What's the Matter with *Franco-Gonzalez*?

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The 2013 class action lawsuit Franco-Gonzalez v. Holder *in the Central District of California was the single most important advancement in the rights of noncitizens with mental health disabilities facing deportation. The court's decision in that case brought much-needed protections in the form of government-appointed counsel, bond hearings, and other procedural safeguards to a uniquely vulnerable population. To date, no other immigrant group has won this right. Amplifying* Franco*'s importance was that, for the first time, immigration judges had a standardized, precise test for evaluating mental competence and supportive tools such as forensic competency evaluations to assist them where a person's mental condition was unclear. Immigration enforcement and detention apparatuses, for their part, were ordered to engage in mental health information-gathering, mental health screenings, record keeping, and reporting.*

Ten years after Franco, *however, the case and its namesake federal program are failing tens of thousands of immigrants with serious mental health challenges. These individuals are excluded from* Franco's *ambit for various reasons: some fall outside the case's narrowly defined scope, while others are trapped in the shadowy extra-legal universe of removal proceedings where many noncitizens find themselves. Still other noncitizens fall squarely*

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within Franco*'s reach but endure extremely prolonged detention times as a direct result of the mental competency process* Franco *created. Poor training of immigration judges and identification failures by the Department of Homeland Security compound the problems.*

This Article is the first scholarly piece to criticize Franco. *It is also the first to conduct a deep, nuanced analysis of* Franco*: both the limits of the court's decision, and the failings of the federal program created to implement* Franco's *mandates. The analysis includes a granular examination of internal government documents obtained from two Freedom of Information Act requests that reveal how the competency "conveyor belt" intersects with detention periods. Finally, this Article offers two possible solutions that would ameliorate some of* Franco's *harms in attainable ways while offering immediate gains for noncitizens with mental health disabilities.*

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INTRODUCTION

I used to imagine *Franco-Gonzalez v. Holder*[1] like a beautiful snow globe. For years leading up to the class action litigation, I dedicated almost all of my professional (and personal) energy to defending detained immigrants with mental health concerns against deportation. It was punishing and heartrending work; scant statutory and precedential frameworks guided immigration couprts and attorneys on how to safeguard persons with mental and cognitive disabilities.[2] Members of this population languished for years in detention,[3] were deported illegally,[4] and died by suicide in solitary confinement.[5]

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[1] Franco-Gonzalez v. Holder, No. CV 10-02211, 2013 WL 8115423 (C.D. Cal. Apr. 23, 2013) (partial judgment and permanent injunction).

[2] *See infra* notes 11–45 and accompanying text.

[3] *See* SARAH MEHTA, HUMAN RTS. WATCH & ACLU, DEPORTATION BY DEFAULT: MENTAL DISABILITY, UNFAIR HEARINGS, AND INDEFINITE DETENTION IN THE U.S. IMMIGRATION SYSTEM 7 (2010), https://www.hrw.org/sites/default/files/reports/usdeportation0710 webwcover_1_0.pdf [https://perma.cc/D74B-WEN9] ("Prolonged and even indefinite detention is an additional problem faced by people with mental disabilities."); *see also* Kristen C. Ochoa, Gregory L. Pleasants, Joseph V. Penn & David C. Stone, *Disparities in Justice and Care: Persons with Severe Mental Illnesses in the U.S. Immigration Detention System*, 38 J. AM. ACAD. PSYCHIATRY L. 392, 396 (2010) (providing a case example of a detainee with schizoaffective disorder and alcohol dementia who spent at least five years in immigration detention).

[4] *See* Esha Bhandari, *U.S. Citizen Wrongfully Deported to Mexico, Settles His Case Against the Federal Government*, ACLU (Oct. 5, 2012), https://www.aclu.org/blog/speakeasy/us-citizen-wrongfully-deported-mexico-settles-his-case-against-federal-government [https://perma.cc/XBK8-9RSQ] ("Lyttle's case is unfortunately not unique, but demonstrates the systemic failures of ICE and the federal government to protect the rights of individuals with mental disabilities. The current lack of procedural safeguards — including no right to appointed counsel — means that even U.S. citizens can end up in immigration detention and be deported."); *see also* Sam Quinones, *Disabled Man Found After 89-Day Ordeal*, L.A. TIMES (Aug. 8, 2007, 12:00 AM PT), https://www.latimes.com/archives/la-xpm-2007-aug-08-me-found8-story.html [https://perma.cc/L78M-AD44] ("A U.S. citizen who had been in the custody of the Los Angeles County Sheriff's Department before he disappeared in May after being wrongly deported to Mexico was found this week and ordered released to his family.").

[5] *See* Erin Donaghue, *ICE Review Found Failures in Care of Mentally Ill Detainee Who Died by Suicide*, CBS NEWS (Aug. 22, 2019, 6:04 PM), https://www.cbsnews.com/news/jean-carlos-jimenez-joseph-ice-review-documented-failures-in-care-of-mentally-ill-detainee-who-died-by-suicide/ [https://perma.cc/UM2W-R9ZL] ("Jimenez-Joseph was held in solitary confinement for 18 days in the custody of Immigration and Customs Enforcement, where he ultimately hanged himself."); *see also* José Olivares & Travis

Almost overnight, Judge Dolly M. Gee of the Central District of California created a small but glittering universe of protocols, protections, guidelines, standards, timeframes, and obligations for this uniquely vulnerable population. The April 23, 2013, injunction's greatest contributions to the field were appointed counsel, mandated custody reviews, and the availability of independent forensic competency evaluations if an immigration judge ("IJ") needed additional guidance in determining competence. Detained, unrepresented noncitizens[6] with mental health disabilities would become the first — and, to date, only — immigrant population to win the right to appointed counsel. It was a wondrous thing.

Franco-Gonzalez v. Holder is now over ten years old. The appointed-counsel program administered by the Executive Office for Immigration Review ("EOIR") — called the National Qualified Representative Program ("NQRP")[7] — has been successful, in part. Thousands of detained individuals have been given lawyers, bond hearings, and other accommodations as they face the horrors of our deportation system.

Mannon, *How Solitary Confinement Kills: Torture and Stunning Neglect End in Suicide at Privately Run ICE Prison,* INTERCEPT (Aug. 29, 2019, 11:40 AM), https://theintercept.com/2019/08/29/ice-solitary-mental-health-corecivic/ [https://perma.cc/P6AU-5T3D] ("Before entering ICE custody, Romero had been diagnosed with schizophrenia and bipolar disorder. During his time in ICE detention, Romero's mental health deteriorated . . . . Nearing the end of his 21st day in solitary, Romero took his own life in the tiny cell."); Rebecca Plevin, *Legal Groups Call for Federal, State Investigations into Suicide at ICE Detention Center*, DESERT SUN (Feb. 25, 2021, 4:44 PM PT), https://www.desertsun.com/story/news/2021/02/25/complaint-investigate-suicide-ice-detention-center-bakersfield/4549497001/ [https://perma.cc/AFA8-TWYK] ("'Despite his known mental health issues, despite ICE knowing that he was somebody who was in a very vulnerable state, they stuck him into solitary confinement — knowing that that exacerbates existing mental health issues, knowing the negative effect that that has on anyone — and they failed to monitor him,' said Lisa Knox, legal director for the California Collaborative for Immigrant Justice.").

[6] Following Justice Jackson's lead, "[t]his opinion uses the term 'noncitizen' as equivalent to the statutory term alien.'" Santos-Zacaria v. Garland, 598 U.S. 411, 414 n.1 (2023).

[7] Mike Corradini, *National Qualified Representative Program*, VERA INST. OF JUST., https://www.vera.org/projects/national-qualified-representative-program (last visited Aug. 15, 2023) [https://perma.cc/AE4B-9U6A].

But the NQRP suffers from serious programmatic flaws that undermine the spirit of the *Franco* decision.[8] I am intimately familiar with the NQRP's limitations; I managed the program from 2016–2018.

One half of the NQRP is located in the Ninth Circuit and is referred to as "Franco" for short. The second half is called the "Nationwide Policy,"[9] and covers respondents who are detained everywhere else. The Nationwide Policy was touted as a genetic match to its court-ordered twin, promising to extend the same rights and protections to immigrants detained throughout the rest of the United States as *Franco* did for those in the Ninth Circuit.

In reality, however, the Nationwide Policy spent the next ten years struggling to keep up with *Franco*. It evolved into a pale, neglected replica, fraught with ethical and due process conundrums. I recently published an article highlighting this exact phenomenon, entitled *Franco I Loved.*[10] The article's title was a reference to a story in the Old Testament about two fraternal twins, Jacob and Esau, one of whom was loved by God, while the other was not. This story came to mind again and again as I thought about the two halves of NQRP. At the conclusion of the article, I made recommendations for bringing the Nationwide Policy in alignment with *Franco* to cure some of its myriad deficiencies. Like Jacob and Esau, the two could reconcile.

There was just one problem making the Nationwide Policy more like *Franco*: the case itself. Aligning the Nationwide Policy with *Franco* merely integrates its shortcomings — both as a program and as a decision — without actually resolving them.

This Article dissects the extremely seminal but imperfect advancement in disability and immigrant justice that is *Franco* in an effort to understand (and find solutions to) its many flaws. Part I

[8] *See* Amelia Wilson, *Franco I Loved: Reconciling the Two Halves of the Nation's Only Government-Funded Public Defender Program for Immigrants,* 97 WASH. L. REV. ONLINE 21, 21 (2022) (describing problematic features of the NQRP such as the "90-day funding rule," flaws in immigration judge trainings, and class member identification errors).

[9] *See* Memorandum from Brian M. O'Leary, Chief Immigr. Judge, to All Immigr. Judges, Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented Detained Aliens with Serious Mental Disorders or Conditions (Apr. 22, 2013), https://www.hoppocklawfirm.com/wp-content/uploads/2021/09/2013-OLeary-Memo.pdf [https://perma.cc/ZBU9-Y4HV].

[10] Wilson, *supra* note 8.

provides brief background information on the federal litigation and the genesis of the NQRP. Part II explains the competency process that arose from the litigation and uses Freedom of Information Act ("FOIA") results to identify areas where it is inefficient. Part III situates who is inside — and left out of — that litigation's orbit by cataloguing all other immigration processes where mentally disabled noncitizens facing exclusion from the United States might need accommodations. This Part also outlines the specific harms *Franco*'s process and exclusions inflict on the population it aims to protect.

Finally, Part IV looks at two possible solutions to remedy *Franco*'s ills. The first is for EOIR to *sua sponte* expand the NQRP to encompass all those in the adjudicatory realm over which EOIR has jurisdiction. This option is not without its foibles, as discussed.

The second option is for EOIR to move to a full public defender system for all immigrants in all postures appearing before it, regardless of disability and detention status. This path carries rich rewards for respondents and the courts, while eliminating the need for a messy, poorly administered competency evaluation process. But it too has its deficiencies.

The Article concludes by acknowledging that neither solution advances an abolitionist agenda. That said, implementing either option would result in immediate and meaningful gains for noncitizens with mental health challenges.

I. THE PRE-*FRANCO* WORLD: SLOW MIGRATION TOWARD CONSIDERATIONS OF COMPETENCE, THEN A GREAT LEAP FORWARD

Prior to 2013, only a small tangle of provisions found in the Code of Federal Regulations and one Board of Immigration Appeals ("BIA") decision from 2011[11] provided the preponderance of the guidance on how courts should proceed where a respondent appearing before them may have lacked mental competence. In order to truly understand how revolutionary *Franco* was (and continues to be), consider the barren landscape that existed just prior to it.

[11] Matter of M-A-M-, 25 I. & N. Dec. 474, 474 (BIA 2011).

A. Nascent Statutory and Case Law Protections Relating to Competency in Immigration Proceedings

Deportation is a civil penalty rather than criminal punishment,[12] despite the fact that the consequences to respondents can be life threatening.[13] Respondents facing removal are not entitled to the same constitutional rights (such as counsel)[14] defendants would have in a criminal trial. That said, removal proceedings must still comport with the basic doctrines of Fundamental Fairness and Due Process enshrined in the Fifth and Fourteenth Amendments.[15]

The Rehabilitation Act[16] compels federal agencies to make reasonable modifications in policies, practices, and procedures to ensure that persons with disabilities have meaningful access to services and programs.[17] The Supreme Court recognized this duty in *Tennessee v. Lane* when it emphasized that accommodations for disabled individuals are

[12] Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("The order of deportation is not a punishment for crime. . . . He has not, therefore, been deprived of life, liberty, or property without due process of law; and the provisions of the constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures and cruel and unusual punishments, *have no application*." (emphasis added)).

[13] Dana Leigh Marks, *Immigration Judge: Death Penalty Cases in a Traffic Court Setting*, CNN (June 26, 2014, 9:29 AM ET), https://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/index.html [https://perma.cc/2XT2-DZM3] ("Immigration judges compare [removal] hearings to death penalty cases because an order of deportation can, in effect, be a death sentence. These cases often include a risk that the person might die if forced to return to his or her homeland, either from violence or from rampant diseases unchecked by an impoverished and/or corrupt government.").

[14] 8 U.S.C. § 1362 ("In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (*at no expense to the Government*) by such counsel, authorized to practice in such proceedings, as he shall choose." (emphasis added)).

[15] Shaughnessey v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) (holding that "traditional standards of fairness encompassed in due process of law" govern immigration proceedings).

[16] 29 U.S.C. § 794.

[17] *Id.* § 794(a); 28 C.F.R. § 39.130 (2023) (applying the Rehabilitation Act to the Department of Justice).

necessary to ensure their fundamental right of access to the courts.[18] EOIR falls under the Department of Justice, and must therefore comport with the requirements of the Rehabilitation Act.

The Code of Federal Regulations and the Immigration and Nationality Act contained a smattering of provisions specifically drafted to address how immigration courts should proceed when confronted with an incompetent[19] respondent. Service of a Notice to Appear, which is the charging document that initiates removal proceedings, is only proper upon an incompetent noncitizen when effectuated in-person upon someone with whom the individual resides, *and* a near relative, guardian, committee or friend.[20] IJs cannot accept an admission of removability from a *pro se*, unaccompanied respondent who lacks competence.[21] A respondent's presence can be waived where, for reasons of mental incompetency, it is impracticable for the respondent to be present.[22] In these instances, an attorney, friend, relative, or guardian can appear in their stead.[23] Section 240(b)(3) of the Immigration and Nationality Act ("INA") provides that "the Attorney General shall prescribe safeguards to protect the rights and privileges" of noncitizens with serious mental health concerns.[24]

Absent from the above provisions are answers to questions such as when, how, and by whom competence is actually adjudicated, what safeguards exist or how they might be implemented, or what an IJ should do if the few competency provisions are not followed. Put another way, the statutory "guidance" offered no guidance at all.

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[18] Tennessee v. Lane, 541 U.S. 509, 532 (2004); *see also* Reno v. Flores, 507 U.S. 292, 306-07 (1993) (recognizing that the Fifth Amendment's due process clause does apply to immigration proceedings).

[19] The use of the term "incompetent" conforms with the language found throughout the statutory framework, case law, and internal agency documents cited in this piece. At times the Code of Federal Regulations even uses the term "incompetents" as a noun (*i.e.*, 8 C.F.R. § 103.8(c)(2)(ii) (2023), titled "*Incompetents* and minors"), which the author has elected not to replicate.

[20] 8 C.F.R. § 103.8(c)(2)(ii) (2011) (emphasis added).

[21] *Id.* § 1240.10(c) (2023).

[22] *Id.* §§ 1240.4, 1240.43.

[23] *Id.*

[24] 8 U.S.C. § 1229a(b)(3) (where section 240(b)(3) of the INA is codified in the *United States Code*); *see also* 8 C.F.R. § 1003.10(b) (2023).

Enter *Matter of M-A-M-*,[25] the groundbreaking case from 2011 and the first precedential decision in fifty years to interpret the regulations governing competence. In it, the BIA provided substantive instruction on how IJs should proceed in these cases.[26] The decision also displayed considerable evolution beyond the BIA's prior unpublished decisions, where the onus was on respondents to prove that they were incompetent and therefore entitled to statutory protections.[27]

At the outset of its opinion in *Matter of M-A-M-*, the BIA made clear that all respondents were presumed competent.[28] Information or evidence that impugned a respondent's competence could rebut this presumption.[29] Such information was termed "indicia;"[30] it could come from multiple sources and "include[s] a wide variety of observations and evidence."[31] Medical reports, courtroom demeanor, inability to answer questions, prior treatment or care, letters from social workers, friends, or family, or a prior incompetence adjudication in another legal context could all form the basis of indicia.[32] The BIA instructed IJs to "take measures to determine whether a respondent is competent to participate" where such indicia of incompetency was present.[33]

[25] Matter of M-A-M-, 25 I. & N. Dec. 474, 474 (BIA 2011).

[26] *See* Mimi E. Tsankov, *Incompetent Respondents in Removal Proceedings*, 3 IMMIGR. L. ADVISOR 1, 2 (2009), https://www.justice.gov/sites/default/files/eoir/legacy/2009/07/24/vol3no4.pdf [https://perma.cc/E36P-T6JN] ("In 1965, the Board issued its first and only published decision interpreting the regulations governing incompetent respondents." (citing Matter of Stoytcheff, 11 I. & N. Dec. 329, 329 (BIA 1965))).

[27] *See In re* Smikle, 2007 WL 2463933 (BIA Aug. 6, 2007) ("In the present case, the respondent has presented no evidence in support of his claim that he is mentally incompetent."); *In re* Vidal Sanchez, 2006 WL 2008263 (BIA May 24, 2006) ("The respondent has not shown that he was not able to understand the nature of the action to be taken against him or that he was unable to participate in his case. He responded appropriately to all questions asked of him and showed no signs of mental illness.").

[28] *Matter of M-A-M-*, 25 I. & N. Dec. at 477.

[29] *Id.*

[30] *Id.* at 479.

[31] *Id.*

[32] *Id.* at 479-80.

[33] *Id.* at 480.

Matter of M-A-M- articulated the first ever test for determining competency in immigration proceedings.[34] The case set a high standard, perhaps because it is more difficult to be competent in immigration proceedings where the burdens of proof and production are almost always on the respondent.[35] The BIA held that a respondent had to be able to perform *all* of the following functions to satisfy the test: 1) have a rational and factual understanding of the nature and object of the proceedings; 2) be able to assist counsel; 3) be able to examine and present evidence; 4) understand their right to cross-examine witnesses; and 5) appreciate their appeal rights.[36] A respondent is incompetent if incapable of performing any one of these functions, and the IJ must prescribe safeguards.

The BIA recommended a non-exhaustive series of safeguards that might be appropriate given a particular respondent's needs such as waiving a respondent's physical appearance, involving a family member or friend in the proceedings, or administratively closing proceedings altogether until such time that a respondent was restored to competence.[37] Some judges took even bolder steps, appointing a

[34] *Id.* at 479 ("[T]he test for determining whether an [individual] is competent to participate in immigration proceedings is whether he or she has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses.").

[35] *See, e.g.*, 8 U.S.C. § 1361 (stating that once alienage is established, the burden is on the respondent to show the time, place, and manner of entry); *In re* S-Y-G-, 24 I. & N. Dec. 247, 258 (BIA 2007) (noting applicant's "heavy burden to show that proffered evidence is material"); *In re* Jean, 23 I. & N. Dec. 373, 377 (B.I.A. 2002) (holding that in applications for relief from deportation, the burden of proof is on the respondent to show eligibility for the relief sought); 8 C.F.R. § 208.13(a), (b) (2023) (placing the burden of proof on the asylum seeker to establish that they are a refugee); *see also* Real ID Act of 2005, Pub. L. No. 109-13, § 101(a)(3), 119 Stat. 231, 303 (requiring that an applicant for asylum must establish that at least one central reason for persecution was or will be race, religion, nationality, membership in a particular social group, or political opinion); 8 C.F.R. § 1240.8(d) (2023).

[36] *See Matter of M-A-M-*, 25 I. & N. Dec. at 479 (noting safeguards for Immigration Judges).

[37] *Id.* at 483.

Guardian *ad litem* to assist where the respondent was so impaired that they could not make decisions or consult with counsel.[38]

Matter of M-A-M- stopped short, however, of mandating the involvement of counsel for incompetent respondents and did not grant explicit appointment authority.[39] Some IJs in the pre-NQRP era took steps to reach out to *pro bono* service providers to seek representation of *pro se* incompetent respondents.[40] Attorneys expressed that such solicitation was unfair because they felt pressure to accommodate the IJ's request but were not compensated for doing so.[41] The ad hoc

[38] 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, 1 (2013); *see also* LEGAL ACTION CTR. & UNIV. OF HOUS. L. CTR. IMMIGR. CLINIC, PRACTICE ADVISORY: REPRESENTING CLIENTS WITH MENTAL COMPETENCY ISSUES UNDER *MATTER OF M-A-M-* 12 (Nov. 30, 2011), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/Mental-Competency-Issues.pdf [https://perma.cc/3FHK-3YTH] ("While there are no reported cases on immigration judges appointing guardians ad litem for immigration court proceedings, practitioners have had some success in persuading judges to exercise this authority.").

[39] *See* PowerPoint Presentation from the Exec. Off. of Immigr. Rev., Determining Mental Competence & Safeguards & Protections, slide 13 (Apr. 5, 2021), https://www.hoppocklawfirm.com/wp-content/uploads/2021/09/April-2021-Powerpoint-on-Competency-Evaluation-Policy.pdf [https://perma.cc/H5D2-X4CL] [hereinafter Presentation on Determining Mental Competence] ("Actions an IJ Cannot Take Under *M-A-M-* . . . Order the appointment of a government-funded attorney or representative to represent respondent."). This document was obtained through Hoppock Law Firm's 2019 FOIA request. *See infra* note 79.

[40] *See*, *e.g.*, Laura Murray-Tjan, *Immigration Puzzle of the Week: Do We Deport People for Being Mentally Ill?*, HUFFINGTON POST (Mar. 12, 2014), https://www.huffpost.com/entry/immigration-mentally-ill-deportation_b_4577314 [https://perma.cc/5Q7Z-BG4S] (noting that a particular IJ would call her office and ask that she visit with a mentally ill detainee); *see also* Christie Thompson, *One Bit of Good News for Immigrants in Detention*, THE MARSHALL PROJECT (July 5, 2017, 10:00 PM), https://www.themarshallproject.org/2017/07/05/one-bit-of-good-news-for-immigrants-in-detention [https://perma.cc/C4H7-T5KR] ("'They're incredibly challenging cases,' said Lauren Dasse, executive director of the nonprofit Florence Immigrant and Refugee Rights Project, which represents clients in detention centers in Arizona. 'Before Franco, we heard some judges would ask attorneys to take cases, and we would take them on in-house or place them with pro bono attorneys. We can all remember those clients.'").

[41] Amelia Wilson, Natalie Prokop & Stephanie Robins, *Addressing All Heads of the Hydra: Reframing Safeguards for Mentally Impaired Detainees in Immigration Removal Proceedings*, 39 N.Y.U. REV. L. & SOC. CHANGE 313, 324 (2015) ("These requests [for

involvement of counsel was also inconsistently administered and lacked agency oversight.[42]

Despite its limitations, *Matter of M-A-M-* seeded creativity and inspired flexibility among IJs and advocates looking for ways to identify gaps in a respondent's ability to perform key functions; they now had the ability to collaboratively envision and propose accommodations that would make the hearing fairer.[43] It also indicated the agency's movement toward embracing procedural protections for respondents with serious mental health concerns.

The BIA would decide another instructive case relating to competence only two years later, in 2013. In *Matter of E-S-I-*, the BIA strengthened the Code of Federal Regulation's service requirement on persons with manifested mental health issues[44] by ruling that the Department of Homeland Security ("DHS") had to prove that service of a Notice to Appear was proper.[45] The case law, it seemed, was making slow, incremental steps toward safeguarding respondents with mental health concerns. It was about to experience a quantum leap.

B. Franco-Gonzalez v. Holder *and Its Seismic Effect*

The Central District of California's decision in *Franco-Gonazlez v. Holder* represents the single greatest advancement in the rights of mentally disabled noncitizens. The ruling would radically alter the landscape for detained persons with mental health disabilities, and for their advocates who had been espousing the need for appointed counsel for years.

Jose Antonio Franco-Gonzalez was twenty-nine years old when he was placed in removal proceedings, though he did not know his age or

representation] by judges, which amounted to de facto appointments of attorneys that they knew and who appeared before them regularly, were improper in that the attorneys received no compensation and the process by which they were appointed lacked both uniformity and regulation.").

[42] *Id.*

[43] *See id.* at 353 (exploring and proposing a number of additional safeguards IJs could take to protect a fair hearing for respondents with mental health disabilities).

[44] 8 C.F.R. § 103.8(c)(2)(ii) (2023).

[45] Matter of E-S-I-, 26 I.&N. Dec. 136, 145 (BIA 2013).

date of birth.[46] The IJ felt that it was unfair to proceed against someone with serious cognitive and learning disabilities who was detained and unassisted by counsel, so the judge decided to administratively close his case.[47] Immigration and Customs Enforcement ("ICE") did not release Mr. Franco following the closure.[48] Instead, he languished for nearly five years in ICE custody in various detention centers throughout southern California.[49]

A coalition of immigrants' rights groups led by the American Civil Liberties Union of Southern California filed suit, alleging various violations of the INA, the Fifth Amendment of the U.S. Constitution, and Section 504 of the Rehabilitation Act.[50] They amended the complaint to add other noncitizens throughout California, Arizona, and Washington who were likewise detained, without counsel, facing removal, and living with serious mental health challenges.[51]

Judge Dolly M. Gee certified the class in November of 2011 to include any detainee in Arizona, California, and Washington who had "a serious mental disorder or defect that may render them incompetent to represent themselves in detention or removal proceedings, and who presently lack counsel in their detention or removal proceedings."[52] The class then branched into two subclasses: Subclass One, whose members

[46] First Amended Class-Action Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus at 10, Franco-Gonzalez v. Holder, No. CV 10-02211 (C.D. Cal. Aug. 2, 2010), https://www.aclu.org/cases/franco-gonzalez-v-holder?document=franco-gonzales-et-al-v-holder-et-al-first-amended-class-action-complaint [https://perma.cc/K53T-ZL8L].

[47] *See id.* at 11 (noting that the IJ who administratively closed Franco-Gonzalez's case cited his incompetence).

[48] *See id.* at 7, 11 ("Defendant and Respondent Timothy S. Robbins is the Field Office Director for the Los Angeles District of ICE. Mr. Robbins has authority over the legal custody of Plaintiff-Petitioner Franco.").

[49] *See id.* at 11 ("Despite the fact that there were no removal proceedings against him, Mr. Franco remained incarcerated for approximately four and a half years.").

[50] *Id.* at 1, 29-32.

[51] Third Amended Class-Action Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus at 6-9, Franco-Gonzalez v. Holder, No. CV 10-02211, 2011 WL 12677104 (C.D. Cal. Oct. 25, 2011).

[52] Franco-Gonzalez v. Holder, No. CV 10-02211, 2013 WL 3674492, at *2 (C.D. Cal. Apr. 23, 2013) (order on plaintiff's motion for partial summary judgment and plaintiff's motion for preliminary injunction on behalf of seven class members).

had been found incompetent following a formal competency hearing, and Subclass Two, whose members had been detained for more than six months.[53]

On April 23, 2013, Judge Gee issued a partial judgment and permanent injunction that held the Rehabilitation Act compelled EOIR to provide all class members with an attorney, paid for by the government, to represent them throughout their entire removal proceedings immediately following an incompetence adjudication.[54] It was the first opinion by any court to recognize the right to appointed counsel in immigration proceedings for any immigrant group.[55] Not even unrepresented children have won that right.[56]

The order also required ICE to create a comprehensive screening and notification system to identify persons with mental disorders held at their facilities in the three states.[57] ICE must perform an initial mental

[53] *Id.*

[54] *See* Franco-Gonzalez v. Holder, No. CV 10-02211, 2013 WL 8115423, at *1 (C.D. Cal. Apr. 23, 2013) (partial judgment and permanent injunction) ("Defendants . . . are hereby enjoined from pursuing further immigration proceedings . . . unless within 60 days from the date of this Order and Judgment, Sub-Class One members are afforded Qualified Representative(s) . . . whether *pro bono* or at Defendants' expense.").

[55] Esha Bhandari & Carmen Iguina, *Historic Decision Recognizing Right to Counsel for Group of Immigration Detainees*, ACLU (Apr. 24, 2013), https://www.aclu.org/news/immigrants-rights/historic-decision-recognizing-right-counsel [https://perma.cc/M9H6-7B9C] ("This is a historic decision — it is the first ever to recognize a right to appointed counsel in immigration proceedings for a group of immigrants. Unlike the criminal justice system, where judges are generally required to appoint counsel for defendants who cannot afford a lawyer, there are no safeguards in the immigration enforcement system to ensure the basic fairness of having legal representation for immigrants."); Thompson, *supra* note 40 ("The Franco ruling was the first time a court found that a group of immigrants were entitled to lawyers.").

[56] *See* J.E.F.M. v. Lynch, 837 F.3d 1026, 1038 (9th Cir. 2016) (unrepresented children did not win right to appointed counsel). *See generally* Amanda Kavita Sewanan, *The Right to Appointed Counsel: The Case for Unaccompanied Immigrant Children*, 41 CARDOZO L. REV. 317, 324 (2019) (noting that the Sixth Amendment grants the right to appointed counsel for criminal defendants, but removal has always been classified as a civil rather than criminal proceeding).

[57] Franco-Gonzalez v. Holder, No. CV 10-02211, 2014 WL 5475097, at *3 (C.D. Cal. Oct. 29, 2014) (order further implementing the permanent injunction issued on April 23, 2013) (instructing that membership is also created if a qualified mental health provider observes a detainee exhibiting one or more active psychiatric symptoms or behaviors such as severe disorganization, active hallucinations or delusions, mania, catatonia,

health screening for each detainee "upon their admission" at the facility, and to immediately gather documents and information relevant to the detainee's mental health.[58] ICE must ensure that a second, more complete mental health evaluation is performed by a "licensed psychiatrist, physician, physician assistant, psychologist, clinical social worker, licensed nurse practitioner, or registered nurse" within fourteen days of admission, and completed no more than seven days after the evaluation.[59] If ICE discovers that a detainee has a serious mental disorder, the agency has twenty-one days to notify the immigration court or the BIA of the detainee's *Franco* class membership.[60]

ICE could not moot or sever class membership by releasing a detainee from custody, or by transferring them to a detention facility outside California, Washington, or Arizona.[61] Class membership and the protections that flowed from it adhered from the moment an individual was identified until the conclusion of the case through either relief or removal.[62]

An IJ's doubt about a respondent's competence would also create *Franco* class membership. The district court adopted *Matter of M-A-M-*'s "indicia" language and renamed it "bona fide doubt."[63] Myriad sources and parties could justify a bona fide doubt finding: prior mental health hospitalizations or diagnoses, notification from a family member or social worker about a mental health condition, school records showing

severe depressive symptoms, suicidal ideation, psychosis, or otherwise diagnoses the detainee as demonstrating significant symptoms of bipolar disorder, schizophrenia or schizoaffective disorder, major depressive disorder with psychotic features, dementia and/or neurocognitive disorder, intellectual development disorder).

[58] *Id.* at *2, *8.

[59] *Id.* at *2.

[60] *Id.* at *5.

[61] *See id.* at *12 ("Released Sub-Class One members are entitled to representation by Qualified Representatives pursuant to this Court's Injunction until the conclusion of their immigration proceedings, irrespective of whether their case is transferred to a venue outside of the three states in which this Order applies.").

[62] *See id.* at *2 ("Any Class member who has entered ICE custody after November 21, 2011, and who is subsequently transferred outside of Arizona, California or Washington, continues to be a Class member and entitled to all of the benefits of Class membership during the course of their immigration proceedings . . . .").

[63] *See id.* at *7-8, *8 n.12.

a learning disability, or an IJ's own courtroom observations are sources of a determination.[64]

An IJ next had to hold a Judicial Competency Inquiry ("competency inquiry") for the newly identified *Franco* class member. Competency inquiries were similar to *M-A-M-* hearings except that the district court took the *M-A-M-* competency standard and expanded it considerably. Under *Franco,* a respondent must have a rational and factual understanding of the proceedings *and* be able to make informed decisions about whether to waive their rights, respond to allegations and charges, present information and evidence relevant to the eligibility for relief, and act upon instructions and information presented by the IJ and government counsel.[65]

The *Franco* order does not provide for the participation of any other parties during the competency inquiries or competency reviews aside from the IJ and the ICE attorney. The presence of a "legal guardian, near relative, friend, or custodian . . . shall not affect an Immigration Judge's assessment of whether a respondent is able to perform the additional functions necessary for self-representation."[66] Put another way, the presence of third parties in a respondent's life does not "boost" their competency; a respondent must be competent on their own, unaided by others.

Judge Gee appointed a Monitor who would receive EOIR's IJ training material, be permitted to observe trainings, and receive data on who was trained and when.[67]

The decision was an undeniably huge step forward in disability justice for noncitizens. And, when EOIR announced that it would be creating a

[64] *See* Matter of M-A-M-, 25 I. & N. Dec. 474, 479-80 (BIA 2011).

[65] *See Franco-Gonzalez*, 2014 WL 5475097, at *6 (listing the requirements for the respondent to "meaningfully participate in the proceeding").

[66] *Id.* at *7.

[67] *See* Franco-Gonzalez v. Holder, No. CV 10-02211, at *7 (C.D. Cal. Mar. 2, 2015) (order appointing Katherine Mahoney as Monitor), https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/05/ORD.DCT_.810-Order-Appointing-Katherine-Mahoney-as-Monitor.pdf [https://perma.cc/3PM4-JC4C] ("Defendants shall provide the Monitor with the categories of individuals trained to implement the Implementation Documents, including the individuals' titles and duty locations, the dates of trainings, and all final training materials bearing upon implementation of the Implementation Documents.").

program beyond the three states in the Ninth Circuit, advocates rejoiced.

C. Preemptive Programing: Birth and Development of the NQRP

It is impossible to know what motivated EOIR and DHS to voluntarily expand many of *Franco*'s primary features beyond the three states in the Ninth Circuit. It may have been in the apprehension of copycat lawsuits; it could have just as easily been animated by a desire to provide at least some safeguards to an extremely vulnerable population.

What is known is that, on the eve of the *Franco* permanent injunction, EOIR's Chief IJ released a memorandum directed to all IJs nationwide entitled the "Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented Detained Aliens with Serious Mental Disorders or Conditions."[68] The policy promised that, by the end of that year, EOIR would implement a new system for handling cases involving detained, incompetent, unrepresented respondents. It would: 1) mandate competency hearings for certain respondents; 2) make forensic competency evaluations ("forensic evaluation") available to IJs unable to determine competency from a competency hearing alone; 3) make available a "qualified legal representative" for detained respondents who have been adjudicated incompetent; and 4) give bond hearings to incompetent respondents who have been detained longer than six months.[69]

That same day and in concert with EOIR, DHS announced a policy of its own promising "New Identification and Information-Sharing Procedures Related to Unrepresented Detainees With Serious Mental Disorders or Conditions."[70] In it, ICE pledged to assist EOIR in identifying detainees in its custody who possibly had a mental health disorder that rendered them incompetent to represent themselves. This

[68] Memorandum from Brian M. O'Leary, *supra* note 9.

[69] *Id.*

[70] Memorandum from John Morton, Dir. of the U.S. Immigr. & Customs Enf't, to Thomas D. Homan, Peter S. Vincent & Kevin Landy, Civil Immigration Detention: Guidance for New Identification and Information-Sharing Procedures Related to Unrepresented Detainees with Serious Mental Disorders or Conditions (Apr. 22, 2013), https://www.ice.gov/doclib/detention-reform/pdf/11063.1_current_id_and_infosharing_detainess_mental_disorders.pdf [https://perma.cc/PK66-XW4Y].

included an initial mental health screening upon arrival at a detention center, followed by a more thorough mental health assessment conducted within fourteen days of admission.[71] If a detainee is identified as having a serious mental disorder during either of these steps, ICE would need to secure a "mental health review report" from a qualified mental health provider or gather relevant medical documentation to be conveyed to ICE's Office of the Chief Counsel.[72]

EOIR and ICE now had only eight months to rapidly design, scaffold, and staff their promised programs by December 31, 2013. First, EOIR unveiled its "Phase I of Plan to Provide Enhanced Procedural Protections to Unrepresented Detained Respondents With Mental Disorders."[73] Then, EOIR contracted with the Vera Institute of Justice[74] in 2014 to manage many aspects of the NQRP, including the identification, onboarding, training, and management of the attorneys who would be handling the cases and to provide EOIR with periodic program analysis and technical support.[75]

The program created in *Franco*'s wake is extremely commendable. In less than ten years, the NQRP has provided court-appointed counsel and other critical services to over 2,100 detained immigrants with mental health concerns.[76] It is now active in every court hearing detained cases

[71] *See id.* (facilities staffed by ICE Health Service Corps directed to begin developing initial screening procedures).

[72] *Id.*

[73] EXEC. OFF. FOR IMMIGR. REV., PHASE I OF PLAN TO PROVIDE ENHANCED PROCEDURAL PROTECTIONS TO UNREPRESENTED DETAINED RESPONDENTS WITH MENTAL DISORDERS 1 (2013), https://immigrationreports.files.wordpress.com/2014/01/eoir-phase-i-guidance.pdf [https://perma.cc/E5JK-2W2R].

[74] The Vera Institute of Justice is the leading nationwide organization committed to ending mass incarceration, ensuring due process for immigrants, and promoting healthy communities through research and advocacy.

[75] Gregory Pleasants, *National Qualified Representative Program*, VERA INST. OF JUST., https://www.vera.org/projects/national-qualified-representative-program (last visited July 10, 2022) [https://perma.cc/AM4H-SNFP] ("In 2014, EOIR contracted with Vera to set up program services and to provide training, technical support, and program analysis."); *see also* Memorandum from Vera Inst. of Just. on Proposal for National Qualified Representative Program (QRP) (Dec. 20, 2013) (on file with author).

[76] Corradini, *supra* note 7 ("From its beginning in 2013 through January 2020, the NQRP has provided representation to over 2,000 detained immigrants with serious mental illness.").

in the United States.[77] Qualified Representatives ("QRs") are located across the United States, primarily within non-profit service providers.[78]

And yet, the NQRP never ventured beyond the four corners of the court's injunction to enable appointed counsel to any other population. So, while EOIR showed a willingness to expand the NQRP beyond the geographic parameters of *Franco*, it has not shown the same boldness jurisdictionally.

II. THE COMPETENCY PROCESS CREATED BY *FRANCO* AND ITS APPLICATION AS WITNESSED THROUGH INTERNAL DOCUMENTS

The *Franco* order itself provided much of the framework for the competency review process. It mandated case triggers, timelines, and party responsibilities. To understand how these mandates appear in application, however, it is useful to examine internal EOIR programmatic, training, and statistical documents recently obtained through two FOIA requests.[79]

A. The Competency Conveyor Belt

Respondents with mental health concerns enter the competency evaluation and adjudication process a number of ways,[80] but once they do so, there is no way off the conveyor belt until the question of competency is fully resolved. This Section briefly explains what that

[77] *Id.* ("Through a nationwide network of nearly 50 legal service providers, the NQRP provides zealous, person-centered representation to its clients at any Immigration Court in the country.").

[78] *See* National Qualified Representative Program Map, VERA INST. OF JUST., https://www.vera.org/knowledge-bank/NQRP-Map-March-2021.pdf (last visited Aug. 13, 2023) [https://perma.cc/6M3G-GP86] (showing a map of the NQRP by state, with almost all NQRP providers being situated within nonprofit service providers).

[79] The first FOIA was filed in January 2019 by an immigration law practitioner in Kansas, Hoppock Law Firm. *See* Matthew Hoppock, *FOIA Results — EOIR's "Guidance and Publications" Site*, HOPPOCK L. FIRM (Sept. 13, 2021), https://www.hoppocklawfirm.com/foia-results-eoirs-guidance-and-publications-site/ [https://perma.cc/U723-DC2H]. The second FOIA was filed on October 21, 2020, by the Harvard Immigration & Refugee Clinical Program (on file with the author but not yet publicly available).

[80] *See supra* notes 57–64 and accompanying discussion.

looks like in terms of timing. It then breaks down two EOIR-produced spreadsheets to determine how well the timing requirements are adhered to (or not), and on average how much detention time is added at each competency stage.

Judges should conduct a competency hearing within twenty-one days following a bona fide doubt determination or upon notification from ICE that the detained respondent had a mental disorder.[81] If unsure after the conclusion of the competency hearing if a respondent was competent or incompetent, an IJ must "promptly" order a forensic evaluation.[82] Only an independent mental health professional can conduct these reports.[83] The forensic evaluator has forty-five days to complete the report following the IJ's order.[84] Thereafter the IJ must convene a final time within thirty days of receiving the doctor's report for a competency review.[85]

Competency reviews represent a hard stopping point in the competency process; an IJ "shall" make a formal competence adjudication at their conclusion.[86] If a respondent is "competent," proceedings resume as before. If the respondent is "incompetent," the judge must appoint the respondent an attorney within twenty-one days.[87] For *Franco* class members, the IJ must additionally hold a bond hearing if the respondent has been detained for more than 180 days.[88]

[81] Franco-Gonzalez v. Holder, No. CV 10-02211, 2014 WL 5475097, at *15 (C.D. Cal. Oct. 29, 2014) (order further implementing the permanent injunction issued on April 23, 2013).

[82] *See id.* at *8.

[83] *Id.* at *9 (defining mental health professionals as "forensically trained and currently licensed psychiatrists, psychologists, and licensed clinical social workers").

[84] *Id.* at *8.

[85] *Id.*

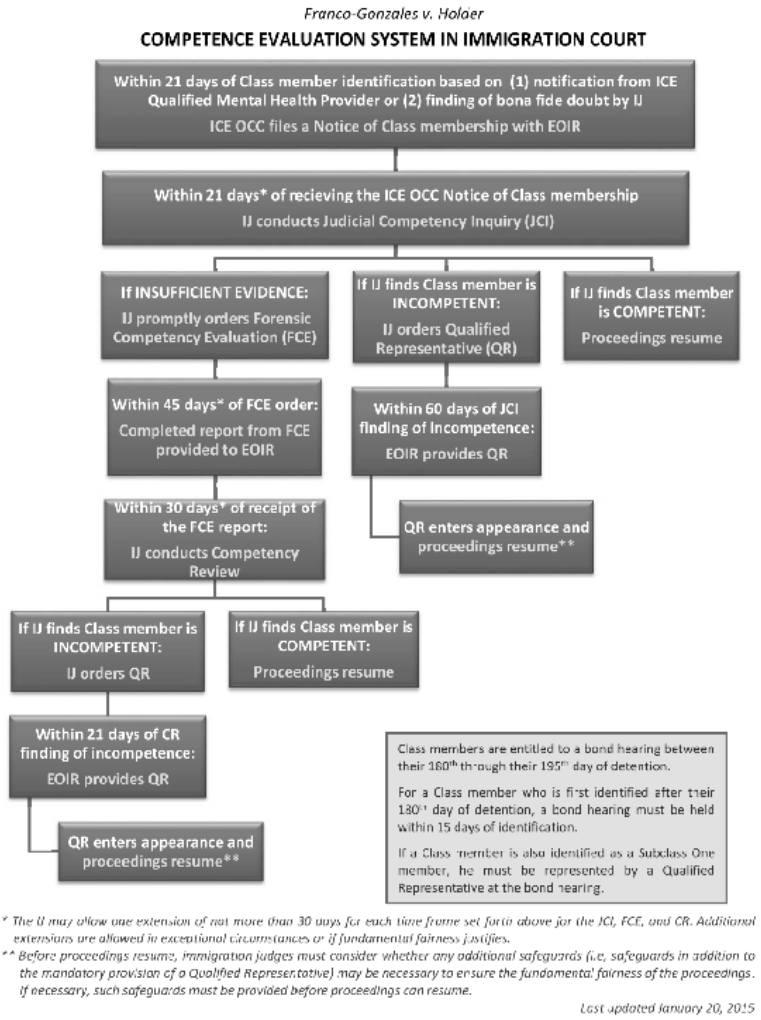
[86] *See id.*

[87] *Id.*

[88] Franco-Gonzalez v. Holder, No. CV 10-02211, 2013 WL 3674492, at *20 (C.D. Cal. Apr. 23, 2013) (order on plaintiff's motion for partial summary judgment and plaintiff's motion for preliminary injunction on behalf of seven class members).

These obligations were presented as part of EOIR's court training materials.[89] The below is EOIR's *Franco* case competency flowchart distributed during training sessions with IJs and court personnel:

[89] Guidance Document from the Exec. Off. for Immigr. Rev., *Franco-Gonzalez v. Holder* Competence Evaluation System in Immigration Court (Jan. 20, 2015), https://www.hoppocklawfirm.com/wp-content/uploads/2021/09/Competence-Evaluation-Flow-Chart.pdf [https://perma.cc/R767-H2MQ]; *see also* Guidance Document from the Exec. Off. for Immigr. Rev., Case Competency Tab Flowchart (Sept. 29, 2016), https://www.hoppocklawfirm.com/wp-content/uploads/2021/09/Case-Competency-Tab-Flowchart.pdf [https://perma.cc/4E82-P9D2]. These documents were both obtained through Hoppock Law Firm's 2019 FOIA request. *See supra* note 79.



Data assists in understanding how the above timelines and process intersect with detention times. The next Section examines how much time each stage of the competency process actually "costs" in terms of detention times experienced by respondents on the conveyor belt.

B. FOIA Results Reveal Prolonged Detention Times Both Before and During the Competency Process

Even prior to *Franco*, unrepresented persons with mental health disabilities were detained for longer periods on average than those without.[90] This section uses FOIA results about the NQRP obtained by the Harvard Immigration and Refugee Clinical Program ("the Immigration Clinic") to investigate how long detainees with mental health disabilities are detained prior to their eventual incompetency adjudication, but also, how much time the competency process itself adds to detention times. It is particularly important to understand this information due to the serious harm that detention inflicts on all people — and especially on those already suffering from mental health concerns.[91]

On October 21, 2020 the Immigration Clinic requested materials from EOIR dating back to April 1, 2013.[92] To summarize its twelve-part request, the Immigration Clinic sought: records, training materials, briefings, guidance, policies, procedures, and memoranda relating to EOIR's implementation of the NQRP; information establishing how competency cases are tracked within EOIR's database; records disclosing how a detainee was flagged as having possible incompetence; how often a respondent was referred for a forensic evaluation; the total number of bond hearings given to a respondent following an incompetency determination; how many IJs were trained in competency and how often; records establishing the timing of all the various stages of the competency review process (including and through the provision of counsel). EOIR filed ten responses to the Immigration Clinic's FOIA request over an eleven-month period from November 19, 2020, through October 26, 2021.[93]

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[90] *See* MEHTA, *supra* note 3, at 47-56 (detailing the elevated challenges that mentally ill noncitizens face in accessing and securing counsel).

[91] *See infra* notes 127–143 and accompanying text.

[92] Letter from Shelley M. O'Hara, Att'y Advisor, Off. of the Gen. Counsel, Exec. Off. for Immigr. Rev., to Sameer Ahmed, Harv. Immigr. & Refugee Clinical Program, Re: FOIA 2021-03376 Tenth Response 1 (Jan. 14, 2022) (on file with author).

[93] *Id.*

Two FOIA results were particularly useful in understanding the length of NQRP respondents' detention: the "Franco Master List," and the "MC Table."

On March 29, 2021, EOIR provided a response that contained a spreadsheet[94] in response to the Immigration Clinic's request for "[t]he total number of ICE detainees where the detainee received a Qualified Representative after the Immigration Judge ordered it, and the date when the Qualified Representative was assigned to the detainee."[95] It showed a total of 2,113 attorney assignments between April 24, 2013, and January 2021, and was titled the Franco Master List. It does not capture dates of all the stages throughout the competency process, though it does provide the date that each NQRP respondent was first detained by ICE.[96]

Then, on April 14, 2021, EOIR provided a spreadsheet containing 3,910 individual case entries.[97] It was disclosed in response to the Immigration Clinic's request for "[a]ll information contained in the 'Mental Competence' or 'MC' section in EOIR's database, including information that tracks decisions and results during the competency determination process, from the initial identification of indicia of mental incompetence to the ultimate decision on competence."[98] The spreadsheet is titled "tbl_70000___MC_Table." This table begins tracking data from the moment that a respondent enters the competency process.

The two spreadsheets therefore offer different vantage points on how long an incompetent respondent spends in detention. Each is now examined in turn.

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[94] Spreadsheet from the Exec. Off. for Immigr. Rev., Franco Master List (provided on Mar. 29, 2021) [hereinafter Franco Master List] (obtained through the Immigration Clinic's FOIA request and on file with author).

[95] *Id.*

[96] *Id.* (featuring a column entitled "Date of Current Detention").

[97] Spreadsheet from the Exec. Off. for Immigr. Rev., tbl_70000___MC_Table (provided on Apr. 14, 2021) [hereinafter MC Table] (obtained through the Immigration Clinic's FOIA request and on file with author).

[98] *Id.*

1. The MC Table

The MC Table enables a granular examination of how much each parceled stage of the competency process "costs" in detention time, on average. That is because it provides important completion dates along the competency process: the date a detainee is first flagged as having possible mental incompetency, the date the judge held a competency hearing, the date the IJ requested a forensic evaluation (if ordered), the date the evaluation was completed and tendered on the court by the forensic evaluator, the date the judge reviewed the evaluation (called a "competency review"), and finally, the date an IJ found a respondent incompetent and ordered the provision of counsel.

Of the 3,910 competency case entries on the MC Table, 1,746 (around forty-five percent) resulted in the provision of a QR.[99] Only competency cases that resulted in the provision of a QR were evaluated.

The methodology employed in arriving at the below numbers was very basic. First, only data sets that were complete on both ends of a particular stage were used (e.g., where there is a date that a competency inquiry took place, followed by a date that the IJ ordered a forensic evaluation). For example, if a case entry contained a date that an IJ conducted a competency review, but EOIR did not record the date that the competency evaluation was ordered, that particular case entry was excluded from the stage's elapsed time calculations.[100]

Then, the complete data sets for each stage were isolated; next, the number of days between the two days was calculated; and finally, I averaged the number of days that elapsed in total across the sum of complete sets.

a. Average Elapsed Time Between a Competency Process' Initiation and the Judicial Competency Inquiry

The *Franco* order provided that class membership is created the moment DHS identifies a serious mental health concern and files notification of membership, or when an IJ forms a bona fide doubt

[99] *Id.*

[100] *See, e.g.*, MC Table, *supra* note 97, at row 280 ("MentalCompetenceID" 797).

concerning a respondent's competence.[101] Class membership initiates the competency process, the first step of which is for the judge to conduct a competency hearing.[102]

Examining the MC Table reveals that the average amount of time that elapsed between a competency process' initiation and the competency hearing varied depending on what party (or parties) first flagged the competency issue.

DHS initiated the competency process in 852[103] of the MC Table case entries (presumably by filing notification of class membership with the court). The average number of days that elapsed between DHS' notification and the competency hearing was twenty-one days.[104]

The IJ initiated the competency process via a bona fide doubt finding in 743 of the case entries. The average number of days that elapsed between an IJ's bona fide doubt finding and the competency hearing was seventeen days.[105]

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[101] *See* Guidance Document from Exec. Off. for Immigr. Rev., Handling Mental Competency Under *Franco-Gonzalez v. Holder* 6 (Oct. 22, 2020), https://www.hoppocklawfirm.com/wp-content/uploads/2021/09/Handling-Mental-Competency-Cases-Under-Franco.pdf [https://perma.cc/5T3Z-YEBD] [hereinafter Guidance on Handling Mental Competency Cases]. This document was obtained through Hoppock Law Firm's 2019 FOIA request. *See supra* note 79.

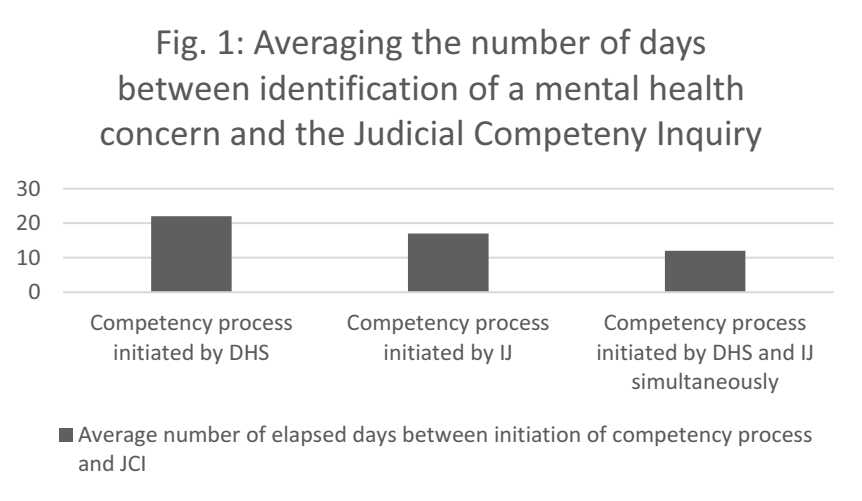
[102] *See* Franco-Gonzalez v. Holder, No. CV 10-02211, 2014 WL 5475097, at *6 (C.D. Cal. Oct. 29, 2014) (order further implementing the permanent injunction issued on April 23, 2013).

[103] The author credited DHS with the initiation of the competency process each time the MC Table's data showed that DHS' notice date was the earliest event in the process. So, if a judge made a bona fide doubt finding after DHS filed notification, DHS' notification is nevertheless credited as having started the competency process (and vice versa) because the notice triggered the process. MC Table, *supra* note 97.

[104] *Id.* The smallest period of time that elapsed was zero days — meaning that DHS filed notification and the IJ held a competency hearing on the same day. This occurred 17 times. In several instances the time that elapsed between DHS' notification and the competency inquiry was significant: 821 days (*id.* at row 481 ("MentalCompetenceID" no. 1002)), 583 days (*id.* at row 2695 ("MentalCompetenceID" no. 3304)), and 395 days (*id.* at row 352 ("MentalCompetenceID" no. 869)). The author can merely speculate as to what caused such significant delays, for example, a respondent's hospitalization or temporary transfer to another facility.

[105] *Id.* The smallest period of time that elapsed between the IJ's bona fide doubt determination and the competency hearing was zero days — meaning that the IJ identified an issue and held a competency inquiry the same day. This occurred 201 times.

In 127 of the case entries, an IJ formed a bona fide doubt concomitantly with DHS' notification. The number of days between where simultaneous identification occurred and the competency inquiry was only twelve days.[106]



b. Average Elapsed Time Between the Judicial Competency Inquiry and a QR Order Where No Additional Review Was Required

In the "simplest" (as in, least procedurally complicated) of cases, one can imagine that an IJ would hold a competency hearing and thereafter find the respondent incompetent without the need to involve a forensic medical examiner. Examining only these instances — which verifiably occurred 1,416 times[107] — the average time that elapsed between these two events was only two days.

In several instances the time that elapsed between the two was significant: 250 days in one case (*id.* at row 3371 ("MentalCompetenceID" no. 4011)), 175 days (*id.* at row 3377 ("MentalCompetenceID" no. 4017)), and 148 days (*id.* at row 1852 ("MentalCompetenceID" no. 2427)). Again, the author can merely speculate as to what caused such significant delays.

[106] *Id.* The smallest period of time that elapsed was zero days. This occurred 44 times. The most significant delay between the competency process' initiation and the competency hearing in such instances was 66 days (*id.* at row 2555 ("MentalCompetenceID" no. 3155)).

[107] MC Table, *supra* note 97. This figure excludes the five cases where a QR was ordered but the individual was never adjudicated incompetent by either an IJ or the BIA

The low number of elapsed days is unsurprising, as the IJ was likely confident in their assessment. Had they not been, they would have involved a mental health expert.

Thereafter an IJ quickly ordered a QR. Specifically, an IJ ordered a QR on the same day that the respondent was adjudicated incompetent after a competency inquiry in eighty-nine percent of the case entries.[108]

As we see in the next set of calculations, however, the process slows down considerably when an IJ orders a forensic evaluation.

c. Increasing Case Processing Times when an IJ Orders a Forensic Competency Evaluation

On average, competency cases slow down significantly where an IJ is unsure whether a respondent is incompetent following a competency hearing and feels compelled to order a forensic evaluation.

It is worth noting at the outset of this analysis that, on average, IJs did not order forensic evaluations the same day that they concluded the competency hearings.[109] On average, a court waited five days between conducting the competency hearing and ordering an evaluation.[110] No information is provided to explain this delay.

Thereafter average processing times jumped significantly. On average, thirty-three days elapsed between when an IJ ordered an evaluation, and when that evaluation was completed and filed with the

(*id.* at rows 10, 108, 578, 977 & 3128 ("MentalCompetenceID" nos. 524, 622, 1101, 1513 & 3756)). It also excludes one case where the IJ found the respondent competent, but the BIA later ordered a QR (*id.* at row 302 ("MentalCompetenceID" no. 819)), and one case where the respondent was initially found competent but later re-evaluated by the IJ and adjudicated incompetent (*id.* at row 3833 ("MentalCompetenceID" no. 4504)). Finally, the figure excludes clearly inaccurate data entry errors, such as the three instances when, according to the MC Table, a QR was ordered *before* an IJ ever held a competency inquiry (*id.* at rows 1170, 1218 & 22 ("MentalCompetenceID" nos. 1713, 1764 & 536)).

[108] *See supra* note 107 (showing that an IJ ordered a QR on the same day that the respondent was adjudicated incompetent in 1,264 of the 1416 entries).

[109] *Id.* (excluding the five cases where a Forensic Competency Evaluation ("FCE") was ordered after a QR was ordered, rows 2281, 2753, 3037, 3212 & 3516 ("MentalCompetenceID" nos. 2870, 3365, 3663, 3846 & 4159)).

[110] *Id.*

court.[111] This number comes under the *Franco* Implementation Order's mandate, which required that the forensic evaluations be completed and tendered within forty-five days.[112] Nevertheless, respondents were detained over one month during the pendency of the evaluation stage of the process.

On average, a little over two weeks, or fifteen days, elapsed between the date that an evaluation was filed with the court, and the date that the court held a competency review.[113]

IJs ordered the provision of counsel very quickly following a competency review[114] — usually the same day.[115] There were a few outliers, including one case where an inexplicable 208 days elapsed between the competency review and order for an attorney,[116] and another where 229 days elapsed.[117] On balance, however, this last stage of the competency process concluded quickly.

[111] *Id.* (calculating the difference in days that elapsed on average between the date identified in the "ForensicEvalOrderDate" column (col. J), and the "ForensicEvalFiledDate" column (col. K) where provided). Five entries did not contain a date that the FCE was filed with the court after one was ordered (*id.* at rows 84, 524, 999, 2753 & 3516 ("MentalCompetenceID" nos. 598, 1046, 1535, 3365 & 4159)).

[112] *See* Franco-Gonzalez v. Holder, No. CV 10-02211, 2014 WL 5475097, at *8 (C.D. Cal. Oct. 29, 2014) (order further implementing the permanent injunction issued on April 23, 2013) ("A Forensic Competency Evaluation ordered by the Immigration Judge shall be completed and a written report provided to the Judge and the parties within 45 days after the date of the order set forth in III.B.7.a, *supra*.").

[113] MC Table, *supra* note 97 (calculating the difference in days that elapsed on average between the date identified in the "ForensicEvalFiledDate" column (col. K) and the "CompetenceReviewDate" column (col. H), where provided). The two cases where the competency review occurred *before* the court received the FCE were excluded as clearly erroneous (*id.* at rows 15 & 507 ("MentalCompetenceID" nos. 529 & 1029)).

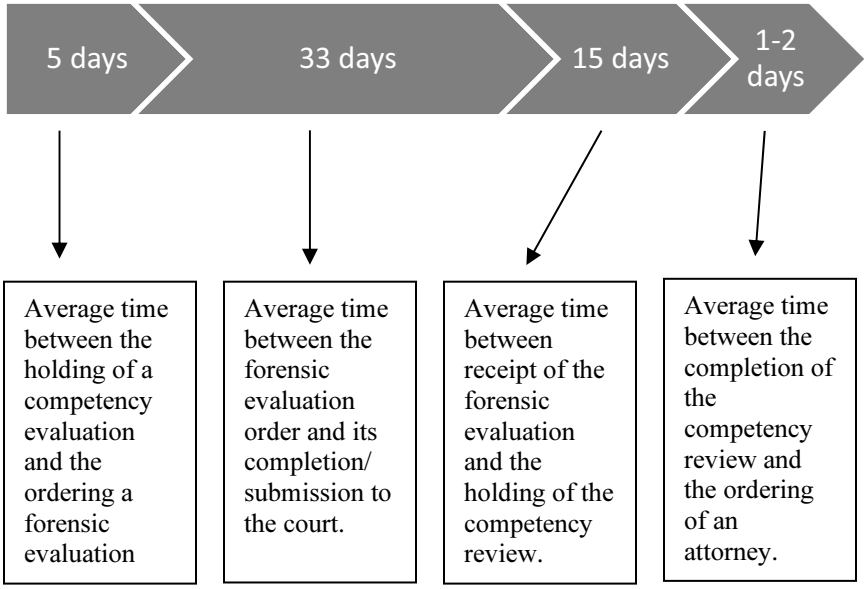
[114] MC Table, *supra* note 97 (calculating the difference in days that elapsed on average between the date identified in the "CompetenceReviewDate" column (col. H), and the "QROrderDate" column (col. N), where provided).

[115] *Id.* (showing that, where EOIR provided complete data for both the competency review and the QR order, IJs ordered a QR on the same day around 83% of the time).

[116] *Id.* at row 851 ("MentalCompetenceID" no. 1381).

[117] *Id.* at row 530 ("MentalCompetenceID" no. 1052).

Fig. 2: Average number of days that elapse between the competency process.



In conclusion, the MC Table reveals the toll that the competency process has on the individual respondents caught within it. And while the prolongation of detention does result in the provision of counsel for many, the harm inflicted on detainees both with and without mental health conditions is incalculable,[118] making any benefits gained by one group fraught with costs to the other.

2. The Master *Franco* List

The Master Franco List contains useful information that the MC Table does not. The Master Franco List shows how long mentally incompetent respondents are detained, in total, prior to being adjudicated incompetent. That is because the Master Franco List captures the "Date of Current Detention" for each respondent who was appointed counsel, and the date the order was "Transferred to Vera

[118] *See infra* notes 126–137 and accompanying discussion.

NQRP Contract / Assigned to Vera."[119] It does not tell us how long the attorney waited before meeting with their client and beginning their representation; that said, its value is in what it informs us about total detention times.

Moreover, the Master Franco List, unlike the MC Table,[120] also appears meticulously maintained. Of the Master Franco List's 2,112 case entries, only fourteen of those entries — less than one percent — do not contain clear data on when a particular respondent was detained by ICE.[121] Only twenty-four case entries lack information on the date that a detainee was adjudicated incompetent by either an IJ or the BIA.[122] Furthermore, all twenty-four of these entries are listed as "pre-order" competency cases dating back to 2012 and 2013, suggesting that these respondents were part of the original *Franco* lawsuit and were awarded QRs as part of the April 23, 2013, settlement.[123]

The median number of days that elapsed between a respondent's detention and their being adjudicated incompetent is eighty-eight days, or just shy of three months. This number does not include the unknown number of days before the same respondent would go on to receive a final adjudication on the merits of their application for relief or be released from ICE custody through bond or removal.

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[119] Franco Master List, *supra* note 94.

[120] *See infra* notes 144–162 and accompanying text (identifying gaps, inconsistencies, and prima facie data entry errors in the MC Table).

[121] Franco Master List, *supra* note 94 (examining the "Date of Current Detention" column (col. I) and isolating those that do not contain a clear (or any) date).

[122] *Id.* (examining Column K, "Date Found Incompetent by IJ" and isolating those that do not contain a date).

[123] *See* Franco-Gonzalez v. Holder, No. CV 10-02211, 2013 WL 8115423, at *1 (C.D. Cal. Apr. 23, 2013) (partial judgment and permanent injunction) ("Defendants, and their officers, agents, servants, employees and attorneys, and all those who are in active concert or participation with them, are hereby enjoined from pursuing further immigration proceedings against Plaintiffs Martinez, Khukhryanskiy, Chavez, Zhalezny, and other members of Sub-Class One, who have been identified on or before the date of this Order and Judgment, unless within 60 days from the date of this Order and Judgment, Sub-Class One members are afforded Qualified Representative(s) as defined in the concurrently issued Order who are willing and able to represent them during all phases of their immigration proceedings, including appeals and/or custody hearings, whether pro bono or at Defendants' expense.").

No comprehensive study to date provides accurate statistics on how much longer immigrants with mental health disabilities are detained versus their counterparts without disabilities.[124] That said, there is growing evidence that serious mental health concerns prolong an individual's period of incarceration.[125]

The data contained in the Franco Master List buttresses this theory. The eighty-eight median days in detention prior to incompetent respondents' incompetency determination is already more than twice the median number of days that a non-incompetent respondent spends in detention for their *entire* proceedings — which, in the year 2021, was just forty-three days.[126]

3. Why Longer Detention Times Matter to this Population

Each day in detention inflicts serious harm on a detainee,[127] regardless of their mental health status. Detained asylum seekers manifest depression at extraordinarily high rates: up to eighty-six percent

[124] *See, e.g.*, Jeffrey Draine, Amy Blank Wilson, Stephen Metraux, Trevor Hadley & Arthur C. Evans, *The Impact of Mental Illness Status on the Length of Jail Detention and the Legal Mechanism of Jail Release*, 61 PSYCHIATRIC SERVS. 458, 458 (2010) ("Research has yet to rigorously examine how long people with mental illnesses are detained or the mechanisms by which they are released.").

[125] *See* MEHTA, *supra* note 3, at 7; *see also* Nick Schwellenbach, Mia Steinle, Katherine Hawkins & Andrea Peterson, *Isolated: ICE Confines Some Detainees with Mental Illness in Solitary for Months*, PROJECT ON GOV'T OVERSIGHT (Aug. 14, 2019), https://www.pogo.org/investigation/2019/08/isolated-ice-confines-some-detainees-with-mental-illness-in-solitary-for-months [https://perma.cc/7DKH-3HP3] ("About 40 percent of the records show detainees placed in solitary have mental illness. At some detention centers, the percentage is much higher.").

[126] EXEC. OFF. FOR IMMIGR. REV., EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ADJUDICATION STATISTICS: MEDIAN COMPLETION TIMES FOR DETAINED CASES (2023), https://www.justice.gov/eoir/page/file/1163621/download [https://perma.cc/Y3GY-E258] (calculating the median number of days to complete what EOIR-defines as "non review" cases, or "removal, deportation, exclusion, asylum-only, and withholding-only cases").

[127] *See* Matthew Boaz, *Practical Abolition: Universal Representation as an Alternative to Immigration Detention*, 89 TENN. L. REV. 199, 203-06 (2021); *see also* Janet Cleveland & Cécile Rousseau, *Psychiatric Symptoms Associated with Brief Detention of Adult Asylum Seekers in Canada*, 58 CAN. J. PSYCHIATRY 409, 414 (2013) ("Our results suggest that for asylum seekers, incarceration is a serious stressor involving severe disempowerment, loss of agency, and uncertainty, all of which are predictors of depression and PTSD, even in people with a lower trauma burden than this population.").

according to a study conducted by Physicians for Human Rights.[128] Detention nigh universally impacts the psychological functioning of immigrants in a negative manner: from sleep disruptions,[129] to increased depression and anxiety,[130] to suicidality.[131]

Preexisting mental health concerns magnify these harms.[132] Respondents with mental health issues risk decompensation,[133] self-

[128] Allen S. Keller, Barry Rosenfeld, Chau Trinh-Shevrin, Chris Meserve, Emily Sachs, Jonathan A. Leviss, Elizabeth Singer, Hawthorne Smith, John Wilkinson, Glen Kim, Kathleen Allden & Douglas Ford, *Mental Health of Detained Asylum Seekers*, 362 LANCET 1721, 1722 (2003) ("54 (77%) detainees had clinically significant symptoms of anxiety, 60 (86%) of depression, and 35 (50%) of post-traumatic stress disorder. 18 (26%) participants reported thoughts of suicide while in detention, and two reported having attempted suicide.").

[129] *See* Joint Affidavit of Altaf Saadi & James Recht at 2, E-mail from Nat'l Immigrant Just. Ctr. to Katherine Culliton-González, Officer for C.R. & C.L., U.S. Dep't of Homeland Sec., Request for Investigation into Inadequate Mental Health Services, Treatment, and Accommodations, Including Improper Use of Solitary Confinement, in ICE Detention (June 2, 2022), https://immigrantjustice.org/sites/default/files/content-type/press-release/documents/2022-06/CRCL-complaint-mental-health-care-immigration-detention_June-2022_public.pdf [https://perma.cc/B5T2-7VW8] ("These conditions of confinement in immigration detention include sleep deprivation, social isolation from family via difficulty accessing family visitation, witnessing or experiencing abuse or harassment, and barriers to needed physical and mental health care. These experiences of conditions of confinement are not experienced in isolation but are rather cumulative or co-occurring conditions.").

[130] *Id.* ("Poor sleep conditions in particular bring out psychiatric illness such as depression and anxiety and exacerbate existing mental health issues. Detention centers frequently keep the lights on in cells 24/7. If lights do go out, guards often interrupt individuals' sleep at night with flashlights.").

[131] *See* Declaration of Jefferson Estime, E-mail from Nat'l Immigrant Just. Ctr., *supra* note 129 ("My mental health got worse at Clay. I felt like I was going crazy sometimes and still do, even though I'm out. It would help when my girlfriend talked to me, and she would calm me down and tell me everything was going to be okay, but sometimes I couldn't take it. I'd say to her over the phone, 'one day; I might just hang myself and kill myself.' I would only get three to four hours of sleep because my mind was racing with so many things.").

[132] *See* Kalina M. Brabeck, Katherine Porterfield & Maryanne Loughry, *Immigrants Facing Detention and Deportation: Psychosocial and Mental Health Issues, Assessment, and Intervention for Individuals and Families*, *in* THE NEW DEPORTATIONS DELIRIUM: INTERDISCIPLINARY RESPONSES 167, 171 (Daniel Kanstroom & M. Brinton Lykes eds., 2015).

[133] E. FULLER TORREY, JOAN STIEBER, JONATHAN EZEKIEL, SIDNEY M. WOLFE, JOSHUA SHARFSTEIN, JOHN H. NOBLE & LAURIE M. FLYNN, NAT'L ALL. FOR THE MENTALLY ILL & PUB.

harm,[134] solitary confinement,[135] or inadequate and inappropriate care for their mental health conditions.[136] The harmful effects of just fifteen days of solitary confinement has been described as "irreversible."[137] Many asylum seekers have already experienced torture, persecution, sexual and domestic violence, and prolonged detention.[138] The months and possibly years that these same asylum seekers are in detention has a magnifying effect on their preexisting post-traumatic stress syndrome and anxiety.[139]

CITIZEN'S HEALTH RSCH. GRP., CRIMINALIZING THE SERIOUSLY MENTALLY ILL: THE ABUSE OF JAILS AS MENTAL HOSPITALS 62-64 (1992) (providing testimonials from impacted individuals and their families regarding a severe psychiatric and medical deterioration during periods of incarceration).

[134] *See id*. at 61 (referencing studies that find approximately half of all inmate suicides are committed by persons suffering from serious mental health disorders).

[135] *See* AZZA ABUDAGGA, SIDNEY WOLFE, MICHAEL CAROME, AMANDA PHATDOUANG & E. FULLER TORREY, PUB. CITIZEN'S HEALTH RSCH. GRP. & TREATMENT ADVOC. CTR., INDIVIDUALS WITH SERIOUS MENTAL ILLNESSES IN COUNTY JAILS: A SURVEY OF JAIL STAFF'S PERSPECTIVES 11-12 (2016) (surveying jails around the U.S., nearly 70% of which reported segregating individuals with serious mental health disabilities); *see also* HEARTLAND ALL. NAT'L IMMIGRANT JUST. CTR. & PHYSICIANS FOR HUM. RTS., INVISIBLE IN ISOLATION: THE USE OF SEGREGATION AND SOLITARY CONFINEMENT IN IMMIGRATION DETENTION 13 (2012) https://immigrantjustice.org/sites/immigrantjustice.org/files/Invisible%20in%20Isolation-The%20Use%20of%20Segregation%20and%20Solitary%20Confinement%20in%20Immigration%20Detention.September%202012_7.pdf [https://perma.cc/Z22D-QCFF] ("Because segregation and solitary confinement is often used as a management tool for individuals with mental illness, those with pre-existing psychiatric disorders often end up in solitary confinement. When placed in solitary confinement, detainees tend to experience further deterioration in their mental health.").

[136] *See* Affidavit of Dr. William Weber at 2, E-mail from Nat'l Immigrant Just. Ctr., *supra* note 129 ("I have also worked with mentally ill individuals in detention who were taken off psychiatric medications and subsequently placed into solitary confinement or segregation."). *See generally* OFF. OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., OIG-22-03, MANY FACTORS HINDER ICE'S ABILITY TO MAINTAIN ADEQUATE MEDICAL STAFFING AT DETENTION FACILITIES (2021), https://www.oig.dhs.gov/sites/default/files/assets/2021-11/OIG-22-03-Oct21.pdf [https://perma.cc/63S5-PQ35] (describing factors that cause decreased mental health care for inmates).

[137] *See* Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 348 (2006).

[138] HEARTLAND ALL. NAT'L IMMIGRANT JUST. CTR. & PHYSICIANS FOR HUM. RTS., *supra* note 135 at 13.

[139] *See* Joint Affidavit of Altaf Saadi & James Recht, E-mail from Nat'l Immigrant Just. Ctr., *supra* note 129, at 2.

Decreased psychological functioning diminishes a noncitizen's ability to defend themselves in immigration court[140] where the burden of proof and production is almost always on them.[141] The need to testify consistently and credibly,[142] to recall specific details, to produce evidence,[143] and to navigate complex laws is challenging enough without the additional psychological toll and logistical challenges presented by immigration detention.

The cascading harm inflicted by immigration detention militates toward the need to speed up the *Franco* competency evaluation process. As discussed in Part IV, accelerating the process should not come at the expense of important *Franco* evaluation tools, such as the involvement of trained medical professionals. Rather, streamlining can be achieved through adjustments to the competency process and immediate release from custody.

4. Acknowledging Data Problems with EOIR's Record-Keeping

At least a brief discussion is warranted about how EOIR's record keeping is less than perfect. On several documented occasions — including once when EOIR provided incomplete and vastly undercounted case statistics to the Supreme Court in support of a

[140] *Id.* at 3 ("Sleep deprivation also contributes to cognitive dysfunction, thereby potentially reducing individuals' ability to participate in their legal cases and defend themselves.").

[141] *See, e.g.*, Matter of Patel, 15 I. & N. Dec. 666 (BIA 1976) (placing the burden of proof on the noncitizen to prove that they merit release from detention on bond because they are not a flight risk or danger to the community); 8 C.F.R. § 1208.13 (2023) (placing the burden of proof on asylum applicants to establish that they are a refugee as defined in section 101(a)(42) of the Act); *id.* § 240.64 (2023) (placing the burden of proof on noncitizens to establish that they are eligible for voluntary departure); *id.* § 1240.8(b)-(d) (2023) (placing the burden of proof on the noncitizen to proof that they are entitled to be admitted to the United States, that they are lawfully present in the United States, that they are eligible for relief from removal, and that bars to such relief do not apply to them).

[142] 8 U.S.C. § 1158(b)(1)(B)(iii).

[143] REAL ID Act of 2005, Pub. L. No. 109-13, tit. II, 119 Stat. 231, 261-68 (requiring corroborating evidence where requested by the trier of fact unless the asylum applicant does not have it, and cannot reasonably obtain it).

nationally significant case[144] — EOIR failed to provide complete and accurate information to the public.[145] The FOIA results discussed in this article contain clear data errors and contradictions as well. The MC Table, in particular, is bedeviled by data entry issues.

On five occasions the MC Table states that a respondent was adjudicated "competent," and yet was assigned an attorney.[146] The MC Table also contains missing data points. Of the 1,740 case entries where counsel was ordered, not all contained useable data for various reasons.[147] For example, it is unclear in fourteen of the case entries whether the competency process was initiated through ICE's identification of a serious mental disorder, by an IJ's "bona fide doubt" determination, or some other means such as a "Third Party Notification."[148] Three entries suggest that an IJ ordered counsel without ever having held a competency hearing.[149] That is not to say that

[144] Letter from Ian Heath Gershengorn, Acting Solic. Gen., to Hon. Scott S. Harris, Clerk, U.S. Sup. Ct., Re: *Demore v. Kim*, S. Ct. No. 01-1491 (Aug. 26, 2016), https://trac.syr.edu/immigration/reports/580/include/01-1491%20-%20Demore%20Letter%20-%20Signed%20Complete.pdf [https://perma.cc/99DZ-M9M9] ("This letter is submitted in order to correct and clarify statements the government made in its submissions . . . . EOIR made several significant errors in calculating those figures.").

[145] TRAC IMMIGR., INCOMPLETE AND GARBLED IMMIGRATION COURT DATA SUGGEST LACK OF COMMITMENT TO ACCURACY (2019), https://trac.syr.edu/immigration/reports/580/ [https://perma.cc/YA2H-3XMJ] ("TRAC recently discovered gross irregularities in recent data releases from the Executive Office for Immigration Review (EOIR), the agency that oversees the US immigration court system. . . . This example illustrates the very real danger posed by the EOIR's mishandling of data, as well as the value to society — and the government itself — of ongoing oversight through Freedom of Information Act (FOIA) requests. Despite the EOIR's past data mistakes, however, the quality of the agency's data releases has recently declined to unacceptable levels, as we discuss in the following section.").

[146] MC Table, *supra* note 97. These five entries were not ones where a respondent was initially found "competent" but subsequently found "incompetent" by either the BIA or an IJ during a re-evaluation.

[147] This figure excludes the five cases where a QR was ordered but the individual was never adjudicated incompetent by either an IJ or the BIA. *Id.* at rows 10, 108, 578, 977 & 3128 ("MentalCompetenceID" nos. 524, 622, 1101, 1513 & 3756).

[148] *Id.* at rows 173, 192, 275, 441, 534, 963, 977, 1068, 1285, 1286, 1370, 2045, 2153 & 2549 ("MentalCompetenceID" nos. 688, 708, 792, 962, 1056, 1499, 1513, 1607, 1835, 1836, 1923, 2626, 2737 & 3148).

[149] *Id.* at rows 368, 527 & 3796 ("MentalCompetenceID" nos. 886, 1049 & 4466).

the hearing never took place, only that its date was never recorded. In six cases, counsel was appointed directly by the BIA.[150] And in nine recorded instances, an IJ held a competency review despite there being no record of the IJ ever ordering a forensic evaluation upon which to base the competency review.[151]

In other instances, there are clearly erroneous data entry issues. For example, in five case competency entries, an IJ ordered a competency review *after* they ordered counsel appointed.[152] In another three case entries, an IJ ordered counsel appointed, but then later held a competency hearing.[153] In two case entries, a forensic evaluation was received by the court after the conclusion of the actual competency review upon which the forensic evaluation was supposed to be based,[154] resulting in a negative number of days elapsed when calculating the difference between two dates that ordinarily must follow one another.[155] In one case, an IJ found a respondent incompetent after a competency hearing, but inexplicably went on to order a forensic evaluation for the same respondent.[156] For purity of sample analysis, such clear data entry issues were excluded from the final tabulations.

Finally, while the MC Table suggests that the total number of attorneys ordered for incompetent respondents was around 1,740, the Franco Master List places the total number at 2,080.[157] One possible explanation for the attorney assignment discrepancy is that different components within EOIR track information differently. The MC Table

[150] *Id.* at rows 302, 872, 2592, 2661, 3139 & 3141 ("MentalCompetenceID" nos. 819, 1404, 3198, 3270, 3767 & 3769).

[151] *Id.* at rows 179, 230, 240, 270, 322, 358, 515, 528 & 1820 ("MentalCompetenceID" nos. 695, 747, 757, 787, 839, 876, 1037, 1050 & 3222).

[152] *Id.* at rows 2281, 2753, 3037, 3212 & 3516 ("MentalCompetenceID" nos. 2870, 3365, 3663, 3846 & 4159).

[153] *Id.* at rows 22, 1170 & 1218 ("MentalCompetenceID" nos. 536, 1713 & 1764).

[154] *Id.* at rows 11 & 507 ("MentalCompetenceID" nos. 525 & 1029).

[155] *See* Franco-Gonzalez v. Holder, No. CV-10-02211, 2014 WL 5475097, at *29-30 (C.D. Cal. Oct. 29, 2014) (order further implementing the court's permanent injunction issued on April 23, 2013) (mandating that a competency review shall be convened within thirty days after receiving the report from a forensic evaluation).

[156] MC Table, *supra* note 97, at row 84 ("MentalCompetenceID" no. 598).

[157] Franco Master List, *supra* note 94.

is pulled from the CASE management system[158] within the Office of the Chief IJ, which is accessible and updated by administrative and legal assistants nationwide. The Office of Legal Access Programs maintains the Master Franco List.[159] The Office of Legal Access Programs is not within the Office of the Chief IJ,[160] and manages the contractual relationships with the Vera Institute of Justice and the subcontracting organizations that are authorized to serve as counsel.[161]

Another explanation for the difference in attorney assignment numbers across the two spreadsheets is that the Master Franco List captures attorney orders that were made erroneously, orders that were later rescinded, or orders for respondents who were in state custody (and therefore ineligible for appointed counsel).[162]

[158] *See* Guidance Document from the Exec. Off. for Immigr. Rev., Case Competency Tab Flowchart – Nationwide (Nov. 6, 2019), https://www.hoppocklawfirm.com/wp-content/uploads/2021/09/Case-Competency-Tab-Flowchart-Nationwide.pdf [https://perma.cc/S3QJ-JPSX] (describing how the CASE management system structures the IJ Competency Evaluation Checklist, consisting of the same formatting and data used in the MC Table). This document was obtained through Hoppock Law Firm's 2019 FOIA request. *See* Hoppock, *supra* note 79.

[159] *See* Eleventh FOIA Request Response 6, Exec. Off. of Immigr. Rev., Harv. Immigr. & Refugee Clinical Program (Jan. 22, 2022) (on file with author) (including a document entitled "NQRP Handbook, The Office of Legal Access Programs" in which can be found descriptions of the Master Franco List spreadsheet, what data it must include, and how often it must be updated (daily)); personal knowledge also forms the basis for this statement. When I worked at the Office of Legal Access Programs within EOIR from 2016–2018, it was one of my daily tasks to maintain the Master Franco List and monitor compliance with the *Franco* court-mandated deadlines.

[160] *See Office of Legal Access Programs*, EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., https://www.justice.gov/eoir/office-of-legal-access-programs (last updated Oct. 13, 2023) [https://perma.cc/29MR-DNAN].

[161] *See, e.g.*, Statement of Work (*Franco* Version) from the EOIR's Off. of Legal Access Programs in Cont. to Provide Legal Representation Servs. 7-8 (Feb. 5, 2014) (obtained through FOIA request and on file with author) (showing a sub-contract relationship between the Office of Legal Access Programs and QR subcontracting organizations); Memorandum on the Proposal for Nat'l Qualified Representative Program ("QRP") from the Vera Inst. of Just., (Dec. 20, 2013) (on file with author) (showing the contractual proposal by Vera, directed to the Office of Legal Access Programs).

[162] Franco Master List, *supra* note 94 (containing entries that read, for example, "previously assigned," "QR ORDER RESCINDED," "CANCELLED," and "STATE PRISON – NOT NQRP ELIGIBLE"); *see also infra* notes 226–329 and accompanying text

Despite EOIR's data entry problems, the two spreadsheets offer an abundance of insights into the competency process. What they do *not* tell us, however, is the origin of the delays. Fortunately, the *Franco* court-appointed Monitor — charged with tracking and investigating the order's actual implementation — provides answers as to why (and where) many of *Franco*'s inefficiencies arise.

C. The Franco *Court-Appointed Monitor Identifies Possible Sources of the Hitches in the Competency Process*

Having now identified areas where the competency process prolongs detention and that, on average, mentally incompetent detainees are detained longer than non-incompetent respondents, it is helpful to understand the possible reasons for that prolongation.

The *Franco* Monitor submits periodic reports to the Central District of California as part of the court's order to monitor EOIR and DHS compliance.[163] These reports, some public, provide a unique view into the inner machinations of the competency process. They reveal that while the defendants (EOIR and DHS) act in conformity with the order most of the time, the process has several serious flaws.

The Monitor is granted significant discovery tools to assist her in understanding the parties' performance under the Implementation Order: 1) interviewing powers (of doctors, trainers, custodial officers, and QRs);[164] 2) the ability to seek and retrieve internal documents;[165] 3) the right to observe competency inquiries, competency reviews, and bond hearings for class members;[166] and 4) to observe trainings of IJs, ICE personnel, and doctors authorized to perform the forensic evaluations.[167] The defendants were also instructed to provide semi-

(discussing how respondents in state custody are one of the many groups that fall outside the *Franco* order).

[163] *See* Franco-Gonzalez v. Holder, No. CV-10-02211, at 8 n.7 (C.D. Cal. Mar. 2, 2015) (order appointing Katherine Mahoney as Monitor), https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/05/ORD.DCT_.810-Order-Appointing-Katherine-Mahoney-as-Monitor.pdf [https://perma.cc/3PM4-JC4C].

[164] *Id.* at 5.

[165] *Id.* at 6.

[166] *Id.* at 7.

[167] *Id.* at 5.

annual reports on each class member's detention history, mental health information, case status, representation status, etc.[168]

In a 2017 report to the district court, the Monitor identified several shortcomings in the competency process that resulted in longer detention times for some class members.[169] For example, she found "facial invalidities" in a detention facility's mental health screening forms that "appeared to unnecessarily delay proceedings or fail[ed] to identify Class Members."[170] The Monitor cited five instances of the 131 cases she reviewed where detainees — despite having serious mental health disorders ranging from severe head traumas[171] to hallucinations[172] to "responding to internal stimuli"[173] — were not detected as having class criteria.[174]

The Monitor also identified specific instances where delays in mental health screenings for individuals with known mental health challenges prolonged their class identification. In one documented instance, a detainee at the Mesa Verde detention center in California was not given a mental health assessment for fifty-seven days after booking despite screening notes indicating that the detainee appeared "disheveled," his affect was blunted, and his speech included "loose associations."[175] The next day, the same detainee reported that he was taking anti-seizure medication and was referred to a neurologist.[176] Despite this information, no mental health assessment took place for nearly two months, whereupon the provider learned that the detainee was schizophrenic and had suffered "multiple head trauma[s]."[177] In another reported instance, a detainee on several psychotropic medications with a history of mental health hospitalizations languished in ICE custody for

[168] *Id.* at 7-11.

[169] *See* Monitor's Report on Status of Implementation for Reporting Period 4 (July 1, 2016 through Mar. 3, 2017), Franco-Gonzalez v. Sessions, No. CV-10-02211, at 8 (C.D. Cal. May 5, 2017).

[170] *Id.*

[171] *Id.* at 16.

[172] *Id.* at 17.

[173] *Id.* at 18.

[174] *See id.* at 16.

[175] *Id.* at 15.

[176] *Id.*

[177] *Id.*

seven months before ICE notified the IJ of the detainee's mental health concerns.[178]

IJs created delays as well. IJs misapplied or misunderstood the court's bona fide doubt standard, which is designed to be relatively low ("broad and flexible" without the need for "conclusive evidence of incompetency").[179] And yet, some IJs convened special hearings called "'bona fide doubt' hearing[s]" uniquely for the purpose of investigating whether there was sufficient evidence for a bona fide doubt finding.[180] The Monitor expressed concern that such hearings not only caused "unnecessary delays," but "may contribute to misapplication of the evidentiary standards for Class Membership and competency."[181] The Monitor then recounted several instances where IJs did in fact misapply the standard, resulting in significant postponements in the competency evaluation process.[182]

The Monitor observed IJs misapplying the *pro se* competency standard as well. Specifically, several IJs adjudicated *Franco* class members "competent" based on a "preponderance of the evidence" standard.[183] However, competence must be established beyond a reasonable doubt.[184]

Despite exposing flaws in the identification and adjudication of competence in certain instances, the Monitor was overall complimentary of the defendants' compliance with the *Franco* order.[185] This tells us that the prolonged detention of incompetent respondents

[178] *Id.* at 15-16.

[179] *Id.* at 23 (citing an order issued on March 8, 2017).

[180] *See id.*

[181] *Id.*

[182] *Id.* at 23-25.

[183] *Id.* at 29.

[184] *See* Franco-Gonzalez v. Holder, No. CV-10-02211, 2014 WL 5475097, at *28 (C.D. Cal. Oct. 29, 2014) (order further implementing the court's permanent injunction issued on April 23, 2013) (holding that a class member is competent only if "[t]here is no reasonable cause to believe that the Class member is suffering from a mental disorder that impairs his or her ability to perform the functions listed in the definition of competence to represent him- or herself").

[185] *See* Monitor's Report on Status of Implementation for Reporting Period 4, *supra* note 169, at 8.

cannot be attributed entirely to those flaws. Put another way, a highly functioning *Franco* is still a slow-moving *Franco*.

But *Franco* has other serious problems, ones that no amount of training can solve. These problems, discussed in the next Part, are immutable aspects of *Franco* itself.

III. A LOOK AT THOSE WHO FALL OUTSIDE THE REACH OF *FRANCO*'S GRASP

The *Franco* decision was an unmatched breakthrough for mentally disabled, detained noncitizens in removal proceedings in California, Washington, and Arizona. Incompetent *Franco* class members were now guaranteed court-appointed counsel throughout their removal proceedings. Judges had a clear competency standard and were to undergo regular trainings. But *Franco* only benefited the very discreet population of respondents who fell precisely within the four corners of the lawsuit. The court created these limits explicitly, and EOIR followed suit when it created the NQRP.

The court clearly stated that "'immigration proceedings' shall mean, *and be limited to*, proceedings at which Immigration and Customs Enforcement appears on behalf of the Department of Homeland Security before an Immigration Judge or the Board of Immigration Appeals."[186]

Therein lies *Franco's* greatest shortcoming: it does not, and cannot, touch entire groups of noncitizens with mental health challenges who are subject to our immigration laws.

EOIR could have viewed the *Franco* mandate as a floor rather than a ceiling. However, EOIR expressly limited the NQRP's scope of representation at the program's infancy. On December 20, 2013, Vera submitted its proposal and operation plan for providing legal representation under the NQRP to "all unrepresented individuals *detained* by the Department of Homeland Security (DHS) *and in INA Section 240 immigration proceedings* who are determined by the Executive Office for Immigration Review (EOIR) to be mentally incompetent to

[186] *Franco-Gonzalez*, 2014 WL 5475097, at *40 (emphasis added, internal abbreviations removed).

represent themselves in their immigration proceedings."[187] This would be the NQRP's programmatic model forevermore.[188]

This Part proceeds in two sections: first, it dissects proceedings not covered by *Franco* but that still fall under EOIR's jurisdiction. Then, it examines the "extra-legal" proceedings entirely outside of EOIR's purview. Understanding where EOIR has and does not have jurisdiction assists in contemplating possible ways to improve or expand *Franco*, and how easy (or difficult) those changes would be to implement.

A. Cases Heard by EOIR That Fall Outside of Franco

The first stop in the investigation of non-covered proceedings is where a massive number of noncitizens find themselves facing removal: non-detained proceedings.

1. Non-detained Proceedings

There are currently around 1.8 million pending cases before EOIR.[189] The number of detained versus non-detained cases fluctuates, however; a recent report by the American Immigration Council found that fifty-six percent of all noncitizens in removal proceedings before EOIR remain detained throughout the entire pendency of their case.[190] Of the remaining forty-four percent in removal proceedings, thirty-four

[187] Memorandum from Vera Inst. of Just., *supra* note 161, at 1 (emphasis added).

[188] *See generally* Wilson, *supra* note 8 (critically examining the two halves of the NQRP — the half for those in the Ninth Circuit and those outside of it — and analyzing the consequences in those differences to respondents over the past ten years of the program's existence).

[189] *Historical Immigration Court Backlog Tool*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/ (last updated Jan. 2023) [https://perma.cc/3TRG-V8AC].

[190] INGRID EAGLY & STEVEN SHAFER, AM. IMMIGR. COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 4 (2016), https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court [https://perma.cc/T8CS-MYSC] ("More than half of immigrants facing removal in immigration court during the six-year period covered in this report (2007-2012) spent their entire case in government custody — almost 56 percent of immigrants were 'detained' in prisons, jails, and detention centers across the country as they awaited the decision of an immigration judge.").

percent were never in ICE custody (the remaining ten percent were detained but released).[191]

A released *Franco* class member maintains the benefit of a QR throughout the pendency of their removal proceedings. However, for released non-*Franco* class members (meaning, those whose cases originated outside of the three named states in the Ninth Circuit), a QR is only guaranteed for ninety days post-release.[192] For these respondents, as well as those respondents who have never been detained, competency inquiries instead follow *Matter of M-A-M-*.[193]

Respondents face several disadvantages when their competency is assessed under *M-A-M-* versus *Franco*. First, the *M-A-M-* competency standard is lower than that of *Franco*. *Franco* adopted the basic *M-A-M-*[194] standard but then enhanced it by adding additional functions

[191] *Id.* ("Some immigrants that started out in detention, however, were released from custody before their cases were decided. These 'released' immigrants made up 10 percent of the immigrants in the study. Finally, some immigrants were never placed in government custody during the pendency of their case. These 'never detained' immigrants accounted for 34 percent of immigrants in this study.").

[192] National Qualified Representative Program Statement of Work (FY 2020) from the EOIR's Off. of Legal Access Programs 8 (Jan. 14, 2022) (obtained through the Immigration Clinic's FOIA request and on file with the author) ("Upon an [Identified Individual's] release from DHS custody, [and regardless of the status or posture of the Identified Individual's immigration proceedings at the time of release,] Contract funds are available to provide Contract services to that Identified Individual for up to 90 days from the date of the Identified Individual's release from DHS custody." (alterations in original)).

[193] Matter of M-A-M-, 25 I. & N. Dec. 474, 474-75 (B.I.A. 2011); *see* Presentation on Determining Mental Competence, *supra* note 39, at slide 3 ("*M-A-M-* applies to any case where there is indicia that the respondent lacks competency, but *Franco* and the *Nationwide Policy* would not apply").

[194] *See Matter of M-A-M-*, 25 I. & N. Dec. at 479; *see, e.g.*, 8 U.S.C. § 1361 (stating that once alienage is established, the burden is on the respondent to show the time, place, and manner of entry); *see also In re* S-Y-G-, 24 I. & N. Dec. 247, 258 (B.I.A. 2007) (holding that the evidence provided by the applicant did not meet the "heavy burden" of showing a material change in the circumstances of the applicant's country of nationality and supporting a *prima facie* case for asylum); *In re* Jean, 23 I. & N. Dec. 373, 386 (B.I.A. 2002) (holding that in applications for relief from deportation, the burden of proof is on the respondent to show eligibility for the relief sought); 8 C.F.R. § 1240.8(d) (2023); *id.* § 208.13(a)-(b) (2023) (placing the burden of proof on the asylum seeker to establish that they are a refugee).

that a respondent had to perform in order to be competent.[195] Put another way, it is easier to be found competent under *M-A-M-* than it is under *Franco*.

Second, *M-A-M-* does not permit IJs to request a forensic evaluation (paid for by EOIR) to gain a better understanding of a respondent's mental condition or neurological functioning.[196] Also, EOIR takes the position that *Matter of M-A-M-* does not authorize an IJ to terminate proceedings against an incompetent respondent as a safeguard.[197] Nor does *Matter of M-A-M-* authorize an IJ to order the provision of a QR following an incompetence determination.[198]

Matter of M-A-M-'s weakened competency standard offers fewer tools in the competency toolbox (e.g., evaluations, termination, the provision of counsel), meaning more respondents who need accommodations will not receive them or may slip through the cracks altogether. They are "stuck" both appearing alone, and without the possibility of having their case dropped.

Proceeding against an unrepresented, incompetent respondent is not only fundamentally unfair, it also diminishes judicial economy. EOIR itself acknowledged that IJs are hampered in "carry[ing] out their adjudicatory duties" when proceeding against *pro se* respondents with mental health concerns.[199] IJs overwhelmingly agreed in a 2011 survey that cases move more efficiently when a respondent is represented by counsel.[200] Having an attorney present reduces the number of

[195] *See Matter of M-A-M-*, 25 I. & N. Dec. at 479-80.

[196] *See* Presentation on Determining Mental Competence, *supra* note 39, at slide 7 ("Actions an IJ Cannot Take under *M-A-M-:* Order that a psychologist conduct an evaluation of the respondent.").

[197] *Id.* ("Actions an IJ Cannot Take under *M-A-M-* . . . . Dismiss the charge(s).").

[198] *Id.* (stating that *M-A-M-* does not authorize the appointment of counsel).

[199] Memorandum from Brian M. O'Leary, *supra* note 9, at 1 ("For those of you who have had unrepresented detained aliens with serious mental disorders or conditions appear in your courtrooms, you are more than aware of the many unique challenges encountered in conducting removal proceedings involving such individuals.").

[200] LENNI B. BENSON & RUSSELL R. WHEELER, ENHANCING QUALITY AND TIMELINESS IN IMMIGRATION REMOVAL ADJUDICATION 56 (2012) ("Our survey asked judges about their agreement with this statement: 'When the respondent has a competent lawyer, I can conduct the adjudication more efficiently and quickly.' Of the 166 judges who responded, ninety-two percent (92%) agreed (sixty-nine percent (69%) "strongly"); five percent (5%) selected 'neutral.'").

continuances by accelerating key procedural stages such as pleadings and tendering of relief.[201]

2. Credible Fear Reviews by an Immigration Judge

In training materials for IJs and court staff, EOIR continuously reasserted that the program's "covered proceedings" were "limited to proceedings at which ICE appears on behalf of DHS before an Immigration Judge or the Board of Immigration Appeals that occur prior to the entry of a final administrative order of removal, deportation, exclusion, or a final administrative determination pursuant to 8 C.F.R. 1208(2)(c)(3)."[202]

However, IJs hear other types of proceedings that do not qualify for *Franco* coverage under this narrow definition.

"Expedited removal" was created in 1996[203] as a means of deputizing low level immigration officials (Customs and Border Protection officers and ICE officers) to deport recent noncitizen arrivals who are apprehended at or near a border.[204] Caught in this web, noncitizens are without the right to an attorney, and cannot access our immigration courts.[205] Expedited removal is discussed in greater detail below as an example of extra-legal proceedings outside of EOIR's purview,[206] however, there is one narrow subset of individuals in this posture who

[201] *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 59 (2015).

[202] Guidance on Handling Mental Competency Cases, *supra* note 101, at 3 (internal abbreviation removed).

[203] *See* H.R. REP. NO. 104-828, at 33-39 (1996) (Conf. Rep.).

[204] AM. IMMIGR. COUNCIL, A PRIMER ON EXPEDITED REMOVAL 1 (2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/primer_on_expedited_removal.pdf [https://perma.cc/G5A2-UMXC] ("Since 2004, immigration official have used expedited removal to deport individuals who arrived our border, as well as individuals who entered without authorization if they are apprehended within two weeks of arrival and within 100 miles of the Canadian or Mexican border." (citing Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877-48881 (Aug. 11, 2004))).

[205] 8 U.S.C. § 1225(b)(1) (permitting DHS to summarily remove noncitizens arriving at the border "without further hearing or review" if they lack valid entry documents or tried to procure admission through fraud or misrepresentation).

[206] *See infra* Section III.B.2 (discussing expedited removal as an extra-legal proceeding).

can — on an extremely limited basis — seek judicial review of their case: those asking for a "credible fear review."[207]

Credible fear reviews are initiated where a recent border arrival expresses a fear of returning to their country, is given a threshold interview of their request for asylum (called a "credible fear interview"[208]) and they do not succeed in that interview.

The credible fear interviews are intended to determine whether there is a significant possibility that an applicant would face persecution or torture if returned.[209] Individuals who "pass" their credible fear interview can be considered for a grant of asylum either directly by the asylum officer, or through referral to an IJ under section 240 of the Act.[210] Those placed in removal proceedings are covered by *Franco* should they later be adjudicated incompetent.[211]

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[207] 8 C.F.R. § 235.3(b)(4) (2022); *see* CONG. RSCH. SERV., IF-11357, EXPEDITED REMOVAL OF ALIENS: AN INTRODUCTION (2022), https://crsreports.congress.gov/product/pdf/IF/IF11357 [https://perma.cc/J9ER-D4GW] ("An alien otherwise subject to expedited removal who expresses an intent to apply for asylum or a fear of persecution if returned to a particular country is entitled to administrative review of that claim before being removed.").

[208] *See* Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18,078, 18,080 (May 31, 2022) (codified at 8 C.F.R. 208.2(a), 208.9(a), 208.30) ("USCIS asylum officers conduct credible fear interviews, make credible fear determinations, and determine whether a noncitizen's affirmative asylum application should be granted.").

[209] *See id.* at 18,091 ("Individuals claiming a fear or an intention to apply for protection are referred to USCIS asylum officers for an interview and consideration of their fear claims under the 'significant possibility' standard.").

[210] 8 C.F.R. § 1240.17(a) (2022) ("Removal proceedings where the respondent has a credible fear of persecution or torture. . . . This section applies in cases referred to the immigration court under 8 CFR 208.14(c)(1) where the respondent has been found to have a credible fear of persecution or torture, and U.S. Citizenship and Immigration Services (USCIS) subsequently adjudicated but did not grant the respondent's application for asylum under section 208 of the Act.").

[211] HUM. RTS. FIRST, CREDIBLE FEAR: A SCREENING MECHANISM IN EXPEDITED REMOVAL 1 (2018), https://humanrightsfirst.org/wp-content/uploads/2022/10/Credible_Fear_Feb_2018.pdf [https://perma.cc/NC7E-HWSE] ("If the individual receives a positive result from the credible fear interview, he or she will be referred to regular removal proceedings — a process under section 240 of the Immigration and Nationality Act — and can then present an asylum claim before an immigration judge.").

Those who "fail" their credible fear interview receive a review of the negative determination by an IJ.[212] These proceedings are called "credible fear reviews,"[213] and are considered limited in scope and nature.[214] Most significantly, for purposes of this discussion, credible fear reviews remain under Section 235 of the Act,[215] meaning respondents in this posture are not covered by *Franco* or the NQRP.

Individuals in the credible fear posture remain detained as the judge reviews the asylum officer's negative determination.[216] The reviews happen extremely quickly — within days of the negative finding[217] — leaving little time for individuals to locate and secure counsel. Furthermore, there is no automatic right to counsel at these hearings,[218]

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[212] 8 C.F.R. § 208.30(g)(1) (2023).

[213] EXEC. OFF. OF IMMIGR. REV., IMMIGRATION COURT PRACTICE MANUAL ch. 7.4(d)(4)(E) (June 10, 2013), https://www.justice.gov/eoir/reference-materials/ic/chapter-7/4 [https://perma.cc/9PFV-PW6A] [hereinafter IMMIGRATION COURT PRACTICE MANUAL] ("A credible fear review is not as exhaustive or in-depth as an asylum hearing in removal proceedings. Rather, a credible fear review is simply a review of the USCIS asylum officer's decision. Either the noncitizen or DHS may introduce oral or written statements, and the court provides an interpreter if necessary. Evidence may be introduced at the discretion of the immigration judge.").

[214] *Id.*

[215] 8 C.F.R. § 208.30(g)(1) (2023) ("If an alien is found not to have a credible fear of persecution or torture . . . [t]he asylum officer shall inquire whether the alien wishes to have an immigration judge review the negative decision, which shall include an opportunity for the alien to be heard and questioned by the immigration judge as provided for *under section 235(b)(1)(B)(iii)(III) of the Act*." (emphasis added)).

[216] 8 C.F.R. § 1235.3(b)(2)(iii) (2021) ("An alien whose inadmissibility is being considered under this section or who has been ordered removed pursuant to this section shall be detained pending determination and removal, except that parole of such alien, in accordance with section 212(d)(5) of the Act, may be permitted only when the Attorney General determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.").

[217] 8 U.S.C. § 1225(b)(1)(B)(iii)(III); *see also* IMMIGRATION COURT PRACTICE MANUAL, *supra* note 213, at ch. 7.4(d)(iv)(A) ("The credible fear review must be concluded no later than 7 days after the date of the DHS asylum officer's decision. If possible, the credible fear review should be concluded 24 hours after the decision.").

[218] IMMIGRATION COURT PRACTICE MANUAL, *supra* note 213, at ch. 7.4(d)(iv)(C) ("[T]he [noncitizen] is not represented at the credible fear review."); Exec. Off. for Immigr. Rev., Interim Operating Policy and Procedure Memorandum 97-3: Procedures for Credible Fear and Claimed Status Reviews 10 (1997) ("There is no right to representation prior to or during the review, either in the statute or the regulation.").

and even in the rare instance where a respondent is able to secure an attorney, some judges actually bar lawyers from participating.[219]

An IJ's decision to uphold or vacate the negative credible fear review is final; there is no appeal before the BIA or the federal courts.[220]

Judges overwhelmingly affirm asylum officers' negative credible fear findings.[221] Affirmance is quickly converted to a swift deportation.[222] According to EOIR's most recent and publicly available statistics, IJs held 9,442 credible and reasonable fear reviews in the 2018 fiscal year.[223] The judges affirmed the officer's negative fear finding around seventy-eight percent of the time.[224] In a study conducted by Human Rights First in collaboration with the Human Rights Center Investigations Lab at

[219] HUM. RTS. FIRST, BIDEN ADMINISTRATION MOVE TO ELIMINATE REQUESTS FOR RECONSIDERATION WOULD ENDANGER ASYLUM SEEKERS, DEPORT THEM TO PERSECUTION AND TORTURE 3 (2021), https://humanrightsfirst.org/wp-content/uploads/2022/09/Requestsfor Reconsideration.pdf [https://perma.cc/GE7N-TYBB] ("Judges often schedule CFI reviews within 24 hours of the initial determination — leaving asylum seekers with virtually no time to prepare or consult with counsel, bar attorneys from participating in reviews (the government contends there is no right to counsel in these reviews), reject additional evidence or testimony, and interpret additional information the asylum seeker did not have time or ability to present at the CFI as impugning the credibility of the asylum seeker.").

[220] 8 C.F.R. § 1208.30(g)(2)(iv)(A) (2023) ("If the immigration judge concurs with the determination of the asylum officer that the alien does not have a credible fear of persecution or torture, the case shall be returned to DHS for removal of the alien. The immigration judge's decision is final and may not be appealed.").

[221] *See* Lauren Schusterman, *A Suspended Death Sentence: Habeas Review of Expedited Removal Decisions*, 118 MICH. L. REV. 655, 662 (2020) ("In reality, the [credible fear review] hearing increasingly functions as a rubber stamp for the asylum officer's determination. As of June 2018, IJs affirmed the negative determination in 85.3 percent of cases, up from 67.3 percent just a year prior. In the rare instances in which the IJ disagrees with the asylum officer and finds a credible fear, the individual is placed in regular (and more thorough) removal proceedings." (footnotes omitted)).

[222] *See* 8 C.F.R. § 1208.30(g)(2)(iv)(A) (2023).

[223] EXEC. OFF. OF IMMIGR. REV., STATISTICS YEARBOOK: FISCAL YEAR 2018, at 15, tbl.6 (2019), https://www.justice.gov/eoir/file/1198896/download [https://perma.cc/E6XM-WHUD].

[224] *Id.* (Of the 9,442 credible fear and reasonable fear cases heard in the 2018 fiscal year, the IJ "[a]ffirmed DHS Decision" 7,399 times, or 78.36% of the time.).

Berkeley School of Law, judges upheld negative credible fear reviews seventy-two percent of the time between 2018–2021.[225]

While it is impossible to know how many of the thousands of individuals appearing before EOIR each year in credible fear reviews lack mental competency, what is known is that zero were eligible for (or received) *Franco* protections.

3. The "Institutional Hearing Program"

The Institutional Hearing Program ("IHP") is a uniquely shadowy area of removal proceedings where *Franco*'s light does not penetrate. These are removal hearings that run while a respondent is still serving time for a criminal conviction.

The IHP was created in 1998 to comply with the Immigration Reform and Control Act of 1986, which instructed the Attorney General to "begin any deportation proceeding [against noncitizens] as expeditiously as possible after the date of the conviction."[226] The proceedings are otherwise identical to "regular" proceedings, where respondents face the same consequences of removal and can put forward the same defenses.

There is little public information or regulatory guidance on the IHP. According to a two-page EOIR factsheet created in 2018, the IHP is coordinated jointly by EOIR and the Bureau of Prisons "in partnership with [ICE]," whereby federal and state noncitizen inmates are selected for parallel removal proceedings while they are still incarcerated for their convictions.[227] The program's stated purpose is to "avoid releasing removable aliens into prolonged ICE custody, or into the community,

[225] HUM. RTS. FIRST, BIDEN ADMINISTRATION POISED TO ELIMINATE CRITICAL SAFEGUARD AMID ESCALATING REPORTS OF ERRONEOUS CREDIBLE FEAR DECISIONS 1 (2021), https://humanrightsfirst.org/wp-content/uploads/2022/09/BidenAdminPosiedtoEliminate SafeguardonErroneousCredibleFearReviews.pdf [https://perma.cc/3R6X-L4ZG] ("Analysis of immigration court data confirms that immigration judges continue to overwhelmingly affirm negative fear determinations — 72.4 percent of negative fear determinations were affirmed between Fiscal Year (FY) 2018 and FY 2021 (through August).").

[226] Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, 3445 (1986).

[227] EXEC. OFF. OF IMMIGR. REV., FACT SHEET: INSTITUTIONAL HEARING PROGRAM (2018), https://www.justice.gov/eoir/page/file/1023101/download [https://perma.cc/Z6L7-XPN9].

pending future adjudication of their immigration case," and to improve the "overall efficiency" of removal proceedings while ensuring the nation's security.[228] The program was expanded under the Trump administration by Attorney General Jeff Sessions to "ensure that illegal aliens who have been convicted of crimes and are serving time in our federal prisons are expeditiously removed from our country."[229]

EOIR offers some information on its website regarding its IHP hearing locations and which detention facilities are included,[230] though some immigrants' rights groups maintain that the list is not complete.[231] IHP respondents have extremely low representation rates,[232] and most

[228] *Id.*

[229] Press Release, Exec. Off. of Immigr. Rev., Attorney General Sessions Announces Expansion and Modernization of Program to Deport Criminal Aliens Housed in Federal Correctional Facilities (Mar. 30, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-announces-expansion-and-modernization-program-deport-criminal [https://perma.cc/KP6T-35RJ].

[230] *See EOIR Immigration Court Listing*, EXEC. OFF. OF IMMIGR. REV., U.S. DEP'T OF JUST., https://www.justice.gov/eoir/immigration-court-administrative-control-list (last visited Aug. 21, 2023) [https://perma.cc/KUA2-EFU8] (listing all EOIR's "Administrative Control List" locations and which ICE detention center, federal or state prison, or juvenile detention center the court maintains jurisdiction over).

[231] *See, e.g.*, *Where the Institutional Hearing Program Operates in the United States*, AM. IMMIGR. COUNCIL, https://www.americanimmigrationcouncil.org/content/where-institutional-hearing-program-operates-united-states (last visited Aug. 21, 2023) [https://perma.cc/3ACM-A4GD] ("The program operates largely outside of public view and with little regard for due process. EOIR does not publicize a complete account of the state and local facilities that participate in the IHP. This contributes to the lack of transparency surrounding the program, making it difficult to ascertain where individuals in the IHP are held and whether they have access to legal services.").

[232] *The Institutional Hearing Program: An Overview*, AM. IMMIGR. COUNCIL, https://www.americanimmigrationcouncil.org/research/institutional-hearing-program-overview (last visited Oct. 15, 2023) [perma.cc/45GM-CB8V] ("A 2015 national study of access to counsel in immigration courts found that only 9 percent of incarcerated noncitizens in IHP removal proceedings between 2007 and 2012 were represented by an attorney, compared to 38 percent of non-IHP removal cases. The 2020 study showed little improvement. Between 1988 and 2019, only 10% of IHP participants were represented by counsel, with an even lower rate (3.5 percent) at federal contract facilities.").

(ninety-three percent) are ordered deported at the conclusion of their proceedings.[233]

Explicit data revealing how many IHP respondents appear before EOIR annually remains elusive. However, a 2021 review of the IHP by the Department of Justice's Office of the Inspector General suggests that just under one percent of newly docketed removal cases are for those incarcerated for a criminal conviction.[234] In that report, the number of new IHP cases was 2,790.

Because IHP respondents are not in ICE custody — but instead in the custody of the Bureau of Prisons (an agency not a party in the *Franco* class action litigation) — *Franco* and the NQRP do not apply.[235] And, because the Bureau of Prisons is not a party to the lawsuit, it is not obligated to conduct mental health screenings or engage in information sharing with the immigration court.[236]

The need for *Franco* to serve this population is clear. Those with mental health concerns are more likely to encounter the criminal justice system. One in four people with serious mental health disabilities[237]

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[233] *Id.* ("According to a 2020 study, 93 percent of all IHP participants were ordered deported between 1988 and 2019, compared to the 83 percent removal rate for non-IHP removal proceedings during the same period. The Department of Justice's Office of Inspector General in 2021 reported that out of 3,116 IHP cases opened and completed between 2013 to 2019, just 1 person was granted relief and 35 people had their cases administratively closed or terminated. The rest were ordered removed.").

[234] OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., REVIEW OF THE INSTITUTIONAL HEARING AND REMOVAL PROGRAM EXPANSION FOR FEDERAL INMATES 1 (2021), https://oig.justice.gov/sites/default/files/reports/21-123.pdf [https://perma.cc/NW2A-AFF3] ("In fiscal year (FY) 2018, EOIR reported that it received 308,304 new immigration cases, of which 2,790 (0.9 percent) were IHRP inmates housed in federal, state, or local correctional facilities.").

[235] Franco-Gonzalez v. Holder, No. CV 10-02211, 2014 WL 5475097, at *12 (C.D. Cal. Oct. 29, 2014) (order further implementing the permanent injunction issued on April 23, 2013) ("The procedural protections set forth in the Permanent Injunction and in this Order are limited to individuals who are physically detained in ICE custody.").

[236] *See* Franco-Gonzalez v. Holder, No. CV 10-02211, 2013 WL 8115423, at *12 (C.D. Cal. Apr. 23, 2013) (partial judgment and permanent injunction).

[237] E. FULLER TORREY, LISA DAILEY, H. RICHARD LAMB, ELIZABETH SINCLAIR & JOHN SNOOK, TREATMENT ADVOC. CTR., TREAT OR REPEAT: A STATE SURVEY OF SERIOUS MENTAL ILLNESS, MAJOR CRIMES AND COMMUNITY TREATMENT 8 (2017), https://www.treatmentadvocacycenter.org/storage/documents/treat-or-repeat.pdf [https://perma.cc/Q78U-7W8G] ("This term is defined differently in different studies but almost always includes

have been arrested by the police,[238] and twenty percent of incarcerated individuals live with mental health disabilities even though they represent only five percent of the general population.[239] Meanwhile, those in IHP proceedings face the same potentially catastrophic consequences of removal as those in "regular" proceedings. And yet, these same individuals are excluded from many forms of relief[240] (including release from detention[241]) on account of their convictions.

To compound the disadvantages faced by those in IHP proceedings, many IHP hearings are held remotely, via "Video Teleconferencing" ("VTC"). As a general matter, EOIR's VTC programming is notoriously plagued by technical failures such as poor sound quality, video and connectivity disruptions, delays, and issues with language interpretation.[242] VTC results in a "depressed engagement" by respondents,[243] and even EOIR's own internal examination of VTC

those diagnosed with schizophrenia, schizoaffective disorder, bipolar disorder or major depression with psychotic features.").

[238] NAT'L ALL. ON MENTAL ILLNESS, MENTAL HEALTH IN GEORGIA (2021), https://www.nami.org/NAMI/media/NAMI-Media/StateFactSheets/GeorgiaStateFactSheet.pdf [https://perma.cc/2PA8-BJ5X].

[239] *Id.*

[240] *See* 8 U.S.C. § 1229b(a)(3) (barring Cancellation of Removal for permanent residents if they have been convicted of an "aggravated felony"); *id.* § 1229b(b)(1)(C) (barring Cancellation of removal for non-permanent residents if they have been convicted of an offense covered under sections 1182(a)(2), 1227(a)(2), or 1227(a)(3) of Title 8 of the *United States Code*); *id.* § 1158(b)(2)(A)(ii) (barring asylum to noncitizens who have been convicted of a particularly serious crime).

[241] 8 U.S.C. § 1226(c) (rendering a noncitizen ineligible for bond if they have been convicted of any number of enumerated crimes).

[242] *See* U.S GOV'T ACCOUNTABILITY OFF., GAO-17-438, IMMIGRATION COURT: ACTIONS NEEDED TO REDUCE BACKLOGS AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 55 (2017), https://www.gao.gov/assets/690/685468.pdf [https://perma.cc/2WRB-V5N7] ("Several immigration court officials, experts, and stakeholders we interviewed expressed concern that the use of VTC technology poses challenges for holding immigration hearings. Specifically, officials from all six of the immigration courts we visited reported challenges related to VTC hearings, including difficulties maintaining connectivity, hearing respondents, exchanging paper documents, conducting accurate foreign language interpretation, and assessing the demeanor and credibility of respondents and witnesses.").

[243] Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 937 (2015).

revealed that "[i]t is difficult for judges to analyze eye contact, nonverbal forms of communication, and body language over VTC."[244] Respondents appearing via VTC expressed a difficulty distinguishing between the various parties in the courtroom.[245] And yet, those in IHP proceedings are excluded from *Franco* on what is essentially a technicality, making it all the more arbitrary.

4. "Tent Courts" on the U.S./Mexico Border

Migrant Protection Protocols ("MPP") is a Trump-era initiative launched in 2019 that forces migrants and asylum seekers to "remain in Mexico" while their asylum applications are adjudicated,[246] barring them — illegally, per many immigration advocates — from the physical and legal protection afforded to those who are permitted to enter the United States to pursue their claims.[247]

The MPP was justified, in part, on the basis that there were insufficient government means to detain all the recent border arrivals in the United States. Thus, migrants had to "wait" in Mexico because

[244] BOOZ ALLEN HAMILTON & EXEC. OFF. FOR IMMIGR. REV., LEGAL CASE STUDY, SUMMARY REPORT 23 (2017), https://www.aila.org/infonet/foia-response-booz-allen-hamilton-report [https://perma.cc/VB69-9JMN].

[245] OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., LIMITED-SCOPE INSPECTION AND REVIEW OF VIDEO TELECONFERENCE USE FOR IMMIGRATION HEARINGS 22 (2022), https://oig.justice.gov/sites/default/files/reports/22-084.pdf [https://perma.cc/T292-V8NJ] [hereinafter LIMITED-SCOPE INSPECTION].

[246] Press Release, U.S. Dep't of Homeland Sec., Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration (Dec. 20, 2018), https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration [https://perma.cc/8JMW-W6E7] ("Aliens trying to game the system to get into our country illegally will no longer be able to disappear into the United States, where many skip their court dates. Instead, they will wait for an immigration court decision while they are in Mexico. 'Catch and release' will be replaced with 'catch and return.'").

[247] HUM. RTS. WATCH, ANY VERSION OF "REMAIN IN MEXICO" POLICY WOULD BE UNLAWFUL, INHUMANE, AND DEADLY 4 (2021), https://humanrightsfirst.org/wp-content/uploads/2022/09/MPPUnlawfulInhumaneandDeadly.pdf [https://perma.cc/RZK3-8788] ("MPP is an illegal policy that violates U.S. refugee law, treaty obligations, and due process protections for asylum seekers. Any attempt to reimplement MPP would be unlawful.").

they could not simply be released into the country.[248] In March 2020, during the global rise of COVID-19, the Trump administration further expelled migrants to the Mexican side of the border pursuant to Title 42 of the U.S. Health Code on the grounds that such asylum seekers posed a public health risk.[249]

By the time President Biden assumed office, 70,000 migrants had already been returned to the southern side of the border pursuant to MPP,[250] where they faced some of the most dangerous conditions in the world, including rape, kidnapping, and torture.[251] Over 1.8 million had been expelled pursuant to Title 42.[252]

MPP proceedings were held in Immigration Hearing Facilities — also referred to as "tent courts"[253] — which were actually shipping containers

[248] Texas v. Biden, 20 F.4th 928, 944 (5th Cir. 2021), *as revised* (Dec. 21, 2021).

[249] 42 U.S.C. § 265 (permitting the Surgeon General to "prohibit . . . the introduction" into the United States of individuals when the director believes that "there is serious danger of the introduction of [a communicable] disease into the United States.").

[250] AM. IMMIGR. COUNCIL, THE "MIGRANT PROTECTION PROTOCOLS", 2, 6 (2022), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_migrant_protection_protocols_0.pdf [https://perma.cc/53WV-ZAJE].

[251] PHYSICIANS FOR HUM. RTS., FORCED INTO DANGER: HUMAN RIGHTS VIOLATIONS RESULTING FROM THE U.S. MIGRANT PROTECTION PROTOCOLS 4 (2021), https://phr.org/wp-content/uploads/2021/01/PHR-Report-Forced-into-Danger_Human-Rights-Violations-and-MPP-January-2021.pdf [https://perma.cc/5C7F-ZD8Z] ("As of December 15, 2020, there have been at least 1,314 public reports of rape, kidnapping, torture, and other violent attacks against asylum seekers and migrants returned to Mexico under MPP."); *see also* Liz Vinson, *"Remain in Mexico": Migrants Still Waiting in Peril as "Cruel and Racist Policy" Continues After Three Years*, S. POVERTY L. CTR. (Jan. 28, 2022), https://www.splcenter.org/news/2022/01/28/remain-mexico-migrants-still-waiting-peril [https://perma.cc/A78W-RRTA] ("Since then, the government has used the Migrant Protection Protocols (MPP) policy, better known as the 'Remain in Mexico' policy, to send tens of thousands of migrants to dangerous Mexican border towns, where they live under life-threatening conditions and with little or no access to legal counsel in the U.S.").

[252] AM. IMMIGR. COUNCIL, A GUIDE TO TITLE 42 EXPULSIONS AT THE BORDER (2022), https://www.americanimmigrationcouncil.org/sites/default/files/research/title_42_expulsions_at_the_border.pdf [https://perma.cc/XV3D-77X6].

[253] OFF. OF THE INSPECTOR GEN., LIMITED-SCOPE INSPECTION, *supra* note 245, at 1 ("At the time of initiation, the OIG's initial focus was on use of VTCs in the setting of Immigration Hearing Facilities (IHF) — also known informally as 'tent courts' — that DHS had begun operating in Brownsville and Laredo, Texas, for the purpose of processing individuals seeking entry into the United States who were subject to the

that had been converted into temporary courtrooms.[254] Judges and interpreters appeared via video from miles away.[255] EOIR's then-director, James McHenry, claimed that these proceedings fully comported with Due Process and were identical to regular proceedings in every way.[256] However, extremely low attorney representation rates due to geographic remoteness,[257] the opacity of the hearings themselves,[258] and the sheer physical difficulty of actually getting to the court[259] cast doubt on Mr. McHenry's assertion. With judges forced to

Migrant Protection Protocols (MPP), also known informally as the 'Remain in Mexico' program.").

[254] Katy Murdza, *I Visited Biden's MPP Tent Courts. The Changes Since Trump Don't Fix the Program's Flaws*, IMMIGR. IMPACT (Apr. 21, 2022), https://immigrationimpact.com/2022/04/21/biden-mpp-tent-courts/ [https://perma.cc/EN2X-SG3T] ("In Brownsville and Laredo, Texas, temporary facilities were built for the hearings — large tents over a complex of shipping containers and trailers.").

[255] Michelle Hackman & Alicia A. Caldwell, *Immigration Tent Courts at Border Raise Due-Process Concerns*, WALL ST. J. (Dec. 14, 2019, 9:00 AM EST), https://www.wsj.com/articles/immigration-tent-courts-at-border-raise-due-process-concerns-11576332002 [https://perma.cc/RRQ9-27UQ] ("Inside a large wedding-style tent, the government has converted shipping containers into temporary courtrooms, where flat screens show the judge and a translator, who are in front of a camera in chambers miles away.").

[256] *Id.* ("James McHenry, head of the Executive Office for Immigration Review, the Justice Department agency that oversees immigration courts, said temporary courts adhere to the same procedures and offer the same rights to people as other immigration courts. 'In all cases, a well-trained and professional immigration judge considers the facts and evidence, applies the relevant law, and makes an appropriate decision consistent with due process,' he said.").

[257] *See* Murdza, *supra* note 254 ("[A]t least 92.5% of people subjected to MPP under the Trump administration did not have legal representation.").

[258] Gus Bova, *Immigration Judge Slams "Remain in Mexico" Tent Courts*, TEX. OBSERVER (Sept. 24, 2019, 11:29 AM CST), https://www.naij-usa.org/images/uploads/newsroom/2019.09.24.00.pdf [https://perma.cc/JC6V-6PZJ] ("And those who do make it to their court dates face a secretive, rushed, and skewed process that makes success extraordinarily difficult.").

[259] Hackman & Caldwell, *supra* note 255 ("Judge Dillow planned to hold hearings for 28 migrants that morning, but only 17 appeared at the bridge the requisite four hours before their 8:30 a.m. hearing."); *see also* Bova, *supra* note 258 (quoting Judge Ashley Tabadoor, then-president of the National Association of Immigration Judges as saying: "Some judges have serious concerns about whether the people have been given adequate information about the logistics of where they need to be and when. Whether they′re actually understanding what′s happening. Other times it could be that, frankly, they

see 80–100 respondents per day,[260] and often over a video screen, judges were unable to do more than a cursory examination of each case.[261] An extremely low percentage of asylum seekers won their cases in this posture.[262]

MPP proceedings do not qualify for NQRP coverage because individuals subjected to them are not detained. Even if the NQRP covered such proceedings, it is difficult to imagine that potentially incompetent respondents would be identified, or that, once identified, they would receive a thorough competency hearing given the challenges respondents face in accessing the courts and the extremely truncated, accelerated nature of the hearings. Equally challenging to envision is how EOIR would comport with the *Franco* mandate that forensic evaluations be conducted in person.[263]

MPP is still in legal limbo as of the writing of this article. The Biden Administration sought to terminate the program in June 2021[264] with mixed legal results. On August 13, 2021, the U.S. District Court for the Northern District of Texas ordered DHS to "enforce and implement

can't make it because they're miles and miles away from the border, so it's very difficult for them to make it on time.").

[260] Bova, *supra* note 258 (quoting Judge Tabadoor as explaining: "It's not unusual [for a judge] to have upwards of 80 or 100 cases scheduled for a session.").

[261] *Id.* (quoting Judge Tabadoor as explaining: "There isn't much room or opportunity to delve beyond very basic issues" meaning that it is "very difficult for the judges to effectively and fairly go through these cases.").

[262] TRAC IMMIGR., 5,000 ASYLUM-SEEKERS ADDED TO THE MIGRANT PROTECTION PROTOCOLS 2.0, FEW ARE GRANTED ASYLUM (2022), https://trac.syr.edu/immigration/reports/686/ [https://perma.cc/JPS7-2V5R] (finding that less than one percent of asylum seekers prevail in their claims for protection).

[263] *See* Franco-Gonzalez v. Holder, No. CV 10-0221, 2014 WL 5475097, at *9 (C.D. Cal. Oct. 29, 2014) (order further implementing the permanent injunction issued on April 23, 2013) ("Except in very rare exigent circumstances, the Forensic Competency Evaluations conducted at the request of an Immigration Judge will be conducted in person, and not by teleconference, videoconference, or other remote access means.").

[264] Memorandum from Alejandro Mayorkas, Sec'y of U.S. Dep't of Homeland Sec., to Troy A. Miller, Acting Comm'r of U.S. Customs & Border Protection, Tae D. Johnson, Acting Dir. of U.S. Immigr. & Customs Enf't & Tracy L. Renaud, Acting Dir. of U.S. Citizenship & Immigr. Servs., Termination of the Migrant Protection Protocols (June 1, 2021), https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf [https://perma.cc/R5YX-7BTQ].

MPP in good faith."[265] The Supreme Court has since held that DHS does in fact have the discretionary power to terminate the program and remanded the case to the district court to consider whether Secretary Mayorkas's particular reasons for ending MPP were sufficient under the Administrative Procedures Act.[266]

The Supreme Court's decision did not outright end MPP, and proceedings pursuant to the MPP continue as of the writing of this article.[267] In August of 2022, the Biden Administration again announced the end of MPP.[268] However, in December 2022, Judge Kacsmaryk of the Northern District of Texas issued a new decision that paused the administration's termination of MPP.[269]

The resulting harm to noncitizens caught in this posture, therefore, also continues. Though DHS originally vowed to exempt certain vulnerable migrants — including those with mental and physical

[265] Texas v. Biden, 554 F. Supp. 3d 818, 857 (N.D. Tex. Aug. 13, 2021) (emphasis omitted).

[266] Biden v. Texas, 142 S. Ct. 2528, 2548 (2022) ("For the reasons explained, the Government's rescission of MPP did not violate section 1225 of the INA, and the October 29 Memoranda did constitute final agency action. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion. On remand, the District Court should consider in the first instance whether the October 29 Memoranda comply with section 706 of the APA.").

[267] Shayna Greene, *"Remain in Mexico" Policy Will Continue for Several Weeks, Mayorkas Says*, POLITICO (July 3, 2022, 12:37 PM EDT), https://www.politico.com/news/2022/07/03/remain-mexico-policy-mayorkas-said-00043884 [https://perma.cc/5V2Y-GNWD].

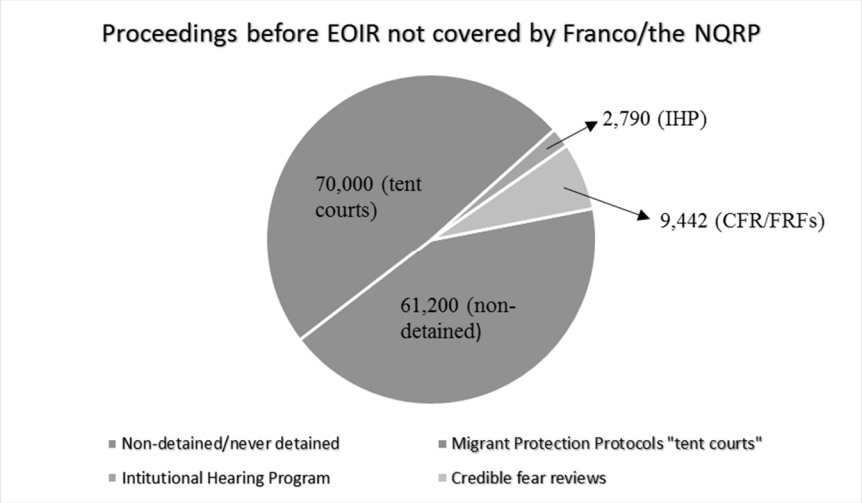
[268] DHS, *Statement on U.S. District Court's Decision Regarding MPP* (Aug. 8, 2022), https://www.dhs.gov/news/2022/08/08/dhs-statement-us-district-courts-decision-regarding-mpp#:~:text=We%20welcome%20the%20U.S.%20District,quick%2C%20and%20orderly%2C%20manner. [https://perma.cc/3KPG-FPFN] ("DHS is committed to ending the court-ordered implementation of MPP in a quick, and orderly, manner. Individuals are no longer being newly enrolled into MPP, and individuals currently in MPP in Mexico will be disenrolled when they return for their next scheduled court date.").

[269] Texas v. Biden, 646 F. Supp. 3d 753 (N.D. Tex. 2022).

disabilities — from the program,[270] human rights organizations and journalists documented many instances of noncompliance.[271]

In all, hundreds of thousands of noncitizens in EOIR's jurisdiction are not covered by *Franco* and the NQRP. The below figure attempts to illustrate that visually.

Fig. 3: Representation of case numbers before EOIR that fall outside *Franco*/NQRP.



[270] Memorandum from Robert Silvers, Under Sec'y, Off. of Strategy, Pol'y, & Plans, U.S Dep't of Homeland Sec., to U.S. Customs & Border Prot., U.S. Immigr. & Customs Enf't, U.S. Citizenship & Immigr. Servs. & Off. of Operations Coordination, Guidance Regarding the Court-Ordered Reimplementation of the Migrant Protection Protocols 5 (Dec. 2, 2021), https://www.dhs.gov/sites/default/files/2022-01/21_1202_plcy_mpp-policy-guidance_508.pdf [https://perma.cc/65ZC-53AM].

[271] Letter from Hum. Rts. First to Cameron Quinn, Officer for C.R. and C.L., U.S. Dep't of Homeland Sec. & Joseph Cuffari, Inspector Gen., U.S. Dep't of Homeland Sec., Re: Rape, Kidnapping, Assault and Other Attacks on Asylum Seekers and Migrants Returned to Mexico Under the "Migrant Protection Protocols"; Returns of Other Vulnerable Individuals 2 (Aug. 26, 2019), https://humanrightsfirst.org/wp-content/uploads/2022/10/OIG-CRCL-Complaint-MPP.pdf [https://perma.cc/G4EM-F4SJ] ("In addition, vulnerable individuals, including children with serious medical conditions, pregnant women, LGBTQ persons, people with physical disabilities, and those with limited mental capacity, have also been returned to Mexico by CBP despite published DHS policies and public assurances allegedly restricting the return of such individuals."); *see also* Murdza, *supra* note 254 (recounting seeing a disabled woman in a wheelchair appear before an immigration judge in an MPP tent court).

B. The "Extra-Legal" Universe: Proceedings that Fall Outside EOIR's Purview Altogether

This Section takes a look at the liminal, procedural space where hundreds of thousands of noncitizens fall, and which is entirely outside our immigration courts' jurisdiction. These same individuals are nevertheless facing expulsion from the United States and yet do not have the benefit of an advocate or other accommodations. These include noncitizens in expedited removal and those on the southern side of the U.S. border who, due to various procedural and executive measures, are outside the courts' scope.

1. Extra-Territorial Proceedings at the Southern Border

Title 42 of the U.S. Code had been used under both the Trump and Biden administrations to bar noncitizens seeking to enter the U.S. at the southern border based on the COVID-19 pandemic. This law expressly allowed the Centers for Disease Control and Prevention ("CDC") to prohibit the entry of individuals if (ostensibly) they presented a danger of introducing a communicable disease. As a result, many individuals at the border were blocked from accessing our judicial system by other executive and procedural means.

On November 15, 2022, Title 42 was struck down in the District Court of Columbia by Judge Emmet G. Sullivan,[272] and it finally expired on May 11, 2023.[273] Its end was far from certain, as the Biden Administration announced in early 2023 that it would be expanding rather than suspending Title 42.[274] However, by permitting Title 42 to expire, the Biden Administration left the door open to enact a new policy that bars

[272] Huisha-Huisha v. Mayorkas, No. 21-CV-100, 2022 WL 16948610 (D.D.C. Nov. 15, 2022), *stayed pending cert. sub. nom.* Arizona v. Mayorkas, 143 S. Ct. 478 (2022).

[273] *See* U.S. Mission to Mexico, *Travel Alert: Expiration of Title 42*, U.S. EMBASSY & CONSULATES IN MEX. (May 11, 2023), https://mx.usembassy.gov/travel-alert-expiration-of-title-42/ [https://perma.cc/WL83-WK22].

[274] *See* Karen Musalo, Opinion, *Enough with the Political Games. Migrants Have a Right to Asylum*, L.A. TIMES, (Jan. 6, 2023, 3:00 AM PST), https://www.latimes.com/opinion/story/2023-01-06/biden-border-immigration-asylum-title-42 [https://perma.cc/MQ6L-FMAL] ("Now, in a head-spinning turn of events, Biden has announced the expansion of Title 42 to Haitians, Nicaraguans and Cubans — nationalities that had not previously been subject to summary expulsion at the border.").

asylum to most migrants who passed through another country on their way to the U.S./Mexico border.[275]

The MPP "tent courts,"[276] as bad as they are, are not even accessible to everyone on the southern side of the border. Customs and Border Control officials were granted full discretion in determining who would be permitted to enter proceedings via MPP's protocol.[277] Officers can similarly choose to exclude arriving asylum seekers via application of the Trump Administration's "Transit Ban"[278] (also referred to as the "Asylum Third Country Rule") that categorically barred asylum to all those who had traveled through another country along their journey to the United States.[279] In January 2023, the Biden Administration announced a revival of the Transit Ban.[280]

Finally, agreements between the United States and so-called "safe third countries" permit the direct expulsion of asylum seekers from the United States to countries that, at least facially, have a comparable asylum system.[281] The "Asylum Cooperative Agreements" entered into

[275] *See* Dakin Andone & Priscilla Alvarez, *Title 42 Has Expired. Here's What Happens Next*, CNN (May 12, 2023, 7:20 AM ET), https://www.cnn.com/2023/05/11/us/title-42-what-happens-next/index.html [https://perma.cc/4ZE6-RJGF] ("The rule, proposed earlier this year, will presume migrants are ineligible for asylum in the US if they didn't first seek refuge in a country they transited through, like Mexico, on the way to the border. Migrants who secure an appointment through the CBP One app will be exempt, according to officials.").

[276] Bova, *supra* note 258; Hackman & Caldwell, *supra* note 255; Murdza, *supra* note 254.

[277] *See* Memorandum from Ronald D. Vitiello, Deputy Dir. & Sr. Off. Performing the Duties of the Dir., to Exec. Assoc. Dirs. & Principal Legal Advisor, Implementation of the Migrant Protection Protocols 1-2 (Feb. 12, 2019) (on file with author) ("Processing determinations, including whether to place an alien into ER or INA section 240 proceedings (and, as applicable, to return an alien placed into INA section 240 proceedings to Mexico under INA section 235(b)(2)(C) as part of MPP), or to apply another processing disposition, will be made by U.S. Customs and Border Protection ('CBP'), in CBP's enforcement discretion.").

[278] Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,830 (July 16, 2019) (codified in 8 C.F.R. pts. 208, 1003, 1208).

[279] The Asylum Transit Ban was preliminarily enjoined in February 2021 as part of the lawsuit E. Bay Sanctuary Covenant v. Barr, 519 F. Supp. 3d 663 (N.D. Cal. Feb. 16, 2021).

[280] Musalo, *supra* note 274; U.S. Mission to Mexico, *supra* note 273.

[281] *See* Press Release, U.S. Dep't of Homeland Sec., DHS Announces Guatemala, El Salvador, and Honduras Have Signed Asylum Cooperation Agreement (Dec. 29, 2020),

with Honduras, El Salvador, and Guatemala were suspended by the Biden Administration in 2021,[282] but remain an example of the shadowy and ever-changing universe of extra-legal procedures where thousands of immigrants remain beyond the grasp of Due Process.[283]

2. Expedited Removal

Expedited removal was designed to hasten the deportation of recent arrivals without having to provide them the same panoply of rights as respondents in full removal proceedings.[284] This group is without the right to an attorney and cannot access our immigration courts.[285]

On May 31, 2022, DHS and the Department of Justice began implementing a new rule whereby individuals in expedited removal who express a fear of return can be granted asylum directly by an asylum officer following a credible fear interview.[286] The individual must "indicate an intention to apply for asylum, a fear of persecution or torture, or a fear of return to their home country."[287] Those not granted

https://www.dhs.gov/news/2020/12/29/dhs-announces-guatemala-el-salvador-and-honduras-have-signed-asylum-cooperation#:~:text=policy%20or%20programs.-,DHS%20Announces%20Guatemala%2C%20El%20Salvador%2C%20and%20Honduras,Have%20Signed%20Asylum%20Cooperation%20Agreement&text=Today%2C%20the%20Department%20of%20Homeland,ACAs%20have%20entered%20into%20force [https://perma.cc/V5VL-G8DX].

[282] Press Release, Antony J. Blinken, Sec'y of State, Suspending and Terminating the Asylum Cooperative Agreements with the Governments El Salvador, Guatemala, and Honduras (Feb. 6, 2021), https://www.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras/ [https://perma.cc/YNF6-MY3Q].

[283] *See* Lori A. Nessel, *Enforced Invisibility: Toward New Theories of Accountability for the United States' Role in Endangering Asylum Seekers*, 55 UC DAVIS L. REV. 1513, 1521-32 (2022) (deconstructing the U.S.' "multi-faceted forced invisibility regime" that results in gross human rights violations against asylum seekers).

[284] *See supra* notes 203–05.

[285] *See* 8 U.S.C. § 1225(b)(1) (permitting DHS to summarily remove noncitizens arriving at the border "without further hearing or review" if they lack valid entry documents or tried to procure admission through fraud or misrepresentation).

[286] *See* Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18,078 (Mar. 29, 2022) (codified at 8 C.F.R. pts. 208, 212, 235, 1003, 1208, 1235, 1240).

[287] *Fact Sheet: Implementation of the Credible Fear and Asylum Processing Interim Final Rule*, U.S. DEP'T OF HOMELAND SEC. (May 26, 2022), https://www.dhs.gov/news/2022/05/

protection "would be ordered removed by the asylum officer but would *have the ability to seek prompt*, de novo review with an immigration judge ('IJ') in EOIR through a newly established procedure."[288] Put another way, the noncitizen must make an affirmative request to have the negative decision reviewed by an IJ.[289] This represents a deviation from the prior credible fear interview process, whereby an individual who receives a negative determination is automatically referred to the IJ for a credible fear review.[290]

Critics of the new rule are concerned that this change might "result in some applicants not receiving further IJ review due to the applicant's confusion or the complexity of the process, and not due to a lack of desire for further review."[291] Asylum seekers may not know or understand that they can seek a de novo review, or may fail to understand the consequences if they waive this right.[292] Additionally, commenters articulated a specific concern that those with mental health issues would be particularly disadvantaged under the new process. Filling out forms, preparing filings, and articulating claims in a credible, consistent way are all tasks made more challenging with a mental health disability.[293]

26/fact-sheet-implementation-credible-fear-and-asylum-processing-interim-final-rule [https://perma.cc/7S7P-JGHN].

[288] Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. at 18080.

[289] *See id.* at 18094 ("If an asylum officer determines that an individual does not have a credible fear of persecution or torture, the individual can request that an IJ review the asylum officer's negative credible fear determination.").

[290] *See supra* notes 212–13.

[291] Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. at 18,155.

[292] *See id.* ("[C]ommenters noted that many asylum seekers who receive a negative credible fear finding may not know that they can seek a 'de novo review' or may not understand the consequences of failing to seek review.").

[293] *See id.* at 18,161 ("Commenters also raised concerns that unrepresented applicants, many of whom are unfamiliar with the complexities of immigration law and do not speak English, would be unable to adequately draft filings, fill out forms, and present their claims at all, particularly within the time constraints presented by the NPRM. *Commenters noted that these concerns are further exacerbated by the fact that many*

The agencies' response to these concerns was paradoxical. First, it pointed to *Matter of M-A-M-* as a procedural safeguard against potential marginalization, even though *Matter of M-A-M-* is not triggered until an individual is appearing before the immigration courts:

> The Departments have included procedural rules to ensure the efficient disposition of these cases, and noncitizens in these streamlined 240 proceedings will receive all of the procedural protections required by section 240 of the Act . . . *see also Matter of M-A-M-*, 25 I&N Dec. at 479-83 (stating that where a noncitizen has indicia of incompetency, the IJ must inquire further and establish safeguards where appropriate).[294]

The agencies do not explain how *Matter of M-A-M-* assists a noncitizen prior to being placed in section 240 proceedings.

The Department of Justice and DHS additionally assure that "vulnerable noncitizens . . . including . . . mentally incompetent individuals" are "explicitly exempt[ed]" from the new process altogether.[295] However, the regulation is silent on how asylum officers would identify an individual as meeting this exemption. Furthermore, asylum officers work for the same agency — DHS — that actively seeks to exclude or remove noncitizens from the United States, presenting a possible conflict of interest.

Given the large numbers of individuals in expedited removal (over 140,000 noncitizens were expeditiously removed in 2016 alone),[296] the lack of accommodations, protections, or identification system is of great concern.

applicants suffer from post-traumatic stress disorder or other mental health ailments." (emphasis added)).

[294] *Id.* at 18,156.

[295] *Id.* at 18,161.

[296] *See* Thuraissigiam v. U.S. Dep't of Homeland Sec., 917 F.3d 1097, 1101 (9th Cir. 2019) (noting that in 2016, DHS removed 141,000 noncitizens through expedited removal).

IV. IMAGINING SOLUTIONS TO ADDRESS *FRANCO*'S SHORTCOMINGS

The *Franco* competency process is bedeviled with case processing delays,[297] uneven training,[298] and prolonged detention times.[299] Even worse, tens of thousands of individuals do not even benefit from these protections at all.[300] The effect is a kaleidoscopic treatment of cases involving immigrants with mental health challenges that changes depending on detention status, geographic location, and procedural posture.

In this Part I propose two solutions to these problems, and then look at the costs and benefits of each.

The first is that EOIR, of its own accord, voluntarily expands the NQRP to encompass all individuals with any type of hearing before an IJ.

The second is for EOIR to end the NQRP, and instead migrate to a full public defender system for all immigrants in all postures appearing before an IJ, regardless of the individual's disability and detention status. This path carries rich rewards for respondents and the courts and circumvents a poorly administered competency process that results in delays,[301] prolongs detention,[302] and harms detainees with mental health challenges.[303]

A. Expanding the NQRP

While the *Franco* order set minimum requirements that EOIR and DHS needed to meet in order to comport with due process and the Rehabilitation Act, no aspect of the decision enjoined either agency from exceeding the order by providing *more* safeguards or including more types of proceedings. Put another way, the *Franco* order mandated a floor, not a ceiling.

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297 *See supra* Part II.A.

298 *See supra* notes 178–85 and accompanying text.

299 *See supra* Part II.B.1–2.

300 *See supra* Part III.

301 *See supra* Part II.B.1.c.

302 *See supra* Part II.B.1.a–b.

303 *See supra* Part II.B.3.

Initially, when EOIR and DHS first announced their respective policies following the lawsuit,[304] they appeared proactively ready to extend the case's main features (identification screenings, competency inquiries, competency evaluations, and counsel) to detainees in immigration proceedings detained outside the Ninth Circuit. EOIR's creation of the Nationwide Policy was the actualization of that pledge.[305] But that was the end of any *Franco* expansion by either agency. Neither agency would broaden the definition of "immigration proceedings"[306] beyond the district court's narrow order, and neither would extend protections to non-detained populations.

An expansion of the NQRP to include all proceedings where EOIR has jurisdiction offers immediate rewards to immigrants with mental health challenges but carries distinct disadvantages.

1. Advantages of a Total NQRP Expansion

Should EOIR widen the NQRP's scope, it would ensure counsel to mentally incompetent individuals in expedited removal proceedings,[307] those whose cases are venued before the non-detained immigration courts,[308] those held in state or federal custody,[309] and individuals at the border subject to the Trump Administration's Migrant Protection Protocol.[310] This move alone would immediately place the roughly 150,000 or so respondents falling within these various postures[311] under the NQRP's purview.

[304] *See supra* notes 68–72 and accompanying discussion.

[305] *See supra* notes 7, 9.

[306] Franco-Gonzalez v. Holder, No. CV 10-02211, 2014 WL 5475097, at *12 (C.D. Cal. Oct. 29, 2014) (order further implementing the permanent injunction issued on Apr. 23, 2013) ("'[I]mmigration proceedings' shall mean, and be limited to, proceedings at which Immigration and Customs Enforcement ('ICE') appears on behalf of the Department of Homeland Security ('DHS') before an Immigration Judge or the Board of Immigration Appeals ('BIA' or 'Board') . . . .").

[307] *See supra* Part III.A.2 (discussing credible and reasonable fear reviews before the immigration judge).

[308] *See supra* Part III.A.1 (discussing non-detained removal proceedings).

[309] *See supra* Part III.A.3 (discussing IHP proceedings).

[310] *See supra* Part III.A.4 (discussing "tent courts" on the border).

[311] *See supra* fig. 3.

The expansion solution fits well within EOIR's current programmatic scaffolding.[312] EOIR's Office of Legal Access Programs has staff specifically dedicated to managing the NQRP;[313] EOIR also has dedicated faculty members within its Office of General Counsel and the Office of the Chief IJ who provide mental competency trainings to court personnel and forensic evaluators;[314] EOIR's contractor, the Acacia Center for Justice,[315] provides robust support and training to its extensive network of QR providers.

EOIR's 2023 budget dedicates $14.2 million specifically to the NQRP.[316] This sum represents a nearly 2 million dollar increase over the prior fiscal year, 2021.[317] EOIR attributes the need for this funding increase to a sixty-six percent rise in cases following a complete nationwide roll-out of the Nationwide Policy.[318] It is difficult to gauge

[312] *See supra* notes 74–78 and accompanying discussion.

[313] *See* EXEC. OFF. FOR IMMIGR. REV., FY 2023 PERFORMANCE BUDGET CONGRESSIONAL BUDGET SUBMISSION 35 (2022), https://www.justice.gov/jmd/page/file/1491716/download [https://perma.cc/CBZ2-7HDY] (identifying one attorney and one-half paralegal as specifically dedicated to the NQRP).

[314] *See* PowerPoint Presentation from the Exec. Off. for Immigr. Rev., Assessing Competence in Immigration Proceedings (Sept. 2020) (obtained through the Immigration Clinic's FOIA request and on file with author); PowerPoint Presentation from the Exec. Off. of Immigr. Rev., Handling Competence Issues in the Immigration Courts & Implementation of the Order in *Franco-Gonzalez v. Holder* (Nov. 2020), https://www.hoppocklawfirm.com/wp-content/uploads/2021/09/November-2020-Powerpoint-re-Franco-Gonzalez.pdf [https://perma.cc/LZE2-98EM] (obtained through Hoppock Law Firm's 2019 FOIA request); Presentation on Determining Mental Competence, *supra* note 39 (showing internal EOIR training materials presented by high-ranking members of EOIR's OCIJ and OGC).

[315] *See generally About Us*, ACACIA CTR. FOR JUST., https://acaciajustice.org/about-us/ (last visited Aug. 11, 2023) [https://perma.cc/9WU2-UJL4] (providing a variety of support tools for QRs); *Associate Program Director for NQRP and CCI Job*, LENSA, https://lensa.com/associate-program-director-for-nqrp-and-cci-jobs/washington/jd/165048b4794164528492991287l497e6 (last visited Aug. 11, 2023) [https://perma.cc/6HQ4-ZDB7] ("Acacia is responsible for carrying out the Executive Office for Immigration Review (EOIR) legal access and representation programs National Qualified Representative Program (NQRP) . . . .").

[316] *See* EXEC. OFF. FOR IMMIG. REV., *supra* note 313, at 35.

[317] *Id.* at 37 ("In FY 2021, EOIR spent approximately $12.3 million to provide for forensic competency evaluations and qualified representatives at approximately 75 locations, in an estimated 1,383 cases.").

[318] *Id.*

how much an expansion of the NQRP would increase case counts, in turn rendering it nearly impossible to anticipate how much more the expanded program would actually cost each year. But, if a sixty-six percent case increase results in only a 15.5% budgetary increase, there is compelling evidence that an NQRP enlargement is cost-effective and justifiable. The economy of scale favors this solution.

EOIR itself acknowledges that providing counsel to unrepresented individuals increases court efficiency while "reduc[ing] costs associated with immigration enforcement and detention."[319]

The logistical ease of an NQRP expansion coupled with the due process imperative to safeguard such a vulnerable population — and that an expansion would likely be cost-effective — weighs heavily in favor of this solution. This option, however, carries serious defects.

2. Disadvantages of an NQRP Expansion

Expanding *Franco*'s mandate to reach all EOIR-covered proceedings is a solution that is heavily burdened by problems at its very outset. First, doing so affirms and replicates the many flaws already inherent in the *Franco* order; second, it risks importing the NQRP's programmatic flaws onto a larger stage, thereby amplifying them.

Replicating *Franco* on a larger scale still leaves many noncitizens unprotected, such as those in the credible fear/reasonable fear component of expedited removal.[320] EOIR has no jurisdiction over these individuals,[321] so unless the two agencies agreed to a provision-of-counsel mechanism as part of the new expedited removal process they jointly released,[322] this population remains out of reach. Compounding the difficulty of protecting individuals caught on the southern side of

[319] *Id.* at 38.

[320] *See supra* Part III.B.2.

[321] *See supra* notes 203–205, 285 and accompanying text.

[322] *See* Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18,078 (Mar. 29, 2022) (codified at 8 C.F.R. pts. 208, 212, 235, 1003, 1208, 1235, 1240) (jointly announced by the Department of Justice and DHS to process border arrivals who express fear of returning to their home country).

the U.S./Mexico border is the constantly evolving policies, protocols and barriers imposed by different administrations.[323]

The competency identification and evaluation process created by *Franco* is a circuitous one that lengthens detention times.[324] So, for those newly covered populations that remain in custody (those in IHP proceedings[325] and those in credible fear/reasonable fear reviews before the immigration court[326]), the exponential harm[327] created by detention remains a harsh reality.

The *Franco* order did not mandate that competency hearings take place in-person, only that the forensic evaluations be conducted in-person.[328] Competency hearings via VTC are discouraged by advocates, as video diminishes comprehension, skews the speakers' tone, and strips them of emotion.[329] Even EOIR recommends the use of VTC only for "procedural" matters,[330] and yet, IJs routinely employ the use of video teleconferencing for all hearing types, even more so since the COVID-19 pandemic.[331]

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[323] *See supra* Part III.B.1.

[324] *See supra* Part II.B.1–.2.

[325] *See supra* Part III.A.3.

[326] *See supra* Part III.A.2.

[327] *See supra* notes 132–140 and accompanying text.

[328] *See* Franco-Gonzalez v. Holder, No. CV 10-02211, 2014 WL 5475097 at *18 (C.D. Cal. Oct. 29, 2014) ("Except in very rare exigent circumstances, the Forensic Competency Evaluations conducted at the request of an Immigration Judge will be conducted in person, and not by teleconference, videoconference, or other remote access means.").

[329] *See* Cassandra H. Chee, *Rehabilitating Our Immigration System with the Rehabilitation Act: Rejecting Video Teleconferencing and Presumptively Requiring In-Person Court Appearances as a Reasonable Accommodation for Mentally Incompetent Detainees*, 70 AM. U. L. REV. 665, 677-78 (2020) ("In addition, VTC often skews respondents' affect and tone of voice, impairing judges' abilities to determine the veracity of their stories and to form a positive emotional connection with them as speakers. A study on the use of VTC in Chicago's immigration courts found that 'emotions were less clearly communicated' and 'judges were likely to feel more emotionally distant from and apathetic to an immigrant on a television screen.'").

[330] *See* BOOZ ALLEN HAMILTON, *supra* note 244, at 23.

[331] *See Immigration Court Hearings Are Defaulting to WebEx Hearings in January*, NAT'L IMMIGRANT JUST. CTR. (Jan. 8, 2022), https://immigrantjustice.org/for-attorneys/legal-resources/copy/immigration-court-hearings-are-defaulting-webex-hearings-january [https://perma.cc/Y4SZ-QQY9] ("On Friday, January 7, 2022, EOIR announced that as

Then there is the conundrum of which of the two programmatic versions of the NQRP — the more robust one that falls in the Ninth Circuit, or the weakened and troublesome version (the Nationwide Policy) that covers the rest of the United States[332] — would actually be employed. The Nationwide Policy is hobbled by serious conflicts of interest,[333] constitutional deprivations,[334] and funding restrictions that are injurious to respondents,[335] their attorneys,[336] and the courts.[337] EOIR has a hard enough time adequately overseeing the existing program.[338] Adding additional jurisdictions, caseloads, and case types would require a Herculean effort on EOIR and its contractors' parts.

3. Proposed Adjustments Aimed at Decreasing Detention Times

The competency "conveyor belt"[339] that *Franco* created is overly cumbersome, resulting in prolonged detention times[340] that are deeply

of Monday, January 10, all non-detained, represented immigration court hearings would be conducted via WebEx or phone. Detained cases (whether represented or not) will proceed by WebEx or phone.").

[332] *See* Wilson, *supra* note 8, at 32-48.

[333] *See id.* at 45 (describing how, in the Nationwide Policy, QRs must seek EOIR's approval before pursuing certain evidence (e.g., an expert), which in turn reveals legal representative's defense strategy while "plac[ing] counsel in a subordinate position to EOIR while subverting the integrity and independence of the public defender model").

[334] *See id.* at 46-48 (identifying key differences in the Nationwide Policy, to wit, that incompetent respondents are not entitled to a bond hearing, are not tracked in EOIR's system to ensure that they do not risk unlawful deportation and are not guaranteed accommodations such as counsel upon release from ICE custody).

[335] *See id.* at 42-43 ("For respondents [with mental health challenges], losing their QR might be disorienting or even psychologically harmful. Other respondents may not understand or remember that their attorney is no longer defending them, and in turn, detrimentally rely on their no-longer-present attorney to file necessary court documents or applications, or to tell them of future hearing dates.").

[336] *See id.* at 43 ("[QRs] are placed in the ethically fraught position of having to either abandon their clients after ninety days due to budget constraints or continue in their representation pro bono at the expense of other potential clients.").

[337] *See id.* at 44-45.

[338] *See id.* at 48-50 (detailing inconsistent personnel training throughout the NQRP as a whole).

[339] *See supra* Part II.A.

[340] *See supra* Part II.B.1–2.

harmful to all populations,[341] but that are particularly harmful to those with mental health challenges in particular.[342] There would need to be adjustments to the competency identification and evaluation process created by *Franco* to decrease these detention periods.

Decreasing detention times could be achieved in two ways. The first is for ICE to release any detained person with a mental health challenge immediately upon identification, and prior to any formal adjudication of incompetence. Put another way, the same threshold identification that initiates the competency process[343] should be sufficient to trigger the noncitizen's release. Release of those with disabilities finds support in the Rehabilitation Act, [344] and does not run afoul of the INA's "mandatory custody" provision that applies to noncitizens with certain criminal convictions.[345]

"Mandatory detention" is often used interchangeably with mandatory custody, [346] despite that the literal term "detention" does not appear in

[341] *See supra* notes 127–131 and accompanying text.

[342] *See supra* notes 132–140 and accompanying text.

[343] *See supra* notes 57–64 and accompanying text.

[344] *See* Margo Schlanger, Elizabeth Jordan & Roxana Moussavian, *Ending the Discriminatory Pretrial Incarceration of People with Disabilities: Liability Under the Americans with Disabilities Act and the Rehabilitation Act*, 17 HARV. LAW & POL'Y REV. 231, 261 (2022) ("The reasonable modification claim seeks an alternative to pretrial incarceration where necessary to avoid the access obstacles faced by an incarcerated plaintiff with disabilities. The modification is all the more appropriate because pretrial incarceration is supposed to be in service of criminal/immigration proceedings, but is, in fact, undermining the fairness of those proceedings.").

[345] *See* 8 U.S.C. § 1226(c)(1)(B)-(C) ("The Attorney General shall take into custody any alien who . . . is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year.").

[346] CONG. RSCH. SERV., IF-11343, THE LAW OF IMMIGRATION DETENTION: A BRIEF INTRODUCTION (2022), https://crsreports.congress.gov/product/pdf/IF/IF11343#:~:text=While%20immigration%20officials%20generally%20have,criminal%20or%20terrorism%2D%20related%20grounds [https://perma.cc/AM5W-U396] ("While immigration officials generally have broad discretion to decide whether to detain aliens during the pendency of removal proceedings, INA § 236(c) *requires the detention of aliens removable on specified criminal or terrorism-related grounds*." (emphasis added)).

the statute's language.[347] Custody assumes many forms including supervision check-ins,[348] anklet monitoring devices,[349] and community-based support and case management,[350] all of which ICE employs as alternatives to detention. In a class action lawsuit brought by the Southern Poverty Law Center during the COVID-19 pandemic,[351] an ICE official acknowledged that the mandatory custody provision of the Act must be balanced against compelling humanitarian and health concerns.[352] Detention is merely the most restrictive form of custody — though not the only one — and certainly does need not be enforced indefinitely.

Second, even if ICE does not release those identified as having a mental health condition, immigration courts should assign a Guardian *ad litem* ("Guardian") to assist during the discreet questioning of competency. Under the *Franco* implementation order, no person is by the noncitizen's side throughout the competency adjudication.[353] Only

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[347] *See* 8 U.S.C. § 1226(c)(1)(C); Katie Mullins, *"Mandatory Detention?" Why the Colloquial Name for INA § 236(c) is a Misnomer and How Alternatives to Detention Programs Can Fulfill Its Custody Requirement*, 71 NAT'L LAWS. GUILD REV. 34, 37-39 (2015).

[348] *See* 8 C.F.R. § 241.13(h)(1) (2005).

[349] *Detention Management*, U.S. IMMIGR. & CUSTOMS ENF'T., https://www.ice.gov/detain/detention-oversight (last visited Sept. 5, 2023) [https://perma.cc/4JHL-WRWT].

[350] *See generally* MELVIN WASHINGTON II, VERA INST. OF JUST., BEYOND JAILS: COMMUNITY-BASED STRATEGIES FOR PUBLIC SAFETY (2021), https://www.vera.org/beyond-jails-community-based-strategies-for-public-safety [https://perma.cc/H38Y-UXYB]; *see also* U.S. COMM'N ON CIV. RTS., WITH LIBERTY AND JUSTICE FOR ALL: THE STATE OF CIVIL RIGHTS AT IMMIGRATION DETENTION FACILITIES 129 (2015), https://www.usccr.gov/files/pubs/docs/Statutory_Enforcement_Report2015.pdf [https://perma.cc/PSM2-3FWS].

[351] Fraihat v. U.S. Immigr. & Customs Enf't, 445 F. Supp. 3d 709 (C.D. Cal. 2020), *vacated*, 2022 WL 20212706 (C.D. Cal. Sept. 16, 2022).

[352] *See* Declaration of Andrew Lorenzen-Strait in Support of Motion for Preliminary Injunction and Class Certification at 2-3, Fraihat v. U.S. Immigr. & Customs Enf't, 445 F. Supp. 3d 709 (C.D. Cal. 2020), https://www.splcenter.org/sites/default/files/documents/declarations.pdf [https://perma.cc/VE4P-KZZ9] ("Even individuals held under mandatory detention, pursuant to . . . §236(c), were released pursuant to ICE's guidelines and policies, particularly where the nature of their illness could impose substantial health care costs or the humanitarian equities mitigating against detention were particularly compelling.").

[353] *See* Franco-Gonzalez v. Holder, No. CV 10-02211, 2014 WL 5475097, at *14 (C.D. Cal. Oct. 29, 2014) (order further implementing the permanent injunction issued on April 23, 2013).

the attorney for the DHS (whose role it is to seek the noncitizen's removal) and the IJ are present during the hearing. Not even the mental health professional who produced the forensic report is involved beyond the report's production; also absent are the individuals authorized under the *Franco* order (social workers, guardians, family members, or legal service providers[354]) to provide third party notification of a respondent's mental health concerns. This structure places too much trust in IJs, ICE officers, ICE-attorneys, and detention center medical staff to safeguard a respondent's best medical and legal interests throughout the process.

A Guardian's involvement could decrease detention times by providing additional documentation, information, and perspectives central to the question of a respondent's mental health history, in turn reducing the need for lengthy forensic evaluations and competency reviews.[355] Guardians are often invoked in state administrative and civil proceedings,[356]especially where a liberty interest is at stake.[357] The Guardian, safeguarding the respondent's best interests, could also advocate for alternatives to detention.

Involving a Guardian serves one last purpose that bears mentioning, which is to counterbalance the inherent conflicts of interest that are present in the current competency process. Both ICE and EOIR are incentivized to cut corners throughout all aspects of removal proceedings: ICE because it is expensive to detain respondents,[358] and

354 *See supra* notes 57–64 and accompanying text.

355 *See supra* Part II.B.1.c.

356 *See, e.g.*, AT&T Mobility, LLC v. Yeager, 143 F. Supp. 3d 1042 (E.D. Cal. 2015) (holding that, in California, a party is entitled to the appointment of a GAL if they lack the capacity to understand the nature or consequences of the proceeding or are unable to assist counsel in the preparation of the case).

357 *See* Robert T. Drapkin, *Protecting the Rights of the Mentally Disabled in Administrative Proceedings: The Right to Legal Representation*, 39 CATH. LAW. 317, 325-30 (2000) (cataloguing the progressive caselaw that has held that mentally ill and disabled individuals are entitled to representation where a liberty interest is implicated, such as parole hearings, involuntary administration of psychotropic medication, and custody transfers).

358 *See* Eagly & Shafer, *supra* note 201, at 60; *see also* AM. IMMIGR. COUNCIL, IMMIGRATION DETENTION IN THE UNITED STATES BY AGENCY 6 (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration_detention_in_the_united_states_by_agency.pdf [https://perma.cc/5G3D-LKNL].

IJs because the current backlog and agency-imposed performance standards push judges to resolve cases quickly.[359] Guardians could protect respondents against these influences by ensuring that the process is observed fully and equitably.

B. Universal Representation for All Immigrants Where Removal or Exclusion Is a Possible Outcome of the Proceeding

The preceding section walked through the many limitations to an NQRP expansion. A simpler and more encompassing solution is to provide universal representation to all noncitizens where removal or exclusion is at stake. This proposal promises the richest rewards for many immigrants and for the agencies that interact with them.

Providing universal representation simplifies our current competency process by mooting all aspects of it pertaining to the provision of a QR. Detention periods (and case processing periods in general) will decrease without the need for a judicial competency inquiry or competency review. EOIR, meanwhile, will be absolved of its need to fix an unevenly administered competency training program[360] of court personnel.

Ensuring counsel is more efficient than leaving individuals to navigate the immigration system alone.[361] Regional universal representation programs like those in New York City have proven their economic

[359] *See* Memorandum from the Att'y Gen. to the Exec. Off. for Immigr. Rev., Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest 2 (Dec. 5, 2017), https://www.justice.gov/eoir/page/file/1356096/download [https://perma.cc/GWZ6-AUKM] ("The timely and efficient conclusion of cases serves the national interest. Unwarranted delays and delayed decision making do not."); *see also* Memorandum from James R. McHenry III, Dir. of Exec. Off. for Immigr. Rev. to The Off. of the Chief Immigr. J., All Immigr. Js., All Ct. Adm'rs & All Immigr. Ct. Staff, Case Priorities and Immigration Court Performance Measures (Jan. 17, 2018), https://www.justice.gov/eoir/page/file/1026721/download [https://perma.cc/GK55-4RPV] ("Accordingly, to ensure that EOIR is meeting these [case completion goals], the court-based performance measures outlined in Appendix A to this memorandum will be tracked by EOIR, and the court performance in meeting them will be regularly audited.").

[360] *See supra* notes 178–185 and accompanying text.

[361] *See* EAGLY & SHAFER, *supra* note 190, at 59.

viability.[362] Scholars examining court statistics and existing public-defender models argue persuasively that appointed counsel could handily be funded by ending immigration detention.[363] It costs $127 a day on average to detain one person and there are over 50,000 people detained on any given day.[364] Ending detention would free up billions of dollars annually that could be redirected to providing counsel.

Guaranteeing legal representation serves ICE's interests as well. ICE routinely claims that detention is necessary, in part, to ensure future court attendance.[365] However, the data unequivocally shows that the most effective means of ensuring court compliance is to provide counsel to each and every noncitizen in removal proceedings.[366]

Finally, I believe this solution is the most advantageous because it cures some of the flawed reasoning behind the *Franco* decision. While the court correctly applied the Rehabilitation Act and the Fifth

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[362] *See* JENNIFER STAVE, PETER MARKOWITZ, KAREN BERBERICH, TAMMY CHO, DANNY DUBBANEH, LAURA SIMICH, NINA SIULC & NOELLE SMART, VERA INST. OF JUST., EVALUATION OF THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT: ASSESSING THE IMPACT OF LEGAL REPRESENTATION ON FAMILY AND COMMUNITY UNITY 5-6 (2017), https://www.vera.org/downloads/publications/new-york-immigrant-family-unity-project-evaluation.pdf [https://perma.cc/3R8T-NNF3].

[363] *See* Boaz, *supra* note 127, at 226-30; *see also* Peter L. Markowitz, *Abolish ICE . . . and Then What?*, 129 YALE L.J.F. 130, 145 (2019) ("Implementing such a program on a national scale would be costly, but the massive scale-down in punitive enforcement contemplated . . . would more than offset any such costs.").

[364] *Immigration Detention 101*, DET. WATCH NETWORK, https://www.detentionwatchnetwork.org/issues/detention-101 (last visited Oct. 6, 2022) [https://perma.cc/SB6H-8568].

[365] *See Detention Management*, *supra* note 349 ("ICE uses its limited detention resources to detain noncitizens to secure their presence for immigration proceedings or removal from the United States — as well as those that are subject to mandatory detention, as outlined by the Immigration and Nationality Act, or those that ICE determines are a public safety or flight risk during the custody determination process.").

[366] *See* Ingrid Eagly & Steven Shafer, *Measuring* in Absentia *Removal in Immigration Court*, 168 U. PA. L. REV. 817, 860-61 (2020) (finding that people with legal representation received far fewer *in absentia* orders); *see also* Markowitz, *supra* note 363, at 145 ("The data demonstrate that the most important thing we can do to improve appearance rates in immigration court is to provide lawyers. The most recent publicly available data show that virtually every family who was released from immigration detention and had a lawyer showed up for all of their immigration court hearings (99%). Those without lawyers were significantly less likely to consistently appear (76%).").

Amendment's promise of a fair trial, it got it wrong when it buttressed the notion that it is ever fair to proceed against unrepresented immigrants. And, in setting such a high threshold for counsel — essentially requiring proof again and again along the conveyor belt that noncitizens merit or need or deserve counsel sets the wrong precedent. Providing universal representation absolves the court of this wrong and harmful thinking and circumvents the need for continued litigation in the Central District (and beyond) on this question.

As with the NQRP-expansion proposal, no noncitizen with mental health disabilities should be detained. Instead, they should be immediately released from custody upon identification. Having an attorney present from the outset will expedite this identification process, as attorneys can provide third-party notification[367] of mental health concerns and are in one of the best positions to know of their client's specific history, needs, or issues.

Questions relating to competence can and should remain a part of removable proceedings. *Matter of M-A-M-* will still be needed to resolve the question of what, if any, accommodations might be required to ensure a fair hearing.[368] But no longer would a respondent with mental health challenges need to undergo a circuitous competency adjudication just to determine whether they need counsel.

This solution need not spell the end of the NQRP. The program could continue to play a crucial role in supporting and training immigration courts as they grapple with cases involving mental health. Thoughtful adjudicators and advocates benefit all parties by smoothing the administration of justice and advancing the shared goal of due process. Counsel is an important step in safeguarding noncitizens, but not the only one. Noncitizens with mental health challenges need holistic support and services across their proceedings and beyond.

An enduring problem is safeguarding noncitizens who are not within the court's jurisdiction[369] (or, for that matter, within the United

[367] *See supra* notes 57–64 and accompanying text.

[368] *See* Matter of M-A-M-, 25 I. & N. Dec. 474, 483 (BIA 2011).

[369] *See supra* Part III.B.

States[370]). But as efforts to end unlawful policies like Title 42[371] and "Remain in Mexico"[372] continue to prevail, this shortcoming's proportionality shrinks in relation to the cascading benefits universal counsel will bring to noncitizens across all other procedural postures.

CONCLUSION

This article's purpose is not to tear down the *Franco* decision, which did bring relief to so many, and is the first and only decision to carve out the right to counsel. *Franco* was and continues to be an extraordinary and historic achievement. The lawsuit's architects — both plaintiffs' counsel and those within the two defendant agencies — worked creatively and collaboratively to build the most comprehensive and protective program for any immigrant population to date. The NQRP has served thousands of respondents; vulnerable noncitizens have been ushered out of, or diverted from, our deeply inhumane detention and deportation system. The Vera Institute of Justice (and now the Acacia Center for Justice) has trained, mentored, and supported hundreds of attorneys in doing what is arguably the most difficult and exhausting work in the field of immigration. *Franco* is an unrivaled advancement in the fight for immigrant justice.

Nor are the proposals found in this Article meant to validate the harmful systems that exist, but instead to ameliorate some of the harm created by them in practical, attainable ways. Measures such as counsel will offer immediate gains for noncitizens and can be pursued alongside the long-term goals of repairing our damaged immigration landscape.

But like a beautiful snow globe, *Franco*'s world is suspended within a small geographic and procedural realm. We can and must do better. If not, *Franco*'s power and promise will remain trapped in stasis, leaving many it was designed to protect outside its fragile boundary.

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[370] *See supra* Part III.B.1.

[371] Huisha-Huisha v. Mayorkas, No. 21-CV-100, 2022 WL 16948610 (D.D.C. Nov. 15, 2022), *stayed pending cert. sub. nom.* Arizona v. Mayorkas, 143 S. Ct. 478 (2022).

[372] Biden v. Texas, 142 S. Ct. 2528 (2022) (holding that the Biden administration's termination of MPP did not violate the INA).