ADMINISTRATIVE ADJUDICATORS' EXTRAJUDICIAL STATEMENTS

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The Trump administration displayed profound disdain for long standing policies and norms of governance, and for the career federal employees who often serve as their guardians. Those career officials, formerly disparaged as "bureaucrats," but more recently collectively cast as "the deep state," resisted,[1] sometimes by speaking out publicly.

This pattern was particularly pronounced in the field of immigration, perhaps President Trump's signature issue. He sought to profoundly alter the enforcement of immigration law and its substance.[2] His administration also appears to have sought to profoundly change the ideological leanings of the cadre of immigration judges.[3]

The Executive Office of Immigration Review ("EOIR") has sought to control immigration judges' ("IJs") speaking engagements by requiring IJs to obtain permission from its speaking engagement team ("SET team") before doing so.[4] EOIR has greatly expanded the concept of official speech subject to agency control. Though constitutionally suspect, the policy may escape judicial

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1. *See, e.g.*, Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349, 349–50 & nn.1–4 (2019).

2. *See* AM. IMMIGR. LAW. ASS'N, A VISION FOR AMERICA AS A WELCOMING NATION: AILA RECOMMENDATIONS FOR THE FUTURE OF IMMIGRATION, Doc. No. 20110933 (2020) [hereinafter A VISION FOR AMERICA]; Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 30, 2017); Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 30, 2017); Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. 81698 (Dec. 16, 2020) (to be codified at 8 C.F.R. pts. 1003, 1103, 1208, and 1240).

3. *See* A VISION FOR AMERICA, *supra* note 2, at 7; Gregory Chen, *The Urgent Need to Restore Independence to America's Politicized Immigration Courts*, JUSTSECURITY.ORG (Nov. 12, 2020), https://www.justsecurity.org/73337/the-urgent-need-to-restore-independence-to-americas-politicized-immigration-courts/. This effort was aided by two developments. First, the Supreme Court's decision in *Lucia v. SEC*, which expanded agency heads' appointment powers with respect to administrative adjudicators. *See* 138 S. Ct. 2044 (June 21, 2018). Second, President Trump's directive urging agency heads to use that authority. *See* Exec. Order No. 13843, 83 Fed. Reg. 32755 (July 13, 2018).

4 *See* Memorandum from James R. McHenry III, Acting Director, Exec. Off. for Immigr. Rev., U.S. Dep't of Just., to EOIR Employees (Sept. 1, 2017), https://immpolicytracking.org/media/documents/2017.9.01_Speaking-Engagement-Policy-for-EOIR-Employees.09.01.17-2-.pdf [hereinafter Sept. 2017 Memo] (communicating new speaking engagement policy to all EOIR employees).

review (particularly if withdrawn by President Biden's appointee to head EOIR).

The controversy surrounding EOIR's initiative provides a backdrop for a broader exploration of administrative adjudicators' extrajudicial speech and its appropriate limits.

The federal and state governments rely upon a large cadre of administrative adjudicators. The *federal* administrative judiciary is not only enormous but quite varied in terms of the selection, compensation, final decision-making authority, independence, and professional stature.[5] State administrative adjudicatory positions are similarly varied. But in addition, many states have embraced an approach the federal government has long eschewed,[6] housing administrative law judges ("ALJs") in a separate agency.[7] This "central panel approach" both provides state administrative adjudicators a greater measure of independence and enhances the public perception of administrative adjudicator independence.[8]

The cadre of federal administrative adjudicators consists of ALJs and various non-ALJs.[9] As of December 2009, the ALJ corps consisted of 1,584 ALJs housed in more than thirty federal agencies.[10] The overwhelming majority were, and still are, employed by the Social Security Administration. The non-ALJ corps, several times larger, consists of approximately 10,800 adjudicators, including 326 IJs within EOIR. EOIR is the fifth largest employer of non-ALJ adjudicators.[11] There are striking differences among non-ALJ adjudicators with respect to various attributes of independence, most notably

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5. While the Administrative Procedure Act ("APA") seeks to create uniform rules governing the federal government's administrative law judges, see AM. BAR ASS'N, A GUIDE TO FEDERAL AGENCY ADJUDICATION: SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE 163–86 (Michael Asimow, ed., 2003), no such uniformity exists regarding non-ALJ adjudicators. *See* KENT BARNETT, ET AL., NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES: STATUS, SELECTION, OVERSIGHT, AND REMOVAL (Sept. 24, 2018) [hereinafter NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES].

6. *See* U.S. DEP'T OF JUST., ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 50–59 (1947); JAMES HART, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES: REPORT ON THE COMMITTEE ON ADMINISTRATIVE PROCEDURE APPOINTED BY THE ATTORNEY GENERAL, S. Doc. No. 8, 77th Cong., 1st Sess. 5560 (1941).

7. For a recent survey of Central Panel Directors, see Malcolm C. Rich, et al., *The Need for a Central Panel Approach to Administrative Adjudication: Pros, Cons, and Selected Practices*, 39 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (2019).

8. *See* David W. Heynderickx, *Finding Middle Ground: Oregon Experiments with a Central Hearing Panel for Contested Case Proceedings*, 36 WILLAMETTE L. REV. 219, 225–26 (2000).

9. *See* NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES, *supra* note 5.

10. *See* Free Enterprise Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 542–43, 586–88 (2010) (Breyer, J., dissenting); *accord* Steven A. Glazer, *Toward a Model Code of Judicial Conduct for Federal Administrative Judges*, 64 ADMIN. L. REV. 337, 341 (2012).

11. *See* NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES, *supra* note 5, at 18–19. Non-ALJ administrative adjudicators have at least 23 different titles. *See id.* at 21–22.

requirements for separation of functions, limits on *ex parte* contacts, reporting relationships, and recusal standards.[12]

Extrajudicial speech by members of the federal and state judiciaries has long been the subject of vibrant debate.[13] With the enhancement of the administrative adjudicators' stature,[14] and the effort to place them on par with their judicial branch brethren, particularly in terms of decisional independence, the issue has surfaced in the context of ALJs.

Codes of conduct for administrative adjudicators, particularly ALJs, typically subject them to the same basic requirements as their judicial branch brethren, with a few exceptions to account for differences between the judicial and administrative contexts.[15] Most notably, rules regarding *ex parte* contacts must be modified given that administrative adjudicators serve within an administrative agency that must coordinate its rulemaking, administrative, and adjudicatory functions. But the codes for administrative adjudicators and traditional judges seem to differ little regarding the constraints upon extrajudicial speech.[16]

This contribution will explore extrajudicial speech by judges in the judicial branch and adjudicators in agencies. Part I will discuss the EOIR initiative referenced above. Part II will briefly outline the benefits of extra-judicial speech and why it should be allowed, and perhaps even

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12. *Id.* at 1, 4–5.

13. *See, e.g.*, CYNTHIA GRAY, AM. JUDICATURE SOC'Y, WHEN JUDGES SPEAK UP: ETHICS, THE PUBLIC, & THE MEDIA (1998); William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 GEO. J. LEGAL ETHICS 589 (1989); Steven Lubet, *Professor Polonius Advises Judge Laertes: Rules, Good Taste and the Scope of Public Comment*, 2 GEO. J. LEGAL ETHICS 665 (1989); Talbot D'Alemberte, *Searching for the Limits of Judicial Free Speech*, 61 TUL. L. REV. 611 (1987); Arthur L. Alarcón, *Judicial Speech: Off-the-Bench Criticism of Supreme Court Decisions by Judges Fosters Disrespect for the Rule of Law and Politicizes Our System of Justice*, 28 LOY. L.A. L. REV. 795 (1995); Jack B. Weinstein, *Limits on Judges' Learning, Speaking, and Acting: Part II Speaking and Part III Acting*, 20 U. DAYTON L. REV. 1, 9 (1994). For a historical view, see Leslie B. Dubeck, Note, *Understanding "Judicial Lockjaw": The Debate Over Extrajudicial Activity*, 82 N.Y.U. L. REV. 569, 588–601 (2007).

14. *See* Karen S. Lewis, Comment, *Administrative Law Judges and the Code of Judicial Conduct: A Need for Regulated Ethics*, 94 DICK. L. REV. 929, 946 (1990). In 1978, Congress changed the title "hearing examiners" to "Administrative Law Judges." Pub. L. No. 95-251, 92 Stat. 183 (1978) (amending various provisions of Title 5 of the United States Code).

15. The ABA Model Code applies to members of administrative judiciaries but counsels each jurisdiction to "consider the characteristics of particular positions within the administrative law judiciary in adopting, adapting, applying, and enforcing the Code for the administrative law judiciary." MODEL CODE OF JUD. CONDUCT Application § I(B) & n.1 (2011); *accord* REPORTER'S EXPLANATION OF CHANGES ABA MODEL CODE OF JUDICIAL CONDUCT 4–5 (2007); *Ethical Standards for Administrative Law Judges*, 26 CAL. L. REVISION COMM'N REP. 335 (1996); N.Y. STATE BAR ASS'N, MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES, Comment. [5.1] [5A] (2009); *see* Glazer, *supra* note 10, at 340, 342.

16. *See generally* Patricia E. Salkin, *Judging Ethics for Administrative Law Judges: Adoption of a Uniform Code of Judicial Conduct for the Administrative Judiciary*, 11 WIDENER J. PUB. L. 7 (2002).

encouraged. Part III will provide the constitutional framework, laying out the First Amendment doctrine cabining the limitations on public employee speech, including adjudicators' extrajudicial speech. Part IV will discuss codes of conduct formulated for the federal and state judiciary and their application. Part V will turn to whether the context in which administrative adjudicators operate require a different approach. As a part of that discussion, this contribution will discuss whether an administrative agency has a role to play in specifying the limits of its administrative adjudicators' speech.

PART I: EOIR'S ATTEMPT TO LIMIT IJS' SPEECH

Historically, EOIR freely permitted IJs to share their personal views on issues relating to immigration, so long as they qualified their remarks with a disclaimer explaining that they were not speaking on the agency's behalf.[17] Within EOIR, such presentations were characterized as statements in a "personal capacity with use of disclaimer," or "PTD."[18] IJs routinely spoke to audiences at educational institutions and professional conferences about the immigration courts and their function within them.[19]

On September 1, 2017, Acting EOIR Director James R. McHenry III distributed a Memorandum, entitled "Speaking Engagements Policy for EOIR Employees," that significantly revised EOIR's traditional approach.[20] The policy proved controversial and became the subject of collective bargaining, resulting in a May 2018 Memorandum of Understanding ("MOU") between EOIR and the National Association of Immigration Judges ("NAIJ").[21] Director McHenry revised the policy by a Memorandum issued in January 2020.[22] The

17. This is fairly typical. *See, e.g.*, 5 C.F.R § 2635.807 (2001); 5 C.F.R § 3601.108(a) (2020) ("The required disclaimer shall expressly state that the views presented are those of the speaker or author and do not necessarily represent the views of DoD or its components.").

18. Sept. 2017 Memo, *supra* note 4, at 1.

19. Complaint for Declaratory and Injunctive Relief, Nat'l Ass'n of Immigr. Judges v. McHenry, No. 20-cv-731 at ¶2, 19 (E.D. Va. July 1, 2020) [hereinafter Complaint No. 20-cv-731].

20. Sept. 2017 Memo, *supra* note 4; *see also* Complaint No. 20-cv-731. McHenry had been appointed Acting Director in May 2017, becoming the permanent Director in January 2018. He stepped down shortly after President Biden's inauguration.

21. At the time, NAALJ was the recognized representative for immigration judges for collective-bargaining purposes. Complaint No. 20-cv-731 at ¶12. The organization views its mission as promoting "the independence of immigration judges" and enhancing "the professionalism, dignity, and efficiency of the nation's immigration courts." *Id.* at ¶12; *Before the Senate Judiciary Committee, Border Security and Immigration Subcommittee: Hearing on* "Strengthening and Reforming America's Immigration Court System," 115th Cong. 1–13 (2018) (statement of Judge A. Ashley Tabaddor, President, Nat.'l Ass'n of Immigr. Judges) [hereinafter Tabaddor Testimony]. It works to "improve" the immigration court system through public education and advocacy, *inter alia*. *Id.* at 1.

22. *See* Memorandum from James R. McHenry III, Acting Director, Exec. Off. for Immigr. Rev., U.S. Dep't of Just., to EOIR Employees (Jan. 2020) (communicating revised speaking engagement policy to all EOIR employees following the filing of a lawsuit and

broad outlines of the September 1, 2017 and the January 2020 memoranda are quite similar.

The McHenry memos recognize only two capacities in which employees appear at speaking engagements: "official capacity" and "personal capacity." Whether an invitation involves speech in an official capacity or a personal one, the IJ must request approval before accepting the invitation. The approval process involves four levels of review, but at its heart is the EOIR SET team's evaluation of the invitation and the proposed presentation.[23] The SET team consists of representatives of the EOIR Policy, General Counsel's, and Director's Offices. The IJ's request must include "presentation slides and handout materials and complete talking points, *at a minimum*."[24] Ultimately, the IJ's supervisor may not only simply approve or disapprove the request, but may, in light of the SET team's evaluation, condition approval of the speaking engagement on the IJ's revision of the planned remarks.[25]

Director McHenry's initial memo asserted, perhaps indiscreetly, that the enhanced review process would not only ensure compliance with agency policy, but also aid EOIR's Office of Communications and Legislative Affairs in "ensur[ing] that EOIR's messaging is consistent across official engagements."[26] The policy reiterated, particularly with respect to non-supervisory adjudicators, "the importance of maintaining impartiality and avoiding the appearance of impropriety, favoritism, or preferential treatment."[27]

The "official capacity" category is quite broad. It includes much more than invitations seeking statements made in an official capacity. It also includes invitations extended because of the employee's official duties or position. And the topics of "official" speaking engagements are capacious, including any topic "related to immigration law or policy issues, the employee's official EOIR duties and position, or any agency program or policies."[28]

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collective bargaining between employees and leadership), https://immpolicytracking.org/media/documents/2020.1.17_Submission_and_Processing.pdf [hereinafter Jan. 2020 Memo].

23. *See* Complaint No. 20-cv-731, *supra* note 19, at ¶36. IJs must initially seek approval from their supervisor. If approved, the request is forwarded to the centralized SET team. Simultaneously, EOIR's Ethics Program team reviews the request to "'offer[] 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" team is returned to the supervisor for a final decision. *Id.*

24. Jan. 2020 Memo., *supra* note 22, at 2.

25. *See id.*.

26. Sept. 2017 Memo, *supra* note 4, at 2; *accord*, Jan. 2020 Memo., *supra* note 22, at 3.

27. Jan. 2020 Memo., *supra* note 22, at 3.

28. In a September 13, 2017 email, McHenry explained that a "good metric" for determining whether a "speaking engagement" required review was whether the IJ would be speaking at an event (a) involving communication with two or more non-DOJ persons about EOIR or (b) primarily promoted by "a group external to DOJ." *See* Complaint No. 20-cv-731, *supra* note 19, at ¶22. Moreover, the email directed IJs to direct contacts from journalists or Congress to [the Office of Communications and Legislation Affairs]. *See id.*

While further guidelines were provided in appendices to both the Sept. 2017 Memo and Jan. 2020 Memo, each made clear that the ultimate categorization of the speaking event turns on "the nature of the engagement, based on the totality of the circumstances."[29] A broad array of appearances are considered speech in an official capacity, including appearances at (1) "immigration conferences or similar events where the subject is immigration," (2) any event at which another DOJ or EOIR official is participating in an official capacity, and (3) any event for which the federal government extends the invitation.[30] Presentations in a personal capacity, on the other hand, are more limited. They include: (1) acting as a moot court judge (on non-immigration-related cases), (2) commencement speeches, (3) career day presentations (provided the IJ steers clear of the substance of immigration law), (4) meeting with Boy Scouts, Girl Scouts, or similar organizations, (5) sitting for an interview regarding a book written in the IJ's personal capacity, and (6) speaking at a book club or hobbyist meeting.[31]

With regard to official speech, the SET team apparently can refuse to approve a speaking engagement request because the engagement should "be handled by EOIR 'management officials' to ensure consistency in the agency's messaging." Responding to one particular request for approval, the SET team reasoned that "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*."[32]

NAIJ challenged Director McHenry's policy on Free Speech grounds in *National Association of Immigration Judges v. McHenry*.[33] In essence, NAIJ alleged that EOIR had established a prior restraint system that lacked adequate safeguards and had prohibited IJs from discussing matters of public importance.

NAIJ explained the importance of IJs' freedom to speak out on immigration issues.[34] It noted the "ongoing national debate" regarding "recent

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29 Jan. 2020 Memo, *supra* note 22, at 2; *accord* Sept. 2017 Memo, *supra* note 4, at 1.

30. Jan. 2020 Memo, *supra* note 22, at 6 Attachment A. Other speaking engagements generally classified as official included meetings with stakeholders, naturalization ceremonies, greeting outside groups visiting the immigration courts, pro bono training related to immigration, presentations for EOIR Mock Hearing Program, and recruitment for the EOIR internship program. *See id.*; *see also* Sept. 2017 Memo, *supra* note 4, at 5 Attachment A.

31 *See* Jan. 2020 Memo, *supra* note 22, at 6 Attachment A.

32. Complaint No. 20-cv-731, *supra* note 19, at ¶¶ 40, 42. Similarly a SET team rejected an IJ's request to appear at a Practicing Law Institute program because "*the nature of the event calls for official capacity and supervisory immigration judges should represent EOIR at events such as this one.*" *Id.* at ¶42.

33. *See* Nat'l Ass'n of Immigr. Judges v. McHenry, 477 F. Supp. 3d 466 (E.D. Va. 2020), *appeal docketed*, No. 20-1868 (4th Cir. Aug. 12, 2020).

34. *See* Complaint No. 20-cv-731, *supra* note 19, at ¶¶ 7, 48. More generally, NAIJ's President discussed the importance of extrajudicial speech to the legitimacy of, and public confidence in, the immigration court system. He noted that the court's primary role as "a neutral

changes to immigration law and policies and . . . the effect of those changes on the immigration court system," and, in addition, IJs' ability to contribute "unique insights."[35] NAIJ also identified several structural attributes of the review system that raised constitutional concerns—delays in the SET team's responses to requests, arbitrary denial of speaking requests, and deficient explanations for denying requests. Combined, these factors not only resulted in frequent denials,[36] but discouraged IJs from even seeking permission to speak.

A district judge dismissed the case, concluding that the policy was immune from judicial review under the Federal Service Labor-Management Relations Act,[37] which sets forth "a dispute-resolution mechanism" for issues that "arise during the collective bargaining process or as part of a final collective bargaining agreement."[38] The District Court did not address NAIJ's constitutional concerns or the policy's propriety more generally.[39]

PART II: WHY EXTRAJUDICIAL SPEECH IS WORTH PROTECTING

Before discussing the constitutional protections for and the judicial code of conduct restraints upon extrajudicial speech, a brief discussion of the benefits extrajudicial speech is in order. Judicial interaction with academics and students, members of the bar, and the general public have benefits for those groups, judges, and society as a whole.

Judicial interactions with academics and students enrich both groups' appreciation of the practical aspects of legal doctrine and legal theory. While practicing lawyers can, and often do, provide a practical perspective as well, judges' more disinterested perspective provides unique contributions on this score. Law students represent the future of the profession and academics play a significant role in the development of the law. Judges themselves benefit from exposure to academics who often think more broadly about particular substantive areas and law in general. Perhaps such interactions provide greater benefits to judges that have significant law-generating responsibilities, like Article III judges, than those whose tasks can better be described as applying prescribed law to the facts, such as, for example, Social Security ALJ's.[40]

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and transparent arbiter" is enhanced when the court is accessible to the community it serves. Tabaddor Testimony, *supra* note 21, at 6.

35. Complaint No. 20-cv-731, *supra*, note 19, at ¶7.

36. NAIJ noted in particular that it was difficult for those hosting immigration conferences to get IJs to participate. *See* Laila L. Hlass, et al., *Let Immigration Judges Speak*, SLATE (Oct. 24, 2019), https://slate.com/news-and-politics/2019/10/immigration-judges-gag-rule.html.

37. 5 U.S.C. §§ 7101–7906 (2018).

38. *Nat'l Ass'n of Immigr. Judges v. McHenry*, 477 F. Supp. 3d at 471–72 (quoting Nat'l Ass'n of Agric. Emps. v. Trump, 462 F. Supp. 3d 572, 576 (D. Md. May 21, 2020)).

39. The decision is currently on appeal. Nat'l Ass'n of Immigr. Judges v. McHenry, No. 20-1868 (4th Cir. filed Aug. 12, 2020).

40. Chief Justice Roberts famously analogized judges to umpires calling balls and strikes. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005). The statement has

Judicial interaction with the bar can advise members of the bar of procedural aspects of litigation and best practices in presenting cases. Such interactions both enhance lawyers' advocacy and improve the overall quality of litigation and, thus, judicial decision-making. And judges often collaborate with practicing lawyers and academics on law reform projects, to improve legal procedures, enhance lawyers' professional ethics, clarify the law, or seek modification in the relevant substantive law.[41] Indeed, for example, the *Code of Judicial Conduct for United States Judges* ("*Federal Judges' Code of Conduct*") encourages federal judges to participate in law improvement efforts, "either independently or through a bar association, judicial conference, or other organization dedicated to the law."[42]

Judicial interaction with the public also has benefits. First, extrajudicial speech to a broad public audience can help demystify the law, and by demystifying it, inspire greater confidence in judicial or administrative adjudicatory institutions.[43] (Ironically, inspiring greater confidence is often also one of the primary justifications offered for *restricting* extrajudicial speech.)[44] Greater public knowledge of the adjudicatory procedures of a particular tribunal and the rationale and substance of the law has salutary effects. Judges perhaps possess more credibility than others who might serve the same role—academics, who may be viewed as too detached from "the real world," and practicing lawyers, who will often be suspected as having a hidden agenda.

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generally been met with skepticism or derision. Even district judges must often decide cases in which the law is not fully established, given the imprecision of Constitutional, and even statutory, text, and the case-specific decisions of appellate courts.

But perhaps Justice Roberts' prosaic description of the judicial task is more apt for some administrative adjudicators. Agencies seek to routinize adjudication to ensure decisional uniformity by promulgating relatively detailed substantive regulations, promulgating precise decision-making frameworks, and providing guidance to judges outside the formal channels of internal appellate review. In the social security disability context, such efforts would include the five-step analytical framework for addressing claims, the medical-vocational guidelines, and social security rulings.

41. The American Law Institute provides just one example of such law reform efforts.

42. CODE OF CONDUCT FOR UNITED STATES JUDGES (AM. BAR ASS'N 2019), at Canon 4 Comment.

43. *See* MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS'N 2010), at Rule 1.2, c. [6] (encouraging judges to "initiate and participate in community outreach activities . . . [to] promot[e] public understanding of and confidence in the administration of justice"); CALIF. RULES OF COURT, STANDARDS OF JUDICIAL ADMIN., Std. 10.5 (2007) ("Judicial participation in community outreach activities should be considered an official judicial function to promote public understanding of and confidence in the administration of justice.").

44 *See* MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS'N 2010), at Rule 1.2; CODE OF CONDUCT FOR UNITED STATES JUDGES (AM. BAR ASS'N 2019), at Canon 4 (extrajudicial speech should not "detract from the dignity of the judge's office," or "reflect adversely on the judge's impartiality," *inter alia*).

PART III: THE CONSTITUTIONAL CONTEXT

The First Amendment, and particularly the public employee speech doctrine, constrains Judicial and Executive Branch attempts to control their adjudicators' extrajudicial speech.[45] In *Pickering v. Board of Education*,[46] the Supreme Court held that the Free Speech Clause protects the rights of public employees to express themselves on matters of public importance.[47] The scope of the constitutional protections for public employee speech has waxed and waned over the years.

In *Garcetti v. Ceballos*, the Court distinguished official and non-official speech—"when public employees make statements pursuant to their official duties, the employees are not speaking as citizens . . . and the Constitution does not insulate their communications from employer discipline."[48] In the context of adjudicators, for example, official speech would encompass judicial rulings and opinions.[49] However, the Court made clear that employee speech does not become "official speech" merely because it addresses the subject matter of the speaker's employment.[50]

The Court has also distinguished speech involving matters of public interest from speech regarding internal office disputes within a government agency. In *Connick v. Meyers*,[51] the Court held that speech seeking to counteract certain managerial initiatives did not qualify as speech involving matters of the public interest. In other words, the employee speech doctrine does not empower employees to "constitutionalize" their "grievance[s]."[52]

However, First Amendment doctrine predominantly protects non-judicial employees, such as public school teachers, prosecutors, and employees otherwise engaged in the provision of services or the administration of

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45. *See* Lynne H. Rambo, *When Should the First Amendment Protect Judges from Their Unethical Speech?*, 79 OHIO ST. L.J. 279 (2018).

46. Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cty., Ill., 391 U.S. 563 (1968).

47. *See id.* at 568.

48. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

49. *See* Harrison v. Coffman, 35 F. Supp. 2d 722 (E.D. Ark. 1999).

50. Imprecise language in *Garcetti*, interpreted literally, could support EOIR's expansive view of official speech, as any speech in response to an invitation extended because an IJ's adjudicative position. However, such a view ignores the opinion's language that not every statement made about the subject matter of an employee's work qualifies as "official speech." *Garcetti*, 547 U.S. at 426. Moreover, it assumes that IJs' responsibilities include speaking externally on behalf of the agency. Yet the agency's view that non-supervisory IJs are unqualified to do so fatally undermines that assumption.

51. *See* Connick v. Meyers, 461 U.S. 138 (1983).

52. *Id.* at 154. Some of the IJs criticism of immigration policy could be characterized as such. However, because such disputes also implicate the public's interest in having private litigants' rights adjudicated by persons who have some independence from the agency opposing them, see Tunik v. Merit Sys. Prot. Bd., 407 F.3d 1326, 1344 (Fed. Cir. 2005), seemingly inter-office disputes regarding IJ independence are also matters of public concern.

government programs.[53] The decision most relevant to adjudicators involves speech in the context of judicial elections.[54] In *Republican Party of Minnesota v. White*, the Supreme Court overturned limitations on judicial candidates typically imposed by state judicial codes of conduct, concluding that the prohibition contravened with the very nature of an election.[55]

Aside from constraints upon the speech of those seeking elective judicial offices, the constraints on judicial officials' extrajudicial speech are probably somewhat less subject to constitutional challenge than many limitations on public employee speech, because judges must act to maintain the appearance of impartiality.[56] The Supreme Court has recognized public perception of judicial integrity as "a state interest of the highest order."[57] For example, in *Williams-Yulee v. Florida Bar*, the Court upheld rules that prohibit judicial candidates from personally soliciting campaign contributions, concluding that the need to ensure that the state's judiciary avoided the appearance of impropriety justified such an infringement on "speech."[58]

In the context of EOIR's *ex ante* review policy, a second body of Free Speech Clause doctrine assumes relevance, the prior restraint doctrine. Regimes in which speakers must obtain permission before speaking, the classic form of prior restraint, are disfavored. Prior restraint systems have several maladies. **First**, they make restricting speech easy. **Second**, censors have an inclination to refuse consent, both to prevent embarrassing speech and to justify their own existence. **Third**, censors often act arbitrarily. **Fourth**, pre-publication review regimes involve delay, and force prospective speakers to modify their speech to obtain timely approval from censors.[59]

However, prior restraint regimes have been upheld in limited circumstances, focusing on obscenity regulation and government employee speech. The Supreme Court outlined the constitutionally-required procedural constraints upon such regimes in an obscenity case, *Freedman v. Maryland*.[60] Administrative prepublication review schemes must meet three procedural requirements: (a) the burden of initiating civil proceedings and proving the

53. *See* Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cty., Ill., 391 U.S. 563 (1968); Rankin v. McPherson, 483 U.S. 378 (1987).

54. *See* Republican Party of Minn. v. White, 536 U.S. 765 (2002).

55. *See id.*

56. *See* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 445 (2015); Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 889 (2009).

57. *Caperton*, 556 U.S. at 868 (quoting *Republican Party of Minn. v. White*, 536 U.S. at 793 (Kennedy, J., concurring)). The limitations here are distinct from, although they may overlap with, limitations on federal employees receiving honoraria for speeches or other presentations made in their personal capacities. *See* United States v. Nat'l Treasury Emps. Union, 513 U.S. 454 (1995). One such case involved a Social Security Administration ALJ seeking to retain proceeds from sales of his disability law textbook. *See* Wolfe v. Barnhart, 446 F.3d 1096 (10th Cir. 2006).

58. *See Williams-Yulee v. Fla. Bar*, 575 U.S. at 445.

59. *See generally* Freedman v. Maryland, 380 U.S. 51 (1965); John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 421–22 (1983).

60. *See* 380 U.S. 51 (1965).

unprotected nature of the speech must rest on the censor, (b) any prior restraint must be for a brief time and only insofar as necessary to preserve the *status quo*, and (c) a prompt final judicial determination must be assured.[61]

The Supreme Court has upheld pre-publication review of government employee or former government employee speech to prevent such individuals from divulging confidential government information that, if disclosed, would harm national security.[62] Such pre-publication review may be a permissible form of ethics regulation for government employees, but in *United States v. National Treasury Employees Union* the Supreme Court found that a prior restraint regime on federal employee speech violated the Free Speech Clause, on grounds of overbreadth.[63]

PART IV: LIMITATIONS ON EXTRAJUDICIAL SPEECH FOR TRADITIONAL JUDGES

Judges hold extraordinarily divergent views on the appropriate scope of extrajudicial speech.[64] Judicial codes of conduct are quite vague on issues of extrajudicial speech and their admonitions subject to a variety of interpretations.[65] On the federal level, while the threat of a potential disciplinary proceeding before the relevant Circuit's Judicial Council is present, there is no mandatory *ex ante* review of any judicial speaking engagement. Though judges can seek advice if they wish it, the system is largely self-policing, and permits a wide range of philosophies with regard to the appropriate ethical norms regarding extrajudicial speech. (This contrasts, at least formally, to EOIR's approach, even pre-McHenry.) The following sections will lay out the code of conduct provisions relevant to extrajudicial speech, construct a taxonomy of extrajudicial speech to tease out the issues raised by such speech, and explore the efficacy of the recusal remedy.

A. The ABA Model Rules and the Federal Judges' Code of Conduct

Both the ABA Model Code of Judicial Conduct ("ABA Model Code")[66] and the Code of Judicial Conduct for United States Judges ("Federal Judges'

61. *See id.* at 59. These requirements were largely reaffirmed in a second decision involving sexually explicit speech and conduct in *FW/PBS Inc. v. Dallas*, 493 U.S. 215 (1990).

62. *See* Snepp v. United States, 444 U.S. 507 (1980); Bernard Bell, *The Court Where It Happened: U.S. v. Bolton*, YALE J. ON REG.: NOTICE & COMMENT (Oct. 21, 2020), https://www.yalejreg.com/nc/the-court-where-it-happened-u-s-v-bolton/; United States v. Bolton, No. 1:20-cv-1580-RCL, 2020 WL 5866623 (D.D.C. Oct. 1, 2020).

63. *See* United States v. Nat'l Treasury Emps. Union, 513 U.S. 454 (1995).

64. *Compare* Alarcón, *supra* note 13, *with* Stephen Reinhardt, *Judicial Speech and the Open Judiciary*, 28 LOY. L.A. L. REV. 805, 809 (1995); Weinstein, *supra* note 13. For an interesting debate, see D. Brock Hornby, *Federal Judges and Public Attention*, 100 JUDICATURE 64 (2016).

65. *See* Lubet, *supra* note 13, at 667–69, 672–73.

66. MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS'N 2010). The ABA House of Delegates adopted the Code on August 7, 1990. It has since been amended on August 6, 1997, August 10, 1999, August 12, 2003, February 12, 2007, and August 10, 2010. The ABA currently reports that 37 jurisdictions had adopted the revised ABA Model Judicial Code, see *Jurisdictional*

Code of Conduct")[67] govern the conduct of judges serving in the judiciary. The ABA Model Code applies to the extent adopted by the relevant state, and the ABA recommends its application to administrative adjudicators. The Federal Judges' Code of Conduct applies to the federal judiciary. While similar in substance, the codes differ.

Three ABA Model Code provisions address extrajudicial speech, though one relates primarily to candidates in judicial elections. Canon 4 provides that "[a] judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary."[68] More specifically, Rule 4.1 contains a long list of prohibitions, including, most relevantly, prohibitions upon: (1) "mak[ing] any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court;"[69] and (2) "mak[ing] pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office," in connection with "cases, controversies, or issues that are likely to come before the court."[70]

Rule 2.10 includes two similar prohibitions. Rule 2.10(A) provides that "[a] judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing."[71] Subsection (B) provides that "[a] judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office."[72] Nevertheless, "a judge may make public statements in the course of official duties, [and] may explain court procedures."[73] The commentary justifies these restriction on speech as "essential to the maintenance of the independence, integrity, and impartiality of the judiciary."[74]

Adoption of Revised Model Code of Judicial Conduct, ABA, https://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/map/ (last visited Apr. 10, 2021).

67. CODE OF CONDUCT FOR UNITED STATES JUDGES (AM. BAR ASS'N 2019). The Code was initially adopted on April 5, 1973, and has since been revised nine times, most recently in 2019. The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351–64, established an administrative complaint process by which circuit judicial councils can address allegations of judicial misconduct or disability. *In re* Charges of Jud. Misconduct (Jones), 769 F.3d 762 (D.C. Cir. 2014). The Judicial Conference of the United States has promulgated the Judicial Conduct Rules, which "establish standards and procedures" for adjudicating judicial misconduct complaints. *Id.* at 765.

68. MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS'N 2010), at Canon 4.

69. *Id.* at r. 4.1(12).

70. *Id.* at r. 4.1(13).

71. *Id.* at r. 2.10(A).

72. *Id.* at r. 2.10(B).

73. *Id.* at r. 2.10(D).

74. *Id.* at r. 2.10, cmt. [1].

Even more broadly, Rule 1.2, provides that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[75] The commentary notes that "[p]ublic confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety."[76] However, it encourages judges to "initiate and participate in community outreach activities . . . [to] promot[e] public understanding of and confidence in the administration of justice," though, it notes, in doing so, "the judge must act in a manner consistent with this Code."[77]

The Federal Judges' Code of Conduct provides that: "[a] judge should not make public comment on the merits of a matter pending or impending in any court."[78] But the prohibition does not extend to "statements made in the course of the judge's official duties, . . . explanations of court procedures," or "scholarly presentations made for purposes of legal education."[79] It allows judges to engage in extrajudicial speech, so long as doing so does not "detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, [or] lead to frequent disqualification," *inter alia*.[80]

Canon 5 counsels judges not to "make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office."[81]

B. A Taxonomy of Extrajudicial Statements

Together, the ABA canons, in particular 2.1 and 1.2, set forth a standard that encompasses several somewhat distinct types of statements. Likewise, Canons 3(A)(6), 4 & 4(A)(1) of the Federal Judges' Code of Conduct cover several types of statements. The central prohibition reflected by the rules regards making statements on issues that may come before the judge for decision. Before addressing such statements, statements that raise other problems should be identified.

One type of remark reveals, presumably unintentionally, the speaker's own lack of judicial temperament or impartiality and, thus, harms the perception of the speaker's own fitness for judicial office.[82] Racially discriminatory

75. *Id.* at r. 1.2.

76. *Id.* at r. 1.2 cmt. [1].

77. *Id.* at r. 1.2 cmt. [6].

78. CODE OF CONDUCT FOR UNITED STATES JUDGES (AM. BAR ASS'N 2019), at Canon 3(A)(6).

79. *Id.*

80. *Id.* at Canon 4; *see also id.* at Comment. to 4(A).

81. *Id.* at Canon 5(A)(2).

82. *See* Comm. on Codes of Conduct, Advisory Op. No. 116 (Feb. 2019) (emphasizing the relationship between a judge's personal probity and the maintenance of "[a]n independent and honorable judiciary," which is "indispensable to justice in our society").

statements or conduct,[83] insulting comments,[84] and statements about female lawyer's appearance,[85] can provide a basis for discipline under such a standard.

A second category of remarks encompasses statements about other judges or other rulings.[86] Those statements may be problematic because they wrongly and without proper substantiation impugn the integrity of another judge's decision-making. Unsupported assertions of bias, bad faith, or corruption would fall into such a category.[87] Such statements by ordinary citizens may be constitutionally protected, but should not be made by those who are both participants in the system and obligated to act judiciously. Private citizens can publicly speculate that the Supreme Court decided *Bush v. Gore* on the basis of the Justices' own political preferences rather than the law; but perhaps judges should be barred from doing so (at least without supporting the statement from the circumstances and being very judicious in saying so).[88]

A third category of remarks may be characterized as statements about the unfairness of the law or expression of views about the correctness or wisdom of legal doctrine. As long as these statements remain expressions of opinion and do not impugn the integrity of decision-making, it is not clear why they should subject a judge to censure.[89] Judges *do* have significant discretion. Legal

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83. *See* CODE OF CONDUCT FOR UNITED STATES JUDGES (AM. BAR ASS'N 2019), at Canon 3(B)(4), Canon 2(C); MODEL CODE OF JUDICIAL CONDUCT, (AM. BAR ASS'N 2010), at Canon 2(C), Canon 3(B)(5), Canon 4(A); *see also*, Randall Samborn, *Ethics Codes Seek to Bar Discrimination*, 16 NAT'L L.J. 12, 12 (1993); In re Charges of Jud. Misconduct (Jones), 769 F.3d 762, 773–76, 781 (D.C. Cir. 2014).

84. *See* Miss. Comm'n on Jud. Performance v. Boland, 975 So. 2d 882, 884–85 (Miss. 2008); *In re Charges of Jud. Misconduct (Jones)*, 769 F.3d at 768–69 (telling another member of an appellate panel to shut up).

85. *See* RGK, *On Being a Dirty Old Man and How Young Women Lawyers Dress*, HERCULES & UMPIRE (Mar. 25, 2014).

86. *See* Comm. on Codes of Conduct, Advisory Op. No. 55 (June 2009) (**"**If the public comment involves a case from the judge's own court, the judge should take particular care so that the comment does not denigrate public confidence in the judiciary's integrity and impartiality, which would violate Canon 2A." (quoting CODE OF CONDUCT FOR UNITED STATES JUDGES, (AM. BAR ASS'N 2019), at Comment. to Canon 3A(6)).

87. *See In re* Kelly, 238 So. 2d 565 (Fla. 1970) (constructive and destructive criticism); Inquiry Concerning a Judge, Decision and Order Imposing Public Censure, Cal. Comm'n on Jud. Performance (Apr. 16, 1997) (disparaging fellow judges); Inquiry Concerning Miller, 644 So. 2d 75 (Fla. 1994) (criticizing the criminal justice system); *In re* Schenck, 870 P. 2d 185 (Ore. 1994) (publicly criticizing the district attorney); *In re* Graham, 620 So. 2d 1273 (Fla. 1993) (alleging official misconduct and improperly criticizing fellow judges, elected officials, and their assistants).

88. *See In re* Charges of Jud. Misconduct, 404 F. 3d 688, 691 (2d Cir. 2005); RGK, *Remembering Alexander Bickel's Passive Virtues and the Hobby Lobby Cases*, HERCULES & UMPIRE (July 5, 2014).

89. When the case is in another judge's court, the fear is that the public will question why there are differences in the views of different judges or will believe that the speaking judge is trying to influence the other. Rambo, *supra* note 45, at 292 (citing *In re* Benoit, 523 A.2d 1381, 1383 (Me. 1987); *In re* Broadbelt, 683 A.2d 543, 548 (N.J. 1996); Broadman v. Comm'n on Jud. Performance, 959 P.2d 715, 727 (Cal. 1998)).

doctrines *are* sometimes wrong, based on erroneous assumptions about the world, or have problematic consequences. Why should judges be precluded from saying so and advocating corrective action?[90] Indeed, it would be difficult for judges to participate in law reform efforts without the freedom to criticize existing law and practice. Though perhaps, to some, the problem with making public extrajudicial statements regarding the flaws in legal doctrine is that judges should share such thoughts only with professional audiences, but not the general public.

A similar, but subtly distinct type of speech, involves judges' expressions of moral qualms regarding enforcing certain laws or profound disagreement with the justice of certain statutes, doctrines, or government actions. As Judge Jack Weinstein asserted in his wide-ranging discussion of extrajudicial activities, "I do not agree that acquiescence or resignation are the only alternatives available to a judge who strongly opposes a current policy on legal and moral grounds."[91] However, judicial expression of profound moral/religious disagreement with the law or government policies implicated in pending or impending cases are particularly problematic, because they cast doubt upon whether the judge expressing such views can and will follow the law.

The classic examples of this sort of speech are *In re Gridley,*[92] *Lawton v. Tarr,*[93] and *In re Charges of Judicial Misconduct (Jones)*.[94] In *Gridley*, a Florida state judge expressed his religiously-based qualms regarding application of the death penalty, and discussed the moral dilemmas he had faced in handling a particular death penalty case.[95] *Lawton v. Tarr* involved a federal district judge that heard cases regarding the Vietnam War, even though he had publicly expressed profound disagreement with the continuation of the war.[96] *In re Charges of Judicial Misconduct (Jones)* involved a federal appellate judge who shared her profound disagreement with the Supreme Court's death penalty jurisprudence.[97] In each decision, the tribunal noted that each judge had asserted that he or she would apply the law despite a profound disagreement

90. *Cf.* Bernard W. Bell, *Book Review*, 67 J. LEG. EDUC. 626, 634 (2018) (reviewing STEPHEN PRESSER, LAW PROFESSORS: THREE CENTURIES OF SHAPING AMERICAN LAW (2017)) (arguing that to ask the legal academy to teach and write as if the law consisted in Blackstonian certainties is . . . unlikely to succeed and that "no academic discipline could commit itself to such [a course of] deception").

91. Weinstein, *supra* note 13, at 26. Weinstein provides historical examples, such as German judges' "silence, acquiescence, and active participation" in the grave injustices of the Nazi regime, judges' acquiescence in and support of racial subordination in the ante-bellum period, exemplified in the *Dred Scott* decision, and judicial acquiescence in the internment of Japanese-Americans during World War II. *Id.* at 25.

92. 417 So. 2d 950 (Fla. 1982).

93. 327 F. Supp. 670, 672 (E.D.N.C. 1971).

94. 769 F.3d 762 (2014).

95. *See Gridley*, 417 So.2d. at 951–53.

96. *See Lawton*, 327 F. Supp. at 671–73.

97. *See In re Charges of Jud. Misconduct (Jones)*, 769 F.3d at 781–87.

with it.[98] Such a rote disclaimer might satisfy a bias-based standard for judicial conduct or recusal, but surely one can reasonably question whether it satisfies an "appearance-based" conduct/recusal standard.

On the other hand, expressions of such moral dilemmas should be respected. They have profound importance for both the judicial speaker and the public audience. For the audience, much like other extrajudicial statements, such expression may illuminate an injustice society should address. There is a more compelling need to address immoral actions than merely unwise or erroneous ones. More broadly, such statements may be meaningful to the audience as a broader statement of the human condition—individuals are often confronted with dissonance between legal obligations and moral/religious ones.[99]

While the speaker's interest in self-expression receives somewhat less attention in the context of employee speech, in general, or judicial speech, in particular, that interest, too, has constitutional stature. Judges should be able to express those concerns, even in public (given that the judge's rendering of a decision adhering to the unjust or immoral doctrine is a public act). As Kent Greenawalt has observed, "speech . . . is . . . an indispensable outlet for emotion and a vital aspect of the development of one's personality and ideas."[100] When the "government declares out of bounds social opinions that a person firmly holds or wishes to explore, he is likely to suffer frustration and affront to his sense of dignity."[101]

To anticipate the discussion of limitations on administrative adjudicator speech, during the Trump administration one might expect that much of EOIR's IJs' urge to speak involved the desire to express either their moral/religious objections to or their profound substantive disagreement with the immigration policies or actions they were being called upon to enforce. Indeed, one might suspect that many administrative adjudicators wished to dissociate themselves

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98. *See Gridley*, 417 So. 2d at 955; *Lawton*, 327 F. Supp. at 673; *In re Charges of Jud. Misconduct (Jones)*, 769 F.3d at 782.

99. Ill. Judges Ass'n, Op. No. 94-17 (June 17, 1994).

> Judges may speak about law-related issues to groups that advocate changes in the content or enforcement of laws, and other members of the public, so long as the judges (1) do not say anything that casts doubt on their capacity to decide impartially any issue that may come before them, and (2) comply with the restrictions on political speech contained in Illinois Supreme Court Rule 67.

Id. See also Gridley, 417 So. 2d; Weinstein, *supra* note 13, at 26.

100. KENT GREENAWALT, SPEECH, CRIME, & THE USES OF LANGUAGE 27 (1989); *see also id.* at 28, 34.

101. *Id.* at 28. *Accord* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 990–1001 (1978); David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963). For Supreme Court cases endorsing the Free Speech Clause's self-realization rationale, see HARVEY L. ZUCKMAN ET AL., MODERN COMMUNICATIONS LAW 17 (1999).

from the harsh (and indeed inhumane) policies pursued by the Trump administration.

A related concern is a judge's expression of general substantive biases on controversial political issues, e.g., immigration, gun control, and abortion. The concern with such statements might be the question of pre-judgment, that such biases will inappropriately influence either a judge's resolution of open legal issues or influence the manner in which the judge views the facts of particular cases.[102] But, in addition, it might reflect a more general concern that judges should not take positions on controversial issues because members of the public and litigants may hold strong beliefs on such issues. In short, to the extent possible, the courts should stand apart from politics to honor the separation of powers.[103]

Having laid out an admittedly incomplete taxonomy of extrajudicial speech that can run afoul of the ABA Model Code and the Federal Code of Judicial Conduct,[104] I will now return to the Codes' central prohibition, namely the prohibition on discussing issues that may come before the judge for decision. Such statements may indicate that the party is likely to lose and lead litigants to fear that the judge will not be entirely impartial.[105] They might lead litigants to believe that the decision in their case will not be based on the law, but on the judge's personal ideological and policy preferences, i.e., that their case has been prejudged.

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102. *See* Comm. on Codes of Conduct Advisory Op. No. 116 (Feb. 2019) ("The Committee has broadly interpreted 'political activity' to include any activity involving 'hot-button issues in current political campaigns' or which is 'politically oriented' or has 'political overtones[]' [or] . . . 'contentious political issues . . .'").

103. Indeed, some judicial doctrines seek to distinguish politics from law, such as the political question doctrine or the generalized grievance doctrine that serves as a corollary of standing requirements. *See* Marbury v. Madison, 5 U.S. 137, 165–66 (1803) (distinguishing acts of a "political character" from acts that violate individuals' legal rights); Valley Forge Christian Coll. v. Citizens United for the Separation of Church and State, 454 U.S. 464, 474–75 (1982) (as a prudential matter, the federal courts will not recognize standing when plaintiffs merely present "'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches"). *See also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 538 (2012) ("[W]e possess neither the expertise nor the prerogative to make policy judgments[;] [t]hose decisions are entrusted to our Nation's elected leaders."); *id.* at 588.

104. My taxonomy is not exhaustive; for example, the manner in which judges discuss legal issues may be problematic, such as responding to questions on a call-in radio show, S.C. Advisory Op.14-1991 (1991); La. Advisory Op. 75 (1989), arguably a form of performance art displaying non-deliberative decision-making.

105. *Broadman*, 959 P.2d at 727. ("[T]he public may perceive the comment as indicating that the judge has prejudged the merits of the controversy or is biased against or in favor of one of the parties."); *In re Benoit*, 523 A.2d at 1383 ("[The rule] minimizes the risk that such comments will . . . unfairly prejudge individuals' rights . . . . "); *In re Broadbelt*, 683 A.2d 543, 548 (N.J. 1996) (per curiam) ("[The rule] thereby minimizes the risk that such comments will either unfairly prejudge individuals' rights or create a public impression that citizens are not being treated fairly because different judges may not agree as to how those citizens' rights should be decided under the law.").

The basis for the concern regarding such statements seems uncontroversial. But several caveats should be noted. First, many of a judge's *judicial* statements, in *dicta*, concurring opinions, or dissenting opinions, likely have a similar affect upon public perception of the judge's impartiality, or at least the judge's open-mindedness. In addition, giving the impression that the judge is completely open-minded and lacks any preconceptions relevant to the resolution of a legal issue may be inappropriate, particularly if *the judge actually has such preconceptions*. And such a pretense is all the more problematic when there is differential access to the judge's views.[106] Advisory opinions counsel federal judges to reject invitations to address "an individual law firm or advocacy group," particularly if the event will be held at the hosts' offices.[107] Nevertheless, judges are free to teach and lecture,[108] even to limited audiences and, thus, differential access to judges' views is currently a danger.[109]

C. Recusal and Its Costs

The cost of judicial violation of these provisions can be the diminution of the public acceptance of judges' propriety and impartiality. But a remedy appears readily available, namely disqualification based on extrajudicial statements. Unfortunately, this remedy comes with its own set of costs.

The most direct cost is the burden of judicial recusal on the court in terms of the need to reassign cases or limit the types of cases assigned to the outspoken judge. Indeed, accommodating such recusals based on public statements may become so frequent that additional judges may be required to account for the number of recusals.[110] Such recusals may undermine collegiality, as judges who avoid speaking extrajudicially may find themselves burdened with a heavier or less appealing caseload.

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106. CODE OF CONDUCT FOR UNITED STATES JUDGES, at Canon 3(A)(6) (Judicial Conference of the U.S. 1999) (explaining that proscription against public commentary for federal judges specifically does not apply to "a scholarly presentation made for purposes of legal education").

107. Committee on Codes of Conduct Advisory Opinion No. 114: (November 2014); *accord* Advisory Opinion No. 87 (Sept. 2010); Advisory Opinion No. 105 (Sept. 2010) (Guide at 199) ("Bar association training programs offer valuable opportunities for judges to share their experience and expertise with the legal community by making themselves available to a large and diverse group of practitioners.").

108. *See* Dubeck, *supra* note 13, at 583–85 (arguing that extrajudicial statements are no less problematic when they take the form of scholarship).

109. *See* United States v. Pitera, 5 F.3d 624, 626 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1103 (1994); Jack B. Weinstein, *Limits on Judges' Learning, Speaking, and Acting: Part II Speaking and Part III Acting*, 20 U. DAYTON L. REV. 1, 9 (1994). New Jersey Advisory Opinion 1–89; Maryland Advisory Opinion 116 (1988); California Advisory Opinion 29 (1983).

110. The burden of accommodation may be particularly acute for courts (or agencies) that employ few adjudicators. In Justice Breyer's 2009 census of ALJs, of the 28 agencies that employed ALJs, 16 had 4 or fewer. *See* Free Enterprise Fund v. Pub. Company Acct. Oversight Board, 561 U.S. 477, 586–88 at Appendix C (2010) (Breyer, J., dissenting). I have excluded EOIR from this count—it employed one ALJ but many IJs.

A second cost of extrajudicial statements, in terms of the recusal remedy, is the increased number of recusal motions. The litigation over whether extrajudicial statements disqualify judges can presumably be costly. Lawyers then must engage in satellite litigation over the judge's qualifications to serve, even if the judge ultimately concludes that recusal (and thus reassignment of the case) is unnecessary. The cost of such satellite litigation may be all the more problematic when the underlying case is a small one that can otherwise be litigated at little cost. Many categories of cases assigned to agencies are so assigned precisely to avoid the enormous expenses associated with fact-finding in the Article III courts. On the other hand, many of these cases will be ones in which only the non-governmental party can move to recuse and, thus, can decide for itself whether the satellite litigation is worth the cost.

The recusal remedy has a third cost—the loss of trust when a judge denies a recusal motion despite the moving party's belief the judge should have disqualified himself.[111] Professor Dmitry Bam surmises that some widely-recognized cognitive biases may well affect decision-making on recusal, including unconscious bias and self-serving bias.[112] Thus, judges often err in deciding recusal cases, systematically underestimating their own partiality, or at least the appearance of impropriety resulting from their actions. But at the very least, due to such cognitive biases, judges' views of the appearance of impropriety surrounding their actions may systematically diverge from that of the litigants appearing before them. Avoiding extrajudicial statements that might suggest bias might often mean that this third cost of the recusal remedy could be avoided.

Indeed, Bam generally argues that the project of fine-tuning the procedural and substantive law regarding recusal, rather than strengthening the prohibition on problematic judicial conduct, may be doomed to failure.[113]

However, banning speech is particularly problematic as an *ex ante* control in the context of extrajudicial speech, because it addresses the *appearance* of partiality without addressing *actual* impartiality. Limiting extrajudicial expression of bias does nothing to diminish the underlying bias itself. Thus, in a sense, vigorously limiting extrajudicial statements can facilitate a form of deception.[114] Provisions directed to enhancing the public perception of judicial

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111. *See, e.g.*, Cheney v. U.S. District Court, 541 U.S. 913 (2004) (Memorandum of Justice Scalia) (recusal due to duck hunting trip); Laird v. Tatum, 409 U.S. 824 (1972) (Memorandum of Justice Rehnquist) (recusal due to work on domestic surveillance issues while at the Department of Justice). Indeed, Justice Rehnquist's failure to disqualify himself in *Laird v. Tatum* led Congress to revise the disqualification standards in 28 U.S.C. § 455. *See* Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. LITIG. 671, 689 (2011).

112. *See* Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011BYU L. REV. 943, 955 (2011).

113. *See id.* at 947–50. Granted, Bam focused his argument on strategies for addressing campaign contributions to judicial candidates, and not extrajudicial speech.

114. The power to appoint ALJs and promote them to an appellate level may raise the same types of questions. The more independent discretion agency heads possess on these matters, the less confidence the public will have in ALJs' impartiality, regardless of tweaks in the substance of the

impartiality should not convey an impartiality that, in actuality, judges lack. Accordingly, entities overseeing judges' conduct have a responsibility to avoid overstating judges' impartiality.[115]

PART V: SHOULD THE RULES DIFFER FOR ADMINISTRATIVE ADJUDICATORS?

Should the constraints on extrajudicial speech differ for the administrative judiciary?[116] The analysis should focus on two questions: (1) whether an agency can require administrative adjudicators to expound upon and defend the agency's policies extrajudicially, or permit judges to suggest that they are speaking on behalf of the agency when speaking extrajudicially, and (2) whether an agency can prohibit administrative judges from publicly expressing their personal views, on policy issues within the agency's purview or agency adjudicatory procedure, outside the context of their decisions.

But one problem merits attention even before taking up the two questions above. The very act of controlling administrative adjudicator extrajudicial speech may undermine whatever appearance of impartiality those controls are designed to foster. Exertion of such control over adjudicator speech will be a powerful affirmation of the agency's dominance over its adjudicators. It will also demonstrate that the agency can control when and how IJs speak to outside groups and what they will say. And if IJs are limited to expressing views consistent with the agency's policy, which appears to be the implicit rationale underlying the McHenry policy, perceptions of a lack of independence and impartiality would presumably be all the greater.[117] Of course, sophisticated

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recusal standards. Kent Barnett's proposal that Congress assign the federal courts to select ALJs would no doubt significantly increase the confidence of non-governmental interested parties in administrative adjudicators' decisions. *See* Kent Barnett, *Resolving the ALJ Quandry*, 66 VAND. L. REV. 797, 844–55 (2019).

115. For example, the Director of PTO has powers that seem inconsistent with truly independent decision-making by its administrative adjudicators. *See* Oil States Energy Servs., LLC v. Greene's Energy Grp., 138 S. Ct. 1365, 1380–81 (2018) (Gorsuch, J., dissenting) (noting that the Director can select which administrative adjudicators and how many of them will hear a particular challenge, and if dissatisfied with that determination, can order the case reheard after adding more adjudicators, including himself, to the panel).

116. This issue can arise in the context of members of agency-heading multi-member boards and commissions. The issues differ because agency heads, unlike lower-level adjudicators, have a greater role in setting out agency policy and communicating with the agency's constituencies. Moreover, recusals can have much more serious implications when they involve disqualifying agency-heading board and commission members. For an example of such issues, see Antoniu v. SEC, 877 F.2d 721 (8th Cir. 1989); Broc Romanek, *When Must a SEC Commissioner Be Recused?*, THECORPORATECOUNSEL.NET (Jan. 13, 2015), https://www.thecorporatecounsel.net/blog/2015/01/when-must-a-sec-commissioner-be-recused.html.

117. Similar concerns have been expressed in the context of the Article III judiciary. *See* Dubeck, *supra* note 13, at 578; Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 306–07 (2003); *see also* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 1021 (2000) ("[I]nternal mechanisms by which the judiciary 'speaks' are structures of authority not representative of the judges within."). Of course, immigration judges may function cohesively

observers will distinguish between control over administrative adjudicators' judicial statements and their extrajudicial ones, but many of the regulated entities and beneficiaries whose rights are decided by such adjudicators may fail to appreciate such a subtle distinction.

Moving to the first question outlined above, EOIR's implicit assertion, in the McHenry policy, that judges must reflect agency policy when they speak extrajudicially, undermines judicial independence and the perception of impartiality. Article III judges cannot be compelled to render service outside of judicial duties and such service has long been discouraged.[118] Administrative adjudicators work in an institutional context in which agency employees must coordinate their actions in order to further the agency's mission. Moreover, as Jerry Mashaw and others have asserted, administrative adjudicators' decisions are potentially subject to greater routinization and, thus, consistency across decisions by many adjudicators may be a much more compelling goal in the mass agency adjudication context.[119]

Nevertheless requiring administrative judges to explain and perhaps defend the agency's position outside the context of their decisions certainty seems inconsistent with judicial independence. The existence of such a requirement would certainly lead litigants opposing the agency to question the administrative adjudicator's impartiality. Indeed, a profound suspicion that administrative adjudicators are not impartial, but consistently favor their employing agency, already exists.[120]

But the EOIR policy is really directed at addressing IJs' extrajudicial criticisms of immigration policy and enforcement, which raises the second question posed at the beginning of this section. Does the institutional context in which administrative adjudicators serve make a difference when it comes to extrajudicial criticism of the agency?

The general benefits of permitting administrative judges to express their personal views extrajudicially, within appropriate bounds, seems somewhat similar. Like their counterparts serving in the federal and state court systems, administrative adjudicators can contribute to the discussion of the substantive

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through the mechanism of their union. However, the Trump administration sought to decertify the IJs' union. *See In re* Nat'l Ass'n of Immigr. Judges, 71 F.L.R.A. No. 207 (2020) (decertifying union because IJs are management employees).

118. *See Independence of Judges: Should They Be Used for Non-Judicial Work?*, 33 A.B.A. J. 792 (1947); Hayburn's Case, 2 U.S. 408 (1792); Muskrat v. United States, 219 U.S. 346 (1911).

119. *See* JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983); David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1217 (2016) (contrasting "equity-minded" Article III judges with "routinized and procedurally minded" SEC adjudicators that further "bureaucratic regularity"). Indeed, even in the context of Article III courts, some measure of decisional consistency among different judges has sometimes been found a compelling need. The prime example is the creation of the sentencing guidelines constraining judge's traditional sentencing discretion.

120. *See* Edward J. Schoenbaum, *Improving Public Trust & Confidence in Administrative Adjudication: What Administrative Law Practitioners, Judges, and Academicians Can Do*, 53 ADMIN. L. REV. 575, 579 (2001); *see also* Rich, *supra* note 7, at 25.

legal context in which they operate and can enhance lawyers' and the public's understanding of court procedures.[121] They can also collaborate with non-judges in law reform initiatives.[122] Administrative and traditional adjudicators also share a personal interest in the freedom to discuss the ways in which they cope with enforcing laws with which they profoundly disagree (indeed extrajudicial speech might be the very way in which they do so).[123]

Perhaps administrative adjudicators' extrajudicial statements might be more likely to be taken as their agency's position, given where administrative adjudicators are housed, but that issue can be addressed as it has traditionally, with disclaimers.

The administrative agency and court system contexts arguably differ in seven respects that may have importance in assessing extrajudicial speech: (1) the relevant disqualification standards and costs of recusal, (2) the nature of the interests adjudicated, (3) the scope of agency and judicial review, (4) the need for coordinated action between adjudicators and other agency officials, (5) the institutional loyalty due, (6) implications of the separation of powers, and relatedly (7) reliance on the acceptance of their judgments by others. I will consider each in turn.

1. Disqualification

The standards governing disqualification of federal judges and at least some administrative adjudicators appear largely similar, even though the federal disqualification statute does not apply to administrative adjudicators. By statute federal judges must recuse themselves from any proceeding "in which": (1) their "impartiality might reasonably be questioned," or (2) they have either "a personal . . . prejudice concerning a party," "personal knowledge of disputed . . . facts," or any interest that could be substantially affected by the outcome.[124] The rule governing administrative adjudicators in *formal* adjudications, the *Cinderella* test, turns on whether "a disinterested observer may conclude that [a decisionmaker] has in some measure adjudged the facts as

121. *See In re* Judicial Misconduct, 632 F.3d 1289, 1289 (9th Cir. Jud. Council 2011) (holding that a judge's speeches about "the direction of immigration law" did not violate the Code of Conduct or constitute misconduct); Dubeck, *supra* note 13, at 572 (stating lockjaw "denies the public important benefits . . . . Judges . . . can contribute to the public discourse, and by virtue of their institutional knowledge and expertise . . . are in a unique position to be 'leader[s] in our democracy.'"); Lubet, *supra* note 13, at 675; Schoenbaum, *supra* note 120, 585–86, 589, 598–99.

122. Bijal Shah, *Civil Servant Alarm*, 94 CHI.-KENT L. REV. 627 (2020) (civil servant dissonance).

123. *See, e.g.*, GREENAWALT, *supra* note 100, at 27–28, 34 (1989). Two classic cases involving extrajudicial statements that involve expression of profound disagreement with government policy or moral dilemmas are *Lawton v. Tarr*, 327 F. Supp. 670, 672 (E.D.N.C. 1971), and *In re Gridley*, 417 So. 2d 950 (Fla. 1982).

124. 28 U.S.C. § 455(a)–(b). The Second Circuit has held that this statute does not apply to ALJs. *See* Greenberg v. Bd. of Governors of Fed. Rsrv. Sys., 968 F.2d 164 (2d Cir. 1992); Bunnell v. Barnhart, 336 F.3d 1112, 1114 (9th Cir. 2003).

well as the law of a particular case in advance of hearing it."[125] The extent to which the *Cinderella* standard applies to a wider range of adjudication is unclear—though it should apply to any proceedings that will be decided on a record developed in the proceeding.

In any event, disqualification is not necessarily a greater problem for administrative agencies than for courts, albeit, the single-subject focus of the administrative judiciary in federal agencies might well make recusal a bigger problem for single-agency adjudicators than for generalist federal judges.[126]

But, as noted above, disqualification has its costs and may not adequately ensure the perception of honest adjudication. And while *courts* accept those costs, in terms of permitting, and even encouraging, extrajudicial statements and allowing judges to make their own individual assessments of the appropriateness of their extrajudicial speech, *administrative agencies* should have some discretion to strike a different balance. Perhaps the administrative agency will want to avoid the disruptions attendant a significant number of recusal decisions and frequent recusal litigation. And, in light of the general suspicion about administrative adjudicator partiality to the agency, the agency may conclude that limiting extrajudicial statements that undercut the perception of independence and impartiality may be a more appropriate solution than strict recusal standards.

2. Nature of Interests Determined

The nature of the interests that can be determined by judicial adjudicators and administrative adjudicators differ to some extent. In *CFTC v. Schor*[127] a seminal case defining Congress' power to assign the judicial power of the United States to Article I courts, the Supreme Court embraced and clarified the distinction between "public rights" (those one holds against the government) and "private rights" (those one holds against other private individuals).[128] Private rights are often akin to common law rights. The Court reasoned that the adjudication of private rights must be free from the influence of political branches of government, whereas adjudicator independence from the political

125. Cinderella Career & Finishing Schs., Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970) (quoting Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir. 1959); *see generally* LOUIS J. VIRELLI III, ADMIN. CONF. OF THE U.S., RECUSAL RULES FOR ADMINISTRATIVE ADJUDICATORS (Nov. 30, 2018). Like § 455, *Cinderella* appears to set forth an appearance-based disqualification regime. For a description of such regimes and comparison with their historical predecessors, see Geyh, *supra* note 111, at 677–690.

126. However, this generalization is not invariably true. First, it may be false with regard to some types of cases. Given the prevalence of criminal cases on federal judges' dockets, injudicious comments regarding the federal sentencing guidelines may disqualify a judge from a significant portion of cases. Second, some judges in the federal court system are specialized, such as bankruptcy and tax court judges. Third, state judiciaries often have a number of specialized judges, to which the same problem would be applicable.

127. 478 U.S. 833 (1986).

128. *See id.*

branches was unnecessary for the adjudication of some public rights.[129] In some ways this dichotomy reflects the long dominant distinction between rights and privileges, which results in categorizing "public rights" as mere largesse. The line between the two can be indistinct,[130] and in any event too sharply distinguishes between common-law rights and non-common-law rights.[131]

But even if the government *could* resolve a claim by an exercise of discretion, rather than an adjudication, when it purports to use the adjudicatory model incorporating decision-making on an evidentiary record, or the equivalent, it should be bound by the norms of that format. Those norms include, among other things, some level of judicial impartiality and decision-making upon the published standards based on the evidence presented in the proceeding.[132] As Justice Scalia noted in *Allentown Mack Sales & Service, Inc. v. NLRB*:

> When the Board purports to be engaged in simple factfinding, unconstrained by substantive presumptions or evidentiary rules of exclusion, it is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands[,] . . . which is the foundation of all honest and legitimate adjudication.[133]

There is yet another problem with according great significance to the public rights/private rights distinction in this context. Even in *Schor*, the Court noted that the Article III courts play a critical structural role in the separation of powers, in addition to their role as an impartial arbiter of private parties' disputes, and that playing such a role required independence from the other branches of government. In doing so, *Schor* acknowledged that even when the government is a party, perhaps especially in such cases, adjudicator independence from executive and legislative control is critical.[134] Indeed, even though agencies adjudicate largely public rights cases, it may be *more* important for agency adjudicators in such cases to both be, and appear, impartial between the private party and the government.

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129. *See id.* at 853–54; Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 589 (1985) (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 68 (1982)).

130. *Compare* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365 (2018) (United States Patent and Trademark Office (PTO) to reconsider and cancel an already-issued patent claim in limited circumstances is a "public right" that can be assigned to an Article I court), *with id.* at 1380 (Gorsuch, J., dissenting) ("Until recently, most everyone considered an issued patent a personal right . . . that the federal government could revoke only with the concurrence of independent judges.").

131. *See* Kent Barnett, *Due Process for Article III—Rethinking* Murray's Lessee, 26 GEO. MASON L. REV. 677 (2019) (suggesting a return to the pre-modern Due Process rights/privileges distinction to define the appropriate scope of delegation of adjudicatory powers to administrative agencies).

132. *See* Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 374–77 (1998).

133. *Id.* at 378–79.

134. *See CFTC v. Schor*, 478 U.S.

3. Scope of Internal Agency and Judicial Review

The generosity of judicial review standards and federal agencies' broad discretion to overturn ALJ decisions may have implications for the importance of maintaining adjudicators' impartiality.[135] One mechanism for constraining the effects of partiality is a regime of judicial review to ensure the soundness of the inferences drawn by administrative adjudicators (and agency officials reviewing those decisions).[136] The requirement for written explanation aids is the application of such a constraint. But even as supplemented by such a requirement, substantive judicial review of an administrative adjudicator's decision is an imperfect means for redressing potential partiality (as opposed to legal or factual error). ALJ's have significant discretion that enables them to hide their biases, even in written decisions subject to "substantial evidence" review by Article III judges.[137]

More disturbingly, while administrative adjudicator bias *against* the employing agency can be somewhat readily overturned by agency reviewers, whose review need not be deferential, bias *favoring* the agency will likely not be overturned by agency reviewers. And such pro-agency bias probably will not be countered on judicial review either, in light of the deference accorded agency adjudicators under the "substantial evidence" test typically applied. Indeed, theoretically, the "substantial evidence" test is more generous than the "clearly erroneous" standard by which federal appellate courts assess federal trial courts' fact-finding.[138]

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135. Kent Barnett has addressed the argument that administrative adjudicator impartiality is unimportant given that "*agency heads can investigate, prosecute, adjudicate, and overrule ALJs' opinions in toto*." Barnett, *supra* note 114, at 822 (emphasis added). Of course, as he explains, ALJ decisions often go unreviewed (and even mor frequently remain unmodified). And even when they are reviewed, the ALJ's decision is significant in terms of a court's ultimate analysis of the soundness of the agency's final decision. Moreover, if an agency adopts adjudication as a mode of decision-making, it should adhere to the fundamental elements of that mode of decisions-making. In any event, a denial of the need for impartiality provides little support for EOIR's policy regarding extrajudicial speech, which purports to be grounded on the opposite assumption. Finally, federal magistrate judges merely make recommended decisions that are reviewed *de novo*, 28 U.S.C. § 636(b)(1)(c), yet there is no claim that such judges may conduct themselves in ways that lead litigants to question their impartiality. *See generally id.* at 822–27.

136. *See* Sarah M. R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1, 2 (2007).

137. *See* Hummel v. Heckler, 736 F.2d 91, 93 (3d Cir. 1984) ("[T]he absence in the administrative process of procedural safeguards normally available in judicial proceedings" justifies an "even stricter application of the requirement that administrative adjudicators be impartial."); NLRB v. Phelps, 136 F.2d 562, 563 & n.1 (1943) (lax judicial review standards justified greater insistence upon administrative adjudicator impartiality).

138. *See* Dickinson v. Zurko, 527 U.S. 150, 162–63 (1999). Granted, the Court added that the difference in the standard was "so fine that . . . we have failed to uncover a single instance in which a reviewing court conceded that use of one standard rather than the other would in fact have produced a different outcome." *Id.* at 163.

But merely preventing expression of bias would seem to do little to address the problem of biased decision-making.[139] As one observer has noted,

> a disqualification regime that evaluates a judge's fitness to sit with exclusive reference to whether the decisions he renders are supported by acceptable reasons would . . . bar disqualification for suspected bias, actual bias, and even corruption, as long as judges are clever enough to devise plausible explanations for their decisions.[140]

While impartiality and appearance of impartiality work in tandem when the issue is recusal or state judges' personal solicitation of campaign contributions,[141] they may work at cross-purposes when the issue is the propriety of extrajudicial speech. Addressing the appearance of bias will not address actual bias. Indeed, as noted earlier, limits on extrajudicial speech focused on conveying the message that judges lack any predispositions or biases relevant to cases, or any discretion in deciding factual and legal issues, may merely facilitate public deception.

4. Need for Coordinated Action

A now-standard account explains that the role of ALJs and other administrative adjudicators reflects a somewhat schizophrenic compromise between proponents of two radically-different philosophies.[142] One group, the pro-New Deal group, conceived of administrative adjudication as a vehicle for the implementation of bold, new agency policies that might be hampered by adjudicator independence.[143] The administrative adjudicator was seen, in a sense, as subservient to agency policy—"when an agency has broad-scale authority (including rule-making authority), it needs people to assist it in enforcing its rules."[144] The competing vision emphasized fairness and due process for private parties that ran afoul of agencies, and took civil litigation in

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139. *See* Geyh, *supra* note 111, at 715; Laird v. Tatum, 409 U.S. 824, 834–35 (1972) (Memorandum of Justice Rehnquist); Stephen Reinhardt, *Judicial Speech and the Open Judiciary*, 28 LOY. L.A. L. REV. 805, 809 (1995).

140. Geyh, *supra* note 111, at 715.

141. *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) (existence of actual bias unnecessary, an appearance of impropriety was sufficient); Williams v. Pennsylvania, 136 S. Ct. 1899, 1905 (2016) ("To establish an enforceable and workable [recusal] framework, the Court's precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present.").

142. *See* John L. Gedid, *ALJ Ethics: Conundrums, Dilemmas, and Paradoxes*, 11 WIDENER J. PUB. L. 33, 43–48 (2002). For a more extensive account of the history, see George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996).

143. *See* Gedid, *supra* note 142, at 43–44.

144. *Id.* at 44 (emphasis omitted) (quoting W. Michael Gillette, *Administrative Law Judges, Judicial Independence, and Judicial Review: Qui Custodiet Ipsos Custodes?*, 20 J. NAT'L ASS'N ADMIN. L. JUDGES 95, 98 (2000)).

the federal courts as its model.[145] The pro-New Deal group's philosophy is reflected in the creation of the hearing examiner status, subordination of such hearing examiners to agency heads who retained the power to make final decisions, and granting agencies the power to make many decisions informally without ALJ involvement.[146] The anti-New Deal group's more traditional view was reflected in specification of some due process protections, the principle of the internal separation of functions, and some tenure protection for ALJs.[147] Over time the role of ALJs, and perhaps some other non-ALJ administrative adjudicators, has evolved toward a greater emphasis of independence for other parts of the agency.

Nevertheless, administrative adjudicators are located within agencies for a reason. Such a placement arguably facilitates agencies' development of a coordinated approach to the challenges that confront them in completing their missions. It allows them to integrate the agency's rule-making, administration, enforcement, and adjudication functions.

Thus, administrative adjudicators "are not impartial and neutral in the same sense as Article III judges, but frequently have a role in developing and applying agency policy."[148] Administrative adjudicators are expected to come to the case with knowledge and experience, as a result of both their adjudication of similar cases and their interaction with other parts of the agency. Any assumption that the administrative adjudicators approach cases *tabula rasa* is unfounded.[149] Indeed, because ALJs operate within an agency that possesses specialized expertise, long time association with a particular agency and its personnel tends to indoctrinate or inculcate into the ALJ "the agency culture, viewpoints, and approaches to problems."[150]

So there is a considerable divergence between the administrative adjudication model and the Article III court civil adjudication model. Those differences do have implications for some aspects of administrative adjudicators' roles. They certainly suggest the need to have a cadre of administrative adjudicators more attuned to non-judicial actors within the agency, and a greater tolerance for *ex parte* contacts with the agency, *inter alia*.[151] But these differences do not appear relevant to the appropriate norms for publicly making extrajudicial statements.

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145. *See id.* at 44–45.

146. *See id.* at 48.

147. *See id.*

148. *Id.* at 38. The statement is made with reference to ALJs but applies to non-ALJ adjudicators to an even greater extent.

149. This is particularly true with regard to non-ALJ adjudicators. *See* Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1667 (2016).

150. Gedid, *supra* note 142, at 40–41.

151. *See id.* at 52. Perhaps the New Deal view that agencies should have an adjudicatory function rather than courts is to ensure that the biases toward the common law (among judges and the organized bar), reflected for instance in the non-derogation canon and the constitutional law at the time, would not infect administrative adjudications. For a discussion of judicial hostility to the administrative state during that era, see Mark Tushnet, *Administrative Law in the 1930s: The*

5. Legitimacy of "Outside" Appeals

In a sense, internal agency organization may broadly mimic the organization of the federal government. Administrative adjudicators serve as a check on those exercising quasi-legislative and prosecutorial functions, much like the Article III courts serve as a check on the political branches of government. Should the respective adjudicators feel the need to keep their criticisms of policy-makers and administrators to their written decisions?

Federal judges operate in an environment in which they need not feel any obligation to refrain from going public with their appeals to change the law. But perhaps the agency context is different. Administrative adjudicators may wield more influence through means other than writing opinions and perhaps owe greater loyalty to the overall goals of the agencies in which they sit. Thus, in terms of substantive differences, as opposed to profound policy or ethical differences, perhaps administrative adjudicators should be more reticent about seeking change through external appeals outside of their agencies. This issue merits fuller consideration, more consideration than I can give it in this wide-ranging Article.

6. Implications of the Separation of Powers

One commentator has suggested that federal judges' extrajudicial statements may violate separation of powers principles or alter the contemplated balance between the three branches of government,[152] but reaches no conclusion on the question. It is not clear why extrajudicial statements by judges in their individual capacity should have much of an impact on the balance of power between the three branches of government. Obviously, *inter*-branch efforts to control extrajudicial statements might be problematic, either legislative attempts to control Article III judges or judicial attempts to control adjudicators within the executive branch. But it is not clear that *intra*-branch limitations on adjudicators within that branch pose different problems for the Executive and Judicial branches.

However, perhaps the appointment process for federal judges, their tenure protections, and the norms of judges acting independently, provide a justification for allowing Article III judges greater discretion in deciding when to speak extrajudicially. The requirements of appointment, nomination by the President and confirmation by the Senate, accord Article III judges greater stature than administrative adjudicators possess.[153] And while many agency adjudicators, especially ALJs, have some tenure protection, they do not rival the security accorded by Article III, removal only upon conviction of a high crime

Supreme Court's Accommodation of Progressive Legal Theory, 60 DUKE L.J. 1565, 1590–1629 (2011).

152. *See* Dubeck, *supra* note 13, at 574–78.

153. However, federal magistrate judges, 28 U.S.C. § 631(a), and bankruptcy judges, 28 U.S.C. § 152(a)(1), do not go through such processes.

or misdemeanor following an impeachment trial.[154] Moreover, Article III judges appear to have unusual freedom of action, largely working alone (outside of serving on appellate panels and responding to orders issued as a result of formal appeals of their decisions).

Nevertheless, if the concerns regarding extrajudicial statements are primarily those regarding the appearance of partiality and participants' denigration of an institution in which they serve, the greater trust reposed in Article III judges would not appear to justify either a different approach to the assessment of the propriety of making extrajudicial statements or a different view of the legitimacy of adjudicators largely making such decisions for themselves.

7. Reliance on Deference of Others in Enforcing its Judgments

Interestingly, discussions regarding the need to maintain the public perception of impartiality in the Article III courts focus on the Judicial Branch's lack of the power of the sword or the purse.[155] That is, of course, not true for administrative adjudicator who sit in agencies that do possess the power of the sword, the purse, other coercive governmental powers, or all three.[156]

But the real point of the concern is the tenuousness of judicial authority, and the need to ensure that those whose rights are resolved in such proceedings do not begin to question their legitimacy. On that score, the legitimacy of administrative adjudication is even more tenuous than that of court adjudication. Adjudication in general, and adjudication in Article III courts in particular, has a much more substantial constitutional pedigree (being explicitly recognized in the U.S. Constitution), has a longer history in the United States,[157] and occurs in a public forum rather than in the less public settings typical of many of agency

154. Of course, judges on some non-administrative courts do not enjoy lifetime tenure, e.g., bankruptcy judges and magistrate judges, each of which have defined terms and can be removed without impeachment. 28 U.S.C. § 631(a), 28 U.S.C. § 631(i) (removal by the judges of the district court for "incompetency, misconduct, neglect of duty, or physical or mental disability"); *see* 28 U.S.C. §§ 152(e) & (i) (8-year term, removal by the judicial council of the relevant circuit for "incompetence, misconduct, neglect of duty, or physical or mental disability"); *see also* 28 U.S.C. § 152(e) (14-year term, removal by the judicial council of the relevant circuit for "incompetence, misconduct, neglect of duty, or physical or mental disability").

155. *See* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 445 (2015); Bam, *supra* note 112, at 967–68.

156. Indeed, so far as effectuating administrative adjudicators' judgments, it is the head of the agency (and perhaps Congress, the President, and the courts) that must have the confidence in the quality of their adjudications. Nevertheless, if an agency establishes an adjudicatory proceeding, the tribunal should be one in which the interested parties and the general public have confidence.

157. On this score, the evolution of attitudes toward according claim and issue preclusion effect to administrative adjudications reveals much. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 83, Reporter's Note § 131 cmts. b & c (Tent. Draft No. 7, 1980) (explaining the decision to abandon the *First Restatement*'s approach and accord issue and claim preclusion effect to administrative adjudications); B & B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. 138, 164–67 (2015) (Thomas, J., dissenting) (outlining the history).

adjudications.[158] Moreover, the Article III courts possess greater stature. So all this suggests that administrative adjudicators must be even more attentive to the propriety and probity of their conduct and statements. That said, the sort of control EOIR seeks to exert over its IJs' extrajudicial speech hardly contributes to confidence in and willingness to accept IJ rulings.

CONCLUSION

EOIR's speaking engagement initiative appears to be a poorly conceived attempt to muzzle IJ criticism of the now-departed Trump administration's immigration policies. It should be substantially revised or eliminated due to the suspect motives underlying it and its dubious constitutionality as structured. However, the initiative does raise a question perhaps too little discussed: the norms and ethics of administrative adjudicator speech.

Any agency effort to enhance the perception of its adjudicators' impartiality by specifying the appropriate scope of extrajudicial speech creates two problems. First, the very effort suggests, certainly to the unsophisticated, that administrative adjudicators are subject to agency control (inevitably diminishing the perception of impartiality). Second, the effort may ultimately prove to be a form of deception, to the extent that agency adjudicators *are* biased.

Nevertheless, the above analysis suggests two conclusions. First, the ethical norms of administrative adjudicator extrajudicial speech should not dramatically differ from those applicable to their brethren serving on courts. While some differences do exist between the agency and judicial contexts, and some cut in favor embracing different norms in the two contexts, on balance the differing contexts do not suggest the need for significantly different norms.

The second conclusion relates to reliance on adjudicator self-governance on these issues. An extraordinary breadth of views on the propriety of extrajudicial speech exists among commentators and members of the federal and state benches. While guidance is available, the system is largely one that relies on judges selecting their own philosophies within a broad range of choice. But the issues are sufficiently significant and have sufficiently broad implications for agencies that agencies should be able to rely less on individual adjudicators' choices and set a framework that accords administrative

158. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), may apply to administrative adjudications, see, e.g., N.Y. Civ. Liberties Union v. N.Y.C. Transit Auth., 684 F.3d 286, 300 (2d Cir. 2012), and courts have split regarding the constitutional right of access to certain types of proceedings. *Compare* Detroit Free Press v. Ashcroft, 303 F.3d 681, 696 (6th Cir. 2002), *with* N.J. Media Grp., Inc. v. Ashcroft, 308 F.3d 198, 208–09 (3d. Cir. 2002) (contrasting conclusions regarding immigration adjudications). Nevertheless, many administrative proceedings have traditionally been closed to the public, see *id.* at 209–11. As Chief Justice Burger observed in *Richmond Newspapers*, it is difficult for the people to trust a process they cannot observe. *See* 448 U.S. at 572 ("[T]he appearance of justice can best be provided by allowing people to observe it.").

adjudicators a more limited range of discretion than court systems currently appear to confer upon judges.[159]

159. Some of the problems with the very promulgation of the standards undermining the perception of administrative adjudicator independence could be ameliorated by presidential assignment of the task of crafting standards governing extrajudicial speech promulgated to a body independent of and external to the agencies employing administrative adjudicators, such as the Office of Government Ethics.