OOD
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To: All of EOIR
From: James R. McHenry III, Director
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ADJUDICATOR INDEPENDENCE AND IMPARTIALITY

PURPOSE:	Reiterate and memorialize Executive Office for Immigration Review policy regarding adjudicator independence and impartiality
OWNER:	Office of the Director
AUTHORITY:	8 C.F.R. § 1003.0(b)
CANCELLATION:	None

In order to carry out the mission of the Department of Justice to, *inter alia*, "enforce the law and defend the interests of the United States according to the law" and the mission of the Executive Office for Immigration Review (EOIR) "to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws," EOIR utilizes multiple adjudicators—Immigration Judges, Appellate Immigration Judges, Administrative Law Judges, the Chief Administrative Hearing Officer, the Assistant Director for Policy, and the Director. All EOIR adjudicators are career officers chosen through an open, competitive, merit-based hiring process that is independent of partisan influence, media pressure, societal clamor, or any other inappropriate consideration. Similarly, once selected, they adjudicate cases independently and impartially without favor to either party or on any basis other than the record before them and the applicable law. This Policy Memorandum (PM) reiterates and formally memorializes the importance of these principles of independence and impartiality for all of EOIR's adjudicators.

Notwithstanding an oft-repeated myth to the contrary, all adjudicators at EOIR are independent in their decision-making in the cases before them. In other words, they exercise "independent judgment and discretion" when adjudicating cases. *See*, *e.g.*, 8 C.F.R. §§ 1003.0(c), 1003.1(d)(1)(ii), 1003.10(b); *accord United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954) ("And if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience."). Consequently, no employee or officer can direct an adjudicator to rule in a particular way on a matter before him or her in the first instance.[1] Similarly, just as media stories,

[1]Nothing in this PM should be construed as limiting the authority of an appropriate appellate entity from instructing an adjudicator regarding issues in a case upon remanding that case following an appeal. Nor, of course, does anything in this PM limit the authority of the Attorney General regarding matters of immigration law.

public clamor, partisan inquiries, pressure from outside groups, or pressure from other employees or officers are all inappropriate considerations for selecting adjudicators, they are all just as inappropriate for adjudicators to consider when making decisions. *See, e.g., Ethics and Professionalism Guide for Immigration Judges* (*Ethics Guide*), sec. VIII. Acting in a Neutral and Detached Manner (Jan. 26, 2011) ("An Immigration Judge should not be swayed by partisan interests or public clamor."). EOIR adjudicators exercise independent decision making in accordance with the law, and to support and reinforce that independence, it remains EOIR policy that adjudicator decisions should continue to be based solely on the record before the adjudicator and the applicable law.

Adjudicator independence does not mean that an adjudicator is free to ignore applicable law, however. The authority of all EOIR adjudicators is circumscribed by law, principally the Immigration and Nationality Act (INA), its attendant regulations in 8 C.F.R. chapter V, Department of Justice regulations in 28 C.F.R. part 0, subpart U and part 68, binding precedent from the Board of Immigration Appeals, the Attorney General, federal circuit courts, and the Supreme Court, and any relevant federal court orders. Nevertheless, the requirement that an adjudicator apply binding precedent, even precedent with which the adjudicator personally disagrees, does not mean that an adjudicator is not independent.

Although an adjudicator has no authority to ignore applicable law, EOIR recognizes that law, especially law embodied in court decisions, is inherently subject to some degree of interpretation. Thus, whether—or how—a precedent or other order applies to a particular case may involve some degree of interpretation by the adjudicator.

In some cases, a precedent or order is clear. *See, e.g. Sessions v. Dimaya*, 138 S.Ct. 1204 (2018) (18 U.S.C. § 16(b) cannot support a finding that a conviction is an aggravated felony for purposes of INA § 101(a)(43)(F) because 18 U.S.C. § 16(b) is unconstitutionally vague). In other cases, however, there remains significant interpretative ambiguity regarding the contours of a precedent or order, and the parties to a case may offer competing interpretations of the same decision or order. Moreover, among judges themselves, there is frequently disagreement over how to interpret another court's decision—*e.g.* what is the precise holding, what parts of a decision are the holding and what are dicta, what is the scope of the holding, or whether the decision is distinguishable based on its facts or the relevant law. Consequently, adjudicators should also be cautious to not conflate the result of a case with the reasoning for that result or about drawing categorical conclusions based only on the result of a case, especially in cases where not all arguments may have been raised or considered by the deciding court. In short, judges and other adjudicators are often called on to interpret decisions and orders by other courts and apply them to pending cases, and there is nothing unusual about them doing so even when they do not all agree on an identical interpretation.[2] *See, e.g.*, 8 C.F.R. §§ 1003.1(e)(6)(i) (Board may assign a case to a three-member panel for review where, *inter alia*, the case presents "[t]he need to settle inconsistencies among the rulings of different immigration judges") and 1003.1(g)(3)(iv) (in considering whether to publish a precedent decision, the Board may consider, *inter alia*, "[w]hether the case involves a conflict in decisions by immigration judges").

[2]For example, following the Supreme Court decision in *Pereira v. Sessions*, 138 S.Ct. 2105 (2018), different Immigration Judges reached significantly different conclusions about the scope and applicability of that decision.

Although EOIR provides adjudicators with timely updates of relevant decisions and potentially applicable orders, adjudicators frequently discuss legal issues with their colleagues or law clerks, and adjudicators may seek legal advice within EOIR on some matters—*e.g.* questions of ethics arising from an adjudication, *see Ethics Guide*, sec. III. Ethics Guidance ("Immigration Judges are encouraged to seek ethics opinions to ensure that their conduct comports with applicable rules and regulations.")—it ultimately remains up to the adjudicator alone regarding how to interpret the law and apply legal authority to individual cases. Adjudicator independence protects the integrity of the proceedings, but it also places responsibility on the adjudicator to maintain fidelity to the law, especially because adjudicator decisions often influence the agency's legal positions. *See, e.g.*, *Ethics Guide*, sec. IV. Professional Competence ("An Immigration Judge should be faithful to the law and maintain professional competence in it.").

Due to their decision-making independence and the policymaking nature of their positions, adjudicators must also assiduously remain neutral when deciding cases. *See, e.g.*, 5 C.F.R. § 2635.101(b)(8); *Ethics Guide*, sec. V. Impartiality ("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."). It is not the role of an adjudicator to provide preferential treatment to one party over another or to provide a procedural advantage to one party at the expense of another. For example, if a party does not provide a certified English translation of a foreign-language document, *e.g.* 8 C.F.R. § 1003.33, it is not the adjudicator's role to have the document translated for the opposing party. Although individual cases may present particularly sympathetic or unsympathetic allegations, adjudicators must be mindful that they are unbiased arbitrators of the law and not advocates for either party in the cases they hear. Suggestions from the media, advocacy organizations, partisan interests, or other employees or offices that adjudicators should favor one party over the other are inappropriate and do not override an adjudicator's ethical obligations to be impartial. *Ethics Guide*, sec. VIII. Acting in a Neutral and Detached Manner ("An Immigration Judge should not be swayed by partisan interests or public clamor."). Further, although EOIR adjudicators exercise discretion where authorized by law, as administrative adjudicators required to act impartially and remain faithful to the law, they do not possess intrinsic free-floating equitable authority; rather, "in considering and determining cases before [them], can only exercise such discretion and authority conferred. . .by law." *Matter of Hernandez-Puente*, 20 I&N Dec. 335, 339 (BIA 1991).

Principles of independence and impartiality may also bear upon the appropriateness of corrective action or discipline for an adjudicator. For example, an adjudicator who abandons neutrality in order to favor one party over the other may be subject to corrective action or discipline, especially if the adjudicator does so in defiance of applicable law. However, impartiality itself—almost by definition—does not result in a particular outcome, and adherence to applicable law does not make an adjudicator partial. Thus, it is inappropriate to evaluate an adjudicator's impartiality or performance simply by reference to the outcomes of cases decided by that adjudicator, especially without further reference to how the adjudicator's decisions are considered on appeal or in situations in which the outcomes are based solely on an application of the law to the facts of those cases.

Accordingly, it is also inappropriate to seek corrective action or discipline against an adjudicator based on normative or policy disagreements with the outcomes of his or her decisions.[3] For example, an assertion that an adjudicator grants or denies too many applications relative to some arbitrary benchmark is not an appropriate basis on which to seek discipline or corrective action.[4] For the same reason, it is inappropriate to direct any adjudicator to grant or deny more applications in order to reach an arbitrary benchmark for outcomes, and both longstanding EOIR policy, *e.g.* ExpectMore.gov Immigration Adjudication Program Assessment ("EOIR cannot adopt outcome measures for the adjudicatory aspect of the program because the agency is an impartial body established to decide immigration cases. Therefore, specific outcome measures. . .would violate the agency's mission, as each case is decided on its own merits."), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/expectmore/detail/10003809.2006.html (last visited January 12, 2021), and applicable law, *e.g.* 8 C.F.R. § 1003.9(c), forbid such direction. Similarly, results-oriented or merits-oriented claims of bias—*i.e.* alleging an adjudicator is "biased" simply because the adjudicator issued a ruling against the party making the claim of bias—are also not appropriate bases for disciplinary decisions.[5]

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[3]To be clear, an adjudicator who chooses to not follow clear binding precedent or a federal court order or to ignore other applicable legal principles—*e.g.* the law of the case—may be subject to corrective action or discipline. For example, an adjudicator who refuses to follow a clear remand order without a recognized legal justification—*e.g.* an intervening change in law—may be subject to discipline or corrective action.

[4]Whether the result of a case is "correct"—*e.g.* whether an application should have been granted or denied—is often solely based on the narrative seeking to be advanced by the evaluator, and there is no accepted way of determining whether an adjudicator's decision is normatively "correct." *See* Barry C. Edwards, *Why Appeals Courts Rarely Reverse Lower Courts: An Experimental Study to Explore Affirmation Bias*, 68 Emory L. J. On. 1035, 1046 (2019) ("Given a sample of. . . court cases, no researcher could practically determine what the courts got 'right' and what they got 'wrong.' There is no reliable method of coding how cases 'should' have been decided and, thus, no reliable way of assessing whether the [decision] rate is 'too high' using observational data."). Moreover, not only are results-oriented metrics based on which party "wins" or "loses" before an adjudicator an unacceptable method of evaluating an adjudicator's performance or integrity, case outcome statistics are prone to manipulation or misrepresentation—*e.g.* by purposefully excluding certain outcomes or including cases without an outcome—and beset by ecological inference concerns due to efforts to draw individual case conclusions from aggregate outcomes. Further, such statistics themselves generally reflect only a consistent application of the law and say nothing about any purported personal bias of an adjudicator. For example, federal district courts have historically granted less than five percent of noncapital habeas petitions and less than one percent in recent years. Diane P. Wood, *The Enduring Challenges for Habeas Corpus*, 95 Notre Dame L. Rev. 1809, 1821 n.76 and 85 (2020). Similarly, federal appellate courts affirm over ninety percent of decisions appealed to them, including appeals from administrative agency decisions. Edwards, 68 Emory L. J. On. at 1037-38. Although there is academic disagreement over why these results occur, there is no reasonable argument that *all* federal district and appellate court judges are personally biased in their decision-making even though the outcomes of their decisions in certain types of cases may cluster around a similar result.

[5]Spurious accusations of bias, particularly ones based on advocacy or policy positions taken or the identity of clients represented by an adjudicator before he or she became an adjudicator, are also inappropriate bases for an adjudicator to recuse himself or herself from hearing a case, as are alleged results-oriented, normative, or policy disagreements with the adjudicator. *See Matter of Exame*, 18 I&N Dec. 303, 306 (1982) ("As to whether the applicant has demonstrated that he was deprived of a constitutionally fair proceeding, we note initially that an immigration judge's rulings in the same or similar cases do not ordinarily form a basis upon which to allege bias. Moreover, an applicant is not denied a fair hearing merely because the immigration judge has a point of view about a question of law or policy. Nor does the fact that the immigration judge may have previously participated in investigative or prosecuting functions in similar proceedings prior to becoming an immigration judge provide a basis upon which to establish a disqualifying bias."); *see also Operating Policies and Procedures Memorandum 05-02, Procedures for Issuing Recusal Orders in Immigration Proceedings* (Mar. 21, 2005); *cf. Laird v. Tatum*, 409 U.S. 824, 831 (1972) (Rehnquist, J.) ("[N]one of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench."); *Baker & Hostetler LLP v. U.S. Dept. of Commerce*, 471 F.3d 1355, 1358 (D.C. Cir. 2006) (Kavanaugh, J.)

EOIR has made great strides in recent years in improving the integrity of its proceedings and in restoring its reputation as a fully-functioning administrative adjudicatory agency whose adjudicators are professional, competent, and neutral. Independence and impartiality are the bedrock foundations of EOIR's adjudicatory system, and it is imperative that adjudicators remain cognizant of the importance of those principles in fulfilling the missions of EOIR and the Department of Justice.

This PM is not intended to, does not, and may not be relied upon to create, any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Further, nothing in this PM should be construed as mandating a particular outcome in any specific case. Finally, nothing in this PM should be construed as limiting the authority of any employee or officer contained in the INA or applicable regulations.

Please contact your supervisor if you have any questions.

("Consistent with the line drawn by Congress in § 455(b)(3), judges who previously participated in policy matters and provided policy advice in government do not ordinarily recuse in litigation involving those policy issues."); *accord Carter v. West Publ'g Co*., 1999 WL 994997, *9 (11th Cir. 1999) (Tjoflat, J.) ("Courts have uniformly rejected the notion that a judge's previous advocacy for a legal, constitutional, or policy position is a bar to adjudicating a case, even when that position is directly implicated in the case before the court.").