# AFTER *FRANCO-GONZALEZ V. HOLDER*: THE IMPLICATIONS OF LOCATING A RIGHT TO COUNSEL UNDER THE REHABILITATION ACT

LESLIE WOLF*

ABSTRACT

On April 23, 2013, Judge Dolly Gee of the U.S. District Court for the Central District of California found that immigrants in removal proceedings who are incompetent due to mental disabilities are entitled to a qualified representative as a reasonable accommodation under Section 504 of the Rehabilitation Act. The Central District of California was the first court to find a right to counsel for immigrants in removal proceedings, and the first court to use the Rehabilitation Act as the basis for a right-to-counsel suit. The ruling spurred the government to develop a national plan to provide safeguards for detained incompetent immigrants. These groundbreaking developments will offer needed protection to immigrants with mental disabilities, but several problems may arise as the parties negotiate how to implement the injunction and the government executes its new polices for immigration proceedings. In the coming months, many issues will have to be resolved between the court, the government, and the plaintiffs to determine how to implement the *Franco-Gonzalez* injunction in California, Washington, and Arizona, and how to carry out the nationwide plan for detained immigrants with mental

---

* Class of 2014, University of Southern California Gould School of Law; B.A. Art History 2007, Wesleyan University. I thank Professor Elyn Saks, Professor Jim Preis, and the staff of the *Review of Law and Social Justice* for their guidance and edits. I also thank Cara Bayles, Evan Langinger, and my family for their feedback, advice, and endless encouragement.

disabilities. What is clear, however, is that *Franco-Gonzalez* will serve as a model for using the Rehabilitation Act to obtain government-funded advocates for people with mental disabilities in other civil proceedings, such as housing, welfare, or employment. This is a promising time for right-to-justice advocates who seek counsel for low-income litigants in all civil proceedings.

TABLE OF CONTENTS



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]

---

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

## I. INTRODUCTION

Jose Antonio Franco-Gonzalez (Franco), a Mexican citizen and the son of lawful permanent residents, suffers from mental retardation so severe that he does not know his age or his birthday.[2] He was twenty-nine years old when he was placed in removal proceedings.[3] The immigration judge (IJ) in Franco's case felt that Franco was unable to proceed because of his incompetence and lack of counsel and administratively closed his case.[4] Franco, however, was not released from immigration detention when his case was administratively closed.[5] Instead, he languished for five years in various detention centers throughout Southern California and was not released until the American Civil Liberties Union (ACLU) of Southern California and several other legal organizations filed a writ of habeas corpus on his behalf.[6]

Unfortunately, Franco's story is not unusual. There are numerous cases of immigrants with mental disabilities getting lost in the immigration detention system for years while U.S. Immigration and Customs Enforcement (ICE) waits for them to become competent for trial and deportation.[7] Other immigrants with mental disabilities must represent themselves and are then deported despite colorable claims for relief.[8]

A groundbreaking case recently litigated in the U.S. District Court for the Central District of California offers hope that the courts will provide a remedy.[9] Franco is now the named plaintiff in the nation's first class-

---

[2] First Amended Class-Action Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus at 4–5, Franco-Gonzalez v. Holder, No. 10-CV-02211 (C.D. Cal. Nov. 2, 2010), *available at* http://www.aclu.org/immigrants-rights/franco-gonzales-et-al-v-holder-et-al-first-amended-class-action-complaint [hereinafter First Amended Class-Action Complaint]; *Immigrants with Mental Disabilities Lost in Detention for Years*, ACLU (March 25, 2010), http://www.aclu.org/immigrants-rights-prisoners-rights/immigrants-mental-disabilities-lost-detention-years [hereinafter *Immigrants with Mental Disabilities*].

[3] *Immigrants with Mental Disabilities*, *supra* note 2.

[4] *Id.*

[5] *Id.*

[6] *Id.*; *see also* First Amended Class-Action Complaint, *supra* note 2.

[7] *See* HUM. RTS. WATCH, DEPORTATION BY DEFAULT: MENTAL DISABILITY, UNFAIR HEARINGS, AND INDEFINITE DETENTION IN THE US IMMIGRATION SYSTEM 4–5 (2010) [hereinafter DEPORTATION BY DEFAULT], *available at* https://www.aclu.org/files/assets/usdeportation0710_0.pdf.

[8] *Id.*

[9] Partial Judgment and Permanent Injunction at 7, Franco-Gonzalez v. Holder, No. 10-CV-02211 (C.D. Cal. Apr. 23, 2013), *available at* http://nwirp.org/Documents/PressReleases/PartialJudgmentandPermanentInjunction.pdf.

action lawsuit filed on behalf of immigrants with severe mental disabilities in removal proceedings.[10] On March 26, 2010, the ACLU of Southern California, along with several other legal and non-profit organizations, filed a petition for writ of habeas corpus on behalf of Franco, alleging violations of the Immigration and Nationality Act (INA), the Due Process Clause of the Fifth Amendment to the Constitution, and Section 504 of the Rehabilitation Act.[11] Franco was released on March 31, 2010, pursuant to Section 236 of the INA, which authorizes release for detained immigrants on bail.[12] On November 2, 2010, Franco's attorneys filed a First Amended Class-Action Complaint for those similarly situated to Franco: mentally disabled immigrant detainees who are held in custody without counsel.[13] The complaint named additional plaintiffs and alleged a right to appointed counsel under the Due Process Clause and Section 504 of the Rehabilitation Act.[14]

On April 23, 2013, Judge Dolly Gee of the Central District of California issued a permanent injunction enjoining the government from removing immigrants who are incompetent due to mental disabilities and are not represented by counsel.[15] This unprecedented injunction required the government to provide "Qualified Representative(s)"[16] to immigrants who are incompetent due to mental disabilities "during all phases of their immigration proceedings, including appeals and/or custody hearings, whether pro bono or at Defendants' expense."[17]

---

[10] First Amended Class-Action Complaint, *supra* note 2.

[11] *Id.* at 29–31.

[12] Franco-Gonzalez v. Holder, 767 F. Supp. 2d 1034, 1037 (C.D. Cal. 2010).

[13] *Id.* at 1038.

[14] *Id.* In total, plaintiffs first demanded and alleged: "1) [a] right to a competency evaluation under the INA; 2) [a] right to a competency evaluation under the Due Process Clause; 3) [a] right to appointed counsel under the INA; 4) [a] right to appointed counsel under Section 504 of the Rehabilitation Act; 5) [a] right to appointed counsel under the Due Process Clause; 6) [a] right to release under the INA; 7) [a] right to release under the Due Process Clause; 8) [a] right to a detention hearing under the INA; 9) [a] right to a detention hearing under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794; 10) [a] right to a detention hearing under the Due Process Clause; and 11) violation[s] of the Administrative Procedures Act." *Id.*

[15] Partial Judgment and Permanent Injunction, *supra* note 9.

[16] A "Qualified Representative" must meet five criteria. He or she must: "(1) be obligated to provide zealous representation; (2) be subject to sanction by the EOIR for ineffective assistance; (3) be free of any conflicts of interest; (4) have adequate knowledge and information to provide representation at least as competent as that provided by a detainee with ample time, motivation, and access to legal materials; and (5) maintain confidentiality of information." *Franco-Gonzalez*, 767 F. Supp. 2d at 1058.

[17] *Id.* at 1061.

Not only was the Central District of California the first court to recognize the right to an appointed representative for immigrants in removal proceedings,[18] the basis of the ruling was also groundbreaking. Judge Gee held that a qualified representative is a reasonable accommodation under Section 504 of the Rehabilitation Act for immigrants who are incompetent due to mental disabilities.[19] No prior court had ruled that the Rehabilitation Act or the Americans with Disabilities Act (ADA) requires courts to appoint counsel for litigants with mental disabilities. In the majority of previous litigation, at both the state and federal level, advocates argued for a right to counsel in civil proceedings based on the Due Process Clause of the Fifth Amendment.[20] In addition to their Rehabilitation Act claim, the plaintiffs in *Franco-Gonzalez* also argued that the Due Process Clause mandates appointing counsel for immigrants with severe mental disabilities,[21] but because the judge found that the Rehabilitation Act required appointing counsel, she did not reach the due process argument.[22]

One day before Judge Gee issued the permanent injunction, the government announced new policies to protect the rights of incompetent

---

[18] *Federal Court Orders Legal Representation for Immigrant Detainees with Mental Disabilities*, ACLU (Apr. 23, 2013), https://www.aclu.org/immigrants-rights/federal-court-orders-legal-representation-immigrant-detainees-mental-disabilities. Plaintiffs also requested a custody hearing in which the government bears the burden of showing that further detention is justified under 8 U.S.C. § 1226(c) for "Subclass 2" members, immigrants with mental disabilities who are detained. First Amended Class-Action Complaint, *supra* note 2, at 34, 38. This subject is beyond the scope of this Note, which focuses on the right to counsel for immigrants with mental disabilities. See Whitney Chelgren, *Preventive Detention Distorted: Why it is Unconstitutional to Detain Immigrants Without Procedural Protections*, 44 LOY. L.A. L. REV. 1477 (2011), for an in-depth discussion of why the current conditions in detention centers are constitutionally problematic for all immigrants, especially for those who suffer from mental illness for whom detention can exasperate symptoms and cause them to decompensate. Chelgren argues that immigrants with mental illness are entitled constitutionally and statutorily to custody determination hearings. *See also* Plaintiffs' Arguments for Subclass 2 Members in Plaintiffs' Memo of Points and Authorities in Support of Motion for Partial Summary Judgment, Franco-Gonzalez v. Holder, No. 10-CV-02211 (C.D. Cal. Aug. 9, 2012) (on file with author).

[19] 29 U.S.C. § 794(a) (2006); *see* Partial Judgment and Permanent Injunction, *supra* note 9, at 2.

[20] *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356 (2010); United States v. Campos-Asencio, 822 F.2d 506 (5th Cir. 1987) (basing arguments for requiring counsel in civil proceedings on the Due Process Clause); Aguilera-Enriquez v. INS, 516 F.2d 565 (6th Cir. 1975).

[21] *Franco-Gonzalez*, 767 F. Supp. 2d at 1037.

[22] *Id.* at 1051 (citing Rosenberg v. Fleuti, 374 U.S. 449, 451 (1963)) (explaining how the doctrine of constitutional avoidance requires courts to "avoid reaching constitutional issues in advance of the necessity of deciding them").

immigrants.[23] For years, the federal government had refused to acknowledge the inadequacy of protections afforded to immigrants with mental disabilities, but on April 22, 2013, the Executive Office for Immigration Review (EOIR) and ICE announced that they would develop a nationwide policy to address the problem of detained immigrants unable to represent themselves due to serious mental disabilities.[24] The plan would enhance procedural protections, including screening for mental disorders, conducting competency hearings, and providing qualified representatives for detainees who are unable to represent themselves in immigration proceedings.[25] These protections mirrored what Judge Gee's injunction required the following day, except that Judge Gee's injunction required qualified representatives for all incompetent immigrants in removal proceedings, while the government's plan only covered detained incompetent immigrants.[26]

What will happen next is unclear. Mentally incompetent immigrants are now entitled to qualified representatives in California, Arizona, and Washington, the states covered by Judge Gee's injunction.[27] Within these states, the EOIR has begun contracting with local immigration providers to offer representation to qualifying immigrants in removal proceedings.[28] When the government announced its nationwide plan in April 2013, it said that the new procedures would be "fully operational . . . by the end of 2013."[29] On December 31, 2013, the EOIR released guidance to the nation's IJs entitled "Phase 1 of Plan to Provide Procedural Protection to

---

[23] *See Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions*, U.S. DEPARTMENT JUST. (Apr. 22, 2013), http://www.justice.gov/eoir/press/2013/SafeguardsUnrepresentedImmigrationDetainees.html [hereinafter *Safeguards for Unrepresented Immigration Detainees*].

[24] *Id.*

[25] *Id.*

[26] *See* Partial Judgment and Permanent Injunction, *supra* note 9; *Safeguards for Unrepresented Immigration Detainees*, *supra* note 23.

[27] *See* Partial Judgment and Permanent Injunction, *supra* note 9; Franco v. Holder, AM. CIV. LIBERTIES UNION S. CAL., http://www.aclusocal.org/franco/ (last visited Nov. 11, 2013) (identifying class members from California, Arizona, and Washington).

[28] *See, e.g.*, *Esperanza Provides Council to Detained Immigrants with Mental Health Issues Following Groundbreaking Lawsuit*, ESPERANZA IMMIGRANT RIGHTS PROJECT, http://www.esperanza-la.org/en/component/content/article/26-newsletter/210-esperanza-provides-counsel-to-detained-immigrants-with-mental-health-issues-following-groundbreaking-lawsuit.html (last visited March 6, 2013).

[29] *Safeguards for Unrepresented Immigration Detainees*, *supra* note 23.

Unrepresented Detained Respondents with Mental Disorders."[30] The plan outlines the standard for competency to be used in immigration proceedings, the procedure judges will employ to determine a respondent's competency, and the safeguards, including qualified representatives, which will be allocated for incompetent, detained respondents.[31] The plan is only guidance for IJs, but the EOIR stated that it also "intends to issue a Notice of Proposed Rulemaking on the subject, and, upon receipt and review of public comment, a Final Rule."[32] Given that it took the threat of losing *Franco-Gonzalez* to spur the government to action,[33] it is difficult to trust the Administration will follow through with its promise to enact rules.

The goal of this Note is three-fold. Part II argues that current statutes and regulations inadequately protect the rights of mentally disabled immigrants in removal proceedings. Part III examines the *Franco-Gonzalez* plaintiffs' two arguments for the right to appointed counsel—the Due Process Clause and the Rehabilitation Act—and evaluates the court's decision to base its ruling on the Rehabilitation Act. Part IV forecasts the problems that may arise as the parties negotiate how to implement the injunction and the government executes its new policies for immigration proceedings. Part V concludes.

## II. COUNSEL IS NECESSARY TO ENSURE THAT IMMIGRANTS WITH MENTAL DISABILITIES RECEIVE FAIR HEARINGS

ICE deported a record 409,849 immigrants in the 2012 fiscal year, up from 396,906 in 2011.[34] Despite the Obama administration's promise

---

[30] EXEC. OFFICE FOR IMMIGR. REVIEW, PHASE 1 OF PLAN TO PROVIDE PROCEDURAL PROTECTION TO UNREPRESENTED DETAINED RESPONDENTS WITH MENTAL DISORDERS (2013) [hereinafter PHASE 1 OF GOVERNMENT PLAN], *available at* https://dl.dropboxusercontent.com/u/27924754/EOIR%20Protections.pdf.

[31] *Id.*

[32] *Id.* at 1.

[33] Judge Gee issued a tentative opinion stating that she intended to enter a permanent injunction on March 22, 2013, one month before the EOIR and ICE issued their policy directives. *See Class Action Lawsuit Forces Policy Change to Protect Detained Immigrants with Serious Mental Disabilities*, AM. CIV. LIBERTIES UNION S. CAL. (Apr. 22, 2013), http://www.aclusocal.org/franco_announcements/ [hereinafter *Class Action*].

[34] Elise Foley, *Deportation Hits Another Record Under Obama Administration*, HUFFINGTON POST (Dec. 21, 2012, 4:33 PM), http://www.huffingtonpost.com/2012/12/21/immigration-deportation_n_2348090.html.

of comprehensive immigration reform,[35] increased deportations rush even more immigrants through an over-burdened and under-funded system.[36] This strain leads to due process violations and mistreatment, especially among more vulnerable populations, such as immigrants with mental disabilities.[37]

### A. IMMIGRATION COURT AND THE IMPORTANCE OF COUNSEL

The U.S. immigration court system is administered by the EOIR, a division of the U.S. Department of Justice (DOJ).[38] The EOIR adjudicates immigration violations through "removal"[39] proceedings.[40] Most detained immigrants are placed in removal proceedings in front of one of approximately 260 IJs, in one of fifty-nine immigration courts located throughout the United States.[41] Detained immigrants in removal proceedings include people who entered the United States without authorization, asylum seekers, and lawful permanent residents who have committed criminal acts (the majority of which are non-violent and relatively minor).[42]

While it is difficult to obtain concrete data, approximately sixty

---

[35] *Id.*

[36] The 2009 Appleseed Report estimated that IJs "must decide four cases per business day to keep up with [the] workload." TEXAS APPLESEED, JUSTICE FOR IMMIGRATION'S HIDDEN POPULATION: PROTECTING THE RIGHTS OF PERSONS WITH MENTAL DISABILITIES IN THE IMMIGRATION COURT AND DETENTION SYSTEM 14 (2010) [hereinafter TEXAS APPLESEED REPORT], *available at* http://www.texasappleseed.net/index.php?option=com_docman&task=doc_download&gid=313. These numbers are surely higher now due to the increase in deportations occurring under the Obama administration. *See* Foley, *supra* note 34.

[37] For the purpose of this Note, "mental disability" refers to both mental health problems, including behavioral and emotional conditions, as well as intellectual disabilities that would inhibit a person's ability to represent himself or herself in court proceedings.

[38] *About the Office*, U.S. DEPARTMENT JUST., http://www.justice.gov/eoir/orginfo.htm (last visited Nov. 11, 2013).

[39] This Note uses the term "removal" to refer to the government's removal of a non-citizen from U.S. territory. "Deportation" and "removal" have different meanings under earlier versions of the INA, but now the law refers to the "removal" of non-citizens from U.S. territory. *Deportation*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=773895c4f635f010VgnVCM1000000ecd190aRCRD&vgnextchannel=b328194d3e88d010VgnVCM10000048f3d6a1RCRD (last visited Nov. 11, 2013).

[40] *See Office of the Chief Immigration Judge*, U.S. DEPARTMENT JUST., http://www.justice.gov/eoir/ocijinfo.htm (last updated Jan. 2014).

[41] *Id.*

[42] TEXAS APPLESEED REPORT, *supra* note 36, at 10.

percent of all immigrants and an upward of eighty-four percent of detained immigrants did not have a lawyer during removal proceedings in 2008.[43] Although immigrants have the "privilege" of being represented by an attorney of their choice during removal proceedings, it must be at "no expense to the Government."[44] Due to the limited number of legal aid organizations and the many indigent immigrants, it is often difficult for immigrants to retain counsel. Detained immigrants face additional hurdles because detention centers are often far from city centers where legal aid organizations are located.[45]

In contrast, the Department of Homeland Security (DHS) employs trained trial attorneys to represent ICE in removal proceedings.[46] ICE attorneys are tasked with "promot[ing] homeland security and public safety through the criminal and civil enforcement of federal laws governing . . . immigration."[47] As a result, immigrants who represent themselves in removal proceedings are at a significant disadvantage when facing trained and specialized ICE attorneys.[48] Immigrants appearing pro se not only lack access to information and face language and cultural barriers, they also are often unaware of possible defenses, such as asylum or cancellation of removal.[49] While immigration law has always been complex, changes in the law have expanded the categories of immigrants subject to mandatory detention, further complicated appeals, and greatly expanded the grounds for removal.[50]

Even if IJs inform immigrants of relief they may qualify for, pro se

---

[43] *Id.* at 14 (citing AMNESTY INT'L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA (2009), *available at* http://www.amnestyusa.org/uploads/jailedwithoutjustice.pdf).

[44] 8 U.S.C. § 1362 (2006).

[45] RICHARD PEÑA, COMM'N ON IMMIGRATION, THE QUEST TO FULFILL OUR NATION'S PROMISE OF LIBERTY AND JUSTICE FOR ALL: ABA POLICIES ON ISSUES AFFECTING IMMIGRANTS AND REFUGEES 8 (2006), *available at* http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/107a_right_to_counsel.authcheckdam.pdf.

[46] TEXAS APPLESEED REPORT, *supra* note 36, at 12.

[47] *Overview: Mission*, ICE, http://www.ice.gov/about/overview/ (last visited Nov. 9, 2013).

[48] Helen Eisner, *Disabled, Defenseless, and Still Deportable: Why Deportation Without Representation Undermines Due Process Rights of Mentally Disabled Immigrants*, 14 U. PA. J. CONST. L. 511, 517 (2011).

[49] *See id.* (citing Michael J. Churgin, *An Essay on Legal Representation of Non-Citizens in Detention*, 5 INTERCULTURAL HUM. RTS. L. REV. 167, 171 (2010) (citing a New York study of detainees that concluded "'that few detainees had any knowledge of possible defenses to removal, while almost 40% had colorable claims as determined by the project attorneys'")).

[50] *See* DONALD KERWIN, MIGRATION POL'Y INST., REVISITING THE NEED FOR APPOINTED COUNSEL 3 (2005), *available at* http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf.

litigants often fail to report important information because they do not realize which facts are relevant to their claim[51] or because post-traumatic stress disorder, fear, or embarrassment prevent them from discussing their horrific experiences.[52] Both the U.S. Court of Appeals for the Ninth Circuit and the Supreme Court have acknowledged that immigration law is extremely difficult for an unrepresented layperson to navigate.[53]

Studies confirm that counsel greatly affects an immigrant's probability of success in court. In 2003, non-detained immigrants with representation obtained relief in thirty-four percent of their cases, while those without representation were successful in only twenty-three percent of their cases.[54] Among detainees, twenty-four percent of those represented obtained relief, while only fifteen percent of pro se respondents were successful.[55] The disparities are even greater in the more complex areas of immigration law.[56] For example, asylum seekers with representation were four to six times more likely to be granted asylum than those without counsel.[57] Asylum cases are exceptionally important because the immigrants' lives may depend on their ability to reside in the United States.[58]

### B. IMMIGRANTS WITH MENTAL DISABILITIES FACE ADDITIONAL CHALLENGES

Legal assistance is even more crucial for mentally disabled immigrants in removal proceedings. In 2008, the DHS estimated that there were between 7571 and 18,929 immigrant detainees suffering from

---

[51] *See* DEPORTATION BY DEFAULT, *supra* note 7, at 31 (stating that for certain mentally disabled persons, "collecting and presenting relevant biographical and factual evidence may be impracticable without support").

[52] *See generally* TEXAS APPLESEED REPORT, *supra* note 36, at 47, 54 (discussing the difficulty some detained immigrants have revisiting past traumas and sharing their fears).

[53] Padilla v. Kentucky, 559 U.S. 356, 369 (2010) ("Immigration law can be complex, and it is a legal specialty of its own."); Escobar-Grijalva v. INS, 206 F.3d 1331, 1335 (9th Cir. 2000) ("Deprivation of the statutory right to counsel deprives an alien asylum-seeker of the one hope she has to thread a labyrinth almost as impenetrable as the Internal Revenue Code.").

[54] KERWIN, *supra* note 50, at 6.

[55] *Id.*

[56] *Id.*

[57] *See* Andrew I. Schoenholz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739, 740 (2002).

[58] *See* KERWIN, *supra* note 50, at 6.

"serious mental illness."[59] Human Rights Watch estimates that approximately fifteen percent of the detained immigrant population has some form of mental disability, which would have totaled approximately 57,000 people in 2008.[60] That number is even greater today.[61]

There is a high risk of error when immigrants with severe mental disabilities appear pro se in removal proceedings.[62] Studies recount many instances of immigrants who did not understand the charges against them, did not comprehend the judge's questions, or were delusional and experiencing hallucinations in the courtroom.[63] The removal proceedings went forward in each case.[64]

It is often difficult for people with mental disabilities to collect and present "relevant biographical and factual evidence" without the support of an attorney or advocate.[65] In *Atkins v. Virginia*,[66] the Supreme Court held that executing mentally disabled individuals violated the Eight Amendment, writing that these defendants were "especially at risk for erroneous fact[ ]finding because—even with counsel—they are less able to present favorable facts and less persuasive as witnesses."[67] Although immigrants' mental illnesses may be helpful to their claims of relief in some cases, many immigrants have said that they were afraid to tell the judge about their mental disabilities for fear that it would negatively impact their cases.[68] Unrepresented immigrants with mental disabilities,

---

[59] DEPORTATION BY DEFAULT, *supra* note 7, at 17.

[60] *Id.*

[61] *See id.* (describing the increasing number of immigrants, including those with mental disabilities).

[62] One woman was unable to answer any questions and instead "stared into space during the interview, shook her head repeatedly, and rocked nervously in her chair." *Id.* at 25. In another case, an asylum officer found that a non-citizen's testimony in a credible fear interview (a preliminary interview before a non-citizen can make a claim for asylum) was not credible because it was "implausible" and "delusional." Although the asylum officer recognized that the non-citizen was suffering from psychosis, he was deported to Nigeria in April 2010. *Id.* at 29–30; *see also* TEXAS APPLESEED REPORT, *supra* note 36.

[63] DEPORTATION BY DEFAULT, *supra* note 7, at 29–30.

[64] *Id.*

[65] *Id.* at 31.

[66] Atkins v. Virginia, 536 U.S. 304 (2002).

[67] Alice Clapman, *Hearing Difficult Voices: The Due-Process Rights of Mentally Disabled Individuals in Removal Proceedings*, 45 NEW ENG. L. REV. 373, 390 (2011) (citing *Atkins*, 536 U.S. at 320).

[68] *See* DEPORTATION BY DEFAULT, *supra* note 7, at 5. This fear is well founded because immigrants with mental disabilities may be inadmissible under Section 212(a)(1)(A)(iii) of the INA. The new government guidelines for unrepresented detained respondents with mental

therefore, face unique challenges beyond the lack of legal training and general confusion that a layperson experiences. Immigrants who are so severely mentally disabled that they are unable to present simple facts about themselves cannot be responsible for their own defense, especially when they may face separation from family and support networks, persecution, or even death.

### C. CURRENT SAFEGUARDS FOR IMMIGRANTS WITH MENTAL DISABILITIES ARE INSUFFICIENT

The INA, written in 1952, directs the Attorney General to "prescribe safeguards to protect the rights and privileges" of a non-citizen "[i]f it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding."[69] Although Congress has already recognized that immigrants with mental disabilities have unique needs,[70] the limited regulatory framework and the lack of subsequent case law gives judges inadequate guidance to identify a person in need of safeguards or to determine which safeguards are appropriate.

#### 1. The Regulations

Current regulations provide that an IJ "shall not accept an admission of removability from an unrepresented respondent who is incompetent,"[71] and "when it is impracticable for the respondent to be present at the hearing because of mental incompetency, the attorney, legal representative, legal guardian, near relative, or friend who was served with a copy of the notice to appear shall be permitted to appear on behalf of the respondent."[72] While these regulations appear to offer protection for immigrants with mental disabilities, they are double-edged swords. Although an IJ cannot accept an admission of removability from an incompetent respondent, the judge can accept an admission from a representing friend, relative, legal guardian, or an officer from the

---

disabilities states that mental health information should only be used to determine the alien's mental competency to represent oneself and not be used to establish ineligibility for relief. *See* PHASE 1 OF GOVERNMENT PLAN, *supra* note 30, at 14.

[69] 8 U.S.C. § 1229a(b)(3) (2006).

[70] *See generally id.* (demonstrating that Congress attempted to address this issue).

[71] 8 C.F.R. § 1240.10(c) (2013).

[72] *Id.* § 1240.4 (2013).

institution where a respondent is an inmate or patient.[73] Therefore, a DHS officer could appear on behalf of a detained immigrant with a mental disability and a judge could accept an admission of removability from the DHS officer.[74] This creates a conflict of interest because ICE (the department seeking removal) is part of the DHS, the immigrant's custodian.

Furthermore, the regulations have done little to clarify whether "presence" means physical presence or the capacity to understand, what safeguards are adequate, and what "incompetent" means in the immigration context.[75] The lack of guidelines has led to inconsistent treatment of immigrants with mental disabilities.[76]

The EOIR's recent announcement of a new policy for immigrants with mental disabilities is not the first time the government has attempted to address the problems in the current immigration system.[77] Several representatives attempted to introduce language into a 2009 appropriations bill that mandated the EOIR to "work with experts and interested parties in developing standards and materials for IJs to use in conducting competency evaluations of persons appearing before the courts," but that language was left out of the final bill.[78] In addition, the DOJ solicited comments to promulgate regulations for appointing guardians ad litem (GALs) in removal proceedings (one of the safeguards used to protect litigants with mental disabilities in other civil proceedings),[79] but over a decade later, those regulations remain unwritten.[80] While the plan released by the EOIR in December 2013 is an important step to safeguarding the rights of immigrants with mental disabilities nationwide, budgetary concerns or the 2016 election could delay the promise to issue binding rules.

---

[73] *See id.*

[74] *See* First Amended Class-Action Complaint, *supra* note 2.

[75] Clapman, *supra* note 67, at 377–78.

[76] DEPORTATION BY DEFAULT, *supra* note 7, at 34.

[77] Clapman, *supra* note 67, at 377–78.

[78] *See id.* at 379 (comparing 155 CONG. REC. H1762 (daily ed. Feb 23, 2009) to the Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, 123 Stat. 3034, 3134).

[79] BLACK'S LAW DICTIONARY 774 (9th ed. 2009).

[80] *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 444, 448 (Jan. 3, 1997).

### 2. The Immigration Judge Benchbook

The EOIR recently added a section on mental incompetence to the Immigration Judge Benchbook (IJ Benchbook); however, this text is merely a guide, up to each judge's discretion,[81] and lacking the force of a regulation.[82] The IJ Benchbook discusses "best practices" for IJs to employ when working with immigrants with mental disabilities, but these discussions are limited, for instance, to staying "calm, patient, and in control," using "direct, simple sentences," and building a "very good record."[83] The IJ Benchbook also suggests using "existing tools" to assist respondents with mental disabilities to find counsel, such as contacting the Pro Bono and Legal Orientation Programs, or continuing a case to give respondents time to find an attorney (which is common practice with all pro se respondents).[84] The IJ Benchbook offers no guidance for situations when the immigrant is unable to obtain counsel using these "existing tools."

However, the IJ Benchbook does recommend considering administratively closing a case if the respondent is unable to proceed because of mental health issues.[85] While this is often beneficial to respondents who are not detained, it is important to note that an administrative closure does not resolve the DHS's charges against a respondent.[86] Rather, it merely removes the case from the judge's docket and either party can move the court to re-calendar the case at a future time.[87] Furthermore, respondents who are detained when their cases are administratively closed remain detained.[88] This is the policy that led to Franco's five-year detention.[89] While it is promising that the EOIR is at least addressing the issues of respondents with mental disabilities, neither

---

[81] EXECUTIVE OFF. FOR IMMIGR. REV., IMMIGRATION JUDGE BENCHBOOK, MENTAL HEALTH ISSUES [hereinafter IJ BENCHBOOK], *available at* http://www.justice.gov/eoir/vll/benchbook/tools/MHI/index.html (last visited Nov. 11, 2013).

[82] EXECUTIVE OFF. FOR IMMIGR. REV., IMMIGRATION JUDGE BENCHBOOK, INTRODUCTION TO THE INTERACTIVE BENCHBOOK FOR IMMIGRATION JUDGES, *available at* http://www.justice.gov/eoir/vll/benchbook/introduction.htm (last visited Nov. 13, 2013).

[83] IJ BENCHBOOK, *supra* note 81.

[84] *Id.*

[85] *Id.*

[86] *See* Clapman, *supra* note 67, at 379 n.34.

[87] *Id.*

[88] DEPORTATION BY DEFAULT, *supra* note 7, at 74.

[89] Franco-Gonzalez v. Holder, 767 F. Supp. 2d 1034, 1037 (C.D. Cal. 2010).

the IJ Benchbook, nor the guidelines released in December, are binding and thus they do not resolve the need for regulations that protect the rights of immigrants with mental disabilities.

### 3. The Board of Immigration Appeals

The Board of Immigration Appeals (BIA) has done little to clarify the due process protections for immigrants with mental disabilities, often choosing to address competency issues in unpublished, non-precedential decisions.[90] The BIA's first published opinion to squarely address competency determinations and to purportedly clarify the issue of safeguards for respondents with mental disabilities came out, not surprisingly, after the *Franco-Gonzalez* First Amended Class-Action Complaint was filed. *Matter of M-A-M-* was decided on May 4, 2011, and for the first time, the BIA offered to "provide a framework for analyzing cases in which issues of mental competency are raised."[91]

Most importantly, *Matter of M-A-M-* helps IJs to determine when an immigrant is incompetent.[92] "Although immigration proceedings are civil in nature," the BIA looked to criminal law, where mental competency law is already developed, to determine a standard.[93] In criminal proceedings, however, when a defendant is found incompetent to stand trial, the proceedings stop and, if possible, the defendant is put in a program to regain competency.[94] On the other hand, *Matter of M-A-M-* clarified that immigration proceedings may continue while an immigrant is mentally incompetent, as long as they are "conducted fairly."[95] The BIA cited to several federal circuit court opinions in support of this position.[96]

---

[90] *See* Clapman, *supra* note 67, at 381–82 (discussing various positions the BIA has taken in past unpublished decisions).

[91] *In re* M-A-M-, 25 I. & N. Dec. 474, 476 (BIA 2011).

[92] *See id.*

[93] *Id.* at 478.

[94] *See* Barry W. Wall, Brandon H. Krupp & Thomas Guilmette, *Restoration of Competency to Stand Trial: A Training Program for Persons with Mental Retardation*, 31 J. AM. ACAD. PSYCHIATRY L. 189, 189 (2003) (discussing programs to restore competency in incompetent criminal defendants), *available at* http://www.jaapl.org/content/31/2/189.full.pdf.

[95] *In re M-A-M-*, 25 I. & N. Dec. at 477.

[96] The cases the BIA cites to are somewhat misleading because they hold that there was no due process violation when an alien with mental illness *was represented by counsel* in removal proceedings. *See* Brue v. Gonzales, 464 F.3d 1227, 1232–34 (10th Cir. 2006) (holding no due process violation when an alien was represented by counsel and able to answer questions posed to him); Nee Hao Wong v. INS, 550 F.2d 521, 521 (9th Cir. 1977) (holding that removal

The BIA settled on a competency test derived from *Drope v. Missouri*,[97] which applied a standard first articulated in *Dusky v. United States*.[98] Under the *Dusky* standard, a person is not competent to stand trial if "he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense."[99] However, the *Dusky* standard, as articulated in *Matter of M-A-M-*, deems an immigrant competent if "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."[100] The part of the BIA's competency test that requires a reasonable opportunity to "present evidence and cross-examine witnesses"[101] appears to require a higher level of functioning than the *Dusky* standard because a person must be able to act as his or her own advocate. Requiring a higher level of functioning for competency arguably conforms to current Supreme Court due process jurisprudence because it recognizes that immigrants, unlike criminal defendants, often represent themselves in removal proceedings.[102] In *Indiana v. Edwards*, which

---

proceedings against a mentally incompetent alien could be continued without violating due process if the alien was represented by counsel and was accompanied by a state court-appointed conservator who testified on his behalf).

[97] Drope v. Missouri, 420 U.S. 162 (1975).

[98] Dusky v. United States, 362 U.S. 402 (1960) (holding that the test for whether a criminal defendant should stand trial is "whether he has sufficient present ability to consult with his attorney with a reasonable degree of rational understanding [] and whether he has a rational as well as factual understanding of the proceedings against him.").

[99] *Drope*, 420 U.S. at 171. *Dusky* articulates the standard in the positive, stating that someone is mentally competent so long as the person "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." *Dusky*, 362 U.S. at 402.

[100] *In re M-A-M-*, 25 I. & N. Dec. at 479.

[101] *Id.*

[102] For a more in-depth analysis of what competency standard should be used in immigration proceedings, see Clapman, *supra* note 67, at 396 (arguing that the standard for competency in removal proceedings should be "whether respondents are capable of presenting arguments and defenses against removal as well as claims for any available relief."); Christopher Klepps, *What Kind of "Process" is This?: Solution to the Case-By-Case Approach in Deportation Proceedings for Mentally Incompetent Non-Citizens*, 30 QUINNIPIAC L. REV. 545, 577–78 (2012) (arguing that the more stringent *Edwards* competency standard, not the *Dusky* standard, should be used in immigration proceedings). The EOIR guidelines released in December 2013 outline a competency standard, which is an expanded version of the standard in *Matter of M-A-M-*: "A respondent is competent to represent him [] or herself in a removal or

addressed competency in criminal proceedings, the Supreme Court held that a higher standard of competency, such as that articulated in *Matter of M-A-M-*, should control when a defendant wants to proceed pro se.[103]

Although *Matter of M-A-M-* provided IJs with much needed guidance for determining whether an immigrant is incompetent,[104] it fails to guarantee fair trials for incompetent immigrants. The BIA merely repeats what is already required by regulations or is suggested in the IJ Benchbook, such as not accepting an admission of removability from an incompetent respondent,[105] modifying questions so they are "simple and direct,"[106] and aiding in the development of the record.[107] The BIA does not guarantee counsel (or even a GAL) for mentally incompetent respondents. Thus, the safeguards reaffirmed in *Matter of M-A-M-* are inadequate to ensure that immigrants with mental disabilities are able to coherently present their case for relief from removal.

## III. ARGUMENTS FOR A RIGHT TO APPOINTED COUNSEL

*Franco-Gonzalez* was the first case to hold that the government must provide qualified representatives for immigrants who are incompetent to

---

custody redetermination proceeding if he or she has a:

> rational and factual understanding of:
> the nature and object of the proceeding;
> the privilege of representation, including but not limited to, the ability to consult with a representative if one is present;
> the right to present, examine, and object to evidence;
> the right to cross-examine witnesses; and
> the right to appeal.
> reasonability ability to:
> make decisions about asserting and waiving rights;
> respond to the allegations and charges in the proceeding; and
> present information and respond to questions relevant to eligibility for relief.

*See* PHASE I OF GOVERNMENT PLAN, *supra* note 30, at 2.

[103] Indiana v. Edwards, 554 U.S. 164, 177 (2008) ("But given the different capacities needed to proceed to trial without counsel, there is little reason to believe that *Dusky* alone is sufficient.").

[104] *See In re M-A-M-*, 25 I. & N. Dec. at 474.

[105] *Id.* at 482.

[106] *Id.* at 480.

[107] *Id.* at 482.

represent themselves in removal proceedings.[108] The plaintiffs' attorneys presented three justifications for the right to a qualified representative at the government's expense: the Due Process Clause, the Rehabilitation Act, and the INA.[109] This part of the Note discusses the right to counsel for immigrants with mental disabilities under the Rehabilitation Act—the reasoning Judge Gee applied[110]—and the Due Process Clause, which most courts apply to find a right to counsel in civil proceedings.[111]

### A. DUE PROCESS AND THE RIGHT TO COUNSEL

Scholars have argued for fifty years that the Due Process Clause of the Fifth Amendment should guarantee all immigrants, or at least all immigrants with mental disabilities, the right to counsel in removal proceedings.[112] Though Franco's attorneys argued similarly, Judge Gee based her ruling on the Rehabilitation Act and did not reach the due process argument.[113]

Since the infamous *Chinese Exclusion Case*, which affirmed Congress's power to exclude non-citizens as inherent in national sovereignty,[114] removal proceedings have been classified as civil. For this

---

[108] Franco-Gonzalez v. Holder, 767 F. Supp. 2d 1034 (C.D. Cal. 2010).

[109] *Id.* at 1037. This Note does not analyze the argument under the INA because it was not the basis for Judge Gee's decision and it is not relevant outside the immigration context.

[110] *Id.* at 1052–53, 1056.

[111] *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356 (2010); United States v. Campos-Asencio, 822 F.2d 506 (5th Cir. 1987) (discussing the Due Process Clause as a basis for requiring counsel in civil proceedings); Aguilera-Enriquez v. INS, 516 F.2d 565 (6th Cir. 1975).

[112] *See, e.g.*, Clapman, *supra* note 67, at 384–87; LaJuana Davis, *Reconsidering Remedies for Ensuring Competent Representation in Removal Proceedings*, 58 DRAKE L. REV. 123 (2009); Eisner, *supra* note 48, at 518–19 (providing an in-depth analysis of criminal and civil constitutional due process jurisprudence and arguing why the Due Process Clause of the Fifth Amendment should guarantee immigrants with mental disabilities the right to counsel in removal proceedings); Charles Gordan, *Right to Counsel in Immigration Proceedings*, 45 MINN. L. REV. 875 (1961) (arguing that immigrants need stronger due process protections, such as right to counsel, in civil and criminal proceedings); Daniel Grosh, *Immigrants, Aliens, and the Constitution*, 49 NOTRE DAME L. REV. 1075 (1974); William Haney, *Deportation and the Right to Counsel*, 11 HARV. INT'L L.J. 177 (1970); Beth J. Werlin, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393 (2000).

[113] *Franco-Gonzalez*, 767 F. Supp. 2d at 1059.

[114] Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581, 609 (1889); *see also* Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) (affirming the *Chinese Exclusion Case* and extending the executive and congressional powers over foreign relations to control over immigration).

reason, the Sixth Amendment's right to assistance of counsel in criminal prosecutions[115] has never applied in the immigration context.[116] The Supreme Court, however, has recognized that immigrants in removal proceedings are entitled to due process protections under the Fifth Amendment.[117] Federal regulations and jurisprudence have further affirmed that removal proceedings must satisfy the principle of fundamental fairness.[118]

Although the courts have continued to regard immigration proceedings as civil,[119] Supreme Court Justices have acknowledged that the consequences of deportation can be as severe as a criminal prosecution.[120] Justice Louis Brandeis wrote that removal can result "in loss of both property and life, or all that makes life worth living,"[121] while the Court in *Bridges v. Wixon* concluded that "[t]hough deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom."[122]

Despite this strong language, courts have rarely offered immigrants in removal proceedings due process protections akin to those available to criminal defendants. Non-English speaking respondents must be provided with a complete and accurate interpretation of the proceedings[123] and respondents with counsel can reopen their cases if their counsel was ineffective,[124] but courts have found little else that respondents in

---

[115] U.S. CONST. amend. VI.

[116] Notes, *A Second Chance: The Right to Effective Assistance of Counsel in Immigration Removal Proceedings*, 120 HARV. L. REV. 1544, 1549 (2007).

[117] *See* Bridges v. Wixon, 326 U.S. 135, 161 (1945) (holding that immigrants are entitled to due process protection); Yamataya v. Fisher (Japanese Immigrant Case), 189 U.S. 86, 101 (1903) (applying the Due Process Clause to aliens who are present in the United States).

[118] Shaughnessey v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) (stating that immigration proceedings must conform to the standards of fairness encompassed by the Due Process Clause); 8 C.F.R. § 1240.10(a)(4) (2006) (stating that an immigrant must have a "reasonable opportunity to examine and object to the evidence against him or her, to present evidence in his or her own behalf, and to cross-examine witnesses presented by the government.").

[119] *See Bridges*, 326 U.S. at 154.

[120] *Id.*

[121] Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

[122] *Bridges*, 326 U.S. at 154.

[123] Perez-Lastor v. INS, 208 F.3d 773, 778 (9th Cir. 2000).

[124] *See* Khan v. Att'y Gen., 448 F.3d 226, 236 (3d Cir. 2006).

immigration proceedings are entitled to. Although six circuits[125] have held that judges must appoint counsel when a non-citizen's lack of representation in a removal proceeding results in "prejudice which implicates the fundamental fairness of the proceeding,"[126] this safeguard has rarely been applied.[127] In most cases, appellate courts found that because the defendant was not entitled to relief from removal, he or she was not prejudiced by his or her lack of counsel.[128]

The Supreme Court first held that the Fourteenth Amendment required the government to appoint and pay for counsel in a civil proceeding in *In re Gault*.[129] This case involved juvenile delinquency proceedings that, although technically civil, could result in jail time.[130] But, in *Gagnon v. Scarpelli*, the Court held that appointed counsel is only needed in parole revocation hearings on a case-by-case basis, when a case's individual factors demand it.[131] Subsequently, in *Vitek v. Jones*, four Justices found a categorical right to counsel in a proceeding that involved the involuntary commitment of a prisoner to a state mental hospital.[132] However, the plurality opinion held that input from mental health professionals was sufficient to protect a prisoner's due process rights.[133]

In *Mathews v. Eldridge*, the Court set forth a balancing test to determine what constitutional protections the Due Process Clause requires for a particular civil proceeding.[134] The *Mathews* balancing test compares "(1) the private interests at stake, (2) the government's interests; and

---

[125] Osei v. INS, 305 F.3d 1205, 1208 (10th Cir. 2002); Huicochea-Gomez v. INS, 237 F.3d 696, 699 (6th Cir. 2001); United States v. Torres-Sanchez, 68 F.3d 227 (8th Cir. 1995); Prichard-Ciriza v. INS, 978 F.2d 219 (5th Cir. 1992); United States v. Proa-Tovar, 975 F.2d 592, 595 (9th Cir. 1992) (en banc); United States v. Holland, 876 F.2d 1533, 1537 (11th Cir. 1989) (all cited in Letter from Merrill Rotter, M.D., Dir., Div. of Law and Psychiatry, Albert Einstein Coll. of Med., et al. to Eric H. Holder, Jr., U.S. Att'y Gen. 4 n.14 (July 24, 2009), *available at* http://ccrjustice.org/files/Letter%20to%20AG%20Holder%20_Mental%20Health.pdf) [hereinafter Holder Letter].

[126] *Prichard-Ciriza*, 978 F.2d at 222 (quoting Michelson v. INS, 897 F.2d 465, 468 (10th Cir. 1990)).

[127] Werlin, *supra* note 112, at 395.

[128] Aguilera-Enriquez v. INA, 516 F.2d 565, 568–69 (6th Cir. 1975).

[129] *In re* Gault, 387 U.S. 1 (1967).

[130] *In re Gault*, 387 U.S. at 41.

[131] Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).

[132] Vitek v. Jones, 445 U.S. 480, 499–500 (1980).

[133] *Id.*

[134] Mathews v. Eldridge, 424 U.S. 319 (1976).

(3) the risk of an erroneous decision in the absence of the safeguard at issue."[135] This balancing test was applied in *Lassiter v. Department of Social Services*, a case where the parties faced the termination of their parental rights.[136] To the disappointment of "civil *Gideon*"[137] advocates, the Court failed to find a categorical right to appointed counsel despite the great private interests at stake. The Court held that the *Mathews* factors did not overcome the presumption against appointing counsel when physical liberty was not threatened.[138]

Many scholars interpreted *Lassiter* to stand for the proposition that a threat to physical liberty implies a categorical right to counsel. In fact, the plaintiffs' attorneys in *Franco-Gonzalez* first argued that immigrants were entitled to counsel in removal proceedings because "removal arguably implicates physical liberty."[139] In June 2011, however, the Supreme Court in *Turner v. Rogers* unanimously agreed that there was no categorical right to appointed counsel in civil contempt proceedings, even though the petitioner faced (and served) a one-year prison sentence.[140] The majority in *Turner* clarified that although the Court had previously found a categorical right to counsel in civil cases involving incarceration, the possibility of incarceration does not always create a right to counsel.[141] Though loss of liberty weighed heavily in the *Mathews* balancing test, three considerations weighed against providing counsel to Turner.[142] First, determining the petitioner's ability to pay child support was relatively

---

[135] Clapman, *supra* note 67, at 387 (citing *Mathews*, 424 U.S. at 335).

[136] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31 (1981).

[137] "Civil *Gideon*" is a term derived from *Gideon v. Wainwright*, 372 U.S. 335 (1963), in which the right to counsel in the criminal context was established. It is used to represent the movement for the right to appointed counsel in civil proceedings. *Philadelphia Bar Association Civil* Gideon *Corner: Expanding the Right to Counsel for Low-Income People in Civil Cases Where Basic Human Needs Are at Stake*, PHILA. BAR ASS'N, http://www.philadelphiabar.org/page/CivilGideon (last visited Nov. 11, 2013).

[138] *Id.*

[139] *See* Clapman, *supra* note 67, at 388; *see also* First Amended Class-Action Complaint *supra* note 2.

[140] Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011). *But see* Laura K. Abel, Turner v. Rogers *and the Right of Meaningful Access to the Courts*, 89 DENV. U. L. REV. 805, 815–17 (2012) (discussing whether the pro se respondent in *Turner* was provided "meaningful access" to the court); Turner v. Rogers *Guidance*, U.S. DEPARTMENT OF HEALTH & HUM. SERVICES, http://www.acf.hhs.gov/programs/css/resource/turner-v-rogers-guidance (last visited Nov. 119, 2013) (discussing whether the safeguards provided in *Turner* sufficiently protect an individual without counsel).

[141] *Turner*, 131 S. Ct. at 2511.

[142] *Id.* at 2510–11.

straightforward and could be done without the aid of a lawyer.[143] Second, in child support cases, opposing parties also often lack counsel, so providing counsel for the defendant could "create an asymmetry of representation that would 'alter significantly the nature of the proceeding.'"[144] Lastly, "'substitute procedural safeguards'"[145] were sufficient to "reduce the risk of an erroneous deprivation of liberty."[146]

While the *Turner* decision disappointed advocates who hoped that the Court would finally recognize a categorical right to counsel in a civil proceeding, some scholars have suggested that *Turner* was a win for the access-to-justice movement.[147] They view the decision as a win because it requires that judges ensure that self-represented litigants receive due process through procedural safeguards and it "supports a right to counsel in certain proceedings," specifically those that do not have the factors that weighed against Turner.[148]

The lawyers in *Franco-Gonzalez* argued that immigration proceedings are distinguishable from civil contempt proceedings in several ways, thus entitling immigrants to the categorical right to appointed counsel under the majority's analysis in *Turner*.[149] First, immigration law has been recognized as one of the most complex areas of the law.[150] The post-9/11 mandatory criminal bars only further complicate it.[151] Further, unlike in child support contempt proceedings where the ability-to-pay issue may be easily determined without the help of an attorney, the many elements involved in an asylum or a cancellation of removal claim require an attorney. Second, because specialized trial attorneys always represent

---

[143] *Id.* at 2511.

[144] *Id.* (quoting Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973)).

[145] *Id.* at 2519 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

[146] *Id.*

[147] Daniel Curry, *The March Toward Justice: Assessing the Impact of* Turner v. Rogers *on Civil Access-to-Justice Reforms*, 25 GEO. J. LEGAL ETHICS 487, 487 (2012).

[148] *Id.*

[149] *See* First Amended Class-Action Complaint, *supra* note 2.

[150] *See* KERWIN, *supra* note 50, at 2–3.

[151] Recent changes in immigration law have made the need for representation in removal proceedings even more dire. There are "expanded grounds for removal, diminished relief from removal, severe limitations on administrative and judicial review, the increased use of detention, and video-conference hearings," moreover, "fewer persons in removal proceedings now have viable claims for relief, and persons who can legally contest removal typically have extremely strong humanitarian or equitable claims to remain." PEÑA, *supra* note 45, at 5.

ICE, asymmetry of representation is not a problem.[152] Third, the current safeguards are clearly insufficient to guarantee the due process rights of mentally disabled immigrants, as outlined in Part II of this Note. In addition, as the plaintiffs argued in their motions, under a *Mathews* balancing test, the private interests of immigrants in the fair adjudication of their removal proceedings greatly outweighs the government interest.[153]

The government in *Franco-Gonzalez* argued against a categorical rule requiring counsel because not all immigrants with mental disabilities will "proceed to a contested merits hearing, or have a complicated case, legally or factually."[154] The four Justices who dissented in *Turner* would likely agree, if *Franco-Gonzalez* were appealed. The *Turner* dissent argued that a categorical right to counsel does not exist outside of proceedings "'functionally akin to a criminal trial.'"[155] Additionally, a case-by-case approach to appointment of counsel in immigration proceedings, which some judges may propose if *Franco-Gonzalez* or another similar case reaches the Court, is unworkable for a number of reasons. It is difficult to determine how complex removal proceedings will be and whether there are any claims for relief at the start of a case. Appointing counsel for immigrants with mental disabilities based on the perceived level of complexity of the case at the outset would require the IJ to investigate all of the immigrant's possible claims. The IJ would need to review ICE files and interview the immigrant. It is extremely unlikely, especially in cases with immigrants with severe mental disabilities, that all the factual nuances of a case will be clear through a cursory investigation. Counsel is vital in developing the factual record of a case; without counsel, some issues and forms of relief would not be immediately apparent. A case-by-case approach to counsel would inevitably lead to numerous post-verdict challenges to the fairness of the proceedings, costing the government more than a categorical approach would cost.[156]

---

[152] The *Turner* Court also stated that the ruling might be different in contempt proceedings in which the child support payment is owed to the state and the government probably has counsel. Turner v. Rogers, 131 S. Ct. 2507, 2511 (2011).

[153] *See* First Amended Class-Action Complaint, *supra* note 2.

[154] Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment at 20, Franco-Gonzalez v. Holder, No. CV 10-2211-DMG (C.D. Cal. Sept. 7, 2012) (on file with author).

[155] *Turner*, 131 S. Ct. at 2523 (quoting Gagnon v. Scarpelli, 411 U.S. 778, 789, n.12 (1973)).

[156] See Justice Blackmun's dissent in *Lassiter v. Department of Social Services*, 452 U.S. 18, 31 (1981), which argues that the majority's approach returns to the discredited logic of *Betts*

Fortunately, Judge Gee did not reach the due process question, and the government is not appealing the case.[157] Recent Supreme Court cases addressing the right to counsel in civil proceedings suggest a reticence to create more categorical rights.[158] While there is a strong case for applying the *Mathews* test to the right to appointed counsel for mentally incompetent immigrants in removal proceedings, it is unlikely that *Franco-Gonzalez* would have succeeded on appeal on due process grounds given the current Supreme Court makeup. Although immigration proceedings are complex and adversarial, and the Court has historically protected mentally incompetent individuals,[159] the Justices may fear a slippery slope if they appoint counsel to immigrants. The Court may be wary that other vulnerable groups facing removal proceedings, such as children or the uneducated, will also argue that they are entitled to counsel, as occurred with the Sixth Amendment in criminal proceedings.

Ultimately, the Rehabilitation Act offered Judge Gee, and can offer other judges deciding right-to-counsel cases, an alternative legal framework to provide counsel to mentally disabled individuals without having to expand civil due process jurisprudence.

### B. AN APPOINTED REPRESENTATIVE IS A REASONABLE ACCOMMODATION FOR IMMIGRANTS WITH MENTAL DISABILITIES UNDER THE REHABILITATION ACT

Judge Gee held that immigrants who were incompetent due to mental disabilities were entitled to a qualified representative as a reasonable accommodation to enable them to participate in their removal proceedings.[160] The Rehabilitation Act, a predecessor of the Americans with Disabilities Act (ADA), prohibits the federal government (including the DOJ and the DHS) from discriminating against any individual,

---

*v. Brady*, 316 U.S. 455 (1942), a precursor to *Gideon v. Wainwright*, 372 U.S. 335 (1963), which found a right to counsel for all criminal defendants. Blackmun argues that *Betts* led to inconsistent and ad hoc determinations, a system that was ultimately overturned in *Gideon*. *Lassiter*, 452 U.S. at 35–37 (Blackmun, J., dissenting).

[157] *See* Partial Judgment and Permanent Injunction, *supra* note 9.

[158] *See, e.g.*, *Lassiter*, 452 U.S. at 18 (using a factor test to assess whether due process mandates counsel in a given case).

[159] *See* Massey v. Moore, 348 U.S. 105 (1954) (holding that due process requires appointed counsel in criminal cases for all people who suffer from serious mental disabilities).

[160] Partial Judgment and Permanent Injunction, *supra* note 9.

including non-citizens, on the basis of a disability.[161] Section 504 of the Rehabilitation Act states: "No otherwise qualified individual . . . shall, solely by reason of his or her 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."[162] Section 504 bars discrimination in programs operated or funded by the federal government, and therefore applies to the immigration court system,[163] whereas the later-enacted ADA bars discrimination for many non-federal private and public programs.[164]

To establish a prima facie case under Section 504 of the Rehabilitation Act, the *Franco-Gonzalez* class members had to show that: (1) they were qualified persons with disabilities; (2) they were otherwise qualified for the benefit or services they sought; (3) they were denied the benefit or services solely by reason of their disability; and (4) the entity providing the benefit or service receives federal funding.[165] To qualify as an individual with a disability, one must have either "a physical or mental impairment that substantially limits one or more major life activities," a "record of such an impairment," or be "regarded as having such an impairment."[166] Major life activities include "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, . . . speaking, breathing, learning, . . . and working."[167]

The *Franco-Gonzalez* class members met the first requirement of the Rehabilitation Act because as immigrants with mental disabilities deemed incompetent under *Matter of M-A-M-*, they qualified as persons with disabilities. Second, the INA prescribes that all immigrants in removal proceedings are accorded "rights and privileges."[168] The INA entitles

---

[161] *See* Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2006).

[162] *Id.* § 794(a).

[163] *See id.*

[164] The ADA of 1990 was "expressly modeled after" Section 504 of the Rehabilitation Act of 1973. Duvall v. Kitsap, 260 F.3d 1124, 1135 (9th Cir. 2001). The language, as well as the legislative history, makes clear that they should be interpreted consistently. *See id.* at 1135 n.8; 42 U.S.C. § 12117(b) (stating that employment discrimination actions under the ADA of 1990 and the Rehabilitation Act of 1973 should be coordinated to avoid inconsistency). Case law precedent for the Rehabilitation Act has been used to interpret the ADA and vice versa. *See Duvall*, 260 F.3d at 1135–36.

[165] Lovell v. Chandler, 303 F. 3d 1039, 1052 (9th Cir. 2002); *see also* 29 U.S.C. § 794(a).

[166] 42 U.S.C. § 12102(1)(A)–(C) (2006) (amended 2008); *Duvall*, 260 F.3d at 1135.

[167] 42 U.S.C. § 12102(2)(A).

[168] 8 U.S.C. § 1229a(b)(3) (2012).

immigrants in removal proceedings to a "reasonable opportunity" to present and examine evidence, and to cross-examine witnesses.[169] These rights constitute the "benefit or service" that class members sought.[170] The *Franco-Gonzalez* class members satisfied the third requirement because immigrants with mental disabilities cannot participate in removal proceedings solely because of their disability.[171] To qualify under the Rehabilitation Act, the inability of immigrants with mental disabilities to understand and participate in removal proceedings must surpass the general confusion that many immigrants experience. As many proponents of a civil *Gideon* note, meaningful access to the courts can be nearly impossible without the help of counsel, even for those without a mental disability.[172] Immigrants with mental disabilities, however, face additional hurdles when appearing pro se because it is difficult for them to collect and present "relevant biographical and factual evidence,"[173] and they are "less persuasive witnesses."[174] Lastly, the plaintiffs met the fourth

---

[169] *Id.* § 1229a(b)(4)(B).

[170] The government in *Franco-Gonzalez* initially argued that plaintiffs were not qualified for a benefit or service, but the plaintiffs responded:

> [T]he Rehabilitation Act take[s] an extremely expansive view of what constitutes a "benefit or service," *see, e.g.*, 28 C.F.R. [§] 39.101–39.103 (Section 504 "applies to *all* programs or activities conducted" by the DOJ) (emphasis added), and another division of [the] DHS has already interpreted those regulations to require accommodations for people seeking naturalization. *See also* Galvez-Letona v. Kirkpatrick, 54 F. Supp. 2d 1218, 1224–25 (D. Utah 1999) (holding that INS violated the Rehabilitation Act when it denied naturalization to an individual who, due to Downs Syndrome, could not take oath of citizenship).

Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment at 10, Franco-Gonzalez v. Holder, No. CV 10-2211-DMG (C.D. Cal. Sept. 7, 2012), *available at* http://www.law.yale.edu/documents/pdf/News_&_Events/ILR12_CaBRF_DCT_MSJ_Memorandum_Points_Authorities.pdf; *see also Exceptions and Accommodations*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/us-citizenship/citizenship-through-naturalization/exceptions-accommodations (last updated Jan. 22, 2013) ("Under Section 504 of the Rehabilitation Act of 1973, we provide accommodations or modifications for applicants with physical or mental impairments that make it difficult for them to complete the naturalization process.").

[171] *See* Layton v. Elder, 143 F.3d 469, 472 (8th Cir. 1998) (holding that disabled veterans demonstrated they would suffer irreparable harm if court services, programs, and activities were not made accessible).

[172] *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 46 (1981) (Blackmun, J., dissenting) ("the defendant parent [of a nondisabled minor] plainly is outstripped if he or she is without the assistance of [counsel]").

[173] DEPORTATION BY DEFAULT, *supra* note 7, at 31.

[174] Atkins v. Virginia, 536 U.S. 304, 321 (2002).

requirement because the EOIR (the entity providing the benefit) receives federal funding.[175] Moreover, the Supreme Court has previously interpreted the ADA, and by extension the Rehabilitation Act, to apply to claims involving courts.[176]

Once plaintiffs demonstrate that their disability prevents them from meaningfully accessing the immigration courts, the Rehabilitation Act mandates that the government provide a reasonable accommodation.[177] A reasonable accommodation is one that offers the respondent "meaningful access" to the benefit or program that he or she seeks.[178] A reasonable accommodation is mandatory unless the accommodation would unduly burden or "fundamentally alter" the program.[179]

Under the Rehabilitation Act, after a request for an accommodation is made, the government must conduct a fact-specific investigation to determine whether it is reasonable.[180] The government is to provide the services necessary for reasonable access.[181] An extensive list of sample aids and services are listed in the regulations, including among others: qualified interpreters, note takers, qualified readers, brailed materials, and "other similar services or actions."[182] The broad reach of the accommodations listed, which includes trained professionals, suggests that appointing counsel for immigrants with mental disabilities would be an appropriate accommodation. An attorney or other qualified representative[183] would enable immigrants with severe mental disabilities to access the procedural rights guaranteed to them under the INA.

The government does not have to provide an individual with an

---

[175] The EOIR is an agency of the DOJ. *EOIR at a Glance*, DEPARTMENT JUST. (Sept. 9, 2010), http://www.justice.gov/eoir/press/2010/EOIRataGlance09092010.htm.

[176] *See* Tennessee v. Lane, 541 U.S. 509, 526–27, 533–34 (2004) (holding that the ADA applies to cases implicating the fundamental right of access to the courts).

[177] *See* 42 U.S.C. § 12132 (2006).

[178] Alexander v. Choate, 469 U.S. 287, 301 (1985).

[179] 28 C.F.R. § 35.150(a)(3) (2013).

[180] Mark H. v. Hamamoto, 620 F.3d 1090, 1098 (9th Cir. 2010).

[181] *See* Wright v. Giuliani, 230 F.3d 543, 548 (2d Cir. 2000).

[182] 28 C.F.R. § 35.104(1), (4) (2010); *see, e.g.*, Duvall v. Kitsap, 260 F.3d 1124 (2001) (ruling that a severely hearing-impaired plaintiff was entitled to use videotext technology if the absence of such technology prevented his participation in a family law case).

[183] *See supra* note 16 for the definition of a qualified representative. The court in *Franco-Gonzalez* found that an adequate representation could include a law student from an immigration clinic, because representatives in immigration court are not required to be attorneys. Franco-Gonzalez v. Holder, 767 F. Supp. 2d 1034, 1058 (2010).

accommodation under the Rehabilitation Act if it would result in a "fundamental" or "substantial" alteration of the program or an "undue financial [or] administrative burden."[184] In *Franco-Gonzalez*, the government argued that providing attorneys to immigrants with mental disabilities would be a fundamental or substantial alteration to the immigration court system because it gives disabled immigrants an unfair advantage over non-disabled immigrants who cannot afford counsel.[185]

However, the plaintiffs argued, and Judge Gee agreed, that legal representation would not be a "fundamental alteration" to a removal proceeding because attorneys already practice in immigration court.[186] The BIA even recommended that IJs help immigrants with mental disabilities find counsel in *Matter of M-A-M-*.[187] Although having appointed counsel would offer immigrants with mental disabilities an advantage over immigrants without mental disabilities, *U.S. Airways, Inc. v. Barnett* demonstrates that preferences are sometimes necessary to achieve the "basic equal opportunity goal" of the Rehabilitation Act, and "[b]y definition any special 'accommodation' requires the employer to treat an employee with a disability differently, i.e. preferentially."[188]

In *Franco-Gonzalez*, the government also argued that finding and paying for qualified representatives for immigrants with severe mental disabilities would create an undue burden on the government.[189] Even if the cost of appointing counsel were great, however, the Ninth Circuit found that under the ADA, when "[f]aced with[ ] a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor."[190] Furthermore, the number of immigrants who are incompetent due to mental disabilities is small compared to the overall population of immigrants in removal proceedings.[191] Therefore,

---

[184] 28 C.F.R. § 35.150(a)(3) (2013).

[185] *Franco-Gonzalez*, 767 F. Supp. 2d at 1056.

[186] Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment, *supra* note 170, at 12–13.

[187] *In re* M-A-M-, 25 I. & N. Dec. 474, 483 (BIA 2011); *see* IJ BENCHBOOK, *supra* note 81.

[188] U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 397 (2002).

[189] *Franco-Gonzalez*, 767 F. Supp. 2d at 1056–57.

[190] Rodde v. Bonta, 357 F.3d 988, 999 (9th Cir. 2004) (quoting Lopez v. Heckler, 713 F.2d 1432, 1437 (9th Cir.1983)).

[191] First Amended Class-Action Complaint, *supra* note 6, at 8 ("About 33,000 immigrants are detained daily and government estimates indicate that over 1,000 of them have mental disabilities.").

appointment of counsel for this vulnerable group would constitute only a "small fraction of [the agency's] annual expenditures."[192] Also, providing qualified representatives could make removal proceedings more efficient, and thus save the government money.[193]

Judge Gee agreed with the plaintiffs and found that a qualified representative was a reasonable accommodation for immigrants with mental disabilities.[194] One disadvantage of locating the right to counsel for mentally incompetent immigrants under the Rehabilitation Act, and not the Due Process Clause, is that it does not allow other vulnerable populations of immigrants, such as children or the detained, to use *Franco-Gonzalez* as precedent for their right to appointed counsel. Nonetheless, *Franco-Gonzalez* may encourage individuals with mental disabilities to request attorneys as reasonable accommodations in other types of civil proceedings where counsel is not available.

## IV. *FRANCO-GONZALEZ* IMPLEMENTATION ISSUES

In the coming months, the government and the attorneys for the plaintiffs will come together to implement Judge Gee's injunction,[195] during which a number of issues may arise.

---

[192] Am. Council of the Blind v. Paulson, 525 F.3d 1256, 1272 (2008).

[193] The government promoted its Legal Orientation Program, which brings attorneys to immigration detention centers to give legal advice to detainees, because it found that when immigrants have a greater understanding of the immigration system, courts are able to handle cases more quickly. *See* NINA SIULC ET AL., VERA INST. FOR JUST., IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM (2008), *available at* http://www.vera.org/sites/default/files/resources/downloads/LOP_Evaluation_May2008_final.pdf. Removal proceedings for incompetent immigrants are also especially lengthy because the respondent often struggles to answer questions posed by the IJ or the ICE attorney. Furthermore, IJs often grant many continuances, hoping that respondents find counsel or regain competency. Throughout these delays, continued detention costs the government about $141 per person per day. *See* Michelle Roberts, *AP Impact: Immigrants Face Detention, Few Rights*, FOXNEWS (Mar. 15, 2009), http://www.foxnews.com/wires/2009Mar16/0,4670,DetainedImmigrants ABRIDGED,00.html. In a July 2009 letter to Attorney General Holder, several organizations suggested appointing counsel for all persons with mental disabilities in removal proceedings. They pointed out that "[g]iven the formidable caseloads and backlogs faced by all immigration judges, the need for appointed counsel to identify and prepare relevant legal claims on behalf of respondents with reduced capacity is especially acute so that immigration judges can avoid unnecessary and costly delays and focus their limited resources on adjudicating prepared cases." *See* Holder Letter, *supra* note 125.

[194] *Franco-Gonzalez*, 767 F. Supp. 2d at 1058.

[195] Partial Judgment and Permanent Injunction, *supra* note 9, at 4.

### A. THE ROLE OF GUARDIANS AD LITEM UNDER THE INJUNCTION

The *Franco-Gonzalez* permanent injunction requires that the government provide a qualified representative for mentally incompetent immigrants, but it does not mention GALs.[196] Rule 17 of the Federal Rules of Civil Procedure requires a court to appoint a GAL for a person who is incompetent,[197] but the Federal Rules of Civil Procedure do not apply to removal proceedings.[198]

GALs may be necessary for representatives to effectively represent incompetent immigrants without violating their roles as advocates. In legal proceedings, clients have the power to determine the goal of the case, and attorneys are ethically precluded from substituting their objectives or goals for their clients'.[199] If a client has "diminished capacity" and the lawyer reasonably believes that the client's actions may cause the client harm, the lawyer is to take protective action such as "seeking the appointment of a guardian ad litem."[200] The role of the GAL is to step into the shoes of the client, who because of mental illness is incapable of making his or her wishes known, and to "essentially channel[] the ward's imputed best interest."[201] A GAL can identify goals and make decisions relevant to the proceedings, thereby removing the ethical conflict a lawyer may have when working with an incompetent immigrant.[202]

It is problematic if lawyers attempt to act as their clients' GALs.[203] For example, removal proceedings move faster for detained immigrants

---

[196] *Id.* at 7.

[197] See FED. R. CIV. P. 17(c); *see also* United States v. Mandycz, 447 F.3d 951, 962 (6th Cir. 2006) (finding that due process requires appointing guardians in civil proceedings to protect incompetent litigants' interests).

[198] The Federal Rules have on occasion been cited by the BIA as persuasive. *See, e.g.*, *In re* Taerghodsi, 16 I. & N. Dec. 260, 263 n.6 (BIA 1977) (using the Federal Rules as a "guide"); *Mandycz*, 447 F.3d at 962 (applying Rule 17 in a denaturalization: "[W]hereas due process protects incompetent criminal defendants by imposing an outright prohibition on trial, it protects incompetent civil parties by requiring the court to appoint guardians to protect their interests and by judicially ensuring that the guardians protect those interests.").

[199] MODEL RULES OF PROF'L CONDUCT R. 1.2 (2012).

[200] *See id.* at R. 1.14.

[201] Amelia Wilson & Natalie H. Prokop, *Applying Method to the Madness: The Right to Court Appointed Guardians Ad Litem and Counsel for the Mentally Ill in Immigration Proceedings*, 16 U. PA. J.L. & SOC. CHANGE 1, 15 (2013).

[202] See Holder Letter, *supra* note 125, for an in-depth discussion of GALs in immigration proceedings.

[203] Wilson & Prokop, *supra* note 201, at 2.

than non-detained immigrants.[204] Detainee proceedings are usually resolved within a few months to minimize the government's cost of detainment and to respect the detainee's liberty interest,[205] whereas non-detainee cases may take several years.[206] It may consequently serve the client's best legal interest to remain detained so the case can quickly be resolved (especially when there is a limited number of a particular type of immigration relief that can be granted each year), but it is also arguably in the client's personal interest to be released from detention as soon as possible.[207] An advocate should not be forced to weigh the client's legal interests against the client's personal interests. When a client is unable to express objectives for his or her case, only a GAL can resolve the advocate's ethical quandaries.

It is also often important for the client to testify at the removal hearing.[208] Testimony is especially important in asylum proceedings, where the respondent must convey subjective fear of returning to the country of origin.[209] A GAL can testify on behalf of an incompetent immigrant, but if the advocate is also serving as the GAL, there is no one to testify.[210]

To be clear, a GAL should not be a substitute for an attorney. A GAL is usually a respondent's family member or a friend who will generally not have legal training and expertise or have access to legal materials and resources necessary to navigate the complex immigration system.[211] Further, non-attorneys, even those serving as GALs, do not have attorneys' enhanced access to detainees in detention facilities.[212] That lack

---

[204] *Id.* at 18–19.

[205] *Id.*

[206] *Id.* at 19.

[207] *Id.* at 18.

[208] *Id.* at 34–35.

[209] *Id.* at 15.

[210] *Id.*

[211] *Id.*

[212] ICE Performance-Based National Detention Standards require that "[e]ach facility . . . permit legal visitation seven days a week, including holidays, for a minimum of eight hours per day on regular business days (Monday through Friday), and a minimum of four hours per day on weekends and holidays." A legal visitor is "an attorney or other person representing another in a matter of law, including: law students or law graduates not yet admitted to the bar under certain conditions; accredited representatives; and accredited officials and attorneys licensed outside the United States." ICE, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 374 (2011), *available at* http://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf.

of access makes it difficult for a GAL to garner information from a detainee, especially if the detention facility is far from a city center.

Not every member of the *Franco-Gonzalez* class may require both a GAL and an advocate. Although the government and the plaintiffs have not determined what competency test will be used, it is likely that they will use a standard similar to the one put forth in *Matter of M-A-M-*: an immigrant is competent if "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."[213] For those respondents who have a "rational and factual understanding of the nature and object of the proceedings" and "can consult with the attorney," but are unable to "examine and present evidence and cross-examine witnesses" an advocate is necessary, but a GAL is not because the respondents are able to articulate their interests to their advocate.[214] For those respondents who do not have a "rational and factual understanding of the nature and object of the proceedings" and cannot consult with an advocate, both a GAL and an advocate would be required.[215]

Phase 1 of the government's plan to provide enhanced procedural protections for detained respondents with mental disabilities also makes no mention of GALs.[216] The plan suggests that IJs should consider "the respondent's ability to consult with and assist counsel when deciding whether provision of a qualified representative is an effective safeguard," but the plan does not say what should be done if the incompetent respondent is so disabled that he or she cannot work with the appointed representative.[217]

Thus, as the government and the plaintiffs negotiate how to implement the injunction, and as the EOIR devises nationwide policies for appointing advocates for detained respondents, it is important that the appointment of GALs be considered. Appointing an advocate without a GAL is problematic for respondents who are not competent to convey their interests for the reasons stated above.

---

[213] *In re* M-A-M-, 25 I. & N. Dec. 474, 479 (BIA 2011).

[214] *Id.*

[215] *Id.*

[216] PHASE 1 OF GOVERNMENT PLAN, *supra* note 30.

[217] *Id.* at 15.

One advantage of Judge Gee using the Rehabilitation Act and the ADA as the basis of her finding is that they require that the government do an individualized inquiry to determine the reasonable accommodations in each case.[218] A public entity is required to give "primary consideration" to the disabled individual's request when determining the appropriate aid or service.[219] Lisa Brodoff, who first proposed using the ADA and the Rehabilitation Act as a means to obtain counsel for people with mental disabilities,[220] argues that "a court cannot offer a blanket accommodation for all individuals with a specific disability; it must consider the particular individual's need when determining which accommodations are reasonable."[221] As the permanent injunction and the EOIRs policies are implemented, the parties should consider how an individualized inquiry of incompetent class members can be used to determine whether a qualified representative alone, or a representative and a GAL together, is the necessary accommodation for the respondent's needs.

## B. PROBLEMS WITH USING COMPETENCY TO DETERMINE WHO GETS A QUALIFIED REPRESENTATIVE

### 1. Fluctuating Competency

One problem with making a competency determination the threshold test for appointing counsel is that the respondent's competency may shift throughout the proceedings.[222] In criminal proceedings, a defendant cannot stand trial if he is incompetent.[223] Therefore, if the defendant is incompetent at the start of trial, proceedings will be suspended until the defendant regains competency, and proceedings will be stayed if the defendant loses competency midway through.[224] The Supreme Court has found that mental illness can "vary over time," affecting the functioning of an individual, "at different times in different ways."[225] Under a *Franco-Gonzalez* analysis, an incompetence finding at the start of the proceedings

---

[218] Lisa Brodoff, Susan McClellan & Elizabeth Anderson, *The ADA: One Avenue to Appointed Counsel Before a Full Civil* Gideon, 2 SEATTLE J. SOC. JUST. 609, 617–18 (2004).

[219] 28 C.F.R. § 35.160(b)(1)(2) (2013).

[220] Brodoff, *supra* note 218, at 611.

[221] *Id.* at 619.

[222] Indiana v. Edwards, 554 U.S. 164, 175 (2008).

[223] *Id.* at 169–70.

[224] Drope v. Missouri, 420 U.S. 162, 181 (1975).

[225] *Edwards*, 554 U.S. at 175.

entitles a respondent to a representative as a reasonable accommodation.[226] Phase 1 of the government's plan for enhanced procedural protections for detained immigrants with mental disabilities acknowledges that "[b]ecause competence is fluid and may change over time, indicia of incompetence may appear and must be considered throughout all stages of the proceeding," suggesting that a representative could be appointed at any stage of the proceedings.[227] It is not clear either under the *Franco-Gonzalez* injunction or under the government's plan for detained immigrants what happens if the respondent regains competency later in the proceedings or while the case is on appeal. Will the respondent lose his or her appointed representative? Will the government stop funding the representative, thus forcing the representative to decide between continuing representation for free or abandoning the client in the middle of the proceedings?[228] If a respondent's competency fluctuates throughout the several years it often takes to litigate an asylum case,[229] intermittent representation would be extremely disruptive.

For these reasons, this Note recommends that once a representative has been appointed for an incompetent respondent, that representation should continue throughout the proceedings, even if the respondent later regains competency.

### 2. Malingering and Willful Decompensation

Another problem that may arise when implementing the *Franco-Gonzalez* injunction and the government's new policies is malingering (faking mental illness) or willful decompensation, such as refusing medications that restore competency. As discussed above, having an attorney increases the chances of a favorable result at court proceedings,[230]

---

[226] Franco-Gonzalez v. Holder, 767 F. Supp. 2d 1034, 1058 (C.D. Cal. 2010).

[227] PHASE 1 OF GOVERNMENT PLAN, *supra* note 30, at 4.

[228] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 11 (2012) (stating that a conflict of interest may occur when one party is represented by an attorney in civil litigation, when the representation is paid for by a third party).

[229] *See, e.g.*, *Franco-Gonzalez*, 767 F. Supp. 2d at 1050 (noting that in one instance, a petitioner waited over fifteen years for a ruling in the petitioner's asylum proceedings (citing Tobar-Barrera v. Napolitano, Civil Nos. RDB 09–3064, RDB 10–0176, 2010 WL 972557 (D. Md. 2010))).

[230] *See, e.g.*, U.S. BANKR. CT.–C.D. OF CAL., ACCESS TO JUSTICE IN CRISIS: SELF-REPRESENTED PARTIES AND THE COURT, 2011 ANNUAL PRO SE REPORT (2011), *available at* http://ecf-ciao.cacb.uscourts.gov/Communications/prose/annualreport/2011/sectioniib.htm (describing the positive affect associated with representation in bankruptcy cases).

which could incentivize an immigrant with mental disabilities who is presently competent to become incompetent in order to receive a government-funded advocate, for instance, by refusing psychotropic medication. A similar concern can also arise in criminal proceedings.[231] If a criminal defendant is found incompetent to stand trial, however, he or she will spend years in mental institutions,[232] a severe limit on freedom. By contrast, immigration proceedings continue whether the respondent is competent or not, reducing the incentive to remain competent, while rewarding incompetence with a government-funded advocate.[233] As a result, there is little incentive for a respondent with serious mental disabilities to remain competent, because under *Franco-Gonzalez*, only an incompetent respondent would be appointed a representative at the government's expense.

Criminal case law suggests that the government can administer antipsychotic drugs to make a criminal defendant competent to stand trial without his or her consent.[234] However, involuntary administration of antipsychotic drugs has been reserved for defendants facing serious, violent criminal charges, when less intrusive alternatives are unavailable. Further, involuntary administration must serve an important government interest,[235] and the government's pecuniary interest in avoiding funding representation would not likely warrant involuntary administration of psychotropic drugs to detained immigrants with mental disabilities. It is unclear how courts will address the incentive to decompensate under the

---

[231] *See, e.g.*, Washington v. Harper, 494 U.S. 210, 226 (1990) (noting that respondent argued that the state should find him incompetent prior to administering medication in order to obtain a court proceeding to approve the treatment).

[232] 18 U.S.C. § 4241 (2012). This federal civil commitment statute mandates that incompetent criminal defendants be committed to appropriate mental health facilities until such time as they are competent to stand trial.

[233] *In re* M-A-M-, 25 I. & N. Dec. 474, 479 (BIA 2011).

[234] *See, e.g.*, Sell v. United States, 539 U.S. 166, 179 (2003) (holding that the government can "involuntarily . . . administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests"); Riggins v. Nevada, 504 U.S. 127 (1992) (allowing involuntary administration of medication to make a defendant competent to stand trial when accused of serious violent crimes, even if the defendant is trying to present an insanity defense); Washington v. Harper, 494 U.S. 210 (1990) (upholding a prison treatment program that forcibly medicated prisoners who were dangerous to themselves or others).

[235] *Sell*, 539 U.S. at 180.

*Franco-Gonzalez* framework.

One solution to malingering and willful decompensation would be to apply the Rehabilitation Act to all immigrants with mental disabilities in removal proceedings, as opposed to only those who are incompetent. Under the 2008 ADA amendments (which apply to the Rehabilitation Act as well), mitigating measures, such as medication, appliances, or the body's compensating systems, cannot be taken into account when determining whether impairment substantially limits a major life activity.[236] Therefore, immigrants with mental disabilities could qualify for reasonable accommodations even if they were taking antipsychotic medications. This would disincentivize immigrants in removal proceedings from refusing medication to obtain a government-funded attorney.

Thus, whether representatives are appointed to all immigrants with mental disabilities or only to those who qualify as incompetent, the Rehabilitation Act offers an avenue to appoint counsel for the most vulnerable immigrants until a full civil *Gideon* is recognized by the Supreme Court.

## V. CONCLUSION

The *Franco-Gonzalez* injunction was the first of its kind. It found that immigrants in removal proceedings who are incompetent due to mental disabilities are entitled to a qualified representative as a reasonable accommodation.[237]

The injunction also spurred the government, which for years had refused to accommodate incompetent respondents in immigration proceedings, to develop a national plan for providing representation to detained immigrants with mental illness.[238] Although critics may disparage the government for not drafting these policies until the threat of an injunction loomed,[239] the result is still a huge win for those immigrants who will now have the assistance of counsel in their removal proceedings. While support for appointed counsel in civil proceedings had grown at the state and local level in recent years,[240] little had been done to expand the

---

[236] 42 U.S.C. § 12102(4)(E)(i)(I)–(IV) (2006).

[237] Franco-Gonzalez v. Holder, 767 F. Supp. 2d 1034, 1061 (C.D. Cal. 2010).

[238] *Safeguards for Unrepresented Immigration Detainees*, *supra* note 23.

[239] *Class Action*, *supra* note 33.

[240] Civil counsel has been created statutorily, for instance, in Illinois for involuntary

right of counsel in immigration proceedings until now. *Franco-Gonzalez* serves as a lesson for right-to-justice advocates on the impact that litigation can have on the government's policy agenda.

In the coming months, many issues will have to be resolved between the court, the government, and the plaintiffs to determine how to implement the *Franco-Gonzalez* injunction in California, Washington and Arizona, and how to carry out the nationwide plan for detained immigrants with mental disabilities. What is clear, however, is that *Franco-Gonzalez* will serve as a model for using the Rehabilitation Act to obtain government-funded advocates for people with mental disabilities in other civil proceedings, such as housing, welfare, or employment. This is a promising time for right-to-justice advocates who seek counsel for low-income litigants in all civil proceedings.

---

sterilization, and in Massachusetts for guardianship proceedings. 755 ILL. COMP. STAT. 5/11a-17.1 (2010); MASS. GEN. LAWS ANN. ch. 190B, § 5-106 (West 2009). A number of state courts and statutes have also found that their constitutions guarantee a right to counsel, for example, for parents in termination of parental rights (Washington), and for children in termination proceedings (Georgia). GA. CODE ANN. § 15-11-98 (West 2010); WASH. ST. BAR ASS'N, THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN WASHINGTON: A REFERENCE GUIDE FOR THE BENCH AND BAR (2005), *available at* http://www.wsba.org/~/media/Files/Resources_Services/Legal%20Help/RightToCounselBrochureR3.ashx. In California, Supreme Court Chief Justice Ronald George advocated for the passage of the Sergeant Shriver Act, which allocated eleven million dollars per year for six years to establish right-to-counsel pilot programs in areas of litigation where basic human needs, such as shelter, sustenance, and child custody, are at stake. *Closing the Loop—Sargent Shriver Civil Counsel Act*, CAL. CTS., http://www.courts.ca.gov/15583.htm (last visited Nov. 12, 2013).