VIA FEDERAL EXPRESS July 24, 2009

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Holder:

We, the undersigned organizations and individuals, respectfully request that the Department of Justice ("DOJ") modify the existing regulations and immigration court practices in removal proceedings for non-citizens with mental disabilities. Non-citizens with mental disabilities confront far greater obstacles in removal proceedings than non-citizens without mental disabilities and therefore require additional legal protections to safeguard their Fifth Amendment due process guarantees. We outline herein proposed changes to regulations and immigration court practices that will help satisfy the Constitutional guarantee of due process for these respondents while also promoting administrative and judicial economy. We hope this letter will begin a process of thoughtful consideration and discussion regarding the removal and detention process for non-citizens with mental disabilities.

In this letter, we recommend the following:

1. The appointment of counsel to all persons with mental disabilities in removal proceedings.
2. The appointment of guardians *ad litem* to persons in removal proceedings who have been found mentally incompetent (in addition to appointed counsel).
3. The revision of existing regulations and the adoption of new regulations and practices to standardize proceedings and provide increased protections for respondents with mental disabilities (especially those respondents found mentally incompetent).
4. The provision of training programs and materials on mental health issues to all immigration judges.

These recommendations flow from the Fifth Amendment's guarantee of due process in removal proceedings, are well-established in other fields of law, and promote administrative and judicial economy, including cost savings for both the DOJ and Department of Homeland Security ("DHS").

As organizations that advocate for the rights of immigrants and/or persons with mental disabilities, we regularly encounter situations in which immigrants with mental disabilities in removal

proceedings are not treated with the basic fairness owed to them under U.S. law.[1] In addition, we often attend hearings where immigration judges appear uncertain about how to handle respondents with mental disabilities in the absence of regulatory guidance.[2] Recognizing these and other shortcomings, DHS Secretary Janet Napolitano recently appointed a special advisor to review immigration detention policies and detainee health care.[3] In light of our experience, Secretary Napolitano's renewed attention to these issues, and your recent order to vacate *Matter of Compean, Bangaly & J-E-C-*, 24 I&N Dec. 710 (A.G. 2009),[4] we believe the time is right to revisit the procedures used in removal proceedings involving non-citizens with mental disabilities in order to improve both fundamental fairness for the respondent and administrative and judicial efficiency for the Department of Justice.

I. Appointment of Counsel

Although emerging international standards and established European law favor a right to counsel for non-citizens in immigration proceedings,[5] in the United States a non-citizen facing removal

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[1] For example, in one case that is representative of many others, an unrepresented non-citizen with severe, long-term schizophrenia was ordered removed without the immigration judge or the Department of Homeland Security raising the issue of or making any inquiry into the non-citizen's mental competence despite obvious signs of mental incompetence and the DHS's knowledge of the non-citizen's severe mental disability. The non-citizen later retained counsel who used the evidence of respondent's incompetence from the initial removal proceeding and readily-available collateral mental health records to win a motion to reopen the case in front of the Board of Immigration Appeals and a subsequent remand of the proceedings based on numerous violations of the non-citizen's due process rights. Interview with Gregory Pleasants, Equal Justice Works Fellow, Mental Health Advocacy Services, Inc., in L.A., Cal. (May 2009). *See, also,* Nina Bernstein, *Mentally Ill and in Immigration Limbo,* NY TIMES, May 5, 2009, *available at* http://www.nytimes.com/2009/05/04/nyregion/04immigrant.html?scp=2&sq=immigration&st=cse.

[2] For example, due to the absence of sufficient guidance regarding detainees with severe mental disabilities, immigration judges frequently either proceed with removal proceedings without addressing the issue of the detainee's mental competence or repeatedly re-set master calendar hearings while the individual remains in detention. Email exchange with Megan Bremer, Managing Attorney, Pennsylvania Immigration Resource Center, in York, Pa. (Apr. 20, 2009).

[3] Dora Schriro, *Opposing view: We're Seeing Progress,* USA TODAY, Mar. 25, 2009, *available at* http://blogs.usatoday.com/oped/2009/03/opposing-view-w.html.

[4] *Matter of Compean, Bangaly & J-E-C-*, 25 I&N Dec. 1 (A.G. 2009)

[5] Under international principles, if the interest of justice requires it, "legal assistance should be assigned without payment if the [detained] person does not have sufficient means to pay for it." UN Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment, Principle 17(2), G.A. Res. 43/173, Annex, U.N. Doc. A/Res/43/173 (Dec. 9, 1988). Similarly, under European Union ("EU") law and European treaty law, non-citizens have a *right* to counsel in certain circumstances. First, Article 47 of the Charter of Fundamental Rights of the European Union provides that "everyone shall have the possibility of being advised, defended and represented" and "legal aid will be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice." 2000 O.J. (C 364) 1. Second, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which has been signed by all members of the Council of Europe (including all EU members), provides that everyone is entitled to a fair hearing. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, Europ.T.S. No. 5, as amended. It specifies that anyone charged with a criminal offense has the right "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require." *Id.* Although this provision relates to criminal matters, the European Court of Human Rights has ruled that this principle also applies to civil matters when such assistance proves indispensable for securing an effective access to court either because legal representation is mandatory under the national law or because of the complexity of the procedure or the case. Airey v. Ireland, 32 Eur. Ct. H.R. (1979). With respect to immigration matters, the EU has adopted several directives (a directive is a legislative act which requires member States to achieve a particular result without dictating the means of achieving that result) regarding the right to receive free legal assistance. Article 13 of the Directive 2008/115/EC of 16 Dec. 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-country Nationals and Article 15 of Directive 2005/85/EC on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status provide that, in accordance with relevant national legislation or rules regarding legal aid and subject to certain conditions set forth therein, member States shall ensure that the necessary legal assistance and/or representation is, upon request, granted free of charge. *See* Council Directive 2008/15, art. 13, 2008 O.J. (L 348) 98 (EC); Council Directive 2005/85, art. 15, 2005 O.J. (L 326) 13 (EC). In addition, certain protective measures apply to "vulnerable persons," including people with disabilities. For example, Article 14 ("Safeguards pending return") of Directive 2008/115/EC provides that member States shall ensure that during the period for voluntary departure and during periods for which removal has been postponed "special needs of vulnerable people are taken into account." *See* Council Directive 2008/15, art. 14, 2008 O.J. (L 348) 98 (EC).

currently only has "the *privilege* of being represented, at no expense to the Government, by counsel . . . ."[6] As a result, although a non-citizen may be represented by counsel in removal proceedings, most non-citizens are unable to afford counsel and thus proceed *pro se*.[7] Amnesty International USA's March 2009 report on immigration detention in the United States indicates that, of those in removal proceedings, 84 percent of detained immigrants and 58 percent overall are without counsel.[8] In addition to the economic hardship that all non-citizens must overcome to retain counsel, non-citizens with mental disabilities—especially where detained and cut off from community support—have reduced capacity to exercise this limited right to counsel and are especially likely to proceed *pro se*. Given their reduced capacity and consequential vulnerability, it is difficult to conceive, in the absence of providing appointed counsel, how non-citizens with mental disabilities may be assured due process and fundamentally fair proceedings. The need for appointed counsel is especially acute in cases where a non-citizen is mentally incompetent.

The Fifth Amendment right to due process applies to non-citizens in removal proceedings.[9] Due process serves an especially vital role in removal proceedings because of the fundamental interests at stake. Indeed, the U.S. Supreme Court has explicitly recognized these fundamental interests: "[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. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."[10] The Court has also acknowledged that deportation can result "in loss of both property and life, or of all that makes life worth living,"[11] and "is . . . at times the equivalent of banishment or exile."[12]

Moreover, the U.S. Supreme Court has repeatedly recognized that due process is flexible and should be measured "in light of . . . the capacities and circumstances of those who are to be heard . . . to insure [a fair hearing]."[13] Provision of additional protections for the class of non-citizens in removal proceedings who have mental disabilities thus flows from the U.S. Supreme Court's conception of meaningful due process.

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[6] 8 U.S.C. § 1229a(b)(4)(A) (2006 & Supp. 2009) (italics added); *see also* 8 U.S.C. § 1362 (2006).

[7] Karin Brulliard, *Battling Deportation Often a Solitary Journey: Without Legal Assistance, Thousands are Expelled Unfairly, Critics of System Say*, WASH. POST, Jan. 8, 2007, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/01/07/AR2007010701281.html?referrer=emailarticlepg; *Hearing on Problems with ICE Interrogation, Detention, and Removal Procedures Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law and the H. Comm. on the Judiciary*, 110th Cong. 6-7 (2008) (testimony of Rachel E. Rosenbloom, Human Rights Fellow and Supervising Attorney, Center for Human Rights and International Justice at Boston College), *available at* http://judiciary.house.gov/hearings/pdf/Rosenbloom080213.pdf.

[8] AMNESTY INT'L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 30 (Mar. 2009), *available at* http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf; VERA INST., Improving EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM: LESSONS FROM THE LEGAL ORIENTATION PROGRAM, REPORT SUMMARY (May 2008), *available at* http://www.vera.org/content/legal-orientation-program-evaluation-and-performance-and-outcome-measurement-report-phase-ii; U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2007 STATISTICAL YEARBOOK (Apr. 2008), *available at* http://www.usdoj.gov/eoir/statspub/fy07syb.pdf.

[9] U.S. CONST. amend. V; Matter of Compean, 24 I. & N. Dec. 710, 717 (2009); Reno v. Flores, 507 U.S. 292, 306 (1993).

[10] Bridges v. Wixon, 326 U.S. 135, 154 (1945).

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

[12] Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

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

Many circuits, including the Fifth, Sixth, Eighth, Ninth, Tenth and Eleventh Circuit Courts of Appeals, all adhere to a "fundamental fairness" due process standard in removal proceedings.[14] Under this standard, judicial intervention is warranted where a non-citizen's lack of representation in removal proceedings has resulted in "prejudice which implicates the fundamental fairness of the proceeding."[15] The "fundamental fairness" of removal proceedings is imperiled where a mentally disabled person proceeds *pro se* in the complex and adversarial arena of U.S. immigration law. Indeed, it is difficult to imagine a more fundamentally unfair situation than that of a respondent with a severe mental disability, potentially without capacity to understand the proceedings and applicable law, who must defend his fundamental life and liberty interests against a trained Government lawyer seeking to deport him before an immigration judge.[16]

Providing counsel to non-citizens with mental disabilities in removal proceedings will promote administrative and judicial economy and will result in cost savings for the DOJ. As discussed at length below, immigration judges do not have adequate guidance on how to handle unrepresented respondents with mental disabilities (especially where such respondents are mentally incompetent). This has led to inconsistent decisions, protracted litigation, and prolonged detention. Unrepresented and mentally incompetent respondents can languish in detention for many months while their cases are on hold because immigration judges may not accept admissions of removability from mentally incompetent respondents who proceed *pro se*.[17] Without adequate guidance or the ability to appoint counsel, immigration judges who are concerned about the respondent's due process rights, may rely on multiple continuances in the hope that new evidence will be submitted by someone other than the respondent. The result is a sharp increase in the healthcare and litigation costs associated with these cases. In one case, the health of the non-citizen deteriorated and U.S. Immigration and Customs Enforcement ("ICE") was ultimately compelled to release him to a hospice facility.[18] In other cases, the health of the non-citizen deteriorated to the point of creating a danger and facility custodians have had to get state court orders for involuntary treatment of 90 days each.[19] With the average per diem detention cost recently estimated to be $141 per person,[20] appointing counsel to represent non-citizens with mental disabilities would enable immigration judges to proceed with these cases, thereby promoting judicial efficiency and saving the U.S. Government considerable resources.[21] Providing appointed counsel is a

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[14] Prichard-Ciriza v. I.N.S., 978 F.2d 219 (5th Cir. 1992); Huicochea-Gomez v. INS, 237 F.3d 696, 699 (6th Cir. 2001); United States v. Torres-Sanchez, 68 F.3d 227 (8th Cir. 1995); United States v. Proa-Tovar, 975 F.2d 592, 595 (9th Cir. 1992) (en banc); Osei v. INS, 305 F.3d 1205, 1208 (10th Cir. 2002); United States v. Holland, 876 F.2d 1533, 1537 (11th Cir. 1989).

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

[16] Under 8 C.F.R. § 1240.2(b), counsel for the DHS is required when an incompetent or minor respondent is unrepresented by counsel, a legal representative, a near relative, a legal guardian, or a friend. 8 C.F.R. § 1240.2(b) (2009), WL 8 CFR s 1240.2. In other words, the Government seeking to deport an incompetent litigant must be represented by counsel although no equivalent protection is provided for the incompetent litigant.

[17] 8 C.F.R. §1240.10(c).

[18] Email exchange with Liz McGrail, Legal Director, Capital Area Immigrants' Rights (CAIR) Coalition, in Wash. D.C. (Apr. 17, 2009, 19:55 EST) (on file with Liz McGrail).

[19] Email exchange with Megan Bremer, Managing Attorney, Pennsylvania Immigration Resource Center, in York, Pa. (June 8, 2009, 01:05 EST) (on file with Megan Bremer).

[20] *See* Michelle Roberts, *AP Impact: Immigrants Face Detention, Few Rights*, ABC NEWS, Mar. 15, 2009, *available at* http://abcnews.go.com/US/wireStory?id=7087875.

[21] There is evidence in other contexts that appointed counsel helps improve efficiencies and achieve overall costs savings because appointed counsel identifies and prepares the legal claims at issue, which in turn allows courts to focus limited judicial resources on adjudicating sharpened legal claims instead of being forced to contend with inefficient and costly delays. See, e.g., OFFICE OF DEFENDER SERVS. TRAINING BRANCH, OFFICE OF DEFENDER SERVS. OF THE ADMIN. OFFICE OF THE U.S. COURTS, PROVIDING COUNSEL TO ALL POTENTIALLY ELIGIBLE BENEFICIARIES OF THE RETROACTIVE CRACK GUIDELINE AMENDMENT MAKES SENSE AND IS CONSTITUTIONALLY REQUIRED, *available at* http://www.fd.org/pdf_ lib/right%20to%20counsel.pdf ("The government, which has an interest in efficiency, should also be in favor of counsel for all. Defense counsel can screen out cases in which prisoners are clearly not eligible, prosecutors cannot negotiate with potentially eligible prisoners for agreed upon orders, defense counsel can sensibly

worthwhile expenditure, analogous to providing immigration court interpreters, because it will create efficiencies and accrue costs savings over time.[22]

Finally, appointed counsel would serve as an urgently-needed protection against the unlawful deportation of U.S. citizens who have mental disabilities. As numerous media reports have demonstrated, U.S. citizens, particularly those with mental disabilities, are at risk of unlawful deportation.[23] Due to their reduced capacity or mental incompetence, persons with mental disabilities face far greater obstacles to proving their U.S. citizenship to immigration authorities than persons without mental disabilities. Providing appointed counsel to all people in removal proceedings who have mental disabilities would mitigate the profound and systemic risk of unlawful deportation faced by all U.S. citizens with mental disabilities who are apprehended by immigration authorities.

II. Appointment of a Guardian *Ad Litem*

Similarly, we encourage the DOJ to adopt a regulation requiring immigration judges to appoint a guardian *ad litem* ("GAL") to any non-citizen in removal proceedings who has been judicially determined to be mentally incompetent by an immigration judge following appropriate evaluation(s)

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litigate issues that need to be litigated, and later appeals and habeas petitions can be avoided through the sound advice of counsel.") (citation omitted). Given 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.

[22] The use of immigration court interpreters provides a useful point of comparison. The available evidence, much of it collected and analyzed by the U.S. Government, indicates that although immigration court interpreters were not always regarded as essential and required an up-front expenditure of resources, they are now regarded as integral to protecting due process for the respondent and to promoting court efficiency and cost savings in the immigration court system. *See* MARTIN A. ROLDAN, OFFICE OF THE CHIEF IMMIGRATION JUDGE, INST. FOR COURT MGMT., IMMIGRATION COURT INTERPRETERS: THEIR STANDING AS PROFESSIONALS (2000), *available at* http://www.ncsconline.org/d_icm/programs/cedp/papers/abstracts/immigrationcourtinterpreters.html (finding that, based primarily on an opinion survey of immigration court personnel, "86% of [immigration] judges, 73% of the administrators, and 62% of the support staff view interpreters as being professional officers of the court."); OFFICE OF MGMT. AND BUDGET, DETAILED INFORMATION ON THE IMMIGRATION ADJUDICATION ASSESSMENT (2006), *available at* http://www.whitehouse.gov/omb/expectmore/detail/10003809.2006.html (stating that the "mission of EOIR is to provide for the fair, expeditious and uniform interpretation and application of immigration law" and "the interpreter contract…is crucial to the daily operation of EOIR" because interpreters help "in ensuring that entities involved in immigration proceedings receive due process"); OFFICE OF THE CHIEF IMMIGRATION JUDGE TO ALL IMMIGRATION COURT PERS., OPERATING POLICIES AND PROCEDURE MEMORANDUM NO. 04-08: CONTRACT INTERPRETER SERVICES (2004), *available at* http://www.usdoj.gov/eoir/efoia/ocij/oppm04/04-08.pdf (stating that the use of the outlined procedures for interpreters would allow the court to continue to conduct proceedings in a "fair and efficient manner.").

[23] Andrew Becker & Patrick J. McDonnell, *U.S. Citizens Caught up in Immigration Sweeps*, L.A. TIMES, Apr. 9, 2009, *available at* http://articles.latimes.com/2009/apr/09/nation/na-citizen9; Anna Gorman, *Immigration Officials Held U.S. Citizen for Two Weeks*, L.A. TIMES, Oct. 28, 2008, *available at* http://articles.latimes.com/2008/oct/28/local/me-deport28; Tim Vetscher, *Buckeye Parents Claim ICE Is Trying to Deport Citizen Son*, ABC15.COM, Apr. 15, 2009, http://www.abc15.com/content/news/westvalley/buckeye/story/Buckeye-parents-claim-ICE-is-trying-to-deport/9L6QduVx4EaTp2zQNSK-6A.cspx; Jannell Ross, *Deportation Order in Nashville Snares U.S. Citizen*, THE TENNESSEAN, June 5, 2009, *available at* http://www.tennessean.com/article/20090605/NEWS03/906050372/1017/Deportation+order+in+Nashville+snares+U.S.+citizen; Suzanne Gamboa, *Dozens of U.S. Citizens Deported*, TUCSONCITIZEN.COM, Apr. 13, 2009, *available at* http://www.tucsoncitizen.com/ss/border/114221.php (Pedro Guzman); Kemp Powers, *Group Says U.S. Citizen Wrongly Deported to Mexico*, REUTERS, June 11, 2007, *available at* http://www.reuters.com/article/domesticNews/idUSN1118919320070611 (Pedro Guzman); Marisa Taylor, *U.S. Citizen's Near-Deportation Not A Rarity*, STAR TRIBUNE, Jan. 26, 2008, *available at* http://www.startribune.com/nation/14456137.html (Thomas Warziniack); Kristin Collins, *Feds Wrongly Deport Citizen Living in N.C.*, THE NEWS & OBSERVER, Apr. 30, 2009, *available at* http://www.newsobserver.com/news/story/1507200.html (Mark Lyttle); Robert Zullo, *Despite Citizenship Claims, Woman Shipped to Honduras*, DAILY COMET, June 14, 2009, *available at* http://www.dailycomet.com/article/20090614/ARTICLES/906141011?Title=Despite-citizenship-claims-woman-shipped-to-Honduras (Diane Williams).

by a qualified and neutral mental health professional.[24] In these cases, the appointed GAL would stand in the shoes of the mentally incompetent respondent, in effect speaking for the respondent, using an expressed-interest model where possible and a best-interest model otherwise. GALs could be drawn from a pool created by the Executive Office for Immigration Review ("EOIR") or selected according to existing state GAL procedures. In addition, where possible and appropriate, a family member of the mentally incompetent respondent could be appointed GAL.

Appointment of a GAL to respondents in removal proceedings who have been found mentally incompetent would serve two purposes. First, it would allow counsel to form an attorney-client relationship with the mentally incompetent respondent. This relationship is difficult for counsel to navigate without a GAL's assistance because a mentally incompetent respondent cannot express ultimate goals with respect to the legal proceedings or make the decisions required to drive the attorney-client relationship, and counsel is ethically precluded from substituting her goals or decisions for those of the respondent. By making the necessary decisions and identifying the necessary goals, the GAL would remove this ethical conflict. Resolution of these ethical conflicts through the standardized use of a GAL may also encourage more *pro bono* legal representation of respondents who are mentally incompetent. Second, the appointment of a GAL in conjunction with appointed counsel would help provide sufficient due process for removal proceedings to go forward against a mentally incompetent respondent, which in turn would promote judicial economy, generate cost savings,[25] and enable the U.S. Government to exercise its strong interest in carrying out removal proceedings.

III. Clarification of Regulations

The DOJ has recognized the importance of having a "consistent, authoritative, nationwide interpretation of ambiguous provisions of the immigration laws."[26] However, the existing regulations are ambiguous and have thus been applied in widely disparate ways that often fall short of due process requirements. We urge the DOJ to clarify existing regulations and adopt new regulations and immigration court procedures in order to facilitate fair and consistent decision-making that comports with due process.

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[24] The appointment of a GAL is not unprecedented in removal proceedings, *see* Johns v. DOJ, 624 F.2d 522 (5th Cir. 1980) (appointing a GAL to an infant in removal proceedings on due process grounds), and is a standard practice in state and federal civil proceedings, *see, e.g.*, N.Y. C.P.L.R. 1201 (McKinney's, Westlaw through L2009, chapters 1 to 7, 9, 10 and 50 to 55) ("A person shall appear by his guardian ad litem if he is . . . [a] person judicially declared to be incompetent . . . or if he is an adult incapable of adequately prosecuting or defending his rights."); CAL. CIV. PROC. CODE § 372 (Deering, LEXIS through 2009, chapters 1, 12 and 20) ("When . . . an incompetent person . . . is a party, that person shall appear either by a guardian or conservator of the estate or by a guardian ad litem appointed by the court in which the action or proceeding is pending, or by a judge thereof, in each case."); VA. CODE ANN. § 8.01-9 (LEXIS through 2008 Sess.) ("A suit wherein a person under a disability is a party defendant shall not be stayed because of such disability, but the court in which the suit is pending, or the clerk thereof, shall appoint a discreet and competent attorney-at-law as guardian ad litem to such defendant, whether the defendant has been served with process or not. If no such attorney is found willing to act, the court shall appoint some other discreet and proper person as guardian ad litem."); FED. R. CIV. P. 17(c) ("A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem — or issue another appropriate order — to protect a minor or incompetent person who is unrepresented in an action.").

[25] There is strong evidence that use of GALs for litigants with mental disabilities has generated cost savings in other contexts. *See, e.g.* Guardian Ad Litem Services, Inc., *The Guardian Model, available at* http://www.guardianadlitemsvcs.org/guardianmodel.html (stating that the provision of a GAL "greatly increase[s] the courts [sic] efficiency in hearing [probate matters involving mentally ill defendants] and moving them forward to a positive resolution"); Gerald Lebovitz, Matthias W. Li & Shani R. Friedman, *Guardians Ad litem in Housing Court*, 5 LANDLORD-TENANT MONTHLY 1, 26 (2007) (describing the importance of the GAL in allowing mentally incompetent tenants to be served while keeping up with the "hectic pace" of the New York Housing Court).

[26] Matter of R-A-, 24 I. & N. Dec. 629, 631 (2008).

Authority Provided to the DOJ by Section 240(b)(3)of the Immigration and Nationality Act and the Fifth Amendment

Where a respondent is not "present" by reason of mental incompetence, Congress has instructed the Attorney General to "prescribe safeguards to protect the rights and privileges" of mentally incompetent non-citizens in removal proceedings.[27] This Section 240(b)(3) of the Immigration and Nationality Act ("INA") demonstrates clear Congressional intent that the Attorney General exercise his rulemaking authority to safeguard due process in removal proceedings for certain non-citizens with mental disabilities. Current regulations fail to fulfill this Congressional intent.

First, for the reasons outlined in this letter, such protections should include appointed counsel for non-citizens with mental disabilities as well as appointed GALs for those non-citizens found legally mentally incompetent. Second, INA § 240(b)(3) implicitly requires a procedure for determining whether a non-citizen in removal proceedings is mentally incompetent, and the DOJ should therefore adopt procedures for holding competency hearings. Finally, read in concert with the Fifth Amendment's requirement of due process in removal proceedings, INA § 240(b)(3) also supports the promulgation of regulations that provide additional due process protections for non-citizens with mental disabilities. Together, INA § 240(b)(3) and the Due Process Clause of the Fifth Amendment give the DOJ the necessary authority to act on the recommendations made in this letter.

Proposed Revision of 8 C.F.R. § 1240.4

We recommend that 8 C.F.R. § 1240.4[28] be re-written to address the issues outlined in this letter and incorporate the following recommendations where substantial concerns regarding the mental competency of respondent exist: (1) the appointment of counsel for mentally disabled respondents, (2) a procedure for conducting competency hearings at the request of counsel, the respondent or *sua sponte* by the court, (3) the appointment of GALs for mentally incompetent respondents, and (4) judicial discretion to provide other protective measures that may be necessary in particular circumstances.

Revision of 8 C.F.R. § 1240.4 should correct deficiencies in the regulation as it is currently written, including the ambiguous use of the word "present" and the apparent recommendation for appointment of an adverse party as GAL. First, although 8 C.F.R. § 1240.4 as it is currently written provides that a respondent may not be "present" at an immigration hearing due to mental incompetence, the regulations do not explain how an immigration judge is to determine whether a respondent is "present." The revisions we propose herein would resolve this ambiguity by clearly and explicitly focusing on the respondent's mental health and requiring an immigration judge to hold a competency hearing when a respondent's mental health is in doubt. Second, the proposed revisions would avoid the unauthorized practice of law when near friends or relatives are appointed as

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[27] 8 U.S.C. § 1229a(b)(3) (2006 & Supp. 2009); *see also* Brue v. Gonzales, 464 F.3d 1227, 1233 (10th Cir. 2006) (noting the Attorney General's authority to prescribe safeguards to protect the rights and privileges of certain aliens with mental disabilities in removal proceedings).

[28] 8 C.F.R. § 1240.4 states, "[w]hen it is impracticable for the respondent to be present at the hearing because of mental incompetence, 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. If such a person cannot be reasonably found or fails or refuses to appear, the custodian of the respondent shall be requested to appear on behalf of the respondent." 8 C.F.R. § 1240.4 (2009), WL 8 CFR s 1240.4. In addition, 8 C.F.R. § 1240.10(c) instructs Immigration Judges that the respondent should have an attorney or other representative and that the Immigration Judge should not accept an admission of removability from an incompetent person who is unrepresented. 8 C.F.R. § 1240.10(c) (2009), WL 8 CFR s 1240.10 ("The immigration judge shall not accept an admission of removability from an unrepresented respondent who is incompetent or under the age of 18 and is not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend; nor from an officer of an institution in which a respondent is an inmate or patient. When, pursuant to this paragraph, the immigration judge does not accept an admission of removability, he or she shall direct a hearing on the issues.").

representatives in the absence of counsel. Finally, the recommended revisions would resolve the due process conflicts stemming from the current regulation's apparent instruction that the "custodian of the respondent" appear on the respondent's behalf if others fail to appear. The custodian of detained non-citizens is an employee or agent of the U.S. Government–the respondent's adversary in the proceedings. Representation by an agent of the adverse party is patently unfair and inconsistent with the Fifth Amendment guarantee of due process.

Proposed Regulations for Competency Hearings: Legal Basis and Proposed Bifurcated Framework

The DOJ should promulgate regulations that provide immigration judges with a standardized framework for assessing a respondent's mental competence while also protecting the respondent from unwarranted or harmful disclosure of private mental health records.

While both U.S. civil and criminal law contain procedures addressing incompetent respondents,[29] criminal law provides clearer guidance for the determination of competency. In the criminal context, "[w]here the evidence raises a '*bona fide* doubt' as to a defendant's competence to stand trial, the judge on his own motion must impanel a jury and conduct a sanity hearing."[30] Moreover, each party in a criminal proceeding–the defense attorney as well as the prosecutor–has a duty, rooted in due process, to raise the issue of a defendant's mental competence when it is in doubt.[31] The U.S. Supreme Court requires a specific inquiry when assessing competency in the criminal context: "[w]hether [the defendant] 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."[32]

Civil law provides less guidance on what circumstances necessitate a competency assessment, but courts have made an effort to clarify the issue.[33] For example, the Second Circuit concluded that a district court must consider invoking Federal Rule of Civil Procedure 17(c) when it has "evidence from an appropriate court of record or a relevant public agency indicating that the party had been adjudicated incompetent, or if the court received verifiable evidence from a mental health professional demonstrating that the party is being or has been treated for mental illness of the type that would render him or her legally incompetent."[34] This federal civil rule guidance has been applied in the immigration context.[35]

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[29] *See, e.g.*, FED. R. CIV. P. 17(c)(2); Pate v. Robinson, 383 U.S. 375, 385 (1966) (criminal).

[30] *Pate*, 383 U.S. at 385. *See also* Drope v. Missouri, 420 U.S. 162, 180 (1975) ("Evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances be sufficient.").

[31] *See, e.g.*, Brady v. Maryland, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); United States v. Spagnoulo, 960 F.2d 990, 995 (11th Cir. 1992) (applying *Brady* to prosecutor's failure to disclose evidence of incompetence); United States v. Boigegrain, 155 F.3d 1181, 1188 (10th Cir. 1998) ("[T]he defendant's lawyer is not only allowed to raise the competency issue, but, because of the importance of the prohibition on trying those who cannot understand proceedings against them, she has a professional duty to do so when appropriate."); CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-4.2 (1989) (pertaining to the obligation of both prosecution and defense).

[32] Dusky v. United States, 362 U.S. 402, 402 (1960).

[33] *See* Mohamed v. TeBrake, 371 F. Supp. 2d 1043, 1046 (D. Minn. 2005) (discussing 8 C.F.R. § 1240.4), *vacated as moot* 470 F.3d 771 (8th Cir. 2006), *amended by* 477 F.3d 522 (8th Cir. 2007); Ferrelli v. River Manor Health Care Ctr., 323 F.3d 196, 201 (2d Cir. 2003) (discussing Federal Rule of Civil Procedure 17(c)).

[34] *Ferrelli*, 323 F.3d at 201.

[35] *Mohamed*, 371 F. Supp. 2d at 1046-47 (noting the *Ferrelli* court's suggestion that the protections afforded to *pro se* litigants by Federal Rule of Civil Procedure 17(c) would become null if judges were permitted to simply ignore clear evidence of incompetency and extending this notion to removal proceedings with respect to 8 C.F.R. § 1240.4), *vacated as moot* 470 F.3d 771 (8th Cir. 2006), *amended by* 477 F.3d 522 (8th Cir. 2007).

Although removal proceedings are not technically criminal proceedings, the fundamental interests at stake are often tantamount to or greater than those at stake in criminal proceedings.[36] We urge using the criminal framework for determining competency as the baseline for determining competency in removal proceedings. While there may be compelling reasons to subject individuals in removal proceedings to a more lenient competency standard, at a minimum, using the criminal standard will improve the fundamental fairness of the proceedings. The criminal standard is practical, efficient and well-developed in criminal case law, so it would provide clear guidelines for application by immigration judges. In addition, forensic mental health professionals, many of whom provide medical evaluations in immigration proceedings, are familiar with the criminal standard.

To provide a fair system for evaluating competency in immigration court, we recommend the adoption of regulations that create a bifurcated hearing regime. This would provide immigration judges with a standardized framework for assessing a respondent's mental competence while also protecting unrepresented respondents with severe mental disabilities from unwarranted or premature disclosure of private mental health records. It would also prevent the DHS from withholding from the immigration court information necessary to make accurate competency determinations.[37]

We recommend that the hearing regime contain at least the following elements:[38]

1. As a threshold matter, all parties, including the legal representatives of the DHS and immigration judges, have an affirmative duty to introduce and address concerns about, or material information relating to, a respondent's mental competence. In their role as officers of the Court, DHS trial attorneys must assess relevant information in the Alien File (the "A-File") and, where that information raises concerns, affirmatively indicate to the immigration court in a written statement or verbally on the record that there is a *bona fide* doubt as to the respondent's mental competence and that invocation of the mental competence hearing regime is warranted.[39]

2. In addition, the DHS is obligated at all times during removal proceedings to disclose mental health information to respondent's counsel (whether appointed or retained), including all relevant evidence in the A-File. However, as long as a respondent is unrepresented by counsel, the DHS may not disclose the information to either the respondent or the immigration court. Instead, the DHS should indicate that there is a *bona fide* question of competency that requires the appointment of counsel, and then disclose the information to subsequently appointed counsel.

3. Concurrently and independently, the immigration judge must (a) note for the record any behavior or any other information that raises questions about a respondent's mental competence and (b) affirmatively and on the record ask the DHS if it is aware of any mental health concerns in the respondent's case.

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[36] *Bridges*, 326 U.S. at 154 ("Though 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. That deportation is a penalty - at times, a most serious one - cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."). *See also Johns*, 624 F.2d at 524 ("Deportation is not a criminal action, but the consequences may more seriously affect the deportee than a jail sentence.").

[37] In current practice, DHS officers often have evidence supporting a claim of incompetence and are currently allowed to withhold such information from the immigration court. Interview with Gregory Pleasants, Equal Justice Works Fellow, Mental Health Advocacy Services, Inc., in L.A., Cal. (May 2009). A process that allows an adverse party to hold such information secret offends the fundamental fairness owed to non-citizens with mental disabilities under the Fifth Amendment.

[38] We recognize that the hearing regime proposed herein is incomplete, and we propose it in an effort to initiate discussion and further consideration of the issues by interested parties.

[39] Imposing this affirmative duty on the U.S. Government has legal precedent. *See supra* note 26.

4. If, at any time during the course of removal proceedings, the DHS' written or verbal statement, the immigration judge's independent observations or information, or information provided by the respondent or respondent's counsel (whether considered alone, together or in concert with other information material to respondent's mental health) demonstrate that a substantial question about a respondent's mental competency exists, then the immigration judge must invoke the mental competence hearing regime, which requires the immigration judge to, at a minimum: (a) appoint a qualified and independent mental health professional to evaluate the respondent's mental competence[40], (b) appoint counsel for an unrepresented respondent, and (c) give respondent's counsel sufficient time to obtain additional evidence, such as a second medical evaluation or information relating to the appointment of a GAL.

5. Upon submission of the mental competency evaluation by the appointed mental health professional as well as any evidence from the DHS and respondent's counsel, the immigration judge will conduct a hearing on the respondent's mental competence. Respondent's rights during this hearing include cross-examination (through counsel) of witnesses and presentation of evidence and arguments. The evidence and testimony proffered during the mental competence hearing will not be used in the case-in-chief unless the DHS or respondent separately submit such evidence during the course of regular removal proceedings.[41]

6. Following the mental competence hearing, the immigration judge will make findings of fact and determine whether the respondent is mentally competent under the appropriate legal standard (i.e. at a minimum, the *Dusky* standard, or, alternatively, a civil standard where the threshold to establish mental incompetency is lower). This decision may be appealed by either party. If the immigration judge determines that the non-citizen is mentally incompetent, then the immigration judge must immediately appoint a GAL to the respondent (to work with respondent's appointed or retained counsel). Only once both counsel and a GAL are in place, may removal proceedings resume for a respondent who has been found mentally incompetent.

At all times during removal proceedings, the immigration judge may take appropriate additional measures to protect the respondent's due process right. Such additional protective measures may include the administrative closure or termination of proceedings, the use of reduced evidentiary burdens, subpoenas for mental-health related records, and/or the provision of other reasonable accommodations. If the immigration judge determines that a non-citizen's mental disability does not rise to the level of mental incompetence, then normal removal proceedings may go forward with appointed counsel, but no GAL.

Termination and Administrative Closure

We urge the DOJ to promulgate regulations expressly authorizing immigration judges to release a respondent from custody, administratively close a respondent's removal proceedings, or

[40] Any person so appointed must (1) be a duly-licensed psychiatrist, psychologist, licensed clinical social worker, or comparable mental health professional with a graduate degree, and (2) have previous forensic mental health experience evaluating mental competency.

[41] This rule is especially important given the risk that such evidence could prejudice respondent's merits case. This procedure could parallel the process for suppression hearings and bond. *See, e.g.*, Orhorhaghe v. I.N.S., 38 F.3d 488, 492 (9th Cir. 1994); 8 C.F.R. § 1003.19(d) (2009), WL 8 CFR s 1003.19 ("Consideration by the Immigration Judge of an application or request of a respondent regarding custody or bond under this section shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding.").

terminate a respondent's removal proceedings in cases where a respondent has a severe mental illness or has been found mentally incompetent.

First, the DOJ should promulgate custody determination regulations that favor, in appropriate circumstances, the release of incompetent or severely mentally ill respondents from immigration detention. Such regulations would both help mitigate the due process concerns stemming from such detention and reduce detention costs. In current practice, for example, immigration judges have agreed to a favorable custody re-determination where a respondent's counsel has arranged an intensive mental health release program located in the community where the respondent is to be released. ICE has occasionally agreed to release respondents under similar circumstances.[42] Such arrangements benefit all parties: (1) the respondent is released from immigration detention and its associated negative effects on mental health and access to counsel and receives effective community-based mental health care, (2) the immigration court is no longer burdened with the difficult due process issues presented by a detained respondent with severe mental illness and insufficient access to counsel, mental health care and other support necessary for restoration of the respondent's mental health, and (3) the DHS no longer has to incur the heightened financial and personnel cost of detaining an individual with severe mental health needs. Moreover, the provision of intensive, community-based mental health services can help allay concerns about mental illness and dangerousness, as intensive mental health services have been shown to be among the most effective ways of significantly reducing mental health symptoms that lead to homelessness, drug use and behavior that leads to re-incarceration.[43] Such regulations could be integrated into the existing custody re-determination procedures or modified bond, parole, or other custody re-determination procedures could be created specifically for such respondents.

Second, the DOJ should promulgate regulations that explicitly permit an immigration judge to administratively close the case of a respondent who has a severe mental illness and/or has been found mentally incompetent. Under existing administrative practice, an immigration judge may, where appropriate, administratively close a case (thereby temporarily removing it from the court's calendar without a final determination).[44] Although administrative closure may currently be used only if both parties assent,[45] we believe it should be made available in those limited cases where (1) a respondent with a severe mental disability requires intensive community-based mental health treatment, (2) a mentally incompetent non-citizen's appointed counsel and GAL require additional time to investigate facts and present the mentally incompetent non-citizen's claims for relief from removal (including additional time to arrange mental health treatment that would increase the respondent's ability to communicate and provide necessary factual information), or (3) other appropriate situations. This proposal is consistent with existing U.S. law. For example, in criminal cases, a finding of incompetency results in the suspension of trial until the defendant regains competency.[46]

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[42] Interview with Gregory Pleasants, Equal Justice Works Fellow, Mental Health Advocacy Services, Inc., in L.A., Cal. (May 2009).

[43] *See, e.g., Effectiveness of Integrated Services For Homeless Adults with Serious Mental Illness*, California Department of Mental Health, May 2002, *available at* http://www.dmh.ca.gov/About_DMH/docs/press/Homeless-Mentally-Ill-Leg_rpt.pdf; Dale E. McNiel & Renée L. Binder, *Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence,* 164 AM. J. PSYCHIATRY 1395 (2007); Heidi A. Herinckx et al., *Rearrest and Linkage to Mental Health Services Among Clients of the Clark County Mental Health Court Program,* 56 PSYCHIATR SERV 853-57 (2005); Merith Cosden et al., *Evaluation of a Mental Health Treatment Court with Assertive Community Treatment,* 21 BEHAV. SCI. & L. 415 (2003); A.F. Lehman et al., *Cost-effectiveness of assertive community treatment for homeless persons with severe mental illness,* 174 BRIT. J. PSYCHIATRY 346-352 (1999).

[44] Matter of Gutierrez-Lopez, 21 I. & N. Dec. 479, 480 (1996); Matter of Amico, 19 I. & N. Dec. 652, 654 (1988).

[45] *Matter of Gutierrez-Lopez*, 21 I. & N. Dec. at 480.

[46] Medina v. California, 505 U.S. 437, 448-51 (1992).

Where a respondent may remain detained during administrative closure, the DOJ should develop safeguards to prevent prolonged detention and permit transfer to an appropriate medical facility. At a minimum, such safeguards should include (1) tying the length of a respondent's detention or hospitalization during administrative closure to the likelihood that further detention and mental health treatment will result in improvement of the respondent's mental health (including possible restoration of the respondent's competency), (2) a three month limit on detention and/or hospitalization during administrative closure, (3) detailing circumstances that require the transfer of a respondent from a detention facility to a treatment facility, (4) respondent's counsel's receipt of mental health progress reports from the custodial facility providing mental health treatment to the respondent, and (5) the ability of the same immigration court that granted administrative closure to monitor the length of such administrative closure and, where appropriate, (a) immediately re-calendar the non-citizen's removal proceedings, (b) hold a new competency hearing, (c) appoint a GAL, and/or (d) provide other protective measures.[47] These measures would not only protect respondents from prolonged detention during administrative closure,[48] but also save the U.S. Government the considerable financial costs associated with prolonged detention.[49]

Third, the DOJ should adopt regulations that explicitly permit an immigration judge to terminate removal proceedings in those rare cases where the mental health of a respondent makes due process and fundamental fairness impossible to achieve without the provision of extensive additional protections. Such regulations would enable an immigration judge to terminate removal proceedings in lieu of appointing counsel and taking other necessary steps to provide due process to a mentally disabled respondent. Such discretionary authority is especially reasonable in cases where a respondent is found mentally incompetent and the U.S. Government is unable or unwilling to provide these protections. Discretionary termination is also reasonable given the complexity of proceedings involving mentally incompetent respondents, the exacerbating effects such proceedings usually have on the condition of respondents with mental disabilities, the costs of prolonged detention, and the grave consequences of a removal order (which often amount to permanent deprivation of adequate mental health treatment, homelessness, and other profound deprivations).[50]

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[47] This regime is similar to the restoration of competency regime used in criminal proceedings, *see Medina*, 505 U.S. at 448 ("If a defendant is incompetent, due process considerations require suspension of the criminal trial until such time, if any, that the defendant regains the capacity to participate in his defense and understand the proceedings against him."), and balances competing interests by giving the State the opportunity to restore the litigant's mental competence and to move forward with the underlying legal proceeding while also protecting the mentally incompetent litigant against prolonged detention. *See* Jackson v. Indiana, 406 U.S. 715 (1972) (holding that an incompetent defendant can only be held for a "reasonable period of time").

[48] *See Jackson*, 406 U.S. at 738 (holding that a defendant found incompetent to stand trial may not be held indefinitely, but only for a "reasonable period of time"). Under current regulations, which provide little guidance on the use of administrative closure in cases involving respondents with mental disabilities, prolonged detention is a reality. For example, in one representative case, the removal proceedings of an unrepresented respondent with severe schizophrenia were administratively closed for over two years while the respondent languished in an ICE-controlled hospital. Interview with Gregory Pleasants, Equal Justice Works Fellow, Mental Health Advocacy Services, Inc., in L.A., Cal. (May 2009). Such unmonitored use of administrative closure raises due process concerns and places an enormous and unnecessary financial burden on the United States Government. The regime that is suggested here would greatly reduce the due process concerns raised by the current use of administrative closure and would result in significant cost savings to the United States Government.

[49] If the Department of Justice adopts this or a similar administrative closure regime for respondents with mental disabilities without acknowledging the right to appointed counsel for respondents with mental disabilities, then additional safeguards will be required in the administrative closure regime to prevent arbitrary and prolonged detention.

[50] DHS policy already recommends termination as a matter of prosecutorial discretion based on, *inter alia*, humanitarian concerns and available agency resources. *See* IMMIGRATION AND NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, MEMORANDUM FROM DORIS MEISSNER ON EXERCISING PROSECUTORIAL DISCRETION (2000), 2000 WL 33596819 (INS); Memorandum from William J. Howard, Principal Legal Advisor of U.S. Immigration and Customs Enforcement, to OPLA Chief Counsel (Oct. 24, 2005) (on file with Gregory Pleasants, Equal Justice Works Fellow, Mental Health Advocacy Services, Inc.); Memorandum from Julie L. Myers, Assistant Secretary of U.S. Immigration and Customs Enforcement, to Field Office Directors and Special Agents in Charge (Nov. 7, 2007) (on file with Gregory Pleasants, Equal Justice Works Fellow, Mental Health Advocacy Services, Inc.).

Finally, we note that the status quo – which results in the immigration detention of significant numbers of people with mental disabilities – is the most expensive and least efficient of all available options. Evidence from a variety of settings demonstrates that the detention of people with mental disabilities places a heightened burden on the U.S. Government and other custodial authorities. Indeed, empirical studies across custodial settings have consistently found that mentally disabled detainees and inmates are held or incarcerated for longer periods of time than persons without mental disabilities and that the cost of providing mental health treatment services in a custodial setting is the most expensive and least effective form of mental health care.[51] In contrast, providing mental health treatment in a community setting reduces the cost of care and is more effective.[52] Given the expense and scarcity of immigration detention bedspace, these findings are noteworthy for their economic implications in the immigration context.[53] Indeed, both the DOJ and the DHS could realize significant

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[51] See, e.g., Eve Bender, *Data Confirm MH Crisis Growing in U.S. Prisons*, 41 PSYCHIATRY NEWS 6 (2006), *available at* http://pn.psychiatryonline.org/cgi/content/full/41/20/6 ("[P]rison inmates who had a mental health problem were incarcerated for an average of five months longer than were prisoners without such a problem."); M.J. Stephey, *De-Criminalizing Mental Illness*, TIME MAG. Aug. 8, 2007, *available at* http://www.time.com/time/health/article/0,8599,1651002,00.html ("[S]tudies show that people with mental illness stay in jail eight times longer than other inmates, at seven times the cost."); *Mentally Ill Offender Treatment and Crime Reduction Act of 2003: Hearings on* S. 1194 *Before the S. Judiciary Comm.*, 108th Cong. (2003) (testimony of Dr. Reginald Wilkinson, director, Ohio Department of Rehabilitation and Correction), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=882&wit_id=2485 ("Pennsylvania estimates that an average prison inmate costs $80 per day to incarcerate, while the added costs of mental health services, medications, and additional correctional staff means that it costs approximately $140 per day to incarcerate an inmate with mental illness"); Ken Jenne and Donald F. Eslinger, Op-Ed., *Without reforms, problems mount*, S. FLORIDA SUN-SENTINEL, Apr. 21, 2003, *available at* http://www.psychlaws.org/GeneralResources/article122.htm ("It costs Broward County taxpayers $78 per day to house a general population inmate, but it costs $125 per day to house an inmate with a mental illness."); cf., Edward Cohen & Jane Pfeifer, COSTS OF INCARCERATING YOUTH WITH MENTAL ILLNESS – FINAL REPORT, PREPARED FOR THE CHIEF PROBATION OFFICERS OF CALIFORNIA AND THE CALIFORNIA MENTAL HEALTH DIRECTORS ASSOCIATION, at vi (2008) (finding that incarcerating "a youth with mental illness can cost at least $18,800 more than other youth….").

[52] *See*, Consensus Project, *People with Mental Illness in the Criminal Justice System: Fiscal Implications*, *available at* http://consensusproject.org/downloads/fact_fiscal_implications.pdf (finding that "programs that provide intensive community-based services to individuals with mental illness who have been involved in the criminal justice system have proven extremely cost-effective" and that using community-based treatment programs rather than incarceration resulted in up to a $39,518 cost savings per person); Christina Leonard, *Detaining mentally ill in jail a problem*, ARIZONA REPUBLIC, Mar. 17, 2005, *available at* http://www.azcentral.com/health/news/articles/0317mentallyill.htm (reporting that "it often costs two to three times the amount to send a mentally ill person through the criminal-justice system compared with treating the person outside it."). Moreover, the U.S. criminal justice system has a high rate of re-incarceration for people with mental illness. *See, e.g.*, Jacques Baillargeon, Ph.D. et al., *Psychiatric Disorders and Repeat Incarcerations: The Revolving Prison Door*, 166 AM. J. PSYCHIATRY 103, 109 (2009) (finding that "inmates with major psychiatric disorders… had substantially increased risks of multiple incarcerations…."); H. Richard Lamb, M.D. *Reversing Criminalization*, 166 AM. J. PSYCHIATRY 8, 10 (2009), *available at* http://ajp.psychiatryonline.org/cgi/content/full/166/1/8 (criticizing the re-incarceration rate of the mentally ill). In addition, the custodial environment may exacerbate existing mental conditions and result in the need for hospitalization and increased resource expenditure. *See, e.g.,* NAT'L COMMISSION ON CORRECTIONAL HEALTH CARE, POSITION STATEMENT ON MENTAL HEALTH SERVICES IN CORRECTIONAL SETTINGS (1992), *available at* http://www.ncchc.org/resources/statements/mentalhealth.html ("Once arrested and detained, preexisting mental illnesses may be exacerbated. In other instances, arrest and detention may precipitate mental illness. The conditions of incarceration, including prolonged idleness, the constant threat of violence, and social isolation as well as feelings of guilt, hopelessness, and helplessness may contribute to psychological disorders including suicidal ideation"). In contrast, community-based treatment alternatives to incarceration are more successful than incarceration at reducing hospitalization time and recidivist behavior. *See, e.g., Prevention of Jail and Hospital Recidivism Among Persons With Severe Mental Illness,* 50 PSYCHIATRIC SERVICES 1477, 1480 (1999) (finding "significant reductions. . . in the total numbers of incarcerations and hospital admissions for the group" receiving community-based treatment).

[53] *See* DEP'T OF HOMELAND SECURITY – OFFICE OF INSPECTOR GEN., IMMIGRATION AND CUSTOM ENFORCEMENT DETENTION BEDSPACE MANAGEMENT, 2 (Apr. 2009) ("Detention bedspace acquisition is the largest single ICE expenditure, totaling more than $800 million annually.") (on file with Gregory Pleasants, Equal Justice Works Fellow, Mental Health Advocacy Services, Inc.); *Organizational Structure, Spending, and Staffing for the Health Care Provided to Immigration Detainees: Testimony Before the Subcomm. on Homeland Security, Comm. on Appropriations, H. of Reps.*, 111th Cong. 1 (2009) (Testimony of Alicia Puente Cackley, Director Health Care- Dep't of Homeland Sec., Gov't Accountability Office) (finding that "the average daily population of detainees [in ICE custody] increased by about 40 percent" from 2003 to 2007)) (on file with Gregory Pleasants, Equal Justice Works Fellow, Mental Health Advocacy Services, Inc.); Anna Gorman, *Rise in detainees straining system - To cope, immigration officials are speeding up deportations, moving more people between facilities and using more private jails*, L.A. TIMES, *available at*

cost savings from regulations that authorize immigration judges to release a mentally disabled respondent from custody, administratively close a mentally disabled respondent's removal proceedings, or terminate a respondent's removal proceedings in cases where a respondent has a severe mental illness or has been found mentally incompetent.

IV. Training For Immigration Judges on Mental Health Issues

Immigration judges have requested training and guidance on how to handle and effectively adjudicate cases involving respondents with mental disabilities.[54] We have frequently observed immigration judges uncertain as to how to handle respondents with mental disabilities, and we believe that basic training on the recognition of and appropriate responses to mental disability would improve both the fairness and efficiency of these cases. In addition, training on mental disabilities would improve immigration judges' ability to make fair judgments regarding a respondent's credibility by educating judges on the impact mental disabilities can have on a respondent's demeanor.

The EOIR should work with appropriate NGOs and other legal and mental health organizations to conduct training programs and provide materials on how to handle mental health issues in immigration proceedings. We suggest such training be incorporated into the annual immigration judges' conference or, alternatively, instructional videos or webcasts. We also recommend that mental health training materials be incorporated into the Immigration Court Practice Manual, the Immigration Judge Benchbook, and the Board of Immigration Appeals Practice Manual. Mental health training and materials should also be provided to EOIR staff members.

The benefits of such training and materials are clear. Mental health training for judges and other court officers in the criminal justice system has enabled courts to conserve resources by reducing the processing time of mentally disabled defendants.[55] Judges throughout the criminal justice system have expressed the need for such training programs, and there are a variety of successful examples throughout the country.[56] Civil jurisdictions provide judges with such training and materials as well. For example, the California Bench Guide of Self-Represented Litigants (which has been adapted for national use) contains a chapter on addressing mental health issues in the courtroom.[57] In addition,

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Nov. 5, 2007, http://articles.latimes.com/2007/nov/05/local/me-immig5 ("In 2007, [ICE] spent more than $10 million to transfer nearly 19,400 detainees.").

[54] Email exchange with Gregory Pleasants, Equal Justice Works Fellow, Mental Health Advocacy Services, Inc., in L.A., Cal. (Apr. 2009).

[55] BOARD OF JUDICIAL ADVISORS, EMERGING JUDICIAL STRATEGIES FOR THE MENTALLY ILL IN THE CRIMINAL CASELOAD: MENTAL HEALTH COURTS IN FT. LAUDERDALE, SAN BERNARDINO, AND ANCHORAGE, ch. 4 (Apr. 2002), *available at* http://www.ncjrs.gov/html/bja/mentalhealth/chap4.html (describing the success of a mental health court involving specialized mental health training for judges in reducing the caseload in the system and creating a faster processing time); *see also* COUNCIL OF STATE GOVERNMENTS, CRIMINAL JUSTICE / MENTAL HEALTH CONSENSUS PROJECT: TRAINING PRACTITIONERS AND POLICYMAKERS AND EDUCATING THE COMMUNITY, ch. 6 (2002), *available at* http://consensusproject.org/the_report/toc/ch-VI/ps29-training-courts (suggesting that increased training for court personnel on mental health issues increases fairness and efficiency and pointing to programs offered by the National Judicial College and the Texas Judicial System).

[56] The Task Force on Indigent Defense, THE OFFICE OF COURT ADMINISTRATION & THE TEXAS CRIMINAL JUSTICE COALITION, JUDICIAL PERSPECTIVES ON SUBSTANCE ABUSE & MENTAL HEALTH DIVERSIONARY PROGRAMS AND TREATMENT (survey of 244 judges found that less than 1% of the judges knew about mental illness at the charging stage, and the majority wanted training in order to identify mental illness at an earlier stage of the proceeding and utilize diversion methods) (on file with Gregory Pleasants, Equal Justice Works Fellow, Mental Health Advocacy Services, Inc.); Liz Lipton, Judges Educate Colleagues about Mental Illness, 37 PSYCHIATRIC NEWS 8 (2002), *available at* http://pn.psychiatryonline.org/cgi/content/full/37/9/8 (detailing training programs throughout the country designed to educate judges about mental illness, create fairer results and promote greater efficiency in the criminal context).

[57] JUDICIAL COUNCIL OF CALIFORNIA: ADMINISTRATIVE OFFICE OF THE COURTS, CTR. FOR FAMILIES, CHILDREN AND THE CTS., HANDLING CASES INVOLVING SELF-REPRESENTED LITIGANTS: A BENCHGUIDE FOR JUDICIAL OFFICERS: CHAPTER 11 (2007), *available at* http://www.courtinfo.ca.gov/reference/4_24legalsvcs.htm.

Canada's Refugee Division has several resources to help its immigration judges address competency and mental health issues in immigration proceedings, including a bench guide and a training manual devoted to handling torture victims.[58] Given these demonstrated benefits, providing such training and materials to Immigration Judges makes sense from both a due process and a cost-benefit standpoint.

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Non-citizens with mental disabilities—especially those who are mentally incompetent—confront greater obstacles in removal proceedings than non-citizens who do not have mental disabilities and therefore require additional legal protections in order to satisfy their Fifth Amendment due process guarantee. We strongly recommend that the DOJ revise and expand the existing regulations and policies regarding removal proceedings to (1) provide appointed counsel to respondents with mental disabilities, (2) provide GALs to incompetent respondents, (3) clarify ambiguous regulations and delineate processes for determining the competency of respondents and, in certain cases, releasing respondents from detention or administratively closing or terminating proceedings, and (4) train immigration judges on the recognition and proper treatment of mentally disabled respondents. We believe that these reforms, or similar reforms developed in more detail after further deliberation and discussion, will substantially improve both the fundamental fairness and the efficiency of removal proceedings—proceedings that can result "in loss of both property and life, or of all that makes life worth living."[59] We therefore urge you to hold discussions on these recommendations with disability rights advocates, mental health professionals, legal experts, social service providers and legal professionals who represent non-citizens in removal proceedings, and other stakeholders.

Please contact Gregory Pleasants, Equal Justice Works Fellow of Mental Health Advocacy Services, Inc., at (213) 389-2077 or Sunita Patel, Staff Attorney of the Center for Constitutional Rights, at (212) 614-6439 with any questions you might have or if you would like to schedule a meeting to discuss these recommendations.

Thank you for your consideration.[*]

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[58] *See, e.g.*, Immigration and Refugee Board of Canada Homepage, http://www.irb-cisr.gc.ca/eng/pages/index.aspx (last visited June 4, 2009) (references and documents provided therein); Immigration and Refugee Board of Canada: Tribunals Homepage, http://www.irb-cisr.gc.ca/Eng/tribunal/Pages/index.aspx (last visited June 4, 2009) (references and documents provided therein); Immigration and Refugee Board of Canada: Refugee Protection Division Homepage, http://www.irb-cisr.gc.ca/eng/tribunal/rpdspr/Pages/index.aspx (last visited June 4, 2009) (references and documents provided therein); Immigration and Refugee Board of Canada: Guide to Proceedings Before the Immigration Division, Chapter 7, *available at* http://www.irb-cisr.gc.ca/eng/brdcom/references/legjur/idsi/guide/Pages/idguide07.aspx (last visited June 4, 2009); Immigration and Refugee Board of Canada: Weighing Evidence, Section 6.5, *available at* http://www.irb-cisr.gc.ca/eng/brdcom/references/legjur/alltous/weiapp/Pages/index.aspx (last visited June 4, 2009); Immigration and Refugee Board of Canada: Training Manual on Victims of Torture, *available at* http://www.irb-cisr.gc.ca/eng/tribunal/rpdspr/victorture/Pages/index.aspx (last visited June 4, 2009).

[59] *Ng Fung Ho*, 259 U.S. at 284.

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