OOD
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To: All of EOIR
From: Sirce E. Owen, Acting Director
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CONSIDERATION OF CONSTITUTIONAL ARGUMENTS IN AGENCY ADJUDICATIONS

PURPOSE:	Provide guidance regarding EOIR's consideration of constitutional arguments in the course of its adjudications
OWNER:	Office of the Director
AUTHORITY:	8 C.F.R. § 1003.0(b)
CANCELLATION:	None

I. Introduction

Historically, as an administrative agency, EOIR has only infrequently had to consider claims or arguments sounding in constitutional law. In recent years, however, constitutional arguments related to administrative adjudications have proliferated and now occur with some regularity in EOIR proceedings in a variety of contexts. This Policy Memorandum (PM) provides guidance to adjudicators confronted with constitutional issues, though it does not direct any particular mode of analysis or outcome when considering constitutional arguments.

II. Background

Federal courts, including the Supreme Court, have sent mixed messages on the appropriateness of administrative agencies deciding constitutional questions in the first instance. *Compare Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures . . . .") *with Elgin v. Dep't of Treasury*, 567 U.S. 1, 23 (2012) (acknowledging that there may be "constitutional claims that [an agency] routinely considers, in addition to a constitutional challenge to a federal statute") *and Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (observing that a rule that agency consideration of constitutional questions is generally beyond the agency's jurisdiction is not "mandatory"); *compare Meredith Corp. v. FCC*, 809 F.2d 863, 874 (D.C. Cir. 1987) (noting both that "we are aware of no precedent that permits a federal agency to ignore a constitutional challenge to the application of its own policy merely because the resolution would be politically awkward" and that the failure of an agency to consider a constitutional argument raised by a respondent in an enforcement action "seems to us the very paradigm of arbitrary and capricious administrative action") *with Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n*, 838 F.2d 536, 544 (D.C. Cir.

1988) (holding that "[i]t was entirely correct for the [administrative agency] to decline to decide the [constitutional] issue . . . on the ground that the federal courts provide more appropriate forums for constitutional claims").

Notwithstanding this somewhat muddled case law, EOIR as a whole has generally taken the position that, as an administrative agency, it can adjudicate most arguments sounding in constitutional law, albeit with a couple of notable exceptions. For instance, EOIR's Office of the Chief Administrative Hearing Officer (OCAHO) has frequently considered constitutional arguments in its proceedings—including arguments related to the Commerce Clause, the Eleventh Amendment, and other constitutional provisions—with little controversy. *See U. S. v. ABS Staffing Solutions, LLC*, 21 OCAHO no. 1632 at 13 (2025) ("Historically, OCAHO's general view has been that, except for arguments regarding the constitutionality of a statute itself, OCAHO adjudicators can and should decide constitutional questions that come before them, including questions related to the constitutional application of statutory provisions."). Further, the one historic exception to this general rule in OCAHO jurisprudence—*i.e.* arguments related to the constitutionality of a statute—has been called into doubt by subsequent Supreme Court caselaw. *See Elgin v. Dep't of Treasury*, 567 U.S. at 16 n.5 (2012) (describing an administrative agency's view that it can consider constitutional challenges to the manner in which an agency acts but not constitutional challenges to the statute itself as both "dubious at best" and "curious").[1] Currently, the only clearly-established exception in recent OCAHO jurisprudence is that its adjudicators may not consider "a constitutional challenge to an [Administrative Law Judge's] appointment which an [Administrative Law Judge] cannot remedy and which an agency head could not directly remedy in the course of an adjudication." *ABS Staffing*, 21 OCAHO no. 1632 at 11-12 (citing *Carr v. Saul*, 593 U.S. 83, 94 (2021)).[2]

The Board of Immigration Appeals (the Board) has taken a similar view of its authority to hear constitutional arguments. Since at least the 1940s, the Board has held that while it cannot adjudicate broad challenges to the constitutionality of statutes,[3] it can address constitutional

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[1] Older OCAHO caselaw prior to *Elgin* had also adopted this distinction, but the applicability of that caselaw after *Elgin* is in significant doubt, though OCAHO has not had a recent occasion to expressly revisit the issue. *See ABS Staffing*, 21 OCAHO no. 1632 at 13 n.10.

[2] Even this exception may have limits, though, as "once a constitutional issue has been decided in a precedential decision by an appropriate circuit court of appeals or the Supreme Court, OCAHO is obligated to faithfully apply that precedent." *ABS Staffing*, 21 OCAHO no. 1632 at 14. Thus, even if OCAHO could not address the issue in the first instance, it would nevertheless be bound to apply precedent from a federal court that had addressed the issue.

[3] The provenance of the Board's view that its jurisdiction precludes assessing the constitutionality of statutes is both unclear and in tension with other authorities. For instance, the Attorney General unquestionably has the authority to assess the constitutionality of a statute, and well-established statutory authority contemplates that either the Attorney General, from whom the Board has delegated authority, or "any officer of the Department of Justice," which would include the Board, can determine that any provision of a statute or regulation within the Attorney General or officer's responsibility is unconstitutional. *See* 28 U.S.C. § 530D(a)(1)(A)(i) ("The Attorney General shall submit to the Congress a report of any instance in which the Attorney General or any officer of the Department of Justice establishes or implements a formal or informal policy to refrain from enforcing, applying, or administering any provision of any Federal statute, rule, regulation, program, policy, or other law whose enforcement, application, or administration is within the responsibility of the Attorney General or such officer on the grounds that such provision is unconstitutional." (cleaned up)). Further, the Department of Justice's Office of Legal Counsel, which typically advises the Attorney General in reviews of Board decisions, *see* 28 C.F.R. § 0.25(f)—and, thus, could aid in the assessment of the Board's determination regarding the constitutionality of a statute—also opines on the constitutionality of statutes. *See*, *e.g.*, *Constitutionality of Statute Governing Appointment of U.S. Trade Representative*, 20 Op. O.L.C.

challenges to the application of statutes.[4] *See, e.g., Matter of O-*, 3 I&N Dec. 736, 738 (1949) ("It is not within the province of this Board to pass upon the constitutionality of statutes enacted by Congress. We shall, however, comment on the constitutional aspects of the statute's application to the instant proceedings.") (citations omitted). However, as discussed, *supra*, this distinction no longer appears viable after *Elgin* and may be subject to reconsideration by the Board. Otherwise, Immigration Judges, the Board, and other administrative immigration adjudicators have routinely considered constitutional arguments related to, for example, the First, Fourth, and Fifth Amendments with no suggestion that such considerations are inappropriate. *See*, *e.g.*, *Matter of Mariscal-Hernandez*, 28 I&N Dec. 666, 669-74 (BIA 2022) (discussing the Fourth Amendment and rejecting an argument that an alien had established a prima facie claim of a Fourth Amendment violation entitling him to a suppression hearing); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 603 (Comm'r 1988) (finding no violation of the Establishment Clause of the First Amendment in review of a visa petition filed by a religious organization); *Matter of Koden*, 15 I&N Dec. 739, 742 (Dep. A.G. 1976) ("Respondent, who was represented by counsel, raised a number of objections, some relating to the Board's constitutional and statutory authority to conduct the proceedings, others of a procedural nature, and still others of an evidentiary nature. The Board, in a comprehensive opinion, rejected the constitutional, statutory, and procedural objections, and I conclude that it acted correctly."), *aff'd by Koden v. DOJ*, 564 F.2d 228 (7th Cir. 1977).

III. Consideration of Constitutional Arguments

In short, with one established exception[5]—and arguably a second one discussed in more detail below—EOIR adjudicators may generally consider arguments arising out of constitutional law, as they have done for many years. In doing so, however, adjudicators should be careful to faithfully apply established relevant precedent, just as they do regarding any other issue raised in a particular case. To that end, all EOIR adjudicators should maintain familiarity with established jurisprudence on constitutional law issues likely to arise in proceedings before them, particularly issues related to the First, Fourth, Fifth, and Seventh Amendments, the Appointments Clause, and the major questions and nondelegation doctrines.

Additionally, as noted, *supra*, both OCAHO and the Board traditionally expressed that issues concerning the general constitutionality of statutes are beyond their purview. However, the underlying basis for that assertion is questionable, and the distinction between constitutional challenges to a statute itself and challenges to the application of a statute appears untenable after

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279 (1996) (concluding that 19 U.S.C. § 2171(b)(3) [now 19 U.S.C. § 2171(b)(4)] is unconstitutional). Whether the Board's view of its own authority on this point is correct is beyond the scope of this PM; however, at the least, the issue may not be as clear-cut as the Board has opined.

[4] To be sure, the Board has not always been consistent in adhering to this distinction. Thus, even if it has not been superseded by *Elgin*, the Board may be well-served to clarify its views on both facial and as-applied challenges to a statute.

[5] It is clear that EOIR adjudicators cannot consider structural constitutional challenges to their own existence, which they cannot remedy. *See generally Carr*, 593 U.S. at 94. However, unlike the situation in *Carr*, there are no obvious structural constitutional challenges applicable to EOIR at the present time that an EOIR adjudicator or the Attorney General acting under 8 C.F.R. § 1003.1(h) or 28 C.F.R. § 68.55 could not remedy. Moreover, even if EOIR could not consider such a structural constitutional challenge in the first instance, it would nevertheless be bound to apply any circuit court or Supreme Court precedent that had addressed such a challenge. In such cases, EOIR would not be deciding the constitutional challenge *per se*; rather, it would simply be applying established precedent, just as it does in all other cases.

Elgin. Moreover, there is no obvious rationale as to why EOIR can decide issues involving the application of the First, Fourth, Fifth, or Eleventh Amendments (or other constitutional provisions), but cannot decide issues when those provisions apply to statutes.[6] Indeed, debate over this question has percolated for many years, but has failed to persuasively support EOIR's position:

> Is there anything about decisions on the validity of statutory provisions which requires that they may not be consigned initially to an agency even though questions of law generally may be so consigned? An affirmative answer seems difficult to justify for a number of reasons. Certainly nothing in the text supports such a distinction. And, from both a functional and a constitutional perspective, it is difficult to distinguish between the myriad legal questions with substantial constitutional components that agencies already decide and the kinds of decisions on the validity of statutes urged here. It is, for example, quite clear that legislative courts can decide the constitutionality of statutes. The Tax Court, while it was "an agency in the executive branch," frequently did so. And many agencies decide due process claims, consider constitutional objections to proposed rules and other administrative actions, rule on whether state statutes are preempted by federal legislation, determine whether a provision may constitutionally be applied to a particular set of facts, and construe statutes to avoid constitutional questions. If the availability of judicial review is adequate to meet constitutional objections to these kinds of agency decisions, there is no reason that it would not be equally adequate for decisions on the validity of statutes.

The Authority of Administrative Agencies to Consider the Constitutionality of Statutes, 90 HARV. L. REV. 1682, 1687-88 (1977).

To be clear, this PM cannot—and does not purport to—alter any precedent issued by an EOIR adjudicator. Moreover, nothing in this PM affects EOIR's precedent that adjudicators may consider constitutional issues related to the application of a statute in a particular case. *See*, *e.g.*, *Church Scientology Int'l*, 19 I&N Dec. at 603 ("Of course, the Service cannot pass upon the constitutionality of the statute it administers. Nevertheless, we can address questions relating to the constitutionality of its application."). Further, adjudicators should always be mindful of situations in which Supreme Court precedent may have superseded EOIR precedent, as the former clearly controls when there is a conflict. Thus, adjudicators should continue to adhere to EOIR precedents, unless there is a legal basis for not doing so (*e.g.*, distinguishability or inapplicability to the case, superseded or abrogated by binding circuit court or Supreme Court authority, or unconstitutionality).

IV. Conclusion

EOIR adjudicators are fully competent to decide most constitutional issues arising in EOIR proceedings and have done so for decades. As such issues become more common in EOIR proceedings, and the proliferation of such issues generates more case law, adjudicators should

[6] These same considerations would also apply to constitutional or lawfulness questions regarding EOIR regulations. *Cf.* PM 25-29, Cancellation of Director's Memorandum 22-03 (Apr. 18, 2025) (raising serious questions regarding the constitutionality or lawful basis of a recent EOIR rulemaking).

ensure they are applying and adhering to the most appropriate interpretations in all cases that come before them.

This PM is not intended to, does not, and may not be relied upon to create, any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Nothing herein should be construed as mandating a particular outcome in any specific case. Nothing in this PM limits an adjudicator's independent judgment and discretion in adjudicating cases or an adjudicator's authority under applicable law.

Please contact your supervisor if you have any questions.