely accurate, but because you don't speak English, you had to rely on the volunteer and the French she remembered from middle school and high school.

Your next court appearance is your asylum hearing before the Immigration Judge, who will decide whether you qualify for political asylum. If you get asylum, you will be on a path to U.S. citizenship. You will be immediately released from detention. In addition, you will get work authorization and, one year later, a green card. After five years, you will be able to apply for U.S. citizenship. If you don't get asylum, the government will send you back to Granea. So, everything is riding on your asylum hearing. Although you are entitled to have an attorney represent you at the hearing, you have no money to pay one and also cannot find one to represent you for free. So, you are on your own. Good luck.

EOIR Ethics - Speaking Engagement/Event Request Form

Asylum Exercise
Revised February 2019

Directions for Government Attorney

You represent the United States Department of Homeland Security (DHS) in immigration cases. Your next assignment is a case involving an individual named Louis Touré from the **Republic of Granea**, on the West African coast. Touré is requesting political asylum, and you are opposing the request.

The alien respondent is seeking asylum based on political opinion. He claims his father was a political leader of the opposition political party in Granea and was jailed by the state security apparatus along with Touré's brother.

DHS first became aware of Touré when he walked up to the San Ysidro Port of Entry in San Diego, California, and told the border officer that he was seeking asylum because he was afraid to return to Granea. He was then taken into immigration custody, where he has remained for the past three months.

He has appeared before an Immigration Judge on two previous occasions. The last time, he filed an application for asylum. He speaks only French, but the asylum application must be completed in English. So, a volunteer from a religious organization who spoke some French helped him complete the form.

The next court appearance is the full asylum hearing before the Immigration Judge, who will decide whether Touré will qualify for political asylum. If he gets asylum, he will be on a path to U.S. citizenship. He will be immediately released from detention. In addition, he will get work authorization and eventually a green card. Several years later, he will be able to apply for U.S. citizenship. If he doesn't get asylum, the government will send him back to Granea. So, everything is riding on the asylum hearing.

As the DHS attorney, you have some information that Touré's father is an opposition political leader in Granea, but you have concerns about parts of his story. First, his asylum application states that his sister and father were taken into custody by the Granea authorities, but previously he told the asylum officer in an interview that it was his brother and father. Second, his asylum application states that he flew from Granea to Brazil and then traveled to the United States through many countries in Central America. In contrast, when Touré was first interviewed at the San Ysidro Port of Entry, he said that he flew directly from Granea to Mexico. This interview was conducted in English because no French interpreters were available, so you think it's possible that there was a miscommunication. Third, he does not have any identity documents to support his claim that he is the son of the jailed Granean opposition leader. Fourth, although his father may have been a political leader, Touré has never claimed to be politically active. So, you don't think he is entitled to asylum based on his political opinions.

You should question Touré on these inconsistencies and issues and oppose his asylum application.

EXHIBIT M

From: Sanchez, Jose A. (EOIR)
To: Tsankov, Mimi (EOIR)
Subject: Re: FBA Annual Meeting and Convention
Date: Tuesday, August 13, 2019 5:34:48 PM

Dear J. Tsankov:

Thank for your prompt response to my inquiry and the attached agenda. Pursuant to EOIR's policy, please be certain to submit your request to the Speaking Engagement Team together with your supervisor's checklist, speaking points, and supporting documentation prior to the event for their review.

José A. Sánchez
ACIJ
Boston/Hartford Immigration Courts
Sent from my iPhone

From: Tsankov, Mimi (EOIR) <Mimi.Tsankov@EOIR.USDOJ.GOV>
Sent: Tuesday, August 13, 2019 4:03 PM
To: Sanchez, Jose A. (EOIR) <Jose.Sanchez@EOIR.USDOJ.GOV>
Cc: Tabaddor, A. Ashley (EOIR) <Ashley.Tabaddor@EOIR.USDOJ.GOV>; Khan, Amiena (EOIR) <Amiena.Khan@EOIR.USDOJ.GOV>
Subject: RE: FBA Annual Meeting and Convention

Dear Judge Sanchez,

By way of follow-up, I confirmed that the title of the program is Advocacy Challenges in Immigration Proceedings, and my part of the presentation is on behalf of the NAIJ relating to working conditions for Immigration Judges, only. The FBA website and written materials are reflecting that information, as well.

Session 5C - **Advocacy Challenges in Immigration Proceedings**

- <!--[if !supportLists]--><!--[endif]-->Stephanie Moncada-Gomez, Attorney, Kozyak Tropin & Throckmorton (moderator)
- <!--[if !supportLists]--><!--[endif]-->Beth S. Persky, Attorney, Law Office of Beth S. Persky
- <!--[if !supportLists]--><!--[endif]-->Hon. Mimi Tsankov, Grievance Chair, National Association of Immigration Judges
- <!--[if !supportLists]--><!--[endif]-->Judith L. Wood, Attorney, Law Office of Judith Wood

Sincerely,

Mimi Tsankov

NAIJ

From: Tsankov, Mimi (EOIR)
Sent: Tuesday, August 13, 2019 11:09 AM
To: Sanchez, Jose A. (EOIR) <Jose.Sanchez@EOIR.USDOJ.GOV>
Cc: Ashley Tabaddor <Ashley.Tabaddor@EOIR.USDOJ.GOV>; Khan, Amiena (EOIR) <Amiena.Khan@EOIR.USDOJ.GOV>
Subject: RE: FBA Annual Meeting and Convention

Dear Judge Sanchez,

Thank you for this email. There must be a mistake in the FBA announcement. I have no intention of speaking on "Advocacy in Gender-Based Asylum Claims" and made that very clear when I was asked to speak on behalf of NAIJ at the FBA conference. I will work with the FBA to confirm that my presentation conforms to NAIJ discussion topics on working conditions for Immigration Judges.

Thank you.

Mimi Tsankov
NAIJ

From: Sanchez, Jose A. (EOIR) <Jose.Sanchez@EOIR.USDOJ.GOV>
Sent: Tuesday, August 13, 2019 10:07 AM
To: Tsankov, Mimi (EOIR) <Mimi.Tsankov@EOIR.USDOJ.GOV>
Subject: FBA Annual Meeting and Convention

Good morning J. Tsankov:

Please see the email below and advise me of your response.

> Judge Tsankov:
>
> The SET contacted me today raising concerns about your planned participation as a presenter at the FBA Annual Meeting and Convention. Specifically, you are listed as a presenter on a panel entitled "Advocacy in Gender-Based Asylum Cases," scheduled for 10;15-11:15 on Friday, September 6. You have not submitted a speaking engagement request regarding your participation on this panel. While I note that you are identified as Grievance Chair for NAIJ on the agenda, it does not seem apparent or likely that you are

participating in a representative function on behalf of NAIJ. Rather, it appears that you will be speaking from your experience as an immigration judge about advocacy before the immigration court, the topic relates to your official duties, and the audience is likely to include persons who appear in immigration court. These and other indicia indicate that you must speak in your official capacity as an immigration judge, and all such speaking engagements must go through the SET process. If you intend to participate, please submit a formal request to me to initiate the ordinary SET review process. I will note however, that based on the information available at this time about the program and your anticipated participation, it is unlikely that you will be approved to participate, given ethics concerns and the Agency's policies regarding immigration judges speaking in an official capacity.

Lauren Alder Reid

Assistant Director
Office of Policy
Executive Office for Immigration Review
U.S. Department of Justice
703-305-0701
Lauren.Alder.Reid@usdoj.gov

JOSÉ A. SÁNCHEZ
United States Department of Justice
Assistant Chief Immigration Judge
Boston & Hartford Immigration Courts
15 New Sudbury Street, Suite 320
Boston, MA 02203-0002
(W) 617 226-5066
(C) 571-451-5029
<image001.png>

Declaration of James McHenry (ECF 27-1), filed July 20, 2020

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.

[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.

[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

Declaration of Chris Cox (ECF 27-2), filed July 20, 2020

DEX 2

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 CHRIS COX
ASSOCIATE GENERAL COUNSEL
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

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

1. I am an Associate General Counsel with the Executive Office for Immigration Review ("EOIR"), an agency within the Department of Justice ("DOJ"). I am the Ethics Counsel for EOIR and have served in that capacity since May 2016. 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 personnel.

2. Prior to joining EOIR, I served as an Attorney Advisor in the Office of General Counsel at the Department of Health and Human Services.

3. As Ethics Counsel for EOIR, my responsibilities, among others, include responding to inquiries and providing guidance to all EOIR personnel regarding the government-wide Standards of Ethical Conduct. The Ethics Office also provides guidance to personnel, from Attorney Advisors, Immigration Judges, members of the Board of Immigration Appeals, leadership of other EOIR components including the Office of the Director, Office of Policy, Office of the General Counsel, Office of the Chief Administrative Hearing Officer, to all non-attorney EOIR employees regarding whether they may participate in particular activities in compliance with their professional ethics obligations and the applicable standards of the Department of Justice. I also conduct training for newly hired EOIR personnel, including Immigration Judges, Assistant Chief Immigration Judges, Board Members, and EOIR attorneys, regarding their ethics responsibilities.

4. Prior to the issuance of the Speaking Engagement Policy for EOIR Employees on September 1, 2017, personnel would submit the Speaking Engagement Form, along with their supervisor's approval and any supporting materials, to the EOIR Ethics Mailbox via EOIR.Ethics@usdoj.gov. At that time, the Ethics attorneys were charged with processing the requests by reviewing the Speaking Engagement Form, and confirming whether the requesting employee would be participating in either his or her capacity as an individual (personal capacity), professional (official capacity), or in their individual capacity with the permitted use of their official title and a disclaimer ("PTD"), which would include a statement that the requestor's views were his or her own and did not necessarily represent the views of EOIR or the Department of Justice.

5. The Ethics attorneys further evaluated the request to determine whether the activity complied with the government-wide ethical standards of conduct, applicable EOIR policies and Department of Justice supplemental regulations regarding outside activities.

6. Upon completion of the review, the Ethics attorneys would send a recommendation to the requestor and their supervisor via email whether the request should be approved or denied from an ethics perspective; that recommendation would also provide additional guidance with applicable restrictions or limitations concerning the specific activity. To my knowledge, in such situations, the supervisor made the ultimate decision as to whether the request was for the requestor to speak in their official, personal or PTD capacity, and whether to approve or deny the request.

7. In July 2017, after consulting with other attorneys and senior officials within the Office of the General Counsel ("OGC"), the Office of Communications and Legislative Affairs ("OCLA"—now known as the Communications and Legislative Affairs Division "CLAD") and the Office of the Director ("OOD"), I forwarded a

draft of an updated speaking engagement policy to Director McHenry that would clarify the approval process for a speaking engagement request by any EOIR employee, the capacity in which an employee could speak, and the standards by which each request would be evaluated. In drafting the policy, I consulted the ethics regulations in 5 CFR Part 2635 – Standards of Ethical Conduct for Federal Employees, Subparts A, B, E, G, and H, as well as 5 CFR § 3801.106 (DOJ Supplemental Standards).

8. My understanding is that the policy update was necessitated by a significant number of requests for EOIR personnel, particularly IJs, to speak at a wide range of events due to the increased public interest in immigration. The objective of the policy update was to clarify the engagement request procedure and the capacity in which a requestor could speak. Further, the policy was intended to ensure that speaking engagements advanced EOIR's mission, presented EOIR and the immigration courts as fair and impartial adjudicators, and that the message conveyed by the speakers was consistent.

9. The new policy, issued in its final form on September 1, 2017, set forth the two capacities in which an EOIR employee could speak – official or personal – and defined those capacities. The new policy eliminated the "PTD" capacity.

10. From an ethics perspective, it was my understanding that the term "PTD" could be collapsed into the official and personal capacity categories, as it is not a term or speaking capacity that is defined in the ethics regulations, but rather a term that appeared to have been developed by agency. However, the policy prescribed that at an event where no biographical information was provided, IJs participating in a personal capacity could be introduced using their titles with an appropriate disclaimer to clarify that they are not appearing on behalf of the agency. Furthermore, the sponsoring organization could not use their official title in promotional material surrounding the event.

11. The policy also established the Speaking Engagement Team ("SET"), consisting of an official from the OOD, the OGC and OCLA (now known as CLAD), which would be responsible for independently reviewing speaking engagement requests.

12. Requests, to include the completed Speaking Engagement Form, supervisory approval and relevant documents, were to be submitted to the SET (the Speakers Mailbox) via EOIR.speakers@usdoj.gov. All requests, whether for an engagement in an official or personal capacity, initially required supervisory approval and were required to be submitted to the Speakers Mailbox by the supervisor on behalf of the requesting employee. A request to speak in an official capacity required the submission of presentation slides, hand-out materials, and talking points, to ensure

compliance with Agency policies and allow OCLA to ensure consistent messaging across official engagements.

13. As of January 2020, the Speaking Engagement Process has moved online. The requesting employee must complete the form online and include all relevant documents with the request. Once the request is submitted, it is forwarded to the employee's supervisor for review. If the supervisor approves the request, it is forwarded to the OOD and OCLA for their review. Ethics is also given the opportunity to provide additional guidance if necessary.

Executed on July 20, 2020

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W. Chris Cox
Associate General Counsel for Ethics
Executive Office for Immigration Review

Declaration of Daniel Swanwick with Exhibits A–C (ECF 27-3), filed July 20, 2020

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

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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
Deputy Director

Date

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
Counsel to the Deputy Director

Date

FOR THE UNION:

Amiena Khan 5-10-2018.

Amiena Khan
Executive Vice President, NAIJ

Date

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 following factors indicate that the speaker will be in personal capacity:*
The speaker was invited because of his or her position at EOIR.	The speaker was not invited because of his or her position at EOIR.
The topic of the event is immigration-related.	The topic is unrelated to immigration, the speaker's duties, or DOJ matters.
The topic of the event relates to the speaker's professional duties.	The topic is only about personal experience, which may include the speaker's career path.
The event is associated with the Office of Legal Access Programs.	The event is a moot court event unrelated to immigration.
The event is a naturalization ceremony.	The request involves teaching a semester-long class at a law school or college.
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 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

Declaration of Lauren Alder Reid (ECF 27-4), filed July 20, 2020

DEX 4

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 LAUREN ALDER REID,
ASSISTANT DIRECTOR, OFFICE OF POLICY,
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

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

1. I am the Assistant Director for the Office of Policy within the Executive Office for Immigration Review (EOIR). I have held this position since August 2018. My testimony is based on my own personal knowledge and experience, on information contained in the records of EOIR, or on information provided to me by EOIR personnel.
2. From December 2017 to August 2018, I was Chief of the Immigration Law Division in EOIR's Office of Policy. From August 2009 to December 2017, I served as Chief and Counsel of the Communications and Legislative Affairs Division in EOIR's Office of Policy.

3. I held several positions prior to joining EOIR. From October 2007 to August 2009, I was an Attorney Advisor in the Office of Legislative Affairs at the U.S. Department of Justice. From September 2006 to October 2007, I served as an Assistant General Counsel at the U.S. Sentencing Commission. From December 2005 to September 2006, I worked at Department of Homeland Security, U.S. Customs and Border Protection, Office of Air and Marine. From September 2004 to December 2005, I was a Presidential Management Fellow with the Drug Enforcement Administration. I received a Bachelor of Arts from Denison University in 2001, and a Juris Doctor from the University of Pittsburgh School of Law in 2004.

4. As the Assistant Director for EOIR's Office of Policy, I am the individual responsible for the Office's functions, including all agency policy and regulatory review and development; internal and external communications; oversight of *pro bono* and legal orientation program activities; and legal education, research, and certifications. The Office is tasked with maintaining communication among components through the efforts of the Communications and Legislative Affairs Division.

5. The Communications and Legislative Affairs Division (CLAD) serves as EOIR's liaison with district congressional offices, the news media, and other interested parties by communicating accurate and timely information about the agency's activities and programs. Among other things, CLAD handles all interview requests in order to present a unified voice for EOIR and to ensure consistency with the Attorney General's messages.

Pre-2017 Policy on Speaking Engagements

6. Before 2017, immigration judges (IJs) could, upon supervisory approval and, in consultation with CLAD, and, if necessary, upon review by an EOIR ethics officer, participate in speaking engagements in their official capacity, personal capacity, or personal capacity with use of title and disclaimer (PTD). The PTD designation allowed IJs to use their official titles at speaking engagements in their personal capacity provided they also included a disclaimer that their views were their own and they were not speaking on behalf of EOIR.
7. While IJs were required to obtain supervisory approval and, if necessary, ethics approval, before participating in any official capacity, personal capacity, or PTD speaking engagement, there was no uniform process in place to review speaking engagement requests to ensure that speeches and presentations accurately reflected, and were consistent with, EOIR's mission.
8. EOIR's primary mission is to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws.

2017 Memorandum

9. On September 1, 2017, EOIR Director James McHenry issued a Speaking Engagement Policy for EOIR Employees (2017 Policy). Noting that interest in immigration law had grown exponentially over the last ten years, including interest in the operation of the immigration courts, the Director explained that the 2017 Policy was intended to clarify the approval process that all EOIR personnel, including IJs, were required to follow to speak at an event.

10. The 2017 Policy clarified that, as before, personnel are required to obtain supervisory approval to speak at an event. The 2017 Policy further clarified that, after obtaining supervisory approval, all requests to speak in an official capacity and/or to speak about immigration-related topics must be reviewed by the Office of General Counsel (OGC) and CLAD, via the headquarters speaking engagement team (SET). The process set up by the 2017 Policy was intended to enable CLAD to review and confirm that official capacity and/or immigration-related speeches and presentations accurately reflected, and were consistent with, EOIR's mission.

11. Under the 2017 Policy, official capacity and/or immigration-related speaking engagement requests were to be submitted to SET no later than seven days before the scheduled event by sending a completed Speaking Engagement Form, accompanied by presentation materials and talking points, to EOIRspeakers@usdoj.gov. Every effort was made to fully adjudicate the request within that time frame, but in light of the varying complexity of the nature of the requests and the occasional need for additional information, timely resolution of the requests could not be guaranteed.

12. The 2017 Policy also outlined the available speaking engagement capacities. The 2017 Policy eliminated the PTD designation, a change that had been contemplated for at least six years prior to the issuance of the 2017 Policy. Consequently, all personnel speaking engagements were categorized as either official- or personal-capacity speaking engagements. This change was intended in part to bring EOIR in line with other DOJ components and to eliminate confusion when an employee nominally spoke in their "personal capacity" but spoke about matters relating to their official duties and using their official title.

13. The 2017 Policy clarified that when EOIR personnel are assigned to participate as speakers or panel participants or otherwise present information on behalf of the agency at conferences or other events, they are doing so in their official capacities. It further clarified that any EOIR personnel speaking at events hosted by a Federal Department, Office, or Agency must speak in an official capacity. The 2017 Policy also clarified that certain EOIR personnel, including component heads and other senior EOIR officials, members of the Board of Immigration Appeals, Deputy Chief Immigration Judges, and Assistant Chief Immigration Judges, may only speak in their official capacity. It also clarified that some IJs may or may not be expected to speak in their official capacity, depending on the particulars of the speaking engagement. The 2017 Policy also clarified that other EOIR personnel may appear and speak at an event in their official capacity if it is part of their official duties or they have been assigned to do so by their supervisor.
14. The 2017 Policy explained that EOIR is under constant scrutiny as an adjudicatory body. Immigration judges in particular have a duty to exercise their independent discretion in all cases in an impartial manner. *See* 8 C.F.R. § 1003.10(b). As such, the 2017 Policy provides that EOIR personnel must avoid all improprieties and the appearance of impropriety to ensure complete public confidence in the integrity of the agency, its adjudicatory process, and all individual adjudications.
15. The 2017 Policy clarified that when EOIR personnel participate in speaking engagements in their personal capacities, they are not appearing at the event as part of their official duties or on behalf of the agency and, therefore, may not imply that EOIR is endorsing or sanctioning the speaking engagement.

16. The 2017 Policy explained that, as before, EOIR personnel may not use or permit the use of their official titles or positions to identify themselves in connection with personal-capacity speaking activities, unless that information is included as one of several biographical details when such information is provided to identify speakers in connection with the activities, provided that their titles or positions are given no more prominence than other significant biographical details.

17. At the same time, although the 2017 Policy eliminated the PTD designation, it noted that, in limited circumstances where an introduction does not include an overall biographical sketch, an IJ may be introduced using his or her title so long as the IJ uses an appropriate disclaimer at the beginning of his or her remarks in order to avoid the perception that he or she is appearing on behalf of the agency. It also noted that the sponsoring organization could not use an IJ's official title to promote an event in which the IJ is invited to speak.

18. The 2017 Policy also reiterated the ethics rules governing travel reimbursements and other compensation for both personal- and official-capacity speaking engagements.

19. On September 13, 2017, Director McHenry sent an email to all EOIR personnel providing additional guidance regarding what qualifies as a "speaking engagement" requiring SET approval. The Director explained that SET approval would likely be required for any events in which personnel would be speaking about EOIR with more than one non-DOJ person or for which groups external to DOJ would be sending out notice of the event. The Director's email also reminded personnel, consistent with longstanding policy, that any phone calls, emails, or visits from the news media or Congress should be directed to CLAD.

2018 Memorandum of Understanding

20. On May 10, 2018, EOIR and the National Association of Immigration Judges (NAIJ) executed a Memorandum of Understanding (MOU) regarding the implementation of the 2017 Policy as it applies to IJs.

21. To my knowledge, the MOU requires EOIR to provide NAIJ a summary of IJ speaking engagement requests received by the SET every six months, identifying the following information:

    a. the date the request was submitted;

    b. the IJ requestor;

    c. the requestor's supervisor;

    d. a description of the event;

    e. the date of the event;

    f. whether the request was approved or denied; and

    g. the speaking capacity (personal or official) of the request.

22. These summaries are prepared for EOIR by CLAD; according to reports from CLAD, EOIR has provided five summaries to date under the MOU, including four relating to the 2017 Policy.

23. CLAD reports reflect that between May 1, 2018 and October 31, 2018, SET received 33 IJ speaking engagement requests, one of which was incomplete and one of which was withdrawn. SET received 13 requests for IJs to speak in their official capacity, eight of which were approved. SET received an additional 18 requests for IJs to speak in their personal capacity, 15 of which were approved.

24. CLAD reports also show that between November 1, 2018 and April 30, 2019, SET received 20 IJ speaking engagement requests, one of which was withdrawn. SET received six requests for IJs to speak in their official capacity, one of which was approved. SET received an additional 13 requests for IJs to speak in their personal capacity, 12 of which were approved.

25. According to CLAD's reports, between May 1, 2019 and October 31, 2019, SET received 25 IJ speaking engagement requests, one of which was incomplete and three of which were withdrawn. This total also includes a denial that did not indicate a specific capacity. SET received five requests for IJs to speak in their official capacity, one of which was approved. SET received an additional 15 requests for IJs to speak in their personal capacity, eight of which were approved.

26. As reflected in CLAD's reports, between November 1, 2019 and January 4, 2020, SET received 9 IJ speaking engagement requests. SET received two requests for IJs to speak in their official capacity, both of which were approved. SET received an additional 7 requests for IJs to speak in their personal capacity, six of which were approved.

27. In sum, CLAD has verified that between May 1, 2018 and January 4, 2020, SET adjudicated 87 IJ speaking requests. This total also includes a denial that did not indicate a specific capacity. Overall, of the 87 IJ speaking requests, the SET approved 53 (61%), denied 27 (31%), two (2%) were determined to be incomplete, and 5 (6%) were withdrawn.

January 2020 Memorandum

28. On January 17, 2020, Director McHenry issued a memorandum updating the speaking engagement policy ("2020 Memorandum"), wherein he announced the establishment of a new automated speaking engagement request portal located on EOIR's intranet for the submission of SET requests. The Director specifically explained that the 2020 Memorandum did not substantively alter the 2017 Policy, which he reissued with the 2020 Memorandum, nor did it alter, or purport to alter, the 2018 MOU between EOIR and NAIJ. The Director clarified, however, that speaking engagements also include written pieces intended for publication in any print or online media.

29. As the Director explained, the new automated speaking engagement request portal was intended to provide more certainty and clarity surrounding the submission, tracking, and delineation of responsibility of each speaking engagement request.

30. Noting that stakeholders and other members of the public continue to be interested in hearing about, and understanding, what the agency does and specifically how immigration courts operate, the Director explained that the 2020 Memorandum did not change the SET approval process, but merely changed the mechanism by which approval is sought. In particular, the 2020 Memorandum eliminated the prior email-based SET approval process and replaced it with an automated speaking engagement request portal, located on EOIR's intranet, intended to increase efficiency and reduce any potential confusion in the submission and evaluation of speaking-engagement requests.

31. A new SET Request Form developed in connection with the 2020 Memorandum is housed on an internal portal that automates the speaking request process and allows personnel to easily upload information related to their proposed speaking engagements.

Once submitted, the portal automatically sends the form and related materials to the requestor's first-line supervisor for review. If the request is incomplete or otherwise does not pass the supervisor's review, the supervisor will deny the request via the portal and provide an explanation for the denial. If the denial is based on an incomplete submission, a requester may resubmit a request with the necessary information included. If the supervisor preliminarily approves the proposed speaking engagement, it will be routed via the portal to the SET team for further review.

32. The SET team consists of the Office of Policy and the Office of the Director, augmented by OGC for requests when an ethics opinion or review for ongoing litigation is needed. SET team review ensures compliance with both the law and agency policy, as well as consistency in EOIR's communications.

33. The OGC Ethics Program (Ethics) will review any SET request that has been recommended for approval. Ethics neither approves nor denies speaking engagement requests, but offers guidance to ensure that speakers do not encounter ethical dilemmas.

34. In addition to introducing the new automated speaking engagement request portal located on EOIR's intranet, the 2020 Memorandum reiterated that there are only two speaking-engagement capacities: (1) official capacity or (2) personal capacity. The 2020 Memorandum further reiterated that in either capacity, all personnel—especially non-supervisory adjudicators—must maintain impartiality and avoid the appearance of impropriety, favoritism, or preferential treatment.

35. The 2020 Memorandum included a description and examples of appearances in official and personal capacities. It also clarified that whether a speaker is presenting in an official or personal capacity is determined by the totality of the circumstances. The label given

by either the inviter or the invitee may be helpful to begin analysis of the request, but is not necessarily dispositive.

36. The 2020 Memorandum reiterated that where EOIR personnel have been invited to participate in speaking engagements related to immigration law or policy issues, their official EOIR duties or their official duties or positions, such invitations shall be deemed to constitute official-capacity requests, regardless of how they are labeled. The 2020 Memorandum also reiterated that all such requests must be approved through the SET process, and directed invitees to submit a request to participate via the new automated speaking engagement portal located on EOIR's intranet page.

37. Whereas speaking engagement requests under the 2017 Policy were to be submitted to SET no later than seven days before the scheduled event, speaking engagement requests under the 2020 Memorandum are to be submitted no later than two weeks before the scheduled event. This time frame was expanded from the seven days recommended under the 2017 Policy to better enable the timely review of and response to SET requests, which frequently were incomplete when initially submitted.

38. Under both the 2017 Policy and 2020 Memorandum, speaking engagement requests must be accompanied by presentation materials and talking points. This is intended to ensure compliance with agency policies and to allow CLAD to ensure that EOIR's messaging is consistent across official engagements when reviewing SET requests.

39. If an IJ was permitted to speak publicly about official matters without proper review of talking points through the agency's SET process, an incorrect – or even imprecise – comment could result in many undesirable consequences.

40. For example, if an IJ spoke to a reporter from a cable news network about the immigration court's resumption of hearings following closure due to COVID-19, that judge might provide information specific to the court, or even their own courtroom, that is not broadly applicable.

41. Similarly, such a hypothetical conversation could lead to identification of an ill, or potentially ill, employee, including one who may not wish to be identified. Simple statements, such as using "he" when there are few male employees at a particular court, and it is obvious who is not in court during a given week, could lead to major risk for the agency and harm to an individual.

42. The dynamic nature of the pandemic results in rapidly changing messaging to ensure stakeholders receive consistent and accurate information in a timely manner.

43. If information that once was true becomes false by the time an IJ speaks, that would result in much confusion from conflicting messages. Such an occurrence would:

    a. require both CLAD and DOJ's Public Affairs Office to expend resources toward remedying the confusion[1];

    b. require the Office of Chief Immigration Judge to attempt to address the misinformation at the immigration courts as parties appear, or fail to appear, due to the imprecise talking point;

    c. impact hearings and, possibly, determinations in aliens' cases;

    d. undermine the agency's and the Department's position with stakeholders by removing the agency as the principal point of new information; and

[1] Misinformation is incredibly difficult to resolve in the 24-hour news cycle. News outlets are constantly updating online pieces with the latest that one outlet reports. Even small outlets can quickly and drastically change a story in a matter of minutes.

e. reduce public trust in the agency as the stakeholders perceive a lack of understanding between the individual court/judge and headquarters.

44. The 2020 Memorandum clarified that requests to speak in a personal capacity are also subject to SET review to determine whether they are genuinely personal capacity events, whether there are any ethics concerns with the speaking engagement, and whether the speaking engagement will disrupt EOIR operations by requiring the employee to miss critical work.

45. This last factor is particularly relevant as applied to IJs, who are currently tasked with handling a backlog of more than a million immigration cases. By contrast, when the 2017 Policy was issued, the backlog, while still significant at more than 650,000 cases, was approximately half of what it is now. While speaking engagements serve an important function, EOIR has an indispensable duty to ensure the timely and efficient adjudication of cases, consistent with due process that is paramount to the agency accomplishing its mission. EOIR also has a corps of public information officers and other agency officials who are available to speak so IJs can continue their vital work.

46. Relatedly, to the extent that IJs may wish to participate in an after-hours speaking engagement in their official capacity, EOIR must take into account the costs associated with their travel time and expenses and consider whether the costs associated with the speaking engagement outweigh the potential benefits to the agency.

47. Ultimately, most speaking engagement requests by EOIR employees in either personal or official capacity are approved. As of July 17, 2020, since November 2017, EOIR has received 356 speaking engagement requests. Of those, 256 have been approved, 63 have been denied, 29 were incomplete or withdrawn, and 8 were pending. Approximately 80%

of speaking engagement requests by EOIR employees, excluding those that were incomplete, withdrawn, or pending, are approved. As discussed, the trend is similar for speaking engagement requests made by IJs, though the numbers are different. As of July 17, 2020, since November 2017, EOIR has received 167 speaking engagement requests for IJs. Of those, 98 were approved, 55 were denied, and 14 were incomplete or withdrawn. Of the approvals, 59 were for speaking engagements in the IJ's personal capacity, whereas only 16 personal-capacity requests have been denied.[2]

Executed on July 20, 2020.

LAUREN REID

Digitally signed by LAUREN REID
Date: 2020.07.20 20:38:05 -04'00'

Lauren Alder Reid
Assistant Director, Office of Policy
Executive Office for Immigration Review

[2] There were 17 approvals and 14 denials from November 2017 through April 2018 in which the capacity was not tracked.

Declaration of Sirce E. Owen with Exhibit A (ECF 27-5), filed July 20, 2020

DEX 5

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

National Association of Immigration Judges, *Plaintiff,* v. James R. McHenry III, *Defendant.*	Case No. 20-cv-731

I, **SIRCE E. OWEN,** do hereby declare under penalty of perjury that the following statements are true and correct to the best of my knowledge, information, and belief:

1. I serve as the Assistant Chief Immigration Judge for the immigration court located at 180 Ted Turner Drive, S.W., Suite 241, Atlanta, Georgia, 30303, (hereinafter the "Atlanta-Ted Turner Drive Immigration Court") which is a component of the Executive Office for Immigration Review ("EOIR"). 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 personnel.

2. As Assistant Chief Immigration Judge for the Atlanta-Ted Turner Drive Immigration Court, my responsibilities include managing and coordinating the Immigration Judge and Court Administrator activities in the court that I supervise. I was appointed to this position in August 2018. As an Assistant Chief Immigration Judge, I have knowledge of the policies, procedures, and practices related to staffing, scheduling, and docketing immigration removal and bond hearings at the courts.

3. In addition, between June 2019 and January 2020, I served as the Acting Deputy Director of EOIR. In my capacities as an Assistant Chief Immigration Judge and as Acting

Deputy Director I have knowledge of the policies and procedures set forth by EOIR, including the process for the submission and review of speaking engagement requests by EOIR personnel. Since joining EOIR in 2018, I have reviewed numerous speaking engagement requests submitted by EOIR personnel.

4. In January 2020, EOIR issued a memorandum titled "Submission and Processing of Requests for Speaking Engagements" (hereinafter the "January 2020 memorandum"). This memorandum followed and clarified a prior memorandum issued on September 1, 2017, titled "Speaking Engagement Policy for EOIR Employees" (hereinafter the "September 2017 memorandum"). Both of these memoranda applied to all EOIR personnel, including Immigration Judges.

5. The January 2020 memorandum also introduced EOIR personnel to the new online portal for submission of speaking engagement requests. Prior to the development of the online portal, personnel wishing to submit speaking engagement requests were required to do so by completing request forms and submitting them via electronic mail. (See the September 2017 memorandum.)

6. Under the January 2020 Memorandum, requests by EOIR personnel must now be submitted through the online portal. The first-line supervisor makes the initial cut on the request, and if he or she denies the request, he or she provides an explanation and the requestor is notified via an electronic message. If the first-line supervisor approves the request, he or she then forwards it to the SET for review and a recommendation. The highest-level Agency supervisor involved, which is typically the Deputy Director who supervises both OCIJ and the components represented in the SET, ultimately makes the final decision on speaking requests.

7. As an Assistant Chief Immigration Judge, I am the first-line supervisor for the Immigration Judges assigned to the Atlanta-Ted Turner Drive Immigration Court. I also directly supervise the Court Administrator, Judicial Law Clerks, and Attorney Advisors assigned to the Atlanta-Ted Turner Drive Immigration Court. When any of these personnel submit a speaking engagement request to the SET (hereinafter "SET request") through the online portal, I am notified via an electronic message that I have a request to review.

8. In reviewing the SET request, I consider the capacity designation made by the requester, but I also look beyond any such designation to review the documentation submitted by the requestor, the described nature of the speaking engagement, the subject matter that the employee will be discussing, the potential type and size of the audience, the media associated with the event, and other relevant factors to determine in which capacity the employee would be speaking. I also determine whether the invitation to the employee was based due all or in part to their position as an employee of EOIR. And I consult the Supervisor's Checklist as an additional resource in my review of the SET request (Exh. A).

9. For SET requests submitted by Immigration Judges, there is a presumption that the request will be deemed to be in the Immigration Judge's official capacity if any or all of the following are present in the request: the topic on which they are being asked to speak involves immigration law, the request was made to the Immigration Judge in whole or in part based on their position as a judge with EOIR, or the request was made based on their position as an employee of the Federal Government. I reach this conclusion regardless of whether or not the speaking request is described by the Immigration Judge as being in their personal capacity. The substance of the request controls the ultimate determination of the actual capacity of the speaking engagement, not how it is described in the SET request.

10. I review SET requests by Immigration Judges with this additional scrutiny due to the Immigration Judges' positions of prominence within EOIR, based on their seniority within the courts, based on their level of pay relative to other EOIR personnel, and based on their positions as adjudicators. Due to their positions with EOIR, they are given great deference not only by EOIR colleagues, but also by the public as a whole. They have been appointed by the Attorney General and are given various authorities that include ordering the removal of aliens from the United States. When they enter a courtroom, the occupants stand as a show of respect and abide by the Immigration Judge's rules and rulings. Therefore, it is imperative that I review the SET request with such careful attention to ensure that an Immigration Judge's speaking engagement does not result in allegations or complaints that would call into question his or her impartiality in matters related to immigration law while performing his or her duties.

11. If any of the above criteria discussed in Paragraphs 6 and 7 apply to the SET request by an Immigration Judge, I then evaluate the details of the request to determine if this presumption that the speaking engagement would be in his or her official capacity can be rebutted. However, if an Immigration Judge is introduced to the audience with his or her title and employer, discussing topics upon which he or she issues decisions in his or her adjudicatory responsibilities, it is difficult, if not impossible, to separate EOIR from the message of the speaker, regardless of any purported disclaimer that the opinions are those of the speaker and not EOIR.

12. If I determine that a SET request by an EOIR employee, which was described as being in his or her personal capacity, is instead a speaking engagement that would be in his or her official capacity, I deny the request, with a recommendation that the request be resubmitted

in his or her official capacity. If the EOIR employee elects not to resubmit the request in his or her official capacity, then no further action is needed.

13. If I determine that the speaking engagement which was requested in the EOIR employee's official capacity is appropriately described as in the employee's official capacity, I then conduct further review to determine whether an employee of EOIR should participate. For example, I evaluate the subject matter of the speaking engagement to determine whether another EOIR employee may have more knowledge or expertise in the matter that would make him or her a more appropriate speaker.

14. If I determine that he or she should, then I will determine whether the requesting employee is the most appropriate speaker for the topic. EOIR personnel, and in particular Immigration Judges, are routinely requested to speak on various topics, the most frequent topic being immigration law. As part of their duties, Immigration Judges participate in a variety of official speaking engagements such as mock hearings, where law students or immigration law practitioners can observe and experience a removal hearing, or on law symposium panels on topics related to immigration law. In addition, Immigration Judges are often invited to speak at luncheons or continuing legal education seminars by local bar associations. Based on the nature of the request, I evaluate which EOIR employee would be best suited to participate in his or her official capacity, based on his or her experience, the type of docket he or she handles (if an Immigration Judge is requested), and whether his or her participation would comply with the relevant ethics guidelines.

15. If the SET request is made by an Immigration Judge to speak in his or her official capacity, I also review his or her scheduled dockets for the date of the requested speaking engagement to determine whether the request would disrupt existing dockets. As an Assistant

Chief Immigration Judge, I may determine that I would be better suited to officially speak on behalf of EOIR. Further, because Assistant Chief Immigration Judges do not carry a full docket of cases due to their other duties, their attendance at a speaking engagement will cause minimal, if any, disruption to existing scheduled dockets.

16. Therefore, even if a particular EOIR employee is not approved to speak in his or her official capacity, it does not mean that an EOIR employee will not be available to participate at all. Rather, the first-line supervisor, and ultimately the SET, may determine that a different EOIR employee would be a more appropriate speaker at the event.

17. If I determine that the speaking engagement will be in the employee's personal capacity, I evaluate whether the employee's participation would cause any disruptions to EOIR's operations or result in any negative publicity or scrutiny to EOIR or the Federal Government.

18. If a SET request is denied, I use the online portal to notify the requesting employee. If the SET request is approved, I use the online portal to approve and forward the request to the SET. The Deputy Director has the ultimate approval authority for all SET requests submitted by EOIR personnel.

19. In addition to reviewing SET requests as an Assistant Chief Immigration Judge, I also reviewed requests during my detail as Acting Deputy Director. As a member of the SET, I employed the same considerations and criteria when reviewing requests that had been elevated to the SET by first-line supervisors in the field and at EOIR headquarters. I also have personally submitted SET requests for speaking engagements that I was invited to, both as an Assistant Chief Immigration Judge and as Acting Deputy Director.

I affirm, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and belief.

Signed in Atlanta, Georgia on July 20, 2020.

SIRCE OWEN Digitally signed by SIRCE OWEN
Date: 2020.07.20 11:27:43 -04'00'

Sirce E. Owen
Assistant Chief Immigration Judge

Exhibit A

Supervisor's Checklist	**YES**	**NO**
Is EOIR participation advantageous and practical?	☐	☐
Does the event's intended message align with EOIR messaging?	☐	☐
AND If not, will the event consider an EOIR-specific message?	☐	☐
Is the requesting speaker the correct speaker for the event and message (e.g. consider current demands of the immigration court; whether there is a notable performance or conduct issue; whether person is a SME)	☐	☐
If you answer "no" to any of the above, the SET is unlikely to recommend approval for this speaking engagement.		
Is the event open to the public?	☐	☐
Is the event open to the press?	☐	☐
If you answer "yes" to either of the above, please again consider whether the requestor is the appropriate speaker for the event and message.		
Has the SET approved other EOIR speakers for this event?	☐	☐
AND If so, would the already approved speaker(s) meet the need?	☐	☐
If you answer "yes" to both of the above, please again consider whether this request is appropriate.		
Is the message consistent with EOIR messaging?	☐	☐
AND If not, is the message able to be refined?	☐	☐
If you answer "no" to any of the above, the SET is unlikely to recommend approval for this speaking engagement.		

Supplemental Declaration of A. Ashley Tabaddor with Exhibits N–O (ECF 29–29-2), filed July 27, 2020

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

NATIONAL ASSOCIATION OF IMMIGRATION JUDGES, affiliated with 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 Civ. 731 (LO) (JFA)

SUPPLEMENTAL DECLARATION OF A. ASHLEY TABADDOR

I, A. Ashley Tabaddor, hereby declare and state as follows:

1. I am the current President of the National Association of Immigration Judges ("NAIJ.), a role I have served in since 2017. I have served as an officer of the NAIJ for the past eight years and as a local representative prior to that. I am over the age of eighteen. I have personal knowledge of the facts stated in this declaration, and, if called to testify, I could and would competently do so under oath.

2. In my opening declaration in support of NAIJ's motion for a preliminary injunction, I explained that prior to 2017, immigration judges were required to seek prior approval before engaging in many speaking engagements. Those requirements were much less onerous than they are now. Immigration judges sought approval from their supervisors and received guidance from the Ethics office. The Executive Office for Immigration Review ("EOIR") did not have a

centralized speaking engagement team, and there was no need for immigration judges to receive approval from anyone other than their supervisors. Requests were routinely approved.

3. EOIR's then-existing preapproval policy was memorialized in the 2011 Ethics and Professionalism Guide for Immigration Judges (the "Ethics Guide"). Under the guide, immigration judges were required to seek preapproval of all written work and speeches. A true and correct copy of the Ethics Guide is attached hereto as **Exhibit N**.

4. The Ethics Guide did not prohibit immigration judges from speaking about immigration or EOIR in their personal capacities. The Ethics Guide did not allow a centralized team from EOIR—consisting of representatives from the Office of Policy, the Office of General Counsel, and the Office of the Director—to make decisions about immigration judges' speaking requests. The Ethics Guide did not state that EOIR could demand to review all handouts and talking points immigration judges prepared for their events. The Ethics Guide also did not instruct supervisors to review the content of immigration judges' planned speech to ensure consistency with EOIR's policies and communications.

5. In every way, the preapproval scheme contemplated by the Ethics Guide was much narrower than the system instituted by EOIR's current speaking engagement policy (the "Policy"). To the best of my knowledge, immigration judges rarely had their requests denied or had to wait for long periods of time while their requests went unanswered. That changed when EOIR issued the 2017 Policy. The 2017 Policy superseded the portions of the Ethics Guide addressing EOIR's preapproval requirement.

6. Recently, I spoke publicly about why I believe NAIJ's challenge to the Policy is so important. I explained that "[p]art of the job of an immigration judge is to educate the public about the immigration courts and the role they play in society."

7. In making that statement, I was describing the civic duty that many immigration judges—and many Article III judges—feel to educate the public about the workings of the courts. In its opposition brief, EOIR interpreted my statement to be a description of the *official* duties of immigration judges, but EOIR is simply misinterpreting my comment. It is not a part of the official duties of immigration judges to speak publicly or to educate the public about immigration courts.

8. Attached hereto as **Exhibit O** is a true and correct copy of a formal description of the job duties of an immigration judge, which was drafted in 1996. That description explains that the official duties of immigrations judges all relate, unsurprisingly, to the adjudication of immigration disputes brought before the immigration courts. There is no mention of public outreach.

9. This fact can also be seen in the way that EOIR handles requests from immigration judges to speak publicly. In doing so, EOIR has often reminded judges that it is the agency's view that speaking engagements related to immigration should be undertaken by EOIR management officials, regardless of speaking capacity.

10. Many immigration judges, myself included, take our civic duties seriously. I have spoken many times on the important role immigration judges can and should play in our communities. I have been heartened to see that in Chief Justice John Roberts' year-end reports on the federal judiciary, he has emphasized the educational role judges should play in society. In his most recent report, for example, he lauded the judges who, "at all levels of the federal court system, including bankruptcy judges and magistrate judges, are personally involved in national,

regional, and local education programs."[1] This is precisely the kind of civic engagement that is so critical for immigration judges—not because it is a part of our job description, but because it is our obligation as members of society who have unique insights into the nation's immigration system.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 26th day of July 2020.

Respectfully submitted,

Judge A. Ashley Tabaddor

July 26, 2020

[1] Chief Justice John Roberts, *2019 Year-End Report on the Federal Judiciary* (2019), https://perma.cc/33LJ-PL6V .

EXHIBIT N

ETHICS AND PROFESSIONALISM GUIDE FOR IMMIGRATION JUDGES

Preamble

To preserve and promote integrity and professionalism, Immigration Judges employed by the Executive Office for Immigration Review (EOIR) should observe high standards of ethical conduct, act in a manner that promotes public confidence in their impartiality, and avoid impropriety and the appearance of impropriety in all activities.

I. Introduction

The provisions in this Guide are binding on all Immigration Judges employed by the Executive Office for Immigration Review. Violations of these provisions may not be used to challenge the rulings of an Immigration Judge. These provisions do not create any rights or interests for any party outside of the Department of Justice, nor may violations of these provisions furnish the basis for civil liability or injunctive relief. The provisions in this Guide do not supersede the personnel or disciplinary rules, or management policies, of the Executive Office for Immigration Review, the Department of Justice, and/or the United States Government. Similarly, this Guide does not affect the applicability or scope of the provisions of the Standards of Ethical Conduct for Executive Branch Employees, or the rules or code(s) of professional responsibility applicable to an Immigration Judge. 5 C.F.R. § 2635.101.

II. Standards of Conduct
(5 C.F.R. Parts 2635, 3801; 28 C.F.R. Part 45)

An Immigration Judge shall comply with the standards of conduct applicable to all attorneys in the Department of Justice, including the Standards of Ethical Conduct for Employees of the Executive Branch, codified in Title 5 of the Code of Federal Regulations, and the Department's supplemental regulations at 5 C.F.R. Part 3801 and 28 C.F.R. Part 45.

III. Ethics Guidance
(5 C.F.R. § 2635.107(b))

Immigration Judges are encouraged to seek ethics opinions to ensure that their conduct comports with applicable rules and regulations. When an Immigration Judge requests ethics guidance from the Office of Government Ethics, the Departmental Ethics Office, the Office of General Counsel of the Executive Office for Immigration Review, or the Professional Responsibility Advisory Office, the Immigration Judge should endeavor to disclose all legally relevant facts. 5 C.F.R. § 2635.107(b).

Note: Disciplinary action will not be taken against any Immigration Judge who has engaged in conduct in good faith reliance upon the advice of an agency ethics official provided that the employee, in seeking such advice, has made full disclosure of all relevant circumstances.

IV. Professional Competence

An Immigration Judge should be faithful to the law and maintain professional competence in it.

Note: In order to "maintain professional competence" in the law, Immigration Judges should strive to be knowledgeable about immigration law, should be skillful in applying it to individual cases, and should attempt to engage in preparation that is reasonably necessary to perform an Immigration Judge's responsibilities.

V. Impartiality
(5 C.F.R. § 2635.101(b)(8))

An Immigration Judge shall act impartially and shall not give preferential treatment to any organization or individual when adjudicating the merits of a particular case. An Immigration Judge should encourage and facilitate pro bono representation. An Immigration Judge may grant procedural priorities to lawyers providing pro bono legal services in accordance with Operating Procedures and Policies Memorandum (OPPM) 08-01.

VI. Appearance of Impropriety
(5 C.F.R. § 2635.101(b)(14))

An Immigration Judge shall endeavor to avoid any actions that, in the judgment of a reasonable person with knowledge of the relevant facts, would create the appearance that he or she is violating the law or applicable ethical standards.

VII. Reporting Misconduct
(5 C.F.R. § 2635.101(b)(11); 28 C.F.R. § 45.12)

An Immigration Judge shall disclose waste, fraud, abuse, and corruption to appropriate authorities, such as a supervisor, or to the Office of the Inspector General. Immigration Judges, like all Department employees, also have a duty to report allegations of misconduct by Department of Justice attorneys, as explained by Chapter 1-4.100 of the United States Attorneys' Manual (USAM). In addition, Immigration Judges have a duty to report allegations of

misconduct by non-Department attorneys or judges, as explained by Chapter 1-4.150 of the USAM.

VIII. Acting in a Neutral and Detached Manner

An Immigration Judge should not be swayed by partisan interests or public clamor.

IX. Acting with Judicial Temperament and Professionalism

An Immigration Judge should be patient, dignified, and courteous, and should act in a professional manner towards all litigants, witnesses, lawyers and others with whom the Immigration Judge deals in his or her official capacity, and should not, in the performance of official duties, by words or conduct, manifest improper bias or prejudice.

Note: An Immigration Judge should be alert to avoid behavior, including inappropriate demeanor, which may be perceived as biased. The test for appearance of impropriety is whether the conduct would create in the mind of a reasonable person with knowledge of the relevant facts the belief that the Immigration Judge's ability to carry out his or her responsibilities with integrity, impartiality, and competence is impaired.

Note: An Immigration Judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the immigration process into disrepute. Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant reference to personal characteristics. Moreover, an Immigration Judge must avoid conduct that may reasonably be perceived as prejudiced or biased. Immigration Judges are not precluded from making legitimate reference to any of the above listed factors, or similar factors, when they are relevant to an issue in a proceeding.

Note: An Immigration Judge has the authority to regulate the course of the hearing. See 8 C.F.R. §§ 1240.1(c), 1240.9. Nothing herein prohibits the Judge from doing so. It is recognized that at times an Immigration Judge must be firm and decisive to maintain courtroom control.

X. Membership in Organizations

An Immigration Judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, or disability.

***Note:** Membership of an Immigration Judge in an organization that practices invidious discrimination may, at a minimum, give rise to perceptions that the Immigration Judge's impartiality is impaired. Whether an organization practices invidious discrimination is often a complex question to which Immigration Judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on the history of the organization's selection of members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. See New York State Club Ass'n Inc. v. City of New York, 487 U.S. 1 (1988); Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984). Other relevant factors include the size and nature of the organization and the diversity of persons in the locale who might reasonably be considered potential members. Thus, the mere absence of diverse membership does not by itself demonstrate invidious discrimination unless reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination.*

XI. Impartiality in Performing Official Duties
(5 C.F.R. §§ 2635.501 to 2635.503)

An Immigration Judge may not participate, without authorization, in a particular matter involving specific parties which the Immigration Judge knows is likely to have a direct and predictable effect on the financial interest of members of the Immigration Judge's household or in which the Immigration Judge knows a person with whom the Immigration Judge has a covered relationship is or represents a party.

An Immigration Judge has a covered relationship with: (a) a person with whom the Immigration Judge has or seeks a business, contractual, or other financial relationship that involves other than a routine consumer transaction; (b) a person who is a member of the Immigration Judge's household, or a relative with whom the Immigration Judge has a close relationship; (c) a

present or prospective employer of a spouse, parent or child; or (d) an organization which the Immigration Judge now serves, or has served, as an employee or in another capacity, within the past year.

An Immigration Judge is banned from adjudicating any cases in which he/she participated personally and substantially prior to becoming an Immigration Judge. An Immigration Judge may not adjudicate a case if he/she: has personal knowledge of the disputed facts; participated as counselor or advisor in the case; or expressed an opinion concerning the merits of the particular case in controversy. A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of the above provision. However, an Immigration Judge formerly employed by a government agency should disqualify himself or herself in a proceeding if the Immigration Judge's impartiality might reasonably be questioned because of such an association.

If a conflict of interest exists, in order for the Immigration Judge to participate in the matter, the EOIR Director or his/her designee must make a determination that the interests of the government in the Immigration Judge's participation outweigh the concern that a reasonable person may question the integrity of the Department's programs and operations. The determination must be made in writing.

If a conflict of interest exists, and the judge has obtained a determination from the EOIR Director or his/her designee that the judge may continue to participate in the matter, the conflict must be disclosed to the parties, either orally on the record or in writing. If an Immigration Judge disqualifies himself or herself from a case that has been assigned to him or her, he or she must do so in a decision in writing or orally on the record before the parties and otherwise follow all the procedures delineated in OPPM 05-02, Procedures for Issuing Recusal Orders in Immigration Proceedings, or any superseding OPPM.

XII. Use of Public Office for Private Gain
(5 C.F.R. § 2635.702)

Immigration Judges may not use their public office for their own private gain or the gain of persons or organizations with which they are associated personally. An Immigration Judge's position or title should not be used: to coerce; to endorse any product, service or enterprise; or to give the appearance of government sanction. Regarding a request for a letter of reference or recommendation, an Immigration Judge may only use his or her official title and stationery for someone he or she has dealt with in the course of federal employment or someone he or she is recommending for federal employment.

XIII. Use of Nonpublic Information
(5 C.F.R. § 2635.703)

An Immigration Judge may not engage in a financial transaction using nonpublic information, nor allow the use of such information to further his or her private interests or those of another. Nonpublic information is information an Immigration Judge gains by reason of federal employment that he or she knows or reasonably should know has not been made available to the general public and is not authorized to be made available upon request.

XIV. Use of Government Property
(5 C.F.R. § 2635.704)

An Immigration Judge has a duty to protect and conserve government property and shall use government property only for authorized purposes.

> ***Note:** Department of Justice employees are generally authorized to make personal use of most office equipment and library facilities where the cost to the Government is negligible and on an employee's own time. 28 C.F.R. § 45.4. Under the Department's policy on the use of its electronic mail systems, an employee may send a short, personal message to another employee. However, personal messages sent to groups of people and messages to disseminate information on non-Government activities, such as charitable events, religious observances and personal businesses, are prohibited.*

XV. Use of Official Time
(5 C.F.R. § 2635.705)

An Immigration Judge shall use official time in an honest effort to perform official duties. Generally, personal activities should not be conducted during duty hours. An Immigration Judge may not use the official time of another employee for anything other than official business. This section does not apply to official time under section 7131 of the Federal Service Labor-Management Relations Statute.

XVI. Conflicting Financial Interest
(5 C.F.R. §§ 2635.401 to 2635.403)

An Immigration Judge is prohibited from participating in any matter in which he or she has a financial interest. In addition to an Immigration Judge's own financial interest, certain interests are considered his or hers (i.e., "imputed" to him or her), including those of a spouse, minor child, general partner or an organization for which the Immigration Judge serves as an officer, director,

trustee, general partner, or employee. However, an Immigration Judge may participate in such a matter if he or she is granted a waiver. Immigration Judges should contact their Deputy Designated Ethics Officer about possible financial conflicts of interest.

If an Immigration Judge has a financial conflict of interest, remedies include disqualification, divestiture, or a waiver of the disqualification under 18 U.S.C. § 208. Before divesting, however, he/she should determine whether he/she is eligible for a Certificate of Divestiture from the Office of Government Ethics, which would allow him/her to defer paying capital gains tax on the sale of the asset. 5 C.F.R. §§ 2634.1001-1004. A waiver may be granted if the financial interest is found to be not so substantial as to affect the integrity of the Immigration Judge's services.

> ***Note: Immigration Judges (levels IJ-2 and above) employed by the Executive Office for Immigration Review are required to file public financial disclosure reports pursuant to statute every year. Financial disclosure reports are used to identify potential or actual conflicts of interest. If the ethics official charged with reviewing an Immigration Judge's report finds a conflict, the ethics official should, upon consultation with the Immigration Judge's supervisor, decide on the appropriate remedy.***
>
> ***Note: In order to comply with the applicable law and regulations regarding financial reporting and disqualification, Immigration Judges must inform themselves about their personal financial interests, as well as the personal financial interests of spouses and minor children.***

XVII. Outside Employment and Activities
(5 C.F.R. §§ 2635.801 to 2635.803)

An Immigration Judge shall not engage in any outside employment or other outside activity that conflicts with his or her official duties. Immigration Judges should regularly reexamine their avocational activities and the organizations with which they are affiliated to ensure that they do not lead to the perception of partiality on the part of an Immigration Judge.

XVIII. Representation before Federal Agencies
(5 C.F.R. § 2635.801)

An Immigration Judge may not represent anyone before a Federal agency or official, or any court, with or without compensation, on a matter in which the United States is a party or has a substantial interest. This prohibition applies whether the Immigration Judge renders the representation personally or

shares in compensation from someone else's representation. 18 U.S.C. §§ 203 and 205.

Nothing in this Article shall prohibit National Association of Immigration Judges (NAIJ) representatives from acting on behalf of NAIJ, or any of its members or any individual in its collective bargaining unit, as otherwise allowed by law. *See, e.g.*, 18 U.S.C. §§ 205(d), 205(i); 5 U.S.C. § 7102(1).

XIX. Practice of Law
(5 C.F.R. § 3801.106)

An Immigration Judge may not engage in the private practice of law unless it is uncompensated and in the nature of community service, or unless it is on behalf of the Immigration Judge himself or herself, or on behalf of the Immigration Judge's parents, spouse, or minor children. An Immigration Judge is prohibited from engaging in the paid practice of law and from engaging in any employment that involves a criminal matter, be it Federal, state or local, or any matter in which the Department is or represents a party, witness, litigant, investigator, or grant-maker. These prohibitions may be waived by the Deputy Attorney General if the restrictions will cause undue personal or family hardship, unduly prohibit a DOJ employee from completing a professional obligation entered into prior to Government service, or unduly restrict the Department from securing necessary and uniquely specialized services. All requests for a waiver of these prohibitions should be made through EOIR's Office of General Counsel.

XX. Serving as an Expert Witness
(5 C.F.R. § 2635.805)

An Immigration Judge may not serve, other than on behalf of the United States, as an expert witness, paid or unpaid, in any proceeding before the United States in which the United States is a party or has a direct and substantial interest, unless specifically authorized by the Designated Agency Ethics Official. Opinion testimony or testimony as to procedures or practice given in any arbitration, disciplinary action, or proceeding under or with respect to a labor agreement or any action under the Federal Labor laws is not "expert testimony" within the meaning of this section.

XXI. Teaching, Speaking, and Writing
(5 C.F.R. § 2635.807)

Generally, an Immigration Judge may not be compensated for speaking or writing about a subject matter that relates to his or her official duties. A subject matter relates to an Immigration Judge's official duties if it deals in

significant part with a matter to which the Immigration Judge is presently assigned or has been assigned in the last year; any ongoing or announced policy, program or operation of the Department; or in the case of a non-career employee, the general subject matter primarily affected by the programs and operations of the Department. 5 C.F.R. § 2635.807. Under 5 C.F.R § 3801.103, an Immigration Judge would only be prohibited from receiving compensation for speaking or writing on a subject matter related to EOIR's policies, programs or operations, not the entire Department's. An Immigration Judge may receive compensation for teaching, even if the course relates to an Immigration Judge's official duties, if the course requires multiple presentations and is offered as part of the regularly established curriculum of: an institution of higher education; an elementary or secondary school; or a program sponsored and funded by the Federal Government or by a state or local government, which is not offered by an entity described above.

When engaging in speaking or writing in a private capacity, an Immigration Judge may not use nonpublic information, nor should there be any use of the Immigration Judge's official title, except as part of other biographical information, or for an article in a scientific or professional journal where there is a disclaimer. An Immigration Judge may not use official time, or that of another employee, to prepare materials. Immigration Judges must seek prior supervisory and ethics approval for written work and speeches.

XXII. Fundraising
(5 C.F.R. § 2635.808)

An Immigration Judge may engage in fundraising in a personal capacity as long as the Immigration Judge does not solicit from subordinates or persons having business with the Department, and does not use his or her official title or position. However, an Immigration Judge may use or permit the use of the term "the Honorable" while fundraising in his/her personal capacity, since Immigration Judges are ordinarily addressed using this general term. In addition, soliciting may not be conducted on government property. Immigration Judges may not engage in fundraising, including active participation in a fundraiser, in their official capacity unless authorized by statute, Executive Order, regulation, or agency determination. The only authorized fundraising in the Department is on behalf of the Combined Federal Campaign. However, an Immigration Judge may be authorized to give an official speech at a fundraising event, if the circumstances are appropriate, even though this constitutes participating in a fundraiser.

XXIII. Just Financial Obligations
(5 C.F.R. § 2635.809)

An Immigration Judge shall satisfy in good faith his or her obligations as a citizen, including all just financial obligations imposed by law, especially those such as Federal, state or local taxes, and child support payments.

XXIV. Purchase of Forfeited Property
(5 C.F.R. § 3801.104)

Without prior written approval, an Immigration Judge may not purchase, directly or indirectly, or use property that has been forfeited to the Government and offered for sale by the Department of Justice or its agents. Similarly, no Immigration Judge may use property forfeited to the United States that has been purchased, directly or indirectly, from the Department of Justice or its agents by the Immigration Judge's spouse or minor child.

XXV. Gifts from Outside Sources
(5 C.F.R. §§ 2635.201 to 2635.205)

An Immigration Judge may not solicit or accept a gift given because of his or her official position, or from a prohibited source. A "prohibited source" is any person who:

(1) has or seeks official action or business with EOIR;

(2) is regulated by EOIR;

(3) has interests that may be substantially affected by the performance of an EOIR Immigration Judge's official duties; or

(4) is an organization composed mainly of persons described above.

XXVI. Gifts that may be Permissible
(5 C.F.R. §§ 2635.201 to 2635.205)

Unless the frequency of the acceptance of gifts would appear to be improper, an Immigration Judge may accept:

(1) items such as publicly available discounts and prizes, commercial loans, food not part of a meal such as coffee and donuts, and items of little value such as plaques and greeting cards.

(2) gifts based on a personal relationship when it is clear that the motivation is not the Immigration Judge's official position.

(3) gifts of $20 or less per occasion, not to exceed $50 in a year from one source.

(4) discounts and similar benefits offered to a broad class, including a broad class of government employees.

(5) most genuine awards and honorary degrees, although in some cases an Immigration Judge will need a formal determination.

(6) free attendance, food, refreshments and materials provided at a conference or widely attended gathering or certain other social events that an Immigration Judge attends in his or her official capacity, and for which the Immigration Judge has received prior approval from his or her component.

When Immigration Judges are participating in their official capacity as speakers or panel members at a conference or other event, they may accept an offer of free attendance at the conference or event on the day of their presentation. Participation in the event on that day is viewed as a customary and necessary part of the Immigration Judge's duties, and is not considered a gift to them or to the Department. 5 C.F.R. § 2635.204(g)(1).

When it is determined that an Immigration Judge's attendance at all (or an appropriate part) of an event is in the interest of the Department because it will further agency programs and operations, the Immigration Judge may accept an unsolicited gift of free attendance from the sponsor of the event if the event is found to be a widely attended gathering. A gathering is widely attended if a large number of people are expected, and persons with a diversity of views or interests will be present, for example, if it is open to members from throughout the interested industry or profession. 5 C.F.R. § 2635.204(g)(2).

A determination that an Immigration Judge's attendance at a widely attended gathering is in the interest of the Department may be made orally or in writing. However, if the person extending the invitation has an interest that may be substantially affected by the performance or nonperformance of the Immigration Judge's official duties, or is an association or organization the majority of whose members have such interests, the determination must be made in writing. 5 C.F.R. § 2635.204(g)(3).

(7) gifts based on an outside business relationship, such as travel expenses related to a job interview.

Note: An Immigration Judge should return gifts not meeting the exceptions or contact the Deputy Designated Ethics Officer on how to dispose of them. Perishable items may be given to charity or shared by the office, with approval.

XXVII. Gifts between Employees
(5 C.F.R. §§ 2635.301 to 2635.304)

Immigration Judges may not give, or solicit a contribution for, a gift to an official superior, nor may they accept a gift from an employee receiving less pay. There are a few exceptions to this general prohibition, however. On annual occasions where gifts are traditionally given, such as birthdays, Christmas, and Boss's Day, an Immigration Judge may give the following to an official superior:

(1) items, other than cash, valued at $10 or less;

(2) items such as food and refreshments to be shared in the office; and

(3) personal hospitality provided at a residence which is of a type and value customarily provided by the employee to personal friends.

On special, infrequent occasions, such as marriage, illness, or the birth of a child, or an occasion that terminates the supervisor/subordinate relationship, an Immigration Judge may give an official superior a gift (in excess of the $10 value) that is appropriate to the occasion. In addition, an Immigration Judge may solicit voluntary contributions of nominal amounts from fellow Immigration Judges, but not subordinates, to contribute to the gift.

XXVIII. Frequent Flyer Miles and Airline "Compensation"
(41 C.F.R. § 301)

Some airlines encourage those purchasing tickets to join frequent flyer programs that award free flights and other benefits to frequent flyers. Pursuant to 41 C.F.R. § 301-53.3, Immigration Judges may keep and use for their personal benefit frequent flyer miles accrued incident to government official travel.

Similarly, pursuant to 41 C.F.R. § 301-10.117, Immigration Judges may retain any compensation (e.g., roundtrip airline ticket) an airline gives if they voluntarily surrender their reserved seat on a flight, and if: 1) voluntarily vacating the seat does not interfere with the Immigration Judge's performance of duties; 2) the Immigration Judge bears, and is not reimbursed for, any additional travel expenses incurred as a result of vacating the seat; and 3) the

Immigration Judge is charged leave if taking a later flight incurs additional duty time in a travel status. If the airline involuntarily denies boarding to an Immigration Judge, the Immigration Judge must give EOIR any compensation an airline gives to him or her. 41 C.F.R. § 310-10.116.

XXIX. Seeking Other Employment
(5 C.F.R. §§ 2635.601 to 2635.606)

An Immigration Judge may not take official action on a matter that can affect the financial interest of a person or organization with which he or she is negotiating or has an arrangement for future employment. The remedy is disqualification. 18 U.S.C. § 208.

An Immigration Judge also must disqualify himself or herself from working on a matter when he/she is merely *seeking* employment and is not yet actually negotiating for a job. An Immigration Judge is considered to be seeking employment if he/she sends a resume to a potential employer or if he/she is approached by someone about a position with a potential employer and the Immigration Judge responds in any way other than to clearly decline interest.

See OPPM 05-02, Procedures for Issuing Recusal Orders In Immigration Proceedings.

XXX. Post-Employment Restrictions
(18 U.S.C. § 207 and 5 C.F.R. § 2641)

There are statutory prohibitions on former Immigration Judges that generally prevent them from "switching sides" after leaving government. The following are the primary restrictions:

(1) Lifetime Ban – A former Immigration Judge is prohibited from representing anyone else before the government on a particular matter involving specific parties in which he or she participated personally and substantially.

(2) Two-Year Ban – A former Immigration Judge is prohibited for two years from representing any other person on a particular matter involving specific parties which was pending under his or her responsibility during the Immigration Judge's last year of government service.

XXXI. Political Activities
(5 C.F.R. Parts 733 & 734)

In regard to political activity, Immigration Judges may:

(1) register and vote as they choose.

(2) assist in voter registration drives.

(3) express opinions on candidates and issues.

(4) be a candidate for public office in non-partisan elections.

(5) solicit, accept, or receive political contributions from a fellow member of a Federal labor or employee organization who is not a subordinate, and the request is for a contribution to the multicandidate political committee of a Federal labor organization or to the multicandidate political committee of a Federal employee organization in existence on October 6, 1993.

(6) contribute money to political organizations, in general.

(7) attend and be active at political rallies and meetings.

(8) attend political fundraisers.

(9) join and be an active member of a political party or club.

(10) sign nominating petitions.

(11) campaign for or against referendum questions, constitutional amendments, and municipal ordinances.

(12) distribute campaign literature in partisan elections.

(13) make campaign speeches for candidates in partisan elections.

(14) campaign for or against candidates in partisan elections.

(15) hold office in political clubs and parties.

Immigration Judges may not:

(1) be a candidate in a partisan election.

(2) engage in political activity on duty, in a government office, wearing an official uniform, or using a government vehicle.

(3) solicit, accept or receive political contributions from another person - except as described in paragraph (5), above.

(4) solicit or discourage the political activity of anyone who has business with the Department.

(5) use official authority or influence to interfere with an election.

(6) wear political buttons while on duty.

Note: In 1993, Congress amended 18 U.S.C. § 603, which governs political contributions by Federal employees to their employer or employing authority. The original statute had been interpreted as potentially prohibiting all Executive branch employees from making political contributions to the reelection campaign committee of an incumbent President. However, by memorandum dated May 2, 1995, the White House issued an opinion that states that based on the Hatch Act Reform Amendments of 1993, 18 U.S.C. § 603 would no longer prohibit employees from making contributions to the reelection campaign of an incumbent President.

XXXII. Ex Parte Communications

An Immigration Judge should not initiate, permit, or consider ex parte communications, or consider other communications made to the Immigration Judge outside the presence of the parties or their lawyers, concerning a pending matter, except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided that the Immigration Judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication.

(2) An Immigration Judge may consult with court staff and court officials, including supervisors, whose functions are to aid the Immigration Judge in carrying out the Immigration Judge's adjudicative responsibilities, or with other Immigration Judges, provided the Immigration Judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility to personally decide the matter.

(3) An Immigration Judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.

If an Immigration Judge inadvertently receives an unauthorized ex parte communication bearing on the substance of a matter, the Immigration Judge should make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond, or to recuse himself or herself if appropriate.

XXXIII. Mechanism for Continuing Dialog

It is understood that the Agency will be providing Immigration Judges with examples relating to the provisions of the Guide. Within thirty (30) days of the effective date of this Guide, each of the parties will designate a person to act as a point of contact (POC) for any updates to the examples.

The NAIJ POC may communicate with the Agency POC any questions or topics about which it would be useful to have an example relating to the Guide. In addition, the NAIJ POC may submit for consideration for use as examples ethics inquiries and answers received by Judges which NAIJ believes would be of general interest.

The Agency POC will consider all suggestions submitted by the NAIJ POC and will notify the NAIJ's POC with the provisions of any updates at least one week prior to any updates. The designated NAIJ POC under this provision will be provided official time to perform a reasonable amount of work associated with these duties.

XXXIV. Disciplinary Action or Action for Failure to Follow the Guide

In the event of conflicting requirements between the provisions of this Guide, the Standards of Ethical Conduct for Executive Branch Employees, the bar rules governing an Immigration Judge's conduct, and/or any oral or written instruction from the Agency, the Immigration Judge should seek appropriate guidance under Article III above. Disciplinary action will not be taken against an Immigration Judge who has engaged in good-faith reliance upon the advice of an agency ethics official in accordance with the Note in Article III. Further, if after consultation with an agency ethics official, the ethics official refers the Immigration Judge to a bar for guidance, compliance with that guidance shall be a defense to disciplinary action against an Immigration Judge.

An Immigration Judge against whom disciplinary or other employment action is taken as a result of an alleged violation of this Guide may avail himself/herself of any rights under the Collective Bargaining Agreement,

including but not limited to the grievance and arbitration procedures under Articles 8 and 9, or any other applicable provision of law or regulation.

The Agency will not cite the specific provisions of this Guide as a basis for disciplinary or other employment action until six months after ratification of the Guide by members of NAIJ and approval by the head of the Agency.

IN WITNESS WHEREOF, on this 26th day of January, 2011, the Executive Office for Immigration Review and the National Association of Immigration Judges have agreed to the provisions of this Ethics and Professionalism Guide for Immigration Judges.

FOR THE AGENCY:

Mary Beth Keller
Assistant Chief Immigration Judge
Office of the Chief Immigration Judge
Executive Office for Immigration Review

FOR NAIJ:

1/31/11

Denise Noonan Slavin
Vice President
National Association of Immigration Judges

EXHIBIT O

INTRODUCTION:

Incumbent serves as an Immigration Judge with the Executive Office for Immigration Review which has ~~field offices~~ located throughout the United States. The incumbent presides as a ~~hearing officer~~ with duties and powers somewhat similar to those of Hearing Examiners, appointed and operating under the Administrative Procedures Act, but with the additional power of entering decisions that are final unless appealed.

DUTIES AND RESPONSIBILITIES:

The Immigration Judge presides at formal, quasi-judicial hearings to determine the issues arising in exclusion and deportation and related proceddings. Although each of these proceedings has distinctive qualities of its own, the Immigration Judge has general procedural duties common to many of them.

The Immigration Judge determines whether the proceeding against the alien was initiated in accordance with due process, advises him of the nature of the proceedings, of his right to representation by counsel, and places him under oath. Where the alien desires counsel but does not have the financial means, the Immigration Judge will advise the alien of legal organizations.

The Immigration Judge regulates the course of the hearings, rules on all objections, motions, procedural issues, requests for continuances, and receives the testimony of witnesses and other evidence.

An attorney may be assigned to the case at the outset to present the evidence of the government, and the Immigration Judge may request such assignment at any time. The Immigration Judge has authority to issue subpoenas to compel the appearance of witnesses or the production of documentation at the requst of the alien or the government, and cause depositions to be taken either in the United States or abroad, and issue letters rogatory to foreign government officials to obtain foeign documents.

The incumbent may hear oral arguments and receive and consider briefs, prior to his decision. At the conclusion of the hearing, he renders a decision on the issues of the proceeding. The decision is issued without prior review or control, and is final unless an appeal is taken, or on rare occasions, if the case is certified to the Board of Immigration Appeals. In most cases, a permanent verbatim record of the entire hearing is kept and the transcript is certified in case of appeal.

Exclusion Proceedings: Determines whether an alien arriving from a foreign country who has been held for further inquiry shall be allowed to enter the United States or shall be excluded and deported.

The Immigration and Nationality Act has some 33 different principal grounds of excludability, any one or more of which may apply in a particular case. These grounds encompass persons afflicted with mental and physical defects, criminals, narcotic users or violators of narcotics laws and persons connected with the business of prostitution, aliens who may have obtained visas or documentation by fraud, who lack proper visas or passports, and those who seek to enter the United States for activities prejudicial to the public interest, or who have been members of the Communist Party or other subversive organizations and aliens who assisted Nazis in persecutions.

The alien may assert a claim to United States citizenship and very complex issues of nationality and expatriation may have to be resolved, as well as related questions of marriage, divorce, legitimacy and custody, including not only the laws of United States, but those of foreign countries as well.

The incumbent also exercises the discretion of the Attorney General to waive certain grounds of excludability, and to admit an alien to the United States despite the existence of such grounds. Also has the power to grant permission to reapply for admission into the United States notwithstanding the alien's prior deportation. Both of these powers may be exercised despite the fact that the administrative authorities have already denied such relief. The incumbent also considers persecution claims.

Deportation Proceedings: Every proceeding to determine deportability of an alien is commenced by service of an order to show cause, setting forth the factual allegations and the charge or charges on which deportability is based.

Preliminary to any determination of deportability is the finding that the subject of the proceedings is in fact an alien; hence, questions of citizenship and related questions of parentage, age, legitimacy, marriage, divorce, and expatriation are at issue in many deportation cases as well as in exclusion cases.

The grounds of deportability are even more numerous than the grounds of excludability, since they include not only all persons who were excludable at the time of their entry, but also persons who have become deportable by certain types of post-entry conduct, including criminal, subversive, and immoral activities in the United States after entry, or by remaining longer than permitted.

Discretionary Relief from Deportation: Once the alien has been found to be deportable, he may be thusly ordered, or there may be an alternative. As the alien's ties to the United States increase by reason of extended periods of residence, close family relationships, employment and professional skills, he may become eligible to apply to the Immigration Judge for permanent residence in the United States under Sections 244, 245, and 249 of the Immigration and Nationality Act. The grant of such residence

is fully the equivalent of the visa issuing functions of such American Counsuls abroad. The Immigration Judge not only has original jurisdiction for such application, but any alien whose previous application for permanent residence under Sections 245 and 249 has been denied by the District Director for Immigration and Naturalization Service (INS), may renew an application to the Immigration Judge before whom he appears and have his application granted despite such previous denial. Finally, he may be allowed to depart voluntarily at his own expense with a time initially fixed by the Immigration Judge.

Claims of Persecution: The Immigration Judge is required to designate the country, or countries, to which the deportable alien may be deported. If the alien believes he might be subject to persecution by reason of his race, religion, or political belief, he may apply to the Immigration Judge for asylum or withholding of deportation. With the increase of world tensions and the displacement of people from such areas of tension, the number of such requests has steadily increased. The importance of the decision on such applications cannot be overestimated.

Stay of Deportation: The physical details of effecting the alien's deportation are the duty of the INS District Director. It frequently happens, however, that an alien, about to be deported, requests an reopening and a reconsideration of the case by the Immigration Judge because of some newly acquired equity, or because of some claimed error in the proceedings.

Before the motion could be decided, the alien might be deported, unless a mechanism existed whereby the entire deportation process could be stayed, pending the determination of the motion by the Immigration Judge. This additional power to stay the hand of the enforcement authorities, has been given to the Immigration Judge and may be used even after the INS District Director has denied such stay.

Recission of Adjustment of Status: Within five years after an alien has had his status adjusted to that of a permanent resident under Sections 244, 245, and 249 of the Immigration and Nationality Act, the Attorney General may move to rescind that status if he finds such person was not in fact eligible for adjustment. If the alien contests the procedure, he is given a formal hearing on the merits before the Immigration Judge. In such cases, the government has the same burden of proof as in a deportation case.

Departure Control: Under the provisions of 22 CFR 46, the Immigration Judge has the duty of holding formal hearings to determine whether the departure of an alien from the United States may be prejudicial to the interest of the United States, and recommending either that the temporary order preventing departure be made final, or that such order be revoked. These cases also may involve aliens who, after departure from the United States, could disclose information relating to the national defense and security, aliens

who may engage in activities imperiling such security, aliens who seek to leave in order to engage in rebellion or insurrection against the United States or its allies, or who are fugitives from justice, or whose technical and scientific training might be used by an enemy of the United States against this country, or whose presence in the United States is desired by another federal agency such as the Internal Revenue Service.

Custody Determinations: When an alien is arrested, the INS District Director sets the amount of bond and the conditions upon which he may be released. Before a deportation order becomes final, upon application of the alien for a reduction, the Immigration Judge may order that the amount of the bond be reduced or that the alien be released on own recognizance, and that any other conditions imposed by the INS District Director be set aside.

Miscellaneous Hearings: The Immigration Judge is also called upon occasionally to hear other types of cases, such as, the withdrawal or approval of schools.

SUPERVISORY CONTROLS:

In a decision-making capacity, the Immigration Judge acts absolutely independently, and is free from supervision from any source. Decisions issued may not be reviewed before publication and are final unless appealed by the government or the alien to the Board of Immigration Appeals. The incumbent is subject to the administrative, ministerial and professional supervision of the Chief Immigration Judge.

The Chief Immigration Judge keeps incumbent informed of administrative and court decisions bearing upon incumbent's duties and functions, and of changes and developments in laws, legislative history, procedures and regulations. The Chief Immigration Judge sets operating procedures to which the incumbent adheres.

OTHER RELATING FACTORS:

The proceedings at which the Immigration Judge presides run the gamut from simple to complex cases and include those characterized by complicated and controverted facts, strong protests against proposals made, complex legal or technical questions or matters, both normal and unique contentions and issues. The records vary in size, from a very few to several hundred pages; and on occasion, thousands of pages, depending on the issues; and frequently have a wide effect of decision. The hearings may be extended over months and even years. The decision of the Immigration Judge affects not only the liberty of the alien, but the economic interest of his family, friends, and business associates. The decisions of the Immigration Judge may also impact on foreign relations and law enforcement in the United States. All of the written decisions ot the Immigration Judge are made available to the general public under the Public Information Act.

Administrative decisions involving deportation cases are judicially reviewable directly in the Court of Appeals on the hearing record created by the Immigration Judge. Exclusion proceedings are reviewed by the U. S. District Court.

SPECIAL KNOWLEDGE AND ABILITIES REQUIRED:

The Immigration Judge must have the ability to conduct hearings in a dignified, orderly, and impartial manner; determine credibility of witnesses, and analyze evidence (In Woodby v. INS, 385 U.S. 276, the Supreme Court concluded that in deportation proceedings it was incumbent upon the Government to establish the facts supporting deportability by clear, unequivocal and convincing evidence.); apply Board of Immigration Appeals and court orders; ascertain and apply judicial and administrative precdent; and perform independent legal research. He must know the rules of evidence, possess a thorough knowledge of the numerous immigration and nationality laws, both past and present, and the regulations and rules of the INS issued thereunder. He must have an expert knowledge of judicial practice, exceptional professional attainments; a capacity for analysis and articulation; a proven ability to assure a fair hearing. Inherent demands of the position include such personal characteristics as tact, poise, firmness, impartiality, diplomacy, originality, imagination and initiative, professional bearing, the ability to control the hearing and the ability to meet and correctly dispose of novel and taxing legal problems.

The incumbent must adjudicate claims to privileges under the First and Fifth Amendment, as well as other claims of privilege, apply foreign and domestic law regarding marriage, divorce, citizenship, legitimation of children, domestic relations, adoption, residence and domicile; determine whether convictions for crimes in foreign jurisdictions as well as in the United States involve "moral turpitude" evaluate conduct and activities in the light of the applicable laws relating to exclusion and deportation, involving subversive activities, associations, memberships, and beliefs of aliens within, or seeking admission to, the United States; make determinations in medical and psychiatric matters related to exclusion and deportation; and be familiar with and apply all the laws, regulations and treaties applicable to foreign government officials and to aliens admitted to the United States pursuant to the Internation Organizations Immunities Act.

The incumbent must have the ability to analyze and summarize complex factual situations and the applicable laws and to make a decision containing a discussion of the facts and law relevant to the case, resolve all disputed issues, and present his views in a logical, orderly and enequivocal manner.

Frequent travel is required in this position to handle cases throughout the United States. Travel of the Immigration Judges is directed by the Chief Immigration Judge.

Order denying Motion for Preliminary Injunction (ECF 31),

filed August 6, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

NATIONAL ASSOCIATION OF IMMIGRATION JUDGES, *Plaintiff* v. JAMES R. MCHENRY III, Director of the Executive Office for Immigration Review, *Defendant.*	Case No. 1:20-cv-000731 Hon. Liam O'Grady

ORDER

Before the Court is Plaintiff NAIJ's motion for a preliminary injunction. Dkt. 9. The motion was fully briefed, and the Court held a telephonic hearing on Friday, July 31.

I. Background

The National Association of Immigration Judges ("NAIJ"), a labor organization, is the exclusive collective bargaining representative for non-managerial immigration judges ("IJs"). IJs are employed by the Executive Office for Immigration Review ("EOIR"), an agency within the Department of Justice. James R. McHenry III, Director of EOIR, exercises authority over the agency's policies.

IJs and other EOIR employees are subject to federal ethics and workplace laws and policies. One such policy is the 2011 Ethics Guide (the "Guide"), which was jointly issued by EOIR and NAIJ. The Guide remains in effect today. It requires IJs to seek prior supervisory and ethics approval for written work and speeches but does not identify a review process. And, although the Guide itself distinguishes between personal capacity speech and official capacity speech, the supervisory approval requirement does not contain that distinction.

Before 2017, IJ speech requests were approved or denied by the requesting IJ's "ACIJ," or supervising Assistant Chief Immigration Judge. If the ACIJ granted the speech request, it was forwarded to the EOIR Ethics Office which offered ethics guidance.

Under this scheme, EOIR recognized speech known to the agency and IJs as "PTD" speech. PTD speech occurred in an IJ's "personal capacity with use of title and disclaimer." IJs were authorized to speak and appear in their personal capacities while using their official titles, so long as they provided a disclaimer stating the appearance and speech was occurring in a personal capacity and not as an EOIR employee.

On September 1, 2017, EOIR issued a memorandum entitled "Speaking Engagement Policy for EOIR Employees." Dkt. 2. The 2017 memorandum outlined a formal review and approval process for IJ speaking engagement requests. It purported only to apply to requests to speak at an event. This memorandum altered the approval process by tasking ACIJs, IJ supervisors, with determining whether the speech requests they received pertained to speech in a personal or official capacity. After a supervisor approved a request, official capacity speech requests are reviewed by EOIR's Speaking Engagement Team ("SET").[1] The 2017 memorandum did not identify criteria used for determining whether requests would be approved or denied, but it eliminated PTD speech.

In 2018, NAIJ initiated collective bargaining with EOIR regarding the 2017 memorandum. Later that year, the parties executed a Memorandum of Understanding ("MOU") in 2018, which settled their labor dispute. The MOU sets aspirational timeliness guidelines for speech requests and requires EOIR to provide reasons when denying requests. It also required

[1] NAIJ representatives were exempted from this review process because of their right to engage in speech relating to working conditions.

EOIR to provide a list of factors considered in assessing requests, and to provide a summary of requests received by SET every six months.

Then, on January 17, 2020, EOIR issued a memorandum entitled "Submission and Processing of Requests for Speaking Engagements" in conjunction with the launch of an automated request review process. The 2020 memorandum purports to be a reissuance of the 2017 memorandum which does not substantively alter the 2017 memorandum or MOU, but merely clarifies points that have caused confusion.

The 2020 memorandum provided that speaking engagements were not limited to IJ speaking events, but instead also included written material intended for publication. It also noted that, in addition to ACIJ and SET review, speech requests were subject to review by the EOIR Ethics Program, for guidance, and a request approved by SET was still subject to final approval by the supervising ACIJ a second time. Finally, the 2020 memorandum explained that the determination of whether an engagement involved personal capacity or official capacity speech depended upon the nature of the engagement, not any label, and provided examples. It provides, in relevant part, that

> An employee who has been invited to participate in a speaking engagement related to immigration law or policy issues, the employee's official EOIR duties or position, or any agency programs and policies, or who has been invited because of the employee's official duties or position, has been invited in an official capacity . . . .

NAIJ sued Director McHenry in his official capacity over EOIR's speech request policies. The Complaint asserts federal question jurisdiction and claims four constitutional causes of action. NAIJ alleges that EOIR's policies, as they are set out separately in memoranda issued in 2020 and 2017, violate the First and Fifth Amendments to the Constitution because they are prior restraints on speech not tailored to any legitimate government interest, and because

they are unconstitutionally vague. NAIJ argues, in essence, that IJ personal capacity speech on matters of public importance is effectively prohibited by the policies.

While the text of the 2020 memorandum purports to reissue the 2017 memorandum with clarifications, NAIJ originally understood the 2020 policy to be separate and distinct from the 2017 policy, as amended by the MOU, and therefore challenged them both. EOIR contends that there is a single policy at issue, which is comprised of the 2017 memorandum, the MOU, and the 2020 memorandum.

II. Legal Standard

Federal Rule of Civil Procedure 65 authorizes courts to issue preliminary injunctions and temporary restraining orders. A preliminary injunction is an extraordinary remedy. *Winter v. Nat. Resources Def. Council, Inc.*, 555 U.S. 7, 22 (2008). A party seeking a preliminary injunction must demonstrate: (1) that it is likely to succeed on the merits of its claim; (2) that it is likely to suffer irreparable harm absent a preliminary injunction; (3) that the balance of equities tips in its favor; and (4) that the injunction is in the public interest. *Accident, Injury & Rehab., PC v. Azar*, 943 F.3d 195, 201 (4th Cir. 2019) (citing *See League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014)). "[C]ourts considering whether to impose preliminary injunctions must separately consider each *Winter* factor." *Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013). But *Winter* clearly established that each of the four factors must be satisfied to obtain preliminary injunctive relief. *Henderson for Nat'l Labor Relations Bd. v. Bluefield Hosp. Co., LLC*, 902 F.3d 432, 439 (4th Cir. 2018) (citing *Winter*, 555 U.S. at 20). Courts have therefore found it is "unnecessary to address all four factors when one or more [has] not been satisfied." *Id.* Particular attention is given to a movant's likelihood of success on the merits. *See Dewhurst v. Cent. Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011).

III. Analysis

1. Likelihood of Success on the Merits

"Because a preliminary injunction affords temporary relief *before trial* of the type that can be granted permanently *after trial*, it is an 'extraordinary remedy' and may be granted only 'upon a clear showing that the plaintiff is entitled to such relief.'" *Accident, Injury & Rehab., PC*, 943 F.3d at 201 (quoting *Winter*, 555 U.S. at 22) (emphases in original). Here, NAIJ cannot show it is entitled to the relief which it seeks because Congress has precluded district court jurisdiction over claims such as these. Due to lack of jurisdiction, NAIJ is unlikely to succeed on the merits of its claims.

Federal district courts generally have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. But Congress may "impliedly preclude jurisdiction by creating a statutory scheme of administrative adjudication and delayed judicial review in a particular court." *Bennett v. SEC*, 844 F.3d 174, 178 (4th Cir. 2016). Whether a statutory scheme impliedly precludes jurisdiction requires application of a two-step analysis developed in a trio of Supreme Court decisions: *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994); *Free Enterprise Fund v. Pub. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Elgin v. Dept. of Treasury*, 567 U.S. 1 (2012). The Fourth Circuit has explained:

> First, we ask whether Congress's intent to preclude district-court jurisdiction is fairly discernible in the statutory scheme. This involves examining the statute's text, structure, and purpose. Second, we ask whether plaintiffs' claims are of the type Congress intended to be reviewed within this statutory structure. At this second stage, we consider three factors. We focus on (1) whether the statutory scheme forecloses all meaningful judicial review. We also consider (2) the extent to which the plaintiff's claims are wholly collateral to the statute's review provisions, and (3) whether agency expertise could be brought to bear on the . . . questions presented.

Bennett, 844 F.3d at 181 (internal quotation marks, citations, and alteration omitted).

A) Congress Intended the FSL-MRS to Preclude District Court Jurisdiction

At the first step of the two-step framework established by *Thunder Basin*, courts must determine whether Congress has manifested a fairly discernible intent to preclude jurisdiction in a given statutory scheme. *Thunder Basin*, 510 U.S. at 207; *accord id.* Here, the relevant statutory scheme is the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 1701 *et seq.* (the "FSL-MRS," or the "Statute").

The Statute was enacted in 1978 as a part of the broader Civil Service Reform Act (CSRA) to govern labor relations between the federal government and its employees. Pub. L. No. 95-454, § 701, 92 Stat. 1111, 1191-1216 (1978) (codified at 5 U.S.C. §§ 7101-35). The Statute "prescribe[s] certain rights and obligations of the employees of the Federal Government and [] establish[es] procedures which are designed to meet the special requirements and needs of the Government." 5 U.S.C. § 7101(b). It provides federal employees with the right to join labor organizations such as NAIJ and engage in collective bargaining. 5 U.S.C.§ 7102. It also sets forth "a dispute-resolution mechanism for the various foreseeable issues that might arise during the collective bargaining process or as part of a final collective bargaining agreement." *Nat'l Ass'n of Agriculature Employees v. Trump* ("*NAAE*"), --- F. Supp. 3d ---, 2020 WL 2571105, at *1 (D. Md. May 21, 2020) (citing 5 U.S.C. §§ 7104-5, 7116, 7118-19, 7121-22, 7132).

This statutory dispute resolution mechanism provides a comprehensive scheme of administrative and then judicial review. "Administrative review is provided by the Federal Labor Relations Authority (FLRA), a three-member agency charged with adjudicating federal labor disputes, including "negotiability" disputes and "unfair labor practice" disputes." *Am. Fed'n of Gov't Employees, AFL-CIO v. Trump* ("*AFGE*"), 929 F.3d 748, 752 (D.C. Cir. 2019) (quoting 5 U.S.C. § 7105(a)). Generally, these disputes are resolved by the FLRA making a

determination as to whether an agency and a union must bargain over a subject, whether the duty to bargain in good faith was violated, or whether a party otherwise failed to comply with the Statute. *See* 5 U.S.C. §§ 7105(a)(2)(E), 7105(a)(2)(G), 7116(a), 7118. FLRA decisions are reviewable by the courts of appeals. 5 U.S.C § 7123.

The Statute satisfies the first step of the *Thunder Basin* analysis. *See AFGE*, 929 F.3d at 755; *accord NAAE*, 2020 WL 2571105 at *4. "With the [Statute], as with all of the CSRA: 'Congress passed an enormously complicated and subtle scheme to govern employee relations in the federal sector.'" *AFGE*, 929 F.3d at 755 (quoting *AFGE v. Sec'y of the Air Force*, 716 F.3d 633, 636 (D.C. Cir. 2013)). Federal courts have repeatedly found that Congress intended this statutory scheme be the exclusive procedure by which federal employees—and their collective bargaining representatives—may assert federal labor relations claims. *See id.*; *accord NAAE*, 2020 WL 2571105 at *4. The parties do not dispute that, and this Court agrees.

B) Congress Intended These Types of Claims to Fall Within the Statutory Framework

Here, the dispute arises at the second step of the *Thunder Basin* analysis: whether the union's claims are of the type which Congress intended to fall within the statutory scheme.

(i) Meaningful Review

The first consideration at this step of the analysis is whether "a finding of preclusion could foreclose all meaningful judicial review." *Thunder Basin*, 510 U.S. at 212-13; *accord Bennett*, 844 at 181. "[M]eaningful judicial review is the most important factor in the *Thunder Basin* analysis." *Bennett*, 844 F.3d at n.7. The Statute clearly does not foreclose meaningful judicial review, because it provides for judicial review in the courts of appeals which may "grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified,

or setting aside in whole or in part the order of the [FLRA]." 5 U.S.C. § 7123(c); *see also AFGE*, 929 F.3d at 757 (in a case involving constitutional challenges, finding that the Statute allowed unions to "obtain review of and relief from the [complained-of actions] by litigating their claims through the statutory scheme,); *accord NAAE*, 2020 WL 2571105 at *5 (discussing how meaningful review is available under the Statute although plaintiffs must "raise [] claims with the FLRA in the first instance.").

NAIJ argues that meaningful review is not available under the Statute for three reasons.[2] First, NAIJ argues that its claims are not amenable to meaningful review because they are pre-enforcement claims, and accordingly they do not present a negotiability or unfair labor practice dispute. This argument fails because pre-enforcement challenges, as a matter of law, may be claims of the type which fall within exclusive statutory schemes and necessitate prior administrative proceedings. *NAAE*, 2020 WL 2571105 at *5 ("parties typically cannot circumvent a comprehensive statutory scheme by bringing a pre-enforcement challenge in district court to government action that has not yet affected them."); *see also, e.g.*, *Thunder Basin*, 510 U.S. at 212-16 (finding meaningful judicial review though there was no way for the mining company plaintiff to assert its pre-enforcement challenge); *accord AFGE*, 929 F.3d at 756 (finding in the context of the Statute that "the unions are not necessarily entitled to raise a pre-implementation challenge in the district court,"); *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 13–14 (2000) (requiring broad, pre-enforcement challenge to be channeled through administrative process).

Resisting this, NAIJ contends that the law does not require it to manufacture a dispute beyond the instant facial challenge and that no negotiability or unfair labor practice claim is

[2] NAIJ posits an additional argument, relying only on a single unpublished Fourth Circuit decision, which is irrelevant here because it relates to the CSRA only and not to the Statute at issue.

implicated. This argument relies on the Supreme Court's decision in *Free Enterprise*, 561 U.S. at 492. There, a statute did not preclude district court jurisdiction over a pre-enforcement challenge to the constitutionality of Board members' appointments. The Supreme Court concluded that the petitioners did not have a "meaningful" avenue of relief under *Thunder Basin*, "[b]ecause the Board had not undertaken regulatory action that would yield a reviewable [] order or rule, [so] the petitioners would have had to 'challenge a Board rule at random' or 'bet the farm' by voluntarily incurring a sanction in order to trigger [the statutory] mechanism for administrative and judicial review." *Bennett*, 844 F.3d at 180 (quoting *Free Enterprise*, 561 U.S. at 490). Here, in contrast, NAIJ is not challenging the existence of an administrative body, but only a policy. And far from a random challenge, NAIJ has identified the target policy precisely. Finally, no sanctions are required because the Statute provides numerous mechanisms by which NAIJ can challenge the policy, as an unfair labor practice or negotiability dispute, pursuant to the rights which Congress guaranteed to it and its members.

Second, NAIJ argues that it is challenging the constitutionality of EOIR's policy rather than a failure to negotiate or an unfair labor practice. But merely casting a federal labor relations dispute in terms of a facial constitutional challenge does not remove it from the statutory scheme because the type of claim is not dependent on clever drafting. Indeed, the Supreme Court has expressly declined to draw "a jurisdictional rule" based on "amorphous distinctions" such as whether a plaintiff is bringing a facial or as-applied challenge. *Elgin*, 567 U.S. at 15. The law is clear that, where a complex statutory scheme is exclusive, that "exclusivity does not turn on the constitutional nature" of a plaintiff's claim. *Id.*

Third, NAIJ argues that judicial review would not be meaningful because of the ongoing harms it will suffer during the dispute resolution process. But "where 'the "injury" inflicted on

the party seeking review is the burden of going through an agency proceeding,' the Supreme Court's [precedent] . . . 'teaches that the party must patiently await the denouement of proceedings within the Article II branch.'" *Tilton v. Sec. & Exch. Comm'n*, 824 F.3d 276, 286 (2d Cir. 2016) (quoting *USAA Fed. Sav. Bank v. McLaughlin*, 849 F.2d 1505, 1510 (D.C. Cir. 1988)). And while NAIJ asks the Court to find that an assertion of a First Amendment violation excuses it from the required administrative proceedings, it has not identified any cases where another court has done so.

Thus, NAIJ's arguments that its claims are not capable of meaningful judicial review each fail. Here, the governing statute provides for judicial review in a federal court of appeals. Even in cases where an administrative body cannot decide an issue of constitutionality, that issue may be meaningfully addressed in a court of appeals. *See Thunder Basin*, 510 U.S. at 215. Thus, meaningful judicial review is available here.

(ii) Wholly Collateral

The second consideration is whether claims presented are wholly collateral to the statutory scheme. Far from being wholly collateral, these claims are directly related to federal labor relations, revolve around a policy which has been the subject of collective bargaining, and may be raised in the context of a concrete bargaining dispute pursuant to the Statute's procedures.

At the outset, the Court notes that NAIJ has previously engaged in collective bargaining regarding the very policy which they now take issue with outside the prescribed statutory scheme. First, NAIJ and EOIR have jointly issued the Ethics Guide which remains in effect and underlies the complained of policy. Second, in 2018, NAIJ submitted a formal request for bargaining relating to the 2017 memorandum and bargaining subsequently occurred. The

collective bargaining resulted in the 2018 MOU. The policy, itself comprised of the 2017 and 2020 memoranda as well as the 2018 MOU, has therefore been the subject of collective bargaining activity in the past and incorporates collectively bargained for terms. Thus, in the instant lawsuit, a collective bargaining representative is challenging a policy which is clearly subject to collective bargaining, and which these parties have already bargained over. The claims are therefore not wholly collateral to the statutory scheme. *Cf. Elgin*, 567 U.S. at 22 ("Far from a suit wholly collateral to the CSRA scheme, the case before us is a challenge to CSRA-covered employment action brought by CSRA-covered employees requesting relief that the CSRA routinely affords.").

NAIJ also argues that the relief it seeks is different from that available under the Statute, and makes these claims collateral. That argument fails. Merely seeking a categorical invalidation does not empower the union to "circumvent the scheme established by the Statute." *NAAE*, 2020 WL 2571105 at *7 (quoting *AFGE*, 929 F.3d at 757). Though a union is "not able to pursue [its] preferred systemwide challenge through the scheme," after "litigating . . . through the statutory scheme in the context of concrete bargaining disputes," an Article III court could address any constitutional claims "even if the FLRA could not." *AFGE*, 929 F.3d at 757, 758; *accord NAAE*, 2020 WL 2571105 at *7 ("even if the FLRA cannot invalidate the Executive Orders, a federal court of appeals could do so on appeal."); *see also Shalala*, 529 U.S. at 23 ("a court reviewing an agency determination . . . has adequate authority to resolve any . . . constitutional contention that the agency does not, or cannot, decide.").

Furthermore, these claims are not wholly collateral because NAIJ may raise them pursuant to the Statute. While the Court is not required to provide a roadmap, it appears that NAIJ could initiate collective bargaining regarding the policy just as it did in 2018. EOIR's

subsequent refusal to consult or negotiate in good faith or an impasse would constitute an unfair labor practice, 5 U.S.C. § 7116(a)(5), resolvable by the FLRA, 5 U.S.C. § 7105(a)(2)(G), and reviewable by a court of appeals 5 U.S.C. § 7123(a), (c). And as previously discussed, this requirement does not impermissibly require NAIJ to manufacture a dispute. It gives effect to Congress' power, and intent, to channel claims pursuant to a comprehensive statute.

Again, NAIJ attempts to distinguish its constitutional claims from other labor-related disputes based on their nature. But, as noted above, that is a jurisdictional line which the Supreme Court considered and rejected. NAIJ is correct in pointing out that EOIR has not cited a case like this one, where a plaintiff presented exclusively constitutional claims rather than constitutional claims in conjunction with others clearly falling within a comprehensive statutory scheme. For example, in *AFGE*, the D.C. Circuit found that the district court lacked subject matter jurisdiction over a case which included constitutional claims as well as claims that the certain executive orders violated the statute as well as the right to bargain collectively guaranteed within the statute. *AFGE*, 929 F.3d at 761, 753-54.

But even so, time and time again, courts have held that merely adding a constitutional claim to an otherwise jurisdictionally precluded lawsuit does not remove it from Congress' prescribed channeling structure. *See, e.g.*, *Elgin*, 567 U.S. at 22. NAIJ is essentially arguing that adding a constitutional claim and at the same time eliminating statutory counts provides jurisdiction. But this is a purely formal distinction. And the Fourth Circuit has warned against accepting such arguments, which would allow plaintiffs to "bypass the judicial-review scheme established by Congress simply by alleging a constitutional challenge and framing it as 'structural,' 'prophylactic,' or 'preventative.'" *Bennett*, 844 F.3d at 188. Such arguments "provide no limiting principle" and accepting them "conflicts with *Elgin*'s admonition that

distinguishing among types of constitutional claims for jurisdictional purposes is a fool's errand. And it conflicts with established precedent that Congress has the power to channel statutory and constitutional claims into administrative adjudication in the first instance." *Id.* Accordingly, this Court may not depart from binding precedent, and NAIJ's argument must be rejected. The claims here are not wholly collateral to the scheme at issue.

(iii) Agency Expertise

Finally, NAIJ argues that its claims fall squarely within the expertise of Article III courts, rather than the agency's, because it has brought purely constitutional claims. Like the petitioners in *Elgin*, NAIJ argues "that [] constitutional claims are not the sort that Congress intended to channel through the [agency] because they are outside the [agency's] expertise." *Elgin*, 567 U.S. at 22. And like the petitioners in *Elgin*, NAIJ has "overlook[ed] the many threshold questions that may accompany a constitutional claim and to which the [agency] can apply its expertise." *Id.* Therefore, for the same reasons the Supreme Court rejected that argument in *Elgin*, this Court will not accept it here, and this factor does not weigh in NAIJ's favor.

Accordingly, all three factors relevant to the second step of the *Thunder Basin* inquiry indicate that Congress intended claims of this type to be exclusively channeled within the statutory framework.

Citing *Weaver v. U.S. Information Agency*, 87 F.3d 1429 (D.C. Cir. 1996), and *United States v. Nat'l Treasury Emps. Union* ("*NTEU*"), 513 U.S. 454 (1995), NAIJ claims jurisdiction here is well established notwithstanding *Thunder Basin*. However, while those cases demonstrate that district courts had jurisdiction over claims such as this in 1995 and 1996 they are inapplicable today. *NTEU* does not include a jurisdictional holding, and since these decisions were published, courts have applied the *Thunder Basin* doctrine to both the CSRA and the

Statute. Moreover, in 2012, the Supreme Court clarified the exact issue presented in this case: the relationship between the *Thunder Basin* doctrine and constitutional claims. Therefore, neither *NTEU* nor *Weaver* still stand for the proposition that this Court has jurisdiction.[3]

In sum, NAIJ is seeking to avoid the established rule that Congress may preclude district court jurisdiction. To achieve this, the union is not merely adding a constitutional count—as other plaintiffs have tried—but adding constitutional counts and eliminating other counts. But constitutional claims are not mere procedural vehicles by which a plaintiff may circumvent Congress' exclusive remedial schemes. Accordingly, NAIJ's arguments fail. Because the Court does not have subject matter jurisdiction, NAIJ is unlikely to succeed on the merits of its claims.

2. Irreparable Harm

The Fourth Circuit has held that "in the context of an alleged violation of First Amendment rights, a plaintiff's claimed irreparable harm is inseparably linked to the likelihood of success on the merits of plaintiff's First Amendment claim." *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (quotation marks omitted). Here, NAIJ has not shown a likelihood of success on the merits and therefore no showing of irreparably harm flows directly from the likelihood of success.

Accordingly, the Court finds that NAIJ has failed to demonstrate irreparable harm.

3. Public Interest and Balance of the Equities

Finally, while the existence of a likely First Amendment violation establishes these final factors weigh in favor of an injunction, *see Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 191 (4th Cir. 2013), as explained above NAIJ has failed to demonstrate a likelihood of success.

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[3] At oral argument, NAIJ cited *Andrade v. Lauer*, 729 F.2d 1475 (D.C. Cir. 1984), for the proposition that constitutional claims need not proceed through the statute's grievance procedures. This case is inapposite for the same reason that *Weaver* and *NTEU* do not support NAIJ's arguments: the relevant law has developed since the opinion issued.

Because NAIJ failed to identify a basis to find that the public interest and balance of the equities weigh in its favor independent of the merits of its claims, NAIJ has failed to make the requisite showing.

IV. Conclusion

For the reasons stated above, the motion for a preliminary injunction, Dkt. 9, is hereby **DENIED**.

It is **SO ORDERED**.

August 6, 2020
Alexandria, Virginia

Liam O'Grady
United States District Judge

Notice of Appeal (ECF 32), filed August 7, 2020

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 Civ. 731 (LO) (JFA)

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Plaintiff the National Association of Immigration Judges hereby appeals to the United States Court of Appeals for the Fourth Circuit from this Court's memorandum opinion and order, entered on August 6, 2020, denying Plaintiff's motion for a preliminary injunction. *See* ECF No. 31.

August 7, 2020

Respectfully submitted,

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Pro hac vice application pending

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of August, 2020, I electronically filed the foregoing Plaintiff's Notice of Appeal with the clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing.

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