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Safeguards for Mentally Disabled Respondents in Removal Proceedings

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— Note —

SAFEGUARDS FOR MENTALLY DISABLED RESPONDENTS IN REMOVAL PROCEEDINGS*

Christina P. Greer†

"No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court."[1]

"How can we determine removability, availability of relief, and discretionary determinations if one side is physically present but not all there?"[2]

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1. Massey v. Moore, 348 U.S. 105, 108 (1954).

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INTRODUCTION

On December 9, 2008, an immigration judge in Atlanta, Georgia, ordered Mark Lyttle removed to Mexico.[3] Nine days later, Immigration and Customs Enforcement (ICE) put Mr. Lyttle on a plane to Hidalgo, Texas, transported him to the border, and forced him to cross into Mexico on foot.[4] On December 26, Mr. Lyttle returned to the border and told the US Border Patrol agents that he was from North Carolina.[5] He had nothing to prove his claim because he was removed without any identification documents.[6] The agents noted that Mr. Lyttle appeared "mentally unstable" and threatened to hurt himself.[7] When they proceeded to interrogate him in Spanish, he did not respond.[8] Because he was unable to prove his immigration status in their country, Mexican authorities deported Mr. Lyttle to Honduras.[9] In Honduras, he was placed in an immigration camp where guards subjected him to mental and physical abuse until a media campaign highlighting his harsh treatment led to his release.[10] Mr. Lyttle was soon arrested in Nicaragua for not being able to show immigration status and deported to Guatemala.[11]

The events above are particularly troubling considering that Mr. Lyttle is a US citizen.[12] He was born in North Carolina to parents of

3. Lyttle v. United States, No. 4:11-CV-152 (CDL), 2012 WL 1108861 at *6 (M.D. Ga. Mar. 31, 2012); Kristin Collins, *N.C. Native Wrongly Deported to Mexico*, CHARLOTTE OBSERVER (Aug. 30, 2009), http://www.charlotteobserver.com/2009/08/30/917007/nc-native-wrongly-deported-to.html.

4. *Lyttle*, 2012 WL 1108861 at *6.

5. *Id.* at *7.

6. Collins, *supra* note 3.

7. *Id.*

8. *Lyttle*, 2012 WL 1108861 at *7.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at *8.

Puerto Rican descent.[13] He and three of his siblings were taken from their birth parents when Mr. Lyttle was seven years old, and he was adopted by a North Carolina couple.[14] Mr. Lyttle does not speak Spanish and suffers from mental illness.[15]

In September 2008, before his first removal, Mr. Lyttle was serving a 100-day sentence in a North Carolina prison for misdemeanor assault for inappropriately touching an orderly at a mental facility where he was receiving treatment.[16] Near the end of his sentence, the prison notified ICE that Mr. Lyttle allegedly reported his place of birth as Mexico during booking.[17] To the contrary, Mr. Lyttle's Department of Homeland Security (DHS) file contained information indicating he was a US citizen.[18] Despite their contact information being present in his file, Mr. Lyttle's parents were not contacted.[19] During this time, Mr. Lyttle never had an attorney.[20] From his removal in December 2008 until he found the US Embassy in Guatemala City in April 2009, Mr. Lyttle was without medication for his mental illness and suffered from cycles of mania and depression.[21]

The US Embassy in Guatemala City located Mr. Lyttle's brother, a member of the US armed forces, who submitted Mr. Lyttle's adoption papers, allowing the Embassy to issue Mr. Lyttle a US passport.[22] On April 22, 2009, upon his attempt to reenter the United States by plane to Nashville, Tennessee, Mr. Lyttle was stopped by customs agents who believed his passport was fake.[23] Without attempting to contact Mr. Lyttle's family or verify his claim to US citizenship, the agents issued an expedited removal order against him.[24] When Mr. Lyttle did not show up at the airport, his family hired an attorney who located him in Atlanta, Georgia, where he was detained awaiting removal yet again.[25]

13. Andria Simmons, *North Carolina Man Sues Over Deportation*, ATLANTA JOURNAL-CONSTITUTION (Oct. 14, 2010), http://www.ajc.com/news/north-carolina-man-sues-681887.html.

14. *Id.*

15. *Id.*

16. Lyttle v. United States, No. 4:11-CV-152 (CDL), 2012 WL 1108861 at *3 (M.D. Ga. Mar. 31, 2012).

17. Simmons, *supra* note 13.

18. *Lyttle*, 2012 WL 1108861 at *4.

19. Collins, *supra* note 3.

20. *See* Simmons, *supra* note 13.

21. Collins, *supra* note 3.

22. *Id.*

23. *Lyttle*, 2012 WL 1108861 at *7.

24. *Id.*

25. *Id.*

The US immigration system has "aptly been called a labyrinth that only a lawyer could navigate"[26] and a beast that is "second only to the Internal Revenue Code in complexity."[27] Despite the byzantine nature of the immigration system, only about 43 percent of individuals in removal proceedings were represented by attorneys in 2010.[28] Both noncitizens and individuals claiming US citizenship have a statutory right to legal representation, but counsel must be obtained "at no expense to the government,"[29] and detained individuals must overcome significant hurdles when attempting to procure or work with an attorney.[30] The ICE Health Services Corps (formerly called the Department of Immigration Health Services), the division of DHS responsible for providing healthcare services to immigration detainees, indicates that approximately 15 percent of individuals in immigration detention—about 4,500 of the 33,000 individuals detained on any given day—suffer from a mental disability.[31] Many are unable to obtain legal representation or,

26. Biwot v. Gonzalez, 403 F.3d 1094, 1098 (9th Cir. 2005).

27. Baltazar-Alcazar v. INS, 386 F.3d 940, 948 (9th Cir. 2004); *see also* Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010); Dan Kowalski, *The Shape of Immigration Reform: It's Not about Votes*, HUFFINGTON POST (Dec. 17, 2012, 11:31 AM), http://www.huffingtonpost.com/dan-kowalski/the-shape-of-immigration-_b_2311835.html ("The Immigration and Nationality Act (INA) is a beast, comprising hundreds of pages of law and thousands of pages of regulations. Maneuvering it occupies over 11,000 working immigration lawyers and untold thousands of federal employees at ICE, CBP, USCIS, DOL, DOJ and the State Department.").

28. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2010 STATISTICAL YEAR BOOK G1 (2011). This figure includes individuals represented by attorneys or by other individuals, including Board of Immigration Appeals-accredited representatives. *Id.*

29. 8 U.S.C. § 1229a(b)(4)(A) (2006); 8 U.S.C. § 1362 (2006). ICE agents and immigration judges are required by regulation to advise individuals of their constitutional right to an attorney and provide them a list of free legal providers that they may contact. 8 U.S.C. § 1362 (2006); 8 C.F.R. §§ 287.3(c), 1240.10(a)(1) (2012). When an immigration judge fails to fulfill these requirements, that failure can constitute "reversible error" because the right to counsel concerns "fundamental notions of fair play underlying the concept of due process." Picca v. Mukasey, 512 F.3d 75, 78 (2d Cir. 2008) (quoting Montilla v. INS, 926 F.2d 162, 168 (2d Cir. 1991)).

30. *See, e.g.*, Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 542-43 (2009).

31. Dana Priest & Amy Goldstein, *Suicides Point to Gaps in Treatment*, WASH. POST (May 13, 2008), http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_d3p1.html (citing memoranda stating that in 2008, approximately 15 percent of detainees had a mental disability). In FY 2010, ICE recorded a total of 57,982 mental health interventions for detainees in DIHS (Department of Immigration Health Services) care, or approximately 25 percent of the total number of DIHS intake screenings for the same year. *Fact Sheet: ERO – Detainee Health*

like Mr. Lyttle, are pressured into accepting removal without an attorney present.[32]

This Note discusses the difficulties mentally disabled[33] individuals face in the immigration system and argues for a different approach to assist respondents, government attorneys, and immigration judges in protecting the rights of this vulnerable population until a right to appointed representation is gained through legislation or litigation. Part I of this Note examines the problems faced by unrepresented mentally disabled individuals in the US immigration system, including inadequate treatment and difficulties in accessing legal representation. Part II discusses the current legal protections for the mentally disabled in removal proceedings. Part III lays out the core arguments and recommendations of this Note: first, that immigration authorities must be trained regarding mental health and mental competency issues; second, that mentally disabled individuals must be identified early and must not be allowed to agree to their own removal; third, that mental health checks be required for all individuals placed in removal proceedings; and fourth, that either regulations should be promulgated creating a pro bono attorney appointment system or that greater safeguards be provided by DHS and the Executive Office for Immigration Review to create a fairer system for those found to be mentally incompetent and thus unable represent themselves in their removal proceedings.

Care—FY2011, IMMIGRATION & CUSTOMS ENFORCEMENT, ENFORCEMENT & REMOVAL OPERATIONS, http://www.ice.gov/doclib/news/library/factsheets/pdf/dhc-fy11.pdf [hereinafter *ERO*].

32. Complaint and Demand for Jury Trial at 16, Lyttle v. Holder, No. 10 Civ. 03302 (N.D. Ga. Oct. 13, 2010), *available at* http://www.aclu.org/files/assets/2010-10-13-MarkLyttleComplaint-Georgia.pdf; *see, e.g.*, Andrew I. Schoenholtz & Hamutal Bernstein, *Improving Immigration Adjudications Through Competent Counsel*, 21 GEO. J. LEGAL ETHICS 55, 56 (2008); FELINDA MOTTINO, VERA INSTITUTE OF JUSTICE, MOVING FORWARD: THE ROLE OF LEGAL COUNSEL IN NEW YORK CITY IMMIGRATION COURTS 24 (2000).

33. This note uses the term "mentally disabled" to refer to individuals with a "mental impairment" as defined by the Department of Justice's (DOJ's) regulations under the Americans with Disabilities Act (ADA). 28 C.F.R. § 35.104(1)(i) (2012). This definition includes neurological disorders, "mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities" as well as conditions such as "visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, [and] multiple sclerosis." *Id.* Using the terms "mentally disabled" and "mental disability" inclusively aids in conciseness and seeks to minimize confusion that may arise from using a variety of terms and phrases.

Mentally disabled noncitizens do not have a right to remain in the United States,[34] but they are entitled to a fair hearing and the opportunity to present a defense to their removal under the Fifth Amendment.[35] Arguments abound that attorneys must be provided to the mentally disabled (or to all immigrants in removal proceedings).[36] This Note does not suggest that these arguments are ill-advised or incorrect. Rather, this Note proposes a framework for immediate regulatory change that would better protect the due process rights of unrepresented mentally disabled citizens and noncitizens in immigration proceedings while reformers continue to seek provision of counsel.

I. DETENTION AND REMOVAL OF THE MENTALLY DISABLED

The immigration law enforcement and adjudication systems in the United States are difficult to navigate, especially for the mentally disabled. These individuals find themselves handcuffed in a foreign country and thrown into a detention center without attorneys and oftentimes without mental health services. DHS reports that approximately 15 percent of individuals in immigration detention are mentally disabled.[37] Although the US Constitution guarantees due process rights to these detainees,[38] they often find obtaining representation and receiving a fair hearing difficult, if not impossible.

34. Since 1882, laws have excluded individuals with certain mental and physical disabilities from entering the United States. In 1882, Congress forbid the landing of any "lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge." An Act to Regulate Immigration, ch. 376, § 2, 22 Stat. 214 (1882). Currently, anyone found "to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others" is ineligible for a visa to the United States. 8 U.S.C. § 1182(a)(1)(A)(iii)(I) (2006).

35. Denko v. INS, 351 F.3d 717, 726 (6th Cir. 2003) (quoting Reno v. Flores, 507 U.S. 292, 306 (1993)).

36. *See, e.g.*, Alice Chapman, *Hearing Difficult Voices: The Due-Process Rights of Mentally Disabled Individuals in Removal Proceedings*, 45 NEW ENG. L. REV. 373, 386-87 (2011); Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1629-30 (2010); LaJuana Davis, *Reconsidering Remedies for Ensuring Competent Representation in Removal Proceedings*, 58 DRAKE L. REV. 123, 158 (2009); Beth J Werlin, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393, 394 (2000); David A. Robertson, Comment, *An Opportunity to Be Heard: The Right to Counsel in a Deportation Hearing*, 63 WASH. L. REV. 1019, 1020 (1988).

37. Priest & Goldstein, *supra* note 31.

38. *See* Demore v. Kim, 538 US 510, 523 (2003).

A. The Immigration Enforcement System

From 1940 until DHS was created in 2002, the majority of immigration enforcement and adjudication authority rested with the US Attorney General.[39] The Immigration and Naturalization Service (INS), an agency under the Department of Justice (DOJ), was responsible for administering most of the immigration laws relating to immigration law enforcement, administrative adjudication, and deportation.[40]

The Homeland Security Act of 2002 divided these responsibilities by relieving the DOJ of the enforcement and service functions (including application processing) and creating two new agencies—one for enforcement and one for application processing and adjudication.[41] President George W. Bush, exercising authority provided by the Homeland Security Act, instead created three agencies: (1) the US Bureau of Customs and Border Protection (CBP); (2) ICE;[42] and (3) the Bureau of Citizenship and Immigration Services (USCIS).[43] The CBP operates at the US borders and other ports of entry, while ICE operates within the country and provides the trial attorneys who act as prosecutors within the immigration courts.[44] Administrative adjudication responsibilities remain with the DOJ under the Executive Office for Immigration Review (EOIR).[45] The EOIR consists of the Immigration Courts and an appellate body called the Board of Immigration Appeals (BIA).[46]

Removal, formerly called "deportation,"[47] generally occurs by order of an immigration judge[48] or by the consent of the individual facing

39. STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 2 (5th ed. 2009).

40. *Id.*

41. 6 U.S.C. §§ 252, 271 (2006).

42. LEGOMSKY & RODRIGUEZ, *supra* note 39, at 3; Name Change From the Bureau of Immigration and Customs Enforcement to U.S. Immigration and Customs Enforcement, and the Bureau of Customs and Border Protection to U.S. Customs and Border Protection, 72 Fed. Reg. 20,131, 20,131 (Apr. 23, 2007).

43. 6 U.S.C. § 271 (2006); Name Change From the Bureau of Citizenship and Immigration Services to U.S. Citizenship and Immigration Services, 69 Fed. Reg. 60,938, 60,938 (Oct. 13, 2004).

44. *Border Reorganization Fact Sheet*, U.S. DEP'T OF HOMELAND SECURITY (Jan. 30, 2003), *screenshot available at* http://www.lb9.uscourts.gov/webcites/09documents/Juvenile_factsheet.pdf.

45. 6 U.S.C. § 522 (2006).

46. *See generally* 8 C.F.R. §§ 1003.1, 1003.9 (2012) (describing the organization of the EOIR).

47. Before 1996, individuals apprehended at a port of entry were subject to "exclusion" proceedings whereas those who had already entered, legally or illegally, were subject to deportation proceedings. The Illegal Immigration

removal.[49] Immigration judges are administrative judges, formerly called "special inquiry officers,"[50] who are not provided the same protections or independence as Article III or administrative law judges.[51] Generally, there are three ways individuals find themselves facing removal. First, CBP apprehends individuals attempting to enter the United States without proper documentation at a port of entry as well as undocumented individuals within a 100-mile radius of our international borders.[52] Second, ICE apprehends individuals that come to the Department's attention through enforcement actions, the ICE tip line, or through denial of relief. Third, local law enforcement agencies notify ICE of potential immigration-law violators after apprehending them for another reason (most often traffic violations) or after the end of a prison sentence.[53] Once an individual is in custody, a DHS or ICE agent inquires into her citizenship or residency status to determine if she is attempting to enter, has entered, or is present in violation of the law.[54] If the officer believes there is a *prima facie* case establishing that the individual is not authorized to be in the United States, then the case is referred to an immigration judge and removal proceedings are initiated.[55]

B. Stipulated Removal

Since 2004, DHS has increasingly relied on "stipulated removal," by which individuals apprehended by immigration authorities agree to removal without a hearing before an immigration judge.[56] Under this process, individuals are generally removed and released to their home countries within a week rather than waiting weeks in detention for a

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Reform and Immigrant Responsibility Act (IIRIRA) of 1996 merged "exclusion" and "deportation" proceedings into the all-encompassing "removal" proceedings. 8 U.S.C. §§ 1229(a)-(c) (2006).

48. § 1229a(c)(1)(A).

49. § 1229a(d).

50. Garcia-Garcia, 25 I. & N. Dec. 93, 97 n.4 (BIA 2009).

51. PAUL R. VERKUIL ET AL., THE FEDERAL ADMINISTRATIVE JUDICIARY, 1992 A.C.U.S 789, 852-53 (1992) *available at* http://ia600306.us.archive.org/20/items/gov.acus.1992.rec.2/adminconf199202unse.pdf.

52. LEGOMSKY & RODRIGUEZ, *supra* note 39, at 503, 649 n.3.

53. *Id.* at 649.

54. 8 C.F.R. § 287.3(b) (2012).

55. *Id.*

56. Jayashri Srikantiah & Karen Tumlin, *Backgrounder: Stipulated Removal*, STANFORD L. SCHOOL 1, http://www.law.stanford.edu/sites/default/files/child-page/163220/doc/slspublic/Stipulated_removal_backgrounder.pdf (last visited Jan. 19, 2013).

hearing.[57] More than 160,000 stipulated removal orders have been entered over the past decade.[58] Of grave concern is that by signing these orders, individuals who may be eligible to remain in the United States will agree to removal. Individuals removed by the US government pursuant to a stipulated order are barred from reentering the United States for five to ten years and forfeit eligibility for any relief that may have allowed them to remain in the United States.[59] Immigrants in criminal proceedings must be advised of the collateral immigration consequences of guilty pleas and convictions,[60] and individuals must sign stipulated removal orders "*voluntarily*, *knowingly*, and *intelligently.*"[61] Nevertheless, DHS or ICE agents are not required to provide advice about the ramifications of stipulating to removal.[62] About 95 percent of individuals who agreed to stipulated removal between 1999 and 2008 did not have legal representation and, therefore, never received adequate legal advice regarding their potential ability to remain in the United States.[63] Although an immigration judge must sign the stipulated order, the individual does not appear before the judge unless the judge requires it.[64] Therefore, nothing guarantees that the individual stipulating to removal is mentally competent to sign away his right to a fair hearing or is, in fact, signing the order voluntarily, knowingly, and intelligently.[65]

In September 2011, the National Immigration Law Center published a report regarding documents related to stipulated removal obtained from ICE, the CBP, and the EOIR through litigation under the Freedom of Information Act.[66] These documents reveal that individuals held in mental institutions were allowed to stipulate to removal despite the requirement that individuals must do so voluntarily, knowingly, and intelligently.[67] A document dated February 10, 2006, by the Baltimore

57. JENNIFER LEE KOH ET AL., DEPORTATION WITHOUT DUE PROCESS 11 (2011), *available at* http://www.stanford.edu/group/irc/Deportation_Without_Due_Process_2011.pdf.

58. *Id.* at 1.

59. *Id.* at 4; 8 U.S.C. § 1182(a)(9)(A) (2006).

60. Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010).

61. 8 C.F.R. § 1003.25(b)(6) (2012) (emphasis added).

62. KOH ET AL., *supra* note 57, at 2-3.

63. Srikantiah & Tumlin, *supra* note 56, at 2-3. Figures demonstrating the number of individuals removed by stipulation who otherwise would have qualified for relief from removal are unknown.

64. 8 U.S.C. § 1229a(d) (2006); 8 C.F.R. § 1003.25(b) (2012).

65. 8 C.F.R. § 1003.25(b)(6) (2012).

66. KOH ET AL., *supra* note 57, at 1.

67. Chief Counsel Offices Responses: Stipulated Removal Process (Feb. 10, 2006) (ICE.08-1450(13).000223).

Chief Counsel indicated that the ICE office in Baltimore used stipulated removal for "aliens who have been found not criminally responsible and who are detained at a state mental institution."[68]

Questions have also arisen regarding immigration agents coercing individuals into signing stipulated orders to avoid long detentions while awaiting adjudication. For example, in his civil suit arising from his mistaken removal, Mr. Lyttle alleges that ICE agents coerced and manipulated him into waiving a hearing and assenting to removal despite evidence of his US citizenship and mental disability.[69] Detainees have reported being pressured by ICE agents to sign stipulated removal orders,[70] and ICE's own internal documentation suggests that coercion in fact occurs[71] although barred by regulation.[72]

Until recently, judicial review of stipulated orders did not exist. A stipulated order is a legally enforceable order of removal.[73] By signing a stipulated order, an individual waives his right to a hearing on that removal as well as judicial review in most cases.[74] If the individual returns to the United States and again faces removal or criminal

68. *Id.*

69. Complaint and Demand, *supra* note 32, at 16.

70. Srikantiah & Tumlin, *supra* note 56, at 1.

71. *See, e.g.*, *Stipulated Orders: A Primer*, STANFORD L. SCHOOL, http://www.stanford.edu/group/irc/ICE/ICE-08-1450-1.pdf (last visited Jan. 19, 2013) (document from a York, Pennsylvania, ICE office instructing agents to "NOT convince or coerce an alien to sign a stipulated order"); Email from Redacted Sender to Redacted Recipients (May 5, 2006), *available at* http://www.stanford.edu/group/irc/ICE/ICE-08-1450-1.pdf ("DO NOT 'push' this on the aliens. You must ascertain that the subject indeed wants to go home, and will not be applying for VD, claims no Asylum related issues, etc."); *Improving Efficiency and Ensuring Justice in the Immigration Court System: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2010) (statement of Julie Myers Wood, Former Assistant Sec'y, ICE), *available at* http://www.judiciary.senate.gov/pdf/5-18-11%20Wood%20Testimony.pdf.

72. 8 C.F.R. § 287.8(c)(2)(vii) (2012).

73. 8 U.S.C. § 1326(d) (2006).

74. *See id.* A motion to reopen the removal proceedings may be filed with the immigration court within ninety days of the order. 8 C.F.R. § 1003.23(b) (2012). After ninety days, the individual must file a motion to reopen requesting that the immigration judge reopen the proceedings sua sponte. 8 C.F.R. §§ 1003.2(d), 1003.23(b). Motions to reopen may not be filed by individuals who have already departed the United States whether through removal or on their own. *Id.* A few circuits have found this "departure bar" unlawful, and the debate continues in the federal courts as to the legal soundness of this prohibition. *See* Beth Werlin & Trina Realmuto, *Departure Bar to Motions to Reopen and Reconsider: Legal Overview and Related Issues*, NAT'L IMMIGR. PROJECT 1-2 (Mar. 14, 2012), http://www.nationalimmigrationproject.org/legalresources/cd_3-14-2012-Departure-Bar-Practice-Advisory.pdf.

sanctions, then he can challenge the prior removal by showing: "(1) exhaustion of any available administrative remedies; (2) improper deprivation of judicial review in the underlying removal proceedings; and (3) prejudice."[75] Because the individual agreed to the underlying removal order, he would find it nearly impossible to demonstrate deprivation of judicial review. Thus, stipulated orders are effectively kept from judicial review.

In 2007, the US Court of Appeals for the Ninth Circuit decided *United States v. Nungaray-Rubalcaba*, finding that a stipulated order of removal could not be used as an element for a conviction if the INS (now ICE) did not inform the immigrant of the potential relief he could seek in immigration court.[76] The court reasoned that the defendant was "improperly deprived of judicial review and denied due process in the underlying removal proceeding, because his waiver of a hearing through a written stipulation for removal was not considered and intelligent."[77] Since *Nungaray-Rubalcaba*, the Ninth Circuit has consistently held that an immigrant's decision to sign an order stipulating removal is not "considered or intelligent" if she was not informed of the potential forms of relief she could pursue in court.[78] Unfortunately, this form of review only arises where the individual fights a charge of illegal re-entry after a previous removal. These orders are not reviewed as they are processed.

At the Eloy, Arizona, detention facility, the stipulated removal program is limited to citizens of Mexico who have been in the United States for less than ten years and are charged with illegal entry; no further inquiry is made into potential relief (which may be available in

75. 8 U.S.C. § 1326(d) (2006).

76. United States v. Nungaray-Rubalcaba, 229 F. App'x 436, 439 (9th Cir. 2007).

77. *Id.* at 438 (citing United States v. Ubaldo-Figueroa, 364 F.3d 1042, 1048 (9th Cir. 2004)).

78. The line of cases leading to *Ningaray-Rubalcaba* began with *United States v. Lopez-Vasquez*, where the Ninth Circuit held that a mass silent waiver of judicial review of one's removal order violates due process. 1 F.3d 751, 754 (9th Cir. 1993). "Courts should 'indulge every reasonable presumption against waiver,' and they should 'not presume acquiescence in the loss of fundamental rights.'" *Id.* (citing Barker v. Wingo, 407 U.S. 514, 525 (1972)). The Ninth Circuit extended this idea in *United States v. Ubaldo-Figueroa*, holding that "[a]n alien can not [sic] make a valid waiver of his right to appeal a removal order if an IJ does not expressly and personally inform the alien that he has the right to appeal." 364 F.3d at 1049. The court stated "[w]e do not consider an alien's waiver of his right to appeal his deportation order to be 'considered and intelligent' when 'the record contains an inference that the petitioner is eligible for relief from deportation,' but the Immigration Judge fails to 'advise the alien of this possibility and give him the opportunity to develop the issue.'" *Id.* at 1049-50 (quoting United States v. Muro-Inclan, 249 F.3d 1180, 1182 (9th Cir. 2001)).

some cases).[79] In *United States v. Ramos*, the Ninth Circuit describes in detail the stipulated removal process at Eloy. When detainees arrive at the facility, the agents review their Alien Registration Forms and choose individuals to whom they will offer the stipulated removal program.[80] The ICE agents conduct a group meeting with the selected individuals[81] and explain that those who accept a stipulated order will be removed to Mexico and released within days or hours.[82] The agents advise the detainees that they can instead wait weeks to go before an immigration judge to request voluntary departure or seek other forms of permanent immigration benefits such as asylum or legal permanent residency.[83] The agents explain neither the severe consequences of removal nor the potential benefits of accepting voluntary departure.[84] The detainees then meet individually with the agents without an attorney or interpreter.[85] The ICE agent verifies the individual's identity and asks whether he "want[s] to have a court hearing or whether [he] want[s] to be deported that day," again without discussing alternative forms of relief.[86] This meeting is conducted in Spanish for those who do not speak English, though not all ICE agents speak the language fluently enough to be understood, some having only attended a few classes in the language.[87] The respondent in *Ramos* went through this process and signed the order.[88] That order was given to the immigration judge who signed it

79. United States v. Ramos, 623 F.3d 672, 678 (9th Cir. 2010).

80. *Id.*

81. *Id.*

82. *Id.*

83. *See id.* at 677-78.

84. *See id.* A grant of voluntary departure (VD) permits an individual to leave the United States (at his own expense) within a short period of time (up to 120 days). 8 U.S.C. §§ 1229c(a)(1), (a)(2)(A) (2006). Those who timely leave are not considered "removed" and so would not have to request special permission to reenter if able to do so lawfully in the future. § 1182(a)(9). Such permission to reapply for admission requires that applicants warrant a favorable exercise of discretion by DHS (reentry may still be barred under other provisions). Anyone can request VD before the removal proceedings are initiated as long as she is not charged with removability for terrorist activities or an aggravated felony conviction. § 1229c(a)(1). If requested after proceedings have completed and the individual has been found removable, then he must satisfy additional requirements to qualify for VD. § 1229c(a)(2).

85. *Ramos*, 623 F.3d at 678.

86. *Id.* (quoting a deportation officer's testimony from an evidentiary hearing held by the district court).

87. *Id.*

88. *Id.* at 677.

without seeing Ramos and ordered him removed.[89] The immigration judge found that

> [i]n his stipulation, respondent states that he understands the consequences of his request and that he has entered his request voluntarily, knowingly, and intelligently. The Court finds the alien's waiver to be voluntary, knowing, and intelligent . . . . The court therefore, finds upon review of the charging document and the written stipulation that he is removable based upon clear and convincing evidence in the form of his own admissions. Respondent makes no application for relief from removal but instead requests an order removing him from this country as soon as possible.[90]

Ramos was in Mexico that evening.[91]

C. Mental Health Services in Immigration Detention Facilities

If not removed by stipulation, mentally disabled individuals often find immigration detention harsh and do not receive adequate physical and mental health services. In the Immigration and Nationality Act (INA), the statutory framework of the US immigration legal system, the only reference to mental health services states that mental health screening may be necessary for aliens arriving at ports of entry.[92] There is no statutory right or privilege to mental health services for individuals detained at facilities within the United States. The ICE Health Service Corps determines the treatment available to detainees through unenforceable policy statements.[93] ICE internal policies regarding health services are defined in the *Operations Manual ICE Performance-Based National Detention Standards* (PBNDS).[94] These standards provide that all detainees shall be evaluated at intake to determine whether they have any mental or physical health problems.[95] Each facility should have: a mental health program that provides intake screening; referral services

89. *See id.* at 679.

90. *Id.*

91. *Id.*

92. 8 U.S.C. § 1222(b) (2006).

93. *ICE Health Service Corps*, DEP'T OF HOMELAND SECURITY, http://www.icehealth.org (last updated January 11, 2010); NAT'L IMMIGRATION LAW CTR. ET AL., A BROKEN SYSTEM: CONFIDENTIAL REPORTS REVEAL FAILURES IN U.S. IMMIGRANT DETENTION CENTERS 5 (2009), *available at* http://www.nilc.org/document.html?id=9.

94. *2008 Operations Manual ICE Performance-Based National Detention Standards (PBNDS)*, DEP'T OF HOMELAND SECURITY, http://www.ice.gov/detention-standards/2008/ (last visited Jan. 20, 2013).

95. DEP'T OF HOMELAND SECURITY, ICE/DRO DETENTION STANDARD: MEDICAL CARE 2 (2008), http://www.ice.gov/doclib/dro/detention-standards/pdf/medical_care.pdf.

for evaluation, diagnosis, treatment, and monitoring of mental illness; crisis intervention; transfer to mental health facilities when necessary; and a suicide prevention program.[96] The manual instructs staff to refer any detainee with mental health needs to a mental health provider for evaluation, which includes taking the individual's health history and determining current suicidal or homicidal ideation or intent, current intellectual function, and current medications.[97] The health screening should conclude with a recommendation about "appropriate treatment," which includes such options as: "[r]emain[ing] in general population with psychotropic medication and counseling"; transferring to a "'[s]hort-stay' unit[,] infirmary, [or] Special Management Unit"; or "[c]ommunity hospitalization."[98]

When detainees are referred for mental health treatment, they are to receive a comprehensive evaluation within fourteen days.[99] The provider is to develop a treatment plan that may include transferring the individual to a mental health facility if the individual's needs exceed the facility's capabilities.[100] The PBNDS also states that "[t]he health administrative authority/clinical medical authority shall ensure due process in compliance with applicable laws."[101] While the manual states that the facility should seek the individual's consent to medical care,[102] there is no mention of the role the individual plays in determining treatment options.

Though these policies are in place, they are not binding on DHS and do not confer any guarantee of the care described.[103] Efforts to make the PBNDS binding have met with resistance[104] despite increasing public awareness of the conditions in immigration detention.[105]

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96. *Id.*

97. *Id.* at 14.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 19.

103. *Justice for Immigration's Hidden Population: Protecting the Rights of Persons with Mental Disabilities in the Immigration Court and Detention System*, TEXAS APPLESEED 11 (March 2010), http://www.texasappleseed.net/index.php?option=com_docman&task=doc_download&gid=313.

104. *See* Letter from Jane Holl Lute, Deputy Secretary, U.S. Department of Homeland Security, to Michael Wishnie, Clinical Professor of Law, Yale Law School, & Paromita Shah, Associate Director, National Immigration Project of the National Lawyers Guild (July 24, 2009), *available at* http://www.clearinghouse.net/chDocs/public/IM-NY-0045-0004.pdf.

105. DHS has been found violating its own PBNDS. *See, e.g.*, U.S. DEP'T OF HOMELAND SECURITY, OFFICE OF THE INSPECTOR GENERAL, TREATMENT

According to ICE, each detainee "undergoes a health screening within the first 12 hours of admission to an ICE detention facility" and "receive[s] a more detailed physical examination within 14 days of admission to a facility."[106] ICE reports that during Fiscal Year 2011, the Department conducted 231,367 intake screenings; 110,680 physical exams; 160,663 sick calls; 14,957 urgent care visits; 16,819 emergency room/off-site referrals; 34,523 dental visits; 57,982 mental health interventions; 129,549 chronic disease interventions; and 337,293 prescription fillings.[107] ICE also reports that all its detention facilities have arrangements with local healthcare providers to care for detainees with health problems that cannot be addressed by the detention facility.[108]

Despite the standards and statistics cited above, there are many documented cases in which detainees' mental health has suffered from denial of mental health services. Xiu Ping Jiang is a Chinese immigrant with a history of mental illness who fled from her home country after forced sterilization.[109] She was ordered removed after the immigration judge became angry with her for not waiting to answer until the interpreter finished asking her a question.[110] She discussed her fear of returning to China and seemed to threaten suicide if removed by saying, "Sir, I not—cannot go home . . . . If I die, I die America."[111] Chinese females forcibly sterilized for violating China's one-child policy are statutorily presumed to have experienced past persecution and are therefore statutorily eligible for asylum.[112] Despite her eligibility to

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OF IMMIGRATION DETAINEES HOUSED AT IMMIGRATION AND CUSTOMS ENFORCEMENT FACILITIES (2006), *available at* http://www.oig.dhs.gov/assets/Mgmt/OIG_07-01_Dec06.pdf. Between October 2003 and December 2011, DHS reports that 127 individuals died in immigration detention. HEALTH SERVICE CORPS, IMMIGRATION & CUSTOMS ENFORCEMENT, LIST OF DEATHS IN ICE CUSTODY, *available at* http://www.ice.gov/doclib/foia/reports/detaineedeaths2003-present.pdf (last visited Jan. 20, 2013). 15 of 83 deaths between 2003 and May 2008 were suicides. Priest & Goldstein, *supra* note 31.

106. *ERO*, *supra* note 31, at 1.

107. *Id.*

108. *Id.* at 2.

109. Nina Bernstein, *Mentally Ill and in Immigration Limbo*, N.Y. TIMES (May 3, 2009), http://www.nytimes.com/2009/05/04/nyregion/04immigrant.html?scp=1&sq=mentally%20ill%20limbo&st=cse.

110. *Id.*

111. *Id.*

112. Forced sterilization establishes past persecution on the basis of political opinion for the purposes of establishing eligibility for asylum. 8 U.S.C. § 1101(a)(42)(B) (2006). Establishing past persecution gives rise to a rebuttable presumption of future persecution; DHS must then show that

remain in the United States legally, the immigration judge ordered Ms. Jiang removed as if she failed to appear because he was angered at her inability to wait for the interpreter.[113] Ms. Jiang spent over a year in detention fighting her removal.[114] When Ms. Jiang's sister finally found her, she did not recognize her; after spending most of her detention in solitary confinement where she was denied mental health services, Ms. Jiang left the detention center emaciated.[115]

Along with the increase in privately owned prison facilities in the United States, the care of mentally disabled detainees by private security corporations has increased.[116] Many of these facilities have been accused of abuse and neglect.[117] Immigration judges often continue cases in hopes that the individual regains competency or obtains counsel, extending the amount of time the individual is potentially denied mental health services.[118] Coupled with the non-binding nature of mental health service guidance and lack of statutory or constitutional requirements to provide such care,[119] continuing cases for the purpose of restoring mental competency or attaining counsel may counterintuitively impair efforts by immigration judges to ensure fairness in proceedings for mentally disabled individuals. Although legislation is currently pending in

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the individual's or the country's conditions have changed to the point that there is not a reasonable fear of future persecution. 8 C.F.R. § 1208.13(b)(1) (2012). However, in the case of women who have been forcibly sterilized pursuant to China's one-child policy or subjected to female genital mutilation, the past persecution is considered to be so gruesome that, even though the harm is unrepeatable and there may be no reasonable fear of future persecution, she should not have to return to the place where that persecution took place. X-P-T-, 21 I. & N. Dec. 634, 636 (BIA 1996); Kasinga, 21 I. & N. Dec. 357, 365 (BIA 1996).

113. Bernstein, *supra* note 109.

114. *Id.*

115. *Id.* Ultimately, Ms. Jiang was granted asylum from China. Nina Bernstein, *Judge Grants Asylum to Chinese Immigrant*, N.Y. TIMES (May 17, 2010), http://cityroom.blogs.nytimes.com/2010/05/17/judge-grants-asylum-to-chinese-immigrant. Another immigration judge found that Ms. Jiang's well-documented mental-health history excused the late filing of Ms. Jiang's asylum application, and DHS agreed to the grant of asylum, noting that Ms. Jiang would be subject to persecution in China after the notoriety of her case. *Id.*

116. AMERICAN CIVIL LIBERTIES UNION, BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATIONS 7 (2011), http://www.aclu.org/files/assets/bankingonbondage_20111102.pdf.

117. *See id.* at 24-25.

118. M-A-M-, 25 I. & N. Dec. 474, 483 (BIA 2011).

119. ICE describes immigration detention as an "administrative custody environment." U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, DETENTION MANAGEMENT PROGRAM OVERVIEW 1 (2008), http://www.lb7.uscourts.gov/documents/08-25201.pdf.

Congress that would establish minimum standards for immigration detention,[120] these efforts have led to mockery (for example, congressional hearings entitled "Holiday on ICE") and do not appear likely to pass in the near future.[121]

D. Long-Term and Indefinite Detention

Regardless of immigration status, all people present in the United States are entitled to due process protections under the Fifth and Fourteenth Amendments.[122] The Sixth Amendments also provides remedies for individuals in removal proceedings who are ineffectively assisted by their counsel.[123] Criminal defense attorneys representing noncitizens are required to inform clients about the potential collateral consequences a guilty or no contest plea may have on one's immigration status in the United States.[124] Unlike criminal proceedings, immigration removal proceedings are civil enforcement actions also called "status determinations."[125] Detention is assumed to be a non-punitive and necessary means of ensuring an individual does not flee prior to determining removability and while awaiting removal.[126] However, when an individual has been found removable but removal is found impractical by an immigration judge, ICE may not detain the individual indefinitely.[127] To justify detention for a long period of time, ICE must show that removal is practically foreseeable or that there are special circumstances, such as terrorism charges.[128] By statute, if removal does not take place within ninety days after the removal order becomes final, then the individual must be placed under supervised release.[129] Before a decision, however, an individual may be detained for years awaiting final adjudication of her ability to remain in the United States.[130]

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120. Immigration Oversight and Fairness Act, H.R. 933, 112th Cong. §§ 2(A)-(K) (2011).

121. *AILA Denounces House Hearing; Immigration Detention is No "Holiday"*, AILA INFONET (Mar. 28, 2012), http://www.aila.org/content/default.aspx?docid=39081.

122. Yick Wo v. Hopkins, 118 U.S. 356, 368 (1886); Wong Wing v. United States, 163 U.S. 228, 238 (1896).

123. Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010).

124. *Id.*

125. VERKUIL ET AL., *supra* note 51, at 784-85.

126. Zadvydas v. Davis, 533 U.S. 678, 680 (2001).

127. *Id.*

128. *Id.*

129. *Id.*; 8 U.S.C. § 1231(a) (2006).

130. Respondents may be held indefinitely while proceedings are pending. Demore v. Kim, 538 U.S. 510, 529 (2003); *see* Contant v. Holder, 352 F. App'x 692, 695 (3d Cir. 2009) (noting that a nineteen-month detainment is

II. "PROTECTIONS" IN REMOVAL PROCEEDINGS

Individuals suffering from mental illness or mental disabilities face unique challenges not only in detention but also in immigration removal proceedings. Cognitive difficulties can prevent the mentally disabled from presenting their own defense or, if represented, from aiding in their defense. Although the INA requires safeguards for the mentally disabled in immigration proceedings,[131] the associated regulations and scant Board of Immigration Appeals (BIA) case law remain ambiguous. Prior to the May 2011 decision in *Matter of M-A-M-*, the BIA had not published a decision providing guidance to immigration judges and practitioners concerning issues of mental incompetency in immigration proceedings. Before this decision, only four cases discussing the matter were decided. In all four, the BIA found the respondents competent (despite evidence to the contrary) either because of their ability to produce documentation demonstrating their disabilities or a lack of evidence to prove their own incompetency.[132] All four of those prior cases were unpublished decisions, not binding precedent. As discussed below, the safeguards articulated by the BIA and DOJ regulations to date fail to provide any significant safeguards for the mentally disabled. Greater safeguards must be put into place for pro se respondents.

A. Before Matter of M-A-M-

The INA presents few safeguards for mentally incompetent individuals. By statute, the Attorney General must provide safeguards to protect their rights and privileges in removal proceedings when mental incompetency prevents them from physically or effectively being present during the proceedings.[133] The Attorney General, however, has provided few of these safeguards. If the individual is unable to attend the hearing

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not unreasonable when the delays were initiated by the respondent as he waited for adjudication of his application for relief); *see also* Prieto-Romero v. Clark, 534 F.3d 1053, 1062 (9th Cir. 2008) (noting a three-year detention while respondent waited for adjudication of his appeal was not unreasonable because the court held that detention is not indefinite as long as there is a "significant likelihood of removal in the reasonably foreseeable future"); Wang v. Ashcroft, 320 F.3d 130, 146 (2d Cir. 2003) ("Wang's due process rights are not jeopardized by his continued detention as long as his removal remains reasonably foreseeable. Because we have declined above to grant Wang's habeas petition based upon his CAT claim, Wang's removal is not merely reasonably foreseeable, it is imminent. Accordingly, Wang's continued detention does not violate his right to due process of law.").

131. 8 U.S.C. § 1229a(b)(3) (2006).

132. *See generally* Uchchukwuka Patience Odita, 2007 WL 4707468, at *2 (BIA 2007); S-, 2007 WL 2463933, at *2 (BIA Aug. 6, 2007); V-, 2006 WL 2008263 (BIA May 24, 2006); E-, 2003 WL 23269901, at *1 (BIA Dec. 4, 2003).

133. 8 U.S.C. § 1229a(b)(3) (2006).

because of his mental incompetence, then an "attorney, legal representative, legal guardian, near relative, or friend"[134] may appear on his behalf.[135] If the respondent appears unable to obtain counsel and has no family member able to represent him, then "the custodian of the respondent shall be requested to appear on behalf of the respondent."[136] Custodian could include the officer in charge of the detainee at the detention facility. Additionally, immigration judges cannot allow minors or mentally incompetent respondents to concede removability if they are not represented by an attorney or accompanied by a relative, legal guardian, or friend.[137] When, for reason of mental incapacity, the judge does not accept a respondent's admission of removability, "he or she shall direct a hearing on the issues."[138] These regulations have changed little since their creation in 1957.[139] Without further guidance, immigration judges' treatment of competency issues has differed greatly, varying from ignoring the issue and proceeding as normal[140] to administratively closing proceedings[141] without a decision, leaving the respondent in immigration detention indefinitely.[142]

Investigating immigration judges' responses to questions regarding competency is difficult because their opinions are not published. Although BIA opinions are either published or posted on its website, mentally incompetent individuals without attorneys generally lack the ability to appeal immigration judges' decisions to the BIA, thereby

134. *See* Whitmore v. Arkansas, 495 U.S. 149, 163-64 (1990) (noting a next friend is an individual representing the best interests of a person who is unable to be present in proceedings due to mental incompetence or disability).

135. 8 C.F.R. § 1240.4 (2012).

136. *Id.*

137. 8 C.F.R. § 1240.10(c) (2012).

138. *Id.*

139. EXEC. OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION JUDGE BENCHBOOK: MENTAL HEALTH ISSUES, *available at* http://www.justice.gov/eoir/vll/benchbook/tools/MHI/index.html (last visited Jan. 20, 2013) [hereinafter IJ BENCHBOOK].

140. Chapman, *supra* note 36, at 397.

141. First Amended Class-Action Complaint and Petition for Writ of Habeas Corpus at 4, Franco-Gonzalez, et al. v. Holder, 767 F.Supp.2d 1034 (C.D. Cal. Aug. 2, 2010).

142. Deia de Brito, *Mentally Ill Immigrants Trapped in U.S. Detention Without Attorneys*, CALIFORNIA WATCH (Feb. 17, 2012), http://californiawatch.org/health-and-welfare/mentally-ill-immigrants-trapped-us-detention-without-attorneys-14896. After the immigration judge became frustrated with continuing Mr. Canto-Ortiz's case to allow him to obtain counsel, the judge terminated proceedings, leaving Mr. Canto-Ortiz in a Santa Ana jail for five years until his family was able to get him out. *Id.*

limiting the amount of legal precedent and guidance available. Accordingly, there is little information available describing what safeguards immigration judges in fact prescribe. Accounts from practitioners, respondents, immigration judges, and litigation do provide some examples of the safeguards immigration judges have put in place for mentally incompetent respondents. Immigration judges have attempted to secure legal representation, terminated proceedings,[143] ignored the issue,[144] required DHS to conduct a competency evaluation[145] and located representation for the respondent,[146] or granted multiple continuances with the hope that the individual's mental state would improve or that she would locate an attorney.[147] Officers from the DHS Detention and Removal Office have even appeared for respondents in their custody when respondents have been unable to do so themselves.[148] Immigration judges reported difficulty in resolving these cases because of disagreements between ICE and the court as to whether hearings should take place, whether an ICE official can stand in for the respondent, and whether hearings should be conducted over televideo while the respondent is in treatment at another facility.[149] No matter the approach taken, both the ICE attorneys and immigration judges found it difficult to balance the demands of due process with few tools to use and little guidance.

B. Matter of M-A-M-

In May 2011, the BIA published its first decision giving guidance to immigration judges about how to handle competency issues in removal proceedings. In *Matter of M-A-M-*, the BIA remanded the respondent's case after finding reasons to believe that he was not competent to proceed before the immigration judge.[150] The respondent, a US lawful permanent resident from Jamaica, was charged with two crimes involving moral turpitude but was found incompetent to proceed with

143. First Amended Class-Action Complaint, *supra* note 141, at 4.

144. Chapman, *supra* note 36, at 397.

145. OFFICE OF THE CHIEF IMMIGRATION JUDGE, "BEST PRACTICES" FOR MENTALLY INCOMPETENT RESPONDENTS 1 (2010) (on file with author); *see* CAPITAL AREA IMMIGRANTS' RIGHTS COALITION, PRACTICE MANUAL FOR PRO BONO ATTORNEYS REPRESENTING DETAINED CLIENTS WITH MENTAL DISABILITIES IN IMMIGRATION COURT (2009).

146. *See id.*

147. *See* Mohamed v. Gonzales, 477 F.3d 522, 525 (8th Cir. 2007).

148. Brief for American Immigration Counsel et al. as Amici Curiae Supporting Respondent, L-T-, *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/Matter-of-L-T-9-14-10.pdf.

149. OFFICE OF THE CHIEF IMMIGRATION JUDGE, "BEST PRACTICES" FOR MENTALLY INCOMPETENT RESPONDENTS 1 (2010) (on file with author).

150. M-A-M-, 25 I. & N. Dec. 474, 484 (BIA 2011).

trial during the criminal proceedings.[151] In the subsequent removal proceedings, the respondent "had difficulty answering basic questions, such as his name and date of birth" and informed the immigration judge that he was diagnosed with schizophrenia and required medication.[152] He was not receiving treatment in detention and asked the judge to allow him to see a psychiatrist.[153] At the final hearing, the judge considered the respondent's mental health evaluations on the record.[154] Yet she allowed the hearing to proceed after the respondent stated that he "would do the best he could" to answer questions from the judge and the ICE attorney.[155] In her opinion ordering removal, the immigration judge discussed the respondent's mental health history without making a finding as to his competency.[156]

On appeal, the BIA remanded the case to the immigration judge for a finding regarding competency and announced a framework for immigration judges to follow to ensure fair proceedings for mentally disabled respondents.[157] The BIA held that "an alien is presumed to be competent to participate in removal proceedings."[158] However, when an immigration judge notices "indicia of incompetency," she must provide appropriate safeguards for protecting the rights of the individual.[159] Indicia of incompetency may include the individual's behavior, communication difficulties, evidence of incompetency in the individual's record, medical reports, and school reports.[160] Acknowledging that DHS often has such information, the BIA stated that DHS has an obligation to inform the immigration judge about any existing doubts concerning respondents' competency.[161]

The BIA looked to criminal law for guidance despite marked differences between civil immigration and criminal proceedings[162] and noted that unlike respondents in immigration proceedings, defendants in criminal proceedings are provided legal representation.[163] Moreover, while

151. *Id.* at 475.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 476.

157. *Id.* at 484.

158. *Id.* at 477; *see, e.g.*, Munoz-Monsalve v. Mukasey, 551 F.3d 1, 6 (1st Cir. 2008).

159. M-A-M-, 25 I. & N. Dec. 474, 479 (BIA 2011).

160. *Id.*

161. *Id.* at 480.

162. *Id.* at 478.

163. *Id.* at 478-79.

criminal proceedings against mentally incompetent defendants are terminated, incompetency does not automatically stop removal proceedings.[164] The opinion emphasizes that all individuals have "rights and privileges" in removal proceedings that must be safeguarded. These include the right to an attorney at no expense to the government[165] and to a "reasonable opportunity" to examine and present evidence and cross-examine witnesses.[166] The BIA then set out the following test for determining whether an individual is competent to participate in immigration proceedings:

> whether he or she has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses.[167]

Mental illness or mental disability does not always make one incompetent; however, a history of either may prompt the immigration judge to inquire into competency.

The opinion further described measures an immigration judge should take to assess competency. These include asking the respondent about the nature of the proceedings, asking questions about medications for mental illnesses, continuing the proceedings to give the individual the opportunity to obtain evidence regarding competency, or ordering DHS to complete a competency examination.[168] If the immigration judge finds that the respondent is mentally incompetent, he must institute the safeguards required by the statutes and regulations as described above.[169] The judge may also provide further safeguards by actively participating in developing the record (e.g., by seeking evidence or questioning witnesses) or potentially administratively closing the case.[170]

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164. *Id.* at 479.

165. *Id.* at 479 (citing 8 U.S.C. § 1362 (2006)).

166. *Id.* (citing 8 U.S.C. § 1229a(b)(4)(B) (2006)). President Clinton, by executive order, mandated that the Department of Justice provide interpreters for individuals with limited English proficiency in order to "improve the internal management of the executive branch" without creating "any right or benefit" to those services. Exec. Order No. 13,166, 65 Fed. Reg. 50,121, 50,122 (Aug. 16, 2000).

167. M-A-M-, 25 I. & N. Dec. 474, 479 (BIA 2011).

168. *Id.* at 481.

169. *Id.*

170. *Id.* at 481-82. Although administrative closure of a case usually requires the agreement of both parties, an immigration judge can administratively close a case even if a party opposes. Avetisyan, 25 I. & N. Dec. 688, 690 (BIA 2012). This, however, is a new development as *Avetisyan* overruled *Gutierrez*, 21 I. & N. Dec. 479 (BIA 1996), which did not allow

Matter of M-A-M- ended the BIA's long silence regarding mental competency by articulating a new test and requiring immigration judges to inquire into an individual's competency when indicia of incompetency exist. Nevertheless, the decision has serious shortcomings. It discusses possible indicia of competency and safeguards judges *may* prescribe but fails to give judges clear guidance on what safeguards to provide when individuals *are* found to be mentally incompetent. Moreover, the decision does not establish clear guidelines for which safeguards respondents or practitioners may request or demand. While *Matter of M-A-M-* is a step in the right direction, immigration judges and practitioners must continue to advocate for more comprehensive guidance to protect the due process rights of the mentally disabled.[171]

C. Defining Competency

As an initial matter, the standard for mental incompetency as provided in *Matter of M-A-M-* is inadequate. In *Dusky v. United States*, the US Supreme Court defined competence to go forward in a criminal proceeding as "whether [the individual] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational as well as factual understanding of the proceedings against him."[172] In *Godinez v. Moran*, the Court held that the *Dusky* standard also applies to competence to waive representation or enter a guilty plea.[173]

The test for competency articulated in *Matter of M-A-M-* is more stringent than the *Dusky* standard. For an individual to be competent to

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immigration judges and the BIA to exercise such discretion. This now allows immigration judges leverage over DHS if the judge finds that DHS is resistant to assisting with a competency hearing or with putting in place other safeguards. *Id.*

171. *See BIA Provides Important but Incomplete Guidance on Mental Competency Issues*, AMERICAN IMMIGRATION COUNCIL (May 9, 2011), http://www.americanimmigrationcouncil.org/newsroom/release/bia-provides-important-incomplete-guidance-mental-competency-issues; *see also* Mimi E. Tsankov, *Incompetent Respondents in Removal Proceedings*, IMMIGRATION LAW ADVISOR 1 (Apr. 2009), http://www.justice.gov/eoir/vll/ILA-Newsleter/ILA%202009/vol3no4.pdf. The BIA has indicated frustration with the lack of standards, even requesting amicus curiae briefs relating to procedures for handling cases involving mentally disabled respondents. TRAVIS PACKER, NON-CITIZENS WITH MENTAL DISABILITIES: THE NEED FOR BETTER CARE IN DETENTION AND IN COURT, AMERICAN IMMIGRATION COUNCIL 9-10 (2010), http://www.ilw.com/articles/2011,0224-packer.pdf. The BIA requested these briefs prior to *Matter of M-A-M-*, but the decision in that case and the BIA's admission that judges are put into a difficult position without much recourse demonstrates the continuing frustration.

172. Dusky v. United States, 362 U.S. 402, 403 (1960).

173. Godinez v. Moran, 509 U.S. 389, 389-90 (1993).

stand trial in a criminal proceeding, he must understand the charges against him and be competent to aid counsel in his defense. Similarly, in immigration proceedings, respondents must have "a rational and factual understanding of the nature and object of the proceedings" and be able to "consult with the attorney or representative if there is one." But immigration respondents must also have "a reasonable opportunity to examine and present evidence and cross-examine witnesses."[174] This language suggests that one must have the ability to litigate in order to be competent to proceed in immigration court pro se. This curious requirement would likely lead to more individuals being declared mentally incompetent under the *Matter of M-A-M-* standard than the criminal standard, which does not call for litigation skills. Courts, however, have yet to apply the *Matter of M-A-M-* standard for competency in a written decision, leaving immigration judges guessing at the meaning and practical impact of the BIA's standard.

III. RECOMMENDATIONS

The BIA often looks to criminal law for guidance on procedural or constitutional matters when seeking solutions in the immigration law context.[175] Yet one critical difference exists between the two systems—criminal defendants are appointed representation while immigration respondents are not—leading to frequent calls for such appointed representation in the immigration context.[176] However, as case law consistently reiterates, immigration matters are not criminal. Courts acknowledge the difficulty that the absence of counsel presents and attempt "to ensure that proceedings are as fair as possible in an unavoidably imperfect situation."[177] Comprehensive legislative reform providing more due process protections is unlikely to occur in the near future. Instead, regulatory changes should be made that provide greater safeguards for pro se respondents with mental disabilities. The four most important changes are: (1) to educate ICE and CBP agents, trial attorneys, and immigration judges on mental competency; (2) to prohibit stipulated removal for individuals with histories of mental disabilities or mental illness or who exhibit indicia of incompetency;

174. M-A-M-, 25 I. & N. Dec. 474, 479 (BIA 2011).

175. *Id.* at 478.

176. *See, e.g.*, Chapman, *supra* note 36, at 386-87; Chacón, *supra* note 36, at 1629-30; Davis, *supra* note 36, at 158; Werlin, *supra* note 36, at 394; Robertson, *supra* note 36, at 1020.

177. M-A-M-, 25 I. & N. Dec. 474, 476 (BIA 2011); *see, e.g.*, Franco-Gonzalez v. Holder, 767 F. Supp. 2d 1034 (C.D. Cal. 2010) (ordering the government to provide counsel to the plaintiff because he was entitled to reasonable accommodation under the Rehabilitation Act).

(3) to promulgate regulations requiring DHS personnel to complete an initial mental health evaluation for all detainees that DHS must submit to the immigration court along with the charging documents; and (4) to establish regulations providing for a pro bono attorney appointment system or, if the respondents must continue pro se, requiring that proceedings cease to be adversarial and instead proceed in a collaborative manner when a respondent is found to be mentally incompetent.

A. Educating the Parties

As the first contact for individuals within the immigration system, DHS agents (including ICE and CBP) are in the best position to identify individuals who exhibit indicia of incompetency. Because DHS agents also determine eligibility for stipulated removal, DHS must provide agents with training in identifying and assisting mentally disabled individuals. ICE attorneys and immigration judges also require greater training concerning mental health issues. The *Immigration Judge Benchbook* contains information regarding mental competency, but the entry provides only as much guidance as *Matter of M-A-M-* and was last updated before that decision was published.[178] If immigration judges are to make decisions regarding mental competency, greater efforts must be made to provide them with the necessary training and information so that they can fulfill their duty to conduct hearings "in a manner that satisfies principles of fundamental fairness."[179]

B. Prohibiting Stipulated Removal

Allowing mentally disabled detainees to stipulate to removal must end. Regulations purport to provide procedural safeguards for the unrepresented by requiring that the immigration judge "determine that the alien's waiver is voluntary, knowing, and intelligent."[180] But many stipulated orders are signed before a DHS agent without the detainee ever appearing before the immigration judge who signs his removal order.[181] The DOJ has noted that requiring an immigration judge's determination regarding the alien's waiver "safeguards against an imprudent waiver of a formal adjudication on the part of an unrepresented alien . . . . If an immigration judge is confronted with a stipulated request raising due process concerns, he or she may examine

178. IJ BENCHBOOK, *supra* note 139 (citing Tsankov, *supra* note 171, at 1, 18) (discussing lack of guidance for dealing with mentally incompetent respondents).

179. M-A-M-, 25 I. & N. Dec. 474, 479 (BIA 2011) (citing Beckford, 22 I. & N. Dec. 1216, 1225 (BIA 2000)).

180. 8 C.F.R. § 1003.25(b) (2012).

181. *Id.*

that request in the context of a hearing."[182] How would an immigration judge know that there are potential due process issues for mentally disabled individuals that she will never see? Not only does allowing an individual with a potential mental disability to stipulate to removal violate the requirements of *Matter of M-A-M-*, it also violates that individual's procedural due process rights.

Continued use of stipulated removal for individuals with histories of mental illness or individuals presenting indicia of incompetency violates the BIA's decision in *Matter of M-A-M-* and must be discontinued. DHS often possesses evidence regarding individuals' mental health, particularly when the individual is detained. *M-A-M-* requires that DHS "provide the court with relevant materials in its possession that would inform the court about the respondent's mental competency."[183] The question, however, is whether this applies when the individual agrees to his own removal before being formally placed into immigration proceedings. Merely requiring the revelation of documentation of mental health issues to the immigration judge may not provide sufficient safeguards because DHS may not have documentation regarding every potentially incompetent detainee's mental health status. Instead, regulations must require that DHS present all individuals, regardless of apparent or documented mental health status, to the immigration judge if DHS seeks a stipulated removal order. If DHS has evidence of incompetency or if the immigration judge notices indicia of incompetency, then the judge must inquire into the individual's competency to verify that the order was signed "voluntarily, knowingly, and intelligently."[184] This solution, while adding to administrative requirements, would provide a second layer of protection for a vulnerable population.

C. Requiring Mental Health Screenings

To ensure that mentally disabled individuals are identified and swiftly brought to the attention of the immigration judge, DHS and the DOJ must promulgate regulations requiring DHS personnel to submit documentation regarding the mental health status of each individual against whom it files charging documents.[185] Specifically, DHS and the DOJ must amend 8 C.F.R. Section 1003.13 to require the filing of a

182. Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10,312, 10,322 (Mar. 6, 1997).

183. M-A-M-, 25 I. & N. Dec. 474, 480 (BIA 2011) (citing 8 C.F.R. § 1240.2(a) (2010) ("[DHS] counsel shall present on behalf of the government evidence material to the issues of deportability or inadmissibility and any other issues that may require disposition by the immigration judge.")).

184. 8 C.F.R. § 1003.25(b)(6) (2012).

185. § 1003.13 (2012).

Notice of Mental Health Status along with the Notice to Appear and other charging documents in order to initiate removal proceedings or before presenting a stipulated removal order to an immigration judge. The notice must include: (1) a certification that a mental health evaluation was conducted in accordance with ICE's policies as provided in the PBNDS;[186] (2) the conclusions from the mental health screening; and (3) a certification that the DHS agent who signs as the preparer of the charging documents conducted a thorough examination of the individual's alien file and noted on the Notice of Mental Health Status any information that would lead a reasonable individual to inquire further into an individual's mental health status. Any indication of a potential mental health issue must be brought to the court's attention immediately so that the judge may determine whether a competency hearing is necessary.

Currently, the intake screenings described in the PBNDS are mere guidelines that are not legally enforceable.[187] Therefore, although the guidelines state that these screenings should be conducted within twelve hours of intake, there is no mechanism to ensure that this happens. If immigration courts require that the results of a screening administered within twelve hours of initiation of custody be submitted with any charging documents, these screenings would then be effectively mandatory for any detainee DHS seeks to remove. Such screenings will not only provide greater protections for the individual facing removal, it will aid the court in managing its docket and providing a fair proceeding.[188]

186. *ICE/DRO Detention Standard*, *supra* note 95, at 11-12. The following are among the topics inquired into as part of the routine screening suggested in the PBNDS: (1) "[c]urrent illness and health problems, including communicable diseases"; (2) [c]urrent and past medication; (3) "[u]se of alcohol and other drugs"; (4) "[o]bservation of behavior, including state of consciousness, mental status, appearance, conduct, tremor, sweating"; (5) "[h]istory of suicide attempts or current suicidal/homicidal ideation or intent"; and (6) "[o]bservation of body deformities and other physical abnormalities." *Id.*

187. NAT'L IMMIGRATION LAW CTR. ET AL., supra note 93, at 5; Anshu Budhrani, Comment, *Regardless of My Status, I Am a Human Being: Immigrant Detainees and Recourse to the Alien Tort Statute*, 14 U. PA. J. CONST. L. 781, 810-11 (2012).

188. Beckford, 22 I. & N. Dec. 1216, 1225 (BIA 2000) ("A removal hearing must be conducted in a manner that satisfies principles of fundamental fairness."); Shaughnessey v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) ("It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness-encompassed in due process of law.").

D. Establishing a Pro Bono Attorney Appointment System

Many courts in the United States appoint pro bono attorneys for indigent individuals appearing pro se.[189] These programs are voluntary, and the appointed attorneys are not paid for their services. An alternative to the current system would be the creation of such a pro bono appointment system overseen by the Executive Office for Immigration Review's (EOIR) Office of Legal Access Programs.[190] This system would encourage attorneys to register with their local immigration court to be considered for appointment. When an immigration judge determines that a respondent is mentally incompetent to go forward pro se, the court would appoint an attorney to represent that individual.

Registration in such a program, though voluntary, would bind the attorney to accept any appointments made by the court, and the attorney could not avoid the appointment or else risk losing the privilege of practicing before the immigration courts for a period of time determined by the EOIR Attorney Discipline Program. However, attorneys would be able to turn down appointments if representing the individual would cause a potential conflict of interest or an unreasonable financial burden or the respondent "is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client."[191] Participation in such a program could be encouraged by the American Immigration Lawyers Association (AILA), the preeminent immigration attorney association, through reduced dues, CLE credit, or as a requirement for membership. Additionally, attorneys who have been disciplined by the court would not be eligible for appointment.

A pro bono appointment system would provide attorneys for mentally incompetent individuals appearing pro se at no expense to the government. As with interpreters, the pro bono appointment program would not bestow a right to representation at government expense.[192] Rather, the regulations creating this program would specify that such a

189. *See Pro Bono Service Opportunities*, U.S. DISTRICT CT. FOR THE DISTRICT OF OREGON, http://www.ord.uscourts.gov/en/attorneys/pro-bono-service-opportunities (last updated Aug. 3, 2012); *Appendix H: Appointment of Attorneys in Pro Se Civil Actions*, U.S. DISTRICT CT. OF N.J. (Oct. 14, 2010), http://www.njd.uscourts.gov/rules/Apph.pdf.

190. U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL ACCESS PROGRAMS, http://www.justice.gov/eoir/probono/probono.htm (last visited Feb. 6, 2013).

191. MODEL RULES OF PROFESSIONAL CONDUCT R. 6.2 (2011).

192. President Clinton, by executive order, ordered the Department of Justice to create a program providing interpreters for individuals with limited English proficiency. Exec. Order No. 13,166, 65 Fed. Reg. 50,121, 50,122 (Aug. 16, 2000).

program is created merely to "improve the internal management of the executive branch" without creating "any right or benefit" to appointment of counsel.[193]

This system may be disfavored by immigrant advocates who continue to push for a right to fully appointed counsel. However, a pro bono appointment program would provide safeguards to individuals found to be mentally incompetent immediately while we wait for the right to appointed counsel to be won through legislation or litigation.[194] It has also been suggested that legal services organizations and the immigration bar are already over-burdened by pro bono responsibilities.[195] Although this presents a challenge for any type of pro bono appointment program, the current dearth of representation is even less desirable. Not all mentally disabled individuals would require representation; only those who the court finds mentally incompetent and unable to represent themselves would qualify for a pro bono attorney. If the DOJ does not set up a pro bono appointment system, then local chapters of AILA, local bar associations, law schools, and legal service providers should fill the void by setting up a system for locating attorneys willing to represent mentally incompetent individuals in removal proceedings.[196] Finally, these organizations should arrange trainings to educate local attorneys on effective representation of mentally incompetent individuals in immigration proceedings whether a

193. *Id.*

194. In *Franco-Gonzalez v. Napolitano*, a class action suit in the US District Court for the Central District of California, the ACLU and the Northwest Immigrant Rights Project are representing a group of mentally disabled respondents against the EOIR and ICE in an attempt to gain representation for the mentally disabled in removal proceedings in the Ninth Circuit and eventually in the United States as a whole. Third Amended Complaint, Franco-Gonzalez v. Napolitano, No. CV 10-2211-DMG (DTB) (C.D. Cal. Oct. 25, 2011). Judge Dolly Gee has already ordered the government to provide counsel to specific class members. Amended Order Re Plaintiffs' Motion for a Preliminary Injunction, Franco-Gonzalez v. Napolitano, No. CV 10-2211-DMG (DTB) at 43 (C.D. Cal. Oct. 25, 2011). At the time of this writing, the case is currently in discovery, and it is unknown when or whether it will go to trial. Docket, Franco-Gonzalez v. Napolitano, No. CV 10-2211-DMG (DTB) (accessed Mar. 8, 2013).

195. Chapman, *supra* note 36, at 402-03.

196. The Florence Project currently ensures free legal representation for all juveniles appearing before the Phoenix Immigration Court through its Detained Immigrant and Refugee Children's Initiative. *Direct Services*, THE FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT, http://www.firrp.org/what/directservices (last visited Feb. 6, 2013). There are likely far less mentally incompetent respondents than children in immigration removal proceedings. Therefore, locating representation for all such individuals is not impossible or even implausible.

pro bono system is created by the DOJ or some other system is constructed through other organizations.[197]

E. More Adequate Safeguards through the Agencies

If creation of a pro bono appointment program is not feasible, the alternative recommended here is to provide more meaningful safeguards to mentally incompetent, pro se respondents through agency action. As administrative judges, US immigration judges have more investigative authority than other judges. Immigration judges are vested with the ability to cross-examine witnesses, question respondents, and actively develop the record during proceedings.[198] Rather than continuing to look to criminal law, reformers should seek regulatory reform requiring immigration judges to exercise their authority to provide safeguards for mentally disabled respondents.

This proposal suggests the promulgation of regulations setting forth a new framework for identification, evaluation, and safeguarding. First, as described previously, ICE should file a mental health status report with each notice to appear that it files with the immigration court. Second, the immigration judge must determine the mental fitness of each respondent and make a finding on the record at each hearing regarding the individual's apparent mental competence at the time of the hearing. Third, if an immigration judge determines that a pro so respondent is mentally incompetent under the standard articulated in *Matter of M-A-M-*,[199] the judge must proceed in a more collaborative and investigational manner, including ordering the DHS attorney to assist with gathering evidence, conducting the proceedings so that the forms of potential relief are a focus, and eliminating party arguments and burdens of proof. The goal of the proceeding would become to objectively ascertain whether the respondent is or is not eligible to remain in the United States considering all the evidence before the court. As part of the implementation of these regulations and to ensure ongoing effectiveness, it is recommended that the EOIR create a new program tasked with oversight of the new system.

1. The Difficulties of Defending against Removal

When respondents are represented in immigration court, the parties' arguments and framing of issues form the basis upon which the judge makes his determination. Parties submit evidence through briefs and at hearings, which may be continued as many times as the immigration

197. Resources exist for attorneys seeking to take pro bono cases to educate themselves, and several organizations already conduct trainings for local attorneys. *See, e.g.*, Capital Area Immigrants' Rights Coalition, *supra* note 145.

198. *See generally* 8 C.F.R. § 1240.1 (2012).

199. M-A-M-, 25 I. & N. Dec. 474, 479 (BIA 2011).

judge deems necessary for proper development of the case and to ensure a fair proceeding.[200] Party submissions form the contents of the record of proceedings to which the immigration judge may add court exhibits.[201] DHS has the burden of proving that the respondent is removable by "clear and convincing evidence."[202] Once DHS proves removability, the respondent has the burden of proving "clearly and beyond doubt" that he is entitled to remain in the United States by proving that he is a citizen or otherwise qualifies for relief (e.g., asylum, permanent residency, or cancellation of removal).[203]

Winning relief in immigration court can be a dizzyingly complex process. Consider an application for asylum. The respondent must first demonstrate that he suffered past persecution or that he has a well-founded fear of future persecution on account of one of five protected grounds—religion, nationality, ethnicity, political opinion, or membership in a particular social group.[204] If the respondent establishes that he has suffered past persecution, then the burden shifts to DHS to show that conditions have changed such that the applicant would not be subjected to persecution if removed to the country he seeks asylum from.[205] Additionally, where there is past persecution, DHS has the burden of showing that the respondent can relocate to another part of the country to avoid persecution.[206] If DHS is able to show that the respondent does not have a well-founded fear of future persecution, the respondent nevertheless may be granted humanitarian asylum if he can demonstrate "compelling reasons for being unwilling or unable to return" or "a reasonable possibility that he or she may suffer other serious harm upon removal to that country."[207] If the respondent cannot demonstrate that he has been subjected to past persecution, he must show that he has a well-founded fear of future persecution based on one of the five protected grounds, which DHS can rebut.[208] In this case, the respondent also bears the burden of proving that internal relocation is not possible to avoid the persecution.[209] Finally, not only must the respondent

200. CATHOLIC LEGAL IMMIGRATION NETWORK, INC., REPRESENTING CLIENTS IN IMMIGRATION COURT 22-23 (2d ed. 2010).

201. "Although the burden of proof in establishing a claim is on the applicant, the Service and the Immigration Judge both have a role in introducing evidence into the record." S-M-J-, 21 I. & N. Dec. 722, 726 (BIA 1997).

202. 8 U.S.C. § 1229a(c)(3)(A) (2006).

203. § 1229a(c)(2).

204. 8 C.F.R. § 1208.13(b)(1)(i)(A) (2012).

205. *Id.*

206. D-I-M-, 24 I. & N. Dec. 448, 450 (BIA 2008).

207. 8 C.F.R. §§ 1208.13(b)(1)(iii)(A), (B) (2012).

208. § 1208.13(b)(1).

209. D-I-M-, 24 I. & N. Dec. 448, 450 (BIA 2008).

demonstrate statutory eligibility for asylum, but as described above, his case must warrant an exercise of favorable discretion by the immigration judge—an almost unreviewable decision that varies greatly between judges.[210]

There are other bars and requirements for asylum, but this example demonstrates the legal complexity of proving eligibility for relief in immigration court, a hurdle almost insurmountable for mentally disabled respondents appearing pro se.[211] In a system without such strict evidentiary burdens, judges are free to determine how the facts apply to the law rather than maintaining strict adherence to an adversarial process that limits what the judge can hear and consider or requires the parties to meet high burdens without the benefit of counsel.

2. Administrative Investigation

Under the proposed safeguards, when an immigration judge finds that an individual is mentally incompetent, the judge must order DHS to use any available means to contact the person's family. If no relatives are located, then DHS must notify the local legal aid society,[212] the local

210. INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987). To determine whether to grant asylum as a matter of discretion, immigration judges may look to different factors such as age, criminal records, length of time in the United States, family ties, health, manner of entry if by fraud, and severity of the persecution. Pula, 19 I. & N. Dec. 467, 473-74 (BIA 1987); H-, 21 I. & N. Dec. 337, 347-48 (BIA 1996); Chen, 20 I. & N. Dec. 16, 20-21 (BIA 1989).

211. There appear to be large differences between immigration judges in granting forms of relief, such as asylum. The University of Syracuse tracks the approval and denial rates from all immigration judges in the United States. The data show that judges' denial rates range between 9.8 percent and 96.7 percent. *Immigration Judges*, TRAC IMMIGRATION (July 31, 2006), http://trac.syr.edu/immigration/reports/160. Even when looking only at data from judges in a single court each adjudicating claims by citizens of the same country, the denial rates ranged from 6.9 percent to 94.5 percent. *Id.* This study does not, however, fully explore the systematic differences between judges such as differences in docket assignments. *See infra* note 232.

212. Legal aid societies can only represent individuals who are in valid status or are victims of crime or domestic abuse because the Legal Services Corporation (LSC) is a federally funded program. Congress has banned the use of federal funds to assist undocumented immigrants since 1979. *See* Act of Sept. 24, 1979, Pub. L. No. 96-68, 93 Stat. 416, 433. That ban was extended to some categories of *documented* immigrants in 1982. *See* Act of Dec. 21, 1982, Pub. L. No. 97-377, 96 Stat. 1830, 1874.

> Today, only aliens falling within certain categories are eligible for legal services from offices that receive federal LSC funding. Those categories include lawful permanent residents; aliens who are spouses, parents or unmarried children under age twenty-one of US citizens and who have pending applications for permanent residence; agricultural workers with H-2A visas

chapter of AILA, and the local bar association. If no counsel can be found, either pro bono or financed by the respondent or his family, then the judge must proceed in a manner that seeks to protect the rights and privileges of the incompetent individual. Once it is determined that the mentally incompetent respondent will proceed without representation, the immigration judge must exercise her authority to determine the merits of the case. The proposed regulation would require the DHS attorney to function as an investigator tasked with locating evidence at the judge's behest. If the DHS attorney is unwilling to assist the judge, then the judge may terminate the case, thus requiring DHS to restart the process.[213] Both the immigration judge and the DHS attorney would provide assistance to the court and the mentally incompetent respondent in obtaining evidence and presenting the case. The immigration judge would also have greater discretionary ability when determining whether relief is warranted. Respondents will not be required to establish every link in the chains normally required; rather, the judge will exercise his authority to determine the truth.

This is not an entirely new system or a great departure from current practices in some courts. The Ninth Circuit has long held that immigration judges have a duty to fully develop the record when respondents appear pro se.[214] This duty has since been expanded to require immigration judges in that Circuit to "prob[e] into relevant facts" and "provid[e] appropriate guidance as to how the alien may prove his application for relief."[215] Engaging the court and the DHS

> (limited to representation on employment contract matters only, such as wages, housing and transportation); asylees and refugees; individuals granted withholding of deportation; refugees granted conditional entry prior to April 1, 1980; women battered by their spouses, children battered by their parents and women whose children have been battered by a spouse (limited to representation to prevent or obtain relief from domestic violence); and victims of severe forms of trafficking in persons in the United States.
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> Laura K. Abel & Risa E. Kaufman, *Preserving Aliens' and Migrant Workers' Access to Civil Legal Services: Constitutional and Policy Considerations*, 5 U. PA. J. CONST. L. 491, 496 n.16 (2003) (internal citations omitted). These prohibitions remove legal aid and other federally funded legal service providers as a possibility for a great many respondents.

213. This would require a change to 8 C.F.R. § 1239.2 to allow the immigration judge to terminate cases sua sponte, as opposed to only being allowed to administratively close them. Administrative closure effectively puts the case on hold whereas termination is tantamount to dismissal. This addition provides immigration judges with a tool to encourage DHS to assist.

214. Jacinto v. INS, 208 F.3d 725, 733 (9th Cir. 2000).

215. Agyeman v. INS, 296 F.3d 871, 884 (9th Cir. 2002) ("A pro se alien is deprived of a full and fair hearing when the IJ mis-informs him about the forms of evidence that are permissible to prove his eligibility for relief.").

attorneys in the fact-gathering process also comports with the United States' international obligations for adjudicating asylum cases. The United Nation's *Handbook on Procedures and Criteria for Determining Refugee Status* places a duty on the applicant and examiner "to ascertain and evaluate all the relevant facts" and places a duty on the adjudicator to "ensure that the applicant presents his case as fully as possible and with all available evidence."[216] Reports from immigration judges indicate that this already occurs in practice, with some judges investigating forms of relief.[217]

The ultimate goal of abandoning the adversarial nature of immigration proceedings is to not only protect the rights of the mentally disabled respondent but to do so while reducing cost—including costs of detention and agency resources. The budget for ICE Detention and Removal Operations in 2010 was $2.55 billion.[218] DHS estimates that housing a detainee costs the department about $122 per day, or $44,530 per year.[219] When operating costs are included, that figure rises to $166

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216. *Jacinto*, 208 F.3d at 732-33 (quoting U.N. HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS at 196, 205(b)(i) (1992). The UNHCR Handbook is not binding on US courts. INS v. Aguirre-Aguirre, 526 U.S. 415, 427 (1999). Courts, however, look to the Handbook for guidance in asylum matters. Ndom v. Ashcroft, 384 F.3d 743, 753 n.4 (9th Cir. 2004); *see also* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 439 n. 22 (1987) ("[T]he Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform.").

217. One immigration judge states that

> [i]n cases where individuals are incompetent, I do ask more of government counsel. I want more documents concerning the individual's immigration history than I would if the respondent was able to agree or disagree with particular facts. Documents relating to potential derivative citizenship, prior information given relating to entry to the US, visa applications, any prior applications with DHS—I usually want to have a complete ROP to ensure I am making the right decision. I sometimes obtain country conditions reports to determine if there are any reasons to be concerned for the safety of the respondent. If he or she came as a refugee or was granted asylum, I encourage the local pro bono programs to assist.

OFFICE OF THE CHIEF IMMIGRATION JUDGE, "BEST PRACTICES" FOR MENTALLY INCOMPETENT RESPONDENTS 3 (2010) (on file with author).

218. Kristen C. Ochoa et al., *Disparities in Justice and Care: Persons with Severe Mental Illnesses in the U.S. Immigration Detention System*, 38 J. AM. ACAD. PSYCHIATRY L. 392, 392 (2010).

219. U.S. DEP'T OF HOMELAND SECURITY, ANNUAL PERFORMANCE REPORT: FISCAL YEARS 2011–2013 36 (Feb. 13, 2012) *available at* http://www.dhs.gov/xlibrary/assets/mgmt/dhs-congressional-budget-justification-fy2013.pdf.

per day per detainee, or $60,590 per year.[220] Individuals receiving medical or mental health treatment cost even more. As described above, many are detained for years awaiting restoration of competency, representation, or simply through neglect. The US Department of Health and Human Services, Office of Inspector General, audits ICE regarding detainee health and welfare and has issued two reports in the past three years calling for improvement of oversight at facilities housing immigration detainees to ensure adherence to standards of medical and mental health care.[221] The most recent report, published by Dr. Dora Schriro, former Director of the ICE Office of Detention Policy and Planning, "describes a costly, punitive immigration detention system that is growing despite management and monitoring flaws and failures to maintain adequate detainee health and safety."[222] Providing additional safeguards to aid mentally incompetent respondents during their removal proceedings would shorten the length of proceedings and detention, thus preventing extended detentions and reducing costs for the immigration detention system.

3. Satisfaction of Laws against Discrimination

In *Franco-Gonzalez v. Holder*, the US District Court for the Central District of California has ordered the government to provide attorneys to mentally incompetent respondents based on Section 504 of the Rehabilitation Act.[223] Section 504 provides that no "qualified individual with a disability" be "excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency."[224] Section 504 requires that agencies provide "reasonable modifications" for such individuals unless the modification would fundamentally alter the nature of the

220. NATIONAL IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION: RUNAWAY COSTS FOR IMMIGRATION DETENTION DO NOT ADD UP TO SENSIBLE POLICIES 1-2 (2012).

221. U.S. DEP'T OF HOMELAND SECURITY, OFFICE OF THE INSPECTOR GENERAL, TREATMENT OF IMMIGRATION DETAINEES HOUSED AT IMMIGRATION AND CUSTOMS ENFORCEMENT FACILITIES (2006), *available at* http://www.oig.dhs.gov/assets/Mgmt/OIG_07-01_ Dec06. pdf; U.S. DEP'T OF HOMELAND SECURITY, OFFICE OF THE INSPECTOR GENERAL: ICE POLICIES RELATED TO DETAINEE DEATHS AND THE OVERSIGHT OF IMMIGRATION DETENTION FACILITIES (2008).

222. Ochoa, *supra* note 218. (citing DEP'T OF HOMELAND SECURITY, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS (2009)).

223. Franco-Gonzalez v. Holder, 767 F. Supp. 2d 1034, 1053 (C.D. Cal. 2010).

224. *Id.* at 1050 (quoting 29 U.S.C. § 794(a)); *see also* 6 C.F.R. § 15.30 (2012) (prohibiting discrimination by DHS); 28 C.F.R. § 39.130 (2012) (prohibiting discrimination by the DOJ).

service, program, or activity.[225] In *Franco*, the court has so far required legal representation as the modification.[226] The court has looked to the EOIR's regulations to determine who is a "qualified representative": "(1) an attorney, (2) a law student or law graduate directly supervised by a retained attorney, or (3) an accredited representative, all as defined in 8 C.F.R. § 1292.1 . . . ."[227] The government has yet to propose another alternative to representation by friends, family-members, or other individuals.[228]

Regulatory safeguards alone are not per se inadequate under the Rehabilitation Act, and those proposed here would be adequate modifications for aiding mentally incompetent individuals to participate in their removal proceedings. Under the current system, mentally incompetent respondents are not able to participate in the hearing due to their mental disability. The system, however, is required to provide modifications that will allow them as much access as possible. Changing the procedures in immigration proceedings so that the DHS attorney and the immigration judge work together to determine the appropriate outcome would place mentally incompetent individuals appearing pro se on more equal footing with individuals appearing pro se who are competent. This alteration in the system would satisfy the requirements of the Rehabilitation Act without fundamentally changing the nature of the proceedings.

4. Disadvantages

A key disadvantage to this approach is that it would not adequately address the disparities in adjudication among immigration courts and even among immigration judges in each court; however, no approach, even providing attorneys to all respondents, would remedy this disparity. The *Refugee Roulette* study performed by Professors Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag demonstrates the differences among judges in asylum adjudication. This study looked at asylum decisions by immigration judges made between 2000 and 2004.[229] The average grant rate varied from 12 percent at the Atlanta immigration court to 54 percent at the San Francisco court.[230] The rates also vary greatly among judges in the same court. For example, the grant rate for one judge in the New York court is 6 percent while

225. 28 C.F.R. § 35.130(b)(7) (2012).

226. Franco-Gonzalez v. Holder, 828 F. Supp. 2d 1133, 1147 (C.D. Cal. 2011); Franco-Gonzalez v. Holder, 767 F. Supp. 2d 1034, 1053 (C.D. Cal. 2010).

227. Franco-Gonzalez v. Holder, 828 F. Supp. 2d 1133, 1147 (C.D. Cal. 2011).

228. *See* 8 C.F.R. § 1240.10(c) (2012).

229. JAYA RAMJI-NOGALES ET AL., REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 34 (2009).

230. *Id.* at 37.

another's is 91 percent.[231] When the data is analyzed for similarly situated asylum seekers, such as Chinese immigrants with legal representation appearing before the New York court, the difference in judges' denial rates remain; one judge granted 93.1 percent of the cases while another granted only 5.5 percent.[232] Although individuals with attorneys generally fare far better in immigration proceedings, there seem to be differences between judges and courts that even legal representation will not equalize.

5. Administrative Oversight

To address the disadvantages noted above, this Note recommends the creation of a new program within the EOIR to oversee the implementation of the suggestions in this Note. This new program would: (1) create and provide trainings for immigration judges, advocates, and DHS attorneys regarding mental illness and how to handle mentally disabled individuals; (2) gather data regarding the effectiveness of the new system; (3) provide suggestions for improvement and work with the General Counsel of the EOIR to promulgate new policies and regulations as needed and after notice and comment; (4) provide ongoing support and assistance to immigration judges; and (5) review all records of proceedings for individuals ordered removed who are mentally disabled, have demonstrated indicia of incompetency, or have been found to be mentally incompetent. As our immigration legal system changes so do the concerns explored in this Note. Creating a program to oversee the implementation of these suggestions would ease the transition and help to further ensure that the rights of mentally disabled individuals are protected during their removal proceedings.

CONCLUSION

According to the ACLU of Georgia, "Mr. Lyttle's disabilities were obvious and well documented," but he failed to be identified and ICE's procedures failed to protect him.[233] With no system in place for

231. *Id.* at 39.

232. *See Immigration Judges*, TRAC IMMIGRATION (July 31, 2006), http://trac.syr.edu/immigration/reports/160/. This study does not, however, state that docketing variation was a consideration. Each court has a different system for dividing the case load, making the distribution of cases uneven. One judge may receive all cases from a certain detention center that processes those who were detained after serving a jail sentence, while another receives the cases from individuals detained at the airport. The difference in the two dockets could explain the great variation in grant rates among even judges in the same court.

233. *ACLU Files Lawsuits After Government Wrongfully Deports U.S. Citizen With Mental Disabilities*, AMERICAN CIVIL LIBERTIES UNION (Oct. 13, 2010), http://www.aclu.org/immigrants-rights/aclu-files-lawsuits-after-government-wrongfully-deports-us-citizen-mental-disabili.

identification and protection, Mr. Lyttle, a US citizen, was erroneously deported. In a case on behalf of another US citizen with cognitive disabilities who was removed to Mexico, Mr. Guzman, the US government agreed to pay $350,000 for his mistaken removal.[234] The cases of Mr. Lyttle and Mr. Guzman raise strong concerns regarding the safeguards currently in place in the US immigration law enforcement and adjudication system. ICE attorneys and immigration judges are placed in a position without access to adequate resources where it is difficult, if not impossible, to carry out their duties without the ability to adequately adjudicate cases involving mentally incompetent respondents. Providing guidance and resources to all those involved in these proceedings will go far in guaranteeing greater protections for those at the greatest disadvantage.

234. Guzman v. United States, No. CV08-01327 GHK (C.D. Cal. June 7, 2010) (order granting settlement).